

**ITEM 3**  
**MANDATE REDETERMINATION**  
**SECOND HEARING: NEW TEST CLAIM DECISION**  
**PROPOSED DECISION**

Penal Code Section 13518.1  
Statutes 1987, Chapter 1334 (AB 1726)  
*CPR Pocket Masks (CSM-4291)*

As Alleged to be Modified by:  
Statutes 2013, Chapter 28 (SB 71)

14-MR-01

Department of Finance, Requester

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**EXECUTIVE SUMMARY**

**Overview**

On March 23, 1988, the Commission on State Mandates (Commission) adopted a decision approving reimbursement for the *CPR Pocket Masks*, CSM-4291 program.<sup>1</sup> The Commission found that Penal Code section 13518.1, as added by Statutes 1987, chapter 1334, required local law enforcement agencies employing peace officers to provide to each of those peace officers a portable manual mask and airway assembly for use when applying cardiopulmonary resuscitation to prevent the spread of communicable disease. Parameters and guidelines were adopted on July 28, 1988, authorizing reimbursement for the increased costs of purchasing, repairing, or replacing a portable manual mask and airway assembly for each officer.<sup>2</sup>

Effective June 27, 2013, Statutes 2013, chapter 28 (SB 71), an urgency bill, amended the plain language of Penal Code section 13518.1 as follows (amendments in underline and strikeout):

In order to prevent the spread of communicable disease, a law enforcement agency employing peace officers described in subdivision (a) of Section 13518 may ~~shall~~ provide to each of these peace officers an appropriate portable manual mask and airway assembly for use when applying cardiopulmonary resuscitation.<sup>3</sup>

On August 18, 2014, Department of Finance (Finance) filed a request to adopt a new test claim decision to supersede the previous decision on *CPR Pocket Masks* to end the program's reimbursement period pursuant to Government Code section 17570. Finance asserts that Statutes 2013, chapter 28 constitutes a subsequent change in law, as defined in Government Code section

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<sup>1</sup> Test Claim Statement of Decision, CSM-4291, adopted March 23, 1988.

<sup>2</sup> Parameters and Guidelines, adopted July 28, 1988, page 2.

<sup>3</sup> Penal Code section 13518.1, as amended by Statutes 2013, chapter 28 (SB 71), section 46.

17570, which modifies the state's liability for reimbursement. Finance concludes that "since the [test claim] statute was amended, no reimbursement is required pursuant to article XIII B, section 6 of the California Constitution and Government Code section 17514."<sup>4</sup>

Section 17570 provides a process whereby a previously determined mandate finding can be redetermined by the Commission based on a subsequent change in law. The Government Code provides for a two-hearing process. The Commission's regulations state that "[i]f the commission proceeds to the second hearing, it shall consider whether the state's liability...has been modified based on the subsequent change in law alleged by the requester, thus requiring adoption of a new test claim decision to supersede the previously adopted test claim decision."<sup>5</sup>

The first hearing on this request was on January 23, 2015. The Commission found that Finance had a substantial possibility of prevailing at the second hearing. Thus, the Commission directed staff to set the matter for a second hearing on whether to adopt a new test claim decision to supersede the Commission's previously adopted test claim decision on CSM-4291.

### **Procedural History**

On August 18, 2014, Finance filed a request to adopt a new test claim decision on the *CPR Pocket Masks* program, asserting that a subsequent change in law ended the reimbursement period of the program.<sup>6</sup> On August 27, 2014, Commission staff issued a notice of complete filing and schedule of comments. On September 26, 2014, the State Controller's Office (Controller) filed comments on the matter, concurring with Finance.<sup>7</sup> On October 30, 2014, Commission staff issued a draft proposed decision for the first hearing.<sup>8</sup> In response, the Controller filed comments on November 20, 2014, recommending no changes to the draft proposed decision.<sup>9</sup> On January 23, 2015, the Commission adopted the decision for the first hearing and directed staff to schedule the second hearing.<sup>10</sup> The draft proposed decision<sup>11</sup> for the second hearing and the draft expedited parameters and guidelines were issued on January 30, 2015. On February 11, 2015, the Controller submitted comments recommending no changes on the draft proposed decision for the second hearing and the draft expedited amendments to the parameters and guidelines.<sup>12</sup>

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<sup>4</sup> Request for Mandate Redetermination, page 1.

<sup>5</sup> California Code of Regulations, title 2, section 1190.5(b)(1).

<sup>6</sup> Request for Mandate Redetermination, filed August 18, 2014.

<sup>7</sup> State Controller's Office Comments on Finance's request for mandate redetermination.

<sup>8</sup> Draft Proposed Decision, First Hearing, issued October 30, 2014.

<sup>9</sup> State Controller's Office Comments on Draft Proposed Decision.

<sup>10</sup> Exhibit A, Decision, First Hearing, adopted January 23, 2015.

<sup>11</sup> Exhibit B, Draft Proposed Decision, Second Hearing, issued January 30, 2015.

<sup>12</sup> Exhibit C, State Controller's Office Comments on the draft proposed decision for the second hearing and the draft expedited amendments to parameters and guidelines.

## **Commission Responsibilities**

### **Mandate Redetermination Process under Government Code Section 17570**

Government Code section 17570 provides a process whereby a test claim decision may be redetermined and superseded by a new test claim decision, if a subsequent change in law, as defined, has modified the state's liability for reimbursement. The redetermination process calls for two hearings. The first hearing is an adequate showing hearing. With regard to the second hearing, the Commission's regulations state:

If the Commission proceeds to the second hearing, it shall consider whether the state's liability pursuant to article XIII B, section 6(a) of the California Constitution has been modified based on the subsequent change in law alleged by the requester, thus requiring adoption of a new test claim decision to supersede the previously adopted test claim decision. If the Commission finds that the state's liability pursuant to article XIII B, section 6(a) of the California Constitution has been modified based on the subsequent change in law alleged by the requester, it shall adopt a new decision that reflects the modified liability of the state.<sup>13</sup>

Therefore, the issue before the Commission at this second hearing is to what extent the state's liability has been modified based on a subsequent change in law alleged by Finance, and whether a new decision shall be adopted to reflect that modification.

### **Staff Analysis**

Staff finds that the state's liability for the *CPR Pocket Masks* program has been modified based upon a subsequent change in law, as defined in Government Code section 17570 and within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. Specifically, Statutes 2013, chapter 28 amended Penal Code section 13518.1, effective June 27, 2013, by deleting the mandatory language in the statute and replacing it with permissive language. As amended, the statute now authorizes law enforcement agencies to provide the portable manual mask and airway assembly to their peace officer employees.

The courts generally interpret the word "may" as permissive and "shall" as mandatory.<sup>14</sup> As determined by the court in the *City of Merced* and *Kern High School Dist.* cases, the "core point... is that activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate."<sup>15</sup> Accordingly, those costs to a local government entity resulting from an action undertaken at the option of the local government entity are not reimbursable as costs mandated by the state. Based on the amended test claim statute, staff finds that Penal Code section 13518.1 is now performed at the option of the local law enforcement agencies and no longer constitutes a mandate of the state. As a result, there are no increased costs mandated by the state within the

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<sup>13</sup> California Code of Regulations, title 2, section 1190.5(b)(1) (Register 2014, No. 21).

<sup>14</sup> See *John Doe v. Albany Unified School District* (2010) 190 Cal.App.4<sup>th</sup> 668, 676 on statutory construction involving the terms "may" and "shall."

<sup>15</sup> *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4<sup>th</sup> 727, 742; *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783.

meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

Section 17570(f) provides that a request for adoption of a new test claim decision shall be filed on or before June 30 following a fiscal year in order to establish eligibility for reimbursement or loss of reimbursement for that fiscal year. This request was filed on August 18, 2014 (in 2014-2015 fiscal year), establishing eligibility for the loss of reimbursement beginning July 1, 2013.

**Staff Recommendation**

Staff recommends that the Commission adopt this proposed decision as its new test claim decision, ending reimbursement for the mandated program beginning July 1, 2013.

Staff also recommends that the Commission authorize staff to make any non-substantive, technical changes to the proposed decision following the hearing.

BEFORE THE  
COMMISSION ON STATE MANDATES  
STATE OF CALIFORNIA

IN RE MANDATE REDETERMINATION  
SECOND HEARING: NEW TEST CLAIM  
DECISION FOR:

Penal Code Section 13518.1  
Added by Statutes 1987, Chapter 1334 (AB  
1726).

*CPR Pocket Masks*, CSM-4291

As Alleged to be Modified by:  
Statutes 2013, Chapter 28 (SB 71)

Filed on August 18, 2014  
By Department of Finance, Requester

Case No.: 14-MR-01

*CPR Pocket Masks* (CSM-4291)

DECISION PURSUANT TO  
GOVERNMENT CODE SECTION 17500  
ET SEQ.; CALIFORNIA CODE OF  
REGULATIONS, TITLE 2, DIVISION 2,  
CHAPTER 2.5, ARTICLE 7

(Adopted March 27, 2015)

**DECISION**

The Commission on State Mandates (Commission) heard and decided this mandate redetermination during a regularly scheduled hearing on March 27, 2015. [Witness list will be included in the adopted decision.]

Government Code section 17570 and section 1190 et seq. of the Commission's regulations establish the mandate redetermination process. In addition, 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., California Code of Regulations, title 2, section 1190 et seq., and related case law.

The Commission [adopted/modified] the proposed decision at the hearing as its new test claim decision, approving the request to end reimbursement for the program's activities by a vote of [vote count will be included in the adopted decision].

**Summary of Findings**

The Commission finds that the state's liability pursuant to article XIII B, section 6(a) of the California Constitution for the *CPR Pocket Masks* program ends beginning July 1, 2013, based upon a subsequent change in law. Specifically, Statutes 2013, chapter 28 (SB 71) amended Penal Code section 13518.1, effective June 27, 2013, by deleting the mandatory language in the statute and replacing it with permissive language. As amended, the statute now authorizes law enforcement agencies to provide the portable manual mask and airway assembly to their peace officer employees. Thus, Penal Code section 13518.1 is now performed at the option of the local law enforcement agencies, and there are no costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

## **Commission Findings**

### **I. Chronology**

03/23/88	Commission adopted the test claim statement of decision. <sup>16</sup>
07/28/88	Commission adopted the parameters and guidelines. <sup>17</sup>
06/27/13	The Legislature enacted Statutes 2013, chapter 28 (SB 71)), as urgency legislation, amending Penal Code section 13518.1 effective June 27, 2013.
08/18/14	Department of Finance (Finance) filed a request to adopt a new test claim decision on <i>CPR Pocket Masks</i> , CSM-4291. <sup>18</sup>
08/27/14	Commission staff issued notice of completed filing and schedule for comments.
09/26/14	State Controller's Office (Controller) submitted comments on Finance's request for a mandate redetermination. <sup>19</sup>
10/30/14	Commission staff issued the draft proposed decision for the first hearing on the request. <sup>20</sup>
11/20/14	The Controller filed comments on the draft proposed decision. <sup>21</sup>
01/23/15	Commission adopted the decision for the first hearing. <sup>22</sup>
01/30/15	Commission staff issued the draft proposed decision <sup>23</sup> for the second hearing and the draft expedited amendments to parameters and guidelines.
02/11/15	Controller filed comments on the second hearing's draft proposed decision and the draft expedited amendments to parameters and guidelines. <sup>24</sup>

### **II. Background**

#### **The CPR Pocket Masks Program**

Penal Code section 13518.1, as added by Statutes 1987, chapter 1334, "required local law enforcement agencies employing peace officers to provide to each of these peace officers an

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<sup>16</sup> Test Claim Statement of Decision, CSM-4291, adopted March 23, 1988.

<sup>17</sup> Parameters and Guidelines, CSM-4291, adopted July 28, 1988.

<sup>18</sup> Request for Mandate Redetermination, filed August 18, 2014.

<sup>19</sup> State Controller's Office Comments on Finance's request for mandate redetermination.

<sup>20</sup> Draft Proposed Decision, First Hearing, issued October 30, 2014.

<sup>21</sup> State Controller's Office Comments on Draft Proposed Decision.

<sup>22</sup> Exhibit A, Decision, First Hearing, adopted January 23, 2015.

<sup>23</sup> Exhibit B, Draft Proposed Decision, Second Hearing, issued January 30, 2015.

<sup>24</sup> Exhibit C, State Controller's Office Comments on the draft proposed decision for the second hearing and the draft expedited amendments to parameters and guidelines.

appropriate portable manual mask and airway assembly designed to prevent the spread of communicable disease when applying cardiopulmonary resuscitation.”<sup>25</sup> On March 23, 1988, the Commission found section 13518.1 to be a reimbursable state mandate.<sup>26</sup> Parameters and guidelines were adopted on July 28, 1988, authorizing reimbursement for the increased costs of purchasing, repairing, or replacing a portable manual mask and airway assembly for each officer.<sup>27</sup>

Effective June 27, 2013, Statutes 2013, chapter 28 (SB 71), an urgency bill, amended Penal Code section 13518.1 as follows in underline and strikeout:

In order to prevent the spread of communicable disease, a law enforcement agency employing peace officers described in subdivision (a) of Section 13518 may ~~shall~~ provide to each of these peace officers an appropriate portable manual mask and airway assembly for use when applying cardiopulmonary resuscitation.<sup>28</sup>

The Senate Rules Committee’s analysis of Senate Bill 71 indicated that the intent of the bill was to eliminate the mandate by making it optional.<sup>29</sup>

### **III. Positions of the Parties**

#### Department of Finance, Requester

Finance requests that the Commission adopt a new test claim decision on this program, arguing that Statutes 2013, chapter 28 constitutes a subsequent change in law that ends the state’s liability for the *CPR Pocket Masks* program pursuant to article XIII B, section 6 of the California Constitution and Government Code section 17514.

#### State Controller’s Office

The Controller concurs with Finance that the state’s liability to reimburse local agencies for the *CPR Pocket Masks* program ended as a result of Statutes 2013, chapter 28.

### **IV. Discussion**

Pursuant to article XIII B, section 6 of the California Constitution, local agencies and school districts are entitled to reimbursement for the increased costs of state-mandated new program or higher levels of service.<sup>30</sup> For local government to be eligible for reimbursement one or more similarly situated local agencies or school districts must file a successful test claim with the

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<sup>25</sup> Parameters and Guidelines, adopted July 28, 1988, page 2.

<sup>26</sup> Test Claim Statement of Decision, CSM-4291, adopted March 23, 1988, page 2.

<sup>27</sup> Parameters and Guidelines, adopted July 28, 1988, page 2.

<sup>28</sup> Penal Code section 13518.1, as amended by Statutes 2013, chapter 28 (SB 71), section 46, effective June 27, 2013.

<sup>29</sup> Exhibit D, Senate Rules Committee, Office of Senate Floor Analyses, Unfinished Business, relates to the General Government Omnibus trailer bill language of the 2013 Budget Act Item 8885-295-0001. That exhibit references the mandate’s suspension since 1992, which implies that the local agencies have not been required to implement or give effect to any statute or executive order that the Legislature has identified as a suspended program since that time.

<sup>30</sup> Article XIII B, section 6(a) of the California Constitution.

Commission. “Test claim” means the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state. Test claims function similarly to class actions and all members of the class have the opportunity to participate in the test claim process and all are bound by the final decision of the Commission for purposes of that test claim.

The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.<sup>31</sup> The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.<sup>32</sup> In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”<sup>33</sup>

Government Code section 17570 provides a process whereby a test claim decision may be redetermined and superseded by a new test claim decision, if a subsequent change in law, as defined, has modified the state’s liability for reimbursement. The redetermination process calls for two hearings. For the first hearing, the Commission’s regulations state that the requester must make “an adequate showing which identifies a subsequent change in law as defined by Government Code section 17570, material to the prior test claim decision, that may modify the state’s liability pursuant to article XIII B, section 6, subdivision (a) of the California Constitution.”<sup>34</sup>

A subsequent change in law is defined in section 17570 as follows:

A change in law that requires a finding that an incurred cost is a cost mandated by the state, as defined by Section 17514, or is not a cost mandated by the state pursuant to Section 17556, or a change in mandates law, except that a “subsequent change in law” does not include the amendments to Section 6 of Article XIII B of the California Constitution that were approved by the voters on November 2, 2004. A “subsequent change in law” also does not include a change in the statutes or executive orders that impose new state-mandated activities and require a finding pursuant to subdivision (a) of Section 17551.<sup>35</sup>

Pursuant to the Commission’s regulations, if the Commission finds, at the first hearing, that the requester has made an adequate showing, “when considered in light of all of the written comments, rebuttals and supporting documentation in the record and testimony at the hearing, the Commission shall publish a decision finding that an adequate showing has been made and setting

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<sup>31</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551 and 17552.

<sup>32</sup> *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

<sup>33</sup> *County of Sonoma v. Commission on State Mandates* (2000), 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

<sup>34</sup> California Code of Regulations, title 2, section 1190.5(a)(1).

<sup>35</sup> Government Code section 17570(a)(2).



the second hearing on whether the Commission shall adopt a new test claim decision to supersede the previously adopted test claim decision.”<sup>36</sup>

For the second hearing, the Commission must consider whether the state’s liability pursuant to article XIII B, section 6 of the California Constitution has been modified based on the subsequent change in law alleged by the requester, thus requiring adoption of a new test claim decision to supersede the previously adopted test claim decision. “If the Commission finds that the state’s liability pursuant to article XIII B, section 6(a) of the California Constitution has been modified based on the subsequent change in law alleged by the requester, it shall adopt a new decision that reflects the modified liability of the state.”<sup>37</sup> If the Commission adopts a new test claim decision that supersedes the previously adopted test claim decision, the Commission is required to adopt new parameters and guidelines or amend existing parameters and guidelines.<sup>38</sup>

**A. Statutes 2013, Chapter 28 Constitutes a Subsequent Change in Law That Requires a Finding that the Costs Incurred Under the *CPR Pocket Masks* Program are No Longer Costs Mandated by the State.**

A subsequent change in law is defined in Government Code section 17570(a)(2) as follows:

A change in law that requires a finding that an incurred cost is a cost mandated by the state, as defined by Section 17514, or is not a cost mandated by the state pursuant to Section 17556, or a change in mandates law, except that a “subsequent change in law” does not include the amendments to Section 6 of Article XIII B of the California Constitution that were approved by the voters on November 2, 2004. A “subsequent change in law” also does not include a change in the statutes or executive orders that impose new state-mandated activities and require a finding pursuant to subdivision (a) of Section 17551.<sup>39</sup>

The courts generally interpret the word “may” as permissive and “shall” as mandatory.<sup>40</sup> As determined in the *City of Merced* and *Kern High School Dist.* cases, “the core point . . . is that activities undertaken at the option or discretion of a local government entity (that is, action undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate ....”<sup>41</sup> Accordingly, those costs to a local government entity resulting from an action undertaken at the option of the local government entity are not reimbursable as costs mandated by the state.

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<sup>36</sup> California Code of Regulations, title 2, section 1190.5(a)(5)(B).

<sup>37</sup> California Code of Regulations, title 2, section 1190.5(b)(1).

<sup>38</sup> Government Code section 17570(i).

<sup>39</sup> Government Code section 17570(a)(2).

<sup>40</sup> See *John Doe v. Albany Unified School District* (2010) 190 Cal.App.4<sup>th</sup> 668, 676 on statutory construction involving the terms “may” and “shall.”

<sup>41</sup> *Kern High School Dist.*, *supra*, 30 Cal.4<sup>th</sup> 727, 742; *City of Merced*, *supra*, 153 Cal.App.3d 777, 783.

Effective June 27, 2013, Statutes 2013, chapter 28 (SB 71) amended Penal Code section 13518.1 as follows in underline and strikeout:

In order to prevent the spread of communicable disease, a law enforcement agency employing peace officers described in subdivision (a) of Section 13518 may ~~shall~~ provide to each of these peace officers an appropriate portable manual mask and airway assembly for use when applying cardiopulmonary resuscitation.<sup>42</sup>

Finance asserts that the amendment to the plain language of the section 13518.1 made the “requirement... of section 13518.1 permissive by substituting the word ‘may’ in place of the word ‘shall,’ resulting in no state liability for reimbursement pursuant to article XIII B, section 6(a) of the California Constitution and Government Code section 17514.”<sup>43</sup>

The Commission finds that Statutes 2013, chapter 28 amended Penal Code section 13518.1 by deleting the mandatory language and replacing it with permissive language. The amendment deletes the legal requirement to provide peace officer employees an appropriate portable manual mask and airway assembly for use when applying cardiopulmonary resuscitation and, instead, now authorizes that activity. Accordingly, Penal Code section 13518.1, as amended by Statutes 2013, chapter 28, is now performed at the option of the local law enforcement agencies and is not mandated by the state. As a result, there are no costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

Government Code section 17570(f) provides that a request for adoption of a new test claim decision shall “be filed on or before June 30 following a fiscal year in order to establish eligibility for reimbursement or loss of reimbursement for that fiscal year.”

Finance filed the request for the adoption of a new test claim decision on August 18, 2014, thereby establishing eligibility for ending reimbursement for this program beginning July 1, 2013.

## **V. Conclusion**

Based on the foregoing, the Commission approves the request for a new test claim decision and finds that the *CPR Pocket Masks* program no longer constitutes a reimbursable state mandated program pursuant to article XIII B, section 6(a) and Government Code section 17514, beginning July 1, 2013.

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<sup>42</sup> Penal Code section 13518.1, amended by Statutes 2013, chapter 28 (SB 71), section 46, effective June 27, 2013.

<sup>43</sup> Request for Mandate Redetermination, filed August 18, 2014, page 1.