



May 8, 2019

Ms. Erika Li  
Department of Finance  
915 L Street  
Sacramento, CA 95814

Mr. Arthur Palkowitz  
Artiano Shinoff  
2488 Historic Decatur Road, Suite 200  
San Diego, CA 92106

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

**Re: Proposed Decision**

*Public School Restrooms: Feminine Hygiene Products, 18-TC-01*  
Education Code Section 35292.6; Statutes 2017, Chapter 687 (AB 10)  
Desert Sands Unified School District, Claimant

Dear Ms. Li and Mr. Palkowitz:

The Proposed Decision for the above-named matter is enclosed for your review.

**Hearing**

This matter is set for hearing on **Friday, May 24, 2019**, at 10:00 a.m., State Capitol, Room 447, Sacramento, California.

Please notify Commission staff not later than the Wednesday prior to the hearing that you or a witness you are bringing plan to testify and please specify the names of the people who will be speaking for inclusion on the witness list. Staff will no longer send reminder emails because the Commission does not have the resources to contact each party and interested party. Therefore, the last communication from Commission Staff is this Proposed Decision and it is incumbent upon the participants to let Commission staff know if they wish to testify or bring witnesses.

If you would like to request postponement of the hearing, please refer to section 1187.9(b) of the Commission's regulations.

**Special Accommodations**

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

Sincerely,

Heather Halsey  
Executive Director

## ITEM 4

### TEST CLAIM

#### PROPOSED DECISION

Education Code Section 35292.6

Statutes 2017, Chapter 687 (AB 10)

*Public School Restrooms: Feminine Hygiene Products*

18-TC-01

Desert Sands Unified School District, Claimant

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#### EXECUTIVE SUMMARY

##### Overview

This Test Claim alleges reimbursable state-mandated activities arising from Statutes 2017, chapter 687 (AB 10), which added section 35292.6 to the Education Code. The test claim statute requires public schools maintaining any grade 6 to grade 12 classes, inclusive, that meet the 40-percent pupil poverty threshold required to operate a schoolwide program pursuant to Section 6314(a)(1)(A) of Title 20 of the United States Code, to stock at least 50 percent of the school's restrooms with feminine hygiene products, defined as tampons and sanitary napkins, at all times. In addition, the test claim statute prohibits schools from charging for any menstrual products, including feminine hygiene products, provided to pupils.

Staff finds that Education Code section 35292.6, added by the test claim statute, imposes a reimbursable state-mandated program on school districts as specified herein.

##### Procedural History

Statutes 2017, chapter 687, became effective on January 1, 2018. The Desert Sands Unified School District (claimant) filed the Test Claim on December 7, 2018.<sup>1</sup> The Department of Finance (Finance) filed comments on the Test Claim on January 16, 2019.<sup>2</sup> The claimant filed rebuttal comments on February 15, 2019.<sup>3</sup> Commission staff issued the Draft Proposed Decision

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1 Exhibit A, Test Claim, page 1.

2 Exhibit B, Finance's Comments on the Test Claim, page 1.

3 Exhibit C, Claimant's Rebuttal Comments, page 1.

on March 5, 2019.<sup>4</sup> The claimant filed comments on the Draft Proposed Decision on March 26, 2019.<sup>5</sup> Finance filed comments on the Draft Proposed Decision on March 26, 2019.<sup>6</sup>

**Commission Responsibilities**

Under article XIII B, section 6 of the California Constitution, local agencies and school districts are entitled to reimbursement for the costs of state-mandated new programs or higher levels of service. In order for local government to be eligible for reimbursement, one or more similarly situated local agencies or school districts must file a test claim with the Commission. “Test claim” means the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state. Test claims function similarly to class actions and all members of the class have the opportunity to participate in the test claim process and all are bound by the final decision of the Commission for purposes of that test claim.

The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution. In making its decisions, the Commission must strictly construe XIII B, section 6 and not apply it as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”<sup>7</sup>

**Claims**

The following chart provides a brief summary of the claims and issues raised and staff’s recommendation:

<b>Issue</b>	<b>Description</b>	<b>Staff Recommendation</b>
Was the Test Claim timely filed?	Government Code section 17551(c) states: “test claims shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later.” Section 1183.1(c) of the Commission’s regulations, in	<i>Timely filed</i> – The test claim statute became effective on January 1, 2018, and the Test Claim was filed on December 7, 2018, within 365 days following the effective date of the statute. <sup>9</sup>

<sup>4</sup> Exhibit D, Draft Proposed Decision.

<sup>5</sup> Exhibit E, Claimant’s Comments on the Draft Proposed Decision.

<sup>6</sup> Exhibit F, Finance’s Comments on the Draft Proposed Decision.

<sup>7</sup> *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1281, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

<sup>9</sup> Exhibit A, Test Claim, page 1.

Issue	Description	Staff Recommendation
	turn, defines “12 months” as 365 days. <sup>8</sup>	
Does Education Code section 35292.6 as added by Statutes 2017, chapter 687 impose a reimbursable state-mandated program on school districts?	<p>The test claim statute requires public schools maintaining any classes from grade 6 to grade 12, inclusive, that meets the 40 percent pupil poverty threshold required to operate a schoolwide program pursuant to Section 6314(a)(1)(A) of Title 20 of the United States Code, to stock at all times at least 50 percent of the school's restrooms with feminine hygiene products, defined as tampons and sanitary napkins, at all times at no cost to students.</p> <p>Finance argues that the implementation of the test claim statute may “simply be absorbed into existing activities of a school district, therefore not resulting in increased labor costs to that district,” because “[e]xisting law (Education Code section 35292.5) requires all schools, with few exceptions, to maintain clean, fully operational restrooms, stocked at all times with toilet paper, soap, and paper towels or functional hand dryers.”<sup>10</sup></p>	<p><i>Approve</i> – Education Code section 35292.6 imposes a state-mandated program on school districts with schools that (1) maintain any classes from grade 6 to grade 12, inclusive, <i>and</i> (2) meet the 40 percent pupil poverty threshold required to operate a schoolwide program pursuant to section 6314(a)(1)(A) of Title 20 of the United States Code, in that the school is eligible for Title I, Part A funds, and not less than 40 percent of the children enrolled in the school are from low-income families, for such schools to:</p> <ul style="list-style-type: none"> <li>• Stock 50 percent of the school’s restrooms with feminine hygiene products (defined only as tampons and sanitary napkins) at all times at no cost to pupils.</li> </ul> <p>This mandated activity is new. Prior state law requires schools to have restrooms open during school hours, and kept in good repair and stocked at all times with toilet paper, soap, and paper towels or functional hand dryers.<sup>11</sup> In addition, prior law requires that school</p>

<sup>8</sup> California Code of Regulations, title 2, section 1183.1(c), Register 2018, No. 18 (eff. April 1, 2018).

<sup>10</sup> Exhibit B, Finance’s Comments on the Test Claim, page 1.

<sup>11</sup> Education Code section 17002; Education Code section 35292.5.

Issue	Description	Staff Recommendation
		<p>restroom facilities be evaluated as to whether they meet the “good repair” standard.<sup>12</sup> Schools are also required by prior law to permit students use facilities consistent with their gender identity, irrespective of the gender listed on the pupil’s records.<sup>13</sup> No prior law requires schools to stock restrooms with feminine hygiene products.</p> <p>In addition, this activity is unique to local government, since it is imposed only on public schools, and it provides a service to the public. According to the test claim statute’s sponsor, the test claim statute is needed because “[n]ot having access to these vital medical necessities creates an additional barrier to a young girl’s education.”<sup>14</sup> The provision of public education is an essential governmental function.<sup>15</sup></p> <p>Finally, the evidence in the record supports a finding of increased costs mandated by the state of at least \$1,000.</p>

<sup>12</sup> Education Code section 17002(d)(1).

<sup>13</sup> Education Code section 221.5.

<sup>14</sup> Exhibit G, Senate Rules Committee, Office of Senate Floor Analyses, Third Reading Analysis of AB 10 (2017-2018), as amended September 1, 2017, page 2.

<sup>15</sup> *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 172.

## **Staff Analysis**

### **A. The Test Claim Was Timely Filed.**

Government Code section 17551 states that test claims must be filed “not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later.”<sup>16</sup>

Section 1183.1(c) of the Commission’s regulations, in turn, defines “12 months” for purposes of filing a test claim as “365 days” and specifically provides:

Except as provided in Government Code sections 17573 and 17574, any test claim or amendment filed with the Commission must be filed not later than 12 months (365 days) following the effective date of a statute or executive order, or within 12 months (365 days) of first incurring increased costs as a result of a statute or executive order, whichever is later.<sup>17</sup>

The test claim statute became effective on January 1, 2018, and the Test Claim was filed on December 7, 2018, within 365 days following the effective date of the statute.<sup>18</sup> The Test Claim is therefore timely pursuant to Government Code section 17551(c) and California Code of Regulations, title 2, section 1183.1(c).<sup>19</sup>

### **B. Education Code Section 35292.6 as Added by Statutes 2017, Chapter 687, Imposes a Reimbursable State-Mandated Program on School Districts with Specified Schools Within the Meaning of Article XIII B, Section 6 of the California Constitution.**

Education Code section 35292.6, as added by Statutes 2017, chapter 687, constitutes a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution, beginning January 1, 2018, for school districts with schools identified below to stock 50 percent of such schools’ restrooms with feminine hygiene products (defined as tampons and sanitary napkins) at all times at no cost to pupils. This mandate applies to those public schools that

- Maintain any combination of classes from grade 6 to grade 12, inclusive; *and*
- Meet the 40 percent pupil poverty threshold required to operate a schoolwide program pursuant to section 6314(a)(1)(A) of Title 20 of the United States Code, in that the school is eligible for Title I, Part A funds, and not less than 40 percent of the children enrolled in the school are from low-income families.

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<sup>16</sup> Government Code section 17551(c).

<sup>17</sup> California Code of Regulations, title 2, section 1183.1(c), Register 2018, No. 18 (eff. April 1, 2018.)

<sup>18</sup> Exhibit A, Test Claim, page 1.

<sup>19</sup> Based on the filing date of December 7, 2018, the potential period of reimbursement would begin July 1, 2017. (Gov. Code, § 17557(e).) However, since the test claim statute did not become effective and operative until January 1, 2018, then the period of reimbursement begins January 1, 2018.

The claimant also requests reimbursement for the costs of training, updating policies and procedures, and for purchasing and installing dispensers in the schools' restrooms. Legislative history acknowledges that the mandate would result in school districts incurring costs to purchase and install dispensers and the claimant has filed evidence supporting that cost.<sup>20</sup> These activities and costs, however, are not mandated by the plain language of the test claim statute. Nevertheless, these activities and costs may be proposed for inclusion in the Parameters and Guidelines pursuant to Government Code section 17557(a), and California Code of Regulations, title 2, sections 1183.7(d) and 1187.5.

The mandated activity to stock 50 percent of the school restrooms with feminine hygiene products (defined as tampons and sanitary napkins) at all times at no cost to pupils is new. Prior to the enactment of the test claim statute, school districts were required to comply with existing standards of cleanliness and maintenance for school restrooms to ensure that every school restroom is maintained and cleaned regularly, and is fully operational and stocked at all times with toilet paper, soap, and paper towels or functional hand dryers.<sup>21</sup> In addition, prior law requires that school restroom facilities be evaluated as to whether they meet the “good repair” standard.<sup>22</sup> Schools are also required by prior law to permit students to use facilities consistent with their gender identity, irrespective of the gender listed on the pupil’s records.<sup>23</sup> However, there is no requirement in prior law to stock 50 percent of the school's restrooms with feminine hygiene products at all times at no cost to students. In addition, the mandated activity is uniquely imposed on public schools, as specified in the test claim statute, and provides a service to the public. According to the legislative history, the test claim statute is needed to remove a barrier to girls’ educations because “[n]ot having access to these vital medical necessities creates an additional barrier to a young girl’s education. Young girls sometimes miss school because of a lack of access to these products.”<sup>24</sup> Thus, the test claim statute imposes a new program or higher level of service.

Finally, based on evidence in the record, staff finds that the test claim statute imposes increased actual costs mandated by the state within the meaning of Government Code section 17514, and that none of the exceptions in Government Code section 17556 apply to deny this Test Claim. The claimant has filed evidence showing \$61,615.72 in costs incurred to comply with the test claim statute in fiscal year 2017-2018. The claimant supports its costs with invoices<sup>25</sup> and a

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<sup>20</sup> Exhibit G, Assembly Concurrence in Senate Amendments Analysis of AB 10 (2017-2018), as amended September 1, 2017, page 1; Exhibit A, Test Claim, pages 21 (Declaration of Jordan Aquino, Chief Business Officer for the Desert Sands Unified School District, December 6, 2018) and 26 (Invoice).

<sup>21</sup> Education Code section 35292.5; Education Code section 17002(d)(1); Education Code section 33126(b)(8).

<sup>22</sup> Education Code section 17002(d)(1).

<sup>23</sup> Education Code section 221.5.

<sup>24</sup> Exhibit G, Senate Rules Committee, Office of Senate Floor Analyses, Third Reading Analysis of AB 10 (2017-2018), as amended September 1, 2017, page 2.

<sup>25</sup> Exhibit A. Test Claim, pages 25-33.

declaration from Jordan Aquino, Chief Business Officer for the Desert Sands Unified School District, as follows:<sup>26</sup>

- \$374.16 to develop and implement policies and procedures.<sup>27</sup>
- \$2,110.51 to train certificated and classified staff.<sup>28</sup>
- \$19,501.67 to purchase and install dispensers.<sup>29</sup>
- \$6,186.14 in purchase price for feminine hygiene products—pads and tampons.<sup>30</sup>
- \$32,387.04 in labor costs for school custodians to refill dispensers (based on \$27.54 hourly rate X 0.13 minutes per day X 180 instructional days).<sup>31</sup>
- \$1,056.20 in labor costs to order and maintain stock for feminine hygiene products (based on \$35.21 hourly rate X 30 hours).<sup>32</sup>

The total estimated costs alleged for the 2018-2019 fiscal year, based on the 2017-2018 costs, amounted to \$43,988.22, including the \$39,629.38 for stocking the restrooms with feminine hygiene products.<sup>33</sup> The claimant also asserts that the statewide cost to implement the alleged mandate is estimated at \$5,000,000.<sup>34</sup>

The claimant has not identified the number of schools in its district required to comply with the mandate or the number of restrooms in each school and Finance, in comments on the Draft Proposed Decision argues that the costs alleged are not sufficiently supported and that some of them should be one time only.<sup>35</sup> However, based on the information contained on the claimant's

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<sup>26</sup> Exhibit A, Test Claim, pages 20-24 (Declaration of Jordan Aquino, Chief Business Officer for the Desert Sands Unified School District, December 6, 2018).

<sup>27</sup> Exhibit A, Test Claim, pages 11 (Narrative) and 20 (Declaration of Jordan Aquino, Chief Business Officer for the Desert Sands Unified School District, December 6, 2018).

<sup>28</sup> Exhibit A, Test Claim, pages 11-12 (Narrative) and 21 (Declaration of Jordan Aquino, Chief Business Officer for the Desert Sands Unified School District, December 6, 2018).

<sup>29</sup> Exhibit A, Test Claim, pages 12 (Narrative), 21 (Declaration of Jordan Aquino, Chief Business Officer for the Desert Sands Unified School District, December 6, 2018), and 26 (Invoice).

<sup>30</sup> Exhibit A, Test Claim, pages 12 (Narrative), 21 (Declaration of Jordan Aquino, Chief Business Officer for the Desert Sands Unified School District, December 6, 2018), and 27-33 (Invoices).

<sup>31</sup> Exhibit A, Test Claim, pages 13 (Narrative) and 22 (Declaration of Jordan Aquino, Chief Business Officer for the Desert Sands Unified School District, December 6, 2018).

<sup>32</sup> Exhibit A, Test Claim, pages 13 (Narrative) and 22 (Declaration of Jordan Aquino, Chief Business Officer for the Desert Sands Unified School District, December 6, 2018).

<sup>33</sup> Exhibit A, Test Claim, pages 13-15 (Narrative).

<sup>34</sup> Exhibit A, Test Claim, page 15 (Narrative).

<sup>35</sup> Exhibit F, Finance's Comments on the Draft Proposed Decision, page 1.



website,<sup>36</sup> and in the publicly available School Accountability Report Card (SARC) reports for the middle and high schools operated by the claimant, the Commission can take notice that the claimant has a number of Title I schools, serving grade 6 to grade 8 for middle schools, and grade 9 to grade 12 for high schools, that receive Title I funds and meet the 40 percent pupil poverty threshold under Section 6314(a)(1)(A) of Title 20 of the United States Code to operate a schoolwide program, which are, therefore, mandated by the state to comply with the test claim statute.<sup>37</sup> Therefore, there is sufficient evidence in the record to support a finding of costs exceeding \$1000 mandated by the state. Whether reasonably necessary activities that have not yet been approved, since they are not required by the plain language of the statute and must be proposed for consideration in the Parameters and Guidelines, should be on-going or one-time costs is an issue for the Parameters and Guidelines.

### **Conclusion**

Accordingly, staff finds that Education Code section 35292.6, as added by Statutes 2017, chapter 687, imposes a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution, beginning January 1, 2018, on school districts with schools that (1) maintain any combination of classes from grade 6 to grade 12, inclusive, *and* (2) meet the 40 percent pupil poverty threshold required to operate a schoolwide program pursuant to section 6314(a)(1)(A) of Title 20 of the United States Code, in that the school is eligible for Title I, Part A funds, and not less than 40 percent of the children enrolled in the school are from low-income families, for such schools to:

Stock 50 percent of the school’s restrooms with feminine hygiene products (defined only as tampons and sanitary napkins) at all times at no cost to pupils. (Ed. Code §35292.6, Stats. 2017, ch. 687.)

All other activities and costs alleged in the Test Claim are not mandated by the plain language of the test claim statute, but may be proposed for inclusion in the Parameters and Guidelines pursuant to Government Code section 17557(a), and California Code of Regulations, title 2, sections 1183.7(d) and 1187.5.

### **Staff Recommendation**

Staff recommends that the Commission adopt the Proposed Decision to approve the Test Claim and authorize staff to make any technical, non-substantive changes to the Proposed Decision following the hearing.

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<sup>36</sup> Exhibit G, Desert Sands Unified School District, State and Federal Programs <https://www.dsusd.us/SFP> (accessed on February 4, 2019), page 1 (stating that Title I funds support district’s programs for five (5) middle schools, and two (2) high schools).

<sup>37</sup> Exhibit G, Indio High School 2016-17 School Accountability Report Card (SARC), published January 2018 (stating that in 2016-17, Indio High School, serving grades 9 through 12, qualified for Schoolwide Title I funding, and at the beginning of the 2016-17 the school year, the school enrolled 2024 students, including 90.8% socioeconomically disadvantaged —students qualifying for free and reduced price lunch).

BEFORE THE  
COMMISSION ON STATE MANDATES  
STATE OF CALIFORNIA

<p>IN RE TEST CLAIM</p> <p>Education Code Section 35292.6</p> <p>Statutes 2017, Chapter 687 (AB 10)</p> <p>Filed on December 7, 2018</p> <p>Desert Sands Unified School District, Claimant</p>	<p>Case No.: 18-TC-01</p> <p><i>Public School Restrooms: Feminine Hygiene Products</i></p> <p>DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7.</p> <p><i>(Adopted May 24, 2019)</i></p>
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**DECISION**

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on May 24, 2019. [Witness list will be included in the adopted 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 sections 17500 et seq., and related case law.

The Commission [adopted/modified] the Proposed Decision to [approve/partially approve/deny] the Test Claim by a vote of [vote will be included in the adopted Decision], as follows:

<b>Member</b>	<b>Vote</b>
Lee Adams, County Supervisor	
Keely Bosler, Director of the Department of Finance, Chairperson	
Mark Hariri, Representative of the State Treasurer	
Jeannie Lee, Representative of the Director of the Office of Planning and Research	
Sarah Olsen, Public Member	
Carmen Ramirez, City Council Member	
Yvette Stowers, Representative of the State Controller, Vice Chairperson	

## **Summary of the Findings**

This Test Claim alleges that Statutes 2017, chapter 687, which added section 35292.6 to the Education Code, effective January 1, 2018, constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution. The test claim statute requires any public school maintaining any classes from grade 6 to grade 12, inclusive, that meets the 40 percent pupil poverty threshold required to operate a Title I, Part A schoolwide program pursuant to Section 6314(a)(1)(A) of Title 20 of the United States Code, to stock at least 50 percent of the school's restrooms with feminine hygiene products, defined as “tampons and sanitary napkins,” at all times. In addition, the test claim statute prohibits schools from charging for any menstrual products, including feminine hygiene products, provided to pupils.

This Test Claim was filed on December 7, 2018, which is within 365 days of the date the test claim statute became effective on January 1, 2018, and is therefore timely filed pursuant to Government Code section 17551 and California Code of Regulations, title 2, section 1183.1(c).<sup>38</sup>

The Commission finds that Education Code section 35292.6, as added by Statutes 2017, chapter 687, constitutes a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution, beginning January 1, 2018, for school districts with schools identified below to stock 50 percent of such schools’ restrooms with feminine hygiene products (defined as tampons and sanitary napkins) at all times at no cost to pupils. This mandate applies to those schools that

- Maintain any combination of classes from grade 6 to grade 12, inclusive; *and*
- Meet the 40 percent pupil poverty threshold required to operate a schoolwide program pursuant to section 6314(a)(1)(A) of Title 20 of the United States Code, in that the school is eligible for Title I, Part A funds, and not less than 40 percent of the children enrolled in the school are from low-income families.

The mandated activity is new. Prior to the enactment of the test claim statute, school districts were required to ensure that every school restroom is maintained and cleaned regularly, and is fully operational and stocked at all times with toilet paper, soap, and paper towels or functional hand dryers.<sup>39</sup> In addition, prior law requires that school restroom facilities be evaluated as to whether they meet the “good repair” standard.<sup>40</sup> Schools are also required by prior law to permit students to use facilities consistent with their gender identity, irrespective of the gender listed on the pupil’s records.<sup>41</sup> However, there is no requirement in prior law to stock 50 percent of the school's restrooms with feminine hygiene products at all times at no cost to students.

In addition, the mandated activity is uniquely imposed on public schools, as specified in the test claim statute, and provides a service to the public. According to the legislative history, the test claim statute is needed to remove a barrier to girls’ educations because “[n]ot having access to

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<sup>38</sup> Exhibit A, Test Claim, page 1.

<sup>39</sup> Education Code section 35292.5; Education Code section 17002(d)(1); Education Code section 33126(b)(8).

<sup>40</sup> Education Code section 17002(d)(1).

<sup>41</sup> Education Code section 221.5.

these vital medical necessities creates an additional barrier to a young girl’s education. Young girls sometimes miss school because of a lack of access to these products.”<sup>42</sup> Public education is an essential governmental function.<sup>43</sup> Thus, the test claim statute imposes a new program or higher level of service.

Finally, based on evidence in the record, the Commission finds that the test claim statute results in increased actual costs mandated by the state within the meaning of Government Code section 17514, and that no exceptions in Government Code section 17556 apply to deny this Test Claim.

## COMMISSION FINDINGS

### I. Chronology

01/01/2018	The effective date of the test claim statute.
12/07/2018	The claimant filed the Test Claim. <sup>44</sup>
12/17/2018	Commission staff issued the Notice of Complete Test Claim, Schedule for Comments, and Notice of Tentative Hearing Date.
01/16/2019	The Department of Finance (Finance) filed comments on the Test Claim. <sup>45</sup>
02/15/2019	The claimant filed rebuttal comments. <sup>46</sup>
03/05/2019	Commission staff issued the Draft Proposed Decision. <sup>47</sup>
03/26/2019	The claimant filed comments on the Draft Proposed Decision. <sup>48</sup>
03/26/2019	Finance filed comments on the Draft Proposed Decision. <sup>49</sup>

### II. Background

This Test Claim addresses Statutes 2017, chapter 687, which added section 35292.6 to the Education Code. Section 35292.6 requires public schools to stock at least 50 percent of the schools’ restrooms with feminine hygiene products (defined as tampons and sanitary napkins), if the school maintains any combination of classes from grade 6 to grade 12, inclusive, and meets a 40 percent pupil poverty threshold specified in federal law for schoolwide Title I program eligibility.

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<sup>42</sup> Exhibit G, Senate Rules Committee, Office of Senate Floor Analyses, Third Reading Analysis of AB 10 (2017-2018), as amended September 1, 2017, page 2.

<sup>43</sup> *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 172.

<sup>44</sup> Exhibit A, Test Claim, page 1.

<sup>45</sup> Exhibit B, Finance's Comments on the Test Claim, page 1.

<sup>46</sup> Exhibit C, Claimant’s Rebuttal Comments, page 1.

<sup>47</sup> Exhibit D, Draft Proposed Decision.

<sup>48</sup> Exhibit E, Claimant’s Comments on the Draft Proposed Decision.

<sup>49</sup> Exhibit F, Finance’s Comments on the Draft Proposed Decision.

**A. Prior Law Established Requirements for School Restroom Maintenance and Reporting, and Requires that School Restrooms Be Kept in Good Repair and Stocked at All Times with Toilet Paper, Soap, and Paper Towels or Functional Hand Dryers.**

Prior law requires school districts to keep facilities and school restrooms in good repair, and to report any needed maintenance on those facilities as follows:

*Restroom Maintenance:* Education Code section 35292.5 requires every public and private school enrolling students from kindergarten through grade 12 to ensure that restrooms are kept open during school hours, maintained and cleaned regularly, be fully operational and stocked at all times with toilet paper, soap, and paper towels or functional hand dryers.<sup>50</sup>

*Good Repair and the Facilities Inspection System:* Education Code section 17002 defines the “Good Repair” standard for school facilities,<sup>51</sup> including school restrooms, to mean that they are clean, safe, and functional as determined pursuant to the Facility Inspection Tool (FIT) created by the Office of Public School Construction (OPSC) or a local evaluation instrument that meets the same criteria.<sup>52</sup> The minimum evaluation criteria for the restrooms require that the restrooms and restroom fixtures (i) are functional, (ii) appear to be maintained and stocked with supplies regularly, (iii) appear to be accessible to pupils during the schoolday, and (iv) appear to be in compliance with Section 35292.5.<sup>53</sup> The FIT developed by the OPSC in 2007 includes the evaluation of the degree to which restrooms are maintained and cleaned regularly; are fully operational; are stocked with toilet paper, soap, and paper towels; and are open during school hours.<sup>54</sup>

*School Accountability Report Card (SARC):* Education Code section 33126 requires that the safety, cleanliness, and adequacy of school facilities, including school restrooms, including any needed maintenance to ensure good repair as specified in sections 17014, 17032.5, 17070.75(a), and 17089(b), be reported on the SARC.<sup>55</sup> “Good repair” for the purpose of SARC has the same

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<sup>50</sup> Education Code section 35292.5 was pled in *Clean School Restrooms*, 04-TC-01 and was withdrawn by the claimant on March 25, 2010.

<sup>51</sup> Education Code section 17002 was pled in *Williams Case Implementation I, II, III*, 05-TC-04; 07-TC-06; 08-TC-01 and was denied by the Commission on the ground that the requirement to maintain schools in good repair is not new, but is a longstanding requirement of statutory and common law, and the statute’s definition of “good repair” is only clarifying the existing law. In addition, all the activities claimed in relation to school facilities programs utilizing the section 17002 good repair definition were voluntarily assumed activities.

<sup>52</sup> Education Code section 17002(d)(1).

<sup>53</sup> Education Code section 17002(d)(1)(M).

<sup>54</sup> Exhibit G, Office of Public School Construction (OPSC), Facility Inspection Tool (FIT) [https://www.documents.dgs.ca.gov/opsc/Forms/Worksheets/FIT\\_rev.pdf](https://www.documents.dgs.ca.gov/opsc/Forms/Worksheets/FIT_rev.pdf) (accessed on January 30, 2018).

<sup>55</sup> Education Code section 33126(b)(8). Education Code section 33126(b) (as amended by Stats. 2004, ch. 900 § 10 (SB 550)) was pled in *Williams Case Implementation I, II, III*, 05-TC-04; 07-

meaning as specified in Section 17002(d).<sup>56</sup> The SARC's must be prepared annually and disseminated to the public.<sup>57</sup>

*Local Control Accountability Plan (LCAP):* As a part of the new Local Control Funding Formula (LCFF),<sup>58</sup> Education Code section 52060 incorporated the requirement to maintain schools in “good repair” as defined in Education Code section 17002(d)(1) into one of the eight state priorities, the “Priority 1/Basic Services,”<sup>59</sup> and requires, to the extent practicable, that the data in the LCAP be reported in a manner consistent with how information is reported on the SARC.<sup>60</sup>

*Use of Facilities Consistent with Gender Identity:* Education Code section 221.5 requires that a pupil be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and to use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil’s records.

## **B. The Test Claim Statute**

Statutes 2017, Chapter 687, added section 35292.6 as follows:

- (a) A public school maintaining any combination of classes from grade 6 to grade 12, inclusive, that meets the 40- percent pupil poverty threshold required to operate a schoolwide program pursuant to Section 6314(a)(1)(A) of Title 20 of the United States Code shall stock at least 50 percent of the school's restrooms with feminine hygiene products at all times.
- (b) A public school described in subdivision (a) shall not charge for any menstrual products provided to pupils, including, but not limited to, feminine hygiene products.
- (c) For purposes of this section, "feminine hygiene products" means tampons and sanitary napkins for use in connection with the menstrual cycle.

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TC-06; 08-TC-01 and was partially approved by the Commission, including the activity to report any needed maintenance to ensure good repair on the SARC.

<sup>56</sup> Education Code section 17014(d).

<sup>57</sup> Education Code section 33126.

<sup>58</sup> Education Code section 42238.02. The formula establishes grade span adjusted base grant funding for average daily attendance for school districts with supplemental and concentration grant add-ons for each school district’s percentage of unduplicated count for English Learners (EL), free and reduced-price meal eligible students and foster youth students.

<sup>59</sup> Education Code section 52060(a)-(d). The governing boards of school districts are required to adopt a three-year LCAPs, using a template adopted by the state board, describing annual goals for all pupils and each subgroup, including the low-income subgroup, and specific actions the districts will take each year to achieve the goals identified in the LCAP for each of the state priorities

<sup>60</sup> Education Code section 52060(f).

The schools required to comply with this statute in accordance with subdivision (a) are analyzed in the Discussion below.

The Senate Floor analysis, quoting the author of the bill, states:

This bill seeks to increase access to menstrual products to girls and young women who need it most by providing them for free in public schools grade 6 to grade 12 that receive Title 1 funding.<sup>61</sup>

The test claim statute is needed, according to the analysis, to remove a barrier to girls' education by providing access to feminine hygiene products, and may result, as evidenced by other jurisdictions, in increased school attendance:

Not having access to these vital medical necessities creates an additional barrier to a young girl's education. Young girls sometimes miss school because of a lack of access to these products. A pilot project to provide menstrual products for free in New York City was done last year in 25 middle schools and high schools and the schools saw a 2.4% increase in attendance. Providing tampons and pads is about equity and social justice. We provide toilet paper in the bathrooms of schools and tampons should be no different.<sup>62</sup>

The analysis further notes that access to female hygiene products is vital for health, well-being, and full participation, but is limited for vulnerable populations stating:

According to a June 20, 2016 committee report by Committee on Women's Issues for the Council of the City of New York, ". . . Feminine hygiene products are vital for the health, well-being and full participation of women and girls. Inadequate menstrual hygiene management is associated with both health and psycho-social issues, particularly among low-income women. It has been reported that a lack of access to feminine hygiene products can cause emotional duress, physical infection and disease, and can lead to cervical cancer. Access to feminine hygiene products has proven to be limited for vulnerable populations. Currently the cost of feminine hygiene products (FHP) are not included in health insurance or flexible spending accounts, nor in public benefits programs such as the Supplemental Nutrition Assistance Program (SNAP) or Women, Infants, and Children (WIC) benefits."<sup>63</sup>

The Assembly Floor Analysis, concurring in Senate amendments, and quoting the Senate Appropriations Committee analysis, indicates that the bill is expected to result in reimbursable state-mandated costs as follows:

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<sup>61</sup> Exhibit G, Senate Rules Committee, Office of Senate Floor Analyses, Third Reading Analysis of AB 10, (2017-2018), as amended September 1, 2017, page 3.

<sup>62</sup> Exhibit G, Senate Rules Committee, Office of Senate Floor Analyses, Third Reading Analysis of AB 10 (2017-2018), as amended September 1, 2017, page 2.

<sup>63</sup> Exhibit G, Senate Rules Committee, Office of Senate Floor Analyses, Third Reading Analysis of AB 10 (2017-2018), as amended September 1, 2017, page 3.

**FISCAL EFFECT:** According to the Senate Appropriations Committee:

- 1) *One-time state reimbursable mandated costs*, ranging from the millions to tens of millions of dollars in Proposition 98 General Fund, for the bill's requirement for Title I schools serving grades 6 to 12 to stock at least 50% of their restrooms with feminine hygiene products. The precise cost will depend on the actual number of bathrooms that will require dispensers to be installed as well as the installation cost for each dispenser, which can vary from anywhere as low as several hundred dollars to as high as two to three thousand dollars.
- 2) *Ongoing state reimbursable mandated costs*, likely in the hundreds of thousands of dollars in Proposition 98 General Fund, to stock the dispensers at no charge.<sup>64</sup>

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

#### **A. Desert Sands Unified School District**

The claimant alleges that the test claim statute constitutes a reimbursable state-mandated program<sup>65</sup> and requires the claimant to perform the following new activities to implement the test claim statute:

- (i) Developing and implementation of internal policies, training, procedures relating to the purchase, installation, stocking of feminine hygiene products.
- (ii) Train certificated, classified and other personnel to administer the availability of feminine hygiene products in the district's restrooms.
- (iii) Purchasing and installing dispensers in the schools' restrooms.
- (iv) Stocking the schools' restrooms with feminine hygiene products at all times.<sup>66</sup>

The total increased costs alleged by the claimant to perform these activities for the 2017-2018 fiscal year amounted to \$61,615.72 for the cost of labor and supplies, including \$39,629.38 for stocking the schools' restrooms with feminine hygiene products at all times.<sup>67</sup> The total estimated costs alleged for the 2018-2019 fiscal year, based on the 2017-2018 costs, amounted to \$43,988.22, including the \$39,629.38 for stocking the restrooms with feminine hygiene

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<sup>64</sup> Exhibit G, Assembly Concurrence in Senate Amendments Analysis of AB 10 (2017-2018), as amended September 1, 2017, page 1, emphasis added.

<sup>65</sup> Exhibit A, Test Claim, page 7 (Narrative).

<sup>66</sup> Exhibit A, Test Claim, page 11 (Narrative).

<sup>67</sup> Exhibit A, Test Claim, pages 11-13 (Narrative).



products.<sup>68</sup> To support its claim, the claimant filed a declaration of Jordan Aquino, Chief Business Officer for the Desert Sands Unified School District<sup>69</sup> and invoices.<sup>70</sup>

The claimant filed rebuttal comments on February 15, 2019 in response to Finance’s argument “questioning the validity of the claimant’s ongoing labor costs claimed in the Test Claim and that the new activities implemented by the Test Claim, as it relates to labor costs, may be “absorbed into existing activities of the school district therefore not resulting in increased labor costs to that district.”<sup>71</sup> The claimant disagrees with Finance’s statement that the Test Claim asserts “a massive overhaul of school policies and procedures” and states that the claimed “labor costs are very reasonable based on the time estimated to perform the tasks.”<sup>72</sup>

On March 26, 2019, the claimant filed comments on the Draft Proposed Decision disagreeing with the recommendation that the proposed activities to update policies and procedures and to purchase and install dispensers are not mandated by the plain language of the test claim statute.<sup>73</sup> The claimant argues that “[l]egislative history acknowledges that the mandate would result in school districts incurring costs to purchase and install dispensers and the claimant has filed evidence supporting that cost.”<sup>74</sup>

### **B. Department of Finance**

Finance argues that “[e]xisting law (Education Code section 35292.5) requires all schools, with few exceptions, to maintain clean, fully operational restrooms, stocked at all times with toilet paper, soap, and paper towels or functional hand dryers”, and, therefore, the activities related to implementation of the test claim statute may “simply be absorbed into existing activities of a school district, therefore not resulting in increased labor costs to that district.”<sup>75</sup>

Alternatively, Finance argues that, to the extent that the test claim statute establishes new responsibilities, the requirement to stock feminine hygiene products in 50 percent of certain public school’s restrooms, already maintained as required by section 35292.5 and 17002, “should not require massive overhaul of school policies and procedures, nor should it result in significant increased labor costs.”<sup>76</sup>

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<sup>68</sup> Exhibit A, Test Claim, pages 13-15 (Narrative).

<sup>69</sup> Exhibit A, Test Claim, pages 20-24 (Declaration of Jordan Aquino, Chief Business Officer for the Desert Sands Unified School District, December 6, 2018).

<sup>70</sup> Exhibit A, Test Claim, pages 25-33.

<sup>71</sup> Exhibit C, Claimant’s Rebuttal Comments, page 1.

<sup>72</sup> Exhibit C, Claimant’s Rebuttal Comments, pages 1-2.

<sup>73</sup> Exhibit E, Claimant’s Comments on the Draft Proposed Decision.

<sup>74</sup> Exhibit E, Claimant’s Comments on the Draft Proposed Decision, page 2.

<sup>75</sup> Exhibit B, Finance’s Comments on the Test Claim, page 1.

<sup>76</sup> Exhibit B, Finance’s Comments on the Test Claim, page 2.

On March 26, 2019, Finance filed comments on the Draft Proposed Decision expressing concerns “regarding some of the costs in the Draft Proposed Decision.”<sup>77</sup> Finance argues that “certain costs, such as development and implementation of policies, and purchase and installation of dispensers, are one-time costs which should not need to be repeated in ongoing years.”<sup>78</sup> And, Finance continues to dispute the significant labor cost alleged to refill dispensers, given that the claimant “has not identified the number of schools in its district required to comply with the measure or the number of restrooms in each school.”<sup>79</sup>

#### **IV. Discussion**

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service...

The purpose of article XIII B, section 6 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.”<sup>80</sup> Thus, the subvention requirement of section 6 is “directed to state-mandated increases in the services provided by [local government] ...”<sup>81</sup>

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or “mandates” local agencies or school districts to perform an activity.<sup>82</sup>
2. The mandated activity constitutes a “program” that either:
  - a. Carries out the governmental function of providing a service to the public; or
  - b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.<sup>83</sup>

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<sup>77</sup> Exhibit F, Finance’s Comments on the Draft Proposed Decision, page 1.

<sup>78</sup> Exhibit F, Finance’s Comments on the Draft Proposed Decision, page 1.

<sup>79</sup> Exhibit F, Finance’s Comments on the Draft Proposed Decision, page 1.

<sup>80</sup> *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

<sup>81</sup> *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

<sup>82</sup> *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

<sup>83</sup> *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles* (1987) 43 Cal.3d 46, 56).

3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.<sup>84</sup>
4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.<sup>85</sup>

The Commission is vested with the exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.<sup>86</sup> The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.<sup>87</sup> In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution, and not apply it as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”<sup>88</sup>

#### **A. This Test Claim Was Timely Filed.**

Government Code section 17551(c) provides that test claims “shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later.”<sup>89</sup> Section 1183.1(c) of the Commission’s regulations, in turn, defines “12 months” as 365 days.<sup>90</sup>

The test claim statute became effective on January 1, 2018, and the Test Claim was filed on December 7, 2018, within 365 days following the effective date of the statute.<sup>91</sup> The Test Claim was therefore timely pursuant to the first prong of Government Code section 17551(c) and California Code of Regulations, title 2, section 1183.1(c).<sup>92</sup>

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<sup>84</sup> *San Diego Unified School Dist.* (2004) 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

<sup>85</sup> *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; Government Code sections 17514 and 17556.

<sup>86</sup> *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487.

<sup>87</sup> *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

<sup>88</sup> *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1280 [citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817].

<sup>89</sup> Government Code section 17551(c) (Stats. 2007, ch. 329).

<sup>90</sup> California Code of Regulations, title 2, section 1183.1(c), Register 2018, No. 18 (eff. April 1, 2018).

<sup>91</sup> Exhibit A, Test Claim, page 1.

<sup>92</sup> Based on the filing date of December 7, 2018, the potential period of reimbursement would begin July 1, 2017. (Gov. Code, § 17557(e).) However, since the test claim statute did not

**B. Education Code Section 35292.6, as Added by Statutes 2017, Chapter 687, Imposes a Reimbursable State-Mandated Program on School Districts with Specified Schools Within the Meaning of Article XIII B, Section 6 of the California Constitution.**

As described below, the Commission finds that Education Code section 35292.6, added by the test claim statute (Stats. 2017, ch. 687) imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

1. Education Code Section 35292.6 Imposes a State-Mandated Program on School Districts with Schools Maintaining Any Combination of Classes from Grade 6 to Grade 12, Inclusive, That Meet a 40 Percent Pupil Poverty Threshold Required to Operate a Schoolwide Title I Program Pursuant to Federal Law, to Stock 50 Percent of Such Schools' Restrooms with Feminine Hygiene Products at All Times at No Cost to Pupils.

The plain language of Education Code section 35292.6 requires specified schools maintaining any combination of classes from grade 6 to grade 12, to stock at all times at least 50 percent of the schools' restrooms with feminine hygiene products, defined as "tampons and sanitary napkins for use in connection with the menstrual cycle." In addition, the statute prohibits these schools from charging for any menstrual products provided to pupils, including, but not limited to, feminine hygiene products. Section 35292.6 states the following:

- (a) A public school maintaining any combination of classes from grade 6 to grade 12, inclusive, that meets the 40- percent pupil poverty threshold required to operate a schoolwide program pursuant to Section 6314(a)(1)(A) of Title 20 of the United States Code *shall stock at least 50 percent of the school's restrooms with feminine hygiene products at all times.*
- (b) A public school described in subdivision (a) *shall not charge for any menstrual products provided to pupils*, including, but not limited to, feminine hygiene products.
- (c) For purposes of this section, "feminine hygiene products" means tampons and sanitary napkins for use in connection with the menstrual cycle.

Based on the plain language of the statute, the activity to stock 50 percent of the school's restrooms with "feminine hygiene products" (defined as tampons and sanitary napkins) at all times, is mandated by the state.<sup>93</sup> Although the statute suggests that a school can stock more than 50 percent of the restrooms with feminine hygiene products (with the language requiring schools to stock "at least 50 percent of the school's restrooms"), there is no mandate to do so. It is within the discretion of a school district or the school site to stock more than 50 percent of the school's restrooms with feminine hygiene products.

In addition, the test claim statute prohibits schools from charging for any "menstrual products provided to pupils, including, but not limited to, feminine hygiene products." The term

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become effective and operative until January 1, 2018, then the period of reimbursement begins January 1, 2018.

<sup>93</sup> Education Code section 75 states that "[s]hall is mandatory and 'may' is permissive."

“menstrual products” is not defined. However, the phrase “menstrual products” is broader than “feminine hygiene products” (defined as tampons and sanitary napkins), since the plain language states that “menstrual products” includes, “but is not limited to,” “feminine hygiene products.” The test claim statute only mandates that schools stock tampons and sanitary napkins. The state has not mandated schools to provide or stock any other menstrual product. Therefore, to the extent a school stocks other menstrual products, it does so at its own discretion and cost.

Moreover, the test claim statute mandates that 50 percent of the school’s restrooms be stocked with feminine hygiene products, but does not define the term “restrooms.” A “restroom” is commonly understood as “*a room or suite of rooms in a public space provided with lavatory, toilet, and other facilities . . .*”<sup>94</sup> Accordingly, no matter how many lavatories or toilets are in a room or suite of rooms, the mandate is to stock with feminine hygiene products, 50 percent of the rooms provided for that purpose at a school site. Thus, for example, if a school has two sets of restrooms, one for men or boys and one for women or girls, it would be required to stock one restroom with tampons and sanitary napkins – and that would be the one for women or girls consistent with the spirit of the law.

Finally, the test claim statute provides that only “a public school maintaining any combination of classes from grade 6 to grade 12, inclusive, that meet the 40 percent pupil poverty threshold required to operate a schoolwide program pursuant to Section 6314(a)(1)(A) of Title 20 of the United States Code” is mandated to comply with the test claim statute. Section 6314 of Title 20 of the United States Code is part of federal statutory scheme known as Title I, Part A, authorized under the Elementary and Secondary Education Act (ESEA) of 1965<sup>95</sup> and most recently reauthorized by the Every Student Succeeds Act (ESSA) of 2015,<sup>96</sup> to provide federal financial assistance to local educational agencies (LEAs) and schools with high numbers or high percentages of children from low-income families to help ensure that all children meet challenging state academic standards.<sup>97</sup> Any state desiring federal funds from Title I, Part A, is required to submit to the federal government a state plan that outlines the state’s challenging academic standards and student academic achievement standards; establishes a single, statewide accountability system that will be effective in ensuring that all LEAs and schools make adequate yearly progress to meet the state’s student academic achievement standards; and establishes statewide annual measurable objectives.<sup>98</sup> The Act also requires each state to produce an annual

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<sup>94</sup> Webster’s Third New International Dictionary, Merriam-Webster, Inc. Massachusetts 1993, page 1937.

<sup>95</sup> Public Law No. 89-10, Title I, Part A has been codified in Title 20 United State Code, Sections 6301-6339, 6571-6578.

<sup>96</sup> Public Law No. 114-95, 129 Statutes 1802 (2015).

<sup>97</sup> Exhibit G, U.S. Department of Education, Programs, Improving Basic Programs Operated by Local Educational Agencies (Title I, Part A) <https://www2.ed.gov/programs/titleiparta/index.html> (accessed on January 30, 2018).

<sup>98</sup> 20 United States Code, section 6311.

report card that summarizes student achievement data statewide, disaggregated by student subgroups, including low-income student subgroups.<sup>99</sup>

Local educational agencies (LEAs) allocate funds received under the federal Title I, Part A program to schools in “eligible school attendance areas” in rank order on the basis of the total number of children from low-income families in each area or school, using certain measures of poverty.<sup>100</sup> Section 6314(a)(1)(A) of Title 20 of the United States Code, which is referenced in the test claim statute, authorizes the LEA to consolidate and use federal Title I, Part A funds, together with other federal, state, and local funds, to upgrade the entire educational program of a school that serves an eligible school attendance area in which not less than 40 percent of the children are from low-income families, or not less than 40 percent of the children enrolled in the school are from such families. Federal regulations clarify that a school is eligible to operate a schoolwide program pursuant to section 6314(a)(1)(A) if it meets two requirements—(i) it is eligible to receive Title I, Part A funds, and (ii) has at least 40 percent level of poverty, ascertained with one of the two poverty tests, identified in subsections (A) and (B), as follows:

- (i) The school’s LEA determines the school serves an eligible attendance area or is a participating school under section 1113 of the ESEA; *and*
- (ii) For the initial year of the schoolwide program -
  - (A) The school serves a school attendance area in which not less than 40 percent of the children are from low-income families, *or*
  - (B) Not less than 40 percent of the children enrolled in the school are from low-income families.<sup>101</sup>

The test claim statute, however, states that it applies to a school that meets the “40 percent *pupil* poverty threshold” required to operate a schoolwide program. The phrase “40 percent *pupil* poverty threshold” is not defined in the test claim statute, and is not a phrase used in federal law. Section 6314(a)(1)(A) of Title 20 of the United States Code instead uses the phrase “*children from low-income families*” and sets out two poverty tests to see if a school that qualifies for Title I, Part A funding also meets the 40 percent threshold required to operate a schoolwide program. The first test, described in subsection (A) of the federal regulation discussed above, is that “the school serves a *school attendance area* in which not less than 40 percent of the children are from low-income families.”<sup>102</sup> This test looks at the “school attendance area,” which is the geographical area in which the children who are normally served by that school reside.<sup>103</sup> Thus,

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<sup>99</sup> 20 United State Code, section 6311.

<sup>100</sup> 20 United States Code, section 6313(c). The measures of poverty are identified in 20 United States Code, section 6313(a)(5). For an LEA with an enrollment of less than 1,000 students, the ranking and serving requirements based on poverty percentages are not applicable. 20 United States Code, section 6313(a)(5).

<sup>101</sup> 34 Code of Federal Regulations section 200.25(b)(1).

<sup>102</sup> 20 United States Code, section 6314(a)(1)(A); 34 Code of Federal Regulations, section 200.25(b)(1)(ii)(A), emphasis added.

<sup>103</sup> 20 United States Code, section 6313(a)(2)(A).

this test looks at the income level of the families that reside in the area served by the school, regardless of whether the children from these families are actually enrolled in the school. The second test, described in subsection (B) of federal regulation discussed above, is a narrower approach, and looks at the income level of the families whose children are actually enrolled in the school. This test states that schools where “not less than 40 percent of the *children enrolled* in the school are from low-income families,” are eligible to operate a schoolwide program.<sup>104</sup>

The Commission finds that the phrase in the test claim statute requiring that a school meet the “40 percent *pupil* poverty threshold required to operate a schoolwide program” means only those schools that are eligible for Title I, Part A funds and meet the second test identified in section 6314(a)(1)(A) of Title 20 of the United States Code, in which not less than 40 percent of the children *enrolled* in the school are from low-income families.

The Legislature is deemed to be aware of existing laws in effect at the time legislation is enacted<sup>105</sup> and, thus, it presumably was aware of the two poverty tests allowed by section 6314(a)(1)(A) of Title 20 of the United States Code when it enacted the test claim statute. The Legislature did not use the phrase “40 percent poverty threshold,” which would suggest that a school meeting either test identified in section 6314(a)(1)(A) (based on the income levels of the families in the school attendance area, or on the income level of the families whose children are actually enrolled in the school) is required to comply with the test claim statute.

Instead, the Legislature expressly used the word “pupil” in the phrase “40 percent *pupil* poverty threshold.” Under the rules of statutory construction, “the statutes should be construed to give meaning to every word in a statute and to avoid constructions that render words, phrases, or clauses superfluous.”<sup>106</sup> Webster’s Third New International Dictionary defines “pupil” as “a child or young person in school or in the charge of a tutor or instructor: STUDENT . . . .”<sup>107</sup> Thus, the word “pupil” refers only to children enrolled in school.

Therefore, the Commission finds that the Legislature intended that a public school maintaining any combination of classes from grade 6 to grade 12, inclusive, is mandated by the state to stock 50 percent of the school’s restrooms with feminine hygiene products at all times at no cost to pupils, if the school is eligible to receive Title I, Part A funds, and not less than 40 percent of the children enrolled in the school are from low-income families.

This interpretation is consistent with the legislative history of the test claim statute, which focuses on the education of girls enrolled in school. According to the Assembly floor analysis, “this bill . . . [r]equires public schools *enrolling pupils* in grades six through twelve, inclusive,

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<sup>104</sup> 20 United State Code, section 6314(a)(1)(A); 34 Code of Federal Regulations, section 200.25(b)(1)(ii)(B), emphasis added.

<sup>105</sup> *People v. Licas* (2007) 41 Cal.4th 362, 367, citation omitted.

<sup>106</sup> *Klein v. United States of America* (2010) 50 Cal.4th 68, 80, citation omitted.

<sup>107</sup> Webster’s Third New International Dictionary, Merriam-Webster, Inc. Massachusetts 1993, page 1844. The courts use the dictionary as a proper source to determine the usual and ordinary meaning of a word or phrase in a statute. “If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs.” (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103, citation omitted).

*that qualify to operate a schoolwide Title I program based upon a 40% pupil poverty threshold, to stock at least 50% of the school's restrooms with feminine hygiene products at all times.*"<sup>108</sup> The Senate floor analysis states that "[n]ot having access to these vital medical necessities creates an additional barrier to a young girl's education. Young girls sometimes miss school because of a lack of access to these products," and that as a result of a pilot project in New York City to provide menstrual products for free in schools "the schools saw a 2.4% increase in attendance."<sup>109</sup> Thus, "[t]his bill seeks to increase access to menstrual products to girls and young women who need it most by providing them for free in public schools grade 6 to grade 12 that receive Title 1 funding."<sup>110</sup> The Senate floor analysis also states that the costs are expected ". . . for the bill's requirement for Title I schools serving grades 6 to 12 to stock at least 50% of their restrooms with feminine hygiene products."<sup>111</sup>

Accordingly, the test claim statute imposes a state-mandated program on school districts with schools that (1) maintain any combination of classes from grade 6 to grade 12, inclusive, *and* (2) meet the 40 percent pupil poverty threshold required to operate a schoolwide program pursuant to section 6314(a)(1)(A) of Title 20 of the United States Code, in that the school is eligible for Title I, Part A funds, and not less than 40 percent of the children enrolled in the school are from low-income families, for such schools to:

- Stock 50 percent of the school's restrooms with feminine hygiene products (defined only as tampons and sanitary napkins) at all times at no cost to pupils.

In addition, the claimant requests reimbursement for the costs of training, updating policies and procedures, and for purchasing and installing dispensers in the schools' restrooms.<sup>112</sup> Although the legislative history of the test claim statute acknowledged that the mandate would result in school districts incurring costs to purchase and install dispensers and the claimant has filed evidence supporting that cost,<sup>113</sup> these activities and costs are not mandated by the plain language of the test claim statute. Nevertheless, these activities and costs may be proposed for inclusion in the Parameters and Guidelines if they are supported by evidence in the record showing they are "reasonably necessary for the performance of the state-mandated program" in

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<sup>108</sup> Exhibit G, Assembly Third Reading Analysis of AB 10 (2017-2018), as amended May 30, 2017, page 1, emphasis added.

<sup>109</sup> Exhibit G, Senate Rules Committee, Office of Senate Floor Analyses, Third Reading Analysis of AB 10, (2017-2018), as amended September 1, 2017, page 2.

<sup>110</sup> Exhibit G, Senate Rules Committee, Office of Senate Floor Analyses, Third Reading Analysis of AB 10, (2017-2018), as amended September 1, 2017, page 3.

<sup>111</sup> Exhibit G, Senate Rules Committee, Office of Senate Floor Analyses, Third Reading Analysis of AB 10, (2017-2018), as amended September 1, 2017, page 1.

<sup>112</sup> Exhibit A, Test Claim, page 11 (Narrative, page 5).

<sup>113</sup> Exhibit G, Assembly Concurrence in Senate Amendments Analysis of AB 10 (2017-2018), as amended September 1, 2017, page 1; Exhibit A, Test Claim, pages 21 (Declaration of Jordan Aquino, Chief Business Officer for the Desert Sands Unified School District, December 6, 2018) and 26 (Invoice).



accordance with Government Code section 17557(a), and California Code of Regulations, title 2, sections 1183.7(d) and 1187.5.

2. Education Code Section 35292.6 Imposes a New Program or Higher Level of Service.

For the test claim statute to be subject to subvention pursuant to article XIII B, section 6 of the California Constitution, the statute must impose a new program or higher level of service. First, the mandated activity must be new when compared with the legal requirements in effect immediately before the enactment of the test claim statute.<sup>114</sup> In addition, the program must carry out of the governmental function of providing services to the public, or, be a law which, to implement a state policy, imposes unique requirements on local government that does not apply generally to all residents and entities in the state:

Looking at the language of section 6 then, it seems clear that by itself the term “higher level of service” is meaningless. It must be read in conjunction with the predecessor phrase “new program” to give it meaning. Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing “programs.” But the term “program” itself is not defined in article XIII B. What programs then did the electorate have in mind when section 6 was adopted? We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term – *programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.*<sup>115</sup>

The Court further held that “the intent underlying section 6 was to require reimbursement to local agencies for the costs involved in carrying out functions *peculiar to government*, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities.”<sup>116</sup>

Finance argues that the implementation of the test claim statute may “simply be absorbed into existing activities of a school district, therefore not resulting in increased labor costs to that district,” because “[e]xisting law (Education Code section 35292.5) requires all schools, with few exceptions, to maintain clean, fully operational restrooms, stocked at all times with toilet paper, soap, and paper towels or functional hand dryers.”<sup>117</sup>

The Commission, however, finds that the activity to stock 50 percent of the school's restrooms with feminine hygiene products (defined as tampons and sanitary napkins) at all times is new. As discussed in the Background, prior state law requires schools to have restrooms open during school hours, and kept in good repair and stocked at all times with toilet paper, soap, and paper

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<sup>114</sup> *San Diego Unified School Dist.* (2004) 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal3d 830, 835.

<sup>115</sup> *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56, emphasis added.

<sup>116</sup> *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56-57, emphasis added.

<sup>117</sup> Exhibit B, Finance’s Comments on the Test Claim, page 1.

towels or functional hand dryers.<sup>118</sup> In addition, prior law requires that school restroom facilities be evaluated as to whether they meet the “good repair” standard in accordance with the Facility Inspection Tool (FIT) created by the Office of Public School Construction (OPSC) or a local evaluation instrument that meets the same criteria,<sup>119</sup> with the findings to be annually reported on the SARCs,<sup>120</sup> and addressed in the LEAs’ LCAPs.<sup>121</sup> Schools are also required by the prior law to permit students use facilities consistent with their gender identity, irrespective of the gender listed on the pupil’s records.<sup>122</sup> No prior law, however, required schools to stock restrooms with feminine hygiene products. Thus, the requirement “to stock at least 50 percent of the school’s restrooms with feminine hygiene products at all times” at no cost to pupils, is new. Although some schools may have been stocking school restrooms with feminine hygiene products prior to the test claim statute, they were not mandated by the state to do so until after the operative date of the mandate. Government Code section 17565 states that “[i]f a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the operative date of the mandate.”

In addition, the activity mandated by the test claim statute is unique to government and applies only to *public* schools. Moreover, it provides a peculiarly governmental service to the public. The test claim statute “seeks to increase access to menstrual products to girls and young women who need it most by providing them for free in public schools . . . .” as not having access to these products “creates an additional barrier to a young girl’s education.”<sup>123</sup> Providing access to education is a core governmental function and mandatory and free public education is required by the California Constitution.<sup>124</sup>

Accordingly, the test claim statute imposes a new program or higher level of service.

3. Education Code Section 35292.6 Results in Increased Costs Mandated by the State Within the Meaning of Article XIII B, Section 6 of the California Constitution and Government Code Section 17514.

The mandated activity must also result in increased costs mandated by the state. Finance argues that the requirement to stock feminine hygiene products in 50 percent of the school restrooms, which are already maintained as required by Education Code sections 35292.5 and 17002,

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<sup>118</sup> Education Code section 17002; Education Code section 35292.5.

<sup>119</sup> Education Code section 17002(d)(1).

<sup>120</sup> Education Code section 33126

<sup>121</sup> Education Code section 52060(a)-(d).

<sup>122</sup> Education Code section 221.5.

<sup>123</sup> Exhibit G, Senate Rules Committee, Office of Senate Floor Analyses, Third Reading Analysis of AB 10, (2017-2018), as amended September 1, 2017, pages 2-3.

<sup>124</sup> *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 172.

“should not require massive overhaul of school policies and procedures, nor should it result in significant increased labor costs.”<sup>125</sup>

Article XIII B, section 6 of the California Constitution and Government Code section 17561(a) require reimbursement for all costs mandated by the state. Government Code section 17514 defines “costs mandated by the state” as any increased cost that a local agency or school district incurs as a result of any statute or executive order that mandates a new program or higher level of service. Government Code section 17564(a) further requires that no claim shall be made nor shall any payment be made unless the claim exceeds \$1,000. In addition, a finding of costs mandated by the state means that none of the exceptions in Government Code section 17556 apply to deny the claim.

Here, the claimant alleges that it has incurred increased costs of \$61,615.72 to comply with the mandate in fiscal year 2017-2018. This amount includes costs for developing and implementing policies and procedures, training, purchasing and installing dispensers, purchasing sanitary napkins and tampons, and labor to stock the products.<sup>126</sup> The claimant supports these assertions with invoices<sup>127</sup> and a declaration from Jordan Aquino, Chief Business Officer for the Desert Sands Unified School District.<sup>128</sup> The claimant identifies the following actual costs incurred in fiscal year 2017-2018 to stock middle and high schools’ restrooms with feminine hygiene products:

- \$374.16 to develop and implement policies and procedures.<sup>129</sup>
- \$2,110.51 to train certificated and classified staff.<sup>130</sup>
- \$19,501.67 to purchase and install dispensers.<sup>131</sup>
- \$6,186.14 in purchase price for feminine hygiene products—pads and tampons.<sup>132</sup>

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<sup>125</sup> Exhibit B, Finance’s Comments on the Test Claim, page 2.

<sup>126</sup> Exhibit A, Test Claim, pages 11-13 (Narrative).

<sup>127</sup> Exhibit A, Test Claim, pages 25-33.

<sup>128</sup> Exhibit A, Test Claim, pages 20-24 (Declaration of Jordan Aquino, Chief Business Officer for the Desert Sands Unified School District, December 6, 2018).

<sup>129</sup> Exhibit A, Test Claim, pages 11 (Narrative) and 20 (Declaration of Jordan Aquino, Chief Business Officer for the Desert Sands Unified School District, December 6, 2018).

<sup>130</sup> Exhibit A, Test Claim, pages 11-12 (Narrative) and 21 (Declaration of Jordan Aquino, Chief Business Officer for the Desert Sands Unified School District, December 6, 2018).

<sup>131</sup> Exhibit A, Test Claim, pages 12 (Narrative), 21 (Declaration of Jordan Aquino, Chief Business Officer for the Desert Sands Unified School District, December 6, 2018), and 26 (Invoice).

<sup>132</sup> Exhibit A, Test Claim, pages 12 (Narrative), 21 (Declaration of Jordan Aquino, Chief Business Officer for the Desert Sands Unified School District, December 6, 2018), and 27-33 (Invoices).

- \$32,387.04 in labor costs for school custodians to refill dispensers (based on \$27.54 hourly rate X 0.13 minutes per day X 180 instructional days).<sup>133</sup>
- \$1,056.20 in labor costs to order and maintain stock for feminine hygiene products (based on \$35.21 hourly rate X 30 hours).<sup>134</sup>

The total estimated costs alleged for the 2018-2019 fiscal year, based on the 2017-2018 costs, amounted to \$43,988.22, including the \$39,629.38 for stocking the restrooms with feminine hygiene products.<sup>135</sup> The claimant also asserts that the statewide cost to implement the alleged mandate is estimated at \$5,000,000.<sup>136</sup>

The claimant has not identified the number of schools in its district required to comply with the mandate or the number of restrooms in each school and Finance, in comments on the Draft Proposed Decision argues that the costs alleged are not sufficiently supported and that some of them (including the installation of dispensers) should be one time only.<sup>137</sup> However, based on the information contained on the claimant's website,<sup>138</sup> and in the publicly available SARC reports for the middle and high schools operated by the claimant, the Commission takes notice that the claimant has a number of Title I schools, serving grade 6 to grade 8 for middle schools, and grade 9 to grade 12 for high schools, that receive Title I funds and meet the 40 percent pupil poverty threshold under Section 6314(a)(1)(A) of Title 20 of the United States Code to operate Title I, Part A schoolwide programs, which are, therefore, required to perform the activity mandated by the test claim statute.<sup>139</sup> Thus, the record contains sufficient evidence that the claimant's cost to comply with the mandate in fiscal year 2017-2018 exceeded \$1,000. Whether reasonably necessary activities that have not yet been approved, since they are not required by the plain language of the statute and must be proposed for consideration in the Parameters and Guidelines, should be on-going or one-time costs is an issue for the Parameters and Guidelines.

Additionally, no law or facts in the record support a finding that the exceptions specified in Government Code section 17556 apply to this claim. There is, for example, no law or evidence

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<sup>133</sup> Exhibit A, Test Claim, pages 13 (Narrative) and 22 (Declaration of Jordan Aquino, Chief Business Officer for the Desert Sands Unified School District, December 6, 2018).

<sup>134</sup> Exhibit A, Test Claim, pages 13 (Narrative) and 22 (Declaration of Jordan Aquino, Chief Business Officer for the Desert Sands Unified School District, December 6, 2018).

<sup>135</sup> Exhibit A, Test Claim, pages 13-15 (Narrative).

<sup>136</sup> Exhibit A, Test Claim, page 15 (Narrative).

<sup>137</sup> Exhibit F, Finance's Comments on the Draft Proposed Decision, page 1.

<sup>138</sup> Exhibit G, Desert Sands Unified School District, State and Federal Programs, <https://www.dsusd.us/SFP> (accessed on February 4, 2019), page 1 (stating that Title I funds support district's programs for five (5) middle schools, and two (2) high schools).

<sup>139</sup> Exhibit G, Indio High School 2016-17 School Accountability Report Card (SARC), published January 2018 (stating that in 2016-17, Indio High School, serving grades 9 through 12, qualified for Schoolwide Title I funding, and at the beginning of the 2016-17 the school year, the school enrolled 2024 students, including 90.8% socioeconomically disadvantaged —students qualifying for free and reduced price lunch).

in the record that additional funds have been made available for the new state-mandated activity.<sup>140</sup> In addition, school districts have no fee authority to pay the costs of the alleged mandate since the statute expressly prohibits schools from charging pupils for feminine hygiene products.<sup>141</sup>

Based on the foregoing, the Commission finds that the test claim statute results in increased actual costs mandated by the state within the meaning of article XIII B, section 6 and Government Code section 17514.

## **V. Conclusion**

Accordingly, the Commission approves this Test Claim and finds that Education Code section 35292.6, as added by Statutes 2017, chapter 687, imposes a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution, beginning January 1, 2018 on school districts with schools that (1) maintain any combination of classes from grade 6 to grade 12, inclusive; *and* (2) meet the 40 percent pupil poverty threshold required to operate a schoolwide program pursuant to section 6314(a)(1)(A) of Title 20 of the United States Code, in that the school is eligible for Title I, Part A funds, and not less than 40 percent of the children enrolled in the school are from low-income families, for such schools to:

Stock 50 percent of the school's restrooms with feminine hygiene products (defined only as tampons and sanitary napkins) at all times at no cost to pupils. (Ed. Code §35292.6, Stats. 2017, ch. 687.)

All other activities and costs alleged in the Test Claim are not mandated by the plain language of the test claim statute, but may be proposed for inclusion in the Parameters and Guidelines pursuant to Government Code section 17557(a), and California Code of Regulations, title 2, sections 1183.7(d) and 1187.5.

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<sup>140</sup> Government Code section 17556(e).

<sup>141</sup> Government Code section 17556(d).

**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 May 8, 2019, I served the:

- **Proposed Decision issued May 8, 2019**

*Public School Restrooms: Feminine Hygiene Products*, 18-TC-01  
Education Code Section 35292.6; Statutes 2017, Chapter 687 (AB 10)  
Desert Sands Unified School District, Claimant

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 May 8, 2019 at Sacramento, California.

  
\_\_\_\_\_  
Jill L. Magee  
Commission on State Mandates  
980 Ninth Street, Suite 300  
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# COMMISSION ON STATE MANDATES

## Mailing List

**Last Updated:** 4/11/19

**Claim Number:** 18-TC-01

**Matter:** Public School Restrooms: Feminine Hygiene Products

**Claimant:** Desert Sands Unified School District

### 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.)

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