Hearing Date: March 26, 2010
J:/mandates/2004/TC/04-TC-01/tc/FSA

ITEM 4

PROPOSED STATEMENT OF DECISION

Education Code Sections 17070.755, 17584.3, and 35292.5
Statutes 2003, Chapter 358 (AB 1124); Statutes 2003, Chapter 909 (SB 892),

Office of Public School Construction, State Allocation Board, and State Department of General Services Forms: SAB Forms 40-21, 50-04, 892, 892R

Clean School Restrooms

04-TC-01

Los Angeles Unified School District, Claimant

This proposed Statement of Decision was originally set for hearing on January 29, 2010 and postponed at the request of claimant. Only the item number has changed since the original decision. See the following pages for the original proposed decision prepared for January 29, 2010.

Hearing: January 29, 2010
j:mandates/2004/04-TC-01/tc/PropSOD

ITEM 9

TEST CLAIM
PROPOSED STATEMENT OF DECISION

Education Code Sections 17070.755, 17584.3, and 35292.5
Statutes 2003, Chapter 358 (AB 1124); Statutes 2003, Chapter 909 (SB 892),

Office of Public School Construction, State Allocation Board, and State Department of General Services Forms: SAB Forms 40-21, 50-04, 892, 892R

Clean School Restrooms

04-TC-01

Los Angeles Unified School District, Claimant

EXECUTIVE SUMMARY

The sole issue before the Commission is whether the Proposed Statement of Decision accurately reflects any decision made by the Commission at the January 29, 2010 hearing on the above named test claim.[1]

Recommendation

Staff recommends that the Commission adopt the Proposed Statement of Decision that accurately reflects the staff recommendation on the test claim. Minor changes, including those to reflect the hearing testimony and the vote count will be included when issuing the final Statement of Decision.

However, if the Commission's vote on Item 8 modifies the staff analysis, staff recommends that the motion on adopting the Proposed Statement of Decision reflect those changes, which would be made before issuing the final Statement of Decision. In the alternative, if the changes are significant, it is recommended that adoption of a Proposed Statement of Decision be continued to the March 26, 2010 Commission hearing.

[1] California Code of Regulations, title 2, section 1188.1, subdivision (a).

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Education Code Sections 17070.755, 17584.3, and 35292.5; Statutes 2003, Chapter 358 (AB 1124); Statutes 2003, Chapter 909 (SB 892), Office of Public School Construction, State Allocation Board, and State Department of General Services Forms: SAB Forms 40-21, 50-04, 892, 892R Filed on December 22, 2004, by Los Angeles Unified School District, Claimant.	Case No.: 04-TC-01 *Clean School Restrooms* 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 on January 29, 2010*)

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on January 29, 2010. [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/modified] the staff analysis to [approve/deny] the test claim at the hearing by a vote of [vote count will be included in the final Statement of Decision].

Summary of Findings

This test claim addresses Education Code statutes and alleged executive orders describing the appropriate standards of cleanliness and maintenance for K-12 school restrooms. The test claim statutes were proposed as a response to a concern regarding the dangerous and unsanitary conditions of school restrooms. The test claim statutes and alleged executive orders require that:

- Restrooms shall at all times be maintained and cleaned regularly, fully operational and stocked at all times with toilet paper, soap, and paper towels or functional hand dryers.
- Restrooms shall be kept open during the hours when pupils are in class and not in class. Restrooms may be temporarily closed when necessary for pupil safety and repair.
- Schools participating in the Deferred Maintenance Program that are in violation of the clean restroom provisions are ineligible for state matching apportionments under the program.

- In order to participate in the Deferred Maintenance Program, schools are required to prioritize and certify the use of deferred maintenance funds to ensure that school restrooms are functional and meet local hygiene standards applicable to public facilities.
- In order to participate in the School Facilities Program, schools are required to prioritize and certify the use of funds in the Maintenance of Facilities Account to ensure that school restrooms are functional and meet local hygiene standards applicable to public facilities.
- The State Allocation Board has developed a Restroom Maintenance Complaint form and a response form for the district when complaints are lodged. The response form must be filled out and sent to the State Allocation Board, verifying that the violation has been remedied, in order to receive the apportionment under the Deferred Maintenance Program.

The Commission finds that Education Code section 35292.5, subdivision (a), mandates the following activities on K-12 school districts:

- Every restroom shall at all times be maintained and cleaned regularly, fully operational and stocked at all times with toilet paper, soap, and paper towels or functional hand dryers.
- Restrooms shall be kept open during school hours when pupils are not in class and a sufficient number of restrooms shall be open when pupils are in class. (A restroom may temporarily close when necessary for pupil safety or repair.)

However, these requirements do not impose a new program or higher level of service. Under prior law (including common law, and Education Code sections 17565, 17576, and 17593), school districts have long been required to perform these activities.

Moreover, the Commission finds that Education Code sections 17070.755 and 17584.3, and the State Allocation Board Forms 40-21, 50-04, 892, and 892R, do not impose a state-mandated program. Rather, the requirements of these statutes and alleged executive orders are conditions precedent to the receipt of state apportionments under the Deferred Maintenance Program and the School Facilities Program. School districts are not mandated by the state to participate in these programs.

The Commission denied the test claim, concluding that Education Code sections 17070.755, 17584.3, and 35292.5, and the State Allocation Board Forms 40-21, 50-04, 892, 892R, do not impose a reimbursable state-mandated program on school districts..

BACKGROUND

This test claim addresses Education Code statutes and alleged executive orders describing the appropriate standards of cleanliness and maintenance for school restrooms. The test claim statutes were proposed as a response to a concern regarding the dangerous and unsanitary conditions of school restrooms. The legislative history for Assembly Bill (AB) 1124 (Stats. 2003, ch. 358) provides as follows:

> The author states, "According to a news report aired in Los Angeles, an undercover investigation at more than 50 California schools revealed that children risk their health everyday at school when they need to use the restroom. The three-month investigation found that many of the bathrooms at these schools were

> either locked or not available, they lacked toilet paper, soap and paper towels, they had broken fixtures and many even tested positive for bacterial contamination. Often, children choose not to use the restroom to avoid contamination. By doing so, they become prone to getting urinary tract infections and many end up suffering stomachaches."[2]

Similarly, the legislative history for Senate Bill 892 (Stats. 2003, ch. 909) states that "[a]ccording to the National Clearinghouse for Educational Facilities, close to 20 percent of middle and high-school students admit to parents that they avoid the school restroom due to dirty or unsafe conditions."[3]

The test claim statutes and alleged executive orders are described below.

1. Education Code Section 35929.5: This section defines how restrooms in K-12 schools are to be maintained:
   - Restrooms shall at all times be maintained and cleaned regularly, fully operational and stocked at all times with toilet paper, soap, and paper towels or functional hand dryers.
   - Restrooms shall be kept open during hours when pupils are not in class and a sufficient number of restrooms shall be open during hours when pupils are in class.
   - An exception to these requirements exists to allow schools to temporarily close any restroom as necessary for pupil safety or repair.
   - Any schools participating in the Deferred Maintenance Program that are in violation of these provisions are ineligible for Deferred Maintenance Program matching apportionments. Districts have 30 days after receipt of written notice to cure any violations prior to termination of funding.
2. Education Code Section 17584.3: This section makes general facility maintenance a priority purpose of funds apportioned under the Deferred Maintenance Program. In order to receive Deferred Maintenance Program apportionments, a priority for use of the funds must be to ensure that facilities, including restrooms, are functional and that they meet local hygiene standards generally applicable to public facilities.
3. Education Code Section 17070.755: This section makes general facility maintenance a priority purpose of funds in the Maintenance of Facilities Account. In order to receive School Facilities Program apportionments, a priority use of the funds must be to ensure that facilities, including restrooms, are functional and meet local hygiene standards generally applicable to public facilities.
4. Alleged Executive Orders:
   - SAB Form 50-04: This is the application for funding under the School Facilities Program. The district must certify that it has established a Restricted Maintenance of

[2] Assembly Committee on Education, Report on AB 1124 (2003-2004 Reg. Sess.), as introduced February 21, 2003, and heard April 2, 2003, page 3.

[3] Senate Rules Committee, Senate Floor Analyses, SB 892 (2003-2004 Reg. Sess.), as amended September 8, 2003, page 3.

Facilities Account pursuant to Education Code section 17070.75. The district must also certify that it has made a priority of the funds in the restricted account to ensure that facilities are functional and meet local hygiene standards.

- SAB Form 40-21: In order to receive State Deferred Maintenance Funds, this form requires the County Superintendent of Schools to certify the amount each district deposits in its Deferred Maintenance Fund for the fiscal year indicated on the form. The form requires certification that, pursuant to Education Code section 17584.3, the district has made a priority of the deferred maintenance basic grant to ensure that facilities are functional and meet local hygiene standards. This form is due to the Office of Public School Construction within 60 days after the Basic Grant is apportioned.
- SAB Form 892: This form is titled "Restroom Maintenance Complaint, Education Code section 35292.5." It describes the requirements established by Education Code section 35292.5 relating to sufficiency and availability of restroom facilities in all public schools. The form asks for the location of the restroom in question and a description of the unsatisfactory conditions prompting the complaint. Types of complaints are listed on the form such as damaged sinks, empty soap dispensers and inaccessibility for extended periods of time. It asks for the complainant's contact information, although anonymous complaints are permitted.
- SAB Form 892R: This form is titled "Response to Restroom Maintenance Complaint. This form is sent to the school site originating the complaint as detailed in SAB Form 892. The Office of Public School Construction requires the school to cure the deficiency and provide confirmation by the District Superintendent within an allotted time period. It requires the District Superintendent to recertify that he or she understands the requirements of Education Code section 35292.5 and that failure to comply shall result in the withholding of deferred maintenance apportionments to the school district under Education Code section 17584.

Claimant's Position

The claimant contends that the test claim statutes and alleged executive orders constitute a reimbursable state-mandated program. The claimant filed a declaration from Bruce Kendall, Director of Maintenance and Operations for the Los Angeles Unified School District, requesting reimbursement for the following activities:

A. Restroom Maintenance and Access

1. Maintain and regularly clean restrooms. Additional custodians and restroom attendants have been hired. Restrooms are now routinely cleaned as often as every night and spot-cleaned and restocked twice per day. Service logs are maintained at each site.
2. Keep restrooms fully operational and stocked at all times with toilet paper, soap, and paper towels or functional hand dryers. A daily inventory of fixtures needing repair is prepared and a "trouble call" system is in place to respond to reports of needed repairs. School plant managers randomly monitor restrooms daily.

3. Keep all restrooms open during school hours when pupils are not in classes, and keep a sufficient number of restrooms open during school hours when pupils are in classes. Restrooms previously closed and used for storage have been reopened and storage containers obtained. Three hundred and nine (309) restrooms have been renovated and 553 restrooms repainted.

B. Restroom Maintenance Complaints

1. Respond to restroom maintenance complaints lodged by members of the public either directly with the district or submitted by the complainant to the Office of Public School Construction. Staff, students, and visitors are urged to report needed repairs to site administrators using the district's Clean Restroom Hotline website.

2. In the case of a direct complaint to the district, responding directly to the person complaining and resolving the deficiency.

3. In the case of a member of the public who submits a SAB form 892 to the Office of Public School Construction, responding to the notice by providing a response on SAB form 892R.

4. Should the district responses prove insufficient to any published or unpublished criteria of the Office of Public School Construction, the district must participate in further resolution procedures including hearing of the matter before the State Allocation Board, taking subsequent steps to resolve the alleged violations, and complying with appeal procedures which may be provided for by the State Allocation Board.

C. Certification of the Use of Funds

Take the actions necessary to be able to certify in the annual applications for state deferred maintenance funds, and other forms as required by the State Allocation Board, that the district has made a priority of the use of funds in the restricted maintenance account to ensure that facilities are functional and meet local hygiene standards, and that the district has made a priority use of the deferred maintenance basic grant to ensure that facilities are functional and meet local hygiene standards.

The claimant estimates costs incurred at "more than $8.9 million in increased labor costs and $13.7 million in repair and renovation costs during the calendar year 2004 to implement these new duties mandated by the state and for which it cannot otherwise obtain complete funding or reimbursement."

Position of the Department of General Services, Office of Public School Construction

The Office of Public School Construction contends that the test claim statutes and alleged executive orders do not impose a reimbursable state-mandated program on the following grounds:

- Education Code section 35929.5 (which requires that restrooms be open, clean, and operational and supplied with water, soap, toilet paper, and a method for drying hands) clarifies existing law and does not impose a new program or higher level of service. Prior law in Education Code section 17576 already requires school districts to furnish sufficient patent flush water closets for the use of pupils.

- Education Code section 17584.3 does not impose a state-mandated program since participation in the Deferred Maintenance Program is voluntary. Education Code section 17582 states that a district "may" establish an account to be known as the district deferred maintenance account.
- School districts that participate in the Deferred Maintenance Program receive annual funding from the state that can be used on the maintenance of school restrooms.

Position of the Department of Finance

The Department of Finance contends that the test claim statutes and alleged executive orders do not impose a reimbursable state-mandated program on the following grounds:

- The test claim statutes pled do not impose a new program or higher level of service, but were enacted in response to negligent practices by school districts in violation of their existing duties. Long standing law, currently codified in Education Code section 17576 requires school districts to provide adequate restrooms for the use of students and staff. Merely clarifying that the hours of operation should coincide with the students' needs and specifying that restroom should be reasonably clean and operational cannot be considered new duties. This conclusion is further supported by a Legislative Counsel opinion requested by the author and provided to the Governor's Office when the bill was signed.

  The Legislative Counsel Opinion attached to the Department's comments addresses the question of whether Education Code section 35292.5, if enacted, "would impose a state-mandated local program on school districts for which the state must provide reimbursement under Section 6 of Article XIII B of the California Constitution?" The Legislative Counsel's Office concluded that existing law, originally enacted before January 1, 1975, requires school districts to provide sufficient water closets for the use of pupils, and that the activities required by section 35292.5 do not impose a new program or higher level of service.
- Activities required as a result of a school district's participation in the Deferred Maintenance Program and the School Facilities Program, are not mandated by the state. These programs are discretionary and requirements of the programs are imposed as a condition of receiving funds.
- The state is not required to provide separate funding for assisting schools with maintenance and repairs, but does so at its option with the Deferred Maintenance Program and the School Facilities Program. The state may condition receipt of these supplementary funds with reasonable expectations. "Because adequate restrooms are a health necessity, they are unquestionably a fundamental priority for maintenance. The legislation merely reminds schools of the obvious in this respect, and makes the optional funding program at risk if this duty is ignored."

COMMISSION FINDINGS

The courts have found that article XIII B, section 6, of the California Constitution[4] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[5] "Its

[4] Article XIII B, section 6, subdivision (a), provides: (a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state

purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[6]

A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[7] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[8]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[9] To determine if the program is new or imposes a higher level of service, the test claim statutes and executive orders must be compared with the legal requirements in effect immediately before the enactment.[10] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[11]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[12]

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shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

[5] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

[6] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[7] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[8] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878, (*San Diego Unified School Dist.)*; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835 *(Lucia Mar).*

[9] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; see also *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

[10] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[11] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[12] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[13] 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."[14]

Issue 1: Do the test claim statutes and alleged executive orders impose state-mandated duties within the meaning of article XIII B, section 6 of the California Constitution?

For the test claim statutes and alleged executive orders to impose a state-mandated program, the language must order or command a school district to engage in an activity or task. If the language does not mandate a school district to perform an activity or task, then article XIII B, section 6 is not triggered. Moreover, where program requirements are only invoked after the district has made an underlying discretionary decision that triggers the requirements to apply, or where participation in the underlying program is voluntary, courts have held that the resulting requirements do not constitute a state-mandated program subject to article XIII B, section 6.[15] A state-mandated program is created when the test claim statutes or alleged executive orders establish conditions under which the state, rather than a local entity, has made the decision requiring the district to incur costs.[16]

A. Education Code Section 35292.5

The claimant asserts that Education Code section 35292.5 requires districts to perform new activities to meet the standards of cleanliness and maintenance described in this code section. Education Code section 35292.5 states in relevant part that:

> (a) Every public and private school maintaining any combination of classes from kindergarten to grade 12, inclusive, shall comply with the following:
>
> > (1) Every restroom shall at all times be maintained and cleaned regularly, fully operational and stocked at all times with toilet paper, soap, and paper towels or functional hand dryers.
> >
> > (2) Restrooms shall be kept open during school hours when pupils are not in class and a sufficient number of restrooms shall be open when pupils are in class.
>
> (b) Notwithstanding subdivision (a), a school may temporarily close any restroom as necessary for pupil safety or as necessary to repair the facility.

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[13] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551 and 17552.

[14] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[15] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783; *Kern High School Dist., supra,* 30 Cal.4th 727, 727.

[16] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 880.

As a penalty for not performing these activities, schools that participate in the Deferred Maintenance Program will no longer receive deferred maintenance matching apportionments from the state. Subdivision (c) of section 35292.5 states that:

> Any school district that operates a public school that is in violation of this section as determined by the State Allocation Board, is ineligible for state deferred maintenance fund matching apportionments pursuant to section 17584 if the school district has not corrected the violation within 30 days after receipt of a written notice of the violation from the board. Prior to determining that the school district is ineligible, the board shall provide the school district with a reasonable opportunity to cure the violation.

Based on the plain language of the statute, the Commission finds that the following activities required by Education Code section 35292.5, subdivision (a), are mandated by the state:[17]

- Every restroom shall at all times be maintained and cleaned regularly, fully operational and stocked at all times with toilet paper, soap, and paper towels or functional hand dryers.
- Restrooms shall be kept open during school hours when pupils are not in class and a sufficient number of restrooms shall be open when pupils are in class.

As more fully described below, the Deferred Maintenance Program is a voluntary program that school districts participate in to receive state funding. Even though Education Code section 35292.5 refers to the Deferred Maintenance Program, the activities required by the statute are imposed on all school districts, including those that do not participate in the Deferred Maintenance Program. Education Code section 35292.5 is located in Title 2, Division 3, Part 21 of the Education Code as duties imposed on all governing boards.

Accordingly, the Commission finds that Education Code section 35292.5 constitutes a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

B. Education Code sections 17070.755 and 17584.3; State Allocation Board Forms 50-04 and 40-21

As summarized below, Education Code sections 17070.755 and 17584.3, and State Allocation Board Forms 50-04 and 40-21 require school districts that apply for grant funding under the School Facilities Program and the Deferred Maintenance Program to certify to the State Allocation Board that the receipt of funding allocated through these programs is prioritized by the district to ensure that restroom facilities for pupils are functional and that they meet local hygiene standards generally applicable to public facilities. A summary of these two programs, Education Code sections 17070.755 and 17584.3, and the State Allocation Board Forms 50-04 and 40-21, is provided below.

School Facilities Program. Education Code section 17070.755 is part of the School Facilities Program, which was created by the Leroy F. Greene School Facilities Act.[18] The School Facilities Program provides bond funding for new construction and modernization projects of

[17] Education Code section 75 states that "'[s]hall is mandatory and 'may' is permissive."

[18] Education Code sections 17000 et seq.

school districts. Basically, a district that has two or more school sites that each have a pupil population density greater than 115 pupils per acre in grades K through 6 or a pupil population density greater than 90 pupils per acre in grades 7 through 12 can apply to the State Allocation Board for funding that will be used to relieve overcrowded conditions.[19] This calculation, as outlined in Education Code section 17071.75, provides the amount of eligibility for proposed projects.

Once approved and prior to releasing funds, the State Allocation Board is required to ensure that the school district has made "all necessary repairs, renewals and replacements to ensure that a project is at all times maintained in good repair, working order and condition."[20] Under the act, good repair is defined as:

> [T]he facility is maintained in a manner that assures that it is clean, safe, and functional as determined pursuant to a school facility inspection and evaluation instrument developed by the Office of Public School Construction and approved by the board or a local evaluation instrument that meets the same criteria. Until the school facility inspection and evaluation instrument is approved by the board, 'good repair' means the facility is maintained in a manner that assures that it is clean, safe and functional as determined by the interim evaluation instrument developed by the Office of Public School Construction or a local evaluation instrument. The school facility inspection and evaluation instrument and local evaluation instruments that meet the minimum criteria of this subdivision shall not require capital enhancements beyond the standards to which the facility was designed and constructed.[21]

The minimum criteria include a specific reference to restroom facilities stating that restrooms and restroom fixtures are functional, the restrooms appear to be maintained and stocked with supplies regularly, and the restroom facilities appear to be in compliance with Education Code section 35292.5.[22]

To ensure that districts in receipt of funds under the act comply with this requirement and to encourage continual maintenance, the applicant district must establish a restricted account, known as the Maintenance of Facilities Account, within the district's general fund for the sole purpose of funding ongoing and major maintenance.[23] The first priority for the funds in the Maintenance of Facilities Account is to comply with the State Allocation Board's requirement to ensure that a project is at all times maintained in good repair. The district must deposit three percent of the total general fund expenditures of the applicant school district into the Maintenance of Facilities Account every year for 20 years after receiving funds under this act. As an additional requirement to receipt of grant funding, the district must publicly approve an ongoing and major maintenance plan that specifies how the funds will be used.[24]

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[19] Education Code section 17071.75, subdivision (a)(1).

[20] Education Code section 17070.75, subdivision (a).

[21] Education Code section 17002, subdivision (d)(1).

[22] Education Code section 17002, subdivision (d)(1)(M)(i-iv).

[23] Education Code section 17070.75, subdivision (b)(1).

[24] Education Code section 17070.75, subdivision (b)(3)

The test claim statute, Education Code section 17070.755, was enacted in 2003 to provide that a priority for the use of the funds in the Maintenance of Facilities Account be used "to ensure that … restroom facilities for pupils are functional and that they meet local hygiene standards generally applicable to public facilities." The alleged executive order, SAB Form 50-04, is the application for funding under the School Facilities Program. The district must certify in the application that it has established a Restricted Maintenance of Facilities Account and that it has made a priority of the funds in the restricted account to ensure that facilities, including restrooms, are functional and meet local hygiene standards.

Deferred Maintenance Program. Education Code section 17584.3 is included in the Deferred Maintenance Program, which is administered by the State Allocation Board for the purpose of funding the deferred maintenance of building systems that are necessary components of a school facility. Deferred maintenance is defined as "[t]he repair or replacement work performed on school facility components that is not performed on an annual or on-going basis but planned for the future" and falls within one of the categories specified on the application form.[25] Education Code section 17582 states that "[a] district *may* establish an account to be known as the district deferred maintenance account." Once an application is approved, school districts are provided "state matching funds, on a dollar-for-dollar basis, to assist school districts with expenditures for major repair or replacement of existing school building components."[26] Education Code section 17582, subdivision (b), states that "[f]unds deposited in the district deferred maintenance fund shall only be expended for maintenance purposes as provided pursuant to subdivision (a)." The maintenance purposes referenced in this code section include:

> [F]or the purpose of major repair or replacement of plumbing, heating, air conditioning, electrical, roofing, and floor systems, the exterior and interior painting of school buildings, the inspection, sampling, and analysis of building materials to determine the presence of asbestos-containing materials, the encapsulation or removal of asbestos-containing materials, the inspection, identification, sampling, and analysis of building materials to determine the presence of lead-containing materials, the control, management, and removal of lead-containing materials, and any other items of maintenance approved by the State Allocation Board.[27]

The test claim statute, Education Code section 17584.3, establishes a priority for use of Deferred Maintenance funds to ensure that "facilities, including, but not limited to, restroom facilities for pupils, are functional and that they meet local hygiene standards generally applicable to public facilities." The alleged executive order, SAB Form 40-21, requires the county superintendent of schools to certify the amount each district deposits in it its Deferred Maintenance Fund for the fiscal year indicated on the form. The form also requires certification that, pursuant to Education Code section 17584.3, the district has made a priority of the deferred maintenance basic grant to ensure that facilities, including restrooms, are functional and meet local hygiene standards.

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[25] California Code of Regulations, title 2, section 1866.

[26] Deferred Maintenance Program Handbook, Office of Public School Construction. June 2007.

[27] Education Code section 17582, subdivision (a).

Education Code Sections 17070.755 and 17584.3; State Allocation Board Forms 50-04 and 40-21 do not impose state-mandated activities on school districts.

The claimant contends that Education Code sections 17070.755 and 17584.3, and State Allocation Board Forms 50-04 and 40-21 mandate school districts to perform the following activities:

> Take the actions necessary to be able to certify in the annual applications for state deferred maintenance funds, and other forms as required by the State Allocation Board, that the district has made a priority of the use of funds in the restricted maintenance account to ensure that facilities are functional and meet local hygiene standards, and that the district has made a priority use of the deferred maintenance basic grant to ensure that facilities are functional and meet local hygiene standards.[28]

The Commission finds that Education Code sections 17070.755 and 17584.3, and State Allocation Board Forms 50-04 and 40-21 do not impose state-mandated activities on school districts. Based on the court's analysis in *Department of Finance v. Commission on State Mandates (Kern High School District)*, whether a district applies for funding through the Deferred Maintenance Program or the School Facilities Program is completely at the pleasure of the school district and, therefore, the requirements imposed by the test claim statutes and alleged executive orders do not qualify as a state-mandated program within the meaning of article XIII B, section 6.[29]

In *Kern High School District*, the Supreme Court analyzed the issue of legal compulsion by examining the nature of the claimants' participation in the underlying programs themselves. The court ruled that even if participation in the programs in question was legally compelled, the claimants were not eligible for reimbursement because they were "free at all relevant times to use funds provided by the state for that program to pay required program expenses. . ."[30]

The California Supreme Court also addressed the issue of whether a district that incurs costs as a result of participating in an optional government funding program is eligible for reimbursement. The court held that there was no "practical" compulsion to participate in these programs because a district that chooses to not participate in the program or ceases participation in a program does not face "certain and severe…penalties" such as "double… taxation" or other "draconian" consequences.[31] The court rested its analysis on the premise that local entities possessing discretion will make the choices that are ultimately the most beneficial for the parties involved:

> As to each of the optional funded programs here at issue, school districts are, and have been, free to decide whether to (i) continue to participate and receive program funding, even though the school district also must incur program-related costs associated with the [new] requirements or (ii) decline to participate in the

[28] Test Claim, page 9.

[29] *Kern High School Dist., supra*, 30 Cal.4th 727, 754.

[30] *Id.* at page 731.

[31] *Id.* at page 754.

> funded program. Presumably, a school district will continue to participate only if it determines that the best interests of the district and its students are served by participation – in other words, if, *on balance*, the funded program, even with strings attached, is deemed beneficial. And, presumably, a school district will decline participation if and when it determines that the costs of program compliance outweigh the funding benefits. (Emphasis in original.)[32]

The holding in *Kern High School District* applies here. School districts have complete discretion in determining whether to apply for Deferred Maintenance and School Facilities funding. Education Code section 17582 states that "[t]he governing board of each school district *may* establish a restricted fund to be known as the 'district deferred maintenance fund' for the purpose of major repair or replacement …" Similarly, Education Code section 17070.25 discusses the application process for funding under the School Facilities Program. Education Code section 17070.70, subdivision (b), states that "[t]he *applicant* school district shall comply with all laws pertaining to the construction, reconstruction, or alteration of, or addition to, school buildings." Thus, if the costs of taking the actions necessary to be eligible for these funds are too high, then the school district can forgo participation in these programs in exercise of its discretionary authority. Furthermore, school districts are not subjected to any penalties for not participating in these programs. Nothing in the law imposes a consequence or penalty for choosing to not participate in the Deferred Maintenance Program or School Facilities Program.

In *City of Merced v. State of California,* (1984) 153 Cal.App.3d 777, the court determined whether reimbursement was required for new statutory costs imposed on the local agency to pay a property owner for loss of goodwill when a local agency exercised the power of eminent domain. The court stated:

> [W]hether a city or county decides to exercise eminent domain is, essentially, an option of the city or county, rather than a mandate of the state. The fundamental concept is that the city or county is not required to exercise eminent domain. If, however, the power of eminent domain is exercised, then the city will be required to pay for loss of goodwill. Thus, payment for loss of goodwill is not a state-mandated cost.[33]

The court's holding in *City of Merced* demonstrates the underlying notion that in order to constitute a state-mandated activity, the school district or agency must have no other option but to perform the activities specified in the test claim statute or executive order. In *Kern High School District,* the Supreme Court reaffirmed the *City of Merced* by stating the following:

> The truer analogy between [*Merced*] and the present case is this: In *City of Merced*, the city was under no legal compulsion to resort to eminent domain – but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded

[32] *Id.* at page 753.

[33] *City of Merced, supra,* 153 Cal.App.3d 777, 783.

> program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate.[34]

Therefore, the courts' holding in *Kern High School District* and *City of Merced* preclude the finding of a mandate where districts are free to participate in the program at will. Therefore Education Code sections 17070.755 and 17584.3, and State Allocation Board Forms 50-04 and 40-21 do not impose state-mandated activities within the meaning of California Constitution XIII B, section 6.

C. State Allocation Board Forms 892 & 892R

Subdivision (c) of Education Code 35292.5 requires the State Allocation Board to establish a mechanism for determining whether a school district has performed the activities specified in subdivision (a); i.e, every restroom shall at all times be maintained and cleaned regularly, fully operational and stocked at all times with toilet paper, soap, and paper towels or functional hand dryers; and restrooms shall be kept open during school hours when pupils are not in class and a sufficient number of restrooms shall be open when pupils are in class.

The State Allocation Board implemented a complaint process that allows pupils, parents and guardians to file complaint forms with the Office of Public School Construction (OPSC). In order to file a complaint, parents, guardians and pupils fill out SAB Form 892, which requests information about the deficient condition of the restroom facilities. This form informs the complainant of the requirements pertaining to school restrooms specified in Education Code section 35292.5 and that any school district that is in ". . . violation of this section, as determined by the State Allocation Board, is ineligible for state deferred maintenance fund matching apportionments." Form 892R is the response that must be completed by the offending district in order to verify that the violation has been remedied. This form also requires the district to certify that it understands the requirements of Education Code section 35292.5. Form 892R contains a clause stating that "[f]ailure to respond to complaints may result in the school district being ineligible for state deferred maintenance fund matching apportionments pursuant to Education Code section 17584."

Based on the language contained in these forms, only school districts that participate in the Deferred Maintenance Program are required to supply this form and to take the actions necessary to be able to certify that the district has complied with Education Code section 35292.5. State Allocation Board Regulation 1866.4.2 states that:

> A district's unresolved complaints, pursuant to Education Code section 35292.5, will be presented to the Board prior to the annual basic grant apportionment for the fiscal year in which the complaint was filed. If the board determines that a violation of Education Code section 35292.5 has occurred, the district will receive a 30 day notice to correct the violation. Districts that do not correct the violation within 30 days of the date of the written notice shall be deemed ineligible for the basic grant and the funds may be distributed to other eligible districts[35]

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[34] *Kern High School District, supra,* 30 Cal.4th 727, 743.

[35] California Code of Regulations, title 2, section 1866.4.2.

The regulation does not provide that school districts must provide these forms and respond to complaints, nor do the State Allocation Board regulations explicitly require school districts to provide these forms to the school community. Rather, the compulsion to use Forms 892 and 892R is ancillary to a school district's decision to apply for funding through the Deferred Maintenance Program. The relevant regulations only state that schools in violation of Education Code section 35292.5 that also wish to receive Deferred Maintenance Program funding will no longer be eligible.

Therefore, the Commission finds that State Allocation Board Forms 892 and 892R do not impose a state-mandated activity within the meaning of article XIII B, section 6 of the California Constitution.

Issue 2: Do the activities mandated by Education Code section 35292.5, subdivision (a), impose a new program or higher level of service?

Education Code section 35292.5, subdivision (a), mandates the following activities on K-12 school districts:

- Every restroom shall at all times be maintained and cleaned regularly, fully operational and stocked at all times with toilet paper, soap, and paper towels or functional hand dryers.
- Restrooms shall be kept open during school hours when pupils are not in class and a sufficient number of restrooms shall be open when pupils are in class. (A restroom may temporarily close when necessary for pupil safety or repair.)

Education Code section 35292.5 was enacted by Statutes 2003, chapter 909 (SB 892), and became effective on January 1, 2004. Section 3 of the statute states the following:

> The Legislature finds and declares that, as regards public schools, a principal purpose of this act is to clarify the preexisting requirements of Section 17576 of the Education Code by specifying the minimum requirements necessary to provide sufficient patent flush water closets for the use of pupils in a manner that is consistent with those requirements that apply to other public and private persons or agencies pursuant to Health and Safety Code section 118505 of the Health and Safety Code. Because the local mandate established pursuant to Section 17576, which was enacted on January 1, 1948, was enacted prior to January 1, 1975, no reimbursement is required under this act pursuant to Section 6 of Article XIII B of the California Constitution.[36]

Legislative disclaimers and findings, like those described in Section 3 of the test claim statute, are not determinative to a finding of a reimbursable state-mandated program.[37] Rather, the statutory scheme in Government Code section 17500 et seq., contemplates that the Commission

[36] Health and Safety Code section 118505 requires publicly and privately owned facilities where the public congregates to be equipped with sufficient temporary or permanent restrooms to meet the needs of the public at peak hours. The statute requires the State Building Standards Commission and the Office of the State Architect to develop standards to satisfy the requirement. The statute exempts "any public or private elementary or secondary school facility."

[37] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 541.

has the sole and exclusive authority to adjudicate the issue.[38] Thus, the Commission must independently determine whether the required activities mandated by Education Code section 35292.5 constitute a new program or higher level of service within the meaning of article XIII B, section 6.

The claimant argues that Education Code section 35292.5 imposes new requirements regarding maintenance and operation of restrooms that were not required by prior law. The claimant further cites to Health and Safety Code section 118505, and argues that the code section "…specifically exempts public or private elementary or secondary school facilities…" from the requirements applicable to public facilities regarding maintenance and operation of restrooms. Thus, claimant contends that keeping school restrooms open, maintained, regularly cleaned, fully operational, and stocked with toilet paper, soap, and paper towels, are new requirements imposed on school districts beginning January 1, 2004.

The Commission disagrees with the claimant. For the reasons below, the Commission finds that the activities required by Education Code section 35292.5 do not constitute a new program or higher level of service.

In 1987, the California Supreme Court in *County of Los Angeles v. State of California* expressly stated that the term "higher level of service" must be read in conjunction with the phrase "new program." Both are directed at *state-mandated increases in the services* provided by local agencies and school districts.[39] The enactment of new statutory language, however, does not always mean that the Legislature intended to change the law, or to increase the level of service provided by school districts. The courts have recognized that changes in statutory language can be intended to clarify the law, rather than to change it.

> We assume the Legislature amends a statute for a purpose, but that purpose need not necessarily be to change the law. [Citation.] Our consideration of the surrounding circumstances can indicate that the Legislature made ... changes in statutory language in an effort only to clarify a statute's true meaning. [Citations omitted.][40]

The requirements to keep school restrooms open, maintained, regularly cleaned, fully operational, and stocked with toilet paper, soap, and paper towels are not new requirements imposed on school districts. As explained below, school districts were required to perform these activities before the enactment of the test claim statute.

Under common law, the courts have long recognized a special relationship between schools and their pupils based on the compulsory nature of K-12 education. This special relationship establishes an affirmative duty on school districts to protect students and to keep the school premises safe and welcoming.

> A special relationship is formed between a school district and its students resulting in the imposition of an affirmative duty on the school district to take all reasonable steps to protect its students. This affirmative duty arises, in part, based

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[38] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817-1818.

[39] *County of Los Angeles, supra*, 43 Cal.3d at page 56.

[40] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.

> on the compulsory nature of education. (*Rodriguez v. Inglewood Unified School Dist.* (1986) 186 Cal.App.3d 707, 714-715; … see also Cal.Const., art. 1, § 28, subd. (c) [students have inalienable right to attend safe, secure, and peaceful campuses]; Ed. Code, § 48200 [children between 6 and 18 years subject to compulsory full-time education].) "The right of all students to a school environment fit for learning cannot be questioned. Attendance is mandatory and the aim of all schools is to teach. Teaching and learning cannot take place without the physical and mental well-being of the students. The school premises, in short, must be safe and welcoming." (*In re William G.* (1985) 40 Cal.3d 550, 563 …)[41]

Since 1948, the Education Code has also required school districts to provide "sufficient patent flush water closets," or restrooms, as an integral part of the school facilities. This requirement is currently found in Education Code section 17576, which states the following:

> The governing board of every school district shall provide, as an integral part of each school building, or as part of at least one building of a group of separate buildings, sufficient patent flush water closets for the use of the pupils. In school districts where the water supply is inadequate, chemical water closets may be substituted for patent flush water closets by the board.
>
> This section shall apply to all buildings existing on September 19, 1947, or constructed after such date.[42]

In addition, prior law required the governing boards of school districts to furnish and repair school property (Ed. Code, § 17565) and required the clerk of each district under the direction of the governing boards, to "keep the schoolhouses in repair during the time school is taught therein, and exercise a general care and supervision over the school premises and property during the vacations of the school" (Ed. Code, § 17593). These requirements have been in statute since the 1959 Education Code.[43]

Thus, immediately before the enactment of the test claim statute, each school district was required to provide, as an integral part of at least one school building, "sufficient patent flush water closets for the use of pupils," and to keep school property "in repair." Since patent flush water closets are an integral part of the school building, they are considered school property and required to be kept "in repair."

In order to determine the meaning of these prior law requirements (to keep sufficient patent flush water closets in repair), courts first look at the words of the statute, giving them their plain and ordinary meaning. The courts use the dictionary as a proper source to determine the usual and

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[41] *M.W. v. Panama Buena Vista Union School Dist.* (2003) 110 Cal.App.4th 508, 517.

[42] Education Code section 17576 was added by Statutes 1976, chapter 277, and derived from former Education Code section 18009 (Stats. 1947, ch. 527).

[43] These statutes were added by Statutes 1976, chapter 277, and derived from former Education Code sections 16051 and 18001.

ordinary meaning of a word or phrase in a statute. Under the rules of statutory interpretation, when the language at issue is clear, the courts should not indulge in further construction.[44]

Webster's Third New International Dictionary defines "water closet" as "1.a. a closet, compartment, or room for defecation and excretion into a hopper fitted with a device for flushing away with water… b. the hopper *and its accessories.*"[45] Thus, under prior law, the requirement to provide a water closet, or restroom in a school building, included the requirement to provide its accessories; i.e., toilet paper, soap, and paper towels.[46]

"Sufficient" is defined broadly to include more than the quantity of an item. The quantity of restrooms required by prior law is clearly provided with the language in Education Code section 17576 that requires a restroom to be provided "as an integral part of each school building, or as part of at least one building of a group of separate buildings." As relevant here, the dictionary also defines "sufficient" to mean "marked by …quality to meet with the demands, wants, or needs of a situation or of a proposed use or end."[47]

And "repair" is defined to mean "1.a. the act or process of repairing; restoration to a state of soundness, efficiency, or health; b. the state of being in good or sound condition."[48] This definition is consistent with the court's interpretation in *People v. Tufts* of a county ordinance requiring that toilets be maintained in good repair.[49] The defendant, who maintained property with an inoperable toilet, argued that the county ordinance was unconstitutionally vague, claiming that the words "state of good repair" were uncertain. The court disagreed, and held that a toilet that does not work is not in a state of good repair. Rather, "good repair" means that the property must be fit for use.

> We disagree, especially in the context pleaded here that the toilet was inoperative. Common sense is sufficient to tell anyone that a toilet which does not work is not in a state of good repair. Persons of ordinary intelligence should be able to understand this. We have rejected a similar challenge. (*People v. Balmer* (1961) 196 Cal.App.2d Supp, 874, 879-880 …) There we said "The words 'good repair' have a well known [an]d definite meaning … They sufficiently inform the

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[44] *E.W. Bliss Co. v. Superior Court* (1989) 210 Cal.App.3d 1254, 1258.

[45] Webster's Third New International Dictionary, Merriam-Webster, Inc. Massachusetts 1993, page 2582.

[46] Evidence Code section 451, subdivision (f), requires a court when interpreting a statute to take judicial notice of ". . . [f]acts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute."

[47] Webster's Third New International Dictionary, Merriam-Webster, Inc. Massachusetts 1993, at page 2284.

[48] Webster's Third New International Dictionary, Merriam-Webster, Inc. Massachusetts 1993, page 1923.

[49] *People v. Tufts* (1979) 97 Cal.App.3d Supp. 37.

ordinary owner that his property must be fit for the habitation of those who would ordinarily use his dwelling." (*Id*. at p. 880.)[50]

With these definitions, the Commission finds that the prior law requirement imposed on school districts to keep sufficient patent flush water closets in repair means that the school restrooms had to be open, maintained, regularly cleaned, fully operational, and stocked with toilet paper, soap, and paper towels – the same requirements imposed by the test claim statute. Thus, the Legislature, with the enactment of Education Code section 35292.5, has not increased the level of service provided by school districts to their pupils. Accordingly, the activities required by Education Code section 35292.5, subdivision (a), do not impose a new program or higher level of service.

CONCLUSION

Accordingly, the Commission finds that Education Code sections 17070.755, 17584.3, and 35292.5, and the State Allocation Board Forms 40-21, 50-04, 892, 892R, do not impose a reimbursable state-mandated program on school districts.

[50] *Id.* at page 44.