

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



December 4, 2015

Ms. Lisa Mierczynski
Department of Finance
915 L Street, 12th Floor
Sacramento, CA 95814

And Parties, Interested Parties, and Interested Persons (See Mailing List)

Re: **First Hearing Decision, Second Hearing Draft Proposed Decision, Draft Expedited Amendment to Parameters and Guidelines, and Notice of Hearing**
Mandate Redetermination Request, 14-MR-05
First Hearing: Adequate Showing
Behavioral Intervention Plans (CSM-4464)
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
As Alleged to be Modified by Statutes 2013, Chapter 48 (AB 86)
Department of Finance, Requester

Dear Ms. Mierczynski:

On December 3, 2015 the Commission on State Mandates (Commission) adopted the decision on the adequate showing issue for the above-named matter and directed staff to notice a second hearing to determine whether to adopt a new test claim decision to supersede the previously adopted test claim decision. The adopted decision is enclosed. The draft proposed decision for the second hearing and the draft expedited amendment to parameters and guidelines are enclosed for your review and comment.

Written Comments on Second Hearing Draft Proposed Decision

Written comments may be filed on the draft proposed decision by **December 28, 2015**. The draft proposed decision is set for hearing on **January 22, 2016**.

Written Comments on Draft Expedited Amendment to Parameters and Guidelines

Staff has prepared a draft expedited amendment to parameters and guidelines for adoption at the January Commission hearing. The draft expedited amendment to parameters and guidelines is set for hearing on **January 22, 2016** and will only be taken up if the Commission first approves the request for redetermination.

Review of Draft Expedited Amendment to Parameters and Guidelines. Proposed comments may be filed on staff's draft proposal by **December 24, 2015**. (Cal. Code Regs., tit. 2, § 1183.9(b).)

Rebuttals. Written rebuttals may be submitted within 15 days of service of the comments. (Cal. Code Regs., tit. 2, § 1183.9(c).)

You are advised that comments filed with the Commission are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. However, this requirement may also be satisfied by electronically filing your

Ms. Lisa Mierczynski

December 4, 2015

Page 2

documents. Please see <http://www.csm.ca.gov/dropbox.shtml> on the Commission's website for instructions on electronic filing. (Cal. Code Regs., tit. 2, § 1181.3.)

If you would like to request an extension of time to file comments, please refer to section 1187.9(a) of the Commission's regulations.

Hearing

The second hearing on the request for a mandate redetermination is set for **Friday, January 22, 2016**, at 10:00 a.m., State Capitol, Room 447, Sacramento, California. Additionally, the expedited amendment to the parameters and guidelines is also set for hearing on **Friday, January 22, 2016**, but will only be taken up if the Commission first approves the request for redetermination.

The proposed decision for the second hearing and amendment to the parameters and guidelines will be issued on or about January 8, 2016. 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 1187.9(b) of the Commission's regulations.

Sincerely,

 for

Heather Halsey
Executive Director

BEFORE THE
 COMMISSION ON STATE MANDATES
 STATE OF CALIFORNIA

IN RE MANDATE REDETERMINATION:
 FIRST HEARING: ADEQUATE SHOWING
 ON:

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

As Alleged to be Modified by:
 Statutes 2013, Chapter 48 (AB 86)

Filed on June 30, 2015

By the Department of Finance, Requester

Case No.: 14-MR-05

Behavioral Intervention Plans (CSM-4464)

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

(Adopted December 3, 2015)

(Served December 4, 2015)

DECISION

The Commission on State Mandates (Commission) heard and decided this mandate redetermination during a regularly scheduled hearing on December 3, 2015. Donna Ferebee and Mollie Quasebarth appeared on behalf of the Department of Finance (Finance).

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., title 2, California Code of Regulations 1181.1 et seq., and related case law.

The Commission adopted the proposed decision at the hearing by a vote of 4-0, and directed staff to notice a second hearing to determine whether to adopt a new test claim decision to supersede the previously adopted test claim decision. The Commission voted as follows:

Member	Vote
Richard Chivaro, Representative of the State Controller, Vice Chairperson	Yes
Mark Hariri, Representative of the State Treasurer	Yes
Scott Morgan, Representative of the Office of Planning and Research	Yes
Sarah Olsen, Public Member	Absent
Eraina Ortega, Representative of the Director of the Department of Finance, Chairperson	Yes
Carmen Ramirez, City Council Member	Absent
Don Saylor, County Supervisor	Absent

SUMMARY OF THE FINDINGS

The Commission finds that Finance has made an adequate showing that the state’s liability pursuant to article XIII B, section 6(a) of the California Constitution, for the *Behavioral Intervention Plans*, CSM-4464 mandate may be modified based on a subsequent change in law, such that Finance has a substantial probability of prevailing at the second hearing. Specifically, Statutes 2013, chapter 48, section 44 (AB 86) expressly requires the Superintendent of Public Instruction to repeal the regulations that impose the mandate, and declares that those sections “are no longer supported by statute.” Pursuant to Government Code section 17570(b)(d)(4), the Commission will hold a second hearing to determine if a new test claim decision shall be adopted to supersede the previously adopted test claim decision.

COMMISSION FINDINGS

I. Chronology

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|------------|---|
| 09/28/2000 | The Commission adopted the test claim statement of decision on <i>Behavioral Intervention Plans</i> , CSM-4464 which was corrected on November 23, 2010. ¹ |
| 04/19/2013 | The Commission adopted the statement of decision and parameters and guidelines for <i>Behavioral Intervention Plans</i> , CSM-4464 which were corrected on April 29, 2013. ² |
| 06/30/2015 | Finance filed a request for redetermination on the <i>Behavioral Intervention Plans</i> mandate, CSM-4464. ³ |
| 08/10/2015 | The State Controller’s Office (Controller) filed comments on the request for redetermination. ⁴ |
| 09/23/2015 | Commission staff issued the draft proposed decision for the first hearing. ⁵ |
| 10/08/2015 | The Controller filed comments on the draft proposed decision for the first hearing. ⁶ |

II. Background

On September 28, 2000, the Commission adopted a 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 (SELPA) within the meaning of article XIII B, section 6 of

¹ Exhibit B, Test Claim Statement of Decision, *Behavioral Intervention Plans*, CSM-4464.

² Exhibit C, Statement of Decision and Parameters and Guidelines, Corrected April 29, 2013.

³ Exhibit A, Request for Mandate Redetermination, 14-MR-05.

⁴ Exhibit D, Controller’s Comments on Request for Redetermination.

⁵ Exhibit E, Draft Proposed Decision, First Hearing.

⁶ Exhibit F, Controller’s Comments on the Draft Proposed Decision, First Hearing.

the California Constitution and Government Code section 17514. The Commission approved the test claim for the following categories of reimbursable activities:

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

On January 25, 2013, after much delay for reasons discussed at length in the statement of decision on parameters and guidelines,⁷ the parameters and guidelines were approved as modified by the Commission for costs incurred beginning July 1, 1993, and the statement of decision was adopted April 19, 2013 and corrected April 29, 2013.⁸ The parameters and guidelines contain three reasonable reimbursement methodologies (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.⁹

On July 1, 2013, the Governor signed AB 86 (Stats. 2013, ch. 48), effective the same day, which amended numerous provisions of the Education Code, including section 56523; the Education Code section that the approved test claim regulations were adopted to implement. As amended, section 56523 now provides that “[t]he Superintendent shall repeal those regulations governing the use of behavioral interventions...including Section 3052 and subdivisions (d), (e), (f), (g), and (ab) of Section 3001 of Title 5 of the California Code of Regulations, as those provisions existed on January 10, 2013.” The State Board has since repealed those regulations, as directed.¹⁰

Mandate Redetermination Process under Section 17570

Government Code section 17570 provides a process for a test claim decision to 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 a two-hearing process. At the first hearing, the requester must make “an adequate showing which

⁷ Exhibit C, Statement of Decision and Parameters and Guidelines, Corrected April 29, 2013, pages 2-5.

⁸ Exhibit C, Statement of Decision and Parameters and Guidelines, Corrected April 29, 2013.

⁹ See Exhibit C, Statement of Decision and Parameters and Guidelines, pages 67-68.

¹⁰ Register 2014, No. 19 (amended July 1, 2014); Register 2013, No. 42 (repealed October 16, 2013).

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(a) of the California Constitution.”¹¹ 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 17551.¹²

The Commission shall find that the requester has made an adequate showing if it “finds that the request, when considered in light of all of the written comments and supporting documentation in the record of this request, has a substantial possibility of prevailing at the second hearing.”¹³ If the Commission finds at the first hearing, that the requester has made an adequate showing, it “shall publish a decision finding that an adequate showing has been made and setting the second hearing on whether the Commission shall adopt a new test claim decision to supersede the previously adopted test claim decision.”¹⁴

III. Positions of the Parties, Interested Parties, and Interested Persons

A. Department of Finance, Requester

Finance asserts that Statutes 2013, chapter 48, effective July 1, 2013, “amended Education Code section 56523 to eliminate the statutory force and effect of the regulations that imposed the reimbursable state-mandated activities and to require the Superintendent of Public Instruction to repeal the regulations that govern behavioral intervention for individuals with exceptional needs that are no longer supported by statute.” Accordingly, Finance states that Code of Regulations, title 5, section 3052 was repealed effective October 16, 2013; and the operative provisions of section 3001, which were identified in the test claim decision as providing context for the mandate, or imposing the mandate, were repealed effective July 1, 2014.¹⁵

¹¹ Code of Regulations, title 2, section 1190.5(a)(1) (Register 2014, No. 21).

¹² Government Code section 17570, as added by Statutes 2010, chapter 719 (SB 856).

¹³ Code of Regulations, title 2, section 1190.5(a)(1) (Register 2014, No. 21).

¹⁴ Code of Regulations, title 2, section 1190.5(a)(5)(B) (Register 2014, No. 21).

¹⁵ Exhibit A, Request for Mandate Redetermination, 14-MR-05, page 8.

B. State Controller's Office

The Controller concurs with Finance's request to adopt a new test claim decision and amend the parameters and guidelines for the *Behavioral Intervention Plans* mandated program, pursuant to the enactment of Statutes 2013, chapter 48.¹⁶

IV. Discussion

Under Government Code section 17570, upon request, the Commission may consider the adoption of a new test claim decision to supersede a prior test claim decision based on a subsequent change in law which modifies the states liability.

The first hearing in the mandate redetermination process is to determine, pursuant to the Government Code and the Commission's regulations, only whether the requester has made an adequate showing that the state's liability has been modified based on a subsequent change in law, as defined. Therefore, the analysis will be limited to whether "the request, when considered in light of all of the written comments and supporting documentation in the record of this request, has a substantial possibility of prevailing at the second hearing."¹⁷ A thorough mandates analysis to determine whether and to what extent the state's liability has been modified, considering the applicable law, the arguments put forth by the parties and interested parties, and the facts in the record, will be prepared for the second hearing on this matter.

A. Statutes 2013, Chapter 48 Constitutes a Subsequent Change in Law, Within the Meaning of 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 altered the state's liability for reimbursement. 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

¹⁶ Exhibit D, Controller's Comments on Request for Redetermination.

¹⁷ Code of Regulations, title 2, section 1190.5(a)(1) (Register 2014, No. 21). This regulation describes the standard for the first hearing as follows:

The first hearing shall be limited to the issue of whether the requester has made 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(a) of the California Constitution. The Commission shall find that the requester has made an adequate showing if it finds that the request, when considered in light of all of the written comments and supporting documentation in the record of this request, has a substantial possibility of prevailing at the second hearing.

in the statutes or executive orders that impose new state-mandated activities and require a finding pursuant to subdivision (a) of Section 17551.¹⁸

Under this definition, then, a subsequent change in law is one that (1) requires a finding of a new cost mandated by the state under section 17514; (2) requires a new finding that a cost is not a cost mandated by the state pursuant to section 17556; or (3) another change in mandates law.

Finance, in its request for redetermination, alleges that a subsequent change in law requires a finding that there are no costs mandated by the state pursuant to section 17514, in that Statutes 2013, chapter 48 requires the repeal of the regulatory provisions that make up the mandate, and also purports to remove all force and effect of those regulatory provisions. The original test claim regulations, Code of Regulations, title 5, sections 3001 and 3052, implemented Education Code section 56523, which the Commission found did not itself impose any mandated activities. Amended section 56523, alleged here to modify the state's liability for the mandated program, now provides:

The Superintendent shall repeal those regulations governing the use of behavioral interventions with individuals with exceptional needs receiving special education and related services that are no longer supported by statute, including Section 3052 and subdivisions (d), (e), (f), (g), and (ab) of Section 3001 of Title 5 of the California Code of Regulations, as those provisions existed on January 10, 2013.¹⁹

The test claim statement of decision and parameters and guidelines for CSM-4464 found reimbursable activities imposed by Code of Regulations, title 5, sections 3001 and 3052.²⁰ Subsections (d), (e), (f), (g), and (ab) of former section 3001 define the terms "behavioral emergency," "behavioral intervention," "behavioral intervention case manager," "behavioral intervention plan," and "serious behavior problems," and have been repealed, along with a number of other definitional provisions of section 3001.²¹ In addition, the entirety of section 3052, which described the substantive requirements or elements of behavioral interventions and behavioral intervention plans, has been repealed.²² These two regulatory sections were the only test claim regulations approved in the Commission's September 28, 2000 test claim decision (corrected November 23, 2010),²³ and the only regulations on which the RRM in the parameters

¹⁸ Government Code section 17570 (Stats. 2010, ch. 719 (SB 856)).

¹⁹ Education Code section 56523(a) (Stats. 2013, ch. 48 (AB 86)).

²⁰ See, e.g., Exhibit C, Statement of Decision and Parameters and Guidelines, Corrected April 29, 2013, page 65.

²¹ Register 2014, No. 19.

²² Register 2013, No. 42.

²³ Exhibit B, Test Claim Statement of Decision, *Behavioral Intervention Plans*, CSM-4464.

and guidelines was based.²⁴ Therefore, all regulatory sections found to impose activities in the test claim have been repealed pursuant to Statutes 2013, chapter 48.

Based on the foregoing, the Commission finds that Statutes 2013, chapter 48, constitutes a subsequent change in law, as defined.

B. The Requester Has Made an Adequate Showing that the State’s Liability May Be Modified Based on a Subsequent Change in Law.

At this hearing, the Commission is required to determine whether “the request, when considered in light of all of the written comments and supporting documentation in the record of this request, has a substantial possibility of prevailing at the second hearing.”²⁵ If the Commission determines that the request has a substantial possibility of prevailing at the second hearing, the Government Code provides that the Commission shall notice a second hearing to determine if a new test claim decision shall be adopted to supersede the previously adopted test claim decision.²⁶

Here, the subsequent change in law is an amendment to the Education Code section underlying the approved test claim regulations, which expressly disclaims the statutory authorization for the regulations, and directs the Superintendent to repeal the regulations. The regulations were, accordingly, repealed by Register 2013, No. 42, and Register 2014, No. 19. Therefore, Education Code section 56523, and the repealed regulations, constitute an adequate showing that the state’s liability may be modified based on a subsequent change in law, such that Finance has a substantial probability of prevailing at the second hearing.

V. Conclusion

Based on the foregoing, the Commission finds that the requester has made an adequate showing that the state’s liability for the *Behavioral Intervention Plans*, CSM-4464 mandate may be modified based on a subsequent change in law and that Finance has a substantial probability of prevailing at the second hearing. The Commission hereby directs Commission staff to notice the second hearing to determine whether to adopt a new test claim decision to supersede the Commission’s previously adopted test claim decision on *Behavioral Intervention Plans*, CSM-4464.

²⁴ Exhibit C, Statement of Decision and Parameters and Guidelines, Corrected April 29, 2013, page 65.

²⁵ Code of Regulations, title 2, section 1190.5(a)(1) (Register 2014, No. 21).

²⁶ Government Code section 17570(d)(4) (Stats. 2010, ch. 719 (SB 856)).

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



RE: **Decision**

Mandate Redetermination Request, 14-MR-05

First Hearing: Adequate Showing

Behavioral Intervention Plans (CSM-4464)

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

As Alleged to be Modified by Statutes 2013, Chapter 48 (AB 86)

Department of Finance, Requester

On December 3, 2015, the foregoing decision of the Commission on State Mandates was adopted on the above-entitled matter.

Handwritten signature of Heather Halsey in cursive, followed by the word "for".

Heather Halsey, Executive Director

Dated: December 4, 2015

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On December 4, 2015, I served the:

First Hearing Decision, Second Hearing Draft Proposed Decision, Draft Expedited Amendment to Parameters and Guidelines, and Notice of Hearing

Mandate Redetermination Request, 14-MR-05

First Hearing: Adequate Showing

Behavioral Intervention Plans (CSM-4464)

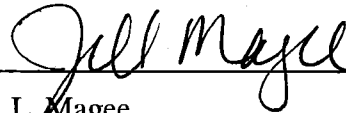
California Code of Regulations, Title 5, Sections 3001 and 3052, as added or amended by Register 93, No. 17; Register 96, No. 8; Register 96, No. 32

As Alleged to be Modified by Statutes 2013, Chapter 48 (AB 86)

Department of Finance, Requester

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on December 4, 2015 at Sacramento, California.



Jill L. Magee

Commission on State Mandates

980 Ninth Street, Suite 300

Sacramento, CA 95814

(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 11/30/15

Claim Number: 14-MR-05

Matter: Behavioral Intervention Plans (CSM-4464)

Requester: Department of Finance

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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, § 1181.3.)

Amber Alexander, *Department of Finance*

915 L Street, Sacramento, Ca

Phone: (916) 445-0328

Amber.Alexander@dof.ca.gov

Socorro Aquino, *State Controller's Office*

Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816

Phone: (916) 322-7522

SAquino@sco.ca.gov

Harmeet Barkschat, *Mandate Resource Services, LLC*

5325 Elkhorn Blvd. #307, Sacramento, CA 95842

Phone: (916) 727-1350

harmeet@calsdrc.com

Lacey Baysinger, *State Controller's Office*

Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816

Phone: (916) 324-0254

lbaysinger@sco.ca.gov

Mike Brown, *School Innovations & Advocacy*

5200 Golden Foothill Parkway, El Dorado Hills, CA 95762

Phone: (916) 669-5116

mikeb@sia-us.com

J. Bradley Burgess, *MGT of America*

895 La Sierra Drive, Sacramento, CA 95864

Phone: (916) 595-2646

Bburgess@mgtamer.com

Gwendolyn Carlos, *State Controller's Office*

Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816

Phone: (916) 323-0706

gcarlos@sco.ca.gov

David Cichella, *California School Management Group*

3130-C Inland Empire Blvd., Ontario, CA 91764

Phone: (209) 834-0556

dcichella@csmcentral.com

Joshua Daniels, *Attorney, California School Boards Association*

3251 Beacon Blvd, West Sacramento, CA 95691

Phone: (916) 669-3266

jdaniels@csba.org

Marieta Delfin, *State Controller's Office*

Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816

Phone: (916) 322-4320

mdelfin@sco.ca.gov

Andra Donovan, *San Diego Unified School District*

Legal Services Office, 4100 Normal Street, Room 2148, , San Diego, CA 92103

Phone: (619) 725-5630

adonovan@sandi.net

Donna Ferebee, *Department of Finance*

915 L Street, Suite 1280, Sacramento, CA 95814

Phone: (916) 445-3274

donna.ferebee@dof.ca.gov

Chris Ferguson, *Department of Finance*

Education Systems Unit, 915 L Street, 7th Floor, 915 L Street, 7th Floor, Sacramento, CA 95814

Phone: (916) 445-3274

Chris.Ferguson@dof.ca.gov

Susan Geanacou, *Department of Finance*

915 L Street, Suite 1280, Sacramento, CA 95814

Phone: (916) 445-3274

susan.geanacou@dof.ca.gov

Paul Golaszewski, *Legislative Analyst's Office*

925 L Street, Suite 1000, Sacramento, CA 95814

Phone: (916) 319-8341

Paul.Golaszewski@lao.ca.gov

Rebecca Hamilton, *Department of Finance*

Education Systems Unit, 915 L Street, 7th Floor, Sacramento, CA 95814

Phone: (916) 445-0328

Rebecca.Hamilton@dof.ca.gov

Ed Hanson, *Department of Finance*

Education Systems Unit, 915 L Street, 7th Floor, Sacramento, CA 95814

Phone: (916) 445-0328
ed.hanson@dof.ca.gov

Mark Ibele, *Senate Budget & Fiscal Review Committee*
California State Senate, State Capitol Room 5019, Sacramento, CA 95814
Phone: (916) 651-4103
Mark.Ibele@sen.ca.gov

Matt Jones, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
matt.jones@csm.ca.gov

Jill Kanemasu, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-9891
jkanemasu@sco.ca.gov

Dan Kaplan, *Fiscal & Policy Analyst, Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8353
Dan.Kaplan@lao.ca.gov

Jennifer Kuhn, *Deputy, Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8332
Jennifer.kuhn@lao.ca.gov

Jay Lal, *State Controller's Office (B-08)*
Division of Accounting & Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-0256
JLal@sco.ca.gov

George Landon, *Deputy Superintendent, Admin. Fiscal Support, Lake Elsinore Unified School District*
545 Chaney Street, Lake Elsinore, CA 92530
Phone: (951) 253-7095
George.Landon@leusd.k12.ca.us

Michelle Mendoza, *MAXIMUS*
17310 Red Hill Avenue, Suite 340, Irvine, CA 95403
Phone: (949) 440-0845
michellemendoza@maximus.com

Yazmin Meza, *Department of Finance*
915 L Street, Sacramento, CA 95814
Phone: (916) 445-0328
Yazmin.meza@dof.ca.gov

Lisa Mierczynski, *Department of Finance (A-15)*
Requester Representative
915 L Street, 12th Floor, Sacramento, CA 95814
Phone: (916) 445-0328
lisa.mierczynski@dof.ca.gov

Meredith Miller, Director of SB90 Services, *MAXIMUS*
3130 Kilgore Road, Suite 400, Rancho Cordova, CA 95670
Phone: (972) 490-9990
meredithcmiller@maximus.com

Robert Miyashiro, *Education Mandated Cost Network*
1121 L Street, Suite 1060, Sacramento, CA 95814
Phone: (916) 446-7517
robertm@sscal.com

Keith Nezaam, *Department of Finance*
915 L Street, 8th Floor, Sacramento, CA 95814
Phone: (916) 445-8913
Keith.Nezaam@dof.ca.gov

Andy Nichols, *Nichols Consulting*
1857 44th Street, Sacramento, CA 95819
Phone: (916) 455-3939
andy@nichols-consulting.com

Christian Osmena, *Department of Finance*
915 L Street, Sacramento, CA 95814
Phone: (916) 445-0328
christian.osmena@dof.ca.gov

Arthur Palkowitz, *Stutz Artiano Shinoff & Holtz*
2488 Historic Decatur Road, Suite 200, San Diego, CA 92106
Phone: (619) 232-3122
apalkowitz@sashlaw.com

Keith Petersen, *SixTen & Associates*
P.O. Box 340430, Sacramento, CA 95834-0430
Phone: (916) 419-7093
kbsixten@aol.com

Mollie Quasebarth, *Department of Finance*
Education Systems Unit, 915 L Street, 7th Floor, Sacramento, CA 95814
Phone: (916) 445-0328
mollie.quasebarth@dof.ca.gov

Mark Rewolinski, *MAXIMUS*
625 Coolidge Drive, Suite 100, Folsom, CA 95630
Phone: (949) 440-0845
markrewolinski@maximus.com

Sandra Reynolds, *Reynolds Consulting Group, Inc.*
P.O. Box 894059, Temecula, CA 92589
Phone: (951) 303-3034
sandrareynolds_30@msn.com

David Scribner, *The Law Office of David E. Scribner, Esq*
11347 Folsom Blvd, Suite D, Rancho Cordova, CA 95742
Phone: (916) 207-2848
david@deslawoffice.com

Steve Shields, *Shields Consulting Group, Inc.*

1536 36th Street, Sacramento, CA 95816

Phone: (916) 454-7310

steve@shieldscg.com

Jim Spano, Chief, Mandated Cost Audits Bureau, *State Controller's Office*

Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816

Phone: (916) 323-5849

jspano@sco.ca.gov

Dennis Speciale, *State Controller's Office*

Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816

Phone: (916) 324-0254

DSpeciale@sco.ca.gov

Meg Svoboda, *Senate Office of Research*

1020 N Street, Suite 200, Sacramento, CA

Phone: (916) 651-1500

meg.svoboda@sen.ca.gov

Amy Tang-Paterno, Educational Fiscal Services Consultant, *California Department of Education*

Government Affairs, 1430 N Street, Suite 5602, Sacramento, CA 95814

Phone: (916) 322-6630

ATangPaterno@cde.ca.gov

Thomas Todd, Assistant Program Budget Manager, *Department of Finance*

Education Systems Unit, 915 L Street, 7th Floor, Sacramento, CA 95814

Phone: (916) 445-0328

Thomas.Todd@dof.ca.gov

Jolene Tollenaar, *MGT of America*

2251 Harvard Street, Suite 134, Sacramento, CA 95815

Phone: (916) 443-411

jolene_tollenaar@mgtamer.com

Brian Uhler, *Legislative Analyst's Office*

925 L Street, Suite 1000, Sacramento, CA 95814

Phone: (916) 319-8328

brian.uhler@lao.ca.gov

Marichi Valle, *San Jose Unified School District*

855 Lenzen Avenue, San Jose, CA 95126

Phone: (408) 535-6141

mvalle@sjusd.org