COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
FAX: (916) 445-0278
E-mail: csminfo@csm.ca.gov

January 11, 2013

Ms. Diana K. McDonough
Fagen Friedman & Fulfrost LLP
70 Washington Street, Suite 205
Oakland, CA 94607

And Interested Parties and Affected State Agencies (See Mailing List)

RE: Proposed Parameters and Guidelines and Statement of Decision and Notice of Hearing
Behavioral Intervention Plans, CSM-4464
Title 5, California Code of Regulations,
Sections 3001 and 3052 (Register 93, No. 17; Register 96, No. 8; Register 96, No. 32.)
Butte County Office of Education, San Joaquin County Office of Education, and San Diego Unified School District, Claimants

Dear Ms. McDonough:

The proposed parameters and guidelines and statement of decision for the above-named matter are enclosed.

Hearing

This matter is set for hearing on **January 25, 2013,** at 10:00 a.m. in the State Capitol, Room 447, Sacramento, California. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01(c)(2) of the Commission's regulations.

Special Accommodations

For any special accommodations such as a sign language interpreter, an assistive listening device, materials in an alternative format, or any other accommodations, please contact the Commission Office at least five to seven *working* days prior to the meeting.

Please contact Heidi Palchik at (916) 323-3562 if you have any questions.

Sincerely,

Heather Halsey
Executive Director

Hearing Date: January 25, 2013
J:\MANDATES\csm4000\4464\Ps&Gs\FSA_PSOD A.docx

ITEM 5
PROPOSED PARAMETERS AND GUIDELINES
AND
STATEMENT OF DECISION

California Code of Regulations, Title 5, Sections 3001 and 3052

Register 93, No. 17; Register 96, No. 8; Register 96, No. 32

Behavioral Intervention Plans
CSM-4464

Butte County Office of Education,
San Diego Unified School District,
San Joaquin County Office of Education, Claimants

EXECUTIVE SUMMARY

The following is the proposed statement of decision for this matter prepared pursuant to section 1188.1 of the Commission's regulations. As of January 1, 2011, Commission hearings on the adoption of proposed parameters and guidelines are conducted under article 7 of the Commission's regulations.[1] Article 7 hearings are quasi-judicial hearings. The Commission is required to adopt a decision that is correct as a matter of law and based on substantial evidence in the record.[2] Oral or written testimony is offered under oath or affirmation in article 7 hearings.[3]

I. Summary of the Mandate

These proposed parameters and guidelines, including a reasonable reimbursement methodology (RRM), pertain to the *Behavioral Intervention Plans* test claim decision (CSM-4464) adopted September 28, 2000. The test claim statement of decision held that Education Code section 56523 does not impose a reimbursable state-mandated program, but that the implementing regulations, at Code of Regulations, Title 5, sections 3001 and 3052, impose a reimbursable state-mandated new program or higher level of service for the following categories of activities:

- Special Education Local Plan Area (SELPA) plan requirements. (Cal. Code of Regs., tit.5, §§ 3001 and 3052(j).)
- Development and implementation of behavioral intervention plans (BIPs). (Cal. Code of Regs., tit. 5, §§ 3001 and 3052(a), (c), (d), (e), and (f).)
- Functional analysis assessments. (Cal. Code of Regs., tit. 5, §§ 3001 and 3052(b), (c), and (f).)

[1] California Code of Regulations, Title 2, section 1187.

[2] Government Code section 17559(b); California Code of Regulations, Title 2, 1187.5.

[3] *Ibid*.

- Modifications and contingent behavioral intervention plans. (Cal. Code of Regs., tit. 5, § 3052(g) and (h).)
- Development and implementation of emergency interventions. (Cal. Code of Regs., tit. 5, §§ 3001 and 3052(i).)
- Prohibited behavioral interventions. (Cal. Code of Regs., tit. 5, §§ 3001 and 3052(l).)
- Due process hearings. (Cal. Code of Regs., tit. 5, § 3052(m).)[4]

II. Procedural History

The claimants filed the test claim in 1994. After numerous requests for extensions, the matter was heard in September 1999, but was not decided due to a tie vote of an even number of members sitting on the Commission at the time. The test claim was later approved by a vote of 5-2 on September 28, 2000.

After the test claim statement of decision was adopted, the claimants filed parameters and guidelines within 30 days, as required. The Department of Finance (DOF) opposed the parameters and guidelines, in comments submitted November 20, 2000, recommending actual cost claiming instead of the proposed uniform time allowances or uniform costs. San Diego City Schools requested four 60-day extensions of time to file comments, stating that the employee responsible for responding in this matter had left the employ of the district. These extensions were granted for good cause. On September 9, 2001 a new representative requested time to review the record and develop rebuttal comments, which was granted for good cause. On October 9, 2001, claimants requested an extension of time, stating that the parties were discussing settlement of the matter. Similar extension requests and approvals followed on November 16, 2001, January 15, 2002, February 19, 2002, and March 15, 2002. On May 22, 2002, claimants filed rebuttal comments. Claimants filed further rebuttal comments on May 31, 2002 and August 26, 2002. On October 11, 2002, claimants requested a continuance pending a statewide study of costs, which was granted for good cause. Sixteen subsequent requests for continuance followed between January 2003 and March 2005, at which time Commission staff informed the claimants that no further extensions would be granted without substantive information from the parties about the status of the matter.

Meanwhile, before the expiration of the three year statute of limitations to seek judicial review of the Commission's decision, on September 26, 2003, DOF filed a petition for a writ of administrative mandamus to set aside the decision, placing this matter on inactive status until the mandamus petition was dismissed in 2010.

On October 7, 2007, the attorney representing DOF approached the claimants regarding possible settlement. The parties worked together to develop cost data upon which to base a settlement agreement, employing the surveys described below. The surveys were completed by 21 of 120 Special Education Local Plan Areas (SELPAs), some of which constitute only one large school

[4] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464 pp. 17-18 [the test claim statement of decision incorrectly cites Code of Regulations, Title 2; the regulations at issue are found at Title 5, sections 3001 and 3052].

district, and others of which are made up of several school districts in a geographic area. The claimants did not estimate; they contacted SELPAs and districts to fill in missing data, and if they were unable to obtain complete data they excluded the SELPA's information. DOF and the claimants worked together in reviewing the survey results, and manipulated the data until DOF agreed that they were accurate.

A settlement was reached on the basis of the survey estimates in early 2009. The settlement called for approximately $520 million in retroactive and one-time costs, and $65 million in ongoing increased revenue. The legislation implementing the settlement was introduced but was not funded by the Legislature in 2009 or 2010, and was eventually suspended and died. The mandamus petition was dismissed on October 26, 2010. The claimants have yet to obtain any reimbursement for this program.

On December 17, 2010, the claimants submitted revised parameters and guidelines, including a proposed RRM. The Commission held an informal conference on the matter with the parties and interested parties on April 25, 2011. In addition, numerous comments on the revised proposed parameters and guidelines and rebuttals to comments have been filed by parties and interested parties from December 2011 through August 2012.

On December 4, 2012, Commission staff issued the draft staff analysis. On December 21, 2012, SCO responded with comments on the draft proposed parameters and guidelines, primarily consisting of technical changes. On December 24, 2012, the claimants submitted comments on the draft staff analysis, which are incorporated where relevant below. On December 28, 2012, Commission staff received comments also from DOF on the draft staff analysis. Those comments as well are addressed below.

III. Staff Analysis

A. Procedural Issue

In comments submitted on the draft staff analysis, DOF argues that adoption of parameters and guidelines at this time is premature. DOF does not support adoption of the RRM, as recommended by staff, and states also that:

> Furthermore, we believe that it is premature to adopt any parameters and guidelines for the BIPs program at this time. Assembly Bill 1476 (Committee on Budget), as amended on August 24, 2012, included provisions that would have significantly altered the underlying statute and regulations pertaining to the BIPs program. While Assembly Bill 1476 was not passed by the Legislature, the Administration continues to engage in negotiations with the Legislature and stakeholders on similar statutory changes and will introduce a related proposal as part of the 2013-14 Governor's Budget on January 10, 2013. If these changes are adopted by the Legislature, they will have significant implications on the proposed parameters and guidelines currently available for review and comment. Therefore, we respectfully urge the Commission to postpone taking any action on

> the BIPs program until after the 2013-14 budget bill and accompanying trailer bills are passed by the Legislature and signed by the Governor.[5]

The Governor's proposed budget, released on January 10, 2013, did in fact propose changes to the underlying statutes addressing BIPs, as well as changes to the funding scheme:

> The Budget Act of 2012 created an alternative method for school and community college districts to receive compensation for performing state‐mandated activities by appropriating $200 million for two new block grants—one for school districts, county offices of education, and charter schools; and one for community college districts. To date, almost 77 percent of school districts and charter schools have opted for block grant funding, while 93 percent of community college districts have selected this option. The block grant statutes specify which mandates are funded through the block grants, and schools are provided with a per‐student funding allocation to support the performance of those activities. Schools that choose to receive block grant funding may not submit reimbursement claims. However, two K‐12 mandated programs were not included in the K‐12 block grant last year; the Graduation Requirements and Behavioral Intervention Plan programs. The Administration proposes to restructure requirements for the Behavioral Intervention Plan program, which will eliminate almost all reimbursable costs for this mandate. There are no changes proposed for the Graduation Requirements program, and the Administration continues to believe that any costs associated with this activity have run their course in the almost 30 years since the inception of this requirement. Nonetheless, the Budget proposes adding an additional $100 million to the K‐12 block grant to fund costs for these two additional programs.[6]

In its comments, DOF "urge[s]" the Commission to postpone action on the parameters and guidelines, but no specific request is made of the executive director, as provided for in section 1183.01 of the Commission's regulations. Section 1183.01 states, in pertinent part:

> (2)Any party may request the postponement of a hearing on a test claim, parameters and guidelines, or statewide cost estimate, until the next regularly scheduled hearing, or other date if specified. Such request shall fully explain the

---

[5] Exhibit O, AB 1476. [Assembly Bill 1476 would have done the following: required CDE to repeal the regulations at issue in this claim; modified the statute relating to BIPs as declaratory of federal law and deemed necessary to implement the federal IDEA; directed the Superintendent of Public Instruction to issue non-mandatory guidelines to implement the statute; included language requiring local educational agencies to agree to adhere to the chapter and federal regulations as a condition of receiving federal funding from IDEA; and requested that the DOF file a request for redetermination on the BIPs statement of decision as a result of this subsequent change in the law. All of these changes are prospective and would not have affected the initial period of reimbursement for this claim, which begins July 1, 1993.]

[6] Exhibit O, Budget Summary 2013, at p. 22.

reason(s) for the postponement, and be filed and served in accordance with section 1181.2 of these regulations. Within forty-eight (48) hours of receipt of such a request, the executive director shall make a determination and shall notify all parties and interested parties who are on the mailing list of the determination.

(A) A request filed by the claimant at least fifteen (15) days before the hearing shall be approved by the executive director for good cause.

[¶] … [¶]

(D) A request filed by a state agency may be approved by the executive director for good cause. If a state agency makes such a request before filing a response, opposition, or recommendation on the test claim, such request shall be accompanied by a notice of intent to oppose the test claim in whole or in part.

(3) The executive director may postpone a hearing on a test claim, parameters and guidelines, and a statewide cost estimate for good cause and shall notify all parties and interested parties who are on the mailing list.

Under the Commission's regulations, the Commission itself may hear a request to continue a matter for hearing, but such requests are not favored. Section 1187.9 of the Commission's regulations states:

(a)The commission may continue a hearing to another time or place on its own motion or, upon a clear showing of good cause, at the request of any party…

(b)In determining whether there is good cause for a continuance within the meaning of subdivision (1) the following policy should be taken into consideration: Continuances are not favored by the commission. The parties are expected to submit for decision all maters in controversy at a single hearing and to produce at such hearing all necessary evidence, including witnesses, documents and all other matters considered essential in the proof of a party's allegations. Continuances will be granted only upon a clear showing of good cause.

Staff recommends that the Commission reject DOF's protestations and proceed to adopt parameters and guidelines in this matter.

DOF argues that it is premature to adopt "any parameters and guidelines" on this nineteen-year-old test claim statute because "the Administration continues to engage in negotiations with the Legislature and stakeholders" on statutory changes that would significantly alter the underlying statute and regulations. But, as DOF points out, similar legislation failed in the last term; DOF presents no evidence that the effort has any greater chance of success in this term, nor what, if any, effect on reimbursement for the BIPs mandate is expected.[7] The Governor's proposed budget alludes to "eliminate[ing] almost all reimbursable costs for this mandate," but does not suggest how that would be accomplished. The Governor's proposed budget also suggests that additional block grant funding will be added to cover the costs of the Behavioral Intervention Plans mandate. Even if the funding described is eventually approved by the Legislature, there

[7] Exhibit M, DOF Comments on Draft Staff Analysis, at p. 1.

can be no assurances that all eligible claimants would agree to allow the block grant funding to satisfy their ongoing mandate claims, and the block grant does not address the nineteen years of reimbursement claims that are owed, which claimants estimate at more than $1 billion.[8]

Moreover, the Commission is required by law, absent an agreement by all parties to waive the process, to move swiftly to adopt parameters and guidelines.[9] Government Code section 17553 requires the approval of a statewide cost estimate within twelve to eighteen months of receipt of the test claim.[10] These parameters and guidelines have languished in litigation and controversy for over twelve years since adoption of the test claim statement of decision approving reimbursement, and negotiations have thus far failed.

Finally, if changes to the underlying statutes or regulations do occur in this budget cycle or the next, DOF is free to file a request to amend the parameters and guidelines, under the Government Code and the Commission's regulations, to end an activity, to provide for new offsetting revenues or savings, or to propose or amend an RRM. Staff recommends that the Commission proceed to adopt parameters and guidelines in this matter, as it is neither necessary nor expedient to wait until the budget is concluded to determine whether the mandate still is in force.

B. Substantive Issue

The question for the Commission is whether the evidence submitted, which includes voluminous documentation of costs to implement the program in 2006-2007, is sufficient to support adoption of the proposed RRM for costs incurred going back to July 1, 1993, consistent with the substantial evidence standard and the constitutional and statutory requirements for RRMs and for Commission decisions generally. In addition, issues relating to the proper scope of reimbursable activities and applicable offsetting revenues are discussed further in the proposed statement of decision below.

As discussed below, DOF and the State Controller's Office (SCO) do not challenge the reimbursable activities proposed by the claimants, but do challenge the proposed RRMs based on an interpretation of the legal requirements of an adopted RRM, derived from a strained reading of the applicable statutes. DOF and SCO argue, alternatively, that the RRM is not based on cost information from a representative sample of eligible claimants; that the RRM does not consider the variation in costs among eligible claimants; that the RRM is not based on actual cost data or actual cost claims that have been audited; that the RRM is based on only a single year of cost claims, and is intended to be applied to over 18 years of cost claims; and that a calculation based on average daily attendance (ADA) is not appropriate in this case. Staff finds that none of the "requirements" that DOF and SCO read into the statutes are evident from the plain language of sections 17557 and 17518.5:

---

[8] See Exhibit O, Budget Summary 2013.

[9] Government Code section 17554 states the following: "With the agreement of all parties to the claim, the commission may waive the application of any procedural requirement imposed by this chapter or pursuant to Section 17553."

[10] See Code of Regulations, title 2, sections 1183.11 and 1183.25.

- Staff finds that there is no requirement of a minimum sample size in order to base an RRM on cost information from a representative sample of eligible claimants;
- Staff finds that there is no requirement that an RRM be based on cost information from a representative sample of eligible claimants; this is only one of several options upon which an RRM may be based;
- Staff finds that there is no requirement that an RRM be based on detailed, actual cost data; or audited cost claims;
- Staff finds that there is no requirement that an RRM mitigate or eliminate cost variation among eligible claimants, only that the RRM must consider the variation;
- Staff finds that there is no requirement that an RRM be based on cost information from more than one fiscal year, nor any limitation on the retroactive or prospective application of an RRM; and
- Staff finds that there is evidence in the record that a per-ADA calculation may be reasonable in some contexts, and substantial evidence would support adoption of an RRM based on ADA in this case.

Staff finds that the only statutory requirements of an RRM are that it consider variations in costs and balance accuracy with simplicity; the only constitutional requirement of an RRM is that it must reasonably reimburse eligible claimants for their costs mandated by the state; and, like all Commission decisions, the proposed RRM must be supported by substantial evidence in the record.

C. Claimants' Proposed Parameters and Guidelines

On December 17, 2010, the claimants submitted revised parameters and guidelines including three reasonable reimbursement methodologies (RRMs), pursuant to Government Code sections 17557 and 17518.5, and offered evidence in the form of cost surveys of eligible claimants in support of the proposed RRMs. The evidence submitted is the same evidence upon which the settlement agreement with DOF was based; the same evidence that DOF helped develop in order to estimate the statewide costs of the mandate. The proposed RRMs are as follows:

1. The first RRM is for one-time SELPA-level activities, which include preparing and adopting procedures and policies, to update the SELPA plan in conformity with the regulations. The SELPA plans, which govern the provision of special education services locally, must be updated to reflect the changes imposed by the test claim regulations, including: training requirements for certain staff involved in developing BIPs; training requirements for staff involved in implementing BIPs; special training for the use of emergency behavioral interventions; and identification of approved emergency behavioral interventions.

   The surveys produced by claimants sought information from SELPAs regarding how much time, for each position involved, was spent updating the SELPA plan in conformity with Code of Regulations section 3052(j), and adopting the changes. The claimants and DOF engaged in some manipulating and negotiating regarding those figures, and resolved a number of discrepancies. An hourly rate was then applied to the time spent, by

position, to determine the cost of each activity. Those costs were then totaled for all SELPAs surveyed, and divided by P2 ADA of all 21 SELPAs for 2006-2007, to arrive at a unit cost per ADA for the one-time SELPA activities. "P2 ADA" refers to "the total number of units of average daily attendance reported for the second principal apportionment" pursuant to section 41601 for all pupils enrolled in the district or districts that are a part of the SELPA. The resulting cost per ADA (unit rate) is adjusted by the Implicit Price Deflator for the appropriate fiscal year in which the one-time activities were conducted by an eligible claimant SELPA, and then applied to the P2 ADA figures for that same year.

2. The second RRM proposed is for on-going activities at the SELPA level. These activities include providing and obtaining training in behavior analysis, positive behavioral interventions, and behavioral emergency interventions; reporting to the California Department of Education (CDE) and Advisory Committee on Special Education on the number of emergency behavior intervention reports; and satisfying due process requirements related to functional analysis assessments or the development or implementation of BIPs.

   The methodology employed to calculate the unit rate was substantially the same as above: the surveys sought information from SELPAs regarding time spent, by position, on the ongoing activities of training, collecting data and reporting on emergency behavior intervention reports; and satisfying due process requirements in the 2006-2007 school year. The time data were then manipulated until agreeable to both claimants and DOF, and multiplied by the reported average hourly rates of the personnel assigned to those tasks. The costs of the ongoing activities at the SELPA level were then totaled for all SELPAs surveyed and divided by the P2 ADA for the 21 SELPAs surveyed in 2006-2007 school year. That figure is then applied retroactively and prospectively, adjusting by the Implicit Price Deflator for each applicable year, to the P2 ADA figures for each year since implementation began (presumably 1993-1994 in most cases).

3. The third RRM proposed is for on-going activities at the school district and county office of education (COE) level. The ongoing activities include: conducting functional analysis assessments; developing, implementing, evaluating, and modifying BIPs; employing emergency interventions, including appropriate recordkeeping; training staff on prohibited behavioral interventions; and satisfying due process requirements related to functional analysis assessments or the development or implementation of BIPs.

   The same methodology as described above is employed. The surveys sought information from school districts and COEs operating schools in the place of school districts regarding time spent, by position, on the reimbursable activities. The surveys also sought to determine whether any outside contractors or specialists were employed to conduct the required activities. Then, the hours reported were multiplied by the average hourly rates reported for the staff involved in those activities, and added to the fees imposed by outside contractors to determine the total district-level costs for 2006-2007. Those costs were totaled from all districts surveyed, then divided by P2 ADA for 2006-2007 for all districts surveyed, to arrive at a unit cost per ADA, which could be applied both retroactively and prospectively, as adjusted by the Implicit Price Deflator.

D. Two Proposed Statements of Decision and Proposed Parameters and Guidelines are Presented for Consideration

Commission staff has analyzed the legal and factual sufficiency of the proposed RRMs. Commission staff has found this to be a particularly challenging matter to analyze because, as mentioned above, Government Code sections 17557 and 17518.5 provide few limitations and almost no guidance on what may be approved by the Commission with regard to an RRM. However, the legislative history and the plain language of the statute indicate that the Legislature intended to provide broad authority to adopt RRMs. This leaves the Commission to determine whether there is sufficient evidence before it to support the findings that the proposed RRMs reasonably reimburse claimants for their state-mandated costs and that the proposed RRMs balance accuracy with simplicity.

Commission staff has taken the unusual approach of preparing two proposed statements of decision and parameters and guidelines for this matter in order to fully explore the arguments for the Commission members; one adopting the proposed RRM, and one denying the proposed RRM as follows:

- Option A is a proposed statement of decision and parameters and guidelines *approving and adopting* the proposed RRM because:
    - The purpose of an RRM is to reimburse local government efficiently and simply, with minimal auditing and documentation required.
    - The only statutory requirements of an adopted RRM are that it considers variations in costs and balances accuracy with simplicity in the claiming process and the only Constitutional requirement is that it reasonably reimburses claimants for their state-mandated costs.
    - The evidence in the record supports the findings that:
        1. The average figures used for the unit costs are reasonable, representative and cost effective;
        2. Though there is a wide range of actual costs per claimant per year, the simplicity, cost efficient benefits and the reasonableness of the reimbursement looked at over multiple years, rather than in a single year, and the fact that the state has funded special education on a per ADA basis since 1997, make the proposed RRMs a reasonable means of reimbursement.
    - DOF and SCO, for all their objections relating to the legal requirements of an RRM, have not put forward any evidence to rebut the calculations or conclusions of the claimants' experts. The state has not filed evidence rebutting the hours, hourly rates, or total costs reported in the surveys, or disputing the calculations prepared by the claimants' experts.
- Option B is a proposed statement of decision and parameters and guidelines *denying* the proposed RRM and requiring that reimbursement claims be filed based on actual costs incurred because there is a wide range of actual costs among claimants such that some claimants will receive reimbursement in excess of their costs and others will not receive

full reimbursement for their costs in any given year. Therefore, based on the evidence submitted, the Commission cannot find that the proposed RRM provides reasonable reimbursement of costs mandated by the state to all eligible claimants in the state, as required by article XIII B, section 6 of the California Constitution.

In addition, both proposed statements of decision address the following relevant issues:

- The effect of AB 1610, a budget trailer bill enacted in 2010 to (1) declare that behavioral intervention plans are federally mandated; (2) to insert conditional language into the code section, giving the activities approved the appearance of downstream requirements of receipt of federal funding, which could be non-reimbursable under *Kern;* (3) to insert language regarding offsetting revenue, intended to end reimbursement beginning in fiscal year 2010-2011; and to direct DOF to file a request under Government Code section 17570 to have the test claim reconsidered.
- Offsetting revenues identified in the parameters and guidelines, including both state and federal funding for special education: to the extent those funds may be applied by eligible claimants to offset the costs of the mandated activities under the test claim regulations, their reimbursement may be reduced accordingly. The claimants have disputed that any revenues should be considered offsetting. They argue that there are no new or additional revenues provided by the test claim statute or another bill that are specifically intended to fund the costs of the mandate and, in practical effect, any claimants who have exercised the discretion and authority to apply state or federal special education funds to cover the costs of the mandate have done so at the expense of other programs. Staff has analyzed these issues below, and has concluded that under the current law the disputed funds must be identified as potential offsets, notwithstanding the claimants' objections.

In the comments submitted in response to the draft staff analysis, DOF states that it "agrees with Commission staff that as stated in Option B, the proposed RRMs do not reasonably represent the costs mandated by the state to comply with the BIPs program."[11] DOF misunderstands the purpose and spirit of the dual analyses. Commission staff wrote that the proposed RRMs do not reasonably represent the costs mandated by the state because that constitutes the finding that the Commission would be required to make to adopt Option B. Commission staff recommends, as stated below, adopting Option A, and any expressions in Option B of whether the proposed RRMs are reasonable or appropriate are made only to express and support the Commission's decision, should the Commission decide to reject staff's recommendation and deny the proposed RRMs.

Staff Recommendation

Staff recommends that the Commission adopt Option A, the proposed statement of decision on the parameters and guidelines approving the RRMs and the attached proposed parameters and guidelines. Staff further recommends that the Commission authorize staff to make non-substantive, technical corrections to the statement of decision and parameters and guidelines following the Commission hearing on this matter.

[11] Exhibit M, DOF comments on the draft staff analysis.

OPTION A – To Approve the Proposed RRM

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE PARAMETERS AND GUIDELINES FOR: California Code of Regulations, Title 5, Sections 3001 and 3052, as added or amended by Register 93, No. 17; Register 96, No. 8; Register 96, No. 32. Period of reimbursement beginning: July 1, 1993	Case No.: CSM 4464 *Behavioral Intervention Plans* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Proposed for Adoption: January 25, 2013*)

STATEMENT OF DECISION

The Commission on State Mandates (Commission) adopted this statement of decision and parameters and guidelines during a regularly scheduled hearing on January 25, 2013. [Witness list will be included in the final statement of decision.]

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission adopted the parameters and guidelines and statement of decision by a vote of [Vote count will be included in the final statement of decision].

I. SUMMARY OF THE MANDATE

These proposed parameters and guidelines, including a reasonable reimbursement methodology (RRM), pertain to the *Behavioral Intervention Plans* test claim decision (CSM-4464) adopted September 28, 2000. Based on the filing date of the test claim, the period of reimbursement begins on July 1, 1993. The test claim addresses a 1990 statute and 1993 implementing regulations adopted by the Department of Education (CDE) regarding special education services for children with disabilities. Education Code section 56523 requires the Superintendent of Public Instruction and the State Board of Education to adopt regulations establishing behavioral intervention plans (BIPs), which:

> (1) include the types of behavioral interventions that can be used; (2) require that a pupil's [individualized education plan] include a description of behavior

interventions that meet certain guidelines; and (3) specify standards and guidelines regarding the use of behavior interventions in emergency situations.[12]

In accordance with Education Code section 56523, CDE adopted sections 3001 and 3052 of Title 5 of the California Code of Regulations, which detail school districts' obligations concerning BIPs.

The Commission found, in the test claim statement of decision, that Education Code section 56523 only requires the Superintendent of Public Instruction and the State Board of Education to adopt regulations establishing BIPs, and does not impose any requirements upon school districts. However, the Commission concluded that the implementing regulations impose a reimbursable state-mandated program upon school districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for the following categories of activities:

- Special Education Local Plan Area (SELPA) plan requirements. (Cal. Code of Regs., tit.5, §§ 3001 and 3052(j).)
- Development and implementation of BIPs. (Cal. Code of Regs., tit. 5, §§ 3001 and 3052(a), (c), (d), (e), and (f).)
- Functional analysis assessments. (Cal. Code of Regs., tit. 5, §§ 3001 and 3052(b), (c), and (f).)
- Modifications and contingent BIPs. (Cal. Code of Regs., tit. 5, § 3052(g) and (h).)
- Development and implementation of emergency interventions. (Cal. Code of Regs., tit. 5, §§ 3001 and 3052(i).)
- Prohibited behavioral interventions. (Cal. Code of Regs., tit. 5, §§ 3001 and 3052(l).)
- Due process hearings. (Cal. Code of Regs., tit. 5, § 3052(m).)[13]

II. PROCEDURAL HISTORY

The underlying test claim was filed in September of 1994 by San Diego Unified School District, Butte County Office of Education, and San Joaquin County Office of Education. A number of requests for extension were granted, both to claimants and to interested state agencies, before the test claim was brought before the Commission. The matter was heard in September 1999, but not decided, due to a tie vote, until a seventh member was appointed the next year. The test claim statement of decision was adopted September 28, 2000, by a 5-2 vote.[14]

---

[12] Exhibit A, Corrected Statement of Decision, *Behavioral Intervention Plans* CSM-4464, p. 2

[13] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464 pp. 17-18 [the test claim statement of decision incorrectly cites Code of Regulations, Title 2; the regulations at issue are found at Title 5, sections 3001 and 3052].

[14] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464 p. 1.

Claimants filed proposed parameters and guidelines for the approved activities on October 26, 2000, within the 30 days provided for in statute.[15] The Department of Finance (DOF) opposed the parameters and guidelines, in comments submitted November 20, 2000, and recommended actual cost claiming instead of the proposed uniform time allowances or uniform costs. San Diego City Schools requested four 60-day extensions of time to file comments, stating that the employee responsible for responding in this matter had left the employ of the district. These extensions were granted for good cause. On September 9, 2001, a new representative requested time to review the record and develop rebuttal comments, which was granted for good cause. On October 9, 2001, claimants requested an extension of time, stating that the parties were discussing settlement of the matter. Similar extension requests and approvals followed on November 16, 2001, January 15, 2002, February 19, 2002, and March 15, 2002. On May 22, 2002, claimants filed rebuttal comments. Claimants filed further rebuttal comments on May 31, 2002 and August 26, 2002. On October 11, 2002, claimants requested a continuance pending a statewide study of costs, which was granted for good cause. Sixteen subsequent requests for continuance followed between January 2003 and March 2005, at which time Commission staff informed the claimants that no further extensions would be granted without substantive information from the parties about the status of the matter.

Meanwhile, before the expiration of the three year statute of limitations to seek judicial review of the Commission's decision, on September 26, 2003, DOF filed a petition for a writ of administrative mandamus to set aside the decision, placing this matter on inactive status until the mandamus petition was dismissed in 2010. On October 7, 2007, the Deputy Attorney General representing DOF opened settlement negotiations with the claimants. Over the next few months, claimants surveyed eligible local educational agencies regarding costs incurred to implement the mandate for the previous school year. The surveys asked for cost data regarding specific activities approved in the test claim decision, and were developed in cooperation with representatives of DOF. The surveys were returned in May 2008 by 21 SELPAs, of the 30 that had originally agreed to participate. While the survey data were being considered the court granted an extension of the five-year rule for the court to hear and determine the matter, which would have required the court to resolve the case before September 26, 2008.[16]

Between July and November 2008, the claimants and DOF worked closely with the survey results. Both agreed that the survey sample was adequate, and the results were compiled and reviewed until both agreed that they were accurate.[17] On October 15, 2008, the court issued a Second Stipulation and Order to Extend Time to Hear Petition for Administrative Mandamus. On November 20, 2008, the court issued a Third Stipulation and Order to Extend Time.

Upon review of the survey results the parties continued cooperative efforts, reaching a settlement in November 2008. The settlement agreement called for all retroactive and current reimbursement claims to be extinguished by an allocation of $510 million to school districts for the cost of the BIPs activities, $10 million to SELPAs and county offices of education, and $65

[15] Exhibit K, Proposed Parameters and Guidelines, *Behavioral Intervention Plans*, CSM-4464.

[16] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Diana McDonough.

[17] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Diana McDonough.

million annually to school districts for ongoing costs of the program.[18] As of the 2008-2009 fiscal year, the total estimated costs, "including the total statewide extrapolated annual costs and the total statewide extrapolated one-time costs, were $1,014,605,046.17.[19] Despite the fact that the settlement would have reimbursed only slightly more than half of the eligible claimants' estimated costs to that point in time, 95% of all LEAs, representing 99% of statewide ADA, agreed to the settlement.[20]

On February 25, 2009, AB 661 was introduced to implement the settlement agreement to appropriate funds for the mandate on an ongoing basis and to appropriate the $520 million in satisfaction of the accumulated costs. AB 661 was introduced by State Assemblyman Torlakson, but died in the Assembly Committee on Appropriations.[21] As a result, the settlement was not funded as described, and the *BIPs* program has not been reimbursed to date. After the settlement agreement was not funded by the Legislature for two consecutive budget years, DOF dismissed its mandamus action with prejudice on October 26, 2010.

On October 19, 2010, one week before the mandamus petition was dismissed, AB 1610 was enacted as a budget trailer bill to amend Education Code section 56523, among others, to address funding shortfalls in a number of state-mandated programs. AB 1610 sought to "deem" the activities approved under the test claim regulations as necessary to implement a federal mandate, and thus negate the Commission's decision on reimbursement.[22] AB 1610 also sought to declare that local educational agencies must agree to implement the BIPs program as a condition of receiving ongoing special education funds. AB 1610, in addition, sought to compel local educational agencies receiving special education funds from the state to use those funds for state-mandated programs first, beginning in the 2010-2011 fiscal year.[23]

On December 17, 2010, after the settlement was not funded by the Legislature and attorneys representing DOF had abandoned the effort to compromise, claimants proposed revised parameters and guidelines that include an RRM relying on the same survey data collected during settlement negotiations with DOF.[24] The proposed parameters and guidelines offer three distinct RRMs: one for one-time activities required in the 1993-1994 school year; one for ongoing SELPA-level activities; and one for ongoing county-level activities.[25]

---

[18] Exhibit O, Settlement and Release Agreement, dated January 26, 2009

[19] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Diana McDonough.

[20] Exhibit O, Joint Stipulation for Entry of Judgment and Proposed Judgment, 05/19/09, Superior Court, County of Sacramento, No 03CS01432, p. 4.

[21] Exhibit O, AB 661 (text of proposed bill).

[22] Exhibit O, Statutes 2010, chapter 724 § 27 (AB 1610).

[23] Exhibit O, Education Code section 56523(b-f) (Stats. 2010, ch. 724 § 27 (AB1610)).

[24] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Diana McDonough.

[25] Exhibit B, Revised Proposed Parameters and Guidelines, December 17, 2010.

On January 27, 2011, the State Controller's Office (SCO) submitted written comments on the revised proposed parameters and guidelines.[26] On February 23, 2011, the claimants submitted a rebuttal to the SCO comments.[27] On August 9, 2011, DOF submitted written comments on the revised proposed parameters and guidelines.[28] On August 12, 2011, the Commission requested comments from parties and interested parties on three pending proposed RRMs.[29] On October 14, 2011, claimants submitted a rebuttal to DOF's comments.[30] On December 20, 2011, claimants submitted a response to the Commission's request for comments on the pending RRMs.[31] On August 15, 2012, claimants submitted Amended Exhibit 2 to the revised proposed parameters and guidelines.[32]

On December 4, 2012, the Commission issued the draft staff analysis. On December 21, 2012, SCO responded with comments on the draft proposed parameters and guidelines, primarily consisting of technical changes, most of which are reflected in the parameters and guidelines attached to this statement of decision. On December 24, 2012, the claimants submitted comments on the draft staff analysis, generally supporting the adoption of option A, with the exception of the language regarding offsetting revenues. Claimants' comments are discussed, where relevant, below. On December 28, 2012, Commission staff received comments also from DOF on the draft staff analysis, generally opposing the adoption of either an RRM or parameters and guidelines at this time. Those comments as well are addressed below.

III. POSITION OF THE PARTIES

A. Claimants' Position

The claimants' proposed parameters and guidelines offer three distinct RRMs, specific to the eligible claimants who implement the reimbursable activities, and to the time and manner in which the activities are implemented.

1. RRM for One-Time SELPA-Level Activities

The first RRM is for one-time SELPA-level activities, which include preparing and adopting procedures and policies, to update the SELPA plan in conformity with the regulations. The SELPA plans, which govern the provision of special education services locally, must be updated to reflect the changes imposed by the test claim regulations, including: training requirements for certain staff involved in developing BIPs; training requirements for staff involved in

[26] Exhibit C, SCO Comments, Revised Proposed Parameters and Guidelines, January 27, 2011.

[27] Exhibit D, Claimants' Rebuttal to SCO Comments, February 23, 2011.

[28] Exhibit E, DOF Comments, Revised Proposed Parameters and Guidelines, August 9, 2011.

[29] Exhibit G, Commission Request for Comments on Proposed Pending RRMs, August 12, 2011.

[30] Exhibit F, Claimants' Rebuttal to DOF Comments, October 14, 2011.

[31] Exhibit H, Claimants' Response to Request for Comments, December 20, 2011.

[32] Exhibit J, Claimants' Comments and Amended Exhibit 2.

implementing BIPs; special training for the use of emergency behavioral interventions; and identification of approved emergency behavioral interventions.[33]

The surveys produced by claimants sought information from SELPAs regarding how much time, for each position involved, was spent updating the SELPA plan in conformity with Code of Regulations section 3052(j) and adopting the changes.[34] The claimants and DOF engaged in some manipulating and negotiating regarding those figures, and resolved a number of discrepancies.[35] An hourly rate was then applied to the time spent, by position, to determine the cost of each activity.[36] Those costs were then totaled for all SELPAs surveyed, and divided by P2 ADA of all 21 SELPAs[37] for 2006-2007, to arrive at a unit cost per average daily attendance (ADA) for the one-time SELPA activities.[38] "P2 ADA" refers to "the total number of units of average daily attendance reported for the second principal apportionment" pursuant to Education Code section 41601 for all pupils enrolled in the district or districts that are a part of the SELPA. The resulting cost per ADA (unit rate) is then to be adjusted by the Implicit Price Deflator for the appropriate fiscal year in which the one-time activities were conducted by an eligible claimant SELPA, and then applied to the P2 ADA figures for that same year.

2. RRM for On-Going SELPA Activities

The second RRM proposed is for on-going activities at the SELPA level. These activities include providing and obtaining training in behavior analysis, positive behavioral interventions, and behavioral emergency interventions; reporting to the CDE and Advisory Committee on Special Education on the number of emergency behavior intervention reports; and satisfying due

[33] Code of Regulations section 3052(j) (Register 93, No. 17).

[34] See, e.g., Exhibit J, Claimants' Comments and Amended Exhibit 2, at p. 0017.

[35] Exhibit B, Claimants' Revised Proposed Parameters and Guidelines, Declaration of Linda Grundhoffer; Claimants' Exhibits 5-7.

[36] Exhibit B, Claimants' Revised Proposed Parameters and Guidelines, Declaration of Linda Grundhoffer, ["We often needed to call school personnel while compiling the data as we became aware of missing information. We always checked to obtain the actual information, and if we were unsuccessful, we ultimately did not use any of that SELPA's information. We did not estimate."]. See, e.g., Exhibit J, Claimants' Comments and Amended Exhibit 2, August 15, 2012, at p. 0052; 0058-0059.

[37] See Exhibit O, AB 602 This includes also schools operated by county offices of education. (Ed. Code § 56836.06 (Stats. 1997, ch. 854 § 65 (AB 602)))]. Section 41601, in turn provides that school districts and COEs "shall report to the Superintendent of Public Instruction during each fiscal year the average daily attendance…during [(1) the period between July 1 and December 31 (period one)] and (2) the period between July 1 and April 15, inclusive, to be known as the "second period" report." (Ed. Code § 41601).

[38] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Michael Lenahan.

process requirements related to functional analysis assessments or the development or implementation of BIPs.[39]

The methodology employed to calculate the unit rate was substantially the same as above: the surveys sought information from SELPAs regarding time spent, by position, on the ongoing activities of training, collecting data and reporting on emergency behavior intervention reports; and satisfying due process requirements in the 2006-2007 school year.[40] The time data were then manipulated until agreeable to both claimants and DOF,[41] and multiplied by the reported average hourly rates of the personnel assigned to those tasks.[42] The costs of the ongoing activities at the SELPA level were then totaled for all SELPAs surveyed and divided by the P2 ADA for the 21 SELPAs surveyed in 2006-2007 school year.[43] That figure is then applied retroactively and prospectively, adjusting by the Implicit Price Deflator for each applicable year, to the P2 ADA figures for each year since implementation began (presumably 1993-1994 in most cases).

3. RRM for On-Going School District and County Office of Education Activities

The third RRM proposed is for on-going activities at the school district and county office of education (COE) level. The ongoing activities include: conducting functional analysis assessments; developing, implementing, evaluating, and modifying BIPs; employing emergency interventions, including appropriate recordkeeping; training staff on prohibited behavioral interventions; and satisfying due process requirements related to functional analysis assessments or the development or implementation of BIPs.

The same methodology used for the other proposed RRMs is employed here. The surveys sought information from school districts and COEs operating schools in the place of school districts regarding time spent, by position, on the reimbursable activities. The surveys also sought to determine whether any outside contractors or specialists were employed to conduct the required activities.[44] Then, the hours reported were multiplied by the average hourly rates reported for the staff involved in those activities, and added to the fees imposed by outside contractors to determine the total district-level costs for 2006-2007.[45] Those costs were totaled from all districts surveyed, then divided by P2 ADA for 2006-2007 for all districts surveyed, to

[39] Exhibit B, Revised Proposed Parameters and Guidelines, December 17, 2010.

[40] See, e.g., Exhibit J, Claimants' Comments and Amended Exhibit 2, at pp. 0017-0022.

[41] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Linda Grundhoffer; Claimants' Exhibits 5-7.

[42] See, e.g., Exhibit B, Revised Proposed Parameters and Guidelines, Claimants' Exhibit 2, Survey Results from Butte SELPA, December 17, 2010.

[43] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Michael Lenahan.

[44] See, e.g., Exhibit J, Claimants' Comments and Amended Exhibit 2, at pp. 0054-0056.

[45] See, e.g., Exhibit J, Claimants' Comments and Amended Exhibit 2, at pp. 0058-0059;

arrive at a unit cost per ADA, which could be applied both retroactively and prospectively, as adjusted by the Implicit Price Deflator.[46]

The claimants urge the Commission to adopt the proposed parameters and guidelines, including the proposed RRMs, believing the proposal to be "reasonable, representative, and cost-effective." The claimants also note that "given the number of years that have passed since the mandate took effect, it will always be difficult, and often impossible, for school agencies to provide documentation of activities and actual costs to perform the mandate," and that the time and effort involved in obtaining such documentation would be "extensive and burdensome."[47] The claimants explain that "because substantial staff time was involved to complete the survey[s] and no funding for the effort was available, [claimants] were not in a position to require participation." Claimants received data from 21 SELPAs, which both claimants and DOF agreed "was an adequate sampling."[48] Claimants stress that they retained "experienced school business officials" as consultants to compile the results, and that the results "were reviewed and modified" by DOF until DOF and claimants agreed that they were accurate. Claimants also state that a settlement agreement was reached with DOF, and the underlying litigation was set to be dismissed, until the Legislature declined to fund the settlement for two consecutive budget cycles, and the settlement fell apart.[49]

The claimants responded to the comments of DOF and SCO by challenging the statutory requirements implied by their comments.[50]

The claimants submitted comments in response to the draft staff analysis on December 24, 2012, agreeing with staff's recommendation to adopt Option A, but disputing staff's conclusions regarding offsetting revenues. The claimants' concerns are addressed in the analysis below.

B. DOF Position

DOF opposes the adoption of the RRMs. DOF argues that section 17518.5(b) and (c), "require that an RRM be based on cost information from a representative sample of eligible claimants, and that it consider the variation of costs among local school districts to implement the mandate in a cost efficient manner."

DOF argues that the proposed RRM would not provide reimbursement based on cost information from a representative sample of eligible claimants. DOF argues that "only 21 of 120 SELPAs" is not a representative sample; those 21 SELPAs represent "just 11.3 percent of total ADA." DOF argues that the largest SELPAs are not represented, and that the southern part of the state is underrepresented.

---

[46] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Michael Lenahan.

[47] Exhibit B, Revised Proposed Parameters and Guidelines, cover letter, December 17, 2010.

[48] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Diana McDonough.

[49] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Diana McDonough.

[50] Exhibit D, Claimants' Rebuttal to SCO Comments, February 23, 2011; Exhibit F, Claimants' Rebuttal to DOF Comments, October 14, 2011.

DOF also argues that the proposed RRM does not consider the variation of costs among local school districts because the survey data betrays a wide range of costs among school districts. DOF argues that the proposed RRM "does not consider the relationship of the mandated activities and the mechanism that triggers the need for those activities." DOF concludes, "we do not believe using ADA as part of the proposed RRM is appropriate."

Finally, DOF notes that "the proposed unit rate is based on survey results from SELPAs, not on actual cost claims that have been audited." DOF expresses concern "that this data along with the proposed RRM does not accurately reflect the cost of the program," and questions "whether the BIPs program is suitable for such an approach."[51]

DOF has not disputed the accuracy of the underlying cost data reported in the surveys, or the methodology by which the survey data were compiled. DOF does not dispute the proposed language describing the reimbursable activities.

DOF submitted comments on the draft staff analysis in which it is argued that "it is premature to adopt any parameters and guidelines for the BIPs program at this time." DOF also disputes staff's recommendation to adopt Option A, approving the RRMs, because DOF believes that Government Code sections 17518.5 and 17557 provide statutory requirements that are not met. The specific arguments raised by DOF are not new, and they are addressed where relevant in the analysis below.

C. SCO Position

SCO opposes the adoption of the RRM also based upon the legal sufficiency of the evidence. SCO opposes the RRM because the rates were based on "1) unaudited cost data; 2) cost data for only a single school year (2006-2007); 3) data from only 12% of SELPA and; 4) to be utilized over an 18 year period."

SCO does not elaborate on the issue of unaudited cost data; and does not further explain its concern with "data from only 12% of SELPA, except to say that "[a]ccording to the Declaration of Diana K. McDonough, both the co-test claimants and the Department of Finance agreed that this was an adequate sampling." But as to SCO's concerns of data for a single school year, and data to be utilized over 18 years of cost claims, SCO cites to section 17518.5(d), which provides:

> In cases when local agencies and school districts are projected to incur costs to implement a mandate over a period of more than one fiscal year, the determination of a reasonable reimbursement methodology may consider local costs and state reimbursements over a period of greater than one fiscal year, but not exceeding 10 years.

SCO argues that the RRM unit rates were "derived from a single fiscal year of cost data and the reimbursement period in question is over 15 years." SCO argues that adjustments based on the Implicit Price Deflator "cannot give an accurate RRM rate for such a long reimbursement period based on a single year of cost data."[52]

---

[51] Exhibit E, DOF Comments, Revised Proposed Parameters and Guidelines, August 9, 2011.

[52] Exhibit C, SCO Comments, Revised Proposed Parameters and Guidelines, January 24, 2011.

SCO has not disputed the accuracy of the underlying cost data reported in the surveys, or the methodology employed. SCO does not dispute the proposed reimbursable activities.

SCO submitted comments on the draft staff analysis, primarily suggesting technical changes, which are incorporated in the attached parameters and guidelines where appropriate, and discussed in the analysis below where necessary.

IV. COMMISSION FINDINGS

The question before the Commission is whether the evidence submitted, which includes voluminous documentation of costs to implement the program in 2006-2007, is sufficient to support adoption of the proposed RRM for costs incurred going back to July 1, 1993, consistent with the substantial evidence standard, and the constitutional and statutory requirements for RRMs and for Commission decisions generally. In addition, issues relating to the proper scope of reimbursable activities and applicable offsetting revenues are discussed further below. However, as a threshold issue, subsequent amendments made to the test claim statute purport to end reimbursement, or to change the Commission's decision on reimbursement, as described in Part (A).

A. The Commission's Decision on Reimbursement is Final, and Legislation Enacted after the Commission's Decision (AB 1610) that Purports to Remove the Implementing Regulations from the Subvention Requirement May Only be Analyzed under a Request for Redetermination Properly Filed Pursuant to the Commission's Governing Statutes and Regulations.

The Commission has exclusive authority to decide mandates issues, and those decisions are final and conclusive, barring judicial review.[53] The Legislature enacted Assembly Bill 1610, which added a number of provisions to Education Code 56523, in an apparent attempt to negate the Commission's decision finding the *BIPs* program reimbursable under article XIII B, section 6 of the California Constitution.[54]

AB 1610 adds the following new provisions to Education Code section 56523:

> (b) This section and the implementing regulations adopted by the board *are declaratory of federal law and deemed necessary to implement the federal*

[53] *California School Boards Association v. State* (*CSBA I*) (Cal. Ct. App. 3d Dist. 2009) 171 Cal.App.4th 1183, at pp. 1199-1200.

[54] Exhibit O, Statutes 2010, chapter 724, Legislative Counsel's Digest (AB 1610) ["This bill would specify that [Section 56523] and its implementing regulations are declaratory of federal law and are intended to provide the clarity, definition, and specificity necessary for local educational agencies to comply with the federal Individuals with Disabilities Education Act. The bill would provide that this provision and the implementing state regulations shall not exceed the requirements of federal law, create new or separate state requirements, or result in a level of state service beyond that needed to comply with federal law and regulations. The bill would require local educational agencies to agree to adhere to implementing federal and state regulations as a condition of choosing to receive funding from the federal Individuals with Disabilities Education Act…"].

Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.) and associated federal regulations. This section is intended to provide the clarity, definition, and specificity necessary for local educational agencies to comply with the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.). This section, including the implementing state regulations needed to implement federal law and regulations, *shall not exceed the requirements of federal law, create new or separate state requirements, or result in a level of state service beyond that needed to comply with federal law and regulations*.

(c) *As a condition of receiving funding* from the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.), a local educational agency *shall agree to adhere* to implementing federal regulations and state regulations set forth in this section.

(d) The Superintendent may monitor local educational agency compliance with this section and may take appropriate action, including fiscal repercussions, if either of the following is found:

(1) The local educational agency failed to comply with this section and implementing regulations that govern the provision of special education and related services to individuals with exceptional needs and failed to comply substantially with corrective action orders issued by the department resulting from monitoring findings or complaint investigations.

(2) The local educational agency failed to implement the decision of a due process hearing officer based on noncompliance with this part, the state implementing regulations, provisions of the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.), or the federal implementing regulations, wherein noncompliance resulted in the denial of, or impeded the delivery of, a free appropriate public education for an individual with exceptional needs.

(e) Commencing with the 2010-11 fiscal year, *if any activities authorized pursuant to this section and implementing regulations are found be a state reimbursable mandate* pursuant to Section 6 of Article XIII B of the California Constitution, *state funding provided for purposes of special education* pursuant to Item 6110-161-0001 of Section 2.00 of the annual Budget Act *shall first be used to directly offset any mandated costs*.

(f) Contingent on the adoption of a statute in the 2009-10 Regular Session that adds Section 17570.1 to the Government Code, the Legislature hereby *requests the Department of Finance on or before December 31, 2010, to exercise its authority pursuant to subdivision (c) of Section 17570 of the Government Code and file a request with the Commission on State Mandates for the purpose of seeking the adoption of a new test claim to supersede CSM-4464 based on*

> *subsequent changes in law* that may modify a requirement that the state reimburse a local government for a state mandate [emphasis added].[55,56]

AB 1610 adopts changes in the substantive law underpinning the *BIPs* mandate and directs DOF to seek a redetermination of the BIPs mandate under Government Code section 17570[57] based upon those changes.[58] Specifically, AB 1610 declares that BIPs are federally mandated; and thereby seeks to implicate Government Code section 17556(c) to negate the Commission's finding on state-mandated local costs.[59] AB 1610 also attempts to preclude reimbursement by inserting conditional language into the code section, giving the activities approved the appearance of downstream requirements of receipt of federal funding, which could be non-reimbursable under *Kern*.[60] Additionally, AB 1610 inserts language regarding offsetting revenue, intended to end reimbursement beginning in fiscal year 2010-2011.[61] The language of the enactment, as well as the Legislative Counsel's Digest,[62] indicate that the intention of this statute is to negate the Commission's decision on reimbursement for this program. But the Commission has no jurisdiction to change its prior final decision or to interpret the provisions of AB 1610, absent a request for redetermination pursuant to Government Code section 17570. To date, no request for redetermination has been filed with the Commission.

In *California School Boards Association v. State*, (*CSBA I*) (Cal. Ct. App. 3d Dist. 2009) 171 Cal.App.4th 1183, the court addressed a similar situation, in which a legislative enactment sought to change mandates law and force a reconsideration of a number of decisions relying on the former law. The court in *CSBA I* held that this was a violation of the separation of powers doctrine to force the Commission to change a prior final decision: "the statutory scheme contemplates that the Commission, as a quasi-judicial body, has *the sole and exclusive authority*

---

[55] Exhibit O, Education Code section 56523 (Stats. 2010, ch. 724 § 27 (AB 1610)) [emphasis added].

[56] AB 1610 is being challenged as unconstitutional in *California School Boards Association v. State*, Superior Court, County of Alameda, Case No. RG 11554698 (January 6, 2011).

[57] Exhibit O, Government Code section 17570 (Stats. 2010, ch. 719 (SB 856) [providing for redetermination of a test claim decision based on a subsequent change in law; also challenged in ongoing litigation with California School Boards Association, petitioners].

[58] Exhibit O, Education Code section 56523 (Stats. 2010, ch. 724 § 27 (AB 1610)).

[59] See *San Diego Unified School Dist. v. Commission on State Mandates* (*San Diego Unified*) (2004) 33 Cal.4th 859 [discussion of section 17556(c); no reimbursement for programs implementing federal mandate].

[60] See *Department of Finance v. Commission on State Mandates* (*Kern High School District*) (2003) 30 Cal.4th 727 [no reimbursement for requirements triggered by or downstream of voluntary funded program].

[61] See Government Code sections 17556(e) and 17514 [no costs mandated by the state where increased costs are met with corresponding increase in funding].

[62] Exhibit O, Statutes 2010, chapter 724, (AB 1610) Legislative Counsel's Digest, paragraph 21.

to adjudicate whether a state mandate exists." The court held that "[t]he Commission's *authority to issue a final decision* that solely and exclusively adjudicates a test claim is *limited only by judicial review*," and that "[t]he Legislature's direction to the Commission to reconsider or set aside its final decisions is an unlawful collateral attack on those decisions." The court therefore concluded that, absent a valid statutory scheme allowing reconsideration based on subsequent changes in the law "[a]s a collateral attack, the Legislature's direction to the Commission to set aside or reconsider Commission decisions went beyond the power of the Legislature."[63]

At the time *CSBA I* was heard and decided, redetermination of Commission decisions based on a subsequent change in law was not a part of the Government Code. The *CSBA I* court recognized that "[o]ver time, any particular decision of the Commission may be rendered obsolete by changes in the law and material circumstances that originally justified the Commission's decision." The court held that "logic may dictate that [a Commission decision] must be subject to some procedure for modification after changes in the law or material circumstances," but the court declined to find, as urged, that the "inherent power of a court to modify a continuing injunction to take into account changes in the law and material circumstances" was sufficiently analogous to permit the Commission to initiate a redetermination absent an enabling statute.[64]

In 2010, the Legislature enacted Government Code section 17570 and 17570.1 (SB 856) to allow a party to request that the Commission re-determine and change a prior final test claim decision if there has been a subsequent change in the law. Section 17570 solves the problem identified in *CSBA I*, by providing a proper mechanism for reconsideration of a test claim decision where a subsequent change in law affects the legal framework underpinning a mandate determination. Section 17570 provides, in pertinent part:

> (b) The commission may adopt a new test claim decision to supersede a previously adopted test claim decision only upon a showing that the state's liability for that test claim decision pursuant to subdivision (a) of Section 6 of Article XIII B of the California Constitution has been modified based on a subsequent change in law.
>
> (c) A local agency or school district, statewide association of local agencies or school districts, or the Department of Finance, the Controller, or other affected stated agency may file a request with the commission to adopt a new test claim decision pursuant to this section.[65]

Here, judicial review of the *BIPs* claim was abandoned by DOF, after the settlement between DOF and claimants broke down. The three year statute of limitations to file for administrative mandamus challenging the Commission's decision on this test claim has passed,[66] and the dismissal was issued *with prejudice*. Therefore the Commission's decision is final, and no

---

[63] *CSBA I*, *supra*, at pp. 1199-1200 [internal quotations and citations omitted].

[64] *CSBA I*, *supra*, at p. 1202.

[65] Exhibit O, Government Code section 17570 (Stats. 2010, ch. 719 § 33 (SB 856).

[66] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 169; *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 534.

further judicial review may be had at this time. AB 1610 directs DOF to "exercise its authority pursuant to subdivision (c) of Section 17570 of the Government Code and file a request with the Commission on State Mandates for the purpose of seeking the adoption of a new test claim to supersede CSM-4464."[67] And, as stated above, no request for redetermination has been filed.

Accordingly, the subsequent changes in law made by AB 1610, in an attempt to change the statement of decision approving the *BIPs* test claim, cannot be considered by the Commission until or unless a request for redetermination is properly filed under section 17570. Absent that process, only the offsetting revenue issues raised by AB 1610, as discussed below, may be considered to reduce the amount of reimbursement beginning in fiscal year 2010-2011.[68]

DOF has stated, in comments filed on the draft staff analysis that "we believe that it is premature to adopt any parameters and guidelines for the BIPs program at this time." DOF asserts that "the Administration continues to engage in negotiations with the Legislature and stakeholders on similar statutory changes and will introduce a related proposal as part of the 2013-2014 Governor's Budget on January 10, 2013." DOF cites, for example, AB 1476, which "included provisions that would have significantly altered the underlying statute and regulations pertaining to the BIPs program." AB 1476 was not passed by the Legislature, but DOF asserts "we respectfully urge the Commission to postpone taking any action on the BIPs program until after the 2013-2014 budget bill and accompanying trailer bills are passed by the Legislature and signed by the Governor."[69]

DOF's position is untenable. It is difficult to imagine how adopting parameters and guidelines at this time could be premature. The test claim statute has been in effect since 1993; the test claim statement of decision was adopted in 2000; what followed was nearly seven years of protracted litigation, followed by a settlement agreement that ultimately fell apart due to legislative impasse. DOF points to AB 1476 as evidence that the Administration is attempting to change the underlying statutory requirements relating to the mandate, and DOF suggests that such changes would alter the landscape so much that the parameters and guidelines should wait. AB 1476 sought to direct the Department of Education to repeal the regulations that impose the *BIPs* mandates, but even if AB 1476 had passed, it would only have ended the mandate prospectively; it would have no effect on reimbursement retroactively, as indicated by the above analysis.[70]

There are no guarantees that DOF can offer that the Administration's foray into eliminating the mandate will be successful, nor when such an effort might be complete. Moreover, as discussed, there is no Legislative action short of a settlement with the claimants and eligible claimants (such as the one offered in 2009) that could affect the state's liability under the test claim statute both prospectively and retroactively. Since, at best, legislative action could only end the mandated activities, the most appropriate method of employing the Commission's process would be to

---

[67] Exhibit O, Education Code section 56523(f) (Stats. 2010, ch. 724 § 27 (AB 1610)).

[68] See Government Code section 17557; Code of Regulations, Title 2, section 1183.1(a)(7).

[69] Exhibit M, DOF Comments on Draft Staff Analysis.

[70] See Exhibit O, AB 1476, at p. 19.

proceed with the parameters and guidelines as written, and then request a parameters and guidelines amendment if and when the test claim statute is repealed or amended.[71]

B. The Test Claim Statement of Decision, the Revised Proposed Parameters and Guidelines, and the Comments Filed By the Department of Finance, the State Controller's Office, and the Claimants Were Reviewed and Considered By the Commission as Discussed Below.

1. Period of Reimbursement (Section III. of Proposed Parameters and Guidelines)

The claimants' proposed language in Section III of the proposed parameters and guidelines, found at Exhibit B, that addresses the period of reimbursement for this claim, is incomplete, in part, and misstates the statutory deadline for establishing the period of reimbursement. The period of reimbursement section of the proposed parameters and guidelines is changed to incorporate the current boilerplate language adopted by the Commission.

2. Reimbursable Activities (Section IV. of Proposed Parameters and Guidelines)

The italicized text in this section is drawn from the claimants' revised proposed parameters and guidelines (Exhibit B), and inserted here for purposes of analysis. The bulleted text contains the Commission's analysis of each section of the reimbursable activities.

As described below, the Commission finds that the claimants' proposed reimbursable activities are consistent with the test claim regulations and the Commission's statement of decision on the test claim. Thus, the Commission adopts the reimbursable activities as proposed by the claimant.

The claimant requests reimbursement for the following one-time activities performed by SELPAs:

A. Proposed One-time Activities for SELPAs only

Preparing and Providing SELPA Procedures and Initial Training.

Preparing procedures for the SELPA local plan regarding the systematic use of behavioral intervention, for the training of behavioral intervention case managers and personnel involved with implementing behavioral intervention plans, for special training for emergency interventions, and for identification of approved behavioral emergency procedures.

The requested one-time activities are consistent with the requirements of the test claim regulations and the findings in the statement of decision as follows:

- Section 3052(j) provides for the adoption of SELPA plan requirements, which include systematic use of BIPs, training of behavioral intervention case managers and personnel involved in implementing BIPS, special training in emergency interventions, and identification of approved emergency procedures.

[71] See Government Code section 17557(d)(2)(A) [request to amend parameters and guidelines may be made to "Delete any reimbursable activity that has been repealed by statute or executive order after the adoption of the original or last amended parameters and guidelines."].

- The Commission approved the SELPA plan requirements in the test claim statement of decision as follows:

> Under the test claim legislation's implementing regulations, each SELPA must include procedures in its local plan regarding the systematic use of behavioral interventions.[72] These procedures include training of behavioral intervention case managers, training of personnel involved with implementing behavioral intervention plans, special training for emergency interventions, and identification of approved behavioral emergency procedures.[73] SELPAs must inform all staff members and parents of these procedures whenever a behavioral intervention plan is proposed.[74]
>
> The Commission found that these activities represent a new program or higher level of service because SELPAs were under no obligation to include such information in their local plans before the adoption of the test claim legislation's implementing regulations.[75]

Based on the regulation, as approved, and the above language from the Commission's statement of decision, the claimants' description of the reimbursable activities under the SELPA plan requirements is consistent with the activities approved in the test claim.

The claimant requests reimbursement for the following three ongoing activities for SELPAs:

> *B. Proposed Ongoing Activities for SELPAs*
>
> *1. Training.*
>
> *Providing and obtaining training in behavior analysis, positive behavioral interventions, and behavioral emergency interventions. Time spent by personnel who design and conduct the training and time spent by personnel who receive the training is reimbursable. Such personnel include behavioral intervention case managers and personnel involved with implementing behavioral intervention plans, conducting functional analysis assessments, or implementing emergency interventions.*

SELPA-level training, as proposed, is consistent with the requirements of the test claim regulations and the Commission's statement of decision on the test claim as follows:

- Training is required to be included in the SELPA plan pursuant to subdivision (j) of section 3052. Subdivision (j) provides that the qualification and training of personnel to be designated as behavioral intervention case managers and personnel involved in implementing behavioral intervention plans and using emergency behavioral interventions must be included in the SELPA plan.

---

[72] Code of Regulations, Title 5, section 3052(j).

[73] *Id*. at subdivision (j)(2)(A)-(D).

[74] *Id*. at subdivision (j)(1).

[75] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464, at p. 4.

- Training is required to develop and implement BIPs pursuant to subdivision (a) of section 3052. Subdivision (a) provides that behavioral intervention plans shall only be implemented by, or be under the supervision of, staff with documented training in behavior analysis, including the use of positive behavioral interventions.
- Training at the SELPA level was approved by the Commission in the test claim statement of decision as follows:

> These procedures include training of behavioral intervention case managers, training of personnel involved with implementing behavioral intervention plans, special training for emergency interventions, and identification of approved behavioral emergency procedures…
>
> The Commission found that these activities represent a new program or higher level of service because SELPAs were under no obligation to include such information in their local plans before the adoption of the test claim legislation's implementing regulations.[76]

Based on the regulations, as approved, and the above-cited language from the Commission's statement of decision, the claimants' description of the reimbursable activities regarding on-going SELPA-level training is consistent with the activities required by the regulations and approved in the test claim.

2. Emergency Interventions.

Preparing reports on the number of Behavioral Emergency Reports to the California Department of Education and Advisory committee on Special Education.

Preparing reports on emergency interventions is consistent with the requirements of the test claim regulations and the Commission's statement of decision on the test claim as follows:

- Section 3052 requires that Behavioral Emergency Report data "shall be collected by SELPAs which shall report annually the number of Behavioral Emergency Reports to the [CDE] and the Advisory Committee on Special Education."[77]
- The Commission approved the collection and reporting on Behavioral Emergency Reports at the SELPA-level as follows:

> SELPAs are required to collect data on "Behavioral Emergency Reports" and annually report the number of Reports to the California Department of Education and the Advisory Committee on Special Education.
>
> The Commission found that all activities associated with emergency interventions represent a new program or higher level of service because school districts were under no obligation to develop and implement emergency behavioral intervention

[76] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464, at p. 4.

[77] Code of Regulations, Title 5, section 3052(i)(9).

plans before the adoption of the test claim legislation's implementing regulations.[78]

Based on the regulation, as approved, and the above-cited language from the Commission's statement of decision, the claimants' description of the reimbursable activities regarding emergency interventions is consistent with the activities approved in the test claim.

3. Due Process Hearings.

Preparing for, attending, and documenting and informing appropriate staff concerning the results of any mediation or due process hearing related to functional analysis assessments or the development or implementation of behavioral intervention plans.

The due process hearing activities are consistent with the requirements of the test claim regulations and the Commission's statement of decision on the test claim as follows:

- Due process hearings are provided for in subdivision (m) of section 3052 of the test claim regulations, which make reference to Education Code section 56501 et seq.[79]
- The Commission approved the due process requirements in the test claim statement of decision as follows:

> Before the enactment of the test claim legislation's implementing regulations school districts were under no obligation to develop and implement behavioral intervention plans.
>
> Therefore, the Commission found that any due process procedures associated with the development and implementation of behavioral intervention plans represents a new program or higher level of service.[80]

Based on the regulation, as approved, and the above-cited language from the Commission's statement of decision, the claimants' description of the reimbursable activities regarding due process hearings is consistent with the activities approved in the test claim.

The claimant requests reimbursement for the following seven ongoing activities performed by school districts and county offices of education.

C. Proposed Ongoing Activities for School Districts and County Offices of Education

1. Conducting Functional Analysis Assessments.

Providing notice to and obtaining written consent from parents to conduct functional analysis assessments; conducting functional analysis assessments; preparing written

[78] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464, at p. 8.

[79] Code of Regulations, Title 5, section 3052(m).

[80] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464, pp. 8-9.

reports of assessment results; providing copies of assessment reports to parents and the IEP Team; conducting IEP Team meetings to review assessment results.[81]

The activities associated with conducting functional analysis assessments are consistent with the requirements of the test claim regulations and the Commission's statement of decision on the test claim as follows:

- Conducting functional analysis assessments is provided for in section 3052(b).
    - The section provides that a functional analysis assessment must be conducted by or under the supervision of a person with documented training in behavior analysis with an emphasis on positive behavioral interventions.
    - The subdivision provides that "prior to conducting the assessment, parent notice and consent shall be given and obtained."
    - Paragraph (b)(2) provides for the completion of a written report, a copy of which "shall be provided to the parent."
- Section 3052(c) provides that "[u]pon completion of the functional analysis assessment, an IEP team meeting shall be held to review results and, if necessary, to develop a behavioral intervention plan."[82]
- The Commission approved the functional analysis assessments, described as follows:

> The Commission found that all of the activities associated with functional analysis assessments represent a new program or higher level of service because school districts were under no obligation to perform functional analysis assessments before the adoption of the test claim legislation's implementing regulations.[83]

Based on the regulation, as approved, and the above-cited language from the Commission's statement of decision, the claimants' description of the reimbursable activities regarding functional analysis assessments is consistent with the activities approved in the test claim.

2. <u>Developing and Evaluating Behavioral Intervention Plans.</u>

Participating in IEP Team meetings in which behavioral intervention plans are developed, evaluated, or modified, or in which functional analysis assessment results are reviewed; preparing behavioral intervention plans; and developing contingency plans for altering the procedures or the frequency or duration of the procedures. Providing copies of SELP A procedures on behavioral interventions and behavioral emergency interventions to parents and staff.

---

[81] An IEP is an Individualized Education Program (Ed. Code § 56032 (Stats. 1993, ch. 1296 § 13.1 (AB 369))).

[82] Code of Regulations, Title 5, section 3052(b-c).

[83] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464, p. 5.

The activities associated with developing and evaluating behavioral intervention plans are consistent with the requirements of the test claim regulations and the Commission's statement of decision on the test claim as follows:

- IEP team meetings are provided for in subdivision (a) of section 3052, which provides that an IEP team "shall facilitate and supervise all assessment, intervention, and evaluation activities related to an individual's [BIP]."
- Section 3052(c) provides for the development of BIPs at an IEP team meeting upon completion of a functional analysis assessment.
- Section 3052(f) provides for evaluation of the effectiveness of BIPs, and provides that if the IEP team determines that changes are necessary to increase effectiveness, additional functional analysis assessments are conducted and changes proposed.
- Section 3052(h) provides for contingency BIPs, in which procedures may be altered without reconvening the IEP team.
- Section 3052(j) provides that the SELPA procedures "shall be available to all staff members and parents whenever a behavioral intervention plan is proposed."
- The Commission approved the development and evaluation of BIPs as follows:

> The Commission found that, to the extent these activities are required to implement an individual's behavioral intervention plan, the activities represent a new program or higher level of service because school districts were under no obligation to develop and implement behavioral intervention plans before the adoption of the test claim legislation's implementing regulations.
>
> Once a behavioral intervention plan is implemented, it is evaluated to measure the frequency, duration, and intensity of the targeted behavior identified in the functional analysis assessment. The teacher, the behavioral intervention case manager, parent or care provider, and others, as appropriate, review the evaluation at scheduled intervals determined by the IEP team. If the IEP team determines changes are necessary, the teacher and behavioral intervention case manager conduct additional functional analysis assessments, and based on the outcomes, propose changes to the plan.
>
> The Commission found that these activities represent a new program or higher level of service because school districts were under no obligation to evaluate the effectiveness of behavioral intervention plans or to modify them based on an additional functional analysis assessment before the adoption of the test claim legislation's implementing regulations.[84]

[84] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464, pp. 6-7 [internal footnotes and citations omitted].

Based on the regulation, as approved, and the above-cited language from the Commission's statement of decision, the claimants' description of the reimbursable activities regarding developing and evaluating BIPs is consistent with the activities approved in the test claim.

> *3. Implementing Behavioral Intervention Plans.*
>
> *Implementing and supervising the implementation of behavioral intervention plans; measuring and documenting the frequency, duration, and intensity of targeted behavior and effectiveness of the behavioral intervention plan. Costs of employing personnel with documented training in behavioral analysis including positive behavioral interventions (whether such personnel are new staff or existing staff) to serve as behavioral intervention case managers is reimbursable under this component.*

The activities associated with implementing the behavioral intervention plans are consistent with the requirements of the test claim regulations and the Commission's statement of decision on the test claim as follows:

- Section 3052(a) provides that BIPs "shall only be implementing by, or be under the supervision of, staff with documented training in behavior analysis, including the use of positive behavioral interventions." This section thereby requires BIPs to be implemented, and requires local educational agencies to maintain properly-trained staff to conduct such implementation.
- Section 3052(f) provides for evaluating the effectiveness of BIPs, including measurement and documentation of the frequency, duration, and intensity of targeted behaviors.
- The Commission approved implementing BIPs as described in the previous section.[85]

Based on the regulation, as approved, and the above-cited language from the Commission's statement of decision, the claimants' description of the reimbursable activities regarding implementing BIPs is consistent with the activities approved in the test claim.

> *4. Modifications to Behavioral Intervention Plans.*
>
> *Providing notice to parents or parent representatives of the need to make minor modifications to the behavioral intervention plans, meeting with parents to review existing program evaluation data; and developing minor modifications to behavioral intervention plans with parents or parent representatives.*

The activities associated with modifying the behavioral intervention plans are consistent with the requirements of the test claim regulations and the Commission's statement of decision on the test claim as follows:

- Section 3052(f) provides for changes to be made to BIPs on the basis of evaluations, which would require additional functional analysis assessments, which in turn require parental notice under subdivision (b).

[85] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464, at pp. 6-7.

- Section 3052(g) provides for minor modifications without an IEP team meeting, which can be made by the behavioral intervention case manager and a parent or parent representative.
- Section 3052(g) provides that parents are entitled to notice, and "shall be informed of their right to question any modification to the plan through the IEP procedures."
- The Commission approved modifications to BIPs in the test claim statement of decision, as follows:

> The Commission found that the activities of the behavioral intervention case manager and the IEP team regarding development and modification of behavioral intervention plans represent a new program or higher level of service because school districts were under no obligation to implement behavioral intervention plans before the adoption of the test claim legislation's implementing regulations.[86]

Based on the regulation, as approved, and the above-cited language from the Commission's statement of decision, the claimants' description of the reimbursable activities regarding modifications to BIPs is consistent with the activities approved in the test claim.

5. Emergency Interventions.

Employing emergency interventions; notifying parents and residential care providers after an emergency intervention is used; preparing and maintaining a Behavioral Emergency Report following the use of an emergency intervention; administrative review of Behavioral Emergency Reports; scheduling and conducting an IEP Team meeting to review a Behavioral Emergency Report and the need for a functional analysis assessment, interim behavioral intervention plan, or modification to an existing behavioral intervention plan.

The activities associated with emergency interventions are consistent with the requirements of the test claim regulations and the statement of decision on the test claim as follows:

- Emergency interventions are provided for in section 3052(i).
- The Commission approved activities related to emergency interventions in the test claim statement of decision, as follows:

> The Commission found that all activities associated with emergency interventions represent a new program or higher level of service because school districts were under no obligation to develop and implement emergency behavioral intervention plans before the adoption of the test claim legislation's implementing regulations.[87]

[86] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464, at p. 7.

[87] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464, at pp. 7-8.

Based on the regulation, as approved, and the above-cited language from the Commission's statement of decision, the claimants' description of the reimbursable activities regarding emergency interventions is consistent with the activities approved in the test claim.

> *6. Prohibited Interventions.*
>
> *Training appropriate staff regarding the types of interventions that are prohibited under Title 5, California Code of Regulations section 3052, subdivision (1).*

Training staff regarding the types of interventions that are prohibited is consistent with the requirements of the test claim regulations and the Commission's statement of decision on the test claim as follows:

- Prohibited interventions are addressed in section 3052(l), which provides that no public education agency, or nonpublic school or agency may authorize, order, consent to, or pay for any of the listed interventions, or any interventions similar to or like the listed interventions. The list is non-exhaustive, implying that some ongoing development of prohibited interventions is expected.
- The Commission approved activities related to prohibited interventions in the test claim statement of decision as follows:

  > Interventions that may cause physical harm, deprivation of sleep or food, humiliation or ridicule, or deprivation of one or more senses are prohibited. The use of restrictive devices that limit mobility, locked seclusion, or inadequate supervision is also prohibited.
  >
  > The Commission found that the activity of informing school district personnel of the restrictions represents a new program or higher level of service because school districts were under no obligation to develop and implement behavioral intervention plans before the adoption of the test claim legislation's implementing regulations.[88]

- SCO objected to the claimants' proposed language for prohibited interventions, noting that the "language found in the original SOD" provided for "informing school district personnel of the restrictions." In other words, the test claim statement of decision approved informing school personnel of prohibited interventions, which, as discussed above, is a non-exhaustive list, and SCO argued that "informing" and "training" are not sufficiently similar. On the other hand, "informing" is a fairly vague description of an activity, whereas "training" is more precise, and is supportable based on the test claim statement of decision and the regulations at issue.

Based on the regulation, as approved, and the above-cited language from the Commission's statement of decision, the claimants' description of the reimbursable activities regarding ongoing training related to prohibited interventions is consistent with the activities required by regulation and approved in the test claim.

[88] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464, at p. 8.

7. Due Process Hearings.

Preparing for, attending, and documenting and informing appropriate staff concerning the results of any mediation or due process hearing related to functional analysis assessments or the development or implementation of behavioral intervention plans.

The activities associated with due process hearings are consistent with the requirements of the test claim regulations and the Commission's statement of decision on the test claim as follows:

- Section 3052(m) provides that the provisions of the BIPs program "related to functional analysis assessments and the development and implementation of [BIPs] are subject to the due process hearing procedures specified in Education Code Section 56501 et seq."
- The Commission approved activities related to due process requirements in the test claim statement of decision, as follows:

> The provisions of the test claim legislation that relate to functional analysis assessments and the development and implementation of behavioral intervention plans are subject to the due process hearing procedures specified in the Education Code. Before the enactment of the test claim legislation's implementing regulations school districts were under no obligation to develop and implement behavioral intervention plans.
>
> Therefore, the Commission found that any due process procedures associated with the development and implementation of behavioral intervention plans represents a new program or higher level of service.[89]

Based on the foregoing discussion, the Commission finds that the reimbursable activities section of the proposed parameters and guidelines is consistent with the regulations approved by the Commission, and the activities approved in the statement of decision. There were no activities alleged in the test claim that were denied in the statement of decision. Moreover, there has been no objection or dispute as to the reimbursable activities raised by DOF or SCO. Accordingly, the Commission adopts the language proposed by the claimants in Section IV of the parameters and guidelines.

3. Claim Preparation (Section V. of Proposed Parameters and Guidelines)

In lieu of filing a reimbursement claim based on detailed documentation of actual costs incurred in a fiscal year, these proposed parameters and guidelines offer three distinct RRMs, calculated by Average Daily Attendance (ADA) of a claimant, multiplied by a unit cost for that claimant's reimbursable activities, developed on the basis of survey data from a sample of eligible claimants. The surveys ask, for each specific activity, how much time was spent at the district/COE level and at the SELPA level, and by what classification of personnel. The surveys then apply an average hourly rate, including base pay and benefits of the personnel assigned to the activities, as calculated and reported by the survey respondents, to estimate the costs of a

[89] Corrected SOD, *Behavioral Intervention Plans*, CSM-4464, at pp. 8-9.

particular activity in the survey year (2006-2007). Those costs are totaled, for each district, and each SELPA, and divided by P2 ADA, as found on the CDE website.[90] The surveys do not inquire as to actual or total costs expended to implement the mandate in each district or COE, except where a district or COE hired outside consultants or specialists to complete the mandated activities who charged certain fees.

Due in part to the many years of litigation involving this test claim, there are not, to the claimants' knowledge, adequate records of cost information with which to make out more exacting estimates going back to 1993, the initial period of reimbursement.[91] But the California Department of Education (CDE) maintains ADA records, and, thus, an RRM based on ADA data is relatively simple to calculate. ADA-based formulae have been used in the past to fund special education generally,[92] and to fund the *Special Education* mandated program (CSM-3986).[93]

The claimants have proposed an RRM, to be considered by the Commission, relying on the same body of evidence collected in the pursuit of the settlement reached between claimants and DOF that was not funded by the Legislature. The claimants have provided the following exhibits in the record to support the proposed parameters and guidelines:

- Declarations from Diana McDonough, Linda Grundhoffer, and Michael Lenahan; Diana McDonough's declaration details the chain of events in this test claim, from the adoption of a statement of decision, to negotiations toward settlement, to the issuance of surveys to collect cost information in collaboration with DOF, to the filing of revised proposed parameters and guidelines; Linda Grundhoffer and Michael Lenahan are consultants with experience as school business officials, and their declarations focus primarily on the methodology of compiling and manipulating the survey data to arrive at an RRM;
- Exhibit 1: Positive Behavioral Intervention Plan/Functional Analysis Assessment Survey: This exhibit contains a copy of all three survey levels sent to the SELPAs; the Behavioral Intervention Case Manager level survey, the District level survey, and the SELPA level survey. These surveys were issued, and the responses collected, between December 2007 and May 2008, and asked for time spent on specific reimbursable activities, by position, in the 2006-2007 school year, and the average hourly rates for those positions;
- Exhibit 2: CSM-4464 Behavioral Intervention Plans Statewide Cost Survey: this exhibit contains compiled results of the surveys, in spreadsheet form, as prepared by claimants. Claimants state that the figures are actual, and that no estimations or

[90] Exhibit B, Positive Behavioral Intervention Plan/Functional Analysis Assessment Survey, Claimants' Exhibit 1.

[91] Exhibit B, Claimants' Revised Proposed Parameters and Guidelines, Cover Letter; Exhibit F, Claimants' Rebuttal to DOF Comments.

[92] See Exhibit O, Statutes 1997, chapter 854 (AB 602) [Education Code section 56836 et seq.].

[93] Exhibit O, Statutes 2001, chapter 203 (SB 982).

guesses were made; in the case that a survey respondent left out some information, efforts were made to obtain the data; and, if unsuccessful, the data were excluded;

- Exhibit 3: Summary Survey of Hughes Bill Costs: this chart summarizes the survey data by SELPA, and includes the SELPA's ADA for the applicable year, the one-time costs, and estimated total costs for the 15 years of the potential reimbursement period, and provides a cost per ADA for each SELPA;
- Exhibit 4: Hughes Bill Survey Data: this exhibit explains the methodology and the statistical significance of the survey respondents as compared with the statewide ADA;
- Exhibit 5: Hughes Bill Survey With Department of Finance and Claimant Discrepancies;
- Exhibit 6: Hughes Bill Survey Reconciling Discrepancies;
- Exhibit 7: Summary – Survey of Hughes Bill Costs With Reimbursement Methodology Calculation: this chart shows the RRM per ADA that the parties calculated based on the survey data;[94]
- Amended Exhibit 2A: Declaration of Diana McDonough; Cover letter to SELPA directors regarding declarations; Cover letter to survey respondents regarding declarations; Blank form declaration provided to survey respondent: these documents detail the process of sending to the original survey respondents and the SELPA directors a form declaration and affidavit, so that the survey respondents may verify their original responses, under oath, in order that the surveys will be treated as credible evidence to support an RRM that the Commission could adopt;
- Amended Exhibit 2B: Original Survey Responses and Declarations: this exhibit pairs the declarations and affidavits from respondents with the original survey responses;
- Amended Exhibit 2C: Declarations of Linda Grundhoffer and Michael Lenahan; and,
- Amended Exhibit 2D: Reconciled spreadsheets summarizing data in survey responses and agreed upon by Finance.[95]

For the following reasons, the Commission finds that the evidence and exhibits submitted are sufficient to support adoption of an RRM, consistent with the constitutional and statutory requirements of RRMs, and of Commission decisions generally.

A. The purpose of an RRM is to reimburse local government efficiently and simply, with minimal auditing and documentation required.

1. <u>The reimbursement requirement</u>

[94] Exhibit B, Claimants' Revised Proposed Parameters and Guidelines.

[95] Exhibit J, Claimants' Comments and Amended Exhibit 2.

Article XIII B, section 6 provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government [defined to include school districts], the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service [with exceptions not applicable here]..."

This reimbursement obligation was "enshrined in the Constitution ... to provide local entities with the assurance that state mandates would not place additional burdens on their increasingly limited revenue resources."[96] Section 17561(a) states: "[t]he state *shall* reimburse each local agency and school district for *all* 'costs mandated by the state,' as defined in Section 17514." Government Code section 17514, in turn, defines "costs mandated by the state" as any increased cost incurred as a result of any state statute or executive order that mandates a new program or higher level of service. The courts have interpreted the Constitutional and statutory scheme as requiring "full" payment of the actual costs incurred by a local entity once a mandate is determined by the Commission.[97]

The statutes providing for the adoption of an RRM, along with the other statutes in this part of the Government Code, are intended to implement article XIII B, section 6.[98]

2. Statutory flexibility and constitutional consistency

Statutory authority for the adoption of an RRM was originally enacted in 2004, and was amended in 2007 to promote greater flexibility in adoption of an RRM.[99] In a 2007 report, the Legislative Analyst's Office (LAO) states that an RRM is intended to reduce local and state costs to file, process, and audit claims; and reduce disputes regarding mandate reimbursement claims and State Controller's claim reductions. The report identifies under the heading "Concerns With the Mandate Process," the difficulties under the statutes then-in-effect:

---

[96] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1282; *CSBA v. State of California* (2011) 192 Cal.App.4th 770, 785-786.

[97] Exhibit O, *CSBA v. State of California* (*CSBA II*) (Cal. Ct. App. 4th Dist. 2011) 192 Cal.App.4th 770, 786; *County of Sonoma v. Commission on State Mandates* (Cal. Ct. App. 1st Dist. 2000) 84 Cal.App.4th 1264, 1284. The court in *County of Sonoma* recognized that the goal of article XIII B, section 6 was to prevent the state from forcing extra programs on local government in a manner that negates their careful budgeting of expenditures, and that a forced program is one that results in "increased actual expenditures." The court further noted the statutory mandates process that refers to the reimbursement of "actual costs incurred."

See also, Government Code sections 17522 defining "annual reimbursement claim" to mean a claim for "actual costs incurred in a prior fiscal year; and Government Code section 17560(d)(2) and (3), referring to the Controller's audit to verify the "actual amount of the mandated costs."

[98] Government Code section 17500 et seq.

[99] Government Code section 17518.5 (enacted by Stats. 2004, ch. 890 (AB 2856); amended by Stats. 2007, ch. 329 (AB 1222)).

- Most mandates are not complete programs, but impose increased requirements on ongoing local programs. Measuring the cost to carry out these marginal changes is complex.
- Instead of relying on unit costs or other approximations of local costs, reimbursement methodologies (or "parameters and guidelines") typically require local governments to document their actual costs to carry out each element of the mandate.
- The documentation required makes it difficult for local governments to file claims and leads to disputes with the State Controller's Office.

The LAO's recommendation to address these issues was to:

> Expand the use of unit-based and *other simple claiming methodologies* by clarifying the type of easy-to-administer methodologies that the Legislature envisioned when it enacted this statute…[100]

The LAO's recommendations were implemented in Statutes 2007, chapter 329 (AB 1222). The former section 17518.5 provided that an RRM must "meet the following conditions:"

> (1) The total amount to be reimbursed statewide is equivalent to total estimated local agency and school district costs to implement the mandate in a cost-efficient manner.
>
> (2) For 50 percent or more of eligible local agency and school district claimants, the amount reimbursed is estimated to fully offset their projected costs to implement the mandate in a cost-efficient manner.[101]

The 2007 amendments to section 17518.5 now define an RRM as follows:

> (a) "Reasonable reimbursement methodology" means a formula for reimbursing local agencies and school districts for costs mandated by the state, as defined in Section 17514.
>
> (b) A reasonable reimbursement methodology shall be based on cost information from a representative sample of eligible claimants, information provided by

---

[100] Exhibit O, "State-Local Working Group Proposal to Improve the Mandate Process," Legislative Analyst's Office, June 21, 2007, page 3. See also, Assembly Bill Analysis of AB 2856 (2004), concurrence in Senate Amendments of August 17, 2004; Assembly Bill Analysis of AB 1222 (2007), concurrence in Senate Amendments of September 4, 2007. These bill analyses identify the purpose of the RRM process is to "streamline the documentation and reporting process for mandates."; *Kaufman & Broad Communities, Inc. v. Performance Plastering* (Cal. Ct. App. 3d Dist. 2005) 133 Cal.App.4th 26, at pp. 31-32 [Reports of the Legislative Analyst's Office may properly be considered, as legislative history, to determine the legislative intent of a statute].

[101] Exhibit O, Government Code section 17518.5 (Stats. 2004, ch. 890 § 6 (AB 2856)).

associations of local agencies and school districts, or projections of other local costs.

(c) A reasonable reimbursement methodology shall consider the variation in costs among local agencies and school districts to implement the mandate in a cost efficient manner.

(d) Whenever possible, a reasonable reimbursement methodology shall be based on general allocation formulas, uniform cost allowances, and other approximations of local costs mandated by the state, rather than detailed documentation of actual costs . . . .

(e) A reasonable reimbursement methodology may be developed by any of the following:

(1) The Department of Finance.

(2) The Controller.

(3) An affected state agency.

(4) A claimant.

(5) An interested party.[102]

An RRM diverges from the traditional requirement of supporting a reimbursement claim with detailed documentation of actual costs incurred and, instead, may apply a standard formula or single standard unit cost, based on approximations of local costs mandated by the state. A unit cost based on approximations or other projections may result in some entities receiving more than their actual costs incurred to comply with a mandated program, and some receiving less.

While considering *Voter Identification Procedures*, (03-TC-23) last year, Commission staff requested comments from the parties and interested parties to three claims that were pending on a proposed unit cost RRM,[103] on the following question: "At some point is the range of figures used to develop the unit cost so wide that it violates the constitutional requirement that local agencies be reimbursed for their mandate-related costs?" Only the claimants in the *Behavioral Intervention Plans* (BIPS) claim responded directly to the question, arguing that the initial enactment of the RRM language and the subsequent amendment evidence the Legislature's conclusion that levels of mandate reimbursement may range widely and still be constitutional:

> Since 2007, the current requirements for RRMs are considerably less specific and more flexible than the former requirements. Now, there is no requirement that a minimum percentage of claimants' projected costs be fully offset or that the total amount to be reimbursed statewide covers the total of local estimated costs. Since 2007, Section 17518.5 requires only that RRMs "be based on cost information from a representative sample of eligible claimants, information provided by

[102] Exhibit O, Government Code section 17518.5(b-d) (Stats. 2007, ch. 329 § 1 (AB 1222)).

[103] *Behavioral Intervention Plans* (CSM-4464); *Habitual Truants* (09-PGA-01, 01-PGA-06) (CSM-4487 and CSM-4487A); *Voter Identification Procedures* (03-TC-23).

associations of local agencies and school districts, or other projections of local costs," and that the RRM "consider the variation in costs among local agencies and school districts to implement the mandate in a cost-efficient manner." [Citation omitted.] In other words, the statute expressly contemplates variation and leaves open the possibility for a potentially large degree of variation in the costs offset.[104]

3. Constitutional requirement of reasonable reimbursement

The Commission finds that the 2007 amendment to section 17518.5 provides for more flexibility when adopting a unit cost RRM, as compared with prior law. However, a unit cost must represent a reasonable approximation of the costs incurred by an eligible claimant to implement the state-mandated program, in order to comply with the constitutional requirement that all costs mandated by the state be reimbursed to a local government entity. Although it is argued in the comment above that a "large degree of variation" is constitutional, it may not be in every case. In certain circumstances, a unit cost based on a significant or large variation of costs reported may not reasonably represent the costs incurred by an eligible claimant and, thus, may not comply with the requirements of article XIII B, section 6 of the California Constitution. On the other hand, given the purpose of the RRM, to "[balance] accuracy with simplicity," some degree of variation in costs is implied.

The reimbursement requirement is constitutional, but the Legislature has the power to enact statutes that provide "reasonable" regulation and control of the rights granted under the Constitution.[105] The Commission must presume that the Government Code sections providing for the consideration and adoption of RRMs meet this standard and are constitutionally valid.[106] Section 17557(f) of the Government Code provides that the Commission, in adopting parameters and guidelines "*shall consult* with the Department of Finance, the affected state agency, the Controller, the fiscal and policy committees of the Assembly and Senate, the Legislative Analyst, and the claimants *to consider a reasonable reimbursement methodology that balances accuracy with simplicity*" [emphasis added].[107] Section 17518.5, as amended, provides for a high degree of flexibility in the adoption of an RRM. Therefore, the Commission must presume that an RRM may be adopted on the basis of any reasonable information that constitutes substantial evidence, and that an RRM that "balances accuracy with simplicity" in reimbursement is permissible under the statute, and thus, constitutional, even if individual claimants are not fully or precisely reimbursed in each fiscal year.

The Commission must apply Government Code section 17518.5 in a constitutional manner. If the Commission approves a unit cost that does not comply with the requirements of the

---

[104] Exhibit H, Claimants' Response to Request for Comments on Pending RRMs, December 20, 2011.

[105] Exhibit O, *Chesney v. Byram* (1940) 15 Cal.2d 460, 465.

[106] Exhibit O, *CSBA II, supra*, 192 Cal.App.4th 770, 795; *Porter v. City of Riverside* (1968) 261 Cal.App.2d 832, 837.

[107] Exhibit O, Government Code section 17557 (Stats. 2010, ch. 719 (SB 856) § 32).

applicable code sections and does not represent a reasonable approximation of costs incurred by eligible claimants to comply with the mandated program, then the Commission's decision could be determined unconstitutional as applied to the case and determined invalid by the courts.[108]

B. *The only statutory requirements of an RRM are that it considers variations in costs and balances accuracy in reimbursement with simplicity in the claiming process.*

Government Code section 17518.5, as amended in 2007, eliminates both the prior rule that 50% of eligible claimants have their costs fully offset, and the rule that the total amount to be reimbursed under an RRM must be equivalent to the total statewide cost estimate. The LAO report upon which the 2007 amendments were largely based noted, under the heading "Concerns with the Mandate Process," that most mandates are not completely new programs in themselves, but higher levels of service of existing programs, and that "[m]easuring the cost to carry out these marginal changes is complex." The LAO also noted a difficulty in that "parameters and guidelines typically require local governments to document their actual costs to carry out each element of the mandate," rather than relying on a unit cost or other approximate reimbursement methodology.[109] Given these "Concerns with the Mandates Process" to which the amendments were addressed, the new statute should be interpreted as imposing less stringent requirements for documentation of costs, and less burdensome measuring of the marginal costs of higher levels of service.[110] In other words, the "requirements" that DOF and SCO read into the amended statute, as discussed below, are not critical to the adoption of an RRM.

Rather than providing rigid requirements or elements to which an RRM proposal for adoption must adhere, the amended statute focuses on the *sources of information for the development of an RRM*, and only requires that the end result "balances accuracy with simplicity."[111] Section 1183.131 of the regulations provides that a proposed RRM "shall include any documentation or *assumption relied upon* to develop the proposed methodology." The Commission's regulations thus further support a view of the RRM statute (section 17518.5) as being focused on the information to be used, rather than any specific degree of precision or accuracy necessary.[112] Implicit, of course, is also the constitutional requirement that the end result must reasonably reimburse claimants for their mandated costs, as required by article XIII B, section 6. For these reasons, and as more fully described below, the Commission disagrees with the arguments raised by DOF and SCO, regarding the existence of statutory requirements or elements in section 17518.5, other than the requirements to balance accuracy with simplicity, and to reasonably reimburse eligible claimants for costs mandated by the state.

---

[108] Exhibit O, *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.

[109] Exhibit O, "State-Local Working Group Proposal to Improve the Mandate Process," Legislative Analyst's Office, June 21, 2007, p. 1.

[110] Exhibit O, *Kaufman & Broad Communities*, *supra*, 133 Cal.App.4th 26, at pp. 31-32 [LAO reports may be relied upon as evidence of legislative history].

[111] Government Code section 17557.

[112] Exhibit O, Government Code section 17518.5(b-d) (Stats. 2007, ch. 329 § 1 (AB 1222)).

1. There is no statutory requirement that the adopted RRM be based on cost data from a representative sample of eligible claimants, and no minimum sample size required to be representative.

The plain language of the statute demonstrates that detailed, actual cost information is not required to develop an RRM. Section 17518.5 provides that an RRM "shall be based on cost information from a representative sample of eligible claimants, information provided by associations of local agencies and school districts, or *other projections of other local costs*."[113] The statute does not *require* any one of these options; it merely outlines these as *possible sources* for the development of evidence to support an RRM. Neither does the statute provide for a minimum number of claimants to constitute a representative sample.

Both SCO and DOF object to the proposed RRM on the basis of the eligible claimants surveyed. SCO notes that the RRM relies on survey data from 21 of 120 possible SELPA claimants, representing approximately 12% of SELPA in the 2006-2007 year.[114] DOF asserts the same insufficiency, but adds that those 21 SELPA represented only 11.3% of statewide ADA for the 2006-2007 school year. DOF also charges that the survey sample does not include representation from the ten largest SELPAs, "which accounted for over 32% of the total ADA in 2006-2007." And DOF "found that the Southern California region was underrepresented," in that 67% of the survey results came from the northern and central parts of the state, while those regions only represent 21% of ADA. "The Southern California region, on the other hand, accounts for 63% of the state's ADA but contributed just 20% of the survey results." In addition, "Los Angeles County represents 26 percent of the state's total ADA but only makes up 3 percent of the ADA surveyed." DOF concludes, based on the foregoing, that the RRM proposal is not based on cost information from a representative sample of eligible claimants, and therefore DOF urges the Commission to deny the RRM proposal.[115]

Claimants argue that SCO and DOF suggest a requirement of a minimum sample size where none exists. Claimants assert that the 21 SELPAs responding to the survey are representative of small and large SELPAs; single- and multi-district SELPAs; rural, urban, and suburban SELPAs; and are geographically diverse.[116] Claimants address DOF's concerns with substantially the same argument, but add as well that with respect to *Municipal Storm Water and Urban Runoff Discharges* (03-TC-04, 03-TC-20, 03-TC-21) the Commission approved an RRM based on information from only 8.2% of eligible claimants, as opposed to the 12% of eligible claimants who participated in the surveys in this case.[117] Claimants also note that "because substantial staff time was involved to complete the survey and no funding for the effort was available, [claimants] were not in a position to require participation." Claimants were able to find 30 SELPAs who voluntarily agreed to help with the data collection, but only 21 ultimately returned

[113] Exhibit O, Government Code section 17518.5(b) (Stats. 2007, ch. 329 § 1 (AB 1222)).

[114] Exhibit C, SCO Comments Revised Proposed Parameters and Guidelines, January 24, 2011.

[115] Exhibit E, DOF Comments, Revised Proposed Parameters and Guidelines, August 9, 2011.

[116] Exhibit D, Claimants Rebuttal to SCO Comments, February 23, 2011, p. 3.

[117] Exhibit F, Claimants Rebuttal to DOF Comments, October 14, 2011, p. 6.

the surveys within a reasonable time frame.[118] Claimants further note that DOF agreed, during settlement negotiations, that the sample was adequate to develop an estimate of costs upon which to base the settlement. And, during negotiations, "[t]he survey results were reviewed and modified by [DOF] until [DOF] and the [claimants] agreed they were accurate."[119]

The Commission finds that section 17518.5 *does not require* that the adoption of the RRM be based on a representative sample of eligible claimants; "cost information from a representative sample of eligible claimants" is only *one potential source of evidence* upon which to base an RRM, along with "information provided by associations of local agencies and school districts, or *other projections* of local costs."[120] Thus, whether the sample size, or the constitution of the sample, is representative should not be dispositive on the question whether an RRM may be adopted.

DOF argues, in comments submitted in response to the draft staff analysis, that if a representative sample of eligible claimants is not a requirement of the statute, "this significant shortcoming makes it inappropriate for the data to be considered representative of actual costs and thus an inappropriate and unreasonable method of determining a reimbursement methodology." DOF continues to stress that "the survey data are collected from only 21 of 120 SELPAs statewide in 2006-07 and only represents 11.3 percent of total ADA," and that the "sample does not include ten of the largest SELPAs in the state constituting 32 percent of total ADA in 2006-07." DOF asserts that "Southern California is not adequately represented as it constitutes 63 percent of the state's ADA but contributed only 20 percent of the survey results," and that "[b]ased on these shortcomings, the sample suffers from significant bias and the survey results cannot be extrapolated to the entire state and should not be used as an RRM to cover costs incurred going back to 1993 as well as into the future."[121] DOF does not explain exactly why a lack of Southern California representation introduces fatal bias into the results, nor why 11.3 percent of ADA is insufficient. Neither does DOF explain why it is inappropriate to consider the data representative of actual costs simply because a representative sample of eligible claimants is not expressly required by the statute. DOF's comments are substantially the same as were raised prior to the draft staff analysis, and they are adequately treated by the analysis above.

Furthermore, the Commission finds that *claimants have in fact put forward* cost information from a representative sample of claimants. The plain language of the section does not indicate a minimum sample size; a representative sample may be many things, but it will always be a smaller sample than the whole, and should be characteristic of the larger population.[122]

---

[118] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Diana McDonough, December 17, 2010.

[119] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Diana McDonough, December 17, 2010.

[120] Exhibit O, Government Code section 17518.5 (Stats. 2007, ch. 329 (AB 1222) § 1) [emphasis added].

[121] Exhibit M, DOF Comments on Draft Staff Analysis, December 28, 2012, at p. 2.

[122] Exhibit O, See Webster's Third New International Dictionary, "representative," and "sample."

Moreover, section 1183.13 of the Commission's regulations provides that a "representative sample of claimants does not include eligible claimants *that do not respond to surveys or otherwise participate* in submitting cost data."[123] Here, 21 SELPAs completed the surveys, as requested, and the sample contains some larger SELPAs, some smaller, some urban, suburban, and rural. Therefore, the Commission finds that even if a representative sample of claimants *were* held to be a requirement of adopting an RRM, the claimants have submitted cost data from a representative sample, in accordance with the ordinary meanings of "representative" and "sample," and with the definition found in the Commission's regulations.

2. <u>There is no statutory requirement that the RRM be based on detailed, actual cost data, nor audited cost data.</u>

The statute provides that an RRM "[w]henever possible… shall be based on general allocation formulas, uniform cost allowances, and *other approximations of local costs* mandated by the state, *rather than detailed documentation* of actual costs."[124]

Both DOF and SCO opposed the proposed RRM in its comments because the RRM was developed based on unaudited cost data.[125] Claimants rightly point out that no *audited* cost data exists until claims have been filed, which they have not, because the reimbursement methodology is yet to be adopted. The statutes and regulations that provide for RRMs do not require any such level of precision, as noted above, and the practical realities of this case do not present any evidence that such an approach is feasible. The claimants indicate that school districts do not have data going back to 1993 to support the costs incurred during those years. The claimants also stress that "if actual, audited cost data existed, there would be no need for an RRM."[126]

As discussed above, the LAO recommendations that gave rise to the amendments to section 17518.5 were to expand the use of easy-to-administer reimbursement mechanisms. And, as discussed throughout this section, the amended text of section 17518.5 provides for flexibility in the development and adoption of RRMs. The section cannot reasonably be read to require audited cost data to develop an RRM, especially in the case that the RRM is proposed as a part of the first parameters and guidelines after a test claim decision, at which time no audited cost data yet exists. Moreover, the RRM is specifically provided as an alternative to the requirement for detailed documentation of actual costs.

3. <u>There is no statutory requirement that an RRM mitigate or eliminate cost variation among local government claimants.</u>

Section 17518.5(c) provides that an RRM "shall *consider* the variation in costs among local agencies and school districts to implement the mandate in a cost-efficient manner."

---

[123] Code of Regulations, Title 2, section 1183.13 (Register 2008, No. 17).

[124] Exhibit O, Government Code section 17518.5(d) (Stats. 2007, ch. 329 § 1 (AB 1222)).

[125] Exhibit C, SCO Comments, Revised Proposed Parameters and Guidelines, January 24, 2011; Exhibit E, DOF Comments, Revised Proposed Parameters and Guidelines, August 9, 2011.

[126] Exhibit F, Claimants Rebuttal to DOF Comments, October 14, 2011, p. 7.

DOF objects to the proposed RRM on the grounds that it "does not consider variation of costs among school districts to implement the mandate in a cost efficient manner." However, DOF's comments, in actuality, center on the fact that the proposed RRM does not adequately *address* or *eliminate* the variation of costs. DOF charges that the cost for a BIP per ADA in the surveys ranged from $1.31 to $81.91, averaging $10.17 per ADA; and that the cost per BIP ranged from $2,400 to $197,000 and averaged $17,047. DOF also notes that the highest cost reported per ADA is 62 times higher than the lowest, and the highest cost reported per BIP is 82 times higher than the lowest. DOF argues that these variations are too broad to permit adoption of an RRM in this case. DOF points out that if the proposed RRM were applied to the 21 survey respondents only three of the SELPAs would receive reimbursement within 20% of reported costs. The remaining 18 SELPAs would receive reimbursement ranging from 88 percent below to 677 percent above their costs, as reported in the surveys.

DOF concludes that this variation is due in part to the fact that some of the reimbursable activities are not performed in every case, or in every year, and therefore some SELPAs, and districts, would receive, under the proposed RRM, reimbursement for activities not necessary in every case, or not performed in every fiscal year. DOF notes that the number of BIPs reported by SELPAs ranges from 0 to 87, and has no apparent correlation to ADA. DOF argues that an RRM based on ADA is not appropriate, due to the wide range in costs, and the wide range in number of BIPs developed in different SELPAs, as revealed by the surveys. DOF also argues that "[r]eimbursement standards that would allow reimbursement for a school district in excess of that district's actual costs or overall reimbursement in excess of statewide actual costs should not be supported." [127]

Claimants respond to DOF's concerns, arguing first that "the variation should be 'considered' to determine what the 'reasonable' level of reimbursement is – and presumably that reasonable level would be one near the middle." Claimants hold that "a variation is relevant as to the *level* of reimbursement proposed in an RRM, not as to *whether* an RRM is appropriate." [Emphasis in original]. Claimants continue, "[t]here is no language that suggests a variation in costs bars reimbursement."[128]

Claimants also argue that, as a practical matter, reimbursement at a standard level will have normalizing effects:

> The highest spenders will not be reimbursed for their full costs, encouraging cost-efficiency. The lowest spenders will be reimbursed above their minimal costs, still encouraging cost-efficiency by ensuring that the mandate will be reasonably implemented, not under-implemented.

Claimants note that the Legislature did not choose to require the "least costly" implementation, but instead "it chose 'cost-efficient,' to protect against inflated costs while still promoting full program implementation."[129]

---

[127] Exhibit E, DOF Comments, Revised Proposed Parameters and Guidelines, August 9, 2011.

[128] Exhibit F, Claimants' Rebuttal to DOF Comments, Dated October 14, 2011.

[129] *Ibid.*

Furthermore, claimants argue that "focusing on the number of [BIPs] as a measure of a district's activities for this mandate is misplaced." The development of BIPs accounts for only three of the seven activities approved for reimbursement. The other four activities consist of training, development and implementation of emergency interventions, and due process hearings, all of which are ongoing activities regardless of the number of BIPs developed in a SELPA in any given year. Claimants note that the wide variation in the number of BIPs in a single calendar year depends on the students served in that year. And, while costs of development of BIPs within a SELPA may vary widely year to year, total statewide costs will be relatively stable from year to year, meaning that an ADA-based RRM is a "rational and reasonable method" by which to reimburse school districts for fluctuating costs.[130]

Moreover, claimants argue that DOF's view of the variation in costs is taken too simplistically:

> Finance's narrow focus does not acknowledge the actual manner in which the RRM is constructed. Co-Claimants developed a two-pronged RRM for ongoing activities, one primarily for training activities to be distributed by SELPA, the other for ongoing activities, to be distributed by school district or COE. Finance ignored this division when analyzing Co-Claimants' proposed RRM, lumping together these two costs…

Claimants point out that the ongoing SELPA-level activities, which are primarily training and reporting activities, are less varied, because those activities must be performed whether or not any functional analysis assessments, development and implementation of BIPs, or emergency interventions, for example, are required in a given year. By combining the SELPA-level and district/COE-level activities, DOF's charge as to the variability of costs per BIPs per ADA is misleading.

Finally, claimants argue that DOF's "true concern" is that an ADA-based RRM will provide too high reimbursement, not whether such reimbursement levels are accurate. Claimants note that DOF challenges the RRM on the basis of reimbursement in excess of actual costs, and "does not appear to be at all troubled that other claimants would be reimbursed less than actual costs."[131]

In comments submitted in response to the draft staff analysis DOF continues to stress the fact that "[t]he wide range of actual costs as well as the number of BIPs reported by SELPAs will create a reimbursement system in which some SELPAs will receive reimbursement in excess of their costs in a given year and others will not receive full reimbursement for their costs."[132] As cited above, the claimants argue that while costs may not be precisely reimbursed in every year, reimbursement will be reasonably representative of actual costs when viewed over time.

The Commission finds that subdivision (c) of section 17518.5 does not require that an RRM proposal address, mitigate, eliminate, or otherwise equalize variation in costs among local government. The Commission finds that variation is relevant to the development of an RRM in terms of finding an appropriate level of reimbursement, but not necessarily fatal to an RRM

---

[130] *Ibid.*

[131] Exhibit F, Claimants' Rebuttal to DOF Comments, October 14, 2011.

[132] Exhibit M, DOF Comments on Draft Staff Analysis, December 28, 2012, at p. 2.

proposal. The Commission finds that the data submitted, and the proposal based on those data, do "consider the variation," as required, in order to arrive at the unit costs proposed.

4. There is no statutory requirement that the RRM be based on more than one year of cost data, nor any limitation on the retroactive or prospective application of an RRM.

Applying a smaller sample of data to multiple claimants and multiple years is the essence of an RRM. SCO objects to the adoption of an RRM on the ground that the RRM based on this single year of data (2006-2007) would apply to 18 years of reimbursement claims. The claimants rightly point out that there is no legal basis for this objection. Claimants conclude that SCO's objection must be based on section 17518.5(d), which, provides:

> In cases when local agencies and school districts are projected to incur costs to implement a mandate over a period of more than one fiscal year, the determination of a reasonable reimbursement methodology may consider local costs and state reimbursements over a period of greater than one fiscal year, but not exceeding 10 years.[133]

The plain language of this subdivision does not proscribe applying an RRM to cost claims for more than 10 years; it only prohibits using more than 10 years of cost data to develop an RRM. SCO's interpretation is unfounded.

Claimants point out that given how long this case has taken to reach the claiming stage, limiting reimbursement under an RRM to only ten years would be unreasonable if applied retroactively. Claimants urge that, at most, the RRM should be limited to ten years prospectively, but claimants assert that SCO fundamentally misinterprets the meaning of subdivision (d), and that no such limitation is indicated.

Claimants also rightly point out that there is no requirement that data span more than one year. SCO suggests that the "snapshot" of a single year's costs is not sufficient to support adoption of the proposed RRM, but section 17518.5(d), as quoted above, provides that where claimants are likely to incur costs over multiple years, "the determination of a reasonable reimbursement methodology *may* consider local costs and state reimbursement over a period of greater than one fiscal year." The section does not *require* that the RRM consider costs over multiple years, but *allows* it.

Indeed the nature of an RRM is to use a small sample of data to develop a formula to be applied to a greater number of claims. This is done either by applying survey data, or applying actual cost claims from a certain year or years, or by applying some other projection or estimation of local costs. Here, the proposed RRM relies on a sample of data from a portion of eligible claimants, for a (then-recent) school year, and seeks to develop a cost formula to be applied going forward. This is exactly what an RRM is meant to be, and to do, based on the statute and the regulations. Thus there is no reason to read into section 17518.5 any express limitation of the scale upon which an RRM can be applied.

[133] Exhibit O, Government Code section 17518.5 (Stats. 2007, ch. 329 (AB 1222) §1).

Furthermore, in the interest of simplicity and efficient resolution of test claims and reimbursement of claimants, it will generally not be in the best interest of the state or the claimants to postpone the adoption of an RRM in order to obtain multiple years' cost information from eligible claimants. Section 17557 directs the Commission to consider an RRM that balances accuracy with simplicity; the goal of simplicity is undermined if the Commission is expected to require investigation and study of cost information spanning multiple years before an RRM can be adopted to begin reimbursement to local government.

Therefore, the Commission finds that there is no language in the governing statutes directing the Commission to use actual costs in adopting an RRM, or requiring that cost data from a span of years be submitted. The Commission finds also that there is no language suggesting that an RRM may only be applied for a certain number of years, either retroactively or prospectively.

5. Conclusion: section 17518.5 provides broad authority with few limitations for the development and adoption of RRMs.

The Commission finds that the only statutory and constitutional requirements for adoption of an RRM are: (1) considering variations in costs and balancing accuracy with simplicity; and (2) reasonable reimbursement of the eligible claimants' costs mandated by the state for the program, in line with article XIII B, section 6. Detailed actual cost information is not required. Neither is cost information from a representative sample of eligible claimants required; nor is audited data from multiple years of cost claims; nor an RRM proposal that addresses or mitigates variation in costs incurred among different districts. An RRM is meant to be based on an *approximation* of local costs, and need not necessarily precisely reimburse every dollar.

C. The Commission is not bound by strict evidence rules but must have substantial evidence in the record to support its decisions.

1. Substantial evidence standard for Commission proceedings

Government Code section 17559 requires that Commission decisions be based on substantial evidence in the record. Section 17559 allows a claimant or the state to petition for a writ of administrative mandamus under section 1094.5 of the Code of Civil Procedure, "to set aside a decision of the commission on the ground that the commission's decision is not supported by substantial evidence."[134]

Code of Civil Procedure section 1094.5, in turn, provides:

> Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. *In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record*.[135]

[134] Government Code section 17559(b) (Stats. 1999, ch. 643 (AB 1679)).

[135] Exhibit O, Code of Civil Procedure section 1094.5 (Stats. 2011, ch. 296 § 41 (AB 1023)).

The latter finding is required for Commission decisions: when reviewing a decision of an administrative body exercising quasi-judicial power, "the reviewing court is limited to the determination of whether or not the decision is supported by substantial evidence and the court may not substitute its view for that of the administrative body, nor reweigh conflicting evidence."[136] Moreover, Government Code section 17559 expressly "requires that the trial court review the decision of the Commission under the substantial evidence standard."[137]

The evidence required to adopt an RRM is necessarily more relaxed than an actual cost reimbursement methodology.[138] However, when the Legislature added section 17518.5 to the Government Code, it did not change the existing requirement in section 17559 that all of the Commission's findings be based on substantial evidence in the record. Statutory enactments must be considered in the context of the entire statutory scheme of which they are a part and be harmonized with the statutory framework as a whole.[139] In 2011, the Commission clarified its regulations to specifically identify the quasi-judicial matters that are subject to these evidentiary rules, including proposed parameters and guidelines and requests to amend parameters and guidelines.[140, 141] Thus, the plain language of the statutory and regulatory mandates scheme requires substantial evidence in the record to support the adoption of an RRM.

2. Evidence rules for Commission proceedings.

---

[136] Exhibit O, *Board of Trustees of the Woodland Union High School District v. Munro* (Cal. Ct. App. 3d Dist. 1958) 163 Cal.App.2d 440, 445.

[137] *City of San Jose v. State* (Cal. Ct. App. 6th Dist. 1996) 45 Cal.App.4th 1802, 1810.

[138] See Government Code 17518.5 [Statute employs terms like "projections;" "approximations"].

[139] Exhibit O, *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 743.

[140] California Code of Regulations, Title 2, section 1187 (Register 2010, No. 44.)

[141] The courts, in recent lawsuits dealing with questions of fact, have determined that the Commission's conclusions were not supported by any evidence in the record and, thus, the Commission's decisions were determined invalid pursuant to Government Code section 17559 and Code of Civil Procedure section 1094.5. (See, *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355 [Peace Officer Procedural Bill of Rights, on the issue of practical compulsion]; *State of California Department of Finance, State Water Resources Control Board, et al. v. Commission on State Mandates and County of San Diego, et al.,* Sacramento County Superior Court, Case No. 34-2010-80000604 [Discharge of Stormwater Runoff, on the issue of whether the permit requirements are considered to fall within the Maximum Extent Practicable standard of federal law]; *State of California Department of Finance, State Water Resources Control Board, and California Regional Water Quality Control Board, Los Angeles Region v. Commission on State Mandates and County of Los Angeles, et al.,* Los Angeles County Superior Court, Case No. BS130730 [Municipal Storm Water and Urban Runoff Discharges, on the issue of whether the permit requirements are considered to fall within the Maximum Extent Practicable standard of federal law]).

The Commission is not required to observe strict evidentiary rules, but its decisions must be reasonable, and grounded in fairness. The courts have interpreted the evidentiary requirement for administrative proceedings as follows:

> While administrative bodies are not expected to observe meticulously all of the rules of evidence applicable to a court trial, common sense and fair play dictate certain basic requirements for the conduct of any hearing at which facts are to be determined. Among these are the following: the evidence must be produced at the hearing by witnesses personally present, or by authenticated documents, maps or photographs; ordinarily, hearsay evidence standing alone can have no weight, and this would apply to hearsay evidence concerning someone else's opinion; furthermore, cross-examination within reasonable limits must be allowed. Telephone calls to one of the officials sitting in the case, statements made in letters and arguments made in petitions should not be considered as evidence.[142]

Section 1187.5(a) of the Commission's regulations provides that when exercising the quasi-judicial functions of the Commission, "[a]ny relevant non-repetitive evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs."[143] This regulation is borrowed from the evidentiary requirements of the Administrative Procedures Act, which contains substantially the same language.[144] Both the Commission's regulations, and the Government Code, provide that hearsay evidence is admissible if it is inherently reliable, but *will not be sufficient in itself* to support a finding unless the evidence would be admissible over objection in a civil case; in other words, unless a hearsay exception applies.[145]

Section 1187.5(d) provides for the admission of evidence and exhibits, and questioning of opposing witnesses, and states that "[i]f declarations are to be used in lieu of testimony, the party

---

[142] Exhibit O, *Desert Turf Club v. Board of Supervisors for Riverside County* (1956) 141 Cal.App.2d 446, 455. The board based its denial of land use permit for race track on testimony, letters and phone calls from members of the public opposing horse racing and betting on moral grounds. The court held that there was no evidence in the record to support the decision. On remand, the court directed the board to "reconsider the petition of appellants as to land use, wholly excluding any consideration as to the alleged immorality of horse racing and betting as authorized by state law, and wholly excluding from such consideration all testimony not received in open hearing, and all statements of alleged fact and arguments in petitions and letters on file, except the bare fact that the petitioners or letter writers approve or oppose the granting of the petition; also wholly excluding each and every instance of hearsay testimony unless supported by properly admissible testimony, it being further required that the attorneys representing any party in interest be granted a reasonable opportunity to examine or cross-examine every new witness produced." *Id*. at p. 456.

[143] Code of Regulations, Title 2, section 1187.5.

[144] Exhibit O, Government Code section 11513.

[145] Code of Regulations, Title 2, section 1187.5; Exhibit O, Government Code section 11513.

proposing to use the declarations shall comply with Government Code section 11514." [146] Government Code section 11514, in turn, provides:

> (a) At any time 10 or more days prior to a hearing or a continued hearing, any party may mail or deliver to the opposing party a copy of any affidavit which he proposes to introduce in evidence, together with a notice as provided in subdivision (b). Unless the opposing party, within seven days after such mailing or delivery, mails or delivers to the proponent a request to cross-examine an affiant, his right to cross-examine such affiant is waived and the affidavit, if introduced in evidence, *shall be given the same effect as if the affiant had testified orally*. If an opportunity to cross-examine an affiant is not afforded after request therefor is made as herein provided, the affidavit may be introduced in evidence, but shall be given only the same effect as other hearsay evidence.[147]

Note that the Commission's regulations use the word "declaration," and the Government Code refers to an "affidavit." An affidavit, by definition, if it is to be used before a court, must "be taken before any officer authorized to administer oaths," usually a judge.[148] But under the Code of Civil Procedure, section 2015.5, a declaration made *under penalty of perjury* is given the same force and effect as an affidavit sworn before an authorized officer. Such declaration must be in writing, must be "subscribed by him or her," and must name the date and place of execution.[149]

The competency of witnesses giving testimonial evidence, in general, relies on personal knowledge. Witnesses are generally required to "express themselves at the lowest possible level of abstraction," rather than making conclusions before the trier of fact. Opinion testimony is generally limited, "if a witness is not testifying as an expert," to that which is "[r]ationally based on the perception of the witness" or "[h]elpful to a clear understanding of his testimony."[150] Where a finding of fact can be made "on the basis of common experience, without any special skill or training…the facts themselves must be given in evidence, and the conclusions or inferences must be drawn by the jury and not by the witness." The opinion rule applies equally to evidence submitted by affidavit: a "general expression of an opinion or belief, without the fact on which it is founded, is in no sense legal evidence."[151]

Where a witness is testifying as an expert, opinion testimony is permitted where both:

- The subject is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact," and

[146] California Code of Regulations, Title 2, section 1187.5.

[147] Exhibit O, Government Code section 11514(a) (Stats. 1947, ch. 491 § 6) [emphasis supplied].

[148] Exhibit O, Code of Civil Procedure section 2012 (Stats. 1907, ch. 393 § 1).

[149] Exhibit O, Code of Civil Procedure section 2015.5 (Stats. 1980, ch. 889 § 1).

[150] Exhibit O, Evidence Code section 800 (Stats. 1965, ch. 299 § 2).

[151] Exhibit O, California Jurisprudence 3d, Vol. 31A: Evidence, section 613.

- Is based on matter, including the expert's experience or training, "whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates."[152]

Before a court accepts such evidence, however, an expert must be qualified, pursuant to section 720 of the Evidence Code, which provides:

> (a) A person is qualified to testify as an expert if he has special knowledge, skill, expertise, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.
>
> (b) A witness' special knowledge, skill, experience, training, or education may be shown by any otherwise admissible evidence, including his own testimony.[153]

The California Supreme Court has held that an expert witness is qualified "if his peculiar skill, training, or experience enable him to form opinion that would be useful to the jury."[154] And in order to lay the foundation to introduce expert testimony, "[it is] the province of the court to determine, from the examination as to the witness' qualifications, whether he [is] competent to testify as an expert."[155] An expert's testimony is intended to make complicated facts or information more understandable to the fact finder, and in so doing may rely on any information, including that which is not admissible in itself, but may not make legal conclusions.[156]

Therefore, in keeping with the applicable evidentiary standards provided by the statutes and regulations, and in an attempt to harmonize the case law with the clear import of statute and regulation, the following standards emerge:

- Commission decisions must be supported by "substantial evidence" under section 17559, but the conduct of hearings need not adhere to strict evidence rules pursuant to section 1187.5 of the Commission's regulations and Government Code section 11513(c).
- Any relevant non-repetitive evidence *shall* be admitted if it is the sort of evidence on which responsible persons are accustomed to rely;

---

[152] Exhibit O, Evidence Code section 801 (Stats. 1965, ch. 299 § 2).

[153] Exhibit O, Evidence Code section 720 (Stats. 1965, ch. 299 § 2).

[154] Exhibit O, *People v. Davis* (1965) 62 Cal.2d 791, at p. 800.

[155] Exhibit O, *Bossert v. Southern Pacific Co.* (1916) 172 Cal. 504, at p. 506.

[156] Exhibit O, Evidence Code section 805; *WRI Opportunity Loans II LLC v. Cooper* (Cal. Ct. App. 2d Dist. 2007) 154 Cal.App.4th 525, at p. 532, Fn 3 ["Generally, Evidence Code section 805 permits expert testimony on the ultimate issue to be decided by the factfinder. However, this rule does not ... authorize ... an 'expert' to testify to legal conclusions in the guise of expert opinion. Such legal conclusions do not constitute substantial evidence." (internal citations omitted)].

- Hearsay evidence may be used to supplement or explain, although it shall not be sufficient to support a finding unless admissible over objection in civil actions.[157]
- Under section 11514, as referenced in the Commission's regulations, an affidavit or declaration may be "given the same effect as if the affiant had testified orally," if properly noticed and an opportunity to cross-examine the affiant is given.[158]
- Expert testimony, in the form of an affidavit, would be admissible if the Commission finds a witness qualified by special skill or training, and the testimony (here, declaration) is helpful to the Commission.[159]
- Furthermore, surveys of eligible claimants as a method of gathering cost data are contemplated by the statute and the regulations as a viable form of evidence, but they must be admissible under the Commission's regulations and the evidence rules, as discussed.[160]

3. Claimants' evidence supporting the proposed RRM is admissible

In this case then, the Commission finds that the rules of evidence do not bar the introduction of the surveys as evidence. The surveys are proffered by the claimants to support the adoption of the three RRMs proposed: one for the one-time SELPA-level activities, one for ongoing SELPA-level activities, and one for ongoing district and COE-level activities.[161] The surveys are relevant, and non-repetitive, and therefore shall be admitted under the regulations. The surveys, without more, would be hearsay, and would not alone be sufficient to support a Commission decision. But the surveys are accompanied by declarations under penalty of perjury,[162] and therefore section 11514, where complied with, gives an affidavit, or a declaration, if made in compliance with Code of Civil Procedure section 2015.5, the same effect as oral testimony, which in turn *is sufficient* to support a Commission decision.[163]

In addition, the conclusions and calculations made by the consultants *based on the survey results* qualify as expert testimony. The surveys were compiled by Mr. Lenahan, and Ms. Grundhoffer. Ms. Grundhoffer is a State Trustee for CDE, and a consultant to the Fiscal Crisis and Management Assistance Team, and before that worked for 10 years as a school business official; Ms. Grundhoffer is qualified as an expert witness, capable of testifying regarding school finance and budget matters, and the regarding cost data with which she worked and the methodology that she used.[164] Mr. Lenahan has a B.S. in Accounting and an M.B.A. in Finance, and is retired after

[157] California Code of Regulations, Title 2, section 1187.5.

[158] Exhibit O, Government Code section 11514(a) (Stats. 1947, ch. 491 § 6).

[159] Exhibit O, Evidence Code sections 720; 801 (Stats. 1965, ch. 299 § 2).

[160] Government Code section 17518.5; Code of Regulations, Title 2, section 1183.13.

[161] Exhibit B, Revised Proposed Parameters and Guidelines, December 17, 2010.

[162] Exhibit J, Claimants' Comments and Amended Exhibit 2, August 15, 2012.

[163] Code of Regulations, section 1187.5; Exhibit O, Government Code section 11514.

[164] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Linda Grundhoffer.

30 years as a school business official; his experience includes calculating and reviewing costs for programs and developing school district budgets on the basis of those calculations. Mr. Lenahan is qualified as an expert to testify regarding school finance, and the study and compiling of cost data, and the methodology that he helped develop.[165] The declarations of Ms. Grundhoffer and Mr. Lenahan are intended to distill the information in the three hundred or more individual survey responses into an accessible set of figures. In this way, Mr. Lenahan and Ms. Grundhoffer constitute expert witnesses, within the meaning of the Evidence Code,[166] and because their conclusions are submitted in the form of declarations under penalty of perjury, they have the same force and effect as oral testimony under Code of Civil Procedure section 2015.5 and Government Code section 11514, as discussed above.

The state has not filed evidence rebutting the hours, hourly rates, or total costs reported in the surveys, or disputing the calculations prepared by the claimants' experts.

D. Substantial evidence in the record supports the adoption of the proposed RRM in this case; the proposed RRM is consistent with the Constitutional and statutory requirements of Commission decisions, and reasonably reimburses local government for the costs of the mandate.

The issue for the Commission is whether substantial evidence supports the adoption of the proposed RRM. The claimants have proposed three RRMs: one for one-time SELPA-level activities; one for ongoing SELPA-level activities; and one for ongoing district-level activities.

The one-time SELPA-level activities include preparing and providing SELPA procedures and initial training for personnel involved in implementing behavioral intervention plans or emergency behavioral interventions. The one-time activities are reimbursed by multiplying the total SELPA ADA for the applicable year in which the activities are performed by the unit rate as adjusted for the applicable year by the implicit price deflator. The unit rate for 2006-2007 is $0.32818.

The ongoing SELPA-level activities include ongoing training in behavior analysis, positive behavior interventions, and emergency interventions; preparing reports for CDE on the number of emergency behavior interventions performed; and satisfying due process hearing requirements regarding functional analysis assessments and the development and implementation of behavioral intervention plans. Those activities are reimbursed by multiplying the total SELPA ADA for each applicable year by the unit rate as adjusted by the implicit price deflator for that year. The unit rate for 2006-2007 is $1.18702.

The ongoing district-level activities include conducting functional analysis assessments; developing, implementing, and evaluating behavioral intervention plans; modifying behavioral intervention plans; performing emergency interventions and completing required documentation; training staff on prohibited interventions, and avoiding the use of prohibited interventions; and satisfying due process hearing requirements related to functional analysis assessments or the development or implementation of behavioral intervention plans. These activities are reimbursed

---

[165] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Michael Lenahan.

[166] Exhibit O, Evidence Code sections 720; 801 (Stats. 1965, ch. 299 § 2).

by multiplying the district's ADA for each applicable year by the unit rate as adjusted by the implicit price deflator for that year. The unit rate for 2006-2007 is $9.45701.

As discussed above, the purpose of an RRM is to reimburse local government efficiently and simply. The statute governing RRMs was amended in 2007 to promote flexibility in the development of an RRM, and the only remaining statutory requirements of an RRM are to *consider variations in costs among eligible claimants* and to *balance accuracy in reimbursement with simplicity in the claiming process*. There is no requirement of a minimum sample size for the data used to develop an RRM, nor a requirement to use actual, detailed cost data at all. There is no requirement that an RRM mitigate or eliminate cost variation among local government claimants, or that cost data from more than one fiscal year be considered.

Here, the proposed RRM *does consider the variation in costs* among school districts to implement the mandate in a cost efficient manner. The proposed RRM *is* developed on the basis of cost information from a representative sample of eligible claimants; a permissible source of information upon which to develop an RRM rate. And the proposed RRM relies on "other approximations" of local costs, to the extent that the survey data submitted provide the number of hours spent and average hourly rates of the personnel assigned, and not the actual costs to comply with the mandate. In this way the proposed RRM *does balance accuracy with simplicity*, as required.

DOF continues to argue, in comments submitted in response to the draft staff analysis, that the proposed RRMs do not "meet the statutory requirements for establishing an RRM contained in [Government Code sections 17557 and 17518.5]."[167] As discussed above, the "requirements" of an RRM are nothing more than considering the variation in costs among eligible claimants (not mitigating or eliminating variation) and balancing accuracy with simplicity. DOF fails to address the issue of the factual sufficiency of the evidence, and whether the substantial evidence standard has been met by the claimants. Absent any dispute on point, the claimants' view of the evidence should be accepted, and the RRM should be considered sufficient to meet the statutory requirements as they are understood by the Commission.

However, as discussed above, whether an RRM meets the statutory requirements does not end the inquiry. The statutes must be applied in a constitutional manner, meaning that the decision adopted by the Commission must provide for reasonable reimbursement of eligible claimants' actual costs incurred.

For the reasons below, the Commission finds that the proposed RRMs reasonably represent the costs mandated by the state to comply with the *BIPs* program.

The claimants "drafted and redrafted a survey document to accurately assess the costs of implementing these mandates and shared these drafts with [DOF]." The claimants concluded that "the survey would best measure the costs of [BIPs] implementation by seeking information at three levels within each SELPA: the Behavioral Intervention Case Manager (BICM) level, the district level, and the SELPA level." The parties agreed to use only the most recent completed school year, so that the school districts would have "ready access" to the information necessary. The claimants stated that they took all reasonable precautions "to collect the most reliable, non-

[167] Exhibit M, DOF Comments on Draft Staff Analysis, at p. 1.

inflated data."[168] The claimants hired consultants, as described above, to compile the results. Those consultants called schools and districts "to obtain the actual information" where there were missing data, and if they were unsuccessful in obtaining the data they ultimately chose not to use any of that SELPA's information.[169]

The survey results were then averaged by taking the total SELPA-level costs, and the total district-level costs, and dividing by P2 ADA for 2006-2007 (attendance data collected by the state).[170] Those average figures are proposed as a unit rate for all other districts and SELPAs, which is represented as "reasonable, representative, and cost effective" for all local educational agencies in the state by claimants' experts.[171]

The claimants acknowledge that the data ranged widely, from 2006-2007 costs of $1.3096 per ADA in Inyo County to $81.9353 per ADA in Modoc County. The average value, of approximately $10 per ADA, will not accurately reimburse the vast majority of claimants for each fiscal year, as pointed out by DOF: "only three SELPAs would receive reimbursement [under this RRM] within 20 percent of reported costs."[172] However, the claimants urge adoption of the RRM because of its simplicity in addressing a group of cost claims long overdue for reimbursement, and because the RRM will have cost-efficient benefits, and because reimbursement over multiple years will be more reasonable than in a single year. The claimants argue that an average level of reimbursement will encourage cost savings in districts currently spending more and encourage fuller implementation in districts not fully in compliance.[173] The claimants also argue that any reimbursement scheme that relies on services rendered to students would incentivize the activities involved in the BIPs mandate; a per-ADA calculation is incentive-neutral, in that it funds the program based on the number of students in the district or the SELPA, regardless of what BIPs activities are undertaken in a given year or on behalf of a certain student or students.[174] Finally, the claimants also argue that "special education costs can vary widely from year to year in the same district depending on the needs of particular students,"[175] but "the total costs state-wide from year to year are not likely to vary, and thus a per ADA approach as [claimants] propose is a rational and reasonable method."[176]

Furthermore, although DOF believed that a per-ADA funding approach was accurate enough in the context of a settlement, here DOF expresses concern that the RRM based on ADA may

---

[168] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Diana McDonough.

[169] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Linda Grundhoffer.

[170] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Michael Lenahan.

[171] Exhibit B, Revised Proposed Parameters and Guidelines, Cover Letter.

[172] Exhibit E, DOF Comments on Revised Proposed Parameters and Guidelines.

[173] Exhibit F, Claimants' Rebuttal to DOF Comments.

[174] *Ibid*.

[175] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Linda Grundhoffer.

[176] Exhibit F, Claimants' Rebuttal to DOF Comments.

reimburse some claimants in excess of their actual costs, and therefore may not be appropriate. But a per-ADA approach to reimbursement for the *BIPs* program is consistent with the manner in which special education has been funded in this state since 1997. By statute, all special education funding is now calculated based on the total ADA of the district or districts making up a SELPA; not just on the basis of the special education students being served.[177] Thus, the Legislature has found it reasonable to fund a "free appropriate public education" for special needs students, as required by applicable federal statutes, by way of calculations based on ADA. Similarly, the *Consolidated Special Education Test Claim* (CSM-3986) was provided for by way of a per-ADA funding formula, pursuant to a settlement between the claimants and the DOF.[178]

It must be conceded, however, that neither of those prior instances of per-ADA funding of special education was developed by the Commission through the mandates process. The Legislature's actions were taken pursuant to political priorities and settlement agreements with school districts, while this RRM, if adopted by the Commission, would have to fulfill a constitutional funding requirement and reasonably represent the costs mandated by the state for local educational agencies.

As stated above, there is evidence in the record that the proposed RRM will reimburse some claimants in excess of, and some less than, their actual costs for fiscal year 2006-2007. There is evidence that some of the ongoing activities will not vary substantially from year to year, and that only the activities tied to services for individual students will vary. And there is evidence that the Legislature chose to make the adoption of RRMs more flexible, and directed that the Commission consider an RRM that balances accuracy with simplicity. There is argument that the proposed reimbursement level will provide incentives for districts to cut costs in some cases, and to more fully implement the program in others. And there is argument that because the number of students served statewide does not vary substantially from year to year, but only within districts and SELPAs, the variability in reimbursement will balance over time. Moreover, there is no requirement that the RRM consider cost data over the course of several fiscal years.

Note also that DOF and SCO, for all their objections relating to the legal requirements of an RRM, have not put forward any evidence to rebut the calculations or conclusions of the claimants' experts. The state has not filed evidence rebutting the hours, hourly rates, or total costs reported in the surveys, or disputing the calculations prepared by the claimants' experts.

Therefore, the Commission finds that the substantial evidence standard is satisfied, by virtue of the admissibility of the surveys with accompanying declarations, the declarations of the educational consultants as expert witnesses, and the fact that no evidence has been submitted to rebut the claimants' evidence of the costs mandated by the state. Under the substantial evidence standard, as it has ordinarily been applied by the courts, the Commission's findings based on the evidence in the record will not be re-weighed by the court. Rather a court will consider only whether, in light of the whole record, substantial evidence supports the Commission's decision.

Given that the Legislature has seen fit to fund special education based on ADA, rather than based on actual costs of services provided, and given that DOF and the Legislature saw fit to do the

---

[177] Exhibit O, Education Code sections 56836.06-56836.155 (Stats. 1997, ch. 854 § 65 (AB 602))

[178] Exhibit O, Statutes 2001, chapter 203 (SB 982).

same with respect to mandated programs for *Special Education* (CSM 3986) as well, the Commission finds it reasonable, under the California Constitution, to fund the mandated activities involved in *BIPs* on the basis of a unit cost per ADA.

On the basis of the foregoing discussion, the Commission hereby adopts the proposed RRM for the reimbursement of the direct and indirect costs incurred under this program.

4. Offsetting Revenues and Other Reimbursements (Section VII. of Proposed Parameters and Guidelines**)**

The claimants propose the following language for Section VII. Offsetting Revenues and Reimbursements:

> Any offsetting savings that the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to, service fees collected, federal funds, and other state funds, shall be identified and deducted from this claim.
>
> The Statement of Decision has not identified any existing general school, COE, or SELPA funding, or special education program funding as an offset to the reimbursable activities.[179]

The proposed language, however, fails to illustrate the complete picture of available special education program funding that might be applied to offset mandated costs in this test claim. As discussed above, the subsequent change in law effected by AB 1610 cannot, of its own force, negate the Commission's findings of law that a program is eligible for reimbursement under article XIII B, section 6 of the California Constitution. However, a subsequent change in law to isolate specified revenues against which the costs of the mandate must be offset can be considered by the Commission when adopting parameters and guidelines.[180,181] The

---

[179] Exhibit B, Claimants' Revised Proposed Parameters and Guidelines, December 17, 2010.

[180] See, e.g., Government Code section 17557(d)(2), wherein the Legislature has given the Commission authority to amend parameters and guidelines to delete any reimbursable activity that has been repealed, or to update offsetting revenues that apply to the mandated program. AB 1610 requires local educational agencies to apply special education funds to satisfy BIPs costs first, and in that way imposes an offset not identified in the test claim statement of decision.

[181] In a footnote on page 6 of the claimants' comments on the draft staff analysis, claimants challenge the Commission's reliance on section 17557(d)(2), above. Section 17557(d)(2) provides that a request to amend parameters and guidelines may be made to "[u]pdate offsetting revenues and offsetting savings that apply to the mandated program and do not require a new legal finding that there are no costs mandated by the state pursuant to subdivision (e) of section 17556." The claimants' concern is that paragraph (d)(2) relates to an request to amend parameters and guidelines, and that there has been no such request. Claimants' objection would be well-heard but that section 17557(d)(2) is referred to (in footnote) only as an illustration of the continuing jurisdiction of the Commission. It is true that here there is no request to amend parameters and guidelines, but there would be no such request where no parameters and

Commission has identified two budget line items containing offsetting revenues that may be applied to reduce the amount to be subvened under the three RRMs, as specified below. The claimants, in comments submitted on the draft staff analysis, take issue with the findings. The claimants' concerns will be addressed in the analysis below.

A. Appropriations made in Line Item 6110-161-0001 in the annual Budget Act are potentially offsetting from July 1, 1993 until October 19, 2010, and must be deducted from a reimbursement claim to the extent a district applied these funds to provide for BIPs mandated activities.

Line Item 6110-161-0001 in the annual Budget Act provides state funding for special education at all times relevant to this test claim.[182] Item 6110-161-0001 provided $66 million in 1993, more than doubled to $1.62 billion in 1994, and increased incrementally to more than $3 billion in fiscal year 2012-2013, including $100 million in ongoing annual funding added pursuant to the 2001 settlement of the *Special Education Mandated Costs* claim (CSM 3986).[183] The *BIPs* program, adopted by CDE regulation pursuant to Education Code section 56523, is part of the special education statutes in the Education Code (Chapter 5.5 of Part 30, entitled "Special Education Programs") and it provides special education related services. Therefore the funds available generally for special education constitute *potentially* offsetting revenues against the activities involved in the *BIPs* mandate, to the extent a claimant uses the special education funding for *BIPs* activities. After October 19, 2010, as discussed below, the funds received

---

guidelines have yet to be adopted. The section is relied upon only to demonstrate that where no new legal finding is necessary on the issue of whether the BIPs program is eligible for reimbursement under article XIII B, section6, as would require a new test claim filing or a request for redetermination under section 17570, the Commission holds continuing jurisdiction to update offsetting revenue or savings as subsequent changes in law may occur prior to adoption of the parameters and guidelines. It would lead to an absurd result to hold that if a mandate is ended, or funded, between the time a test claim is approved for reimbursement and the time parameters and guidelines are adopted, that the Commission is powerless to take notice of the change in the legal landscape surrounding the test claim. In addition, the Commission's regulations, at section 1183.1, require that the parameters and guidelines identify any offsetting revenues for the program.

[182] Statutes 1993, chapter 55 (SB 80); Statutes 1994, chapter 139 (SB 2120); Statutes 1995, chapter 303 (AB 903); Statutes 1996, chapter 162 (SB 1393); Statutes 1997, chapter 282 (AB 107); Statutes 1998, chapter 324 (AB 1656); Statutes 1999, chapter 50 (SB 160); Statutes 2000, chapter 52 (AB 1740); Statutes 2001, chapter 106 (SB 739); Statutes 2002, chapter 379 (AB 425); Statutes 2003, chapter 157 (AB 1765); Statutes 2004, chapter 208 (SB 1113); Statutes 2005, chapter 38 (SB 77); Statutes 2006, chapter 47 (AB 1801); Statutes 2007, chapter 171 (SB 77); Statutes 2008, chapter 268 (AB 1781); Statutes 2009, chapter 1, 4th Extraordinary Session (AB 1); Statutes 2010, chapter 712 (SB 870); Statutes 2011, chapter 33 (SB 87); Statutes 2012, chapter 21 (AB 1464).

[183] Statutes 2001, chapter 203 (SB 982).

under that line item constitute *required* offsetting revenues, pursuant to changes effected in AB 1610.

In comments submitted in response to the draft staff analysis, the claimants dispute the identification of Line Item 6110-161-0001 as potentially offsetting revenue. The claimants rely on Government Code section 17556(e) to suggest that local government claimants are eligible for full reimbursement for state-mandated costs unless there are offsetting savings or "*additional revenue that was specifically intended to fund the costs of the state mandate* in an amount sufficient to fund the cost of the state mandate."[184] The claimants argue as well that because the test claim statement of decision found no offsetting savings or additional revenue, to here identify potentially offsetting revenues is inconsistent with the law and with the Commission's prior decision. The claimants assert that the funds identified in the analysis "do not and cannot constitute potentially offsetting revenues against the mandated activities involved in the BIPs test claim because they have never included funds specifically intended for the *BIPs* mandate or provided offsetting savings."[185]

The claimants further argue that the settlement of the *Special Education Mandated Costs* claim (CSM 3986) in 2000-01 demonstrates that no funding was previously available for the mandated activities. In the settlement of that test claim, the state provided a $270 million one-time payment, $100 million in additional annual funding for special education, and $250 million over ten years, in satisfaction of outstanding mandates claims, as follows:

> The funds provided in subdivisions (a) to (e), inclusive, shall be used for the costs of *any state-mandated special education programs* and services established pursuant to Sections 56000 to 56885, inclusive…as those sections read on or before July 1, 2000. These funds shall be considered in full satisfaction of, and are in lieu of, any reimbursable mandate claims relating to special education programs and services, with the exception of the programs and services delineated in subdivision (g).[186]

Subdivision (g), in turn, provides:

> Notwithstanding subdivision (f), the following existing mandate test claim *remains subject to the normal mandate procedure*, including judicial review, if any: behavioral interventions established pursuant to Section 56523 and Sections 3001 and 3052 of Title 5 of the California Code of Regulations.[187]

The claimants cite this legislation as evidence of the state's understanding of the landscape of available funding for *BIPs*. The claimants assert that the fact of the settlement itself

---

[184] Exhibit N, Claimants' Comments on Draft Staff Analysis, December 24, 2012, at pp. 1-2. See Government Code section 17556(e) for the origin of the italicized language.

[185] Exhibit N, Claimants' Comments on Draft Staff Analysis, December 24, 2012, at pp. 2-3.

[186] Education Code section 56836.156 (Stats. 2001, ch. 203 (SB 982)) [subdivision (g), in turn, refers to the BIPs mandate].

[187] *Ibid.*

"acknowledges the *basic requirement that the State provide an additional subvention of funds specifically intended* to fund state-mandated costs," and that "[t]his addition of funding specifically intended to reimburse certain special education mandated costs evidences the State's belief that there was not existing funding in any of the annual Budget Acts up to the date of the settlement."[188]

The claimants also argue that the Governor's proposed budget for 2012-2013 eliminated the *BIPs* mandated program without providing for any accompanying reduction in funds, that the state (DOF) approved the *BIPs* mandate settlement agreement, and that both of these actions suggest that the state has not provided any funding specifically intended for the *BIPs* mandate, and that therefore no offsetting revenues can be identified. And finally, the claimants argue that "perhaps most telling, the fact that the State proposed adding additional funds to AB 602 on an ongoing basis in the BIP settlement and proposed bill suggests that the State does not even believe that there are any such ongoing offsets."[189]

The claimants also assert, without evidence in support, that "[t]o the extent districts have used existing special education funds to implement the *BIPs* mandate, they either did so to the detriment of other special education programs to avoid encroachment or encroached on general funds to fund other special education programs." Moreover, the claimants demonstrate an essential misunderstanding of the analysis herein, saying:

> To state that districts must deduct "potentially offsetting revenues" when no funds were specifically intended for the BIP mandate and when no other bill provided for offsetting savings such that districts experienced no net costs, contravenes the constitutional requirement that the state provide a subvention of funds to reimburse the increased cost of a state mandate.[190]

The claimants state, on page 3 of the comments, that the offsets identified "do not meet the constitutional and statutory standard of offsetting savings or additional revenue specifically intended to fund the costs of the state mandate in an amount sufficient to fund the costs of the state mandate as delineated above."[191]

The bulk of the claimants' argument rests on a misunderstanding of the distinction between revenues identified at the test claim phase that would prohibit a finding of costs under section 17556, and offsetting or potentially offsetting revenues identified in parameters and guidelines. The "constitutional and statutory standard" that the claimant implies is not supported by the applicable case law and governing statutes. In adopting parameters and guidelines, the Commission is required by Government Code section 17557 to determine the "amount to be subvened" under the Constitution. Specifically, the Commission's regulations require

---

[188] Exhibit N, Claimants' Comments on Draft Staff Analysis, December 24, 2012, at p. 4.

[189] Exhibit N, Claimants' Comments on Draft Staff Analysis, December 24, 2012, at pp. 4-6.

[190] Exhibit N, Claimants' Comments on Draft Staff Analysis, December 24, 2012, at pp. 2-3.

[191] Exhibit N, Claimants' Comments on Draft Staff Analysis, December 24, 2012, at p. 3.

parameters and guidelines to identify offsetting revenues that may apply to the program as follows:

i. Dedicated state and federal funds appropriated for this program

ii. Non-local agency funds dedicated for this program.

iii. Local agency's general purpose funds for this program.

iv. Fee authority to offset partial costs of this program.[192]

These items, required to be identified, are not meant to call into question the Commission's finding that a program is reimbursable, but are only meant to highlight the possible non-local funds that might be called upon to determine the amount to be subvened. This analysis is not inconsistent with the test claim statement of decision because the parameters and guidelines do not require a finding of *additional revenue specifically intended to cover the costs of the mandate,* and in an amount sufficient to cover the costs of the mandate, as required under section 17556(e) to deny the test claim (as suggested by the claimants).[193]

Here, because the parameters and guidelines only identify *potentially* offsetting revenues, the Controller may only reduce a claimant's reimbursement *if the claimant demonstrates, by applying the funds authorized to be used on the program to the mandated activities,* that it was not compelled to rely on local proceeds of taxes to fund the mandate. A reduction in this manner is consistent with Article XIII B, section 6, which requires subvention only when the costs in question can be recovered solely from tax revenues. The Supreme Court has determined that

> [Article XIII B, section 6] was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. [Citations omitted.] Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditures of such revenues. Thus, although its language broadly declares that the "state shall provide a subvention of funds to reimburse … local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered solely from tax revenues.
>
> . . . . As the discussion makes clear, the Constitution requires reimbursement only for those expenses that are recoverable solely from taxes.[194]

Accordingly, in *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, the Supreme Court held that claimant school districts were *not entitled to reimbursement* for costs incurred in complying with notice and agenda requirements for meetings of a school site council, without reaching the issue of whether the underlying funded

---

[192] Code of Regulations, Title 2, section 1183.1 (Register 2005, No. 36).

[193] Government Code section 17556(e).

[194] *County of Fresno, supra*, 53 Cal.3d at p. 487.

school site council program was itself mandated, "because the state, in providing program funds to claimants, already has provided funds that may be used to cover the necessary notice and agenda-related expenses." In that case, the court "found nothing to suggest that a school district is precluded from using a portion of the [program] funds obtained from the state for the implementation of the underlying funded program to pay the associated [mandated] costs." In fact, the court found that the program "explicitly authorizes school districts to do so," quoting the statute authorizing the appropriation of program funds to allow school districts to "claim funds appropriated for purposes of this article for expenditures in, but not limited to, reasonable district administrative expenses."[195] The court concluded, therefore, that "we view the state's provision of *program funding as satisfying, in advance, any reimbursement requirement*." (Emphasis added.)

Thus, state program funds appropriated to school districts that *can* be used for a mandated program are required to be identified as potential offsets in the parameters and guidelines. And, in turn, *by applying the identified potentially offsetting revenues to the mandate*, an eligible claimant shows the actual expenditure of funds other than its local tax revenues on the program, thus demonstrating that it is not in need of the protection offered by Article XIII B, section 6, to the extent of the revenues thus applied. When funds other than local proceeds of taxes are thus applied, the Controller may reduce reimbursement accordingly.

The finding that available revenues satisfied the reimbursement requirement in *Kern* rests on a number of variables, which are somewhat less clear on these facts, but the analysis can nevertheless be applied. In *Kern*, the notice and agenda requirements applied to a number of different *funded* programs, and imposed requirements that were administrative in nature *within* the specified programs. Moreover, the court found that the mandated costs were "rather modest."[196] Additionally while the programs upon which the mandated activities were imposed were fully funded, those programs might also be voluntary. And finally, the funding that the court identified, at least for the "Bilingual-Bicultural Education program" was explicitly made available for costs of that nature.[197]

Here, the *BIPs* mandated activities fall within the special education program generally, but impose far more than "modest" administrative costs. Additionally, the provision of special education services is not voluntary, and though it is arguably "fully" funded, there is argument that the mandated activities extend beyond currently available funding: claimants have asserted that the *BIPs* mandated activities have resulted in substantial encroachment upon other special education activities and services. Finally, because the *BIPs* mandated activities are mandated by the state as a part of the provision of special education and related services, there is no reason to conclude that the funding is not applicable to those costs, even though no explicit provision has been made for *BIPs*. The annual Budget Act provides more than $3 billion for "Special

[195] *Kern*, supra, at pp. 747.

[196] In *Kern*, the Commission had already adopted parameters and guidelines with a unit cost for the program, allowing reimbursement at $90 per meeting. (*Kern, supra,* at p. 747, fn. 16.)

[197] *Kern, supra,* at pp. 746-747.

Education Programs for Exceptional Children."[198] The *BIPs* mandated activities are a part of providing special education services, authorized under section 56523 and Line Item 6110-161-0001 provides funding for all special education instruction and services in Education Code section 56000 et seq. With the exception of $100 million specifically intended to fund the programs identified in the Special Education Mandated Costs (CSM 3986) settlement, implemented by Statutes 2001,chapter 203 (SB 982), the funds in Line Item 6110-161-0001 are available to offset the costs of the *BIPs* mandated activities. However, absent explicit authorization such as was found in *Kern*, the offset must be considered *potential*, and not *required*. As the foregoing analysis demonstrates, this finding is not inconsistent with the test claim statement of decision.

The claimants also argue, in further demonstration of the fundamental misunderstanding of the proper scope of the "specifically intended" language found in Government Code section 17556, that the "state's actions have been consistent with the notion that it must provide a subvention of funds *specifically intended* to reimburse state mandates – funds over and above existing special education funding." The claimants argue that the state's conduct demonstrates that because no funding was *specifically intended* to reimburse the *BIPs* mandated activities, no funding was available at all, and no offsets should be identified. As is discussed throughout this section, *potentially* offsetting revenues may be found when program funding has been provided and can be used, even when the funding is not *additional revenue specifically intended to reimburse the costs of the mandate*, or is not sufficient to cover all costs of the mandate.

The Commission's findings regarding the existence of potentially offsetting revenues are not tantamount to "stat[ing] that districts must deduct [those revenues]," as suggested by the claimants. The test claim statement of decision did indeed conclude that there was no "additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate" and approved the claim. But it is not inconsistent to consider here whether some other available state revenues might have been applied by an eligible claimant to satisfy, in whole or in part, the costs of the mandate. The Commission therefore finds potentially offsetting revenues within existing state special education funding from Line Item 6110-161-0001, except as provided by Statutes 2001, chapter 203 (SB 982), as specified below.

B. Changes to Education Code section 56523 effected by Statutes 2010, chapter 724 (AB 1610) transform potential offsets to required offsets, beginning in fiscal year 2010-2011.

Beginning in fiscal year 2010-2011, changes effected by AB 1610 (Stats. 2010, ch. 724) to Education Code section 56523 (the test claim statute for *BIPs*) *require* eligible claimants to first use the funds appropriated in Item 6110-161-0001 to offset the costs of the *BIPs* mandate. Section 56523 is amended by AB 1610 to provide, in pertinent part:

> (e) Commencing with the 2010-11 fiscal year, *if any activities authorized pursuant to this section and implementing regulations are found be a state*

[198] See, e.g., Statutes 2002, Chapter 379, Line Item 6110-161-0001; Statutes 2012, Chapter 1464, Line Item 6110-161-0001.

> *reimbursable mandate* pursuant to Section 6 of Article XIII B of the California Constitution, *state funding provided for purposes of special education* pursuant to Item 6110-161-0001 of Section 2.00 of the annual Budget Act *shall first be used to directly offset any mandated costs*.[199]

AB 1610 is currently being challenged on constitutional grounds in *California School Boards Association v. State,* Superior Court of California, County of Alameda, Case No. RG 11554698 (filed January 6, 2011). The petitioners in that case allege that the changes made to Education Code section 56523 by AB 1610 constitute "a clear attempt to eliminate the state's mandate liability for several Commission-determined mandates."[200] The claimants incorporate the constitutional arguments of the CSBA petitioners by reference in comments submitted in response to the draft staff analysis.[201]

However, the Commission, like any other quasi-judicial body, "must presume the Legislature acts consistent with the Constitution when enacting legislation."[202] Line Item 6110-161-0001, pursuant to Education Code section 56523, as amended in 2010, provides state funding for special education programs, of which *BIPs* is a part, that must be applied to the *BIPs* program first, beginning in fiscal year 2010-2011.

In comments submitted in response to the draft staff analysis, the claimants focus largely on whether funding for the *BIPs* mandate was specifically intended to cover the costs of the mandate, as discussed above. Here, AB 1610 represents the state's expression of such intent from fiscal year 2010-2011 forward. However, the claimants have also urged that no "new or additional revenue" was provided: "AB 1610 does not include 'additional revenue' 'specifically intended' for the BIP mandate." The claimants continue: "[i]nstead, it offers the 'same' revenue which is simply 'deemed' to satisfy the state's obligation to reimburse the BIP mandate"

It is true that no new or additional revenue was appropriated. But, as discussed above, the distinction must be drawn between offsetting revenue under section 17556(e) and offsetting revenue identified for parameters and guidelines. The language cited by the claimants above regarding "additional revenue" "specifically intended" to fund the mandate, is drawn directly from section 17556, which addresses findings to be made in the test claim statement of decision to determine whether a test claim can be approved and is eligible for reimbursement. As noted

---

[199] Exhibit O, Education Code section 56523 (Stats. 2010, ch. 724 § 27 (AB 1610)).

[200] Exhibit O, Memorandum of Points and Authorities, *CSBA v. State*, Superior Court, County of Alameda, Case No. RG 11554698. The petitioners in the current AB 1610 challenge assert that the language of AB 1610 which purports to deem the funds in Line Item 6110-161-0001 as being in satisfaction of the mandated costs is also contrary to the Commission's findings. The petitioners assert that the provision refers to "the appropriation for special education," and that "no new money is provided; existing funding is simply 'deemed' to satisfy the obligation to reimburse for the costs of this program."

[201] Exhibit N, Claimants' Comments on Draft Staff Analysis, December 24, 2012, at pp. 7-8.

[202] Exhibit O, *CSBA II*, *supra*, 192 Cal.App.4th at p. 795.

above, section 1183.1 of the Commission's regulations requires the parameters and guidelines to include not only dedicated state and non-local agency funds.[203]

Moreover, as discussed above, a local government claimant only warrants the protection of article XIII B, section 6 for its expenditure of local "proceeds of taxes."[204] Where the funding at issue is given by the state in the first instance, the Commission must assume that the Legislature acts consistently with the Constitution if the Legislature designates a portion of those non-local funds to cover the costs of a mandated program or activity. Additionally, as in *Kern*, "the costs necessarily incurred in complying with [mandated program requirements] under that funded program do not entitle claimants to obtain reimbursement under article XIII B, section 6, because the state, in providing program funds to claimants, already has provided funds that may be used to cover the necessary…expenses."[205]

Furthermore, there is precedent to support the Legislature's power to direct local educational agencies with respect to how funds are expended, which is essentially the result reached by AB 1610. In *California Teachers Association v. Hayes*, the court stated:

> Since Proposition 98 did not alter the state's role in education, the Constitution continues to make education and the operation of the public schools a matter of statewide rather than local or municipal concern. Local school districts remain agencies of the state rather than independent, autonomous political bodies. The Legislature's control over the public education system is still plenary. The Legislature still has ultimate and nondelegable responsibility for education in this state. All school properties are still held in trust with the state as the beneficial owner. And school districts still do not have a proprietary interest in moneys which are apportioned to them. Of course, if the electorate chose to alter our constitutional scheme for education it could do so. Education could be made a matter of local concern and school districts could be given greater autonomy. But we cannot conclude that such a major governmental restructuring was accomplished by implication in a measure dealing with public finance which spoke not at all on such matters.[206]

AB 1610, as quoted above, provides direction to local educational agencies, in accordance with the Legislature's plenary control over schools and school districts, to use certain funds first, beginning in the 2010-2011 fiscal year. As such, those funds, as specified, must be included in the parameters and guidelines as "dedicated state funds."[207]

---

[203] Code of Regulations, Title 2, section 1183.1

[204] *County of Fresno, supra*, at p. 487.

[205] *Kern*, supra, (2003) 30 Cal.4th 727.

[206] Exhibit O, *California Teachers Ass'n v. Hayes* (Cal. Ct. App. 3d Dist. 1992) 5 Cal.App.4th 1513, at p. 1533.

[207] Code of Regulations, Title 2, section 1183.1

The available funding is reduced, however, for fiscal years 2011-2012 and 2012-2013, by AB 114. AB 114, enacted in 2011, provides that:

> [F]unding provided in provisions 18 and 26 of Item 6110-161-0001 and provision 9 of Item 6110-161-0890 of Section 2.00 of the Budget Act of 2011 for educationally related mental health services, including out-of-home residential services for emotionally disturbed pupils, required by the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.) shall be exclusively available for these services only for the 2011-2012 and 2012-2013 fiscal years.[208]

Provisions 18 and 26 of Item 6110-161-0001 in the 2011 Budget Act provide $31 million and $218,786,000, respectively, in state funding for educationally related mental health services.[209] These funds are earmarked, pursuant to AB 114, to be available only for the care of emotionally disturbed pupils, and therefore not available, for the two fiscal years, as provided, for the *BIPs* program. In Item 6110-161-0001 of the 2012 Budget Act the funds are set aside, in accordance with AB 114, as follows:

> 22. Of the amount specified in Schedule (1), $348,189,000 shall be available only to provide educationally related mental health services, including out-of-home residential services for emotionally disturbed pupils, required by an individualized education program pursuant to the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.) and as described in Section 56363 of the Education Code. The Superintendent of Public Instruction shall allocate these funds to special education local plan areas in the 2012–13 fiscal year based upon an equal rate per pupil using the methodology specified in Section 56836.07 of the Education Code.

Based on the foregoing, the parameters and guidelines identify the following offsetting revenue:

- Except as provided by Statutes 2001, chapter 203 (SB 982)[210], Item 6110-161-0001 of Section 2.00 of the annual Budget Act provides state funding for special education that is potentially offsetting from July 1, 1993 (the beginning of the period of reimbursement) until June 30, 2010. To the extent an eligible claimant applies these potentially offsetting revenues to the approved mandated activities during this time period, those funds shall be identified and deducted from the reimbursement claims filed on the basis of the RRM.

---

[208] Statutes 2011, chapter 43, section 54 (AB 114).

[209] Statutes 2011, chapter 33 (SB 87).

[210] SB 982 provided for $100 million in augmentation of Line Item 6110-161-0001, beginning in 2001, and continuing in the annual budget acts, to provide for the *Special Education Mandated Costs* test claim (CSM 3986). That funding is intended exclusively, and by express priority, to fund the costs of the specified mandated programs identified in Education Code 56836.156, and therefore cannot be identified as potentially offsetting revenue for this mandate.

- Commencing with the 2010-11 fiscal year, and except as provided by Statutes 2001, chapter 203 (SB 982), and Statutes 2011, chapter 43, section 54 (AB 114) for fiscal years 2011-2012 and 2012-2013,[211] state funding provided for purposes of special education pursuant to Item 6110-161-0001 of Section 2.00 of the annual Budget Act shall first be used to directly offset any mandated costs in this program. Except as provided in Statutes 2001, chapter 203 and Statutes 2011, chapter 43, funds received by an eligible claimant from this appropriation shall be identified and deducted from the reimbursement claims filed on the basis of the RRM, beginning in the 2010-2011 fiscal year.

C. The federal Individuals with Disabilities Education Act (IDEA) funding appropriated in Item 6110-161-0890 for special education is potentially offsetting revenue against the mandated activities, and must be deducted from the claim to the extent a district used these funds to provide for BIPs mandated activities.

Item 6110-161-0890 in the annual Budget Act provides federal funding for special education, distributed by CDE.[212] This funding is meant to provide assistance to the states to provide special education and related services to students, as provided by applicable law. The provision of special education and related services is federally mandated under IDEA, but the act "leaves primary responsibility for implementation to the states." Thus, "[t]o the extent the state implemented the act by freely choosing to impose new programs or higher levels of service upon local school districts, the costs of such programs of higher levels of service are state-mandated and subject to subvention."[213]

The Commission found in the test claim statement of decision that the program at issue in these parameters and guidelines is a new program or higher level of service, beyond that required

---

[211] AB 114 earmarked a portion of funds appropriated in Item 6110-161-0001 and Item 6110-161-0890 for educationally related mental health services, including out-of-home residential services for emotionally disturbed pupils, required by the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.) to be exclusively available for these mental health services only for the 2011-2012 and 2012-2013 fiscal years. Thus, the funds identified in AB 114 cannot be used for purposes of the *BIPs* mandate in fiscal years 2011-2012 and 2012-2013.

[212] Statutes 1993, chapter 55 (SB 80); Statutes 1994, chapter 139 (SB 2120); Statutes 1995, chapter 303 (AB 903); Statutes 1996, chapter 162 (SB 1393); Statutes 1997, chapter 282 (AB 107); Statutes 1998, chapter 324 (AB 1656); Statutes 1999, chapter 50 (SB 160); Statutes 2000, chapter 52 (AB 1740); Statutes 2001, chapter 106 (SB 739); Statutes 2002, chapter 379 (AB 425); Statutes 2003, chapter 157 (AB 1765); Statutes 2004, chapter 208 (SB 1113); Statutes 2005, chapter 38 (SB 77); Statutes 2006, chapter 47 (AB 1801); Statutes 2007, chapter 171 (SB 77); Statutes 2008, chapter 268 (AB 1781); Statutes 2009, chapter 1, 4th Extraordinary Session (AB 1); Statutes 2010, chapter 712 (SB 870); Statutes 2011, chapter 33 (SB 87); Statutes 2012, chapter 21 (AB 1464).

[213] *Hayes v. Commission on State Mandates* (Cal. Ct. App. 3d Dist. 1992) 11 Cal.App.4th 1564, 1594.

under IDEA.[214] However, the federal IDEA funds are allocated to the states for special education and related services, and the *BIPs* activities fall within the ambit of related services. Therefore, consistent with the reasoning applied above to state special education funds, to the extent that an eligible claimant chooses to apply the identified revenues to the mandated activities, reimbursement may be reduced accordingly.

The claimants object to the identification of federal IDEA funds as a potential offset, in comments submitted in response to the draft staff analysis. The claimants cite Education Code section 56844, which contains substantially the same language as Title 20 of the United States Code, section 1412; both of which address the permissible uses of federal special education funding. Education Code section 56844 provides, in pertinent part:

> In complying with paragraph (17), regarding the prohibition against supplantation of federal funds, and paragraph (18), regarding maintenance of state financial support for special education and related services, of subsection (a) of Section 1412 of Title 20 of the United States Code, the *state may not use funds paid to it* under Part B of the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.) *to satisfy state-mandated funding obligations to local educational agencies*, including funding based on pupil attendance or enrollment, or on inflation.[215]

Title 20, United States Code, section 1412 provides similarly:

> (20) Rule of construction
> In complying with paragraphs (17) and (18), *a State may not use funds paid to it under this subchapter to satisfy State-law mandated funding obligations to local educational agencies*, including funding based on student attendance or enrollment, or inflation.[216]

Notwithstanding the apparent prohibition against the state's use of federal IDEA funds "to satisfy state-mandated funding obligations to local educational agencies," neither the state statute, nor the federal statute, touches on how a local educational agency may direct funds received under IDEA. Moreover, while in some contexts it may be ambiguous whether a federal statute referring to "the State" means to include by implication the local government subdivisions within the state, in section 1401 of Title 20 separate definitions are provided for "State" and "local educational agency," and in section 1412 the prohibition is directed to the state; no suggestion is made that the terms might be inclusive of one another or used interchangeably.

The claimants argue that the identification of Item 6110-161-0890 in the annual Budget Act as a potential offset "is in violation of state law which forbids federal funds provided to districts for

---

[214] See Exhibit A, Corrected Statement of Decision, Behavioral Intervention Plans.

[215] Education Code section 56844 (Stats. 2005, ch. 653 (AB 1662)). See also 20 United States Code section 1412(a)(20) (Pub. L. 108-446, Title I, § 101, Dec. 3, 2004, 118 Stat. 2676).

[216] 20 United States Code section 1412(a)(20) (Pub. L. 108-446, Title I, § 101, Dec. 3, 2004, 118 Stat. 2676).

special education purposes from being used for state mandates." But the claimants overreach in this interpretation of the law on point; the section upon which the claimants rely forbids the *state* from using IDEA funds for state-mandated activities; it does not prohibit the local educational agencies from applying the federal funds to mandated programs. In this way it would be fair to argue that federal IDEA funds could never be treated as a *required* offset, because the state could not, without running afoul of the federal provision, *compel* local educational agencies to apply federal funds in this way. It would also be reasonable to conclude that the Controller could not apply a *mandatory* reduction in reimbursement based on federal IDEA funds whether or not eligible claimants chose to apply the funds to the BIPs mandate. But neither of those is the situation on these facts.

In further support of this interpretation is the LAO's report recommending the changes that would become Education Code 56844, on which the claimants rely. The LAO states that "Congress reauthorized the federal special education law in 2004." A newly added provision of that law "prohibits states from using federal funds to pay for 'state-law mandated funding obligations *to local educational agencies*.'" The LAO interprets this prohibition as intended "to prohibit states from using federal funds to supplant state funds for normal budget increases such as growth and COLA." Therefore the LAO recommends that the Legislature adopt a plan to provide for growth and cost of living adjustments for the state's share of special education funding, rather than allowing the federal funding to cover these costs for both the state and federal shares of special education funding. No mention is made of limiting the manner in which local educational agencies can apply the federal funds received.[217]

Furthermore, while claimants rely on Education Code section 56844 and Title 20, section 1412 of the United States Code, section 1411 of Title 20 is overlooked. Section 1411 provides that

> The Secretary shall make grants to States, outlying areas, and freely associated States, and provide funds to the Secretary of the Interior, to assist them to provide special education and related services to children with disabilities in accordance with this subchapter.[218]

Section 1411 goes on to provide that states are authorized to reserve some portion of funding received under IDEA "[t]o assist local educational agencies in providing positive behavioral interventions and supports and appropriate mental health services for children with disabilities."[219]

As is shown by the foregoing analysis, the claimants' reliance on section 56844 is misplaced. The code section does not, as the claimants suggest, prohibit the use of federal IDEA funds toward *BIPs* activities conducted by the local educational agencies. Instead, the more reasonable view is that both the state and federal statutes on point prohibit the state from *compelling* the use

---

[217] Exhibit O, LAO Report on K-12 Education, February 25, 2005, at pp. 71-74.

[218] United States Code, title 20, section 1411(a)(1) (Pub. L. 91-230; Pub. L. 108-446, 118 Stat. 2662).

[219] United States Code, title 20, section 1411(e)(2)(C) (Pub. L. 91-230; Pub. L. 108-446, 118 Stat. 2662).

of federal IDEA funds to cover the costs of *BIPs* and other mandated activities. In this context, then, the Commission finds that the federal funds are a potential offset, but could never be compelled by the state to be applied as an actual offset, as is directed by AB 1610 with reference to the state special education funds. Therefore, the federal funds are only *potentially* offsetting as against the *BIPs* mandated activities, and not required offsets as discussed above. Only if eligible claimants are shown to have applied these funds to the mandated activities would their reimbursement claims be correspondingly reduced.

AB 114, as discussed above, limits the amount of funding available for potentially offsetting revenue with respect to the IDEA funds as well as state special education funds. AB 114 requires certain specified funds in Line Item 6110-161-0890 of the annual Budget Act to be applied exclusively, for two fiscal years, to the provision of out-of-home services to emotionally disturbed pupils. Provision 9 of Item 6110-161-0890 of the 2011 Budget Act provides $69 million in federal funding for educationally related mental health services.[220] And in Item 6110-161-0890 of the 2012 Budget Act the funds are set aside, in accordance with AB 114, as follows:

> 7.5. Of the funds appropriated in Schedule (4), $51,750,000 shall be available only for the purpose of providing educationally related mental health services, including out-of-home residential services for emotionally disturbed pupils, required by an individualized education program pursuant to the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.) and as described in Section 56363 of the Education Code.[221]

AB 114 requires that these provisions be used exclusively for services to emotionally disturbed pupils for the 2011-2012 and 2012-2013 fiscal years. Therefore, for the 2011-2012 and 2012-2013 fiscal years, the revenues that are considered potentially offsetting must exclude the funds described above.

Accordingly, the parameters and guidelines contain the following source of offsetting revenue:

- Except as provided by Statutes 2011, chapter 43, section 54 (AB 114) for fiscal years 2011-2012 and 2012-2013, Item 6110-161-0890 of Section 2.00 of the annual Budget Act, which provides for state pass-through allocation of federal funding for special education, constitutes potentially offsetting revenue beginning July 1, 1993 (the beginning of the period of reimbursement). To the extent an eligible claimant applies this potentially offsetting revenue to the approved mandated activities, those funds shall be identified and deducted from the reimbursement claims filed on the basis of the RRM.

The parameters and guidelines reflect these changes, and incorporate the current boilerplate language approved by the Commission.

5. State Controller's Claiming Instructions (section VIII. of Proposed Parameters and Guidelines)

[220] Statutes 2011, chapter 33 (SB 87).

[221] Statutes 2012, chapters 21/29 (AB 1464).

Prior to 2012, existing law required the State Controller to issue claiming instructions for each reimbursable mandate no later than 60 days after receiving the adopted parameters and guidelines from the Commission. In 2011, SB 112 (Statutes 2011, chapter 144) revised this statute to require the State Controller to issue the claiming instructions within 90 days of receiving the parameters and guidelines. Due to the change in statute, the Commission updated this section to reflect this new 90-day requirement.

V. CONCLUSION

For the foregoing reasons the Commission hereby adopts this statement of decision and the attached proposed parameters and guidelines, including the proposed reasonable reimbursement methodology.

OPTION B – To Deny the Proposed RRM

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE PARAMETERS AND GUIDELINES FOR: California Code of Regulations, Title 5, Sections 3001 and 3052, as added or amended by Register 93, No. 17; Register 96, No. 8; Register 96, No. 32. Period of reimbursement beginning: July 1, 1993	Case No.: CSM 4464 *Behavioral Intervention Plans* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Proposed for Adoption: January 25, 2013*)

STATEMENT OF DECISION

The Commission on State Mandates (Commission) adopted this statement of decision and parameters and guidelines during a regularly scheduled hearing on January 25, 2013. [Witness list will be included in the final statement of decision.]

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission adopted the parameters and guidelines and statement of decision by a vote of [Vote count will be included in the final statement of decision].

I. SUMMARY OF THE MANDATE

These proposed parameters and guidelines pertain to the *Behavioral Intervention Plans* test claim decision (CSM-4464) adopted September 28, 2000. Based on the filing date of the test claim, the period of reimbursement begins on July 1, 1993. The test claim addresses a 1990 statute and 1993 implementing regulations adopted by the Department of Education (CDE) regarding special education services for children with disabilities. Education Code section 56523 requires the Superintendent of Public Instruction and the State Board of Education to adopt regulations establishing behavioral intervention plans (BIPs), which:

> (1) include the types of behavioral interventions that can be used; (2) require that a pupil's [individualized education plan] include a description of behavior

interventions that meet certain guidelines; and (3) specify standards and guidelines regarding the use of behavior interventions in emergency situations.[1]

In accordance with Education Code section 56523, CDE adopted sections 3001 and 3052 of Title 5 of the California Code of Regulations, which detail school districts' obligations concerning BIPs.

The Commission found, in the test claim statement of decision, that Education Code section 56523 only requires the Superintendent of Public Instruction and the State Board of Education to adopt regulations establishing BIPs, and does not impose any requirements upon school districts. However, the Commission concluded that the implementing regulations impose a reimbursable state-mandated program upon school districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for the following categories of activities:

- Special Education Local Plan Area (SELPA) plan requirements. (Cal. Code of Regs., tit.5, §§ 3001 and 3052(j).)
- Development and implementation of BIPs. (Cal. Code of Regs., tit. 5, §§ 3001 and 3052(a), (c), (d), (e), and (f).)
- Functional analysis assessments. (Cal. Code of Regs., tit. 5, §§ 3001 and 3052(b), (c), and (f).)
- Modifications and contingent BIPs. (Cal. Code of Regs., tit. 5, § 3052(g) and (h).)
- Development and implementation of emergency interventions. (Cal. Code of Regs., tit. 5, §§ 3001 and 3052(i).)
- Prohibited behavioral interventions. (Cal. Code of Regs., tit. 5, §§ 3001 and 3052(l).)
- Due process hearings. (Cal. Code of Regs., tit. 5, § 3052(m).)[2]

II. PROCEDURAL HISTORY

The underlying test claim was filed in September of 1994 by San Diego Unified School District, Butte County Office of Education, and San Joaquin County Office of Education. A number of requests for extension were granted, both to claimants and to interested state agencies, before the test claim was brought before the Commission. The matter was heard in September 1999, but not decided, due to a tie vote, until a seventh member was appointed the next year. The test claim statement of decision was adopted September 28, 2000, by a 5-2 vote.[3]

---

[1] Exhibit A, Corrected Statement of Decision, *Behavioral Intervention Plans* CSM-4464, p. 2

[2] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464 pp. 17-18 [the test claim statement of decision incorrectly cites Code of Regulations, Title 2; the regulations at issue are found at Title 5, sections 3001 and 3052].

[3] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464 p. 1.

Claimants filed proposed parameters and guidelines for the approved activities on October 26, 2000, within the 30 days provided for in statute.[4] The Department of Finance (DOF) opposed the parameters and guidelines, in comments submitted November 20, 2000, and recommended actual cost claiming instead of the proposed uniform time allowances or uniform costs. San Diego City Schools requested four 60-day extensions of time to file comments, stating that the employee responsible for responding in this matter had left the employ of the district. These extensions were granted for good cause. On September 9, 2001, a new representative requested time to review the record and develop rebuttal comments, which was granted for good cause. On October 9, 2001, claimants requested an extension of time, stating that the parties were discussing settlement of the matter. Similar extension requests and approvals followed on November 16, 2001, January 15, 2002, February 19, 2002, and March 15, 2002. On May 22, 2002, claimants filed rebuttal comments. Claimants filed further rebuttal comments on May 31, 2002 and August 26, 2002. On October 11, 2002, claimants requested a continuance pending a statewide study of costs, which was granted for good cause. Sixteen subsequent requests for continuance followed between January 2003 and March 2005, at which time Commission staff informed the claimants that no further extensions would be granted without substantive information from the parties about the status of the matter.

Meanwhile, before the expiration of the three year statute of limitations to seek judicial review of the Commission's decision, on September 26, 2003, DOF filed a petition for a writ of administrative mandamus to set aside the decision, placing this matter on inactive status until the mandamus petition was dismissed in 2010. On October 7, 2007, the Deputy Attorney General representing DOF opened settlement negotiations with the claimants. Over the next few months, claimants surveyed eligible local educational agencies regarding costs incurred to implement the mandate for the previous school year. The surveys asked for cost data regarding specific activities approved in the test claim decision, and were developed in cooperation with representatives of DOF. The surveys were returned in May 2008 by 21 SELPAs, of the 30 that had originally agreed to participate. While the survey data were being considered the court granted an extension of the five-year rule for the court to hear and determine the matter, which would have required the court to resolve the case before September 26, 2008.[5]

Between July and November 2008, the claimants and DOF worked closely with the survey results. Both agreed that the survey sample was adequate, and the results were compiled and reviewed until both agreed that they were accurate.[6] On October 15, 2008, the court issued a Second Stipulation and Order to Extend Time to Hear Petition for Administrative Mandamus. On November 20, 2008, the court issued a Third Stipulation and Order to Extend Time.

Upon review of the survey results the parties continued cooperative efforts, reaching a settlement in November 2008. The settlement agreement called for all retroactive and current reimbursement claims to be extinguished by an allocation of $510 million to school districts for the cost of the BIPs activities, $10 million to SELPAs and county offices of education, and $65

[4] Exhibit K, Proposed Parameters and Guidelines, *Behavioral Intervention Plans*, CSM-4464.

[5] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Diana McDonough.

[6] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Diana McDonough.

million annually to school districts for ongoing costs of the program.[7] As of the 2008-2009 fiscal year, the total estimated costs, "including the total statewide extrapolated annual costs and the total statewide extrapolated one-time costs, were $1,014,605,046.17.[8] Despite the fact that the settlement would have reimbursed only slightly more than half of the eligible claimants' estimated costs to that point in time, 95% of all LEAs, representing 99% of statewide ADA, agreed to the settlement.[9]

On February 25, 2009, AB 661 was introduced to implement the settlement agreement to appropriate funds for the mandate on an ongoing basis and to appropriate the $520 million in satisfaction of the accumulated costs. AB 661 was introduced by State Assemblyman Torlakson, but died in the Assembly Committee on Appropriations.[10] As a result, the settlement was not funded as described, and the *BIPs* program has not been reimbursed to date. After the settlement agreement was not funded by the Legislature for two consecutive budget years, DOF dismissed its mandamus action with prejudice on October 26, 2010.

On October 19, 2010, one week before the mandamus petition was dismissed, AB 1610 was enacted as a budget trailer bill to amend Education Code section 56523, among others, to address funding shortfalls in a number of state-mandated programs. AB 1610 sought to "deem" the activities approved under the test claim regulations as necessary to implement a federal mandate, and thus negate the Commission's decision on reimbursement.[11] AB 1610 also sought to declare that local educational agencies must agree to implement the BIPs program as a condition of receiving ongoing special education funds. AB 1610, in addition, sought to compel local educational agencies receiving special education funds from the state to use those funds for state-mandated programs first, beginning in the 2010-2011 fiscal year.[12]

On December 17, 2010, after the settlement was not funded by the Legislature and attorneys representing DOF had abandoned the effort to compromise, claimants proposed revised parameters and guidelines that include an RRM relying on the same survey data collected during settlement negotiations with DOF.[13] The proposed parameters and guidelines offer three distinct RRMs: one for one-time activities required in the 1993-1994 school year; one for ongoing SELPA-level activities; and one for ongoing county-level activities.[14]

---

[7] Exhibit O, Settlement and Release Agreement, dated January 26, 2009

[8] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Diana McDonough.

[9] Exhibit O, Joint Stipulation for Entry of Judgment and Proposed Judgment, 05/19/09, Superior Court, County of Sacramento, No 03CS01432, p. 4.

[10] Exhibit O, AB 661 (text of proposed bill).

[11] Exhibit O, Statutes 2010, chapter 724 § 27 (AB 1610).

[12] Exhibit O, Education Code section 56523(b-f) (Stats. 2010, ch. 724 § 27 (AB1610)).

[13] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Diana McDonough.

[14] Exhibit B, Revised Proposed Parameters and Guidelines, December 17, 2010.

On January 27, 2011, the State Controller's Office (SCO) submitted written comments on the revised proposed parameters and guidelines.[15] On February 23, 2011, the claimants submitted a rebuttal to the SCO comments.[16] On August 9, 2011, DOF submitted written comments on the revised proposed parameters and guidelines.[17] On August 12, 2011, the Commission requested comments from parties and interested parties on three pending proposed RRMs.[18] On October 14, 2011, claimants submitted a rebuttal to DOF's comments.[19] On December 20, 2011, claimants submitted a response to the Commission's request for comments on the pending RRMs.[20] On August 15, 2012, claimants submitted Amended Exhibit 2 to the revised proposed parameters and guidelines.[21]

On December 4, 2012, the Commission issued the draft staff analysis. On December 21, 2012, SCO responded with comments on the draft proposed parameters and guidelines, primarily consisting of technical changes, most of which are reflected in the parameters and guidelines attached to this statement of decision. On December 24, 2012, the claimants submitted comments on the draft staff analysis, generally supporting the adoption of option A, with the exception of the language regarding offsetting revenues. Claimants' comments are discussed, where relevant, below. On December 28, 2012, Commission staff received comments also from DOF on the draft staff analysis, generally opposing the adoption of either an RRM or parameters and guidelines at this time. Those comments as well are addressed below.

III. POSITION OF THE PARTIES

A. Claimants' Position

The claimants' proposed parameters and guidelines offer three distinct RRMs, specific to the eligible claimants who implement the reimbursable activities, and to the time and manner in which the activities are implemented.

1. RRM for One-Time SELPA-Level Activities

The first RRM is for one-time SELPA-level activities, which include preparing and adopting procedures and policies, to update the SELPA plan in conformity with the regulations. The SELPA plans, which govern the provision of special education services locally, must be updated to reflect the changes imposed by the test claim regulations, including: training requirements for certain staff involved in developing BIPs; training requirements for staff involved in

[15] Exhibit C, SCO Comments, Revised Proposed Parameters and Guidelines, January 27, 2011.

[16] Exhibit D, Claimants' Rebuttal to SCO Comments, February 23, 2011.

[17] Exhibit E, DOF Comments, Revised Proposed Parameters and Guidelines, August 9, 2011.

[18] Exhibit G, Commission Request for Comments on Proposed Pending RRMs, August 12, 2011.

[19] Exhibit F, Claimants' Rebuttal to DOF Comments, October 14, 2011.

[20] Exhibit H, Claimants' Response to Request for Comments, December 20, 2011.

[21] Exhibit J, Claimants' Comments and Amended Exhibit 2.

implementing BIPs; special training for the use of emergency behavioral interventions; and identification of approved emergency behavioral interventions.[22]

The surveys produced by claimants sought information from SELPAs regarding how much time, for each position involved, was spent updating the SELPA plan in conformity with Code of Regulations section 3052(j) and adopting the changes.[23] The claimants and DOF engaged in some manipulating and negotiating regarding those figures, and resolved a number of discrepancies.[24] An hourly rate was then applied to the time spent, by position, to determine the cost of each activity.[25] Those costs were then totaled for all SELPAs surveyed, and divided by P2 ADA of all 21 SELPAs[26] for 2006-2007, to arrive at a unit cost per average daily attendance (ADA) for the one-time SELPA activities.[27] "P2 ADA" refers to "the total number of units of average daily attendance reported for the second principal apportionment" pursuant to Education Code section 41601 for all pupils enrolled in the district or districts that are a part of the SELPA. The resulting cost per ADA (unit rate) is then to be adjusted by the Implicit Price Deflator for the appropriate fiscal year in which the one-time activities were conducted by an eligible claimant SELPA, and then applied to the P2 ADA figures for that same year.

2. RRM for On-Going SELPA Activities

The second RRM proposed is for on-going activities at the SELPA level. These activities include providing and obtaining training in behavior analysis, positive behavioral interventions, and behavioral emergency interventions; reporting to the CDE and Advisory Committee on Special Education on the number of emergency behavior intervention reports; and satisfying due

[22] Code of Regulations section 3052(j) (Register 93, No. 17).

[23] See, e.g., Exhibit J, Claimants' Comments and Amended Exhibit 2, at p. 0017.

[24] Exhibit B, Claimants' Revised Proposed Parameters and Guidelines, Declaration of Linda Grundhoffer; Claimants' Exhibits 5-7.

[25] Exhibit B, Claimants' Revised Proposed Parameters and Guidelines, Declaration of Linda Grundhoffer, ["We often needed to call school personnel while compiling the data as we became aware of missing information. We always checked to obtain the actual information, and if we were unsuccessful, we ultimately did not use any of that SELPA's information. We did not estimate."]. See, e.g., Exhibit J, Claimants' Comments and Amended Exhibit 2, August 15, 2012, at p. 0052; 0058-0059.

[26] See Exhibit O, AB 602 This includes also schools operated by county offices of education. (Ed. Code § 56836.06 (Stats. 1997, ch. 854 § 65 (AB 602)))]. Section 41601, in turn provides that school districts and COEs "shall report to the Superintendent of Public Instruction during each fiscal year the average daily attendance…during [(1) the period between July 1 and December 31 (period one)] and (2) the period between July 1 and April 15, inclusive, to be known as the "second period" report." (Ed. Code § 41601).

[27] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Michael Lenahan.

process requirements related to functional analysis assessments or the development or implementation of BIPs.[28]

The methodology employed to calculate the unit rate was substantially the same as above: the surveys sought information from SELPAs regarding time spent, by position, on the ongoing activities of training, collecting data and reporting on emergency behavior intervention reports; and satisfying due process requirements in the 2006-2007 school year.[29] The time data were then manipulated until agreeable to both claimants and DOF,[30] and multiplied by the reported average hourly rates of the personnel assigned to those tasks.[31] The costs of the ongoing activities at the SELPA level were then totaled for all SELPAs surveyed and divided by the P2 ADA for the 21 SELPAs surveyed in 2006-2007 school year.[32] That figure is then applied retroactively and prospectively, adjusting by the Implicit Price Deflator for each applicable year, to the P2 ADA figures for each year since implementation began (presumably 1993-1994 in most cases).

3. RRM for On-Going School District and County Office of Education Activities

The third RRM proposed is for on-going activities at the school district and county office of education (COE) level. The ongoing activities include: conducting functional analysis assessments; developing, implementing, evaluating, and modifying BIPs; employing emergency interventions, including appropriate recordkeeping; training staff on prohibited behavioral interventions; and satisfying due process requirements related to functional analysis assessments or the development or implementation of BIPs.

The same methodology used for the other proposed RRMs is employed here. The surveys sought information from school districts and COEs operating schools in the place of school districts regarding time spent, by position, on the reimbursable activities. The surveys also sought to determine whether any outside contractors or specialists were employed to conduct the required activities.[33] Then, the hours reported were multiplied by the average hourly rates reported for the staff involved in those activities, and added to the fees imposed by outside contractors to determine the total district-level costs for 2006-2007.[34] Those costs were totaled from all districts surveyed, then divided by P2 ADA for 2006-2007 for all districts surveyed, to

[28] Exhibit B, Revised Proposed Parameters and Guidelines, December 17, 2010.

[29] See, e.g., Exhibit J, Claimants' Comments and Amended Exhibit 2, at pp. 0017-0022.

[30] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Linda Grundhoffer; Claimants' Exhibits 5-7.

[31] See, e.g., Exhibit B, Revised Proposed Parameters and Guidelines, Claimants' Exhibit 2, Survey Results from Butte SELPA, December 17, 2010.

[32] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Michael Lenahan.

[33] See, e.g., Exhibit J, Claimants' Comments and Amended Exhibit 2, at pp. 0054-0056.

[34] See, e.g., Exhibit J, Claimants' Comments and Amended Exhibit 2, at pp. 0058-0059;

arrive at a unit cost per ADA, which could be applied both retroactively and prospectively, as adjusted by the Implicit Price Deflator.[35]

The claimants urge the Commission to adopt the proposed parameters and guidelines, including the proposed RRMs, believing the proposal to be "reasonable, representative, and cost-effective." The claimants also note that "given the number of years that have passed since the mandate took effect, it will always be difficult, and often impossible, for school agencies to provide documentation of activities and actual costs to perform the mandate," and that the time and effort involved in obtaining such documentation would be "extensive and burdensome."[36] The claimants explain that "because substantial staff time was involved to complete the survey[s] and no funding for the effort was available, [claimants] were not in a position to require participation." Claimants received data from 21 SELPAs, which both claimants and DOF agreed "was an adequate sampling."[37] Claimants stress that they retained "experienced school business officials" as consultants to compile the results, and that the results "were reviewed and modified" by DOF until DOF and claimants agreed that they were accurate. Claimants also state that a settlement agreement was reached with DOF, and the underlying litigation was set to be dismissed, until the Legislature declined to fund the settlement for two consecutive budget cycles, and the settlement fell apart.[38]

The claimants responded to the comments of DOF and SCO by challenging the statutory requirements implied by their comments.[39]

The claimants submitted comments in response to the draft staff analysis on December 24, 2012, agreeing with staff's recommendation to adopt Option A, but disputing staff's conclusions regarding offsetting revenues. The claimants' concerns are addressed in the analysis below.

B. DOF Position

DOF opposes the adoption of the RRMs. DOF argues that section 17518.5(b) and (c), "require that an RRM be based on cost information from a representative sample of eligible claimants, and that it consider the variation of costs among local school districts to implement the mandate in a cost efficient manner."

DOF argues that the proposed RRM would not provide reimbursement based on cost information from a representative sample of eligible claimants. DOF argues that "only 21 of 120 SELPAs" is not a representative sample; those 21 SELPAs represent "just 11.3 percent of total ADA." DOF argues that the largest SELPAs are not represented, and that the southern part of the state is underrepresented.

---

[35] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Michael Lenahan.

[36] Exhibit B, Revised Proposed Parameters and Guidelines, cover letter, December 17, 2010.

[37] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Diana McDonough.

[38] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Diana McDonough.

[39] Exhibit D, Claimants' Rebuttal to SCO Comments, February 23, 2011; Exhibit F, Claimants' Rebuttal to DOF Comments, October 14, 2011.

DOF also argues that the proposed RRM does not consider the variation of costs among local school districts because the survey data betrays a wide range of costs among school districts. DOF argues that the proposed RRM "does not consider the relationship of the mandated activities and the mechanism that triggers the need for those activities." DOF concludes, "we do not believe using ADA as part of the proposed RRM is appropriate."

Finally, DOF notes that "the proposed unit rate is based on survey results from SELPAs, not on actual cost claims that have been audited." DOF expresses concern "that this data along with the proposed RRM does not accurately reflect the cost of the program," and questions "whether the BIPs program is suitable for such an approach."[40]

DOF has not disputed the accuracy of the underlying cost data reported in the surveys, or the methodology by which the survey data were compiled. DOF does not dispute the proposed language describing the reimbursable activities.

DOF submitted comments on the draft staff analysis in which it is argued that "it is premature to adopt any parameters and guidelines for the BIPs program at this time." DOF also disputes staff's recommendation to adopt Option A, approving the RRMs, because DOF believes that Government Code sections 17518.5 and 17557 provide statutory requirements that are not met. The specific arguments raised by DOF are not new, and they are addressed where relevant in the analysis below.

C. SCO Position

SCO opposes the adoption of the RRM also based upon the legal sufficiency of the evidence. SCO opposes the RRM because the rates were based on "1) unaudited cost data; 2) cost data for only a single school year (2006-2007); 3) data from only 12% of SELPA and; 4) to be utilized over an 18 year period."

SCO does not elaborate on the issue of unaudited cost data; and does not further explain its concern with "data from only 12% of SELPA, except to say that "[a]ccording to the Declaration of Diana K. McDonough, both the co-test claimants and the Department of Finance agreed that this was an adequate sampling." But as to SCO's concerns of data for a single school year, and data to be utilized over 18 years of cost claims, SCO cites to section 17518.5(d), which provides:

> In cases when local agencies and school districts are projected to incur costs to implement a mandate over a period of more than one fiscal year, the determination of a reasonable reimbursement methodology may consider local costs and state reimbursements over a period of greater than one fiscal year, but not exceeding 10 years.

SCO argues that the RRM unit rates were "derived from a single fiscal year of cost data and the reimbursement period in question is over 15 years." SCO argues that adjustments based on the Implicit Price Deflator "cannot give an accurate RRM rate for such a long reimbursement period based on a single year of cost data."[41]

---

[40] Exhibit E, DOF Comments, Revised Proposed Parameters and Guidelines, August 9, 2011.

[41] Exhibit C, SCO Comments, Revised Proposed Parameters and Guidelines, January 24, 2011.

SCO has not disputed the accuracy of the underlying cost data reported in the surveys, or the methodology employed. SCO does not dispute the proposed reimbursable activities.

SCO submitted comments on the draft staff analysis, primarily suggesting technical changes, which are incorporated in the attached parameters and guidelines where appropriate, and discussed in the analysis below where necessary.

IV. COMMISSION FINDINGS

The question before the Commission is whether the evidence submitted, which includes voluminous documentation of costs to implement the program in 2006-2007, is sufficient to support adoption of the proposed RRM for costs incurred going back to July 1, 1993, consistent with the substantial evidence standard, and the constitutional and statutory requirements for RRMs and for Commission decisions generally. In addition, issues relating to the proper scope of reimbursable activities and applicable offsetting revenues are discussed further below. However, as a threshold issue, subsequent amendments made to the test claim statute purport to end reimbursement, or to change the Commission's decision on reimbursement, as described in Part (A).

A. The Commission's Decision on Reimbursement is Final, and Legislation Enacted after the Commission's Decision (AB 1610) that Purports to Remove the Implementing Regulations from the Subvention Requirement May Only be Analyzed under a Request for Redetermination Properly Filed Pursuant to the Commission's Governing Statutes and Regulations.

The Commission has exclusive authority to decide mandates issues, and those decisions are final and conclusive, barring judicial review.[42] The Legislature enacted Assembly Bill 1610, which added a number of provisions to Education Code 56523, in an apparent attempt to negate the Commission's decision finding the *BIPs* program reimbursable under article XIII B, section 6 of the California Constitution.[43]

AB 1610 adds the following new provisions to Education Code section 56523:

> (b) This section and the implementing regulations adopted by the board *are declaratory of federal law and deemed necessary to implement the federal*

---

[42] *California School Boards Association v. State* (*CSBA I*) (Cal. Ct. App. 3d Dist. 2009) 171 Cal.App.4th 1183, at pp. 1199-1200.

[43] Exhibit O, Statutes 2010, chapter 724, Legislative Counsel's Digest (AB 1610) ["This bill would specify that [Section 56523] and its implementing regulations are declaratory of federal law and are intended to provide the clarity, definition, and specificity necessary for local educational agencies to comply with the federal Individuals with Disabilities Education Act. The bill would provide that this provision and the implementing state regulations shall not exceed the requirements of federal law, create new or separate state requirements, or result in a level of state service beyond that needed to comply with federal law and regulations. The bill would require local educational agencies to agree to adhere to implementing federal and state regulations as a condition of choosing to receive funding from the federal Individuals with Disabilities Education Act…"].

Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.) and associated federal regulations. This section is intended to provide the clarity, definition, and specificity necessary for local educational agencies to comply with the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.). This section, including the implementing state regulations needed to implement federal law and regulations, *shall not exceed the requirements of federal law, create new or separate state requirements, or result in a level of state service beyond that needed to comply with federal law and regulations*.

(c) *As a condition of receiving funding* from the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.), a local educational agency *shall agree to adhere* to implementing federal regulations and state regulations set forth in this section.

(d) The Superintendent may monitor local educational agency compliance with this section and may take appropriate action, including fiscal repercussions, if either of the following is found:

(1) The local educational agency failed to comply with this section and implementing regulations that govern the provision of special education and related services to individuals with exceptional needs and failed to comply substantially with corrective action orders issued by the department resulting from monitoring findings or complaint investigations.

(2) The local educational agency failed to implement the decision of a due process hearing officer based on noncompliance with this part, the state implementing regulations, provisions of the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.), or the federal implementing regulations, wherein noncompliance resulted in the denial of, or impeded the delivery of, a free appropriate public education for an individual with exceptional needs.

(e) Commencing with the 2010-11 fiscal year, *if any activities authorized pursuant to this section and implementing regulations are found be a state reimbursable mandate* pursuant to Section 6 of Article XIII B of the California Constitution, *state funding provided for purposes of special education* pursuant to Item 6110-161-0001 of Section 2.00 of the annual Budget Act *shall first be used to directly offset any mandated costs*.

(f) Contingent on the adoption of a statute in the 2009-10 Regular Session that adds Section 17570.1 to the Government Code, the Legislature hereby *requests the Department of Finance on or before December 31, 2010, to exercise its authority pursuant to subdivision (c) of Section 17570 of the Government Code and file a request with the Commission on State Mandates for the purpose of seeking the adoption of a new test claim to supersede CSM-4464 based on*

> *subsequent changes in law* that may modify a requirement that the state reimburse a local government for a state mandate [emphasis added].[44,45]

AB 1610 adopts changes in the substantive law underpinning the *BIPs* mandate and directs DOF to seek a redetermination of the BIPs mandate under Government Code section 17570[46] based upon those changes.[47] Specifically, AB 1610 declares that BIPs are federally mandated; and thereby seeks to implicate Government Code section 17556(c) to negate the Commission's finding on state-mandated local costs.[48] AB 1610 also attempts to preclude reimbursement by inserting conditional language into the code section, giving the activities approved the appearance of downstream requirements of receipt of federal funding, which could be non-reimbursable under *Kern*.[49] Additionally, AB 1610 inserts language regarding offsetting revenue, intended to end reimbursement beginning in fiscal year 2010-2011.[50] The language of the enactment, as well as the Legislative Counsel's Digest,[51] indicate that the intention of this statute is to negate the Commission's decision on reimbursement for this program. But the Commission has no jurisdiction to change its prior final decision or to interpret the provisions of AB 1610, absent a request for redetermination pursuant to Government Code section 17570. To date, no request for redetermination has been filed with the Commission.

In *California School Boards Association v. State*, (*CSBA I*) (Cal. Ct. App. 3d Dist. 2009) 171 Cal.App.4th 1183, the court addressed a similar situation, in which a legislative enactment sought to change mandates law and force a reconsideration of a number of decisions relying on the former law. The court in *CSBA I* held that this was a violation of the separation of powers doctrine to force the Commission to change a prior final decision: "the statutory scheme contemplates that the Commission, as a quasi-judicial body, has *the sole and exclusive authority*

---

[44] Exhibit O, Education Code section 56523 (Stats. 2010, ch. 724 § 27 (AB 1610)) [emphasis added].

[45] AB 1610 is being challenged as unconstitutional in *California School Boards Association v. State*, Superior Court, County of Alameda, Case No. RG 11554698 (January 6, 2011).

[46] Exhibit O, Government Code section 17570 (Stats. 2010, ch. 719 (SB 856) [providing for redetermination of a test claim decision based on a subsequent change in law; also challenged in ongoing litigation with California School Boards Association, petitioners].

[47] Exhibit O, Education Code section 56523 (Stats. 2010, ch. 724 § 27 (AB 1610)).

[48] See *San Diego Unified School Dist. v. Commission on State Mandates* (*San Diego Unified*) (2004) 33 Cal.4th 859 [discussion of section 17556(c); no reimbursement for programs implementing federal mandate].

[49] See *Department of Finance v. Commission on State Mandates* (*Kern High School District*) (2003) 30 Cal.4th 727 [no reimbursement for requirements triggered by or downstream of voluntary funded program].

[50] See Government Code sections 17556(e) and 17514 [no costs mandated by the state where increased costs are met with corresponding increase in funding].

[51] Exhibit O, Statutes 2010, chapter 724, (AB 1610) Legislative Counsel's Digest, paragraph 21.

to adjudicate whether a state mandate exists." The court held that "[t]he Commission's *authority to issue a final decision* that solely and exclusively adjudicates a test claim is *limited only by judicial review*," and that "[t]he Legislature's direction to the Commission to reconsider or set aside its final decisions is an unlawful collateral attack on those decisions." The court therefore concluded that, absent a valid statutory scheme allowing reconsideration based on subsequent changes in the law "[a]s a collateral attack, the Legislature's direction to the Commission to set aside or reconsider Commission decisions went beyond the power of the Legislature."[52]

At the time *CSBA I* was heard and decided, redetermination of Commission decisions based on a subsequent change in law was not a part of the Government Code. The *CSBA I* court recognized that "[o]ver time, any particular decision of the Commission may be rendered obsolete by changes in the law and material circumstances that originally justified the Commission's decision." The court held that "logic may dictate that [a Commission decision] must be subject to some procedure for modification after changes in the law or material circumstances," but the court declined to find, as urged, that the "inherent power of a court to modify a continuing injunction to take into account changes in the law and material circumstances" was sufficiently analogous to permit the Commission to initiate a redetermination absent an enabling statute.[53]

In 2010, the Legislature enacted Government Code section 17570 and 17570.1 (SB 856) to allow a party to request that the Commission re-determine and change a prior final test claim decision if there has been a subsequent change in the law. Section 17570 solves the problem identified in *CSBA I*, by providing a proper mechanism for reconsideration of a test claim decision where a subsequent change in law affects the legal framework underpinning a mandate determination. Section 17570 provides, in pertinent part:

> (b) The commission may adopt a new test claim decision to supersede a previously adopted test claim decision only upon a showing that the state's liability for that test claim decision pursuant to subdivision (a) of Section 6 of Article XIII B of the California Constitution has been modified based on a subsequent change in law.
>
> (c) A local agency or school district, statewide association of local agencies or school districts, or the Department of Finance, the Controller, or other affected stated agency may file a request with the commission to adopt a new test claim decision pursuant to this section.[54]

Here, judicial review of the *BIPs* claim was abandoned by DOF, after the settlement between DOF and claimants broke down. The three year statute of limitations to file for administrative mandamus challenging the Commission's decision on this test claim has passed,[55] and the dismissal was issued *with prejudice*. Therefore the Commission's decision is final, and no

---

[52] *CSBA I*, *supra*, at pp. 1199-1200 [internal quotations and citations omitted].

[53] *CSBA I*, *supra*, at p. 1202.

[54] Exhibit O, Government Code section 17570 (Stats. 2010, ch. 719 § 33 (SB 856).

[55] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 169; *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 534.

further judicial review may be had at this time. AB 1610 directs DOF to "exercise its authority pursuant to subdivision (c) of Section 17570 of the Government Code and file a request with the Commission on State Mandates for the purpose of seeking the adoption of a new test claim to supersede CSM-4464."[56] And, as stated above, no request for redetermination has been filed.

Accordingly, the subsequent changes in law made by AB 1610, in an attempt to change the statement of decision approving the *BIPs* test claim, cannot be considered by the Commission until or unless a request for redetermination is properly filed under section 17570. Absent that process, only the offsetting revenue issues raised by AB 1610, as discussed below, may be considered to reduce the amount of reimbursement beginning in fiscal year 2010-2011.[57]

DOF has stated, in comments filed on the draft staff analysis that "we believe that it is premature to adopt any parameters and guidelines for the BIPs program at this time." DOF asserts that "the Administration continues to engage in negotiations with the Legislature and stakeholders on similar statutory changes and will introduce a related proposal as part of the 2013-2014 Governor's Budget on January 10, 2013." DOF cites, for example, AB 1476, which "included provisions that would have significantly altered the underlying statute and regulations pertaining to the BIPs program." AB 1476 was not passed by the Legislature, but DOF asserts "we respectfully urge the Commission to postpone taking any action on the BIPs program until after the 2013-2014 budget bill and accompanying trailer bills are passed by the Legislature and signed by the Governor."[58]

DOF's position is untenable. It is difficult to imagine how adopting parameters and guidelines at this time could be premature. The test claim statute has been in effect since 1993; the test claim statement of decision was adopted in 2000; what followed was nearly seven years of protracted litigation, followed by a settlement agreement that ultimately fell apart due to legislative impasse. DOF points to AB 1476 as evidence that the Administration is attempting to change the underlying statutory requirements relating to the mandate, and DOF suggests that such changes would alter the landscape so much that the parameters and guidelines should wait. AB 1476 sought to direct the Department of Education to repeal the regulations that impose the *BIPs* mandates, but even if AB 1476 had passed, it would only have ended the mandate prospectively; it would have no effect on reimbursement retroactively, as indicated by the above analysis.[59]

There are no guarantees that DOF can offer that the Administration's foray into eliminating the mandate will be successful, nor when such an effort might be complete. Moreover, as discussed, there is no Legislative action short of a settlement with the claimants and eligible claimants (such as the one offered in 2009) that could affect the state's liability under the test claim statute both prospectively and retroactively. Since, at best, legislative action could only end the mandated activities, the most appropriate method of employing the Commission's process would be to

---

[56] Exhibit O, Education Code section 56523(f) (Stats. 2010, ch. 724 § 27 (AB 1610)).

[57] See Government Code section 17557; Code of Regulations, Title 2, section 1183.1(a)(7).

[58] Exhibit M, DOF Comments on Draft Staff Analysis.

[59] See Exhibit O, AB 1476, at p. 19.

proceed with the parameters and guidelines as written, and then request a parameters and guidelines amendment if and when the test claim statute is repealed or amended.[60]

B. The Test Claim Statement of Decision, the Revised Proposed Parameters and Guidelines, and the Comments Filed By the Department of Finance, the State Controller's Office, and the Claimants Were Reviewed and Considered By the Commission as Discussed Below.

1. Period of Reimbursement (Section III. of Proposed Parameters and Guidelines)

The claimants' proposed language in Section III of the proposed parameters and guidelines, found at Exhibit B, that addresses the period of reimbursement for this claim, is incomplete, in part, and misstates the statutory deadline for establishing the period of reimbursement. The period of reimbursement section of the proposed parameters and guidelines is changed to incorporate the current boilerplate language adopted by the Commission.

2. Reimbursable Activities (Section IV. of Proposed Parameters and Guidelines)

The italicized text in this section is drawn from the claimants' revised proposed parameters and guidelines (Exhibit B), and inserted here for purposes of analysis. The bulleted text contains the Commission's analysis of each section of the reimbursable activities.

As described below, the Commission finds that the claimants' proposed reimbursable activities are consistent with the test claim regulations and the Commission's statement of decision on the test claim. Thus, the Commission adopts the reimbursable activities as proposed by the claimant.

The claimant requests reimbursement for the following one-time activities performed by SELPAs:

A. Proposed One-time Activities for SELPAs only

Preparing and Providing SELPA Procedures and Initial Training.

Preparing procedures for the SELPA local plan regarding the systematic use of behavioral intervention, for the training of behavioral intervention case managers and personnel involved with implementing behavioral intervention plans, for special training for emergency interventions, and for identification of approved behavioral emergency procedures.

The requested one-time activities are consistent with the requirements of the test claim regulations and the findings in the statement of decision as follows:

- Section 3052(j) provides for the adoption of SELPA plan requirements, which include systematic use of BIPs, training of behavioral intervention case managers and personnel involved in implementing BIPS, special training in emergency interventions, and identification of approved emergency procedures.

[60] See Government Code section 17557(d)(2)(A) [request to amend parameters and guidelines may be made to "Delete any reimbursable activity that has been repealed by statute or executive order after the adoption of the original or last amended parameters and guidelines."].

- The Commission approved the SELPA plan requirements in the test claim statement of decision as follows:

> Under the test claim legislation's implementing regulations, each SELPA must include procedures in its local plan regarding the systematic use of behavioral interventions.[61] These procedures include training of behavioral intervention case managers, training of personnel involved with implementing behavioral intervention plans, special training for emergency interventions, and identification of approved behavioral emergency procedures.[62] SELPAs must inform all staff members and parents of these procedures whenever a behavioral intervention plan is proposed.[63]
>
> The Commission found that these activities represent a new program or higher level of service because SELPAs were under no obligation to include such information in their local plans before the adoption of the test claim legislation's implementing regulations.[64]

Based on the regulation, as approved, and the above language from the Commission's statement of decision, the claimants' description of the reimbursable activities under the SELPA plan requirements is consistent with the activities approved in the test claim.

The claimant requests reimbursement for the following three ongoing activities for SELPAs:

> *B. Proposed Ongoing Activities for SELPAs*
>
> *1. Training.*
>
> *Providing and obtaining training in behavior analysis, positive behavioral interventions, and behavioral emergency interventions. Time spent by personnel who design and conduct the training and time spent by personnel who receive the training is reimbursable. Such personnel include behavioral intervention case managers and personnel involved with implementing behavioral intervention plans, conducting functional analysis assessments, or implementing emergency interventions.*

SELPA-level training, as proposed, is consistent with the requirements of the test claim regulations and the Commission's statement of decision on the test claim as follows:

- Training is required to be included in the SELPA plan pursuant to subdivision (j) of section 3052. Subdivision (j) provides that the qualification and training of personnel to be designated as behavioral intervention case managers and personnel involved in implementing behavioral intervention plans and using emergency behavioral interventions must be included in the SELPA plan.

---

[61] Code of Regulations, Title 5, section 3052(j).

[62] *Id*. at subdivision (j)(2)(A)-(D).

[63] *Id*. at subdivision (j)(1).

[64] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464, at p. 4.

- Training is required to develop and implement BIPs pursuant to subdivision (a) of section 3052. Subdivision (a) provides that behavioral intervention plans shall only be implemented by, or be under the supervision of, staff with documented training in behavior analysis, including the use of positive behavioral interventions.
- Training at the SELPA level was approved by the Commission in the test claim statement of decision as follows:

> These procedures include training of behavioral intervention case managers, training of personnel involved with implementing behavioral intervention plans, special training for emergency interventions, and identification of approved behavioral emergency procedures…
>
> The Commission found that these activities represent a new program or higher level of service because SELPAs were under no obligation to include such information in their local plans before the adoption of the test claim legislation's implementing regulations.[65]

Based on the regulations, as approved, and the above-cited language from the Commission's statement of decision, the claimants' description of the reimbursable activities regarding on-going SELPA-level training is consistent with the activities required by the regulations and approved in the test claim.

2. Emergency Interventions.

Preparing reports on the number of Behavioral Emergency Reports to the California Department of Education and Advisory committee on Special Education.

Preparing reports on emergency interventions is consistent with the requirements of the test claim regulations and the Commission's statement of decision on the test claim as follows:

- Section 3052 requires that Behavioral Emergency Report data "shall be collected by SELPAs which shall report annually the number of Behavioral Emergency Reports to the [CDE] and the Advisory Committee on Special Education."[66]
- The Commission approved the collection and reporting on Behavioral Emergency Reports at the SELPA-level as follows:

> SELPAs are required to collect data on "Behavioral Emergency Reports" and annually report the number of Reports to the California Department of Education and the Advisory Committee on Special Education.
>
> The Commission found that all activities associated with emergency interventions represent a new program or higher level of service because school districts were under no obligation to develop and implement emergency behavioral intervention

[65] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464, at p. 4.

[66] Code of Regulations, Title 5, section 3052(i)(9).

plans before the adoption of the test claim legislation's implementing regulations.[67]

Based on the regulation, as approved, and the above-cited language from the Commission's statement of decision, the claimants' description of the reimbursable activities regarding emergency interventions is consistent with the activities approved in the test claim.

3. Due Process Hearings.

Preparing for, attending, and documenting and informing appropriate staff concerning the results of any mediation or due process hearing related to functional analysis assessments or the development or implementation of behavioral intervention plans.

The due process hearing activities are consistent with the requirements of the test claim regulations and the Commission's statement of decision on the test claim as follows:

- Due process hearings are provided for in subdivision (m) of section 3052 of the test claim regulations, which make reference to Education Code section 56501 et seq.[68]
- The Commission approved the due process requirements in the test claim statement of decision as follows:

> Before the enactment of the test claim legislation's implementing regulations school districts were under no obligation to develop and implement behavioral intervention plans.
>
> Therefore, the Commission found that any due process procedures associated with the development and implementation of behavioral intervention plans represents a new program or higher level of service.[69]

Based on the regulation, as approved, and the above-cited language from the Commission's statement of decision, the claimants' description of the reimbursable activities regarding due process hearings is consistent with the activities approved in the test claim.

The claimant requests reimbursement for the following seven ongoing activities performed by school districts and county offices of education.

C. Proposed Ongoing Activities for School Districts and County Offices of Education

1. Conducting Functional Analysis Assessments.

Providing notice to and obtaining written consent from parents to conduct functional analysis assessments; conducting functional analysis assessments; preparing written

[67] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464, at p. 8.

[68] Code of Regulations, Title 5, section 3052(m).

[69] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464, pp. 8-9.

reports of assessment results; providing copies of assessment reports to parents and the IEP Team; conducting IEP Team meetings to review assessment results.[70]

The activities associated with conducting functional analysis assessments are consistent with the requirements of the test claim regulations and the Commission's statement of decision on the test claim as follows:

- Conducting functional analysis assessments is provided for in section 3052(b).
    - The section provides that a functional analysis assessment must be conducted by or under the supervision of a person with documented training in behavior analysis with an emphasis on positive behavioral interventions.
    - The subdivision provides that "prior to conducting the assessment, parent notice and consent shall be given and obtained."
    - Paragraph (b)(2) provides for the completion of a written report, a copy of which "shall be provided to the parent."
- Section 3052(c) provides that "[u]pon completion of the functional analysis assessment, an IEP team meeting shall be held to review results and, if necessary, to develop a behavioral intervention plan."[71]
- The Commission approved the functional analysis assessments, described as follows:

> The Commission found that all of the activities associated with functional analysis assessments represent a new program or higher level of service because school districts were under no obligation to perform functional analysis assessments before the adoption of the test claim legislation's implementing regulations.[72]

Based on the regulation, as approved, and the above-cited language from the Commission's statement of decision, the claimants' description of the reimbursable activities regarding functional analysis assessments is consistent with the activities approved in the test claim.

2. <u>Developing and Evaluating Behavioral Intervention Plans.</u>

Participating in IEP Team meetings in which behavioral intervention plans are developed, evaluated, or modified, or in which functional analysis assessment results are reviewed; preparing behavioral intervention plans; and developing contingency plans for altering the procedures or the frequency or duration of the procedures. Providing copies of SELP A procedures on behavioral interventions and behavioral emergency interventions to parents and staff.

---

[70] An IEP is an Individualized Education Program (Ed. Code § 56032 (Stats. 1993, ch. 1296 § 13.1 (AB 369))).

[71] Code of Regulations, Title 5, section 3052(b-c).

[72] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464, p. 5.

The activities associated with developing and evaluating behavioral intervention plans are consistent with the requirements of the test claim regulations and the Commission's statement of decision on the test claim as follows:

- IEP team meetings are provided for in subdivision (a) of section 3052, which provides that an IEP team "shall facilitate and supervise all assessment, intervention, and evaluation activities related to an individual's [BIP]."
- Section 3052(c) provides for the development of BIPs at an IEP team meeting upon completion of a functional analysis assessment.
- Section 3052(f) provides for evaluation of the effectiveness of BIPs, and provides that if the IEP team determines that changes are necessary to increase effectiveness, additional functional analysis assessments are conducted and changes proposed.
- Section 3052(h) provides for contingency BIPs, in which procedures may be altered without reconvening the IEP team.
- Section 3052(j) provides that the SELPA procedures "shall be available to all staff members and parents whenever a behavioral intervention plan is proposed."
- The Commission approved the development and evaluation of BIPs as follows:

> The Commission found that, to the extent these activities are required to implement an individual's behavioral intervention plan, the activities represent a new program or higher level of service because school districts were under no obligation to develop and implement behavioral intervention plans before the adoption of the test claim legislation's implementing regulations.
>
> Once a behavioral intervention plan is implemented, it is evaluated to measure the frequency, duration, and intensity of the targeted behavior identified in the functional analysis assessment. The teacher, the behavioral intervention case manager, parent or care provider, and others, as appropriate, review the evaluation at scheduled intervals determined by the IEP team. If the IEP team determines changes are necessary, the teacher and behavioral intervention case manager conduct additional functional analysis assessments, and based on the outcomes, propose changes to the plan.
>
> The Commission found that these activities represent a new program or higher level of service because school districts were under no obligation to evaluate the effectiveness of behavioral intervention plans or to modify them based on an additional functional analysis assessment before the adoption of the test claim legislation's implementing regulations.[73]

[73] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464, pp. 6-7 [internal footnotes and citations omitted].

Based on the regulation, as approved, and the above-cited language from the Commission's statement of decision, the claimants' description of the reimbursable activities regarding developing and evaluating BIPs is consistent with the activities approved in the test claim.

> *3. Implementing Behavioral Intervention Plans.*
>
> *Implementing and supervising the implementation of behavioral intervention plans; measuring and documenting the frequency, duration, and intensity of targeted behavior and effectiveness of the behavioral intervention plan. Costs of employing personnel with documented training in behavioral analysis including positive behavioral interventions (whether such personnel are new staff or existing staff) to serve as behavioral intervention case managers is reimbursable under this component.*

The activities associated with implementing the behavioral intervention plans are consistent with the requirements of the test claim regulations and the Commission's statement of decision on the test claim as follows:

- Section 3052(a) provides that BIPs "shall only be implementing by, or be under the supervision of, staff with documented training in behavior analysis, including the use of positive behavioral interventions." This section thereby requires BIPs to be implemented, and requires local educational agencies to maintain properly-trained staff to conduct such implementation.
- Section 3052(f) provides for evaluating the effectiveness of BIPs, including measurement and documentation of the frequency, duration, and intensity of targeted behaviors.
- The Commission approved implementing BIPs as described in the previous section.[74]

Based on the regulation, as approved, and the above-cited language from the Commission's statement of decision, the claimants' description of the reimbursable activities regarding implementing BIPs is consistent with the activities approved in the test claim.

> *4. Modifications to Behavioral Intervention Plans.*
>
> *Providing notice to parents or parent representatives of the need to make minor modifications to the behavioral intervention plans, meeting with parents to review existing program evaluation data; and developing minor modifications to behavioral intervention plans with parents or parent representatives.*

The activities associated with modifying the behavioral intervention plans are consistent with the requirements of the test claim regulations and the Commission's statement of decision on the test claim as follows:

- Section 3052(f) provides for changes to be made to BIPs on the basis of evaluations, which would require additional functional analysis assessments, which in turn require parental notice under subdivision (b).

[74] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464, at pp. 6-7.

- Section 3052(g) provides for minor modifications without an IEP team meeting, which can be made by the behavioral intervention case manager and a parent or parent representative.
- Section 3052(g) provides that parents are entitled to notice, and "shall be informed of their right to question any modification to the plan through the IEP procedures."
- The Commission approved modifications to BIPs in the test claim statement of decision, as follows:

> The Commission found that the activities of the behavioral intervention case manager and the IEP team regarding development and modification of behavioral intervention plans represent a new program or higher level of service because school districts were under no obligation to implement behavioral intervention plans before the adoption of the test claim legislation's implementing regulations.[75]

Based on the regulation, as approved, and the above-cited language from the Commission's statement of decision, the claimants' description of the reimbursable activities regarding modifications to BIPs is consistent with the activities approved in the test claim.

5. <u>Emergency Interventions.</u>

Employing emergency interventions; notifying parents and residential care providers after an emergency intervention is used; preparing and maintaining a Behavioral Emergency Report following the use of an emergency intervention; administrative review of Behavioral Emergency Reports; scheduling and conducting an IEP Team meeting to review a Behavioral Emergency Report and the need for a functional analysis assessment, interim behavioral intervention plan, or modification to an existing behavioral intervention plan.

The activities associated with emergency interventions are consistent with the requirements of the test claim regulations and the statement of decision on the test claim as follows:

- Emergency interventions are provided for in section 3052(i).
- The Commission approved activities related to emergency interventions in the test claim statement of decision, as follows:

> The Commission found that all activities associated with emergency interventions represent a new program or higher level of service because school districts were under no obligation to develop and implement emergency behavioral intervention plans before the adoption of the test claim legislation's implementing regulations.[76]

[75] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464, at p. 7.

[76] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464, at pp. 7-8.

Based on the regulation, as approved, and the above-cited language from the Commission's statement of decision, the claimants' description of the reimbursable activities regarding emergency interventions is consistent with the activities approved in the test claim.

> *6. Prohibited Interventions.*
>
> *Training appropriate staff regarding the types of interventions that are prohibited under Title 5, California Code of Regulations section 3052, subdivision (1).*

Training staff regarding the types of interventions that are prohibited is consistent with the requirements of the test claim regulations and the Commission's statement of decision on the test claim as follows:

- Prohibited interventions are addressed in section 3052(l), which provides that no public education agency, or nonpublic school or agency may authorize, order, consent to, or pay for any of the listed interventions, or any interventions similar to or like the listed interventions. The list is non-exhaustive, implying that some ongoing development of prohibited interventions is expected.
- The Commission approved activities related to prohibited interventions in the test claim statement of decision as follows:

  > Interventions that may cause physical harm, deprivation of sleep or food, humiliation or ridicule, or deprivation of one or more senses are prohibited. The use of restrictive devices that limit mobility, locked seclusion, or inadequate supervision is also prohibited.
  >
  > The Commission found that the activity of informing school district personnel of the restrictions represents a new program or higher level of service because school districts were under no obligation to develop and implement behavioral intervention plans before the adoption of the test claim legislation's implementing regulations.[77]

- SCO objected to the claimants' proposed language for prohibited interventions, noting that the "language found in the original SOD" provided for "informing school district personnel of the restrictions." In other words, the test claim statement of decision approved informing school personnel of prohibited interventions, which, as discussed above, is a non-exhaustive list, and SCO argued that "informing" and "training" are not sufficiently similar. On the other hand, "informing" is a fairly vague description of an activity, whereas "training" is more precise, and is supportable based on the test claim statement of decision and the regulations at issue.

Based on the regulation, as approved, and the above-cited language from the Commission's statement of decision, the claimants' description of the reimbursable activities regarding ongoing training related to prohibited interventions is consistent with the activities required by regulation and approved in the test claim.

[77] Exhibit A, Corrected SOD, *Behavioral Intervention Plans*, CSM-4464, at p. 8.

7. Due Process Hearings.

Preparing for, attending, and documenting and informing appropriate staff concerning the results of any mediation or due process hearing related to functional analysis assessments or the development or implementation of behavioral intervention plans.

The activities associated with due process hearings are consistent with the requirements of the test claim regulations and the Commission's statement of decision on the test claim as follows:

- Section 3052(m) provides that the provisions of the BIPs program "related to functional analysis assessments and the development and implementation of [BIPs] are subject to the due process hearing procedures specified in Education Code Section 56501 et seq."
- The Commission approved activities related to due process requirements in the test claim statement of decision, as follows:

> The provisions of the test claim legislation that relate to functional analysis assessments and the development and implementation of behavioral intervention plans are subject to the due process hearing procedures specified in the Education Code. Before the enactment of the test claim legislation's implementing regulations school districts were under no obligation to develop and implement behavioral intervention plans.
>
> Therefore, the Commission found that any due process procedures associated with the development and implementation of behavioral intervention plans represents a new program or higher level of service.[78]

Based on the foregoing discussion, the Commission finds that the reimbursable activities section of the proposed parameters and guidelines is consistent with the regulations approved by the Commission, and the activities approved in the statement of decision. There were no activities alleged in the test claim that were denied in the statement of decision. Moreover, there has been no objection or dispute as to the reimbursable activities raised by DOF or SCO. Accordingly, the Commission adopts the language proposed by the claimants in Section IV of the parameters and guidelines.

3. Claim Preparation (Section V. of Proposed Parameters and Guidelines)

In lieu of filing a reimbursement claim based on detailed documentation of actual costs incurred in a fiscal year, the proposed parameters and guidelines offer three distinct RRMs, calculated by Average Daily Attendance (ADA) of a claimant, multiplied by a unit cost for that claimant's reimbursable activities, developed on the basis of survey data from a sample of eligible claimants. The surveys ask, for each specific activity, how much time was spent at the district/COE level and at the SELPA level, and by what classification of personnel. The surveys then apply an average hourly rate, including base pay and benefits of the personnel assigned to the activities, as calculated and reported by the survey respondents, to estimate the costs of a

[78] Corrected SOD, *Behavioral Intervention Plans*, CSM-4464, at pp. 8-9.

particular activity in the survey year (2006-2007). Those costs are totaled, for each district, and each SELPA, and divided by P2 ADA, as found on the CDE website.[79] The surveys do not inquire as to actual or total costs expended to implement the mandate in each district or COE, except where a district or COE hired outside consultants or specialists to complete the mandated activities who charged certain fees.

Due in part to the many years of litigation involving this test claim, there are not, to the claimants' knowledge, adequate records of cost information with which to make out more exacting estimates going back to 1993, the initial period of reimbursement.[80] But the California Department of Education (CDE) maintains ADA records, and, thus, an RRM based on ADA data is relatively simple to calculate. ADA-based formulae have been used in the past to fund special education generally,[81] and to fund the *Special Education* mandated program (CSM-3986).[82]

The claimants have proposed an RRM, to be considered by the Commission, relying on the same body of evidence collected in the pursuit of the settlement reached between claimants and DOF that was not funded by the Legislature. The claimants have provided the following exhibits in the record to support the proposed parameters and guidelines:

- Declarations from Diana McDonough, Linda Grundhoffer, and Michael Lenahan; Diana McDonough's declaration details the chain of events in this test claim, from the adoption of a statement of decision, to negotiations toward settlement, to the issuance of surveys to collect cost information in collaboration with DOF, to the filing of revised proposed parameters and guidelines; Linda Grundhoffer and Michael Lenahan are consultants with experience as school business officials, and their declarations focus primarily on the methodology of compiling and manipulating the survey data to arrive at an RRM;
- Exhibit 1: Positive Behavioral Intervention Plan/Functional Analysis Assessment Survey: This exhibit contains a copy of all three survey levels sent to the SELPAs; the Behavioral Intervention Case Manager level survey, the District level survey, and the SELPA level survey. These surveys were issued, and the responses collected, between December 2007 and May 2008, and asked for time spent on specific reimbursable activities, by position, in the 2006-2007 school year, and the average hourly rates for those positions;
- Exhibit 2: CSM-4464 Behavioral Intervention Plans Statewide Cost Survey: this exhibit contains compiled results of the surveys, in spreadsheet form, as prepared by claimants. Claimants state that the figures are actual, and that no estimations or

[79] Exhibit B, Positive Behavioral Intervention Plan/Functional Analysis Assessment Survey, Claimants' Exhibit 1.

[80] Exhibit B, Claimants' Revised Proposed Parameters and Guidelines, Cover Letter; Exhibit F, Claimants' Rebuttal to DOF Comments.

[81] See Exhibit O, Statutes 1997, chapter 854 (AB 602) [Education Code section 56836 et seq.].

[82] Exhibit O, Statutes 2001, chapter 203 (SB 982).

guesses were made; in the case that a survey respondent left out some information, efforts were made to obtain the data; and, if unsuccessful, the data were excluded;

- Exhibit 3: Summary Survey of Hughes Bill Costs: this chart summarizes the survey data by SELPA, and includes the SELPA's ADA for the applicable year, the one-time costs, and estimated total costs for the 15 years of the potential reimbursement period, and provides a cost per ADA for each SELPA;
- Exhibit 4: Hughes Bill Survey Data: this exhibit explains the methodology and the statistical significance of the survey respondents as compared with the statewide ADA;
- Exhibit 5: Hughes Bill Survey With Department of Finance and Claimant Discrepancies;
- Exhibit 6: Hughes Bill Survey Reconciling Discrepancies;
- Exhibit 7: Summary – Survey of Hughes Bill Costs With Reimbursement Methodology Calculation: this chart shows the RRM per ADA that the parties calculated based on the survey data;[83]
- Amended Exhibit 2A: Declaration of Diana McDonough; Cover letter to SELPA directors regarding declarations; Cover letter to survey respondents regarding declarations; Blank form declaration provided to survey respondent: these documents detail the process of sending to the original survey respondents and the SELPA directors a form declaration and affidavit, so that the survey respondents may verify their original responses, under oath, in order that the surveys will be treated as credible evidence to support an RRM that the Commission could adopt;
- Amended Exhibit 2B: Original Survey Responses and Declarations: this exhibit pairs the declarations and affidavits from respondents with the original survey responses;
- Amended Exhibit 2C: Declarations of Linda Grundhoffer and Michael Lenahan; and,
- Amended Exhibit 2D: Reconciled spreadsheets summarizing data in survey responses and agreed upon by Finance.[84]

For the followings reasons, the Commission finds that the evidence does not support the adoption of an RRM in this case, consistent with the constitutional and statutory requirements for Commission decisions.

A. The purpose of an RRM is to reimburse local government efficiently and simply, with minimal auditing and documentation required.

1. <u>The reimbursement requirement</u>

[83] Exhibit B, Claimants' Revised Proposed Parameters and Guidelines.

[84] Exhibit J, Claimants' Comments and Amended Exhibit 2.

Article XIII B, section 6 provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government [defined to include school districts], the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service [with exceptions not applicable here]..."

This reimbursement obligation was "enshrined in the Constitution ... to provide local entities with the assurance that state mandates would not place additional burdens on their increasingly limited revenue resources."[85] Section 17561(a) states: "[t]he state *shall* reimburse each local agency and school district for *all* 'costs mandated by the state,' as defined in Section 17514." Government Code section 17514, in turn, defines "costs mandated by the state" as any increased cost incurred as a result of any state statute or executive order that mandates a new program or higher level of service. The courts have interpreted the Constitutional and statutory scheme as requiring "full" payment of the actual costs incurred by a local entity once a mandate is determined by the Commission.[86]

The statutes providing for the adoption of an RRM, along with the other statutes in this part of the Government Code, are intended to implement article XIII B, section 6.[87]

2. Statutory flexibility and constitutional consistency

Statutory authority for the adoption of an RRM was originally enacted in 2004, and was amended in 2007 to promote greater flexibility in adoption of an RRM.[88] In a 2007 report, the Legislative Analyst's Office (LAO) states that an RRM is intended to reduce local and state costs to file, process, and audit claims; and reduce disputes regarding mandate reimbursement claims and State Controller's claim reductions. The report identifies under the heading "Concerns With the Mandate Process," the difficulties under the statutes then-in-effect:

---

[85] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1282; *CSBA v. State of California* (2011) 192 Cal.App.4th 770, 785-786.

[86] Exhibit O, *CSBA v. State of California* (*CSBA II*) (Cal. Ct. App. 4th Dist. 2011) 192 Cal.App.4th 770, 786; *County of Sonoma v. Commission on State Mandates* (Cal. Ct. App. 1st Dist. 2000) 84 Cal.App.4th 1264, 1284. The court in *County of Sonoma* recognized that the goal of article XIII B, section 6 was to prevent the state from forcing extra programs on local government in a manner that negates their careful budgeting of expenditures, and that a forced program is one that results in "increased actual expenditures." The court further noted the statutory mandates process that refers to the reimbursement of "actual costs incurred."

See also, Government Code sections 17522 defining "annual reimbursement claim" to mean a claim for "actual costs incurred in a prior fiscal year; and Government Code section 17560(d)(2) and (3), referring to the Controller's audit to verify the "actual amount of the mandated costs."

[87] Government Code section 17500 et seq.

[88] Government Code section 17518.5 (enacted by Stats. 2004, ch. 890 (AB 2856); amended by Stats. 2007, ch. 329 (AB 1222)).

- Most mandates are not complete programs, but impose increased requirements on ongoing local programs. Measuring the cost to carry out these marginal changes is complex.
- Instead of relying on unit costs or other approximations of local costs, reimbursement methodologies (or "parameters and guidelines") typically require local governments to document their actual costs to carry out each element of the mandate.
- The documentation required makes it difficult for local governments to file claims and leads to disputes with the State Controller's Office.

The LAO's recommendation to address these issues was to:

> Expand the use of unit-based and *other simple claiming methodologies* by clarifying the type of easy-to-administer methodologies that the Legislature envisioned when it enacted this statute…[89]

The LAO's recommendations were implemented in Statutes 2007, chapter 329 (AB 1222). The former section 17518.5 provided that an RRM must "meet the following conditions:"

> (1) The total amount to be reimbursed statewide is equivalent to total estimated local agency and school district costs to implement the mandate in a cost-efficient manner.
>
> (2) For 50 percent or more of eligible local agency and school district claimants, the amount reimbursed is estimated to fully offset their projected costs to implement the mandate in a cost-efficient manner.[90]

The 2007 amendments to section 17518.5 now define an RRM as follows:

> (a) "Reasonable reimbursement methodology" means a formula for reimbursing local agencies and school districts for costs mandated by the state, as defined in Section 17514.
>
> (b) A reasonable reimbursement methodology shall be based on cost information from a representative sample of eligible claimants, information provided by

---

[89] Exhibit O, "State-Local Working Group Proposal to Improve the Mandate Process," Legislative Analyst's Office, June 21, 2007, page 3. See also, Assembly Bill Analysis of AB 2856 (2004), concurrence in Senate Amendments of August 17, 2004; Assembly Bill Analysis of AB 1222 (2007), concurrence in Senate Amendments of September 4, 2007. These bill analyses identify the purpose of the RRM process is to "streamline the documentation and reporting process for mandates."; *Kaufman & Broad Communities, Inc. v. Performance Plastering* (Cal. Ct. App. 3d Dist. 2005) 133 Cal.App.4th 26, at pp. 31-32 [Reports of the Legislative Analyst's Office may properly be considered, as legislative history, to determine the legislative intent of a statute].

[90] Exhibit O, Government Code section 17518.5 (Stats. 2004, ch. 890 § 6 (AB 2856)).

associations of local agencies and school districts, or projections of other local costs.

(c) A reasonable reimbursement methodology shall consider the variation in costs among local agencies and school districts to implement the mandate in a cost efficient manner.

(d) Whenever possible, a reasonable reimbursement methodology shall be based on general allocation formulas, uniform cost allowances, and other approximations of local costs mandated by the state, rather than detailed documentation of actual costs . . . .

(e) A reasonable reimbursement methodology may be developed by any of the following:

(1) The Department of Finance.

(2) The Controller.

(3) An affected state agency.

(4) A claimant.

(5) An interested party.[91]

An RRM diverges from the traditional requirement of supporting a reimbursement claim with detailed documentation of actual costs incurred and, instead, may apply a standard formula or single standard unit cost, based on approximations of local costs mandated by the state. A unit cost based on approximations or other projections may result in some entities receiving more than their actual costs incurred to comply with a mandated program, and some receiving less.

While considering *Voter Identification Procedures*, (03-TC-23) last year, Commission staff requested comments from the parties and interested parties to three claims that were pending on a proposed unit cost RRM,[92] on the following question: "At some point is the range of figures used to develop the unit cost so wide that it violates the constitutional requirement that local agencies be reimbursed for their mandate-related costs?" Only the claimants in the *Behavioral Intervention Plans* (BIPS) claim responded directly to the question, arguing that the initial enactment of the RRM language and the subsequent amendment evidence the Legislature's conclusion that levels of mandate reimbursement may range widely and still be constitutional:

> Since 2007, the current requirements for RRMs are considerably less specific and more flexible than the former requirements. Now, there is no requirement that a minimum percentage of claimants' projected costs be fully offset or that the total amount to be reimbursed statewide covers the total of local estimated costs. Since 2007, Section 17518.5 requires only that RRMs "be based on cost information from a representative sample of eligible claimants, information provided by

[91] Exhibit O, Government Code section 17518.5(b-d) (Stats. 2007, ch. 329 § 1 (AB 1222)).

[92] *Behavioral Intervention Plans* (CSM-4464); *Habitual Truants* (09-PGA-01, 01-PGA-06) (CSM-4487 and CSM-4487A); *Voter Identification Procedures* (03-TC-23).

associations of local agencies and school districts, or other projections of local costs," and that the RRM "consider the variation in costs among local agencies and school districts to implement the mandate in a cost-efficient manner." [Citation omitted.] In other words, the statute expressly contemplates variation and leaves open the possibility for a potentially large degree of variation in the costs offset.[93]

3. Constitutional requirement of reasonable reimbursement

The Commission finds that the 2007 amendment to section 17518.5 provides for more flexibility when adopting a unit cost RRM, as compared with prior law. However, a unit cost must represent a reasonable approximation of the costs incurred by an eligible claimant to implement the state-mandated program, in order to comply with the constitutional requirement that all costs mandated by the state be reimbursed to a local government entity. Although it is argued in the comment above that a "large degree of variation" is constitutional, it may not be in every case. In certain circumstances, a unit cost based on a significant or large variation of costs reported may not reasonably represent the costs incurred by an eligible claimant and, thus, may not comply with the requirements of article XIII B, section 6 of the California Constitution. On the other hand, given the purpose of the RRM, to "[balance] accuracy with simplicity," some degree of variation in costs is implied.

The reimbursement requirement is constitutional, but the Legislature has the power to enact statutes that provide "reasonable" regulation and control of the rights granted under the Constitution.[94] The Commission must presume that the Government Code sections providing for the consideration and adoption of RRMs meet this standard and are constitutionally valid.[95] Section 17557(f) of the Government Code provides that the Commission, in adopting parameters and guidelines "*shall consult* with the Department of Finance, the affected state agency, the Controller, the fiscal and policy committees of the Assembly and Senate, the Legislative Analyst, and the claimants *to consider a reasonable reimbursement methodology that balances accuracy with simplicity*" [emphasis added].[96] Section 17518.5, as amended, provides for a high degree of flexibility in the adoption of an RRM. Therefore, the Commission must presume that an RRM may be adopted on the basis of any reasonable information that constitutes substantial evidence, and that an RRM that "balances accuracy with simplicity" in reimbursement is permissible under the statute, and thus, constitutional, even if individual claimants are not fully or precisely reimbursed in each fiscal year.

The Commission must apply Government Code section 17518.5 in a constitutional manner. If the Commission approves a unit cost that does not comply with the requirements of the

---

[93] Exhibit H, Claimants' Response to Request for Comments on Pending RRMs, December 20, 2011.

[94] Exhibit O, *Chesney v. Byram* (1940) 15 Cal.2d 460, 465.

[95] Exhibit O, *CSBA II, supra*, 192 Cal.App.4th 770, 795; *Porter v. City of Riverside* (1968) 261 Cal.App.2d 832, 837.

[96] Exhibit O, Government Code section 17557 (Stats. 2010, ch. 719 (SB 856) § 32).

applicable code sections and does not represent a reasonable approximation of costs incurred by eligible claimants to comply with the mandated program, then the Commission's decision could be determined unconstitutional as applied to the case and determined invalid by the courts.[97]

B. The only statutory requirements of an RRM are that it considers variations in costs and balances accuracy in reimbursement with simplicity in the claiming process.

Government Code section 17518.5, as amended in 2007, eliminates both the prior rule that 50% of eligible claimants have their costs fully offset, and the rule that the total amount to be reimbursed under an RRM must be equivalent to the total statewide cost estimate. The LAO report upon which the 2007 amendments were largely based noted, under the heading "Concerns with the Mandate Process," that most mandates are not completely new programs in themselves, but higher levels of service of existing programs, and that "[m]easuring the cost to carry out these marginal changes is complex." The LAO also noted a difficulty in that "parameters and guidelines typically require local governments to document their actual costs to carry out each element of the mandate," rather than relying on a unit cost or other approximate reimbursement methodology.[98] Given these "Concerns with the Mandates Process" to which the amendments were addressed, the new statute should be interpreted as imposing less stringent requirements for documentation of costs, and less burdensome measuring of the marginal costs of higher levels of service.[99] In other words, the "requirements" that DOF and SCO read into the amended statute, as discussed below, are not critical to the adoption of an RRM.

Rather than providing rigid requirements or elements to which an RRM proposal for adoption must adhere, the amended statute focuses on the *sources of information for the development of an RRM*, and only requires that the end result "balances accuracy with simplicity."[100] Section 1183.131 of the regulations provides that a proposed RRM "shall include any documentation or *assumption relied upon* to develop the proposed methodology." The Commission's regulations thus further support a view of the RRM statute (section 17518.5) as being focused on the information to be used, rather than any specific degree of precision or accuracy necessary.[101] Implicit, of course, is also the constitutional requirement that the end result must reasonably reimburse claimants for their mandated costs, as required by article XIII B, section 6. For these reasons, and as more fully described below, the Commission disagrees with the arguments raised by DOF and SCO, regarding the existence of statutory requirements or elements in section 17518.5, other than the requirements to balance accuracy with simplicity, and to reasonably reimburse eligible claimants for costs mandated by the state.

---

[97] Exhibit O, *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.

[98] Exhibit O, "State-Local Working Group Proposal to Improve the Mandate Process," Legislative Analyst's Office, June 21, 2007, p. 1.

[99] Exhibit O, *Kaufman & Broad Communities, supra*, 133 Cal.App.4th 26, at pp. 31-32 [LAO reports may be relied upon as evidence of legislative history].

[100] Government Code section 17557.

[101] Exhibit O, Government Code section 17518.5(b-d) (Stats. 2007, ch. 329 § 1 (AB 1222)).

1. There is no statutory requirement that the adopted RRM be based on cost data from a representative sample of eligible claimants, and no minimum sample size required to be representative.

The plain language of the statute demonstrates that detailed, actual cost information is not required to develop an RRM. Section 17518.5 provides that an RRM "shall be based on cost information from a representative sample of eligible claimants, information provided by associations of local agencies and school districts, or *other projections of other local costs*."[102] The statute does not *require* any one of these options; it merely outlines these as *possible sources* for the development of evidence to support an RRM. Neither does the statute provide for a minimum number of claimants to constitute a representative sample.

Both SCO and DOF object to the proposed RRM on the basis of the eligible claimants surveyed. SCO notes that the RRM relies on survey data from 21 of 120 possible SELPA claimants, representing approximately 12% of SELPA in the 2006-2007 year.[103] DOF asserts the same insufficiency, but adds that those 21 SELPA represented only 11.3% of statewide ADA for the 2006-2007 school year. DOF also charges that the survey sample does not include representation from the ten largest SELPAs, "which accounted for over 32% of the total ADA in 2006-2007." And DOF "found that the Southern California region was underrepresented," in that 67% of the survey results came from the northern and central parts of the state, while those regions only represent 21% of ADA. "The Southern California region, on the other hand, accounts for 63% of the state's ADA but contributed just 20% of the survey results." In addition, "Los Angeles County represents 26 percent of the state's total ADA but only makes up 3 percent of the ADA surveyed." DOF concludes, based on the foregoing, that the RRM proposal is not based on cost information from a representative sample of eligible claimants, and therefore DOF urges the Commission to deny the RRM proposal.[104]

Claimants argue that SCO and DOF suggest a requirement of a minimum sample size where none exists. Claimants assert that the 21 SELPAs responding to the survey are representative of small and large SELPAs; single- and multi-district SELPAs; rural, urban, and suburban SELPAs; and are geographically diverse.[105] Claimants address DOF's concerns with substantially the same argument, but add as well that with respect to *Municipal Storm Water and Urban Runoff Discharges* (03-TC-04, 03-TC-20, 03-TC-21) the Commission approved an RRM based on information from only 8.2% of eligible claimants, as opposed to the 12% of eligible claimants who participated in the surveys in this case.[106] Claimants also note that "because substantial staff time was involved to complete the survey and no funding for the effort was available, [claimants] were not in a position to require participation." Claimants were able to find 30 SELPAs who voluntarily agreed to help with the data collection, but only 21 ultimately returned

[102] Exhibit O, Government Code section 17518.5(b) (Stats. 2007, ch. 329 § 1 (AB 1222)).

[103] Exhibit C, SCO Comments Revised Proposed Parameters and Guidelines, January 24, 2011.

[104] Exhibit E, DOF Comments, Revised Proposed Parameters and Guidelines, August 9, 2011.

[105] Exhibit D, Claimants Rebuttal to SCO Comments, February 23, 2011, p. 3.

[106] Exhibit F, Claimants Rebuttal to DOF Comments, October 14, 2011, p. 6.

the surveys within a reasonable time frame.[107] Claimants further note that DOF agreed, during settlement negotiations, that the sample was adequate to develop an estimate of costs upon which to base the settlement. And, during negotiations, "[t]he survey results were reviewed and modified by [DOF] until [DOF] and the [claimants] agreed they were accurate."[108]

The Commission finds that section 17518.5 *does not require* that the adoption of the RRM be based on a representative sample of eligible claimants; "cost information from a representative sample of eligible claimants" is only *one potential source of evidence* upon which to base an RRM, along with "information provided by associations of local agencies and school districts, or *other projections* of local costs."[109] Thus, whether the sample size, or the constitution of the sample, is representative should not be dispositive on the question whether an RRM may be adopted.

DOF argues, in comments submitted in response to the draft staff analysis, that if a representative sample of eligible claimants is not a requirement of the statute, "this significant shortcoming makes it inappropriate for the data to be considered representative of actual costs and thus an inappropriate and unreasonable method of determining a reimbursement methodology." DOF continues to stress that "the survey data are collected from only 21 of 120 SELPAs statewide in 2006-07 and only represents 11.3 percent of total ADA," and that the "sample does not include ten of the largest SELPAs in the state constituting 32 percent of total ADA in 2006-07." DOF asserts that "Southern California is not adequately represented as it constitutes 63 percent of the state's ADA but contributed only 20 percent of the survey results," and that "[b]ased on these shortcomings, the sample suffers from significant bias and the survey results cannot be extrapolated to the entire state and should not be used as an RRM to cover costs incurred going back to 1993 as well as into the future."[110] DOF does not explain exactly why a lack of Southern California representation introduces fatal bias into the results, nor why 11.3 percent of ADA is insufficient. Neither does DOF explain why it is inappropriate to consider the data representative of actual costs simply because a representative sample of eligible claimants is not expressly required by the statute. DOF's comments are substantially the same as were raised prior to the draft staff analysis, and they are adequately treated by the analysis above.

Furthermore, the Commission finds that *claimants have in fact put forward* cost information from a representative sample of claimants. The plain language of the section does not indicate a minimum sample size; a representative sample may be many things, but it will always be a smaller sample than the whole, and should be characteristic of the larger population.[111]

---

[107] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Diana McDonough, December 17, 2010.

[108] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Diana McDonough, December 17, 2010.

[109] Exhibit O, Government Code section 17518.5 (Stats. 2007, ch. 329 (AB 1222) § 1) [emphasis added].

[110] Exhibit M, DOF Comments on Draft Staff Analysis, December 28, 2012, at p. 2.

[111] Exhibit O, See Webster's Third New International Dictionary, "representative," and "sample."

Moreover, section 1183.13 of the Commission's regulations provides that a "representative sample of claimants does not include eligible claimants *that do not respond to surveys or otherwise participate* in submitting cost data."[112] Here, 21 SELPAs completed the surveys, as requested, and the sample contains some larger SELPAs, some smaller, some urban, suburban, and rural. Therefore, the Commission finds that even if a representative sample of claimants *were* held to be a requirement of adopting an RRM, the claimants have submitted cost data from a representative sample, in accordance with the ordinary meanings of "representative" and "sample," and with the definition found in the Commission's regulations.

2. <u>There is no statutory requirement that the RRM be based on detailed, actual cost data, nor audited cost data.</u>

The statute provides that an RRM "[w]henever possible… shall be based on general allocation formulas, uniform cost allowances, and *other approximations of local costs* mandated by the state, *rather than detailed documentation* of actual costs."[113]

Both DOF and SCO opposed the proposed RRM in its comments because the RRM was developed based on unaudited cost data.[114] Claimants rightly point out that no *audited* cost data exists until claims have been filed, which they have not, because the reimbursement methodology is yet to be adopted. The statutes and regulations that provide for RRMs do not require any such level of precision, as noted above, and the practical realities of this case do not present any evidence that such an approach is feasible. The claimants indicate that school districts do not have data going back to 1993 to support the costs incurred during those years. The claimants also stress that "if actual, audited cost data existed, there would be no need for an RRM."[115]

As discussed above, the LAO recommendations that gave rise to the amendments to section 17518.5 were to expand the use of easy-to-administer reimbursement mechanisms. And, as discussed throughout this section, the amended text of section 17518.5 provides for flexibility in the development and adoption of RRMs. The section cannot reasonably be read to require audited cost data to develop an RRM, especially in the case that the RRM is proposed as a part of the first parameters and guidelines after a test claim decision, at which time no audited cost data yet exists. Moreover, the RRM is specifically provided as an alternative to the requirement for detailed documentation of actual costs.

3. <u>There is no statutory requirement that an RRM mitigate or eliminate cost variation among local government claimants.</u>

Section 17518.5(c) provides that an RRM "shall *consider* the variation in costs among local agencies and school districts to implement the mandate in a cost-efficient manner."

---

[112] Code of Regulations, Title 2, section 1183.13 (Register 2008, No. 17).

[113] Exhibit O, Government Code section 17518.5(d) (Stats. 2007, ch. 329 § 1 (AB 1222)).

[114] Exhibit C, SCO Comments, Revised Proposed Parameters and Guidelines, January 24, 2011; Exhibit E, DOF Comments, Revised Proposed Parameters and Guidelines, August 9, 2011.

[115] Exhibit F, Claimants Rebuttal to DOF Comments, October 14, 2011, p. 7.

DOF objects to the proposed RRM on the grounds that it "does not consider variation of costs among school districts to implement the mandate in a cost efficient manner." However, DOF's comments, in actuality, center on the fact that the proposed RRM does not adequately *address* or *eliminate* the variation of costs. DOF charges that the cost for a BIP per ADA in the surveys ranged from $1.31 to $81.91, averaging $10.17 per ADA; and that the cost per BIP ranged from $2,400 to $197,000 and averaged $17,047. DOF also notes that the highest cost reported per ADA is 62 times higher than the lowest, and the highest cost reported per BIP is 82 times higher than the lowest. DOF argues that these variations are too broad to permit adoption of an RRM in this case. DOF points out that if the proposed RRM were applied to the 21 survey respondents only three of the SELPAs would receive reimbursement within 20% of reported costs. The remaining 18 SELPAs would receive reimbursement ranging from 88 percent below to 677 percent above their costs, as reported in the surveys.

DOF concludes that this variation is due in part to the fact that some of the reimbursable activities are not performed in every case, or in every year, and therefore some SELPAs, and districts, would receive, under the proposed RRM, reimbursement for activities not necessary in every case, or not performed in every fiscal year. DOF notes that the number of BIPs reported by SELPAs ranges from 0 to 87, and has no apparent correlation to ADA. DOF argues that an RRM based on ADA is not appropriate, due to the wide range in costs, and the wide range in number of BIPs developed in different SELPAs, as revealed by the surveys. DOF also argues that "[r]eimbursement standards that would allow reimbursement for a school district in excess of that district's actual costs or overall reimbursement in excess of statewide actual costs should not be supported." [116]

Claimants respond to DOF's concerns, arguing first that "the variation should be 'considered' to determine what the 'reasonable' level of reimbursement is – and presumably that reasonable level would be one near the middle." Claimants hold that "a variation is relevant as to the *level* of reimbursement proposed in an RRM, not as to *whether* an RRM is appropriate." [Emphasis in original]. Claimants continue, "[t]here is no language that suggests a variation in costs bars reimbursement."[117]

Claimants also argue that, as a practical matter, reimbursement at a standard level will have normalizing effects:

> The highest spenders will not be reimbursed for their full costs, encouraging cost-efficiency. The lowest spenders will be reimbursed above their minimal costs, still encouraging cost-efficiency by ensuring that the mandate will be reasonably implemented, not under-implemented.

Claimants note that the Legislature did not choose to require the "least costly" implementation, but instead "it chose 'cost-efficient,' to protect against inflated costs while still promoting full program implementation."[118]

---

[116] Exhibit E, DOF Comments, Revised Proposed Parameters and Guidelines, August 9, 2011.

[117] Exhibit F, Claimants' Rebuttal to DOF Comments, Dated October 14, 2011.

[118] *Ibid.*

Furthermore, claimants argue that "focusing on the number of [BIPs] as a measure of a district's activities for this mandate is misplaced." The development of BIPs accounts for only three of the seven activities approved for reimbursement. The other four activities consist of training, development and implementation of emergency interventions, and due process hearings, all of which are ongoing activities regardless of the number of BIPs developed in a SELPA in any given year. Claimants note that the wide variation in the number of BIPs in a single calendar year depends on the students served in that year. And, while costs of development of BIPs within a SELPA may vary widely year to year, total statewide costs will be relatively stable from year to year, meaning that an ADA-based RRM is a "rational and reasonable method" by which to reimburse school districts for fluctuating costs.[119]

Moreover, claimants argue that DOF's view of the variation in costs is taken too simplistically:

> Finance's narrow focus does not acknowledge the actual manner in which the RRM is constructed. Co-Claimants developed a two-pronged RRM for ongoing activities, one primarily for training activities to be distributed by SELPA, the other for ongoing activities, to be distributed by school district or COE. Finance ignored this division when analyzing Co-Claimants' proposed RRM, lumping together these two costs…

Claimants point out that the ongoing SELPA-level activities, which are primarily training and reporting activities, are less varied, because those activities must be performed whether or not any functional analysis assessments, development and implementation of BIPs, or emergency interventions, for example, are required in a given year. By combining the SELPA-level and district/COE-level activities, DOF's charge as to the variability of costs per BIPs per ADA is misleading.

Finally, claimants argue that DOF's "true concern" is that an ADA-based RRM will provide too high reimbursement, not whether such reimbursement levels are accurate. Claimants note that DOF challenges the RRM on the basis of reimbursement in excess of actual costs, and "does not appear to be at all troubled that other claimants would be reimbursed less than actual costs."[120]

In comments submitted in response to the draft staff analysis DOF continues to stress the fact that "[t]he wide range of actual costs as well as the number of BIPs reported by SELPAs will create a reimbursement system in which some SELPAs will receive reimbursement in excess of their costs in a given year and others will not receive full reimbursement for their costs."[121] As cited above, the claimants argue that while costs may not be precisely reimbursed in every year, reimbursement will be reasonably representative of actual costs when viewed over time.

The Commission finds that subdivision (c) of section 17518.5 does not require that an RRM proposal address, mitigate, eliminate, or otherwise equalize variation in costs among local government. The Commission finds that variation is relevant to the development of an RRM in terms of finding an appropriate level of reimbursement, but not necessarily fatal to an RRM

---

[119] *Ibid.*

[120] Exhibit F, Claimants' Rebuttal to DOF Comments, October 14, 2011.

[121] Exhibit M, DOF Comments on Draft Staff Analysis, December 28, 2012, at p. 2.

proposal. The Commission finds that the data submitted, and the proposal based on those data, do "consider the variation," as required, in order to arrive at the unit costs proposed.

4. There is no statutory requirement that the RRM be based on more than one year of cost data, nor any limitation on the retroactive or prospective application of an RRM.

Applying a smaller sample of data to multiple claimants and multiple years is the essence of an RRM. SCO objects to the adoption of an RRM on the ground that the RRM based on this single year of data (2006-2007) would apply to 18 years of reimbursement claims. The claimants rightly point out that there is no legal basis for this objection. Claimants conclude that SCO's objection must be based on section 17518.5(d), which provides:

> In cases when local agencies and school districts are projected to incur costs to implement a mandate over a period of more than one fiscal year, the determination of a reasonable reimbursement methodology may consider local costs and state reimbursements over a period of greater than one fiscal year, but not exceeding 10 years.[122]

The plain language of this subdivision does not proscribe applying an RRM to cost claims for more than 10 years; it only prohibits using more than 10 years of cost data to develop an RRM. SCO's interpretation is unfounded.

Claimants point out that given how long this case has taken to reach the claiming stage, limiting reimbursement under an RRM to only ten years would be unreasonable if applied retroactively. Claimants urge that, at most, the RRM should be limited to ten years prospectively, but claimants assert that SCO fundamentally misinterprets the meaning of subdivision (d), and that no such limitation is indicated.

Claimants also rightly point out that there is no requirement that data span more than one year. SCO suggests that the "snapshot" of a single year's costs is not sufficient to support adoption of the proposed RRM, but section 17518.5(d), as quoted above, provides that where claimants are likely to incur costs over multiple years, "the determination of a reasonable reimbursement methodology *may* consider local costs and state reimbursement over a period of greater than one fiscal year." The section does not *require* that the RRM consider costs over multiple years, but *allows* it.

Indeed the nature of an RRM is to use a small sample of data to develop a formula to be applied to a greater number of claims. This is done either by applying survey data, or applying actual cost claims from a certain year or years, or by applying some other projection or estimation of local costs. Here, the proposed RRM relies on a sample of data from a portion of eligible claimants, for a (then-recent) school year, and seeks to develop a cost formula to be applied going forward. This is exactly what an RRM is meant to be, and to do, based on the statute and the regulations. Thus there is no reason to read into section 17518.5 any express limitation of the scale upon which an RRM can be applied.

[122] Exhibit O, Government Code section 17518.5 (Stats. 2007, ch. 329 (AB 1222) §1).

Furthermore, in the interest of simplicity and efficient resolution of test claims and reimbursement of claimants, it will generally not be in the best interest of the state or the claimants to postpone the adoption of an RRM in order to obtain multiple years' cost information from eligible claimants. Section 17557 directs the Commission to consider an RRM that balances accuracy with simplicity; the goal of simplicity is undermined if the Commission is expected to require investigation and study of cost information spanning multiple years before an RRM can be adopted to begin reimbursement to local government.

Therefore, the Commission finds that there is no language in the governing statutes directing the Commission to use actual costs in adopting an RRM, or requiring that cost data from a span of years be submitted. The Commission finds also that there is no language suggesting that an RRM may only be applied for a certain number of years, either retroactively or prospectively.

5. Conclusion: section 17518.5 provides broad authority with few limitations for the development and adoption of RRMs.

The Commission finds that the only statutory and constitutional requirements for adoption of an RRM are: (1) considering variations in costs and balancing accuracy with simplicity; and (2) reasonable reimbursement of the eligible claimants' costs mandated by the state for the program, in line with article XIII B, section 6. Detailed actual cost information is not required. Neither is cost information from a representative sample of eligible claimants required; nor is audited data from multiple years of cost claims; nor an RRM proposal that addresses or mitigates variation in costs incurred among different districts. An RRM is meant to be based on an *approximation* of local costs, and need not necessarily precisely reimburse every dollar.

C. The Commission is not bound by strict evidence rules but must have substantial evidence in the record to support its decisions.

A. Substantial evidence standard for Commission proceedings

Government Code section 17559 requires that Commission decisions be based on substantial evidence in the record. Section 17559 allows a claimant or the state to petition for a writ of administrative mandamus under section 1094.5 of the Code of Civil Procedure, "to set aside a decision of the commission on the ground that the commission's decision is not supported by substantial evidence."[123]

Code of Civil Procedure section 1094.5, in turn, provides:

> Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. *In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record*.[124]

[123] Government Code section 17559(b) (Stats. 1999, ch. 643 (AB 1679)).

[124] Exhibit O, Code of Civil Procedure section 1094.5 (Stats. 2011, ch. 296 § 41 (AB 1023)).

The latter finding is required for Commission decisions: when reviewing a decision of an administrative body exercising quasi-judicial power, "the reviewing court is limited to the determination of whether or not the decision is supported by substantial evidence and the court may not substitute its view for that of the administrative body, nor reweigh conflicting evidence."[125] Moreover, Government Code section 17559 expressly "requires that the trial court review the decision of the Commission under the substantial evidence standard."[126]

The evidence required to adopt an RRM is necessarily more relaxed than an actual cost reimbursement methodology.[127] However, when the Legislature added section 17518.5 to the Government Code, it did not change the existing requirement in section 17559 that all of the Commission's findings be based on substantial evidence in the record. Statutory enactments must be considered in the context of the entire statutory scheme of which they are a part and be harmonized with the statutory framework as a whole.[128] In 2011, the Commission clarified its regulations to specifically identify the quasi-judicial matters that are subject to these evidentiary rules, including proposed parameters and guidelines and requests to amend parameters and guidelines.[129, 130] Thus, the plain language of the statutory and regulatory mandates scheme requires substantial evidence in the record to support the adoption of an RRM.

---

[125] Exhibit O, *Board of Trustees of the Woodland Union High School District v. Munro* (Cal. Ct. App. 3d Dist. 1958) 163 Cal.App.2d 440, 445.

[126] *City of San Jose v. State* (Cal. Ct. App. 6th Dist. 1996) 45 Cal.App.4th 1802, 1810.

[127] See Government Code 17518.5 [Statute employs terms like "projections;" "approximations"].

[128] Exhibit O, *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 743.

[129] California Code of Regulations, Title 2, section 1187 (Register 2010, No. 44.)

[130] The courts, in recent lawsuits dealing with questions of fact, have determined that the Commission's conclusions were not supported by any evidence in the record and, thus, the Commission's decisions were determined invalid pursuant to Government Code section 17559 and Code of Civil Procedure section 1094.5. (See, *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355 [Peace Officer Procedural Bill of Rights, on the issue of practical compulsion]; *State of California Department of Finance, State Water Resources Control Board, et al. v. Commission on State Mandates and County of San Diego, et al.,* Sacramento County Superior Court, Case No. 34-2010-80000604 [Discharge of Stormwater Runoff, on the issue of whether the permit requirements are considered to fall within the Maximum Extent Practicable standard of federal law]; *State of California Department of Finance, State Water Resources Control Board, and California Regional Water Quality Control Board, Los Angeles Region v. Commission on State Mandates and County of Los Angeles, et al.,* Los Angeles County Superior Court, Case No. BS130730 [Municipal Storm Water and Urban Runoff Discharges, on the issue of whether the permit requirements are considered to fall within the Maximum Extent Practicable standard of federal law]).

B. Evidence rules for Commission proceedings.

The Commission is not required to observe strict evidentiary rules, but its decisions must be reasonable, and grounded in fairness. The courts have interpreted the evidentiary requirement for administrative proceedings as follows:

> While administrative bodies are not expected to observe meticulously all of the rules of evidence applicable to a court trial, common sense and fair play dictate certain basic requirements for the conduct of any hearing at which facts are to be determined. Among these are the following: the evidence must be produced at the hearing by witnesses personally present, or by authenticated documents, maps or photographs; ordinarily, hearsay evidence standing alone can have no weight, and this would apply to hearsay evidence concerning someone else's opinion; furthermore, cross-examination within reasonable limits must be allowed. Telephone calls to one of the officials sitting in the case, statements made in letters and arguments made in petitions should not be considered as evidence.[131]

Section 1187.5(a) of the Commission's regulations provides that when exercising the quasi-judicial functions of the Commission, "[a]ny relevant non-repetitive evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs."[132] This regulation is borrowed from the evidentiary requirements of the Administrative Procedures Act, which contains substantially the same language.[133] Both the Commission's regulations, and the Government Code, provide that hearsay evidence is admissible if it is inherently reliable, but *will not be sufficient in itself* to support a finding unless the evidence would be admissible over objection in a civil case; in other words, unless a hearsay exception applies.[134]

---

[131] Exhibit O, *Desert Turf Club v. Board of Supervisors for Riverside County* (1956) 141 Cal.App.2d 446, 455. The board based its denial of land use permit for race track on testimony, letters and phone calls from members of the public opposing horse racing and betting on moral grounds. The court held that there was no evidence in the record to support the decision. On remand, the court directed the board to "reconsider the petition of appellants as to land use, wholly excluding any consideration as to the alleged immorality of horse racing and betting as authorized by state law, and wholly excluding from such consideration all testimony not received in open hearing, and all statements of alleged fact and arguments in petitions and letters on file, except the bare fact that the petitioners or letter writers approve or oppose the granting of the petition; also wholly excluding each and every instance of hearsay testimony unless supported by properly admissible testimony, it being further required that the attorneys representing any party in interest be granted a reasonable opportunity to examine or cross-examine every new witness produced." *Id*. at p. 456.

[132] Code of Regulations, Title 2, section 1187.5.

[133] Exhibit O, Government Code section 11513.

[134] Code of Regulations, Title 2, section 1187.5; Exhibit O, Government Code section 11513.

Section 1187.5(d) provides for the admission of evidence and exhibits, and questioning of opposing witnesses, and states that "[i]f declarations are to be used in lieu of testimony, the party proposing to use the declarations shall comply with Government Code section 11514." [135] Government Code section 11514, in turn, provides:

> (a) At any time 10 or more days prior to a hearing or a continued hearing, any party may mail or deliver to the opposing party a copy of any affidavit which he proposes to introduce in evidence, together with a notice as provided in subdivision (b). Unless the opposing party, within seven days after such mailing or delivery, mails or delivers to the proponent a request to cross-examine an affiant, his right to cross-examine such affiant is waived and the affidavit, if introduced in evidence, *shall be given the same effect as if the affiant had testified orally*. If an opportunity to cross-examine an affiant is not afforded after request therefor is made as herein provided, the affidavit may be introduced in evidence, but shall be given only the same effect as other hearsay evidence.[136]

Note that the Commission's regulations use the word "declaration," and the Government Code refers to an "affidavit." An affidavit, by definition, if it is to be used before a court, must "be taken before any officer authorized to administer oaths," usually a judge.[137] But under the Code of Civil Procedure, section 2015.5, a declaration made *under penalty of perjury* is given the same force and effect as an affidavit sworn before an authorized officer. Such declaration must be in writing, must be "subscribed by him or her," and must name the date and place of execution.[138]

The competency of witnesses giving testimonial evidence, in general, relies on personal knowledge. Witnesses are generally required to "express themselves at the lowest possible level of abstraction," rather than making conclusions before the trier of fact. Opinion testimony is generally limited, "if a witness is not testifying as an expert," to that which is "[r]ationally based on the perception of the witness" or "[h]elpful to a clear understanding of his testimony."[139] Where a finding of fact can be made "on the basis of common experience, without any special skill or training…the facts themselves must be given in evidence, and the conclusions or inferences must be drawn by the jury and not by the witness." The opinion rule applies equally to evidence submitted by affidavit: a "general expression of an opinion or belief, without the fact on which it is founded, is in no sense legal evidence."[140]

Where a witness is testifying as an expert, opinion testimony is permitted where both:

- The subject is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact," and

---

[135] California Code of Regulations, Title 2, section 1187.5.

[136] Exhibit O, Government Code section 11514(a) (Stats. 1947, ch. 491 § 6) [emphasis supplied].

[137] Exhibit O, Code of Civil Procedure section 2012 (Stats. 1907, ch. 393 § 1).

[138] Exhibit O, Code of Civil Procedure section 2015.5 (Stats. 1980, ch. 889 § 1).

[139] Exhibit O, Evidence Code section 800 (Stats. 1965, ch. 299 § 2).

[140] Exhibit O, California Jurisprudence 3d, Vol. 31A: Evidence, section 613.

- Is based on matter, including the expert's experience or training, "whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates."[141]

Before a court accepts such evidence, however, an expert must be qualified, pursuant to section 720 of the Evidence Code, which provides:

> (a) A person is qualified to testify as an expert if he has special knowledge, skill, expertise, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.
>
> (b) A witness' special knowledge, skill, experience, training, or education may be shown by any otherwise admissible evidence, including his own testimony.[142]

The California Supreme Court has held that an expert witness is qualified "if his peculiar skill, training, or experience enable him to form opinion that would be useful to the jury."[143] And in order to lay the foundation to introduce expert testimony, "[it is] the province of the court to determine, from the examination as to the witness' qualifications, whether he [is] competent to testify as an expert."[144] An expert's testimony is intended to make complicated facts or information more understandable to the fact finder, and in so doing may rely on any information, including that which is not admissible in itself, but may not make legal conclusions.[145]

Therefore, in keeping with the applicable evidentiary standards provided by the statutes and regulations, and in an attempt to harmonize the case law with the clear import of statute and regulation, the following standards emerge:

- Commission decisions must be supported by "substantial evidence" under section 17559, but the conduct of hearings need not adhere to strict evidence rules pursuant to section 1187.5 of the Commission's regulations and Government Code section 11513(c);
- Any relevant non-repetitive evidence *shall* be admitted if it is the sort of evidence on which responsible persons are accustomed to rely;

---

[141] Exhibit O, Evidence Code section 801 (Stats. 1965, ch. 299 § 2).

[142] Exhibit O, Evidence Code section 720 (Stats. 1965, ch. 299 § 2).

[143] Exhibit O, *People v. Davis* (1965) 62 Cal.2d 791, at p. 800.

[144] Exhibit O, *Bossert v. Southern Pacific Co.* (1916) 172 Cal. 504, at p. 506.

[145] Exhibit O, Evidence Code section 805; *WRI Opportunity Loans II LLC v. Cooper* (Cal. Ct. App. 2d Dist. 2007) 154 Cal.App.4th 525, at p. 532, Fn 3 ["Generally, Evidence Code section 805 permits expert testimony on the ultimate issue to be decided by the factfinder. However, this rule does not ... authorize ... an 'expert' to testify to legal conclusions in the guise of expert opinion. Such legal conclusions do not constitute substantial evidence." (internal citations omitted)].

- Hearsay evidence may be used to supplement or explain, although it shall not be sufficient to support a finding unless admissible over objection in civil actions.[146]
- Under section 11514, as referenced in the Commission's regulations, an affidavit or declaration may be "given the same effect as if the affiant had testified orally," if properly noticed and an opportunity to cross-examine the affiant is given.[147]
- Expert testimony, in the form of an affidavit, would be admissible if the Commission finds a witness qualified by special skill or training, and the testimony (here, declaration) is helpful to the Commission.[148]
- Surveys of eligible claimants as a method of gathering cost data are contemplated by the statute and the regulations as a viable form of evidence, but they must be admissible under the Commission's regulations and the evidence rules, as discussed.[149]

C. Claimants' evidence supporting the proposed RRM is admissible

In this case then, the Commission finds that the rules of evidence do not bar the introduction of the surveys as evidence. The surveys are proffered by the claimants to support the adoption of the three RRMs proposed: one for the one-time SELPA-level activities, one for ongoing SELPA-level activities, and one for ongoing district and COE-level activities.[150] The surveys are relevant, and non-repetitive, and therefore shall be admitted under the regulations. The surveys, without more, would be hearsay, and would not alone be sufficient to support a Commission decision. But the surveys are accompanied by declarations under penalty of perjury,[151] and therefore section 11514, where complied with, gives an affidavit, or a declaration, if made in compliance with Code of Civil Procedure section 2015.5, the same effect as oral testimony, which in turn *is sufficient* to support a Commission decision.[152]

In addition, the conclusions and calculations made by the consultants *based on the survey results* qualify as expert testimony. The surveys were compiled by Mr. Lenahan, and Ms. Grundhoffer. Ms. Grundhoffer is a State Trustee for the CDE, and a consultant to the Fiscal Crisis and Management Assistance Team, and before that worked for 10 years as a school business official; Ms. Grundhoffer is qualified as an expert witness, capable of testifying regarding school finance and budget matters, and the regarding cost data with which she worked and the methodology that she used.[153] Mr. Lenahan has a B.S. in Accounting and an M.B.A. in Finance, and is retired after

[146] California Code of Regulations, Title 2, section 1187.5.

[147] Exhibit O, Government Code section 11514(a) (Stats. 1947, ch. 491 § 6).

[148] Exhibit O, Evidence Code sections 720; 801 (Stats. 1965, ch. 299 § 2).

[149] Government Code section 17518.5; Code of Regulations, Title 2, section 1183.13.

[150] Exhibit B, Revised Proposed Parameters and Guidelines, December 17, 2010.

[151] Exhibit J, Claimants' Comments and Amended Exhibit 2, August 15, 2012.

[152] Code of Regulations, section 1187.5; Exhibit O, Government Code section 11514.

[153] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Linda Grundhoffer.

30 years as a school business official; his experience includes calculating and reviewing costs for programs and developing school district budgets on the basis of those calculations. Mr. Lenahan is qualified as an expert to testify regarding school finance, and the study and compiling of cost data, and the methodology that he helped develop.[154] The declarations of Ms. Grundhoffer and Mr. Lenahan are intended to distill the information in the three hundred or more individual survey responses into an accessible set of figures. In this way, Mr. Lenahan and Ms. Grundhoffer constitute expert witnesses, within the meaning of the Evidence Code,[155] and because their conclusions are submitted in the form of declarations under penalty of perjury, they have the same force and effect as oral testimony under Code of Civil Procedure section 2015.5 and Government Code section 11514, as discussed above.

The state has not filed evidence rebutting the hours, hourly rates, or total costs reported in the surveys, or disputing the calculations prepared by the claimants' experts.

D. Adoption of the proposed RRM in this case is not consistent with the Constitutional and statutory requirements of Commission decisions, because the proposed RRM does not reasonably reimburse the actual costs mandated by the state for local educational agencies.

The issue for the Commission is whether substantial evidence supports the adoption of the proposed RRM. The claimants have proposed three RRMs: one for one-time SELPA-level activities; one for ongoing SELPA-level activities; and one for ongoing district-level activities.

The one-time SELPA-level activities include preparing and providing SELPA procedures and initial training for personnel involved in implementing behavioral intervention plans or emergency behavioral interventions. The one-time activities are reimbursed by multiplying the total SELPA ADA for the applicable year in which the activities are performed by the unit rate as adjusted for the applicable year by the implicit price deflator. The unit rate for 2006-2007 is $0.32818.

The ongoing SELPA-level activities include ongoing training in behavior analysis, positive behavior interventions, and emergency interventions; preparing reports for CDE on the number of emergency behavior interventions performed; and satisfying due process hearing requirements regarding functional analysis assessments and the development and implementation of behavioral intervention plans. Those activities are reimbursed by multiplying the total SELPA ADA for each applicable year by the unit rate as adjusted by the implicit price deflator for that year. The unit rate for 2006-2007 is $1.18702.

The ongoing district-level activities include conducting functional analysis assessments; developing, implementing, and evaluating behavioral intervention plans; modifying behavioral intervention plans; performing emergency interventions and completing required documentation; training staff on prohibited interventions, and avoiding the use of prohibited interventions; and satisfying due process hearing requirements related to functional analysis assessments or the development or implementation of behavioral intervention plans. These activities are reimbursed

---

[154] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Michael Lenahan.

[155] Exhibit O, Evidence Code sections 720; 801 (Stats. 1965, ch. 299 § 2).

by multiplying the district's ADA for each applicable year by the unit rate as adjusted by the implicit price deflator for that year. The unit rate for 2006-2007 is $9.45701.

As discussed above, the purpose of an RRM is to reimburse local government efficiently and simply. The statute governing RRMs was amended in 2007 to promote flexibility in the development of an RRM, and the only remaining statutory requirements of an RRM are to *consider variations in costs among eligible claimants* and to *balance accuracy in reimbursement with simplicity in the claiming process*. There is no requirement of a minimum sample size for the data used to develop an RRM, nor a requirement to use actual, detailed cost data at all. There is no requirement that an RRM mitigate or eliminate cost variation among local government claimants, or that cost data from more than one fiscal year be considered.

Here, the proposed RRM *does consider the variation in costs* among school districts to implement the mandate in a cost efficient manner. The proposed RRM *is* developed on the basis of cost information from a representative sample of eligible claimants; a permissible source of information upon which to develop an RRM rate. And the proposed RRM relies on "other approximations" of local costs, to the extent that the survey data submitted provide the number of hours spent and average hourly rates of the personnel assigned, and not the actual costs to comply with the mandate. In this way the proposed RRM *does balance accuracy with simplicity*, as required.

DOF continues to argue, in comments submitted in response to the draft staff analysis, that the proposed RRMs do not "meet the statutory requirements for establishing an RRM contained in [Government Code sections 17557 and 17518.5]."[156] As discussed above, the "requirements" of an RRM are nothing more than considering the variation in costs among eligible claimants (not mitigating or eliminating variation) and balancing accuracy with simplicity. DOF fails to address the issue of the factual sufficiency of the evidence, and whether the substantial evidence standard has been met by claimants. Absent any dispute on point, the claimants' view of the evidence should be accepted, and the RRM should be considered sufficient to meet the statutory requirements as they are understood by the Commission.

However, as discussed above, whether an RRM meets the statutory requirements does not end the inquiry. The statutes must be applied in a constitutional manner, meaning that the decision adopted by the Commission must provide for reasonable reimbursement of eligible claimants' actual costs incurred.

For the reasons below, the Commission finds that the proposed RRMs do not reasonably represent the costs mandated by the state to comply with the *BIPs* program.

The claimants concluded that a survey "would best measure the costs of [BIPs] implementation by seeking information at three levels within each SELPA: the Behavioral Intervention Case Manager (BICM) level, the district level, and the SELPA level." The parties agreed to use only the most recent completed school year, so that the school districts would have "ready access" to the information necessary. The claimants stated that they took all reasonable precautions "to collect the most reliable, non-inflated data." When meeting with DOF, the claimants' estimates and preliminary figures were always adjusted upward, "indicating that whenever there was a

[156] Exhibit M, DOF Comments on Draft Staff Analysis, at p. 1.

question, we took a careful and pessimistic look at the data."[157] The claimants hired consultants, as described above, to compile the results. Those consultants called schools and districts "to obtain the actual information" where there were missing data, and if they were unsuccessful in obtaining the data they ultimately chose not to use any of that SELPA's information.[158] The survey results were then averaged by taking the total SELPA-level costs, and the total district-level costs, and dividing by P2 ADA for 2006-2007.[159] Those average figures are proposed as a unit rate for all other districts and SELPAs, which is claimed to be "reasonable, representative, and cost effective."[160] However, claimants acknowledge that the data ranged widely, from $1.3096 per ADA in Inyo County to $81.9353 in Modoc County. The average value, of approximately $10 per ADA, will not accurately reimburse the actual costs incurred by the vast majority of claimants in any given year. As pointed out by DOF: "only three SELPAs would receive reimbursement [under this RRM] within 20 percent of reported costs."[161]

Furthermore, DOF expresses concern that the RRM based on ADA may reimburse some claimants in excess of their actual costs, and therefore may not be appropriate. A per-ADA approach to reimbursement for the *BIPs* program is consistent with the manner in which special education has been funded in this state since 1997. By statute, all special education funding is now calculated based on the total ADA of the district or districts making up a SELPA; not just on the basis of the special education students being served.[162] Thus, the Legislature has found it reasonable to fund a "free appropriate public education" for special needs students, as required by applicable federal statutes, by way of calculations based on ADA. Similarly, the *Consolidated Special Education Test Claim* (CSM-3986) was provided for by way of a per-ADA funding formula, pursuant to a settlement between the claimants and the DOF.[163]

However, neither of those prior instances of per-ADA funding of special education was developed by the Commission through the mandates process. The Legislature's actions were taken pursuant to political priorities and settlement agreements with school districts, while this RRM, if adopted by the Commission, would have to fulfill a constitutional funding requirement, and reasonably represent the costs mandated by the state for local educational agencies.

There is evidence in the record that the proposed RRM will reimburse some claimants in excess of, and some less than, their actual costs for a given year. There is evidence that some of the ongoing activities will not vary substantially from year to year, and that only the activities tied to services for individual students will vary. And there is evidence that the Legislature chose to make the adoption of RRMs more flexible, and directed that the Commission consider an RRM

---

[157] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Diana McDonough.

[158] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Linda Grundhoffer.

[159] Exhibit B, Revised Proposed Parameters and Guidelines, Declaration of Michael Lenahan.

[160] Exhibit B, Revised Proposed Parameters and Guidelines, Cover Letter.

[161] Exhibit E, DOF Comments on Revised Proposed Parameters and Guidelines.

[162] Exhibit O, Education Code sections 56836.06-56836.155 (Stats. 1997, ch. 854 § 65 (AB 602))

[163] Exhibit O, Statutes 2001, chapter 203 (SB 982).

that balances accuracy with simplicity. There is argument, but no evidence in support, that the proposed reimbursement level will provide incentives for districts to cut costs in some cases, and to more fully implement the program in others. And there is argument, without evidence, that because the number of students served statewide does not vary substantially from year to year, but only within districts and SELPAs, the variability in reimbursement will balance over time.

However, based on the evidence submitted, the Commission cannot find that the proposed RRM provides reasonable reimbursement of the costs mandated by the state to all eligible claimants in the state, as required by article XIII B, section 6 of the California Constitution. The variation in costs is too great for an RRM based on ADA, a relatively stable figure, to be appropriate and constitutionally representative of the actual costs in this case. The record does not provide substantial evidence that local educational agencies will be reasonably reimbursed for their actual costs incurred in a given year, and therefore the RRM cannot be supported.

On the basis of the foregoing discussion, the Commission finds that the proposed RRM is not consistent with the constitutional and statutory requirements applicable to the Commission's decisions, and therefore the proposed RRM is denied.

Accordingly, the parameters and guidelines require eligible claimants to file reimbursement claims based on actual costs incurred in a fiscal year. Actual costs must be traceable to and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts. Each claim will be subject to the audit of the SCO. Claimants have repeatedly stated that school districts generally do not have documentation to support claims for reimbursement going back to July 1, 1993. However, to the extent allowed by the SCO within their auditing authority, certain activities may be reimbursed based on auditing tools such as time studies.[164]

4. Offsetting Revenues and Other Reimbursements (Section VII of Proposed Parameters and Guidelines)

The claimants propose the following language for Section VII. Offsetting Revenues and Reimbursements:

> Any offsetting savings that the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate

[164] It must be conceded however, that historically the SCO has only allowed time studies for task repetitive activities, such as the training requirements. Therefore, a denial of the proposed RRMs may result in no reimbursement being provided for several of the approved activities performed for which there is no source documentation available. However, in making its decisions, the Commission cannot apply article XIII B as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities. (*City of San Jose v. State of California (1996)* 45 Cal.App.4th 1802.)

from any source, including but not limited to, service fees collected, federal funds, and other state funds, shall be identified and deducted from this claim.

The Statement of Decision has not identified any existing general school, COE, or SELPA funding, or special education program funding as an offset to the reimbursable activities.[165]

The proposed language, however, fails to illustrate the complete picture of available special education program funding that might be applied to offset mandated costs in this test claim. As discussed above, the subsequent change in law effected by AB 1610 cannot, of its own force, negate the Commission's findings of law that a program is eligible for reimbursement under article XIII B, section 6 of the California Constitution. However, a subsequent change in law to isolate specified revenues against which the costs of the mandate must be offset can be considered by the Commission when adopting parameters and guidelines.[166,167] The Commission has identified two budget line items containing offsetting revenues that may be applied to reduce the amount to be subvened under the three RRMs, as specified below. The

[165] Exhibit B, Claimants' Revised Proposed Parameters and Guidelines, December 17, 2010.

[166] See, e.g., Government Code section 17557(d)(2), wherein the Legislature has given the Commission authority to amend parameters and guidelines to delete any reimbursable activity that has been repealed, or to update offsetting revenues that apply to the mandated program. AB 1610 requires local educational agencies to apply special education funds to satisfy BIPs costs first, and in that way imposes an offset not identified in the test claim statement of decision.

[167] In a footnote on page 6 of the claimants' comments on the draft staff analysis, claimants challenge the Commission's reliance on section 17557(d)(2), above. Section 17557(d)(2) provides that a request to amend parameters and guidelines may be made to "[u]pdate offsetting revenues and offsetting savings that apply to the mandated program and do not require a new legal finding that there are no costs mandated by the state pursuant to subdivision (e) of section 17556." The claimants' concern is that paragraph (d)(2) relates to an request to amend parameters and guidelines, and that there has been no such request. Claimants' objection would be well-heard but that section 17557(d)(2) is referred to (in footnote) only as an illustration of the continuing jurisdiction of the Commission. It is true that here there is no request to amend parameters and guidelines, but there would be no such request where no parameters and guidelines have yet to be adopted. The section is relied upon only to demonstrate that where no new legal finding is necessary on the issue of whether the BIPs program is eligible for reimbursement under article XIII B, section6, as would require a new test claim filing or a request for redetermination under section 17570, the Commission holds continuing jurisdiction to update offsetting revenue or savings as subsequent changes in law may occur prior to adoption of the parameters and guidelines. It would lead to an absurd result to hold that if a mandate is ended, or funded, between the time a test claim is approved for reimbursement and the time parameters and guidelines are adopted, that the Commission is powerless to take notice of the change in the legal landscape surrounding the test claim. In addition, the Commission's regulations, at section 1183.1, require that the parameters and guidelines identify any offsetting revenues for the program.

claimants, in comments submitted on the draft staff analysis, take issue with the findings. The claimants' concerns will be addressed in the analysis below.

A. Appropriations made in Line Item 6110-161-0001 in the annual Budget Act are potentially offsetting from July 1, 1993 until October 19, 2010, and must be deducted from a reimbursement claim to the extent a district applied these funds to provide for BIPs mandated activities.

Line Item 6110-161-0001 in the annual Budget Act provides state funding for special education at all times relevant to this test claim.[168] Item 6110-161-0001 provided $66 million in 1993, more than doubled to $1.62 billion in 1994, and increased incrementally to more than $3 billion in fiscal year 2012-2013, including $100 million in ongoing annual funding added pursuant to the 2001 settlement of the *Special Education Mandated Costs* claim (CSM 3986).[169] The *BIPs* program, adopted by CDE regulation pursuant to Education Code section 56523, is part of the special education statutes in the Education Code (Chapter 5.5 of Part 30, entitled "Special Education Programs") and it provides special education related services. Therefore the funds available generally for special education constitute *potentially* offsetting revenues against the activities involved in the *BIPs* mandate, to the extent a claimant uses the special education funding for *BIPs* activities. After October 19, 2010, as discussed below, the funds received under that line item constitute *required* offsetting revenues, pursuant to changes effected in AB 1610.

In comments submitted in response to the draft staff analysis, the claimants dispute the identification of Line Item 6110-161-0001 as potentially offsetting revenue. The claimants rely on Government Code section 17556(e) to suggest that local government claimants are eligible for full reimbursement for state-mandated costs unless there are offsetting savings or "*additional revenue that was specifically intended to fund the costs of the state mandate* in an amount sufficient to fund the cost of the state mandate."[170] The claimants argue as well that because the test claim statement of decision found no offsetting savings or additional revenue, to here identify potentially offsetting revenues is inconsistent with the law and with the Commission's prior decision. The claimants assert that the funds identified in the analysis "do not and cannot constitute potentially offsetting revenues against the mandated activities involved in the BIPs test

---

[168] Statutes 1993, chapter 55 (SB 80); Statutes 1994, chapter 139 (SB 2120); Statutes 1995, chapter 303 (AB 903); Statutes 1996, chapter 162 (SB 1393); Statutes 1997, chapter 282 (AB 107); Statutes 1998, chapter 324 (AB 1656); Statutes 1999, chapter 50 (SB 160); Statutes 2000, chapter 52 (AB 1740); Statutes 2001, chapter 106 (SB 739); Statutes 2002, chapter 379 (AB 425); Statutes 2003, chapter 157 (AB 1765); Statutes 2004, chapter 208 (SB 1113); Statutes 2005, chapter 38 (SB 77); Statutes 2006, chapter 47 (AB 1801); Statutes 2007, chapter 171 (SB 77); Statutes 2008, chapter 268 (AB 1781); Statutes 2009, chapter 1, 4th Extraordinary Session (AB 1); Statutes 2010, chapter 712 (SB 870); Statutes 2011, chapter 33 (SB 87); Statutes 2012, chapter 21 (AB 1464).

[169] Statutes 2001, chapter 203 (SB 982).

[170] Exhibit N, Claimants' Comments on Draft Staff Analysis, December 24, 2012, at pp. 1-2. See Government Code section 17556(e) for the origin of the italicized language.

claim because they have never included funds specifically intended for the *BIPs* mandate or provided offsetting savings."[171]

The claimants further argue that the settlement of the *Special Education Mandated Costs* claim (CSM 3986) in 2000-01 demonstrates that no funding was previously available for the mandated activities. In the settlement of that test claim, the state provided a $270 million one-time payment, $100 million in additional annual funding for special education, and $250 million over ten years, in satisfaction of outstanding mandates claims, as follows:

> The funds provided in subdivisions (a) to (e), inclusive, shall be used for the costs of *any state-mandated special education programs* and services established pursuant to Sections 56000 to 56885, inclusive…as those sections read on or before July 1, 2000. These funds shall be considered in full satisfaction of, and are in lieu of, any reimbursable mandate claims relating to special education programs and services, with the exception of the programs and services delineated in subdivision (g).[172]

Subdivision (g), in turn, provides:

> Notwithstanding subdivision (f), the following existing mandate test claim *remains subject to the normal mandate procedure*, including judicial review, if any: behavioral interventions established pursuant to Section 56523 and Sections 3001 and 3052 of Title 5 of the California Code of Regulations.[173]

The claimants cite this legislation as evidence of the state's understanding of the landscape of available funding for *BIPs*. The claimants assert that the fact of the settlement itself "acknowledges the *basic requirement that the State provide an additional subvention of funds specifically intended* to fund state-mandated costs," and that "[t]his addition of funding specifically intended to reimburse certain special education mandated costs evidences the State's belief that there was not existing funding in any of the annual Budget Acts up to the date of the settlement."[174]

The claimants also argue that the Governor's proposed budget for 2012-2013 eliminated the *BIPs* mandated program without providing for any accompanying reduction in funds, that the state (DOF) approved the *BIPs* mandate settlement agreement, and that both of these actions suggest that the state has not provided any funding specifically intended for the *BIPs* mandate, and that therefore no offsetting revenues can be identified. And finally, the claimants argue that "perhaps most telling, the fact that the State proposed adding additional funds to AB 602 on an

---

[171] Exhibit N, Claimants' Comments on Draft Staff Analysis, December 24, 2012, at pp. 2-3.

[172] Education Code section 56836.156 (Stats. 2001, ch. 203 (SB 982)) [subdivision (g), in turn, refers to the BIPs mandate].

[173] *Ibid.*

[174] Exhibit N, Claimants' Comments on Draft Staff Analysis, December 24, 2012, at p. 4.

ongoing basis in the BIP settlement and proposed bill suggests that the State does not even believe that there are any such ongoing offsets."[175]

The claimants also assert, without evidence in support, that "[t]o the extent districts have used existing special education funds to implement the *BIPs* mandate, they either did so to the detriment of other special education programs to avoid encroachment or encroached on general funds to fund other special education programs." Moreover, the claimants demonstrate an essential misunderstanding of the analysis herein, saying:

> To state that districts must deduct "potentially offsetting revenues" when no funds were specifically intended for the BIP mandate and when no other bill provided for offsetting savings such that districts experienced no net costs, contravenes the constitutional requirement that the state provide a subvention of funds to reimburse the increased cost of a state mandate.[176]

The claimants state, on page 3 of the comments, that the offsets identified "do not meet the constitutional and statutory standard of offsetting savings or additional revenue specifically intended to fund the costs of the state mandate in an amount sufficient to fund the costs of the state mandate as delineated above."[177]

The bulk of the claimants' argument rests on a misunderstanding of the distinction between revenues identified at the test claim phase that would prohibit a finding of costs under section 17556, and offsetting or potentially offsetting revenues identified in parameters and guidelines. The "constitutional and statutory standard" that the claimant implies is not supported by the applicable case law and governing statutes. In adopting parameters and guidelines, the Commission is required by Government Code section 17557 to determine the "amount to be subvened" under the Constitution. Specifically, the Commission's regulations require parameters and guidelines to identify offsetting revenues that may apply to the program as follows:

i. Dedicated state and federal funds appropriated for this program

ii. Non-local agency funds dedicated for this program.

iii. Local agency's general purpose funds for this program.

iv. Fee authority to offset partial costs of this program.[178]

These items, required to be identified, are not meant to call into question the Commission's finding that a program is reimbursable, but are only meant to highlight the possible non-local funds that might be called upon to determine the amount to be subvened. This analysis is not inconsistent with the test claim statement of decision because the parameters and guidelines do not require a finding of *additional revenue specifically intended to cover the costs of the*

---

[175] Exhibit N, Claimants' Comments on Draft Staff Analysis, December 24, 2012, at pp. 4-6.

[176] Exhibit N, Claimants' Comments on Draft Staff Analysis, December 24, 2012, at pp. 2-3.

[178] Code of Regulations, Title 2, section 1183.1 (Register 2005, No. 36).

[178] Code of Regulations, Title 2, section 1183.1 (Register 2005, No. 36).

mandate, and in an amount sufficient to cover the costs of the mandate, as required under section 17556(e) to deny the test claim (as suggested by the claimants).[179]

Here, because the parameters and guidelines only identify *potentially* offsetting revenues, the Controller may only reduce a claimant's reimbursement *if the claimant demonstrates, by applying the funds authorized to be used on the program to the mandated activities,* that it was not compelled to rely on local proceeds of taxes to fund the mandate. A reduction in this manner is consistent with Article XIII B, section 6, which requires subvention only when the costs in question can be recovered solely from tax revenues. The Supreme Court has determined that

> [Article XIII B, section 6] was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. [Citations omitted.] Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditures of such revenues. Thus, although its language broadly declares that the "state shall provide a subvention of funds to reimburse … local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered solely from tax revenues.
>
> . . . . As the discussion makes clear, the Constitution requires reimbursement only for those expenses that are recoverable solely from taxes.[180]

Accordingly, in *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, the Supreme Court held that claimant school districts were *not entitled to reimbursement* for costs incurred in complying with notice and agenda requirements for meetings of a school site council, without reaching the issue of whether the underlying funded school site council program was itself mandated, "because the state, in providing program funds to claimants, already has provided funds that may be used to cover the necessary notice and agenda-related expenses." In that case, the court "found nothing to suggest that a school district is precluded from using a portion of the [program] funds obtained from the state for the implementation of the underlying funded program to pay the associated [mandated] costs." In fact, the court found that the program "explicitly authorizes school districts to do so," quoting the statute authorizing the appropriation of program funds to allow school districts to "claim funds appropriated for purposes of this article for expenditures in, but not limited to, reasonable district administrative expenses."[181] The court concluded, therefore, that "we view the state's provision of *program funding as satisfying, in advance, any reimbursement requirement*." (Emphasis added.)

Thus, state program funds appropriated to school districts that *can* be used for a mandated program are required to be identified as potential offsets in the parameters and guidelines. And,

---

[179] Government Code section 17556(e).

[180] *County of Fresno, supra*, 53 Cal.3d at p. 487.

[181] *Kern*, supra, at pp. 747.

in turn, *by applying the identified potentially offsetting revenues to the mandate*, an eligible claimant shows the actual expenditure of funds other than its local tax revenues on the program, thus demonstrating that it is not in need of the protection offered by Article XIII B, section 6, to the extent of the revenues thus applied. When funds other than local proceeds of taxes are thus applied, the Controller may reduce reimbursement accordingly.

The finding that available revenues satisfied the reimbursement requirement in *Kern* rests on a number of variables, which are somewhat less clear on these facts, but the analysis can nevertheless be applied. In *Kern*, the notice and agenda requirements applied to a number of different *funded* programs, and imposed requirements that were administrative in nature *within* the specified programs. Moreover, the court found that the mandated costs were "rather modest."[182] Additionally while the programs upon which the mandated activities were imposed were fully funded, those programs might also be voluntary. And finally, the funding that the court identified, at least for the "Bilingual-Bicultural Education program" was explicitly made available for costs of that nature.[183]

Here, the *BIPs* mandated activities fall within the special education program generally, but impose far more than "modest" administrative costs. Additionally, the provision of special education services is not voluntary, and though it is arguably "fully" funded, there is argument that the mandated activities extend beyond currently available funding: claimants have asserted that the *BIPs* mandated activities have resulted in substantial encroachment upon other special education activities and services. Finally, because the *BIPs* mandated activities are mandated by the state as a part of the provision of special education and related services, there is no reason to conclude that the funding is not applicable to those costs, even though no explicit provision has been made for *BIPs*. The annual Budget Act provides more than $3 billion for "Special Education Programs for Exceptional Children."[184] The *BIPs* mandated activities are a part of providing special education services, authorized under section 56523 and Line Item 6110-161-0001 provides funding for all special education instruction and services in Education Code section 56000 et seq. With the exception of $100 million specifically intended to fund the programs identified in the Special Education Mandated Costs (CSM 3986) settlement, implemented by Statutes 2001,chapter 203 (SB 982), the funds in Line Item 6110-161-0001 are available to offset the costs of the *BIPs* mandated activities. However, absent explicit authorization such as was found in *Kern*, the offset must be considered *potential*, and not *required*. As the foregoing analysis demonstrates, this finding is not inconsistent with the test claim statement of decision.

The claimants also argue, in further demonstration of the fundamental misunderstanding of the proper scope of the "specifically intended" language found in Government Code section 17556, that the "state's actions have been consistent with the notion that it must provide a subvention of

---

[182] In *Kern*, the Commission had already adopted parameters and guidelines with a unit cost for the program, allowing reimbursement at $90 per meeting. (*Kern*, *supra*, at p. 747, fn. 16.)

[183] *Kern*, *supra*, at pp. 746-747.

[184] See, e.g., Statutes 2002, Chapter 379, Line Item 6110-161-0001; Statutes 2012, Chapter 1464, Line Item 6110-161-0001.

funds *specifically intended* to reimburse state mandates – funds over and above existing special education funding." The claimants argue that the state's conduct demonstrates that because no funding was *specifically intended* to reimburse the *BIPs* mandated activities, no funding was available at all, and no offsets should be identified. As is discussed throughout this section, *potentially* offsetting revenues may be found when program funding has been provided and can be used, even when the funding is not *additional revenue specifically intended to reimburse the costs of the mandate*, or is not sufficient to cover all costs of the mandate.

The Commission's findings regarding the existence of potentially offsetting revenues are not tantamount to "stat[ing] that districts must deduct [those revenues]," as suggested by the claimants. The test claim statement of decision did indeed conclude that there was no "additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate" and approved the claim. But it is not inconsistent to consider here whether some other available state revenues might have been applied by an eligible claimant to satisfy, in whole or in part, the costs of the mandate. The Commission therefore finds potentially offsetting revenues within existing state special education funding from Line Item 6110-161-0001, except as provided by Statutes 2001, chapter 203 (SB 982), as specified below.

B. Changes to Education Code section 56523 effected by Statutes 2010, chapter 724 (AB 1610) transform potential offsets to required offsets, beginning in fiscal year 2010-2011.

Beginning in fiscal year 2010-2011, changes effected by AB 1610 (Stats. 2010, ch. 724) to Education Code section 56523 (the test claim statute for *BIPs*) *require* eligible claimants to first use the funds appropriated in Item 6110-161-0001 to offset the costs of the *BIPs* mandate. Section 56523 is amended by AB 1610 to provide, in pertinent part:

> (e) Commencing with the 2010-11 fiscal year, *if any activities authorized pursuant to this section and implementing regulations are found be a state reimbursable mandate* pursuant to Section 6 of Article XIII B of the California Constitution, *state funding provided for purposes of special education* pursuant to Item 6110-161-0001 of Section 2.00 of the annual Budget Act *shall first be used to directly offset any mandated costs.*[185]

AB 1610 is currently being challenged on constitutional grounds in *California School Boards Association v. State,* Superior Court of California, County of Alameda, Case No. RG 11554698 (filed January 6, 2011). The petitioners in that case allege that the changes made to Education Code section 56523 by AB 1610 constitute "a clear attempt to eliminate the state's mandate liability for several Commission-determined mandates."[186] The claimants incorporate the

[185] Exhibit O, Education Code section 56523 (Stats. 2010, ch. 724 § 27 (AB 1610)).

[186] Exhibit O, Memorandum of Points and Authorities, *CSBA v. State,* Superior Court, County of Alameda, Case No. RG 11554698. The petitioners in the current AB 1610 challenge assert that the language of AB 1610 which purports to deem the funds in Line Item 6110-161-0001 as being in satisfaction of the mandated costs is also contrary to the Commission's findings. The petitioners assert that the provision refers to "the appropriation for special education," and that

constitutional arguments of the CSBA petitioners by reference in comments submitted in response to the draft staff analysis.[187]

However, the Commission, like any other quasi-judicial body, "must presume the Legislature acts consistent with the Constitution when enacting legislation."[188] Line Item 6110-161-0001, pursuant to Education Code section 56523, as amended in 2010, provides state funding for special education programs, of which *BIPs* is a part, that must be applied to the *BIPs* program first, beginning in fiscal year 2010-2011.

In comments submitted in response to the draft staff analysis, the claimants focus largely on whether funding for the *BIPs* mandate was specifically intended to cover the costs of the mandate, as discussed above. Here, AB 1610 represents the state's expression of such intent from fiscal year 2010-2011 forward. However, the claimants have also urged that no "new or additional revenue" was provided: "AB 1610 does not include 'additional revenue' 'specifically intended' for the BIP mandate." The claimants continue: "[i]nstead, it offers the 'same' revenue which is simply 'deemed' to satisfy the state's obligation to reimburse the BIP mandate"

It is true that no new or additional revenue was appropriated. But, as discussed above, the distinction must be drawn between offsetting revenue under section 17556(e) and offsetting revenue identified for parameters and guidelines. The language cited by the claimants above regarding "additional revenue" "specifically intended" to fund the mandate, is drawn directly from section 17556, which addresses findings to be made in the test claim statement of decision to determine whether a test claim can be approved and is eligible for reimbursement. As noted above, section 1183.1 of the Commission's regulations requires the parameters and guidelines to include not only dedicated state and non-local agency funds.[189]

Moreover, as discussed above, a local government claimant only warrants the protection of article XIII B, section 6 for its expenditure of local "proceeds of taxes."[190] Where the funding at issue is given by the state in the first instance, the Commission must assume that the Legislature acts consistently with the Constitution if the Legislature designates a portion of those non-local funds to cover the costs of a mandated program or activity. Additionally, as in *Kern*, "the costs necessarily incurred in complying with [mandated program requirements] under that funded program do not entitle claimants to obtain reimbursement under article XIII B, section 6, because the state, in providing program funds to claimants, already has provided funds that may be used to cover the necessary…expenses."[191]

"no new money is provided; existing funding is simply 'deemed' to satisfy the obligation to reimburse for the costs of this program."

[187] Exhibit N, Claimants' Comments on Draft Staff Analysis, December 24, 2012, at pp. 7-8.

[188] Exhibit O, *CSBA II*, *supra*, 192 Cal.App.4th at p. 795.

[189] Code of Regulations, Title 2, section 1183.1

[190] *County of Fresno*, *supra*, at p. 487.

[192] Exhibit O, *California Teachers Ass'n v. Hayes* (Cal. Ct. App. 3d Dist. 1992) 5 Cal.App.4th 1513, at p. 1533.

Furthermore, there is precedent to support the Legislature's power to direct local educational agencies with respect to how funds are expended, which is essentially the result reached by AB 1610. In *California Teachers Association v. Hayes*, the court stated:

> Since Proposition 98 did not alter the state's role in education, the Constitution continues to make education and the operation of the public schools a matter of statewide rather than local or municipal concern. Local school districts remain agencies of the state rather than independent, autonomous political bodies. The Legislature's control over the public education system is still plenary. The Legislature still has ultimate and nondelegable responsibility for education in this state. All school properties are still held in trust with the state as the beneficial owner. And school districts still do not have a proprietary interest in moneys which are apportioned to them. Of course, if the electorate chose to alter our constitutional scheme for education it could do so. Education could be made a matter of local concern and school districts could be given greater autonomy. But we cannot conclude that such a major governmental restructuring was accomplished by implication in a measure dealing with public finance which spoke not at all on such matters.[192]

AB 1610, as quoted above, provides direction to local educational agencies, in accordance with the Legislature's plenary control over schools and school districts, to use certain funds first, beginning in the 2010-2011 fiscal year. As such, those funds, as specified, must be included in the parameters and guidelines as "dedicated state funds."[193]

The available funding is reduced, however, for fiscal years 2011-2012 and 2012-2013, by AB 114. AB 114, enacted in 2011, provides that:

> [F]unding provided in provisions 18 and 26 of Item 6110-161-0001 and provision 9 of Item 6110-161-0890 of Section 2.00 of the Budget Act of 2011 for educationally related mental health services, including out-of-home residential services for emotionally disturbed pupils, required by the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.) shall be exclusively available for these services only for the 2011-2012 and 2012-2013 fiscal years.[194]

Provisions 18 and 26 of Item 6110-161-0001 in the 2011 Budget Act provide $31 million and $218,786,000, respectively, in state funding for educationally related mental health services.[195] These funds are earmarked, pursuant to AB 114, to be available only for the care of emotionally disturbed pupils, and therefore not available, for the two fiscal years, as provided, for the *BIPs* program. In Item 6110-161-0001 of the 2012 Budget Act the funds are set aside, in accordance with AB 114, as follows:

---

[192] Exhibit O, *California Teachers Ass'n v. Hayes* (Cal. Ct. App. 3d Dist. 1992) 5 Cal.App.4th 1513, at p. 1533.

[193] Code of Regulations, Title 2, section 1183.1

[194] Statutes 2011, chapter 43, section 54 (AB 114).

[195] Statutes 2011, chapter 33 (SB 87).

22. Of the amount specified in Schedule (1), $348,189,000 shall be available only to provide educationally related mental health services, including out-of-home residential services for emotionally disturbed pupils, required by an individualized education program pursuant to the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.) and as described in Section 56363 of the Education Code. The Superintendent of Public Instruction shall allocate these funds to special education local plan areas in the 2012–13 fiscal year based upon an equal rate per pupil using the methodology specified in Section 56836.07 of the Education Code.

Based on the foregoing, the parameters and guidelines identify the following offsetting revenue:

- Except as provided by Statutes 2001, chapter 203 (SB 982)[196], Item 6110-161-0001 of Section 2.00 of the annual Budget Act provides state funding for special education that is potentially offsetting from July 1, 1993 (the beginning of the period of reimbursement) until June 30, 2010. To the extent an eligible claimant applies these potentially offsetting revenues to the approved mandated activities during this time period, those funds shall be identified and deducted from the reimbursement claims.
- Commencing with the 2010-11 fiscal year, and except as provided by Statutes 2001, chapter 203 (SB 982), and Statutes 2011, chapter 43, section 54 (AB 114) for fiscal years 2011-2012 and 2012-2013,[197] state funding provided for purposes of special education pursuant to Item 6110-161-0001 of Section 2.00 of the annual Budget Act shall first be used to directly offset any mandated costs in this program. Except as provided in Statutes 2001, chapter 203 and Statutes 2011, chapter 43, funds received by an eligible claimant from this appropriation shall be identified and deducted from the reimbursement claims, beginning in the 2010-2011 fiscal year.

C. The federal Individuals with Disabilities Education Act (IDEA) funding appropriated in Item 6110-161-0890 for special education is potentially offsetting revenue against the mandated activities, and must be deducted from

[196] SB 982 provided for $100 million in augmentation of Line Item 6110-161-0001, beginning in 2001, and continuing in the annual budget acts, to provide for the *Special Education Mandated Costs* test claim (CSM 3986). That funding is intended exclusively, and by express priority, to fund the costs of the specified mandated programs identified in Education Code 56836.156, and therefore cannot be identified as potentially offsetting revenue for this mandate.

[197] AB 114 earmarked a portion of funds appropriated in Item 6110-161-0001 and Item 6110-161-0890 for educationally related mental health services, including out-of-home residential services for emotionally disturbed pupils, required by the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.) to be exclusively available for these mental health services only for the 2011-2012 and 2012-2013 fiscal years. Thus, the funds identified in AB 114 cannot be used for purposes of the *BIPs* mandate in fiscal years 2011-2012 and 2012-2013.

the claim to the extent a district used these funds to provide for BIPs mandated activities.

Item 6110-161-0890 in the annual Budget Act provides federal funding for special education, distributed by CDE.[198] This funding is meant to provide assistance to the states to provide special education and related services to students, as provided by applicable law. The provision of special education and related services is federally mandated under IDEA, but the act "leaves primary responsibility for implementation to the states." Thus, "[t]o the extent the state implemented the act by freely choosing to impose new programs or higher levels of service upon local school districts, the costs of such programs of higher levels of service are state-mandated and subject to subvention."[199]

The Commission found in the test claim statement of decision that the program at issue in these parameters and guidelines is a new program or higher level of service, beyond that required under IDEA.[200] However, the federal IDEA funds are allocated to the states for special education and related services, and the *BIPs* activities fall within the ambit of related services. Therefore, consistent with the reasoning applied above to state special education funds, to the extent that an eligible claimant chooses to apply the identified revenues to the mandated activities, reimbursement may be reduced accordingly.

The claimants object to the identification of federal IDEA funds as a potential offset, in comments submitted in response to the draft staff analysis. The claimants cite Education Code section 56844, which contains substantially the same language as Title 20 of the United States Code, section 1412; both of which address the permissible uses of federal special education funding. Education Code section 56844 provides, in pertinent part:

> In complying with paragraph (17), regarding the prohibition against supplantation of federal funds, and paragraph (18), regarding maintenance of state financial support for special education and related services, of subsection (a) of Section 1412 of Title 20 of the United States Code, the *state may not use funds paid to it* under Part B of the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.) *to satisfy state-mandated funding obligations to local*

---

[198] Statutes 1993, chapter 55 (SB 80); Statutes 1994, chapter 139 (SB 2120); Statutes 1995, chapter 303 (AB 903); Statutes 1996, chapter 162 (SB 1393); Statutes 1997, chapter 282 (AB 107); Statutes 1998, chapter 324 (AB 1656); Statutes 1999, chapter 50 (SB 160); Statutes 2000, chapter 52 (AB 1740); Statutes 2001, chapter 106 (SB 739); Statutes 2002, chapter 379 (AB 425); Statutes 2003, chapter 157 (AB 1765); Statutes 2004, chapter 208 (SB 1113); Statutes 2005, chapter 38 (SB 77); Statutes 2006, chapter 47 (AB 1801); Statutes 2007, chapter 171 (SB 77); Statutes 2008, chapter 268 (AB 1781); Statutes 2009, chapter 1, 4th Extraordinary Session (AB 1); Statutes 2010, chapter 712 (SB 870); Statutes 2011, chapter 33 (SB 87); Statutes 2012, chapter 21 (AB 1464).

[199] *Hayes v. Commission on State Mandates* (Cal. Ct. App. 3d Dist. 1992) 11 Cal.App.4th 1564, 1594.

[200] See Exhibit A, Corrected Statement of Decision, Behavioral Intervention Plans.

> *educational agencies*, including funding based on pupil attendance or enrollment, or on inflation.[201]

Title 20, United States Code, section 1412 provides similarly:

> (20) Rule of construction
> In complying with paragraphs (17) and (18), *a State may not use funds paid to it under this subchapter to satisfy State-law mandated funding obligations to local educational agencies*, including funding based on student attendance or enrollment, or inflation.[202]

Notwithstanding the apparent prohibition against the state's use of federal IDEA funds "to satisfy state-mandated funding obligations to local educational agencies," neither the state statute, nor the federal statute, touches on how a local educational agency may direct funds received under IDEA. Moreover, while in some contexts it may be ambiguous whether a federal statute referring to "the State" means to include by implication the local government subdivisions within the state, in section 1401 of Title 20 separate definitions are provided for "State" and "local educational agency," and in section 1412 the prohibition is directed to the state; no suggestion is made that the terms might be inclusive of one another or used interchangeably.

The claimants argue that the identification of Item 6110-161-0890 in the annual Budget Act as a potential offset "is in violation of state law which forbids federal funds provided to districts for special education purposes from being used for state mandates." But the claimants overreach in this interpretation of the law on point; the section upon which the claimants rely forbids the *state* from using IDEA funds for state-mandated activities; it does not prohibit the local educational agencies from applying the federal funds to mandated programs. In this way it would be fair to argue that federal IDEA funds could never be treated as a *required* offset, because the state could not, without running afoul of the federal provision, *compel* local educational agencies to apply federal funds in this way. It would also be reasonable to conclude that the Controller could not apply a *mandatory* reduction in reimbursement based on federal IDEA funds whether or not eligible claimants chose to apply the funds to the BIPs mandate. But neither of those is the situation on these facts.

In further support of this interpretation is the LAO's report recommending the changes that would become Education Code 56844, on which the claimants rely. The LAO states that "Congress reauthorized the federal special education law in 2004." A newly added provision of that law "prohibits states from using federal funds to pay for 'state-law mandated funding obligations *to local educational agencies*.'" The LAO interprets this prohibition as intended "to prohibit states from using federal funds to supplant state funds for normal budget increases such as growth and COLA." Therefore the LAO recommends that the Legislature adopt a plan to provide for growth and cost of living adjustments for the state's share of special education

---

[201] Education Code section 56844 (Stats. 2005, ch. 653 (AB 1662)). See also 20 United States Code section 1412(a)(20) (Pub. L. 108-446, Title I, § 101, Dec. 3, 2004, 118 Stat. 2676).

[202] 20 United States Code section 1412(a)(20) (Pub. L. 108-446, Title I, § 101, Dec. 3, 2004, 118 Stat. 2676).

funding, rather than allowing the federal funding to cover these costs for both the state and federal shares of special education funding. No mention is made of limiting the manner in which local educational agencies can apply the federal funds received.[203]

Furthermore, while claimants rely on Education Code section 56844 and Title 20, section 1412 of the United States Code, section 1411 of Title 20 is overlooked. Section 1411 provides that

> The Secretary shall make grants to States, outlying areas, and freely associated States, and provide funds to the Secretary of the Interior, to assist them to provide special education and related services to children with disabilities in accordance with this subchapter.[204]

Section 1411 goes on to provide that states are authorized to reserve some portion of funding received under IDEA "[t]o assist local educational agencies in providing positive behavioral interventions and supports and appropriate mental health services for children with disabilities."[205]

As is shown by the foregoing analysis, the claimants' reliance on section 56844 is misplaced. The code section does not, as the claimants suggest, prohibit the use of federal IDEA funds toward *BIPs* activities conducted by the local educational agencies. Instead, the more reasonable view is that both the state and federal statutes on point prohibit the state from *compelling* the use of federal IDEA funds to cover the costs of *BIPs* and other mandated activities. In this context, then, the Commission finds that the federal funds are a potential offset, but could never be compelled by the state to be applied as an actual offset, as is directed by AB 1610 with reference to the state special education funds. Therefore, the federal funds are only *potentially* offsetting as against the *BIPs* mandated activities, and not required offsets as discussed above. Only if eligible claimants are shown to have applied these funds to the mandated activities would their reimbursement claims be correspondingly reduced.

AB 114, as discussed above, limits the amount of funding available for potentially offsetting revenue with respect to the IDEA funds as well as state special education funds. AB 114 requires certain specified funds in Line Item 6110-161-0890 of the annual Budget Act to be applied exclusively, for two fiscal years, to the provision of out-of-home services to emotionally disturbed pupils. Provision 9 of Item 6110-161-0890 of the 2011 Budget Act provides $69 million in federal funding for educationally related mental health services.[206] And in Item 6110-161-0890 of the 2012 Budget Act the funds are set aside, in accordance with AB 114, as follows:

> 7.5. Of the funds appropriated in Schedule (4), $51,750,000 shall be available only for the purpose of providing educationally related mental health services,

---

[203] Exhibit O, LAO Report on K-12 Education, February 25, 2005, at pp. 71-74.

[204] United States Code, title 20, section 1411(a)(1) (Pub. L. 91-230; Pub. L. 108-446, 118 Stat. 2662).

[205] United States Code, title 20, section 1411(e)(2)(C) (Pub. L. 91-230; Pub. L. 108-446, 118 Stat. 2662).

[206] Statutes 2011, chapter 33 (SB 87).

including out-of-home residential services for emotionally disturbed pupils, required by an individualized education program pursuant to the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.) and as described in Section 56363 of the Education Code.[207]

AB 114 requires that these provisions be used exclusively for services to emotionally disturbed pupils for the 2011-2012 and 2012-2013 fiscal years. Therefore, for the 2011-2012 and 2012-2013 fiscal years, the revenues that are considered potentially offsetting must exclude the funds described above.

Accordingly, the parameters and guidelines contain the following source of offsetting revenue:

- Except as provided by Statutes 2011, chapter 43, section 54 (AB 114) for fiscal years 2011-2012 and 2012-2013, Item 6110-161-0890 of Section 2.00 of the annual Budget Act, which provides for state pass-through allocation of federal funding for special education, constitutes potentially offsetting revenue beginning July 1, 1993 (the beginning of the period of reimbursement). To the extent an eligible claimant applies this potentially offsetting revenue to the approved mandated activities, those funds shall be identified and deducted from the reimbursement claims.

The parameters and guidelines reflect these changes, and incorporate the current boilerplate language approved by the Commission.

5. State Controller's Claiming Instructions (section VIII. of Proposed Parameters and Guidelines)

Prior to 2012, existing law required the State Controller to issue claiming instructions for each reimbursable mandate no later than 60 days after receiving the adopted parameters and guidelines from the Commission. In 2011, SB 112 (Statutes 2011, chapter 144) revised this statute to require the State Controller to issue the claiming instructions within 90 days of receiving the parameters and guidelines. Due to the change in statute, the Commission updated this section to reflect this new 90-day requirement.

V. CONCLUSION

For the foregoing reasons, the Commission hereby denies the proposed reasonable reimbursement methodologies, and instead approves the attached parameters and guidelines, which require reimbursement claims be filed based on actual costs incurred.

[207] Statutes 2012, chapters 21/29 (AB 1464).

OPTION A

PROPOSED PARAMETERS AND GUIDELINES

California Code of Regulations, Title 5, Sections 3001 and 3052

Register 93, No. 17; Register 96, No. 8; Register 96, No. 32

Behavioral Intervention Plans
CSM-4464

I. Summary of the Mandate

On September 28, 2000, the Commission on State Mandates (Commission) adopted its statement of decision finding that regulations in Title 5, California Code of Regulations, sections 3001 and 3052, which implement Education Code section 56523, impose a reimbursable state-mandated new program on school districts and special education local plan areas (SELPAs) within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The Commission approved this test claim for the following categories of reimbursable activities:

- SELPA plan requirements. (Cal. Code of Regs., tit. 5, §§ 3001 and 3052, subd. (j).)
- Development and implementation of behavioral intervention plans (BIPs). (Cal. Code of Regs., tit. 5, §§ 3001 and 3052, subds. (a), (c), (d), (e), and (f).)
- Functional analysis assessments. (Cal. Code of Regs., tit. 5, §§ 3001 and 3052, subds. (b), (c), and (f).)
- Modifications and contingent BIPs. (Cal. Code of Regs., tit. 5, § 3052, subds. (g) and (h).)
- Development and implementation of emergency interventions. (Cal. Code of Regs., tit. 5,§§ 3001 and 3052, subd. (i).)
- Prohibited behavioral interventions. (Cal. Code of Regs., tit. 5, §§ 3001 and 3052, subd. (l).)
- Due process hearings. (Cal. Code of Regs., tit. 5, § 3052, subd. (m).)

II. Eligible Claimants

School districts and county offices of education (COEs), as defined in Government Code section 17519, are eligible to claim reimbursement where specified below. SELPAs, whose sole constituents are school districts and COEs, are also eligible as specified below. Community colleges and charter schools are not eligible to claim reimbursement.

III. Period of Reimbursement

Government Code section 17557(e) states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. The claimants filed the test claim on September 28, 1994, establishing eligibility for reimbursement on or after July 1, 1993. Therefore, costs incurred pursuant to Code of Regulations, Title 5, sections 3001 and 3052, on or after July 1, 1993, are eligible for reimbursement under these parameters and guidelines.

Reimbursement for state-mandated costs may be claimed as follows:

- Reimbursement based on the unit cost reasonable reimbursement methodologies (RRMs) provided for in these parameters and guidelines, shall be included in each claim.
- Pursuant to Government Code section 17561(d)(1)(A), all claims for reimbursement of initial fiscal year costs shall be submitted to the State Controller within 120 days of the issuance date for the claiming instructions.
- Pursuant to Government Code section 17560(a), a claimant may, by February 15 following the fiscal year in which costs were incurred, file an annual reimbursement claim for that fiscal year based on the RRMs.
- If revised claiming instructions are issued by the State Controller pursuant to Government Code section 17558(c), between November 15 and February 15, a claimant filing an annual reimbursement claim shall have 120 days following the issuance date of the revised claiming instructions to file a claim. (Government Code section 17560(b).)
- If the total costs for a given fiscal year do not exceed $1,000, no reimbursement shall be allowed except as otherwise allowed by Government Code section 17564(a).
- There shall be no reimbursement for any period in which the Legislature has suspended the operation of a mandate pursuant to state law.

IV. Reimbursable Activities

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

For each eligible claimant that incurs increased costs, the following activities are reimbursable:

A. <u>One-Time Activities - SELPA Only.</u>

The direct and indirect costs of labor, materials and supplies, contracted services, equipment and other capital assets, travel, and training incurred for the following mandate components are eligible for reimbursement on a one-time basis:

1. Preparing and Providing SELPA Procedures and Initial Training.

   Preparing procedures for the SELPA local plan regarding the systematic use of behavioral intervention, for the training of behavioral intervention case managers and personnel involved with implementing behavioral intervention plans, for special training for emergency interventions, and for identification of approved behavioral emergency procedures.

B. <u>On-Going Activities - SELPA Only.</u>

The direct and indirect costs of labor, materials and supplies, contracted services, equipment and other capital assets, travel, and training incurred for the following mandate components are eligible for reimbursement on an on-going basis:

1. Training.

Providing and obtaining training in behavior analysis, positive behavioral interventions, and behavioral emergency interventions. Time spent by personnel who design and conduct the

training and time spent by personnel who receive the training is reimbursable. Such personnel include behavioral intervention case managers and personnel involved with implementing behavioral intervention plans, conducting functional analysis assessments, or implementing emergency interventions.

2. Emergency Interventions.

Preparing reports on the number of Behavioral Emergency Reports to the California Department of Education (CDE) and Advisory committee on Special Education.

3. Due Process Hearings.

Preparing for, attending, and documenting and informing appropriate staff concerning the results of any mediation or due process hearing related to functional analysis assessments or the development or implementation of behavioral intervention plans.

C. On-going Activities - School Districts and COEs Only.

The direct and indirect costs of labor, materials and supplies, contracted services, equipment and other capital assets, travel, and training incurred for the following mandate components are eligible for reimbursement on an on-going basis:

1. Conducting Functional Analysis Assessments.

Providing notice to and obtaining written consent from parents to conduct functional analysis assessments; conducting functional analysis assessments; preparing written reports of assessment results; providing copies of assessment reports to parents and the IEP Team; conducting IEP Team meetings to review assessment results.[1]

2. Developing and Evaluating BIPs.

Participating in IEP Team meetings in which BIPs are developed, evaluated, or modified, or in which functional analysis assessment results are reviewed; preparing BIPs; and developing contingency plans for altering the procedures or the frequency or duration of the procedures. Providing copies of SELPA procedures on behavioral interventions and behavioral emergency interventions to parents and staff.

3. Implementing BIPs.

Implementing and supervising the implementation of BIPs; measuring and documenting the frequency, duration, and intensity of targeted behavior and effectiveness of the BIP. Costs of employing personnel with documented training in behavioral analysis including positive behavioral interventions (whether such personnel are new staff or existing staff) to serve as behavioral intervention case managers is reimbursable under this component.

[1] An IEP is an Individualized Education Program (Ed. Code § 56023 (Stats. 1993, ch. 1296 § 13.1 (AB 369))).

4. Modifications to BIPs.

Providing notice to parents or parent representatives of the need to make minor modifications to the BIPs, meeting with parents to review existing program evaluation data; and developing minor modifications to BIPs with parents or parent representatives.

5. Emergency Interventions.

Employing emergency interventions; notifying parents and residential care providers after an emergency intervention is used; preparing and maintaining a Behavioral Emergency Report following the use of an emergency intervention; administrative review of Behavioral Emergency Reports; scheduling and conducting an IEP Team meeting to review a Behavioral Emergency Report and the need for a functional analysis assessment, interim BIP, or modification to an existing BIP.

6. Prohibited Interventions.

Training appropriate staff regarding the types of interventions that are prohibited under Title 5, California Code of Regulations section 3052(l).

7. Due Process Hearings.

Preparing for, attending, and documenting and informing appropriate staff concerning the results of any mediation or due process hearing related to functional analysis assessments or the development or implementation of BIPs.

V. Claim Preparation and Submission

In lieu of filing detailed documentation of actual costs, the Commission adopted a reasonable reimbursement methodology (RRM) to reimburse claimants for all *direct* and *indirect* costs of the reimbursable activities identified in Section IV. Reimbursable Activities of this document as authorized by Government Code sections 17557(b) and 17518.5. Additionally, each reimbursement claim must be filed in a timely manner.

The RRM for the mandated activities shall consist of three uniform cost allowances as follows:

A. RRM for One-time Activities - SELPA Only.

The RRM for the one-time activities shall be calculated as follows: Multiply the total number of SELPA ADA for the one fiscal year during which the one-time activities were performed, likely the 1993-94 fiscal year, by the relevant unit cost rate for one-time SELPA activities for that fiscal year. The unit cost rate for one time SELPA activities is $.32818 for FY 2006-07. This unit cost rate shall be adjusted by the Implicit Price Deflator to the appropriate fiscal year during which the one-time activities were performed.

SELPA ADA figures shall be those found on the CDE website for AB 602, P2 ADA or a comparable source.

The State Controller's Office shall provide the correct unit cost rate for each fiscal year with each year's claiming instructions.

B. RRM for On-going Activities - SELPA Only - Training.

The RRM for the on-going activities shall be calculated as follows: Multiply the total number of SELPA ADA for the fiscal year by the relevant unit cost rate for on-going SELPA activities for the fiscal year. The unit cost rate for on-going SELPA activities is $1.18702 for FY 2006-07.

This unit cost rate shall be adjusted for each prior and subsequent year by the Implicit Price Deflator.

ADA figures shall be those found on the CDE website for AB 602, P2 ADA or a comparable source.

The State Controller's Office shall provide the correct unit cost rate for each fiscal year with each year's claiming instructions.

C. RRM for On-going Activities - School Districts and COEs.

The RRM for the on-going activities shall be calculated as follows: Multiply the total number of ADA per fiscal year by the relevant unit cost rate for on-going school district and COE activities for the fiscal year. The unit cost rate for ongoing school district and COE activities is $9.45701 for FY 2006-07. This unit cost rate shall be adjusted for each prior and subsequent year by the Implicit Price Deflator.

ADA figures shall be those found on the CDE website for AB 602, P2 ADA or a comparable source.

The State Controller's Office shall provide the correct unit cost rate for each fiscal year with each year's claiming instructions.

VI. Record Retention

Pursuant to Government Code section 17558.5(a), a reimbursement claim for costs filed by a claimant pursuant to this chapter is subject to the initiation of an audit by the State Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the State Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. Pursuant to Government code section 17561(d)(2), the State Controller has the authority to audit the application of a reasonable reimbursement methodology. If an audit has been initiated by the State Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings. Claimants must retain documentation that supports the application of the RRM, including ADA documentation.

VII. Offsetting Revenues and Other Reimbursements

Any offsets the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to, service fees collected, federal funds, and other state funds, shall be identified and deducted from this claim.

The following offsetting revenues are identified, for purposes of the reimbursable activities approved in the test claim:

- Except as provided by Statutes 2001, chapter 203 (SB 982)[2], Item 6110-161-0001 of Section 2.00 of the annual Budget Act provides state funding for special education that is potentially offsetting from July 1, 1993 (the beginning of the period of reimbursement) until June 30, 2010. To the extent an eligible claimant applies these potentially offsetting revenues to the approved mandated activities during this time period, those funds shall be identified and deducted from the reimbursement claims filed on the basis of the RRM.
- Commencing with the 2010-11 fiscal year, and except as provided by Statutes 2001, chapter 203 (SB 982), and Statutes 2011, chapter 43, section 54 (AB 114) for fiscal years 2011-2012 and 2012-2013,[3] state funding provided for purposes of special education pursuant to Item 6110-161-0001 of Section 2.00 of the annual Budget Act shall first be used to directly offset any mandated costs in this program. Except as provided in Statutes 2001, chapter 203 and Statutes 2011, chapter 43, funds received by an eligible claimant from this appropriation shall be identified and deducted from the reimbursement claims filed on the basis of the RRM, beginning in the 2010-2011 fiscal year.
- Except as provided by Statutes 2011, chapter 43, section 54 (AB 114) for fiscal years 2011-2012 and 2012-2013, Item 6110-161-0890 of Section 2.00 of the annual Budget Act, which provides for state pass-through allocation of federal funding for special education, constitutes potentially offsetting revenue beginning July 1, 1993 (the beginning of the period of reimbursement). To the extent an eligible claimant applies this potentially offsetting revenue to the approved mandated activities, those funds shall be identified and deducted from the reimbursement claims filed on the basis of the RRM.

VIII. State Controller's Claiming Instructions

Pursuant to Government Code section 17558(b), the State Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 90 days after receiving the adopted parameters and guidelines from the Commission, to assist local agencies and school districts in claiming costs to be reimbursed. The claiming instructions shall be

[2] SB 982 provided for $100 million in augmentation of Line Item 6110-161-0001, beginning in 2001, and continuing in the annual budget acts, to provide for the *Special Education Mandated Costs* test claim (CSM 3986). That funding is intended exclusively, and by express priority, to fund the costs of the specified mandated programs identified in Education Code 56836.156, and therefore cannot be identified as potentially offsetting revenue for this mandate.

[3] AB 114 earmarked a portion of funds appropriated in Item 6110-161-0001 and Item 6110-161-0890 for educationally related mental health services, including out-of-home residential services for emotionally disturbed pupils, required by the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.) to be exclusively available for these mental health services only for the 2011-2012 and 2012-2013 fiscal years. Thus, the funds identified in AB 114 cannot be used for purposes of the *BIPs* mandate in fiscal years 2011-2012 and 2012-2013.

derived from the test claim decision and the parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561(d)(l), issuance of the claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

IX. Remedies before the Commission

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the State Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines, the Commission shall direct the State Controller to modify the claiming instructions and the State Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557(d), and California Code of Regulations, title 2, section 1183.2.

X. Legal and Factual Basis for the Parameters and Guidelines

The statements of decision for the test claim and parameters and guidelines are legally binding on all parties and provide the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record for the test claim. The administrative record is on file with the Commission.

OPTION B

PROPOSED PARAMETERS AND GUIDELINES

California Code of Regulations, Title 5, Sections 3001 and 3052

Register 93, No. 17; Register 96, No. 8; Register 96, No. 32

Behavioral Intervention Plans
CSM-4464

I. Summary of the Mandate

On September 28, 2000, the Commission on State Mandates (Commission) adopted its statement of decision finding that regulations in Title 5, California Code of Regulations, sections 3001 and 3052, which implement Education Code section 56523, impose a reimbursable state-mandated new program on school districts and special education local plan areas (SELPAs) within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The Commission approved this test claim for the following categories of reimbursable activities:

- SELPA plan requirements. (Cal. Code of Regs., tit. 5, §§ 3001 and 3052, subd. (j).)
- Development and implementation of behavioral intervention plans (BIPs). (Cal. Code of Regs., tit. 5, §§ 3001 and 3052, subds. (a), (c), (d), (e), and (f).)
- Functional analysis assessments. (Cal. Code of Regs., tit. 5, §§ 3001 and 3052, subds. (b), (c), and (f).)
- Modifications and contingent BIPs. (Cal. Code of Regs., tit. 5, § 3052, subds. (g) and (h).)
- Development and implementation of emergency interventions. (Cal. Code of Regs., tit. 5,§§ 3001 and 3052, subd. (i).)
- Prohibited behavioral interventions. (Cal. Code of Regs., tit. 5, §§ 3001 and 3052, subd. (l).)
- Due process hearings. (Cal. Code of Regs., tit. 5, § 3052, subd. (m).)

II. Eligible Claimants

School districts and county offices of education (COEs), as defined in Government Code section 17519, are eligible to claim reimbursement where specified below. SELPAs, whose sole constituents are school districts and COEs, are also eligible as specified below. Community colleges and charter schools are not eligible to claim reimbursement.

III. Period of Reimbursement

Government Code section 17557(e) states that a test claim shall be submitted on or before *June 30* following a given fiscal year to establish eligibility for that fiscal year. The claimants filed the test claim on September 28, 1994, establishing eligibility for reimbursement on or after July 1, 1993. Therefore, costs incurred pursuant to Code of Regulations, Title 5, sections 3001 and 3052, on or after July 1, 1993, are eligible for reimbursement under these parameters and guidelines.

Reimbursement for state-mandated costs may be claimed as follows:

- Actual costs for one fiscal year shall be included in each claim.
- Pursuant to Government Code section 17561(d)(1)(A), all claims for reimbursement of initial fiscal year costs shall be submitted to the State Controller within 120 days of the issuance date for the claiming instructions.
- Pursuant to Government Code section 17560(a), a claimant may, by February 15 following the fiscal year in which costs were incurred, file an annual reimbursement claim that details the costs actually incurred for that fiscal year.
- If revised claiming instructions are issued by the State Controller pursuant to Government Code section 17558(c), between November 15 and February 15, a claimant filing an annual reimbursement claim shall have 120 days following the issuance date of the revised claiming instructions to file a claim. (Government Code section 17560(b).)
- If the total costs for a given fiscal year do not exceed $1,000, no reimbursement shall be allowed except as otherwise allowed by Government Code section 17564(a)
- There shall be no reimbursement for any period in which the Legislature has suspended the operation of a mandate pursuant to state law.

IV. Reimbursable Activities

To be eligible for mandated cost reimbursement for any fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable to and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, training packets, and declarations. Declarations must include a certification or declaration stating, "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

For each eligible claimant that incurs increased costs, the following activities are reimbursable:

A. <u>One-Time Activities - SELPA Only.</u>

The direct and indirect costs of labor, materials and supplies, contracted services, equipment and other capital assets, travel, and training incurred for the following mandate components are eligible for reimbursement on a one-time basis:

1. Preparing and Providing SELPA Procedures and Initial Training.

   Preparing procedures for the SELPA local plan regarding the systematic use of behavioral intervention, for the training of behavioral intervention case managers and personnel involved with implementing behavioral intervention plans, for special training for emergency interventions, and for identification of approved behavioral emergency procedures.

B. On-Going Activities - SELPA Only.

The direct and indirect costs of labor, materials and supplies, contracted services, equipment and other capital assets, travel, and training incurred for the following mandate components are eligible for reimbursement on an on-going basis:

1. Training.

   Providing and obtaining training in behavior analysis, positive behavioral interventions, and behavioral emergency interventions. Time spent by personnel who design and conduct the training and time spent by personnel who receive the training is reimbursable. Such personnel include behavioral intervention case managers and personnel involved with implementing behavioral intervention plans, conducting functional analysis assessments, or implementing emergency interventions.

2. Emergency Interventions.

   Preparing reports on the number of Behavioral Emergency Reports to the California Department of Education (CDE) and Advisory committee on Special Education.

3. Due Process Hearings.

   Preparing for, attending, and documenting and informing appropriate staff concerning the results of any mediation or due process hearing related to functional analysis assessments or the development or implementation of behavioral intervention plans.

C. On-going Activities - School Districts and COEs Only.

The direct and indirect costs of labor, materials and supplies, contracted services, equipment and other capital assets, travel, and training incurred for the following mandate components are eligible for reimbursement on an on-going basis:

1. Conducting Functional Analysis Assessments.

   Providing notice to and obtaining written consent from parents to conduct functional analysis assessments; conducting functional analysis assessments; preparing written reports of assessment results; providing copies of assessment reports to parents and the IEP Team; conducting IEP Team meetings to review assessment results.[1]

2. Developing and Evaluating BIPs.

   Participating in IEP Team meetings in which BIPs are developed, evaluated, or modified, or in which functional analysis assessment results are reviewed; preparing BIPs; and developing contingency plans for altering the procedures or the frequency or

[1] An IEP is an Individualized Education Program (Ed. Code § 56023 (Stats. 1993, ch. 1296 § 13.1 (AB 369))).

duration of the procedures. Providing copies of SELPA procedures on behavioral interventions and behavioral emergency interventions to parents and staff.

3. Implementing BIPs.

   Implementing and supervising the implementation of BIPs; measuring and documenting the frequency, duration, and intensity of targeted behavior and effectiveness of the BIP. Costs of employing personnel with documented training in behavioral analysis including positive behavioral interventions (whether such personnel are new staff or existing staff) to serve as behavioral intervention case managers is reimbursable under this component.

4. Modifications to BIPs.

   Providing notice to parents or parent representatives of the need to make minor modifications to the BIPs, meeting with parents to review existing program evaluation data; and developing minor modifications to BIPs with parents or parent representatives.

5. Emergency Interventions.

   Employing emergency interventions; notifying parents and residential care providers after an emergency intervention is used; preparing and maintaining a Behavioral Emergency Report following the use of an emergency intervention; administrative review of Behavioral Emergency Reports; scheduling and conducting an IEP Team meeting to review a Behavioral Emergency Report and the need for a functional analysis assessment, interim BIP, or modification to an existing BIP.

6. Prohibited Interventions.

   Training appropriate staff regarding the types of interventions that are prohibited under Title 5, California Code of Regulations section 3052(l).

7. Due Process Hearings.

   Preparing for, attending, and documenting and informing appropriate staff concerning the results of any mediation or due process hearing related to functional analysis assessments or the development or implementation of BIPs.

V. Claim Preparation and Submission

Each of the following cost elements must be identified for each reimbursable activity identified in Section IV. Reimbursable Activities of this document. Each claimed reimbursable cost must be supported by source documentation as described in Section IV. Additionally, each reimbursement claim must be filed in a timely manner.

A. Direct Cost Reporting

Direct costs are those costs incurred specifically for the reimbursable activities. The following direct costs are eligible for reimbursement.

1. Salaries and Benefits

   Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

3. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. Attach a copy of the contract to the claim. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the dates when services were performed and itemize all costs for those services.

4. Fixed Assets

Report the purchase price paid for fixed assets (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1., Salaries and Benefits, for each applicable reimbursable activity.

6. Training

Report the cost of training an employee to perform the reimbursable activities, as specified in Section IV. of this document. Report the name and job classification of each employee preparing for, attending, and/or conducting training necessary to implement the reimbursable activities. Provide the title, subject, and purpose (related to the mandate of the training session), dates attended, and location. If the training encompasses subjects broader than the reimbursable activities, only the pro-rata portion can be claimed. Report employee training time for each applicable reimbursable activity according to the rules of cost element A.1., Salaries and Benefits, and A.2., Materials and Supplies. Report the cost of consultants who conduct the training according to the rules of cost element A.3., Contracted Services.

B. Indirect Cost Rates

Indirect costs are costs that have been incurred for common or joint purposes. These costs benefit more than one cost objective and cannot be readily identified with a particular final cost objective without effort disproportionate to the results achieved. After direct costs have been determined and assigned to other activities, as appropriate, indirect costs are those remaining to be allocated to benefited cost objectives. A cost may not be allocated as an indirect cost if any other cost incurred for the same purpose, in like circumstances, has been claimed as a direct cost.

Indirect costs may include: (a) the indirect costs originating in each department or agency of the governmental unit carrying out state mandated programs; and (b) the costs of central governmental services distributed through the central service cost allocation plan and not otherwise treated as direct costs.

Claimants must use the CDE approved indirect cost rate for the year that funds are expended.

VI. Record Retention

Pursuant to Government Code section 17558.5(a), a reimbursement claim for actual costs filed by a claimant pursuant to this chapter is subject to the initiation of an audit by the State Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the State Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the reimbursable activities, as described in Section IV. must be retained during the period subject to audit. If an audit has been initiated by the State Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

VII. Offsetting Revenues and Other Reimbursements

Any offsets the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to, service fees collected, federal funds, and other state funds, shall be identified and deducted from this claim.

The following offsetting revenues are identified, for purposes of the reimbursable activities approved in the test claim:

- Except as provided by Statutes 2001, chapter 203 (SB 982)[2], Item 6110-161-0001 of Section 2.00 of the annual Budget Act provides state funding for special education that is potentially offsetting from July 1, 1993 (the beginning of the period of reimbursement) until June 30, 2010. To the extent an eligible claimant applies these potentially offsetting revenues to the approved mandated activities during this time period, those funds shall be identified and deducted from the reimbursement claims.
- Commencing with the 2010-11 fiscal year, and except as provided by Statutes 2001, chapter 203 (SB 982), and Statutes 2011, chapter 43, section 54 (AB

[2] SB 982 provided for $100 million in augmentation of Line Item 6110-161-0001, beginning in 2001, and continuing in the annual budget acts, to provide for the *Special Education Mandated Costs* test claim (CSM 3986). That funding is intended exclusively, and by express priority, to fund the costs of the specified mandated programs identified in Education Code 56836.156, and therefore cannot be identified as potentially offsetting revenue for this mandate.

114) for fiscal years 2011-2012 and 2012-2013,[3] state funding provided for purposes of special education pursuant to Item 6110-161-0001 of Section 2.00 of the annual Budget Act shall first be used to directly offset any mandated costs in this program. Except as provided in Statutes 2001, chapter 203 and Statutes 2011, chapter 43, funds received by an eligible claimant from this appropriation shall be identified and deducted from the reimbursement claims, beginning in the 2010-2011 fiscal year.

- Except as provided by Statutes 2011, chapter 43, section 54 (AB 114) for fiscal years 2011-2012 and 2012-2013, Item 6110-161-0890 of Section 2.00 of the annual Budget Act, which provides for state pass-through allocation of federal funding for special education, constitutes potentially offsetting revenue beginning July 1, 1993 (the beginning of the period of reimbursement). To the extent an eligible claimant applies this potentially offsetting revenue to the approved mandated activities, those funds shall be identified and deducted from the reimbursement claims.

VIII. State Controller's Claiming Instructions

Pursuant to Government Code section 17558(b), the State Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 90 days after receiving the adopted parameters and guidelines from the Commission, to assist local agencies and school districts in claiming costs to be reimbursed. The claiming instructions shall be derived from the test claim decision and the parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561(d)(l), issuance of the claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

IX. Remedies before the Commission

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the State Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines, the Commission shall direct the State Controller to modify the claiming instructions and the State Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557(d), and California Code of Regulations, title 2, section 1183.2.

---

[3] AB 114 earmarked a portion of funds appropriated in Item 6110-161-0001 and Item 6110-161-0890 for educationally related mental health services, including out-of-home residential services for emotionally disturbed pupils, required by the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.) to be exclusively available for these mental health services only for the 2011-2012 and 2012-2013 fiscal years. Thus, the funds identified in AB 114 cannot be used for purposes of the *BIPs* mandate in fiscal years 2011-2012 and 2012-2013.

X. Legal and Factual Basis for the Parameters and Guidelines

The statements of decision for the test claim and parameters and guidelines are legally binding on all parties and provide the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record for the test claim. The administrative record is on file with the Commission.

Commission on State Mandates

Original List Date: 10/13/1994
Last Updated: 1/11/2013
List Print Date: 01/11/2013
Claim Number: 4464
Issue: Behavioral Intervention Plans

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

Mr. Jeff Goldstein MAXIMUS 17310 Red Hill Avenue, Suite 340 Irvine, CA 92614	Tel: Email Fax:	(949) 440-0845 jeffgoldstein@maximus.com (949) 440-0855
Ms. Socorro Aquino State Controller's Office Division of Audits 3301 C Street, Suite 700 Sacramento, CA 95816	Tel: Email Fax:	(916) 322-7522 SAquino@sco.ca.gov
Ms. Diana K. McDonough Fagen Friedman & Fulfrost LLP 70 Washington Street, Suite 205 Oakland, CA 94607-3795	Tel: Email Fax:	(510) 550-8200 dmcdonough@fagenfriedman.com (510) 550-8211
Mr. Jay Lal State Controller's Office (B-08) Division of Accounting & Reporting 3301 C Street, Suite 700 Sacramento, CA 95816	Tel: Email Fax:	(916) 324-0256 JLal@sco.ca.gov (916) 323-6527
Mr. Keith B. Petersen SixTen & Associates P.O. Box 340430 Sacramento, CA 95834-0430	Tel: Email Fax:	(916) 419-7093 kbpsixten@aol.com (916) 263-9701
Mr. Mike Brown School Innovations & Advocacy 5200 Golden Foothill Parkway El Dorado Hills, CA 95762	Tel: Email Fax:	(916) 669-5116 mikeb@sia-us.com (888) 487-6441

Ms. Sandee Kludt San Joaquin County Office of Education P.O. Box 213030 Stockton, CA 95213	Tel: Email Fax:	(209) 969-4927 skludt@sjcoe.net
Ms. Evelyn Calderon-Yee State Controller's Office (B-08) Division of Accounting and Reporting 3301 C Street, Suite 700 Sacramento, CA 95816	Tel: Email Fax:	(916) 323-0706 eyee@sco.ca.gov (916) 322-4404
Ms. Jolene Tollenaar MGT of America 2001 P Street, Suite 200 Sacramento, CA 95811	Tel: Email Fax:	(916) 443-9136 jolene_tollenaar@mgtamer.com (916) 443-1766
Mr. Christien Brunette MAXIMUS 625 Coolidge Drive, Suite 100 Folsom, CA 95630	Tel: Email Fax:	(916) 471-5510 christienbrunette@maximus.com (916) 366-4838
Mr. Mark Rewolinski MAXIMUS 625 Coolidge Drive, Suite 100 Folsom, CA 95630	Tel: Email Fax:	(916) 471-5516 markrewolinski@maximus.com (916) 366-4838
Ms. Veronica Lanto San Jose Unified School District 855 Lenzen Avenue San Jose, CA 95126-2736	Tel: Email Fax:	(408) 535-6572 Veronica_Lanto@sjusd.org (408) 535-6692
Mr. Matthew Cody Olson Hagel & Fishburn LLP 555 Capitol Mall, Suite 1425 Sacramento, CA 95814	Tel: Email Fax:	(916) 442-2952 matt@olsonhagel.com (916) 442-1280
Ms. Yazmin Meza Department of Finance 915 L Street Sacramento, CA 95814	Tel: Email Fax:	(916) 445-0328 Yazmin.meza@dof.ca.gov
Ms. Rachel Ehlers Legislative Analyst's Office (B-29) 925 L Street, Suite 1000 Sacramento, CA 95814	Tel: Email Fax:	(916) 319-8330 rachel.ehlers@lao.ca.gov (916) 324-4548
Ms. Sandy Reynolds Reynolds Consulting Group, Inc. P.O. Box 894059 Temecula, CA 92589	Tel: Email Fax:	(951) 303-3034 sandrareynolds_30@msn.com (951) 303-6607

Ms. Donna Ferebee Department of Finance (A-15) 915 L Street, 11th Floor Sacramento, CA 95814	Tel: Email Fax:	(916) 445-3274 donna.ferebee@dof.ca.gov (916) 323-9584
Ms. Juliana F. Gmur 1865 Hernden Avenue, Suite K-44 Clovis, CA 93611	Tel: Email Fax:	(559) 960-4507 julianagmur@msn.com
Ms. Kathy Skeels San Joaquin County Office of Education P.O. Box 213031 Stockton, CA 95213	Tel: Email Fax:	(209) 969-4925 kskeels@sjcoe.net
Mr. Frank Murphy MAXIMUS 17310 Red Hill Avenue, Suite 340 Irvine, CA 92614	Tel: Email Fax:	(949) 440-0845 frankmurphy@maximus.com (949) 440-0855
Mr. J. Bradley Burgess MGT of America 895 La Sierra Drive Sacramento, CA 95864	Tel: Email Fax:	(916)595-2646 Bburgess@mgtamer.com
Ms. Melanie Seymour Fagen Friedman & Fulfrost LLP 70 Washington Street, Suite 205 Oakland, CA 94607-3795	Tel: Email Fax:	(510) 550-8200 mseymour@fagenfriedman.com (510) 550-8211
Mr. Christian Osmena Department of Finance 915 L Street Sacramento, CA 95814	Tel: Email Fax:	(916) 445-0328 christian.osmena@dof.ca.gov
Ms. Kris Kuzmich Senate Budget and Fiscal Review Committee State Capitol, Room 5019 Sacramento, CA 95814	Tel: Email Fax:	(916) 651-4103 Kris.Kuzmich@sen.ca.gov
Mr. Paul Golaszewski Legislative Analyst's Office (B-29) 925 L Street, Suite 1000 Sacramento, CA 95814	Tel: Email Fax:	(916) 319-8341 Paul.Golaszewski@lao.ca.gov
Mr. Chris Ferguson Department of Finance (A-15) Education Systems Unit 915 L Street, 7th Floor Sacramento, CA 95814	Tel: Email Fax:	(916) 445-3274 Chris.Ferguson@dof.ca.gov

Mr. Matt Jones Commission on State Mandates 980 9th Street, Suite 300 Sacramento, CA 95814	Tel: Email Fax:	(916) 323-3562 matt.jones@csm.ca.gov
Mr. Arthur Palkowitz Stutz Artiano Shinoff & Holtz 2488 Historic Decatur Road, Suite 200 San Diego, CA 92106	Tel: Email Fax:	(619) 232-3122 apalkowitz@stutzartiano.com (619) 232-3264
Ms. Lacey Baysinger State Controller's Office Division of Accounting and Reporting 3301 C Street, Suite 700 Sacramento, CA 95816	Tel: Email Fax:	(916) 324-0254 LBaysinger@sco.ca.gov
Mr. Mark Ibele Senate Budget & Fiscal Review Committee (E-22) California State Senate State Capitol, Room 5019 Sacramento, CA 95814	Tel: Email Fax:	(916) 651-4103 Mark.Ibele@sen.ca.gov (916) 323-8386
Mr. David Cichella California School Management Group 3130-C Inland Empire Blvd. Ontario, CA 91764	Tel: Email Fax:	(209) 834-0556 dcichella@csmcentral.com (209) 834-0087
Ms. Linda Martin Fagen Friedman & Fulfrost LLP 70 Washington Street, Suite 205 Oakland, CA 94607-3795	Tel: Email Fax:	(510) 550-8200 Lmartin@fagenfriedman.com (510) 550-8211
Mr. Dennis Speciale State Controller's Office (B-08) Division of Accounting and Reporting 3301 C Street, Suite 700 Sacramento, CA 95816	Tel: Email Fax:	(916) 324-0254 DSpeciale@sco.ca.gov
Ms. Jill Kanemasu State Controller's Office (B-08) Division of Accounting and Reporting 3301 C Street, Suite 700 Sacramento, CA 95816	Tel: Email Fax:	(916) 322-9891 jkanemasu@sco.ca.gov
Mr. Jim Spano State Controller's Office (B-08) Division of Audits 3301 C Street, Suite 700 Sacramento, CA 95816	Tel: Email Fax:	(916) 323-5849 jspano@sco.ca.gov (916) 327-0832
Mr. Nicolas Schweizer Department of Finance (A-15) Education Systems Unit	Tel: Email Fax:	(916) 445-0328 nicolas.schweizer@dof.ca.gov (916) 323-9530

915 L Street, 7th Floor Sacramento, CA 95814		
Mr. Robert Miyashiro Education Mandated Cost Network 1121 L Street, Suite 1060 Sacramento, CA 95814	Tel: Email Fax:	(916) 446-7517 robertm@sscal.com (916) 446-2011
Ms. Harmeet Barkschat Mandate Resource Services, LLC 5325 Elkhorn Blvd. #307 Sacramento, CA 95842	Tel: Email Fax:	(916) 727-1350 harmeet@calsdrc.com (916) 727-1734
Mr. Michael Johnston Clovis Unified School District 1450 Herndon Ave Clovis, CA 93611-0599	Tel: Email Fax:	(559) 327-9000 michaeljohnston@clovisusd.k12.ca.us (559) 327-9129
Mr. Steve Shields Shields Consulting Group, Inc. 1536 36th Street Sacramento, CA 95816	Tel: Email Fax:	(916) 454-7310 steve@shieldscg.com (916) 454-7312
Ms. Susan Geanacou Department of Finance (A-15) 915 L Street, Suite 1280 Sacramento, CA 95814	Tel: Email Fax:	(916) 445-3274 susan.geanacou@dof.ca.gov (916) 449-5252
Ms. Carol Bingham California Department of Education (E-08) Fiscal Policy Division 1430 N Street, Suite 5602 Sacramento, CA 95814	Tel: Email Fax:	(916) 324-4728 cbingham@cde.ca.gov (916) 319-0116
Ms. Patricia de Cos State Board of Education 1430 N Street, Suite #5111 Sacramento, CA 95814	Tel: Email Fax:	(916) 319-0827 PdeCos@cde.ca.gov
Mr. Allan Burdick CSAC-SB 90 Service 2001 P Street, Suite 200 Sacramento, CA 95811	Tel: Email Fax:	(916) 443-9236 allan_burdick@mgtamer.com (916) 443-1766
Ms. Elisa Wynne Department of Finance Department of Finance 915 L Street Sacramento, CA 95814	Tel: Email Fax:	(916) 445-0238 elisa.wynne@dof.ca.gov
Mr. David E. Scribner Max8550 2200 Sunrise Boulevard, Suite 240 Gold River, California 95670	Tel: Email Fax:	(916) 852-8970 dscribner@max8550.com (916) 852-8978

Mr. Andy Nichols Nichols Consulting 1857 44th Street Sacramento, CA 95819	Tel: Email Fax:	(916) 455-3939 andy@nichols-consulting.com (916) 739-8712
Mr. Rusty Gordon Butte County Office of Education 1859 Bird Street Oroville, CA 95965	Tel: Email Fax:	(530) 532-5621 Rgordon@bcoe.org
Ms. Andra Donovan San Diego Unified School District Legal Services Office 4100 Normal Street, Room 2148 San Diego, CA 92103	Tel: Email Fax:	(619) 725-5630 adonovan@sandi.net
Mr. Keith Nezaam Department of Finance (A-15) 915 L Street, 8th Floor Sacramento, CA 95814	Tel: Email Fax:	(916) 445-8913 Keith.Nezaam@dof.ca.gov
Ms. Jennifer Kuhn Legislative Analyst's Office (B-29) 925 L Street, Suite 1000 Sacramento, CA 95814	Tel: Email Fax:	(916) 319-8332 Jennifer.kuhn@lao.ca.gov (916) 324-4281
Ms. Heather Halsey Commission on State Mandates 980 9th Street, Suite 300 Sacramento, CA 95814	Tel: Email Fax:	(916) 323-3562 heather.halsey@csm.ca.gov
Ms. Kathy Rios State Controllers Office Division of Accounting and Reporting 3301 C Street, Suite 700 Sacramento, CA 95816	Tel: Email Fax:	(916) 324-5919 krios@sco.ca.gov (916) 323-4807