BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

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| IN RE TEST CLAIM<br>Penal Code Section 1170.03, as Added by Statutes 2021, Chapter 719, Section 3.1 (AB 1540)[1]<br>Filed on December 16, 2022<br>County of Los Angeles, Claimant | Case No.: 22-TC-03<br>*Criminal Procedure: Resentencing*<br>DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7.<br>(*Adopted January 26, 2024*)<br>(*Served January 29, 2024*) |

**TEST CLAIM**

The Commission on State Mandates adopted the attached Decision on January 26, 2024.

Juliana Gmur, Acting Executive Director

[1] Statutes 2022, chapter 58 (AB 200) renumbered Penal Code section 1170.03 to Penal Code section 1172.1, with no changes to the statute's contents, effective June 30, 2022. In addition, Statutes 2023, chapter 131 (AB 1754), chapter 446 (AB 600), and chapter 795 (AB 88) made additional substantive changes to section 1172.1, effective January 1, 2024, that will not be discussed here.

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## DECISION

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on January 26, 2024. Fernando Lemus appeared as the representative of and Lucia Gonzalez appeared as witness for the County of Los Angeles (claimant). Chris Hill and Kaily Yap appeared on behalf of the Department of Finance (Finance).

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 the Proposed Decision to deny the Test Claim by a vote of 5-0, as follows:

| **Member** | **Vote** |
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| Lee Adams, County Supervisor | Yes |
| Juan Fernandez, Representative of the State Treasurer, Vice Chairperson | Yes |
| Jennifer Holman, Representative of the Director of the Office of Planning and Research | Yes |
| Gayle Miller, Representative of the Director of the Department of Finance, Chairperson | Yes |

[1] Statutes 2022, chapter 58 (AB 200) renumbered Penal Code section 1170.03 to Penal Code section 1172.1, with no changes to the statute's contents, effective June 30, 2022. In addition, Statutes 2023, chapter 131 (AB 1754), chapter 446 (AB 600), and chapter 795 (AB 88) made additional substantive changes to section 1172.1, effective January 1, 2024, that will not be discussed here.

| Member | Vote |
|---|---|
| Renee Nash, School District Board Member | Absent |
| David Oppenheim, Representative of the State Controller | Yes |

**Summary of the Findings**

Penal Code section 1170.03, as added by the test claim statute, Statutes 2021, chapter 719, establishes a hearing procedure for the recall of an original sentence imposed following the conviction of a crime and the resentencing of a defendant upon receipt of a resentencing recommendation from the CDCR Secretary, the Board of Parole Hearings, a county correctional administrator, a district attorney, or the Attorney General. Upon receipt of a resentencing recommendation, the court is required to provide notice to the defendant, set a date for a status conference within 30 days of receiving the recommendation, and appoint counsel for the defendant.[2] The court may not deny a resentencing recommendation or reject a stipulation by the parties to recall and resentence a defendant "without a hearing where the parties have an opportunity to address the basis for the intended denial or rejection."[3] The test claim statute provides a presumption in favor of recalling and resentencing the defendant upon receipt of the recommendation, which may only be overcome if the court finds the defendant is an unreasonable risk of danger to public safety.[4] If the court grants the resentencing, the original sentence and commitment previously ordered is recalled and the defendant is resentenced "in the same manner as if they had not previously been sentenced," and provided the new sentence, if any, is no greater than the initial sentence.[5] In recalling and resentencing the defendant, the court is required to apply the sentencing rules of the Judicial Council and apply any changes in law that reduce sentences or provide for judicial discretion to eliminate disparity of sentences.[6] The court may also reduce a defendant's term of imprisonment by modifying the sentence, or vacating the conviction and impose judgment on lesser included offenses with the concurrence of the parties.[7] The court may consider post-conviction factors that support a finding "that continued incarceration is no longer in the interest of justice;" whether the defendant has experienced psychological, physical, or childhood trauma; or "if the defendant was a youth … at the time of the commission of the crime."[8] In addition, if the defendant's

[2] Penal Code section 1170.03(b)(1).

[3] Penal Code section 1170.03(a)(8).

[4] Penal Code section 1170.03(b)(2).

[5] Penal Code section 1170.03(a)(1).

[6] Penal Code section 1170.03(a)(2).

[7] Penal Code section 1170.03(a)(3).

[8] Penal Code section 1170.03(a)(4).

original sentence is recalled and the defendant is resentenced, "[c]redit shall be given for time served."[9]

Under prior law, there were no procedural requirements for if and how a court would respond to a resentencing recommendation, and many courts issued notices rejecting the resentencing recommendation without a hearing or an opportunity for the defendant to be heard.[10]

The claimant contends that the test claim statute imposes new requirements on county district attorneys and public defenders to participate in the hearing procedures established by the state, and the Senate Appropriations Committee acknowledged that the statute would create "unknown, potentially significant workload costs to counties, specifically district attorneys and public defenders, to litigate resentencing requests."[11]

The Commission finds that county district attorneys and public defenders are required to participate in the hearings required by the test claim statute. However, the test claim statute changes the penalty for a crime within the meaning of Government Code section 17556(g) and, therefore, does not impose any costs mandated by the state. As a direct result of the test claim statute, all defendants who receive a resentencing recommendation will be appointed counsel and have an opportunity at a hearing to present arguments in favor of the court recalling the original sentence and resentencing the defendant to a new sentence that accounts for time already served and any changes in law that reduce the original sentence. In *County of San Diego v. Commission on State Mandates*, which addressed the Commission's Decision in *Youth Offender Parole Hearings* (YOPH), the court found that the test claim statute changed the penalty for a crime pursuant to Government Code section 17556(g) "by changing the manner in which the original sentences operate and guaranteeing youth offenders the chance to obtain release on parole."[12] The same is true here. By guaranteeing all defendants who receive a recommendation for resentencing a court hearing and the chance to have their original sentence recalled and a new, reduced sentence imposed, the test claim statute changes the penalties for the crimes committed by these defendants.[13]

Accordingly, the test claim statute does not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514, and this Test Claim is denied.

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[9] Penal Code section 1170.03(a)(5).

[10] Exhibit E (3), Committee on Revision of the Penal Code, *Annual Report and Recommendations* (2020), page 66.

[11] Exhibit E (2), Senate Committee on Appropriations, Analysis of AB 1540 as amended July 12, 2021, page 1.

[12] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 641.

[13] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 641.

## COMMISSION FINDINGS

### I. Chronology

01/01/2022 Penal Code section 1170.03 was added by Statutes 2021, Chapter 719, section 3.1 and became effective.

12/16/2022 The claimant filed the Test Claim.[14]

07/18/2023 The Department of Finance (Finance) filed comments on the Test Claim.[15]

11/29/2023 Commission staff issued the Draft Proposed Decision.[16]

12/20/2023 The claimant filed comments on the Draft Proposed Decision.[17]

### II. Background

#### A. The History of Resentencing Recommendations Under Penal Code Section 1170(d)(1).

Since 1968, the state corrections department has had the authority to recommend that the courts "recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he had not previously been sentenced."[18] A resentencing recommendation creates "an exception to the common law rule that the court loses resentencing jurisdiction once execution of sentence has begun."[19] The new sentence may not be greater than the one originally imposed, but the court has discretion to "impose any otherwise permissible new sentence, which may include consideration of facts that arose after [the defendant] was committed to serve the original sentence."[20] When the Legislature moved to a determinate sentencing system, this ability was moved to Penal Code section 1170(c), reading:

> When a defendant subject to this section has been sentenced to be imprisoned in the state prison and has been committed to the custody of the Director of Corrections, the sentencing court may, at any time upon the recommendation of the Director of Corrections, the Community Release Board, or the court may, within 120 days of the date of commitment, on its own motion recall and resentence the defendant in the same manner as if he had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence. The

[14] Exhibit A, Test Claim, filed December 16, 2022.

[15] Exhibit B, Finance's Comments on the Test Claim, filed July 18, 2023.

[16] Exhibit C, Draft Proposed Decision, issued November 29, 2023.

[17] Exhibit D, Claimant's Comments on the Draft Proposed Decision, filed December 20, 2023.

[18] See Penal Code section 1168, as amended by Statutes 1967, chapter 850, section 1.

[19] *Dix v. Superior Court* (1991) 53 Cal.3d 442, 445.

[20] *Dix v. Superior Court* (1991) 53 Cal.3d 442, 465.

> resentence under this subdivision shall apply the sentencing rules of the Judicial Counsel so as to eliminate disparity of sentences and promote uniformity of sentencing. Credit shall be given for time served.[21]

Later on, the powers of the Director of Corrections and Community Release Board to make resentencing recommendations were transferred to the California Department of Corrections and Rehabilitation (CDCR) Secretary and the Board of Parole Hearings, and moved to Penal Code section 1170(d)(1).[22]

Although the CDCR and Board of Parole Hearings have been able to make resentencing recommendations for any reason they see fit for decades, until fairly recently as explained below, it was a rarely used power.[23] Even if the CDCR or Board of Parole Hearings made a resentencing recommendation, the recommendation only gave the courts the ability to recall a sentence and resentence the defendant. It did not require the courts take any specific actions in response to the recommendation, even though other subdivisions within Penal Code section 1170 did specifically require the appointment of counsel for the defendant and holding hearings.[24] Penal Code section 1170(d)(1) provided no guidance to the courts for how they should handle resentencing recommendations.[25] Case law firmly established that section 1170(d)(1) "merely authorizes the court to recall a prison sentence and commitment and resentence the defendant under certain conditions. It is permissive, not mandatory."[26]

### B. Using Resentencing Recommendations as a Method for Reducing Prison Populations.

In 2010, a three-judge panel issued a ruling ordering the State of California to reduce its prison population to 137.5 percent of design capacity because overcrowding was the primary reason that CDCR was unable to provide inmates with constitutionally adequate healthcare.[27] As part of the efforts to address prison overcrowding, funding was allocated for the CDCR to identify people within its custody with a demonstrated history

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[21] See Penal Code section 1170(c), as amended by Statute 1976, chapter 1139, section 273.

[22] See Penal Code section 1170(d), as amended by Statute 2007, chapter 3, section 3, and Penal Code section 1170(d)(1), as amended by Statute 2012, chapter 828, section 2.

[23] Exhibit E (1), Assembly Committee on Public Safety, Analysis on AB 1540 as amended April 22, 2021, page 7.

[24] *Dix v. Superior Court* (1991) 53 Cal.3d 442, 458 (comparing former section 1170(d) with disparate sentencing review in former section 1170(f)(1)).

[25] Exhibit E (1), Assembly Committee on Public Safety, Analysis on AB 1540 as amended April 22, 2021, page 7.

[26] *People v. Delson* (1984) 161 Cal.App.3d 56, 62.

[27] Exhibit E (1), Assembly Committee on Public Safety, Analysis on AB 1540 as amended April 22, 2021, page 4.

of rehabilitation and issue recommendations that the courts reevaluate their sentences. The CDCR established new policies for when it is willing to consider making a resentencing recommendation and began issuing resentencing recommendations more regularly.[28] The Legislature also expanded the list of agencies with authority to recommend a defendant be resentenced to include the district attorney of the county where the defendant was sentenced and the county correctional administrator for defendants that were being held in county jail.[29]

Before the test claim statute went into effect, Penal Code section 1170(d)(1) read:

> When a defendant subject to this section or subdivision (b) of Section 1168 has been sentenced to be imprisoned in the state prison or a county jail pursuant to subdivision (h) and has been committed to the custody of the secretary or the county correctional administrator, the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the secretary or the Board of Parole Hearings in the case of state prison inmates, the county correctional administrator in the case of county jail inmates, or the district attorney of the county in which the defendant was sentenced, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if they had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence. The court resentencing under this subdivision shall apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing. The court resentencing under this paragraph may reduce a defendant's term of imprisonment and modify the judgment, including a judgment entered after a plea agreement, if it is in the interest of justice. The court may consider postconviction factors, including, but not limited to, the inmate's disciplinary record and record of rehabilitation while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the inmate's risk for future violence, and evidence that reflects that circumstances have changed since the inmate's original sentencing so that the inmate's continued incarceration is no longer in the interest of justice. Credit shall be given for time served.

### C. Impetus Behind the Removal of the Courts Discretion Regarding Whether to Act On or Respond to Resentencing Recommendations.

As the CDCR and district attorneys began actively utilizing their ability to make resentencing recommendations, problems with the way the system was originally designed became apparent. Most courts had never encountered a resentencing

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[28] See 15 California Code of Regulations section 3076.1.

[29] See Penal Code section 1170(d), as amended by Statutes 2015, chapter 378, section 2 (adding county correctional administrators), and Statutes 2018, chapter 1001, section 1 (adding district attorneys).

recommendation before. With prior case law that held the courts were not obligated to act on the authority granted to them under Penal Code section 1170(d)(1), many courts issued *suo motu* notices rejecting the resentencing recommendation without a hearing or any opportunity for defendants to address whatever concerns the court may have with resentencing them, or simply chose to ignore the recommendation completely, essentially denying resentencing without giving the defendant a decision they could appeal. The CDCR Office of Research found that of the 1,603 resentencing recommendations the CDCR issued in the 2019-2020 year, only 1,133 (71 percent of total cases) received any response from the court, and of those only 475 (30 percent of total cases) resulted in the court choosing to resentence the defendant.[30]

Further issues arose when defendants tried to challenge the courts' decisions not to follow the CDCR's recommendations. Multiple appellate courts reaffirmed that 1170(d)(1) did not require courts to hold hearings, appoint counsel, or resentence a defendant under any specific circumstances.[31] "The Secretary's recommendation letter is but an invitation to the court to exercise its equitable jurisdiction. It furnishes the court with the jurisdiction it would not otherwise possess to recall and resentence; it does not trigger a due process right to a hearing, let alone any right to the recommended relief."[32] One appellate court even incorrectly held that changes in law that would have affected what crimes the defendant was charged with could not be retroactively applied during resentencing because 1170(d)(1) "says nothing about 'reopening' a judgment that has been final for years."[33] At the same time however, it was found to be an abuse of discretion to deny resentencing without giving the defendant a chance to address the reasons for the decision, and that courts should provide notice to the parties of their intent to resentence a defendant that includes the tentative resentencing order and a statement of the reasons for the decision, and give the parties a chance to object to the tentative resentencing and request a hearing at which the defendant would have a right to counsel.[34] If the Legislature intended to use resentencing recommendations as a tool to address unjust sentences and reduce prison sentences, it needed to amend the law to provide courts with clearer guidance on the procedures they must follow when responding to a resentencing recommendation.

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[30] Exhibit E (3), Committee on Revision of the Penal Code, *Annual Report and Recommendations* (2020), page 66. The Committee on Revision of the Penal Code was created in 2019 and is part of the California Law Revision Commission. (Gov. Code, §§ 8280, et seq., as amended by Statute 2019, Chapter 25, section 2.)

[31] *People v. McCallum* (2020) 55 Cal.App.5th 202, 215-216; *People v. Fraizer* (2020) 55 Cal.App.5th 858, 866; *People v. Williams* (2021) 65 Cal.App.5th 828, 834.

[32] *People v. Fraizer* (2020) 55 Cal.App.5th 858, 866.

[33] *People v. Federico* (2020) 50 Cal.App.5th 318 (depublished by *People v. Federico* (2022) 511 P.3d 191).

[34] *People v. McCallum* (2020) 55 Cal.App.5th 202, 218-219; *People v. Williams* (2021) 65 Cal.App.5th 828, 834.

In 2020, the Committee on Revision of the Penal Code advised changes to Penal Code section 1170(d)(1) to clarify what courts must do when responding to a resentencing recommendation and expand the ability to consider resentencing.

> Despite these expansions to the resentencing statute, current law has failed to protect many important interests at stake. For example, because the Penal Code does not provide any rules, many trial courts provide virtually no process while considering these requests, including denying resentencing requests without providing notice to the parties, appointing counsel, or giving parties an opportunity to be heard. The law does not require a court to give any specific reason for denying a resentencing request.[35]

The Committee recommended changes to Penal Code section 1170(d)(1) that included: (1) establishing judicial procedures that require notice, an initial status conference within 60 days, written reasons for the court's decisions, and in the case of resentencings that are recommended by law enforcement, appointed counsel; (2) establishing a presumption in favor of resentencing when recommended by a law enforcement agency because of an unjust sentence or because of the defendant's "exceptional rehabilitative achievement while incarcerated"; and (3) expanding "second look" resentencing to allow anyone who has served more than 15 years to request reconsideration of their sentence by establishing that their sentence is no longer in the interest of justice.[36]

### D. The Test Claim Statute

In 2021, the Legislature enacted the test claim statute, moving the resentencing procedure found in section 1170(d)(1) to its own Penal Code section, 1170.03, effective January 1, 2022.[37] The bill's author noted that:

> Courts are currently left to sift through a statute that does not provide adequate structure for the resentencing process, leaving many requests languishing in limbo, or worse -denied without reason. The changes contained in AB 1540 strengthen common procedural problems to address

[35] Exhibit E (3), Committee on Revision of the Penal Code, *Annual Report and Recommendations* (2020), page 66.

[36] Exhibit E (3), Committee on Revision of the Penal Code, *Annual Report and Recommendations* (2020), page 65.

[37] Statutes 2021, chapter 719, § 3.1 (AB 1540). Statutes 2022, chapter 58 (AB 200) later renumbered Penal Code section 1170.03 to Penal Code section 1172.1, with no changes to the statute's contents, effective June 30, 2022. In addition, Statutes 2023, chapter 131 (AB 1754), chapter 446 (AB 600), and chapter 795 (AB 88) made additional substantive changes to section 1172.1, effective January 1, 2024, that will not be discussed here.

equity and due process concerns in how courts should handle second look sentencing requests.[38]

The newly added Penal Code section 1170.03 provides:

> (a) (1) When a defendant, upon conviction for a felony offense, has been committed to the custody of the Secretary of the Department of Corrections and Rehabilitation or to the custody of the county correctional administrator pursuant to subdivision (h) of Section 1170, the court may, within 120 days of the date of commitment on its own motion, at any time upon the recommendation of the secretary or the Board of Parole Hearings in the case of a defendant incarcerated in state prison, the county correctional administrator in the case of a defendant incarcerated in county jail, the district attorney of the county in which the defendant was sentenced, or the Attorney General if the Department of Justice originally prosecuted the case, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if they had not previously been sentenced, whether or not the defendant is still in custody, and provided the new sentence, if any, is no greater than the initial sentence.
>
> (2) The court, in recalling and resentencing under this subdivision, shall apply the sentencing rules of the Judicial Council and apply any changes in law that reduce sentences or provide for judicial discretion so as to eliminate disparity of sentences and to promote uniformity of sentencing.
>
> (3) The resentencing court may, in the interest of justice and regardless of whether the original sentence was imposed after a trial or plea agreement, do the following:
>
> (A) Reduce a defendant's term of imprisonment by modifying the sentence.
>
> (B) Vacate the defendant's conviction and impose judgment on any necessarily included lesser offense or lesser related offense, whether or not that offense was charged in the original pleading, and then resentence the defendant to a reduced term of imprisonment, with the concurrence of both the defendant and the district attorney of the county in which the defendant was sentenced or the Attorney General if the Department of Justice originally prosecuted the case.
>
> (4) In recalling and resentencing pursuant to this provision, the court may consider postconviction factors, including, but not limited to, the disciplinary record and record of rehabilitation of the defendant while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the defendant's risk for

[38] Exhibit E (1), Assembly Committee on Public Safety, Analysis of AB 1540 as amended April 22, 2021, pages 3-4.

future violence, and evidence that reflects that circumstances have changed since the original sentencing so that continued incarceration is no longer in the interest of justice. The court shall consider if the defendant has experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence, if the defendant was a victim of intimate partner violence or human trafficking prior to or at the time of the commission of the offense, or if the defendant is a youth or was a youth as defined under subdivision (b) of Section 1016.7 at the time of the commission of the offense, and whether those circumstances were a contributing factor in the commission of the offense.

(5) Credit shall be given for time served.

(6) The court shall state on the record the reasons for its decision to grant or deny recall and resentencing.

(7) Resentencing may be granted without a hearing upon stipulation by the parties.

(8) Resentencing shall not be denied, nor a stipulation rejected, without a hearing where the parties have an opportunity to address the basis for the intended denial or rejection. If a hearing is held, the defendant may appear remotely and the court may conduct the hearing through the use of remote technology, unless counsel requests their physical presence in court.

(b) If a resentencing request pursuant to subdivision (a) is from the Secretary of the Department of Corrections and Rehabilitation, the Board of Parole Hearings, a county correctional administrator, a district attorney, or the Attorney General, all of the following shall apply:

(1) The court shall provide notice to the defendant and set a status conference within 30 days after the date that the court received the request. The court's order setting the conference shall also appoint counsel to represent the defendant.

(2) There shall be a presumption favoring recall and resentencing of the defendant, which may only be overcome if a court finds the defendant is an unreasonable risk of danger to public safety, as defined in subdivision (c) of Section 1170.18.

The California District Attorneys Association opposed the enactment of the test claim statute, stating that section 1170.18(c)'s definition of "unreasonable risk to public safety," which requires an unreasonable risk the defendant will commit a new violent felony, would be too difficult for prosecutors to prove. It asserted that:

> AB 1540 would shift the burden of proof from a standard which allows the court to grant a petition when the evidence shows that the inmate's continued incarceration is no longer in the interest of justice, to an impossible-to-rebut standard that would require the court to grant every petition 'unless there is evidence beyond a reasonable doubt that the

> defendant is likely to commit a future violent crime.' This would not only impose the highest standard of proof in the inverse but would require the impossible – the ability to not only accurately predict the future, but to do so beyond a reasonable doubt. There will never be proof beyond a reasonable doubt of the future conduct of any human being because no human is possessed of such ability.[39]

However, the Assembly Committee on Public Safety noted this was exactly how the statute was intended to work, as it explained:

> This bill would require a court to presume that it is appropriate to recall and resentence a defendant that has been referred by CDCR, BPH, the county sheriff, or the prosecuting agency, unless a court finds an unreasonable risk that the defendant would commit a violent felony, as specified. That is a fairly high bar. However, these are cases which have already been vetted as being appropriate for recall and resentencing by the law enforcement agencies recommending recall and resentencing. Even if a court grants the petition for recall and resentence, the court still has discretion in imposing a new sentence. The new sentence cannot be more than the original sentence, but a court would not necessarily impose a lower sentence if the court did not otherwise feel that one was appropriate (unless a change in law from the time of the original sentence mandated a lower sentence).[40]

## III. Positions of the Parties

### A. County of Los Angeles

The claimant is seeking reimbursement for district attorneys' activities while representing the People when the CDCR makes a resentencing recommendation, and public defenders' activities when representing defendants in both CDCR- and district attorney-recommended resentencings.

The claimant acknowledges that district attorneys already had activities they must perform when making a resentencing recommendation under prior law, and explicitly disclaimed it is not seeking reimbursement for district attorneys' activities when district attorneys make a resentencing recommendation.[41] In contrast, the claimant asserts that the courts were not required under prior law to hold hearings for CDCR-recommended resentencings, and district attorneys were not required to participate in any hearings the courts chose to hold for CDCR-recommended resentencings.[42] Now, when the CDCR makes a resentencing recommendation, the deputy district attorney

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[39] Exhibit E (1), Assembly Committee on Public Safety, Analysis of AB 1540 as amended April 22, 2021, page 7.

[40] Exhibit E (1), Assembly Committee on Public Safety, Analysis of AB 1540 as amended April 22, 2021, page 6.

[41] Exhibit A, Test Claim, filed December 16, 2022, page 12.

[42] Exhibit A, Test Claim, filed December 16, 2022, pages 11-12.

assigned to the case must review the recommendation and any supplemental attachments that were provided by the CDCR, contact any victims of the defendant to inform them of their right to be heard in the proceedings, review the defendant's prison files, prepare a written response either concurring with or objecting to the CDCR's recommendation, and participate in multiple hearings throughout the process.[43]

Regarding public defenders, the claimant asserts that under prior law the courts were not required to appoint counsel or hold hearings for recommended resentencings.[44] Public defenders were therefore not required to represent defendants during resentencing under prior law, although they did voluntarily participate sporadically if they were aware of a resentencing recommendation and the courts permitted them to represent the defendant.[45] The public defenders' Post-Conviction Unit handles district attorney-recommended resentencings, while CDCR-recommended resentencings are handled by public defenders throughout the county.[46] As part of acting as appointed counsel for a defendant, public defenders must contact their client to discuss their case, and must gather prison records, risk assessment scores, prison central files, medical and mental health records, and any records of schooling or programming the defendant participated in while in prison.[47] The public defenders must review the case and prepare a sentencing memorandum they submit to the district attorney and courts.[48]

The claimant states that in fiscal year 2021-2022, the district attorneys' office incurred $343,694 in increased costs and public defenders incurred $101,166 working on resentencings under the test claim statute.[49] The district attorney's office estimates incurring approximately $576,985 during the 2022-2023 fiscal year.[50] The public defender's office estimates $584,000 for fiscal year 2022-2023, of which it noted approximately $475,000 came from district attorney-recommended resentencings, while the remaining $109,000 came from CDCR-recommended resentencings.[51] The estimated statewide costs are $2,136,981 for district attorneys, and $2,160,000 for public defenders.[52] The claimant also identified several one-time grants that in the event this is found to be a reimbursable state-mandated program, would offset costs.[53]

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[43] Exhibit A, Test Claim, filed December 16, 2022, page 11.

[44] Exhibit A, Test Claim, filed December 16, 2022, page 12.

[45] Exhibit A, Test Claim, filed December 16, 2022, page 12.

[46] Exhibit A, Test Claim, filed December 16, 2022, page 12.

[47] Exhibit A, Test Claim, filed December 16, 2022, page 11.

[48] Exhibit A, Test Claim, filed December 16, 2022, page 11.

[49] Exhibit A, Test Claim, filed December 16, 2022, page 12.

[50] Exhibit A, Test Claim, filed December 16, 2022, page 12.

[51] Exhibit A, Test Claim, filed December 16, 2022, page 24 (Declaration of Sung Lee).

[52] Exhibit A, Test Claim, filed December 16, 2022, page 13.

[53] Exhibit A, Test Claim, filed December 16, 2022, page 13.

The claimant did not respond to Finance's comments.

In its response to the Draft Proposed Decision, the claimant pointed out that article XIII B, section 6(a) of the California Constitution states that the Legislature may, but need not, provide a subvention of funds for mandates that define a new crime or change an existing definition of a crime. It asserts that exceptions to the state's subvention obligation must be narrowly construed, and "Since Assembly Bill (AB) 1540 did not define a new crime or change the existing definition of a crime, the exemption as stated in article XIII B, section 6 of the California Constitution does not apply."[54] Regarding the finding that the test claim statute changes the penalty for a crime within the meaning of Government Code section 17556(g), the claimant responds that it felt that the Draft Proposed Decision's explanation of how the alleged required activities change the penalty for a crime or infraction and relate directly to the enforcement of the crime or infraction was inadequate.

> AB 1540 added Penal Code § 1170.03, which requires Claimant to perform non-enforcement related activities, including: (1) preparing for hearings related to sentencing cases submitted by the California Department of Corrections and Rehabilitation (CDCR); (2) acting as appointed counsel in response to a recommendation from the CDCR; and (3) acting as appointed counsel for individuals after a sentence has been invalidated. Therefore the Commission has not met its burden in showing that the activities described in AB 1540 changed the penalty as it relates directly to the enforcement of the crime.[55]

The claimant also asserts that the Fourth District Court of Appeals' decision in *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625 (YOPH) is not applicable here, because the test claim statute at issue in that decision explicitly changed when youth offenders became eligible for parole, while "AB 1540 makes no specific penalty change, but rather outlines procedures courts must follow based on recommendations from the CDCR and District Attorney."[56] Finally, the claimant requests that if the Commission still determines that the exemption applies, that the Commission exercise its discretion to reimburse the claimant for its substantial costs incurred by the enactment of the test claim statute.[57]

### B. Department of Finance

Finance argues that the Test Claim should be denied because the test claim statute changes the penalty for a crime within the meaning of Government Code section

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[54] Exhibit D, Claimant's Comments on the Draft Proposed Decision, filed December 20, 2023, page 2.

[55] Exhibit D, Claimant's Comments on the Draft Proposed Decision, filed December 20, 2023, pages 2-3.

[56] Exhibit D, Claimant's Comments on the Draft Proposed Decision, filed December 20, 2023, page 3.

[57] Exhibit D, Claimant's Comments on the Draft Proposed Decision, filed December 20, 2023, page 3.

17556(g) and, thus, there are no costs mandated by the state.[58] In the event that 17556(g) does not apply, Finance asserts that the activities required for district attorney-recommended resentencings, including those imposed on public defenders, are not mandated by the state and therefore not reimbursable, because they are the result of local discretionary actions.[59] Finance did not file comments on the Draft Proposed Decision.

## 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."[60] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[61]

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.[62]
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.[63]

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[58] Exhibit B, Finance's Comments on the Test Claim, filed July 18, 2023, page 2.

[59] Exhibit B, Finance's Comments on the Test Claim, filed July 18, 2023, page 2.

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

[61] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[62] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

[63] *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.[64]

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.[65]

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.[66] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[67] 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."[68]

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

Government Code section 17551 provides that local government 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."[69]

The test claim statute became effective on effective January 1, 2022, and the Test Claim was filed on December 16, 2022, within 12 months following the effective date of the test claim statute.[70] Therefore, the Test Claim was timely filed.

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[64] *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.

[65] *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.

[66] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 335.

[67] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

[68] *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].

[69] Government Code section 17551(c) (Stats. 2007, ch. 329); California Code of Regulations, title 2, section 1183.1(c).

[70] Exhibit A, Test Claim, filed December 16, 2022.

## B. The Test Claim Statute Does Not Impose a Reimbursable State-Mandated Program Within the Meaning of Article XIII B, Section 6 of the California Constitution and Government Code Section 17514.

### 1. The Test Claim Statute Requires Activities of the County District Attorneys and Public Defenders.

The test claim statute requires that when a court receives a recommendation for the recall and resentencing of a defendant from the CDCR Secretary, the Board of Parole Hearings, a county correctional administrator, a district attorney, or the Attorney General, the court shall provide notice to the defendant, set a date for a status conference within 30 days of receiving the recommendation, and appoint counsel.[71] A recall and resentencing recommendation creates a presumption in favor of resentencing that may only be overcome if the defendant is an unreasonable risk of danger to public safety, as defined by Penal Code section 1170.18.[72] The court may recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if the defendant had not previously been sentenced, whether or not the defendant is still in custody, and provided the new sentence, if any, is no greater than the initial sentence.[73] Recalling and resentencing may be granted without a hearing when stipulated by the parties, but the court may not deny resentencing or reject a stipulation without first holding a hearing where the parties will have an opportunity to address the basis for the intended denial or rejection.[74] A court may choose to hold a hearing remotely using remote technology unless counsel requests their physical presence in court.[75] The court must state on the record its reasons for granting or denying resentencing.[76] When recalling and resentencing a defendant, the court shall apply the sentencing rules of the Judicial Counsel and apply any changes in law that reduce sentences or provide judicial discretion so as to eliminate disparity and promote uniformity of sentencing.[77] The court may reduce a defendant's term of imprisonment by modifying the sentence, or may vacate the defendant's conviction and impose judgment on any included lesser offenses or lesser related offenses if it is with the concurrence of both the defendant and the prosecuting attorney.[78] During resentencing, the court may consider postconviction factors including but not limited to: the defendant's disciplinary record and record of rehabilitation; evidence that reflects

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[71] Penal Code section 1170.03(b)(1).

[72] Penal Code section 1170.03(b)(2). Section 1170.18's definition of an unreasonable risk of danger to public safety is an unreasonable risk that they will commit a new violent felony within the meaning of Penal Code section 667(e)(2)(C)(iv).

[73] Penal Code section 1170.03(a)(1).

[74] Penal Code section 1170.03(a)(7), (8).

[75] Penal Code section 1170.03(a)(8).

[76] Penal Code section 1170.03(a)(6).

[77] Penal Code section 1170.03(a)(2).

[78] Penal Code section 1170.03(a)(3).

whether age, time served, or diminished physical capacity have reduced the defendant's risk for future violence; and evidence that reflects circumstances have changed so that continued incarceration is no longer in the interest of justice.[79] The court shall also consider whether the defendant has experienced psychological, physical, or childhood trauma, if the defendant was a victim of intimate partner violence or human trafficking, or if the defendant was a youth at the time of committing their offense, and whether any of those circumstances were a contributing factor in committing the offense.[80] Credit shall be given for time served, and the new sentence can be no greater than the original sentence.[81]

The hearing procedures established by the test claim statute require participation by county public defenders and district attorneys, and the Senate Appropriations Committee acknowledged that the statute would create "unknown, potentially significant workload costs to counties, specifically district attorneys and public defenders, to litigate resentencing requests."[82] The test claim statute requires the court to appoint counsel for a defendant when it receives a resentencing recommendation, and the role of appointed counsel to indigent defendants falls to a public defender.[83] Although the statute does not explicitly state that district attorneys are required to participate in resentencing, it does require that a court's decision to vacate the original conviction and impose judgment on any lesser included or lesser related offenses be with the concurrence of both the defendant and the prosecuting attorney. The presumption in favor of resentencing would also require the district attorney to make a case to the court when the defendant presents an unreasonable risk to public safety. It would be a dereliction of a district attorney's duty if they did not represent the People in a criminal proceeding.[84]

Accordingly, the test claim statute imposes requirements on counties. However, the Commission makes no findings on whether these activities are mandated by the state or are the result of discretionary actions by the county, or whether the test claim statute imposes a new program or higher level of service because, as described below, the test claim statute does not result in costs mandated by the state.

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[79] Penal Code section 1170.03(a)(4).

[80] Penal Code section 1170.03(a)(4).

[81] Penal Code section 1170.03(a)(1), (5).

[82] Exhibit E (2), Senate Committee on Appropriations, Analysis of AB 1540 as amended July 12, 2021, page 1.

[83] Counties have always had the duty to provide indigent defense counsel in criminal cases and the right to counsel "applies at all critical stages of a criminal proceeding in which the substantial rights of a defendant are at stake," including at sentencing hearings. (Pen. Code, § 987.2; Gov. Code, § 27706; *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 815 citing *Gideon v. Wainwright* (1963) 372 U.S. 335; *People v. Bauer* (2012) 212 Cal.App.4th 150, 155.)

[84] *People v. Dehle* (2008) 166 Cal.App.4th 1380, 1388.

### 2. The Test Claim Statute Does Not Result in Costs Mandated by the State Because the Test Claim Statute Changes the Penalty for a Crime Under Government Code Section 17556(g).

Government Code section 17556 provides that "[t]he commission shall not find costs mandated by the state, as defined by Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds any one of the following… the statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction."[85] This exception to the reimbursement requirement is intended to allow the state to address public safety issues involving crimes, without having to consider whether reimbursement to local government would be required under article XIII B, section 6, as a result of its actions. Although the claimant asserts that the change in penalty for a crime or infraction language in Government Code section 17556(g) may not be consistent with article XIII B, section 6 in its comments on the Draft Proposed Decision, section 17556(g) is presumed to be constitutional, and the Commission is required by law to follow it.[86]

The Fourth District Court of Appeal considered the application of the change in penalty for a crime or infraction language in Government Code section 17556(g) in *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625 (YOPH). In that case, the Commission denied a Test Claim seeking reimbursement for *Franklin* proceedings related to youth offender parole hearings. The test claim statute required the Board of Parole Hearings to hold parole hearings at statutory periods for youthful offenders serving lengthy prison sentences who were under 26 years old when they committed their crimes, and to consider certain youth-related factors that may have contributed to them committing their offense.[87] The purpose of the statutes was to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when the person shows he or she has been rehabilitated and gained maturity.[88] The statutes

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[85] Government Code Section 17556(g).

[86] Exhibit D, Claimant's Comments on the Draft Proposed Decision, filed December 20, 2023, page 2 (where the claimant states that article XIII B, section 6, simply provides that the "Legislature may, but need not, provide a subvention of funds for legislative mandates that define a new crime or change an existing definition of a crime" and that the test claim statute did not define a new crime or change the definition of a crime); California Constitution article III, section 3.5(a) prohibits an administrative agency from declaring a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional.

[87] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 635.

[88] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 633.

effectively reformed the parole eligibility date of a youth offender's original sentence, at times amounting to "de facto" life sentences, so that the longest possible term of incarceration before parole eligibility is 25 years.[89] To accomplish this purpose, the courts created a procedure called a *Franklin* proceeding for preserving evidence of those youth-related factors in the court record for future parole hearings, and county public defenders and district attorneys sought reimbursement for their costs in participating in these *Franklin* proceedings. The Commission denied the Test Claim on two counts: the state did not require the counties to hold *Franklin* proceedings, and even if it did, the requirement to hold youth offender parole hearings for youthful defendants changed the penalties for those defendants' crimes pursuant to Government Code section 17556(g) by capping the number of years the offender may be imprisoned before becoming eligible for release on parole and, therefore, there were no costs mandated by the state.[90]

The County of San Diego raised several arguments in support of its writ, including that Government Code section 17556(g) did not apply since the test claim statutes do not vacate the original sentence or require resentencing proceedings and, thus, the penalties for the crimes were not changed.[91] The court disagreed with the County, finding that the test claim statutes changed the penalty for a crime within the meaning of Government Code section 17556(g) as follows:

> It is true the Test Claim Statutes do not vacate youth offenders' sentences, nor do they require resentencing proceedings. (*Franklin, supra*, 63 Cal.4th at p. 278, 202 Cal.Rptr.3d 496, 370 P.3d 1053; *People v. White* (2022) 86 Cal.App.5th 1229, 1238–1239, 302 Cal.Rptr.3d 863.) But these facts do not mean the Test Claim Statutes effect no change on the penalties suffered by youth offenders. The Test Claim Statutes "change[ ] the manner in which the juvenile offender's original sentence *operates* by capping the number of years that he or she may be imprisoned before becoming eligible for release on parole. The Legislature has effected this change *by operation of law*, with no additional resentencing procedure required." (*Franklin*, at pp. 278–279, 202 Cal.Rptr.3d 496, 370 P.3d 1053, italics added; *id.* at p. 281, 202 Cal.Rptr.3d 496, 370 P.3d 1053 ["by operation of law, [the defendant] is entitled to a parole hearing and possible release after 25 years of incarceration"].) In short, by changing the manner in which the original sentences operate, and guaranteeing youth offenders the chance to obtain release on parole, the Test Claim Statutes—by operation of law—

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[89] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 641.

[90] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 638.

[91] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 641.

alter the penalties for the crimes perpetrated by eligible youth offenders.[92]

The court also found that although the test claim statutes did not guarantee the defendant would be granted parole, it did guarantee the chance to obtain release on parole. "As a direct result of the Test Claim Statutes, most youth offenders are statutorily *eligible for parole* at a youth offender parole hearing conducted during the 15th, 20th, or 25th year of incarceration, depending on the term of incarceration included within the youth offender's original sentence."[93] Thus, by operation of law, the statutes at issue in that case "alter[ed] the penalties for the crimes perpetrated by eligible youth offenders."[94]

The same is true here. As a direct result of the test claim statute, defendants receiving a resentencing recommendation are guaranteed the chance to have their original criminal sentences recalled or vacated and to be resentenced and, thus, the test claim statute changes the penalty for a crime within the meaning of Government Code section 17556(g). Like the *County of San Diego* case, the test claim statute does not guarantee a recall and resentencing in every case and may not necessarily result in a reduced sentence. Courts are required to apply current laws and sentencing rules that *may* reduce the sentence or allow for greater judicial discretion when receiving a resentencing recommendation, and a new sentence can be no greater than the sentence that was originally imposed, but the Legislature was clear that it did not intend to impede on the court's ability to determine an appropriate sentence.[95] However, to paraphrase the Court of Appeal in the *County of San Diego* YOPH case, by guaranteeing all defendants who receive a recommendation for resentencing a hearing and the chance to have their original sentence recalled and a new, reduced sentence imposed, the test claim statute alters the penalties for the crimes committed by the

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[92] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 641.

[93] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 640 (Emphasis added).

[94] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 641.

[95] Exhibit E (1), Assembly Committee on Public Safety, Analysis of AB 1540, as amended April 22, 2021, page 6, ("Even if a court grants the petition for recall and resentence, the court still has discretion in imposing a new sentence. The new sentence cannot be more than the original sentence, but a court would not necessarily impose a lower sentence if the court did not otherwise feel that one was appropriate (unless a change in law from the time of the original sentence mandated a lower sentence)."). See also, *People v. Braggs* (2022) 85 Cal.App.5th 809, 820, finding that the presumption in favor of recall and resentencing refers to the decision whether to grant resentencing at all, and does not apply to determining the appropriate new sentence.

defendants.[96] As stated above, the test claim statute provides a presumption in favor of resentencing when a recommendation is received, which makes it significantly more likely a court will grant resentencing, which did not exist under prior law.[97] If the court grants the resentencing, the original sentence and commitment previously ordered is recalled and the defendant is resentenced "in the same manner as if they had not previously been sentenced."[98] In recalling and resentencing the defendant, the court may reduce a defendant's term of imprisonment by modifying the sentence, or vacate the conviction and impose judgment on lesser included offenses with the concurrence of the parties.[99] The court may also consider post-conviction factors that support a finding "that continued incarceration is no longer in the interest of justice" or "if the defendant was a youth … at the time of the commission of the crime."[100] In addition, "[c]redit shall be given for time served."[101] Thus, the test claim statute changes the penalties for the crimes committed by the defendants.

The claimant argues, however, that the findings in *County of San Diego (YOPH)* are inapplicable because the test claim statute in YOPH explicitly changed youth offender parole eligibility dates, while the test claim statute here outlines the procedure that courts must follow.[102] This argument raises a distinction without a difference and is without merit. The test claim statutes in *County of San Diego* (YOPH) did cap the number of years a youthful offender may be imprisoned before becoming *eligible* for release on parole, and the statutes imposed a procedure on the State Board of Parole Hearings to determine the issue once the offender was eligible for release on parole. No requirements were imposed on the counties.[103] The County sought reimbursement, however, for the *Franklin* proceedings created by the court for preserving evidence of youth-related factors of the defendant that may be relevant for future parole hearings held by the State Board of Parole Hearings.[104] In other words, like the claimant here,

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[96] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 641.

[97] Penal Code section 1170.03(b)(2), which states: "There shall be a presumption favoring recall and resentencing of the defendant, which may only be overcome if a court finds the defendant is an unreasonable risk of danger to public safety, as defined in subdivision (c) of Section 1170.18."

[98] Penal Code section 1170.03(a)(1).

[99] Penal Code section 1170.03(a)(3).

[100] Penal Code section 1170.03(a)(4).

[101] Penal Code section 1170.03(a)(5).

[102] Exhibit D, Claimant's Comments on the Draft Proposed Decision, filed December 20, 2023, page 3.

[103] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 634-635.

[104] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 627 (". . . the County of San Diego filed a test claim with the Commission on State

the County sought reimbursement for the procedures established that guaranteed the defendant a chance to have the previous penalty for a crime or infraction set aside and changed. The County of San Diego argued that Government Code section 17556(g) did not apply because the *Franklin* activities were merely procedural or administrative, rather than changes to the punishment for a crime.[105] The court disagreed and held that parole is part of the penalty for a crime, and in light of the effect that the test claim statute had on the penalties as a whole, the court explained that "By guaranteeing parole eligibility for all qualified youth offenders, the Test Claim Statutes altered the substantive punishments, i.e., the penalties, for the offenses perpetrated by those offenders."[106]

The same is true here. As indicated above, defendants receiving a resentencing recommendation are guaranteed the chance to have their original criminal sentences recalled or vacated and to be resentenced with a new penalty for the underlying crime as a direct result of the test claim statute. In many cases, the new penalty results in a reduced sentence. The court may reduce a defendant's term of imprisonment by modifying the sentence, vacating the conviction and imposing judgment on lesser included offenses, and may consider other factors to reduce the sentence originally ordered.[107] Therefore, the test claim statute changes the penalty for a crime within the meaning of Government Code section 17556(g).

The claimant also argues that the "burden has not been met" showing that the activities required by the test claim statute "changed the penalty as it relates directly to the enforcement of the crime" since the test claim statute requires the claimant to perform "non-enforcement related activities" to prepare for resentencing hearings and act as appointed counsel.[108] As indicated above, Government Code section 17556(g) requires the Commission to not find costs mandated by the state when the statute "changed the penalty for a crime or infraction, *but only for that portion of the statute relating directly to the enforcement of the crime or infraction*." The claimant's argument is similar to one made in *County of San Diego (YOPH),* which was rejected by the court. In that case, the County of San Diego argued that one of the test claim statutes did not relate directly to the enforcement of the crime since the statute simply dictated the evidence and information the Board of Parole Hearings had to assess when determining a candidate's

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Mandates seeking reimbursement from the State for costs the County incurs to prepare for, and attend, criminal proceedings known as *Franklin* proceedings.").

[105] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 642.

[106] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 642.

[107] Penal Code section 1170.03(a)(3); see also Penal Code section 1179.03(a)(4) and (a)(5).

[108] Exhibit D, Claimant's Comments on the Draft Proposed Decision, filed December 20, 2023, pages 2-3.

parole suitability.[109] The court disagreed and found that an activity directedly related to enforcing a crime or infraction if "it plays an indispensable role" in the Legislature's scheme that changes the penalty for a crime.[110]

> Because it dictates the evidence and information the Board may, or must, assess when determining a candidate's parole suitability, it plays an indispensable role in the youth offender parole hearing scheme. Indeed, in practice, it very well may be determinative as to whether a given youth offender will be released on parole. Further, there can be no dispute that parole flows directly from the parolee's underlying crime. (Citations omitted.) Because Penal Code section 3051, subdivision (f), plays a pivotal role in the Board's parole determination, and parole is a direct consequence of a criminal conviction, we conclude section 3051, subdivision (f)—like the other statutory components that make up the Test Claim Statutes—directly relates to the enforcement of the crimes perpetrated by eligible youth offenders.

Similarly, the procedures and hearing process to recall and resentence a defendant as required by the test claim statute play an indispensable role in the change of the penalty for a crime. Prompted in part by the Legislature's desire to reduce the prison population, this test claim statute changes the penalty for a crime by guaranteeing defendants who qualify for resentencing under Penal Code section 1170.03 or its predecessor section 1170(d)(1) through a resentencing recommendation are appointed counsel and go through a statutory hearing procedure with a strong presumption in favor of resentencing, which in many cases results in a reduced sentence.[111] The Legislature's intent in making this change was to ensure that judges "recognize the scrutiny that has already been brought to these referrals by the referring entity, and to ensure that each referral be granted the court's consideration by setting an initial status conference, recalling the sentence, and providing the opportunity for resentencing for every felony conviction referred by one of these entities."[112] Thus, the hearing procedure to recall and resentence a defendant and the claimed activities to participate in the hearing process play an indispensable role in the Legislature's scheme that changes the penalty for a crime. Accordingly, there are no costs mandated by the state pursuant to Government Code section 17556(g).

Finally, the claimant requests that in the event the Commission finds an exception to the subvention requirement applies, that "the Commission exercise its discretion to

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[109] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 643.

[110] *County of San Diego v. Commission on State Mandates* (2023) 91 Cal.App.5th 625, 643.

[111] Exhibit E (1), Assembly Committee on Public Safety, Analysis on AB 1540 as amended April 22, 2021, page 4; Penal Code section 1170.03(a)(3-5), (b)(2) (Stats. 2021, ch. 719).

[112] Statutes 2021, chapter 719, section 1(a) (AB 1540).

reimburse the Claimant for the substantial costs incurred to Claimant by the enactment AB 1540."[113] The Commission, however, has no authority to exercise discretion when determining whether a test claim statute imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution. That determination is a question of law.[114] Article XIII B, section 6, must be strictly construed and not applied as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[115]

## V. Conclusion

Based on the foregoing analysis, the Commission denies this Test Claim.

[113] Exhibit D, Claimant's Comments on the Draft Proposed Decision, filed December 20, 2023, page 3.

[114] *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 206; *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 64, 71, fn. 15; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

[115] *County of Sonoma v. Commission on State Mandate*s (2000) 84 Cal.App.4th 1264, 1281*; City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816; *Redevelopment Agency of the City of San Marcos v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 985.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

| | |
|---|---|
| IN RE TEST CLAIM<br>Education Code Sections 17660, 17661<br>Statutes 2022, Chapter 777, Sections 1 and 2 (AB 2232), Effective<br>January 1, 2023<br>Filed on November 17, 2023<br>Hesperia Unified School District, Claimant | Case No.: 23-TC-01<br>*Heating, Ventilation, and Air Conditioning (HVAC) Program*<br>DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7.<br>(*Adopted November 22, 2024*)<br>(*Served November 22, 2024*) |

**TEST CLAIM**

The Commission on State Mandates adopted the attached Decision on November 22, 2024.

Juliana F. Gmur, Executive Director

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

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|---|---|
| IN RE TEST CLAIM<br>Education Code Sections 17660, 17661<br>Statutes 2022, Chapter 777, Sections 1 and 2 (AB 2232), Effective January 1, 2023<br>Filed on November 17, 2023<br>Hesperia Unified School District, Claimant | Case No.: 23-TC-01<br>*Heating, Ventilation, and Air Conditioning (HVAC) Program*<br>DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7.<br>(*Adopted November 22, 2024*)<br>(*Served November 22, 2024*) |

## DECISION

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on November 22, 2024. Arthur Palkowitz and Dr. George Landon appeared on behalf of the claimant. Alex Anaya and Jessica Deitchman appeared on behalf of the Department of Finance.

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 the Proposed Decision to deny the Test Claim by a vote of 5-0, as follows:

| **Member** | **Vote** |
|---|---|
| Lee Adams, County Supervisor | Yes |
| Shannon Clark, Representative of the Director of the Governor's Office of Land Use and Climate Innovation | Yes |
| Deborah Gallegos, Representative of the State Controller | Yes |
| Karen Greene Ross, Public Member | Yes |
| Renee Nash, School District Board Member | Absent |
| William Pahland, Representative of the State Treasurer, Vice Chairperson | Yes |
| Michelle Perrault, Representative of the Director of the Department of Finance, Chairperson | Absent |

## Summary of the Findings

The test claim statute, effective January 1, 2023, seeks to further the declared "policy of the state that school facilities provide healthy indoor air quality, including adequate ventilation, to students, teachers, and other occupants in order to protect occupant health, reduce sick days, and improved student productivity and performance."[1] To do this, the test claim statute adds section 17661(b) to the Education Code to require 'covered schools' (defined to include school districts and county offices of education) to:[2]

> [E]nsure that facilities, including but not limited to, classrooms for students, have HVAC [defined as heating, ventilation, and air conditioning] systems that meet the minimum ventilation rate requirements set forth in Table 120.1-A of Part 6 (commencing with Section 100.0) of Title 24 of the California Code of Regulations, unless the existing HVAC system is not capable of safely and efficiently providing the minimum ventilation rate.[3]

Part 6 of the title 24 regulations refers to the Energy Code adopted by the California Energy Commission.[4] Part 6 contains energy conservation standards applicable to nonresidential government buildings throughout California with HVAC systems, including schools and community colleges.[5] Table 120.1-A of the Energy Code governs the "Minimum Ventilation Rates" for HVAC systems in various types of classrooms and science labs and art rooms. Table 120.1-A identifies standards for the total outdoor air rate, the minimum ventilation rates for systems with DCV (demand control ventilation) devices, and the air class, which is a measure of air quality.[6]

If a school's existing HVAC system is incapable of meeting the minimum ventilation rate standard in Table 120.1-A of the Energy Code, then the school district is required to:

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[1] Education Code section 17660 (Stats 2022, ch. 777).

[2] Statutory references are to the Education Code unless otherwise indicated.

[3] Education Code section 17661(b)(1) (Stats 2022, ch. 777). The incorporation by reference of a table in "Part 6 (commencing with Section 100.0) of Title 24 of the California Code of Regulations" refers to California's Building Standards Code. Part 2 of title 24 is known as the "Building Code."

[4] Health and Safety Code section 18942(a).

[5] California Code of Regulations, title 24, part 6, section 100(a). Exhibit F (12), Department of General Services, Division of the State Architect, Overview Title 24 Building Standards Code as Adopted by the Division of the State Architect, https://www.dgs.ca.gov/DSA/Resources/Page-Content/Resources-List-Folder/Overview-Title-24-Building-Standards-Code#:~:text=PART%206%20%2D%20CALIFORNIA%20ENERGY%20CODE,including%20schools%20and%20community%20colleges (accessed September 25, 2024), page 2. Public Resources Code section 25488.

[6] California Code of Regulations, title 24, part 6, Table 120.1-A.

> [E]nsure that its HVAC system meets the minimum ventilation rates in effect at the time the building permit for installation of that HVAC system was issued . . . [and;];
>
> [D]ocument the HVAC system's inability to meet the current ventilation standards set forth in paragraph (1) [i.e., in the current version of Table 120.1-A of Part 6 of Title 24] in the annual HVAC inspection report required by Section 5142 of Title 8 of the California Code of Regulations, which shall be available to the public upon request.[7]

A covered school is also required to:

> [I]nstall filtration that achieves MERV levels of 13 or higher to the extent determined to be feasible and appropriate for the existing HVAC system, as determined by the school.
>
> If . . . it is determined that the existing HVAC system is not designed to achieve MERV levels of 13 or higher, a covered school shall install filtration that achieves the highest MERV level that the school determines is feasible without significantly reducing the lifespan or performance of the existing HVAC system.[8]

The test claim was timely filed on November 17, 2023.[9] This filing date establishes reimbursement eligibility for the 2022-2023 fiscal year,[10] but because the test claim statute became effective on January 1, 2023, the potential period of reimbursement begins January 1, 2023.

The Commission finds sections 17660 (the Legislature's findings and declarations) and 17661(a), (d), and (e), as well as uncodified section 1 of the test claim statute, impose no requirements on school districts so they do not constitute a state-mandated program.

The Commission further finds section 17661(b) does not impose a reimbursable state-mandated program because:

- The requirement in section 17661(b)(2), requiring a school to inspect to "[e]nsure that its HVAC system meets the minimum ventilation rates *in effect at the time the building permit for installation of that HVAC system was issued*" is *not* new and does not impose a new program or higher level of service. Since 1987, section 5142(b) of the title 8 regulations has required employers, including school

[7] Education Code section 17661(b)(2) (Stats 2022, ch. 777).

[8] Education Code section 17661(c) (Stats 2022, ch. 777). MERV is the minimum efficiency reporting value as determined by ASHRAE [American Society of Heating, Refrigerating, and Air Conditioning Engineers] Standard 52.2 Method of Testing General Ventilation Air-Cleaning Devices for Removal Efficiency by Particle Size. (Cal. Code Regs., tit. 23, pt. 6, § 100.1(b).)

[9] Exhibit A, Test Claim, filed November 17, 2023, page 1.

[10] Government Code section 17557(e) requires a test claim be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year.

districts, to conduct annual workplace HVAC inspections to ensure compliance with the minimum ventilation rate requirements in effect when the installation permit was issued, with inspections and maintenance documented in writing.[11]

- The requirements in section 17661(b)(1) and (b)(2), to inspect HVAC systems to ensure compliance with the *current* minimum ventilation rates in Table 120.1-A of the Energy Code, as amended in 2022, and to document the system's inability to meet the *current* ventilation standards in the annual inspection report required by section 5142 of the title 8 regulations, are *not* new and do not impose a new program or higher level of service for school districts that received a permit for HVAC installation under the 2019 or 2022 Energy Codes (for HVAC systems approved on or after January 1, 2020).

  Under existing law, schools were already required to conduct annual inspections to ensure the HVAC systems provide "at least the quantity of outdoor air required by . . . Title 24, . . . in effect at the time the building permit was issued" and to document that inspection in writing.[12] Since Table 120.1-A in the 2019 and 2022 Energy Codes are the same, the requirements in the test claim statute to perform the same activities are not new.[13]

- The requirements in section 17661(b)(1) and (2) to ensure compliance with *current* minimum ventilation rates in Table 120.1-A of the Energy Code, as amended in 2022, and to document the HVAC system's inability to meet the *current* ventilation standards in the annual HVAC inspection report required by section 5142 of the title 8 regulations is new for schools that received a permit for an HVAC installation under the 2016 or earlier Energy Code (i.e., *before* January 1, 2020).[14] However, the claimant has not requested reimbursement to comply with section 17661(b)(1) and (2) and there is no evidence in the record

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[11] California Code of Regulations, title 8, section 5142 (Register 87, No. 2). Section 5142 is a general industrial safety order (see Cal. Code Regs., tit. 8, § 3200 et. seq.). GISOs apply to ". . . all employments and places of employment in California as defined by Labor Code Section 6303. . . " See also, the Leroy F. Greene School Facilities Act of 1998 and the State School Building Lease Purchase Law of 1976, which require school construction project plans for "major maintenance, repair and replacement," to keep school facilities in "good repair," including heating and cooling systems. (Ed. Code §§ 17002(d)(1)(B), 17014(c), 17075(a), 17070.77(a)-(b); Exhibit F (9), Office of Public School Construction, Facility Inspection Tool, revised April 2022, https://www.dgs.ca.gov/-/media/Divisions/OPSC/Forms/Facility-Inspection-Tool---SAB-Approved-04-27-2022.pdf (accessed on May 1, 2024).

[12] California Code of Regulations, title 8, section 5142. Emphasis added.

[13] California Code of Regulations, title 24, part 6, section 120.1(h), Table 120.1-A. In the 2019 code, Table 120.1-A is at section 120.1(g).

[14] Exhibit F (4), California Energy Commission, 2016 Nonresidential Compliance Manual, Chapter 4, page 4-45; Exhibit F (8), International Code Council, *Significant Changes to the California Energy Code*, 2019 Edition, May 2021, page 101.

school districts incurred any costs mandated by the state to comply with these requirements.[15]

The Commission further finds reimbursement is not required to comply with section 17661(c), which requires school districts to install MERV 13 or the highest filtration the school determines is feasible without significantly reducing the lifespan or performance of the existing HVAC system. The 2016 Energy Code did not require filters rated at MERV 13 or higher.[16] The 2019 amendment to the Energy Code (eff. Jan. 1, 2020) set the minimum requirement to MERV 13.[17] However, reimbursement under article XIII B, section 6 is not required because:

- The MERV 13 requirement is *not* new to the extent a school received a permit to install a new HVAC system under the 2019 or 2022 Energy Code (i.e., on or after Jan. 1, 2020) because those Codes already required the HVAC system to have MERV 13 or higher filters.[18] Prior law also required filters be replaced or cleaned regularly.[19]
- In addition, the MERV 13 requirement is *not* new if there was a COVID-19 outbreak in the school. When the test claim statute became effective on January 1, 2023, MERV 13 filters were required for schools that had a COVID-19 outbreak (meaning three or more *employee* COVID-19 cases within an exposed group, as defined, who visited the worksite during their infectious period any time during a 14-day period).[20] Under these circumstances, existing regulations required the school to comply with the same filtration requirement as the test claim statute.[21]
- Therefore, the MERV 13 requirement in section 17661(c) is new only for schools with HVAC systems approved for installation *before* January 1, 2020 (under the 2016 or earlier Energy Code), and only to the extent these schools did *not* have a

[15] Government Code section 17514; California Code of Regulations, title 2, section 1183.1(e).

[16] Exhibit X (3), California Energy Commission, 2016 Building Energy Efficiency Standards for Residential and Nonresidential Buildings, page 241.

[17] Exhibit F (8), International Code Council, *Significant Changes to the California Energy Code*, 2019 Edition, May 2021, pages 91-92.

[18] California Code of Regulations, title 24, part 6, section 120.1(c)(1)(B). The citation is the same under both the 2019 and 2022 Energy Codes.

[19] California Code of Regulations, title 8, section 5143(d)(3) (Register 2003, No. 24).

[20] California Code of Regulations, title 8, section 3205.1(a)(1) (Register 2022, No. 18, eff. May 5, 2022).

[21] California Code of Regulations, title 8, section 3205.1(f) (Register 2022, No. 18, eff. May 5, 2022).

COVID-19 outbreak as defined in the title 8 regulations.[22] Although the claimant alleges the test claim statute requires school districts to replace the MERV 13 filters more often than every three months,[23] section 17661(c) imposes a ***one-time*** requirement to purchase and install the required filters since prior law already required employers, including school districts, to regularly replace or clean filters, regardless of the efficiency level.[24] On-going filter purchase and installation is not new.[25]

However, there is no evidence of increased costs mandated by the state to comply with the newly-mandated activity, as required by law.[26] The Test Claim does not acknowledge any prior requirements to install MERV 13 filters when a new HVAC system is approved for installation under the 2019 or 2022 Energy Code or when a COVID outbreak occurs, or the existing requirement to regularly replace or clean these filters. Instead, the Test Claim alleges costs, supported by a declaration from the claimant's Deputy Superintendent of Business Services, to install MERV 13 filters in *all* of its schools' HVAC systems since January 1, 2023.[27]

The Declaration submitted with the Test Claim also identifies revenues received under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) that provides funding to Local Education Agencies through the Elementary and Secondary School Emergency Relief (ESSER) Fund to address the impact of COVID-19 on elementary and secondary schools. The claimant used these funds to *replace* HVAC systems, beginning in June 2021, and to purchase MERV 13 filters.[28] This evidence shows the claimant has schools *not* subject to the

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[22] California Code of Regulations, title 8, section 3205.1(f) (Register 2022, No. 18, eff. May 5, 2022).

[23] Exhibit A, Test Claim, filed November 17, 2023, page 13.

[24] California Code of Regulations, title 8, section 5143 (as last amended by Register 2003, No. 24).

[25] Even if purchasing and installing MERV 13 filters is more costly, as asserted by the claimant, increased costs alone do not establish the right to reimbursement under article XIII B, section 6 of the California Constitution. (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 54; *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 735; *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877.)

[26] Government Code section 17514; California Code of Regulations, title 2, section 1183.1(e).

[27] Exhibit A, Test Claim, filed November 17, 2023, pages 13, 14, 18-19 (Landon Declaration); Exhibit C, Claimant's Rebuttal Comments, filed March 14, 2024, pages 2, 5 (Landon Declaration); Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed September 23, 2024, pages 7-8 (Landon Declaration).

[28] Exhibit A, Test Claim, filed November 17, 2023, page 20 (Landon Declaration).

newly-mandated requirement since any new HVAC installation approved beginning in June 2021 would have been approved under the 2019 and 2022 Energy Codes. As indicated above, the MERV 13 requirement in section 17661(c) is *not* new and does not mandate a new program or higher level of service to the extent a school received a permit to install a new HVAC system after January 1, 2020 (under the 2019 or 2022 Energy Code) because those Codes already required the HVAC system to have MERV 13 or higher filters.[29]

There is *no* evidence in the record of any increased costs mandated by the state to perform the one-time activity to install MERV 13 or higher filtration or install filtration that achieves the highest feasible MERV level without significantly reducing the lifespan or performance of the existing HVAC system, in schools with HVAC systems approved for installation *before* January 1, 2020 (under the 2016 or earlier Energy Code), and only to the extent these schools did *not* have a COVID-19 outbreak as defined in section 3205.1 of the title 8 regulations.[30] The Commission cannot make a finding of costs mandated by the state without evidence in the record.[31]

Accordingly, the Commission finds the test claim statute does not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 and denies this Test Claim.

## COMMISSION FINDINGS

### I. Chronology

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|---|---|
| 09/29/2022 | Statutes 2022, chapter 777 was enacted. |
| 11/17/2023 | The claimant filed the Test Claim.[32] |
| 02/15/2024 | The Department of Finance (Finance) filed comments on the Test Claim.[33] |
| 03/14/2024 | The claimant filed rebuttal comments.[34] |
| 09/03/2024 | Commission staff issued the Draft Proposed Decision.[35] |

[29] California Code of Regulations, title 24, part 6, section 120.1(c)(1)(B). The citation is the same under both the 2019 and 2022 Energy Codes.

[30] California Code of Regulations, title 8, section 3205.1.

[31] Government Code section 17514; California Code of Regulations, title 2, section 1183.1(e).

[32] Exhibit A, Test Claim, filed November 17, 2023.

[33] Exhibit B, Finance Comments, filed February 15, 2024.

[34] Exhibit C, Claimant's Rebuttal Comments, filed March 14, 2024.

[35] Exhibit D, Draft Proposed Decision, issued September 3, 2024.

09/23/2024 The claimant filed comments on the Draft Proposed Decision.[36]

## II. Background

### A. The Test Claim Statute (Stats. 2022, ch. 777)

The test claim statute, effective January 1, 2023, seeks to further the declared "policy of the state that school facilities provide healthy indoor air quality, including adequate ventilation, to students, teachers, and other occupants in order to protect occupant health, reduce sick days, and improved student productivity and performance."[37]

In doing so, the test claim statute adds section 17661(b) to the Education Code to require 'covered schools' (defined as "a school district, a county office of education, a charter school, a private school, the California Community Colleges, or the California State University")[38] to:

> [E]nsure that facilities, including but not limited to, classrooms for students, have HVAC systems that meet the minimum ventilation rate requirements set forth in Table 120.1-A of Part 6 (commencing with Section 100.0) of Title 24 of the California Code of Regulations, unless the existing HVAC system is not capable of safely and efficiently providing the minimum ventilation rate.[39]

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[36] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed September 23, 2024.

[37] Education Code section 17660 (Stats 2022, ch. 777).

[38] Under Government Code section 17514, "school districts" are eligible to seek reimbursement for state-mandated new programs or higher levels of service within the meaning of article XIII B, section 6 of the California Constitution. Government Code section 17519 defines "school district," as "any school district. . . , or county superintendent of schools." The county superintendent of schools is the executive officer of the county office of education. (Ed. Code, § 1010.) County offices of education provide alternative educational programs for pupils attending county community schools who have been expelled from school, referred as a condition of probation, or who are homeless. (Ed. Code, § 1981, 1984, 48852.7, 48859.) Thus, this Decision applies to K-12 school districts and county offices of education, referred to as "school districts."

The definition of "covered schools" in section 17661(a)(1) also includes the California Community Colleges. A test claim has not been filed by a community college district. Therefore, the Commission makes no findings with respect to community college districts.

[39] Education Code section 17661(b)(1) (Stats 2022, ch. 777). The incorporation by reference of a table in "Part 6 (commencing with Section 100.0) of Title 24 of the California Code of Regulations" refers to California's Building Standards Code. Part 2 of title 24 is known as the "Building Code."

If a school's existing HVAC system is incapable of meeting the minimum ventilation rate standard in Table 120.1-A of part 6 (commencing with section 100.0) of title 24 of the California Code of Regulations, then the district is required to:

> [E]nsure its HVAC system meets the minimum ventilation rates in effect at the time the building permit for installation of that HVAC system was issued . . . [and;]
>
> [D]ocument the HVAC system's inability to meet the current ventilation standards set forth in paragraph (1) (i.e., in the current version of Table 120.1-A of Part 6 of Title 24) in the annual HVAC inspection report required by Section 5142 of Title 8 of the California Code of Regulations, which shall be available to the public upon request.[40]

A covered school is also required by section 17661(c) to:

- [I]nstall filtration that achieves MERV levels of 13 or higher to the extent determined to be feasible and appropriate for the existing HVAC system, as determined by the school
- If . . . it is determined that the existing HVAC system is not designed to achieve MERV levels of 13 or higher, a covered school shall install filtration that achieves the highest MERV level that the school determines is feasible without significantly reducing the lifespan or performance of the existing HVAC system.[41]

Finally, the test claim statute requires the California Building Standards Commission and the Division of the State Architect to research, develop, and propose for adoption mandatory standards for carbon dioxide monitors in classrooms of a covered school and the University of California on the next triennial update of the California Building Standards Code (title 24 of the California Code of Regulations).[42]

The test claim statute was enacted because "despite "laws requiring schools to maintain functional HVAC systems to supply adequate ventilation and safe indoor air quality, poor indoor air quality remains an extensive problem."[43] As described in the statute's legislative findings and declarations below, studies and reports indicate the minimum ventilation rates in classrooms were not being met:

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[40] Education Code section 17661(b)(2) (Stats 2022, ch. 777).

[41] Education Code section 17661(c) (Stats 2022, ch. 777). MERV is the minimum efficiency reporting value as determined by ASHRAE [American Society of Heating, Refrigerating, and Air Conditioning Engineers] Standard 52.2 Method of Testing General Ventilation Air-Cleaning Devices for Removal Efficiency by Particle Size. (Cal. Code Regs., tit. 23, pt. 6, § 100.1(b)).

[42] Education Code section 17661(d) (Stats 2022, ch. 777).

[43] Exhibit F (11), Senate Rules Committee, Office of Senate Floor Analyses, Third Reading Analysis of AB 2232, as amended June 28, 2022, page 3.

(b) In November 2003, the State Air Resources Board and the State Department of Health Care Services issued a report to the Legislature detailing the adverse impact that poor indoor air quality is having on California schools. The report found significant indoor air quality problems, including problems with ventilation, temperature, humidity, air pollutants, floor dust contaminants, moisture, mold, noise, and lighting. The report found that ventilation with outdoor air was inadequate during 40 percent of classroom hours and seriously deficient during 10 percent of classroom hours in both portable classrooms and traditional classrooms.

(c) In February 2005, the State Air Resources Board approved an indoor air quality report that cites proven health and economic benefits to reducing indoor air pollution, which is estimated to cost California $45 billion per year. The report noted that children are particularly vulnerable to poor indoor air quality. According to the report, children under 12 years of age spend about 86 percent of their time indoors with 21 percent of the time being spent in schools.

(d) A 2019 report by the University of California, Davis, Western Cooling Efficiency Center and the Indoor Environment Group of the Lawrence Berkeley National Laboratory identifies numerous studies finding that underventilation of classrooms is common and negatively impacts student health and learning. Improved heating, ventilation, and air conditioning (HVAC) system performance improves student and teacher health and attendance, student productivity, and the performance of mental tasks, such as better concentration and recall. The report found that students in classrooms with higher ventilation rates have a significantly higher percentage of students—13 to 14 percent—scoring satisfactorily on mathematics and reading tests than students in classrooms with lower outdoor air ventilation rates.

(e) A 2018 report in the Environment International Journal found that short-term carbon dioxide exposure beginning at 1,000 parts per million (ppm) negatively affects cognitive performances, including decisionmaking and problem resolution. The Wisconsin Department of Health Services states that carbon dioxide levels between 1,000 and 2,000 ppm are associated with drowsiness and attention issues. Carbon dioxide levels above 2,000 ppm affect concentration and cause headaches, increased heart rate, and nausea.

(f) The California Building Energy Efficiency Standards set minimum ventilation rates for classrooms. Sections 17002 and 17070.75 of the Education Code require school districts to ensure schools are maintained in good repair, including HVAC systems that are functional, supply adequate ventilation to classrooms, and maintain interior temperatures within acceptable ranges. Regulations adopted pursuant to Section 142.3 of the Labor Code require that HVAC systems be

maintained and operated to provide at least the quantity of outdoor air required by the California Building Standards Code (Title 24 of the California Code of Regulations) in effect at the time the building permit was issued. Despite these requirements, poorly performing HVAC systems and underventilation of classrooms continue to be a significant problem in California.

(g) The 2019 report by the University of California, Davis, Western Cooling Efficiency Center and the Indoor Environment Group of the Lawrence Berkeley National Laboratory found that over one-half of new HVAC systems in schools had significant problems within three years of installation and that the vast majority of classrooms in California, including 95 percent of the classrooms studied in the central valley, continue to fail to meet minimum ventilation rates. Some classrooms were found to have carbon dioxide concentrations above 2,000 ppm for substantial periods of the day. The study recommended periodic testing of HVAC systems and continuous real-time carbon dioxide monitoring to detect and correct these problems.

(h) Monitoring levels of carbon dioxide in classrooms will help ensure that California students' school environment is healthy and conducive to learning and performing well on tests.

(i) A March 2021 study found that proper ventilation in classrooms could reduce COVID-19 infection risk by over 80 percent compared to classrooms without ventilation.

(j) The Centers for Disease Control and Prevention and the American Society of Heating, Refrigerating and Air-Conditioning Engineers recommend that schools, buildings, and homes combine filters and air cleaners to achieve minimum efficiency reporting values (MERV) levels of performance for air cleaning of 13 or higher.[44]

The legislative history indicates compliance with the test claim statute would result in "unknown potentially significant costs for school districts . . . to inspect and ensure that their HVAC systems meet the minimum ventilation rate requirements" and "it is unclear how many school . . . districts statewide need to install new filtration as a result of the inspections."[45]

[44] Statutes 2022, chapter 777, section 1 (AB 2232). Exhibit A, Test Claim, filed November 17, 2023, pages 99-100.

[45] Exhibit F (10), Senate Appropriations Committee, Analysis of AB 2232, as amended June 28, 2022, page 1.

### B. Existing Law Requires School District HVAC Systems to Be Maintained and Operated to Provide at Least the Quantity of Outdoor Air Required by Title 24 in Effect When the HVAC Installation Permit Was Issued.

Existing law provides "On or after January 1, 1979, no governmental agency shall commence construction on any new structure unless the new structure complies with Title 24 Standards."[46] The test claim statute incorporates by reference a table in "Part 6 (commencing with Section 100.0) of Title 24 of the California Code of Regulations."[47] Part 6 of the title 24 regulations refers to the Energy Code adopted by the California Energy Commission which, like all parts of the building regulations in title 24, is revised and published every three years.[48] Part 6 contains energy conservation standards applicable to all residential and nonresidential buildings throughout California, including schools and community colleges.[49] All of the indoor air quality regulations in part 6 apply to new construction, alterations, and repairs of existing buildings.[50] The Code also contains an enforcement provision requiring a building inspection agency "shall not issue a building permit for any construction unless the enforcement agency determines in writing that the construction is designed to comply with the requirements of Part 6 that are in effect on the date the building permit was applied for."[51]

Table 120.1-A of part 6, (commencing with section 100.0) of the title 24 regulations establishes minimum HVAC system ventilation rates for nonresidential buildings, including schools.[52] For public schools, the State's Division of State Architect in the

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[46] Public Resources Code section 25493; Education Code section 17280(a).

[47] Education Code section 17661(b)(1) (Stats 2022, ch. 777). The reference is to table 120.1-A of part 6, commencing with section 100.0) of the title 24 regulations, which establishes minimum outside air ventilation rates for HVAC systems and filtering requirements for nonresidential buildings, including schools.

[48] Health and Safety Code section 18942(a).

[49] California Code of Regulations, title 24, Part 6, section 100(a). See also Exhibit F (12), Department of General Services, Division of the State Architect, Overview Title 24 Building Standards as Adopted by the Division of the State Architect, https://www.dgs.ca.gov/DSA/Resources/Page-Content/Resources-List-Folder/Overview-Title-24-Building-Standards-Code#:~:text=PART%206%20%2D%20CALIFORNIA%20ENERGY%20CODE,including%20schools%20and%20community%20colleges (accessed September 25, 2024), page 2; Public Resources Code section 25488.

[50] California Code of Regulations, title 24, Part 6, sections 120, 141.

[51] California Code of Regulations, title 24, Part 1, section 10-103(d)(1).

[52] California Code of Regulations, title 24, part 6, section 100(a). Public Resources Code section 25488; Exhibit F (12), Department of General Services, Division of the State Architect, Overview Title 24 Building Standards Code as Adopted by the Division of the State Architect, https://www.dgs.ca.gov/DSA/Resources/Page-Content/Resources-List-Folder/Overview-Title-24-Building-Standards-

Department of General Services is the enforcement agency supervising the design and construction of school buildings to ensure compliance with title 24, including inspections during installation.[53]

The test claim statute also references "regulations adopted pursuant to Section 142.3 of the Labor Code."[54] These are Cal/OSHA regulations in title 8 of the California Code of Regulations that impose General Industry Safety Orders (GISOs) on employers, including school districts.[55] Since 1987, section 5142 of title 8 has required workplace HVAC systems to be maintained and operated to provide at least the quantity of outdoor air required by title 24 in effect when the building permit was issued, and requires the HVAC systems be inspected at least annually and any problems found be corrected within a reasonable time.[56] The employer is required to document in writing the name of the individual inspecting or maintaining the system, the date of the inspection or maintenance or both, and the specific findings and actions taken. The records shall be retained for at least five years and made available for examination and copying within 48 hours of a request to the Division of Occupational Safety and Health, any employee of the employer, and to any designated representative of employees.[57]

And as more fully explained below, as a condition of receiving funds for new construction or modernization projects under the Leroy F. Greene School Facilities Act of 1998 and the State School Building Lease Purchase Law of 1976, schools are required to keep facilities in good repair, including HVAC systems that are functional and unobstructed, supply adequate ventilation to classrooms, and maintain interior temperatures within acceptable ranges.[58]

Finally, during the COVID-19 pandemic, the Legislature enacted the School Energy Efficiency Stimulus Program,[59] which includes the School Reopening Ventilation and

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Code#:~:text=PART%206%20%2D%20CALIFORNIA%20ENERGY%20CODE,including%20schools%20and%20community%20colleges (accessed September 25, 2024), page 2.

[53] Education Code section 17280(a) references the Department of General Services that is over the Division of State Architect. *Hall v. City of Taft* (1956) 47 Cal.2d, 177. Regarding inspections, see Education Code sections 17311(a), 17280; See also California Code of Regulations, title 21, section 2.

[54] Statutes 2022, chapter 777, section 1(f).

[55] Public schools are "employers" for purposes of the Labor Code (Lab. Code, §§ 6304, 3300). Labor Code section 142.3 authorizes adoption of "safety and health standards" published in title 8 (see Labor Code, § 142.3(a)(1), (a)(4)(D)).

[56] California Code of Regulations, title 8, section 5142(a)(1), (b).

[57] California Code of Regulations, title 8, section 5142(b).

[58] Education Code sections 17002, 17070.75.

[59] Public Utilities Code section 1600 et seq. (AB 841, Stats. 2020, ch. 372).

Energy Efficiency Verification and Repair Program (SRVEVR).[60] This Energy Commission grant program uses ratepayer-funded energy efficiency incentives to fund HVAC upgrades for school districts.[61] School districts that receive grants must, among other requirements, install filtration of MERV 13 or higher where feasible, and have qualified testing personnel review system capacity and airflow to determine the highest MERV filtration that can be installed without adversely impacting the equipment, replace or upgrade filters where needed, and verify that those filters are installed correctly.[62] Also, qualified testing personnel must verify the ventilation rates in the classrooms, auditoriums, gymnasiums, nurses offices, restrooms, and other occupied areas to assess whether they meet the minimum ventilation rate requirements in Table 120.1-A of the Energy Code in accordance with specific assessment criteria.[63] If the HVAC system does not meet the minimum ventilation rates in Table 120.1-A, a licensed professional or qualified adjusting personnel shall review the system airflow and capacity to determine if additional ventilation can be provided without adversely impacting equipment performance and building indoor environmental quality. If additional ventilation can be provided, a qualified adjusting personnel shall adjust ventilation rates to meet the minimum ventilation rate requirements in Table 120.1-A to the extent feasible. If these minimum ventilation rates cannot be met, the deficiency shall be reported in the assessment report addressed by a licensed professional as required.[64] Upon completion of grant-funded work under the SRVEVR, the district must prepare an HVAC verification report.[65] The School Energy Efficiency Stimulus Program and SRVEVR Program are repealed as of January 1, 2027.[66]

In addition, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) provided funding to Local Education Agencies through the Elementary and Secondary School Emergency Relief (ESSER) Fund to address the impact of COVID-19 on elementary and secondary schools, which can be used for HVAC improvements.[67]

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[60] Public Utilities Code section 1620 et seq. SRVEVR is the acronym defined in the bill. See Public Utilities Code section 1601(b) (Stats. 2020, ch. 372).

[61] The statute uses “local educational agency” but defines it as school districts, charter schools granted charters pursuant to Part 26.8 of the Education Code, and regional occupation centers established under section 52301 of the Education Code. Public Utilities Code section 1601(a) (Stats. 2020, ch. 372).

[62] Public Utilities Code section 1623(a)(1) (Stats. 2020, ch. 372).

[63] Public Utilities Code section 1623(b)(1) (Stats. 2020, ch. 372).

[64] Public Utilities Code section 1623(b)(2) (Stats. 2020, ch. 372). The assessment report requirements are in section 1626.

[65] Public Utilities Code section 1627 (Stats. 2020, ch. 372).

[66] Public Utilities Code section 1640 (Stats. 2020, ch. 372).

[67] Public Law No. 116-136 (Mar. 27, 2020) 134 Stat. 281.

## III. Positions of the Parties

### A. Hesperia Unified School District

The claimant maintains the test claim statute imposes a reimbursable state mandate. According to the Test Claim:

> Claimant incurred new activities and costs to ensure that facilities have heating, ventilation, and air conditioning (HVAC) systems that meet specified minimum ventilation rate requirements, unless the existing HVAC system is not capable of safely and efficiently providing the minimum ventilation rate, in which to ensure that its HVAC system meets the minimum ventilation rates in effect at the time the building permit for installation of that HVAC system was issued. Additionally, schools are required to install filtration that achieves specified minimum efficiency reporting values (MERV) levels, determined by the school to be feasible with the existing HVAC system, as provided. The new activities and costs incurred by the Claimant includes the purchasing and installation of new filters . . ..[68]

The claimant alleges the test claim statute requires schools to provide a healthy indoor environment by requiring their HVAC systems meet "the minimum ventilation rate requirements" unless the system is incapable of safely and efficiently providing the minimum ventilation rate.[69] According to the claimant, "To achieve this requirement Claimant is required to perform the new activity to install filtration that achieves MERV levels of 13 or higher to the extent determined to be feasible and appropriate for the existing HVAC system, as determined by the school."[70] The claimant describes the process to replace its MERV 9 air filters with new MERV 13 air filters, which the claimant alleges are more difficult to store, have a shorter life span, require the indoor coil to be cleaned more frequently, and require more maintenance and higher labor costs than its former filters.[71]

The claimant argues the required activities are new and "the good repair, working order, and condition[al] requirements of the Leroy F. Greene School Facilities Act of 1998 and its predecessor program" do not include the test claim statute's requirement for public schools to install MERV 13 filtration or filtration the school determines to be feasible with the existing HVAC system.[72]

The claimant alleges its increased costs exceed the $1,000 minimum amount specified in Government Code section 17564(a). The claimant also states there is "no evidence

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[68] Exhibit A, Test Claim, filed November 17, 2023, pages 7, 18 (Landon Declaration).

[69] Exhibit A, Test Claim, filed November 17, 2023, pages 11-13.

[70] Exhibit A, Test Claim, filed November 17, 2023, page 13.

[71] Exhibit A, Test Claim, filed November 17, 2023, pages 13, 18-19 (Landon Declaration).

[72] Exhibit C, Claimant's Rebuttal Comments, filed March 14, 2024, page 3.

that additional on-going revenue has been appropriated" to fund the costs of the mandated activities, so Government Code section 17556(e) does not apply.[73]

In addition to listing the following labor and filter costs, the claimant alleges it hired two employees to replace and install the MERV 13 air filters every three months:[74]

| Year | Costs |
|---|---|
| January 1, 2023, to June 30, 2023 | $27,443.12 labor to install filters<br>$66,236.22, for MERV 13 filters.[75] |
| July 1, 2023, to June 30, 2024 | $81,669.06 estimated labor to install filters<br>$100,119.04 estimated for MERV 13 filters[76] |
| July 1, 2024, to June 30, 2025 | $120,624.56 estimated labor to install filters<br>$151,920.32 estimated for MERV 13 filters.[77] |

The claimant also estimates statewide costs of $10 million.[78]

In rebuttal comments, the claimant notes it provided documented evidence with the test claim supporting the labor hours needed to replace the MERV 13 filters.[79] Further, the claimant asserts it provided documentation showing it has 22 school sites with 830 rooftop HVAC units and 614 wall (portable) HVAC units and it submitted work orders (duty statements) for the employee positions to install and replace the MERV filters, and its Ventilation Maintenance Policy and Procedure and checklist for Indoor Air Quality.[80]

Regarding available funds, the claimant cites the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) that provides funding to Local Education Agencies through the Elementary and Secondary School Emergency Relief (ESSER) Fund to address the impact of COVID-19 on elementary and secondary schools. The claimant admits receiving ESSER II funds of $26,295,815 distributed from June 2021 to August 2023, to use towards the districtwide HVAC project to remove and replace HVAC systems at elementary, middle, and high schools.[81] Prior to January 1, 2023, ESSER funds were

[73] Exhibit A, Test Claim, filed November 17, 2023, page 9.

[74] Exhibit A, Test Claim, filed November 17, 2023, pages 14, 19 (Landon Declaration). In rebuttal comments, the claimant states it replaces its HVAC rooftop units every six months and portable wall units every three months. Exhibit C, Claimant's Rebuttal Comments, filed March 14, 2024, pages 2, 5 (Landon Declaration).

[75] Exhibit A, Test Claim, filed November 17, 2023, pages 14, 19 (Landon Declaration).

[76] Exhibit A, Test Claim, filed November 17, 2023, pages 14, 19 (Landon Declaration).

[77] Exhibit A, Test Claim, filed November 17, 2023, pages 15, 20 (Landon Declaration).

[78] Exhibit A, Test Claim, filed November 17, 2023, pages 15, 21 (Landon Declaration).

[79] Exhibit C, Claimant's Rebuttal Comments, filed March 14, 2024, page 2.

[80] Exhibit C, Claimant's Rebuttal Comments, filed March 14, 2024, page 3.

[81] Exhibit A, Test Claim, filed November 17, 2023, pages 15, 20 (Landon Declaration).

used to purchase MERV 13 filters for new HVAC systems.[82] The claimant states it also received ESSER III funds of $58,852,535, of which it allocated $13 million to the districtwide HVAC project to remove and replace HVAC systems at elementary, middle, and high schools, with the difference due to having other spending priorities for the remaining ESSER III funds.[83] The claimant says it has until September 30, 2024, to spend this allocation, and there will be no additional ESSER funds.[84] The claimant identifies no other state or federal funds, or offsetting fee authority, available for this program, and states its "General funds are the funding sources for the purchasing of the MERV 13 costs and labor from January 1, 2023, to June 30, 2023, and in Fiscal Years 2023-2024 and 2024-2025."[85]

The claimant also points out Finance submitted no evidence supporting its concerns with the costs identified in the Test Claim, and Finance failed to submit its representations of fact under oath or affirmation and signed under penalty of perjury, as required by the Commission's regulations.[86]

In comments on the Draft Proposed Decision, the claimant agrees that sections 17660, 17661(a),(d), and (e), and uncodified section 1 of the test claim statute do not impose a reimbursable mandate because they do not require school districts to perform activities.[87] But the claimant maintains that "it was not until AB 2232 [the test claim statute] that California schools were explicitly required to install MERV 13 or higher filters in their HVAC systems. AB 2232 set new ventilation standards and formalized the requirement for MERV 13 filters to be used."[88] The claimant also argues that the requirements in section 120.1 of the Energy Code (including Table 120.1-A) did not

[82] Exhibit A, Test Claim, filed November 17, 2023, pages 15, 20 (Landon Declaration).

[83] Exhibit A, Test Claim, filed November 17, 2023, pages 15, 20 (Landon Declaration).

[84] Exhibit A, Test Claim, filed November 17, 2023, pages 15-16, 20 (Landon Declaration).

[85] Exhibit A, Test Claim, filed November 17, 2023, pages 15-16, 20 (Landon Declaration).

[86] Exhibit C, Claimant's Rebuttal Comments, filed March 14, 2024, pages 3-4. Section 1183.1(e) of the Commission's regulations requires "[a]ll representations of fact shall be supported by documentary or testimonial evidence in accordance with section 1187.5 of the Commission's regulations." However, the determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law. *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

[87] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed September 23, 2024, page 2.

[88] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed September 23, 2024, page 2.

apply to schools before the test claim statute.[89] Regarding the title 8 occupational safety regulations, the claimant states:

> Title 8 of the California Code of Regulations generally deals with workplace safety, governed by Cal/OSHA (California Occupational Safety and Health Administration). Section 3205, along with its subsections like 3205.1 requirements due to the COVID-19 Outbreaks to install MERV 13 filters sunsets on February 3, 2025 [citation omitted]. Claimant will continue to be required to comply with the requirements of Education Code Section 17661(c).[90]

With its comments, and in light of the Draft Proposed Decision, the claimant files a "declaration supporting the initial (one-time) costs incurred by the claimant for the purchase and installation of the MERV 13 filters" from the claimant's Deputy Superintendent, Business Services.[91] The declaration repeats most of that person's declaration filed with the Test Claim, but specifically identifies the following one-time labor and material costs to install MERV 13 filters:

6. I have submitted documentation (HV AC 105-HV AC 106) stating the following: List of District Schools (22); Total Units (830); Total Roof Tops Replaced (815); Total Roof Tops Not Replaced (15); Total Wall Mounts (614); Total Wall Units Replaced (517); Total Roof Tops Not Replaced (97).
7. The Claimant first incurred increased one-time labor costs to replace and install the MERV 13 air filters on about January 1, 2023 in the amount of **$18,681.16.** (Assembly Bill No. 2232, Statutes 2022, Chapter 777, Section 2, Education Code Section 17661 ( c )(1) ).
8. The Claimant first incurred increased one-time costs on about January 1, 2023 for purchasing the MERV 13 air filters in the amount of **$16,559.06.** (Assembly Bill No. 2232, Statutes 2022, Chapter 777, Section 2, Education Code Section 1766l(c)(l)).
9. The Claimant's General funds are the funding sources for the initial purchasing of the MERV 13 air filter costs and the labor of replacing and installing the MERV 13 air filters.[92]

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[89] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed September 23, 2024, pages 3-4.

[90] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed September 23, 2024, page 4.

[91] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed September 23, 2024, page 2.

[92] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed September 23, 2024, pages 7-8 (Landon Declaration).

### B. Department of Finance

Finance states "to the extent that AB 2232 establishes new responsibilities, it appears that activities and claimed costs are overstated in the test claim."[93] Finance notes the test claim statute does not require schools to hire additional staff and the claimant must provide sufficient justification for those costs. And it is unclear if the additional staff would be responsible for duties unrelated to the test claim statute, especially when four established positions already cover HVAC maintenance.[94] Further, schools that opt to receive school construction funds under the Leroy F. Greene School Facilities Act or its predecessor are already required to keep facilities at all times in good repair. Finance states the claimant should provide the following information to justify the claimed costs:

- Documented evidence of the labor hours needed to replace the MERV 13 filter, which would be part of the annual HVAC inspection report required by Section 5142 of Title 8 of the California Code of Regulations.
- The total number of HVAC systems within its district.
- Duty Statements for the existing positions and the two additional positions that highlight any extra duties these positions are expected to perform, in addition to maintaining the MERV 13 filters.
- Documentation that the identified facilities are not already subject to the good repair, working order, and condition requirements of the Leroy F. Greene School Facilities Act of 1998 or its predecessor program, the State School Building Lease-Purchase Law of 1976.[95]

Additionally, Finance points out the claimant provided a receipt for multiple Ply Panels, which is not aligned with the requirements of AB 2232 and is not required by the plain language of the test claim statute nor is reasonably necessary to implement it, so reimbursement for these costs should be denied.[96]

## 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

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[93] Exhibit B, Finance's Comments on the Test Claim, filed February 15, 2024, page 1.

[94] Exhibit B, Finance's Comments on the Test Claim, filed February 15, 2024, page 2.

[95] Exhibit B, Finance's Comments on the Test Claim, filed February 15, 2024, page 2.

[96] Exhibit B, Finance's Comments on the Test Claim, filed February 15, 2024, pages 2-3.

equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[97] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[98]

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.[99]
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.[100]
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.[101]
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.[102]

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.[103] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[104] In making its

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

[98] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[99] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

[100] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875 (reaffirming the test in *County of Los Angeles* (1987) 43 Cal.3d 46, 56).

[101] *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.

[102] *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.

[103] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 335.

[104] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

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."[105]

### A. The Test Claim Was Timely Filed and the Potential Period of Reimbursement Begins January 1, 2023.

Government Code section 17551(c) requires test claims "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 defines "12 months" as 365 days.[106]

The test claim statute became effective on January 1, 2023.[107] The Test Claim was filed on November 17, 2023,[108] within 12 months of the effective date of the test claim statute, so the Test Claim was timely filed.

Government Code section 17557(e) requires a test claim be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. The November 17, 2023 filing date establishes reimbursement eligibility for the 2022-2023 fiscal year, but because the test claim statute became effective on January 1, 2023, the potential period of reimbursement begins January 1, 2023.

### B. The Uncodified Language in Section 1 of the Test Claim Statute and Education Code Section 17660 as Added by the Test Claim Statute Describe the Legislature's Findings, But Does Not Impose Requirements on School Districts and Therefore Does Not Constitute a State-Mandated Program.

Reimbursement under article XIII B, section 6 is required if a state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[109]

Section 17660, added by the test claim statute, does not impose requirements on school districts, but provides:

> The Legislature finds and declares that it is the policy of the state that school facilities provide healthy indoor air quality, including adequate ventilation, to students, teachers, and other occupants in order to protect

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[105] *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].

[106] California Code of Regulations, title 2, section 1183.1(c), Register 2018, No. 18 (eff. April 1, 2018).

[107] Statutes 2022, chapter 777. Exhibit A, Test Claim, filed November 17, 2023, page 98.

[108] Exhibit A, Test Claim, filed November 17, 2023, page 1.

[109] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

occupant health, reduce sick days, and improve student productivity and performance.[110]

Similarly, uncodified section 1 of the test claim statute contains legislative findings and declarations and cites four studies or reports on the adverse effects of poor indoor quality on school-age children but imposes no requirements on school districts.[111]

Accordingly, the uncodified language in section 1 of the test claim statute and section 17660, as added by the test claim statute, do not impose a state-mandated program.

### C. Education Code Section 17661, as Added by the Test Claim Statute, Does Not Impose a Reimbursable State-Mandated Program.

#### 1. Education Code Section 17661(a), (d), and (e) Do Not Impose Any Requirements on School Districts.

Section 17661(a) defines "covered school," "HVAC," and "MERV" as used in the test claim statute, but does not impose any requirements on school districts.

Section 17661(d) requires the California Building Standards Commission and the Division of the State Architect to research, develop, and propose for adoption mandatory standards for carbon dioxide monitors in classrooms of a covered school and the University of California on the next triennial update of the California Building Standards Code (title 24 of the California Code of Regulations).[112]

Section 17661(e) states: "This section shall apply to the University of California only to the extent that the Regents of the University of California, by resolution, make it applicable."

Section 17661(a), (d) and (e) as added by the test claim statute, do not impose any requirements on school districts and, therefore, there is no state-mandated program imposed by these subdivisions.

[110] Education Code section 17660 (Stats 2022, ch. 777).

[111] Statutes 2022, chapter 777, section 1.

[112] Education Code section 17661(d) (Stats 2022, ch. 777).

**2. The Requirement in Education Code Section 17661(b)(2), to Inspect the HVAC Systems to Ensure They Meet the Minimum Ventilation Rates *in Effect When the Building Permit for HVAC Installation Was Issued* Is Not New and Does Not Impose a New Program or Higher Level of Service. Although the Requirements in Sections 17661(b)(1) and (b)(2) to Inspect HVAC Systems to Ensure Compliance with the *Current* Minimum Ventilation Rates in Table 120.1-A of the Energy Code and Document in the Annual Inspection Report the System's Inability to Meet *Current* Ventilation Standards in Table 120.1-A Is New for School Districts with HVAC Systems Approved for Installation *Before* January 1, 2020, There Is No Evidence of Increased Costs Mandate by the State to Comply with the Requirements.**

Section 17661(b)(1) requires school districts to:

> [E]nsure that facilities, including but not limited to, classrooms for students, have HVAC [defined as heating, ventilation, and air conditioning] systems *that meet the minimum ventilation rate requirements set forth in Table 120.1-A of Part 6* (commencing with Section 100.0) of Title 24 of the California Code of Regulations, *unless the existing HVAC system is not capable of safely and efficiently providing the minimum ventilation rate*.[113]

Section 17661(b)(2) requires a school incapable of meeting the minimum ventilation rates in Table 120.1-A of title 24 to:

- [E]nsure that its HVAC system meets the minimum ventilation rates in effect at the time the building permit for installation of that HVAC system was issued. . . [and;]
- [D]ocument the HVAC system's inability to meet the current ventilation standards set forth in paragraph (1) in the annual HVAC inspection report required by Section 5142 of Title 8 of the California Code of Regulations, which shall be available to the public upon request.[114]

As indicated in the background, title 24, including the Energy Code in part 6, is revised and published every three years.[115] The test claim statute and the 2022 Energy Code (published July 1, 2022 and eff. Jan. 1, 2023) both became effective on January 1, 2023.[116] Thus, the requirement in section 17661(b)(1) to "[e]nsure that facilities . . . have HVAC systems that meet the minimum ventilation rate requirements set forth in Table 120.1-A of Part 6 (commencing with Section 100.0) of Title 24 of the California Code of Regulations" refers to the *current* Energy Code. If a school HVAC

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[113] Education Code section 17661(b)(1) (Stats 2022, ch. 777). Emphasis added.

[114] Education Code section 17661(b)(2) (Stats 2022, ch. 777). Emphasis added.

[115] Health and Safety Code section 18942(a).

[116] Exhibit F (1), Building Standards Commission, California Building Standards Code, https://www.dgs.ca.gov/BSC/Codes#:~:text=Code%20Regs.%2C%20Title%2024),date%20of%20January%201%2C%202023 (accessed on Aug. 12, 2024).

system is incapable of meeting the minimum ventilation rates in the current Energy Code, Education Code section 17661(b)(2) requires the school to "[e]nsure that its HVAC system meets the minimum ventilation rates in effect at the time the building permit for installation of that HVAC system was issued."[117]

Table 120.1-A of the Energy Code identifies the "Minimum Ventilation Rates" for HVAC systems, including the total outdoor air rate, the minimum ventilation rates for systems with DCV (demand control ventilation) devices, and the air class applicable to "educational facilities," including classrooms. To understand these terms, a summary of the Energy Code's requirements is necessary. The Energy Code currently requires occupiable spaces in nonresidential buildings, including school facilities, to meet specified air filtration requirements (which are discussed in the next section) and the requirements for naturally ventilated spaces or mechanically ventilated spaces, depending on the HVAC system the school uses.[118] Some mechanically ventilated systems have demand control ventilation (DCV) devices, which vary the outdoor air delivery rate based on carbon dioxide ($CO_2$) and occupancy levels in the room.[119] DCV devices are required for spaces with a design occupant density of greater than or equal to 25 people per 1,000 square feet and the system has an air economizer, a modulating outside air control, or a design outdoor air rate of greater than 3000 cfm.[120] All systems are required to meet the minimum outside air ventilation rates for each occupied area based on the anticipated occupancy and the minimum required ventilation rate per occupant in Table 120.1-A.[121]

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[117] Emphasis added.

[118] California Code of Regulations, title 24, part 6, section 120.1(c). Section 120.1(c)(2) also requires naturally ventilated spaces to include a mechanical ventilation system designed in accordance with certain specifications.

[119] California Code of Regulations, title 24, part 6, section 120.1(d); Exhibit F (5), California Energy Commission, Installer and Inspector Quick-Reference: 2022 NRCA-MCH-06-A Demand Control Ventilation (DCV) Systems, 2022, https://www.energy.ca.gov/filebrowser/download/4953 (accessed on Aug. 15, 2024), page 1; Exhibit F (2), California Department of Public Health, Ventilation and Filtration to Reduce Long-Range Airborne Transmission of COVID-19 and Other Respiratory Infections: Considerations for Reopened Schools, California Department of Public Health, July 2021, https://www.cdph.ca.gov/Programs/CCDPHP/DEODC/EHLB/IAQ/CDPH%20Document%20Library/School_ventilation_and_filtration_ADA.pdf (accessed on Aug. 23, 2024), page 18.

[120] California Code of Regulations, title 24, part 6, section 120.1(d)(3).

[121] California Code of Regulations, title 24, part 6, sections 120.1(c), 120.1(c)(3), 120.1(d), and 120.l(f).

The regulations also provide, "[a]ir classification and recirculation limitations of air shall be based on the air classification as listed in Table 120.1-A,"[122] which are also identified in ASHRAE 62.1 (the standards of the American Society of Heating, Refrigerating and Air-Conditioning Engineers). Two air classifications are relevant to school facilities.[123] Class 1 air can be recirculated to any space type and is typical of the air in a classroom. Class 2 air is moderately contaminated or odorous with mild sensory irritation intensity, is restricted in its recirculation, and is typical of a science laboratory or art classroom.[124]

Thus, Table 120.1-A identifies the following "Minimum Ventilation Rates" for schools:[125]

| Occupancy Category | Total Outdoor Air Rate $R_t$ (cfm/ft$^2$ ) | Min. Ventilation Air Rate for DCV $R_a$ (cfm/ft$^2$) | Air Class | Notes |
|---|---|---|---|---|
| Classrooms (ages 5-8) | 0.38 | 0.15 | 1 | |
| Classrooms (age 9-18) | 0.38 | 0.15 | 1 | |
| Art Classrooms | 0.15 | - | 2 | |
| Science Laboratories | 0.15 | - | 2 | |

The table indicates the total outdoor air rate for classrooms is 38 cubic feet per unit area, and the minimum ventilation air rate for systems with demand control ventilation devices is 15 cubic feet per minute of outdoor air flow per person.[126] Table 120.1-A also identifies the minimum ventilation rates for other school facilities such as lecture halls; multi-use assembly rooms; wood and metal shops; computer labs; media centers; and music, theater, and dance rooms.

The test claim statute does not define what "ensure" compliance with the minimum ventilation rate requirements means. According to its legislative history, "AB 2232 will require comprehensive HVAC *inspections* . . . in classrooms *to ensure* the wellbeing and learning of California students are protected from the harmful effects of poor air quality."[127] Thus, section 17661(b)(1) requires school districts *to inspect* their HVAC systems to ensure they meet the current minimum ventilation rate requirements in Table 120.1-A above, and if their systems do not, section 17661(b)(2) requires the schools to ensure the systems meet the minimum ventilation rates in the Energy Code when their HVAC installation permit was issued and document the HVAC system's inability to meet the current ventilation standards in the annual HVAC inspection report required by section 5142 of the title 8 regulations.

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[122] California Code of Regulations, title 24, part 6, sections 120.1(g).

[123] California Code of Regulations, title 24, part 6, section 120.1(g).

[124] California Code of Regulations, title 24, part 6, section 120.1(g)(1)-(g)(2).

[125] California Code of Regulations, title 24, part 6, section 120.1.

[126] California Code of Regulations, title 24, part 6, section 120.1(c)(3).

[127] Exhibit F (11), Senate Rules Committee, Office of Senate Floor Analyses, Third Reading Analysis of AB 2232, as amended June 28, 2022, page 3. Emphasis added.

The claimant contends that part 6 of the Energy Code did not apply to schools before the test claim statute was enacted, suggesting that school compliance with the Energy Code is newly required in the test claim statute. According to the claimant:

> California Code of Regulations, title 24, part 6, section 120.1(c)(1)(B) requirements for ventilation and indoor air quality are applicable to "All occupiable spaces in hotel/motel buildings, and nonresidential buildings other than healthcare facilities shall comply with the applicable requirements of Section 120.1(a) through 120.1(g). . . . This requirement did not include schools.[128]

The claimant also states that section 17661(b)(1) of the test claim statute supports the argument that title 24, part 6 did not apply to schools before the test claim statute was enacted.[129]

The claimant is incorrect. Part 6 of the title 24 regulations establishes requirements for the design and installation of ventilation and space conditioning systems in "*nonresidential*, high-rise residential, and hotel/motel buildings as well as covered processes that are within the scope of Section 100.0(a)."[130] Public schools are "nonresidential buildings. Moreover, section 100 of the Energy Code describes the scope of Part 6.[131] It states "[t]he provisions of Part 6 apply to all buildings" that are in a specified occupancy group, including "Group E," meaning "the use of a building or structure, or a portion thereof, by more than six persons at any one time for educational purposes through the 12th grade;"[132] and "for which an application for a building permit or renewal of an existing permit is filed (or is required by law to be filed) on or after the effective date of the provisions, or which are constructed by a governmental agency;" and are either "unconditioned," or "indirectly or directly conditioned, or process

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[128] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed September 23, 2024, page 3.

[129] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed September 23, 2024, page 3.

[130] California Code of Regulations, title 24, part 6, section 120.0. Emphasis added. See also, Exhibit F (3), California Energy Commission, 2016 Building Energy Efficiency Standards for Residential and Nonresidential Buildings, page 133.

[131] California Code of Regulations, title 24, part 6, section 100(a) is entitled "scope;" See also, Exhibit F (3), California Energy Commission, 2016 Building Energy Efficiency Standards for Residential and Nonresidential Buildings, page 57.

[132] Group E buildings are defined in California Code of Regulations, title 24, part 2, section 305.1; see also, Exhibit F (3), California Energy Commission, 2016 Building Energy Efficiency Standards for Residential and Nonresidential Buildings, page 81 ("NONRESIDENTIAL BUILDING is any building which is identified in the California Building Code Table; Description of Occupancy as Group A, B, E, F, H, M, or S; and is a U; as defined by Part 2 of Title 24 of the California Code or Regulation.").

spaces."[133] A directly conditioned space is an "enclosed space that is provided with wood heating, mechanical heating that has a capacity exceeding 10 Btu/hr-ft², or mechanical cooling that has a capacity exceeding Btu/hr-ft²."[134] An HVAC system is defined in part 6 as "a space conditioning system or a ventilation system."[135] A space-conditioning system is defined as "a system that provides mechanical heating or mechanical cooling within or associated with conditioned spaces in a building,"[136] and a ventilation system is "a mechanical device intended to remove air from buildings."[137]

In addition, Table 120.1-A expressly provided standards for nonresidential "classroom" air quality, including "science labs" and "art classrooms" at the time the test claim statute was enacted.[138] Therefore, school buildings were required to comply with the Energy Code before the enactment of the test claim statute.

This interpretation is consistent with that of the State's Division of State Architect, which is the "enforcement agency" supervising the design and construction of school buildings to ensure compliance with title 24, including inspections during installation.[139] As

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[133] California Code of Regulations, title 24, part 6, section 100 (a) is entitled "scope;" See also, Exhibit F (3), California Energy Commission, 2016 Building Energy Efficiency Standards for Residential and Nonresidential Buildings, page 57.

[134] California Code of Regulations, title 24, Part 6, section 100.1(b); See also, Exhibit F (3), California Energy Commission, 2016 Building Energy Efficiency Standards for Residential and Nonresidential Buildings, page 67.

[135] California Code of Regulations title 24, Part 6, section 100.1(b); See also, Exhibit F (3), California Energy Commission, 2016 Building Energy Efficiency Standards for Residential and Nonresidential Buildings, page 75.

[136] California Code of Regulations title 24, Part 6, section 100.1(b); See also, Exhibit F (3), California Energy Commission, 2016 Building Energy Efficiency Standards for Residential and Nonresidential Buildings, page 91.

[137] California Code of Regulations title 24, Part 6, section 100.1(b). The section provides definitions for various kinds of ventilation systems, the common theme being that they are mechanical devices intended to remove air from buildings. Section 120.1(c) in Part 6 requires occupiable spaces to be ventilated with either a natural ventilation system or a mechanical ventilation system. (See also, Exhibit F (3), California Energy Commission, 2016 Building Energy Efficiency Standards for Residential and Nonresidential Buildings, page 134.)

[138] California Code of Regulations, title 24, part 6, section 120(g), Table 120.1-A, effective January 1, 2020. In the 2022 Energy Code (eff. Jan. 1, 2023), the same table is in section 120(h).

[139] Education Code section 17280(a), (as last amended by Stats. 2002, ch. 33), which references the Department of General Services that is over the Division of State Architect. *Hall v. City of Taft* (1956) 47 Cal.2d, 177. Regarding inspections, see Education Code sections 17311(a), 17280; See also California Code of Regulations, title 21, section 2.

explained by the State Architect, "Title 24 . . . contains the regulations that govern structural safety and sustainability for California's public schools . . ." and Part 6 "contains energy conservation standards applicable to all . . . nonresidential buildings throughout California, *including schools* and community colleges."[140] Under the rules of statutory interpretation, the Commission can rely on the State Architect's interpretation of the Energy Code since "[a]n agency's expertise with regard to a statute or regulation it is charged with enforcing entitles its interpretation of the statute or regulation to be given great weight unless it is clearly erroneous or unauthorized."[141]

Moreover, existing law already requires school districts to inspect, maintain, and ensure their installed HVAC systems are running and in good repair, and provide at least the quantity of outdoor air required by title 24 *at the time their building or installation permit was obtained*. Since 1987, section 5142(b) of the title 8 regulations has required annual inspections of HVAC systems in workplaces, with inspections and maintenance to be documented in writing.[142] Title 8 includes the General Industry Safety Orders (GISOs) for employers,[143] which apply to school districts.[144] The GISO in section 5142 of title 8, entitled "Mechanically Driven Heating, Ventilating and Air Conditioning (HVAC) Systems to Provide Minimum Building Ventilation," expressly requires annual workplace inspections to ensure compliance with the minimum ventilation rate requirements in effect when the building permit was issued so the HVAC system operates properly each year after installation, as it states:

(a) Operation:

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[140] Exhibit F (12), Department of General Services, Division of the State Architect, Overview Title 24 Building Standards Code as Adopted by the Division of the State Architect, https://www.dgs.ca.gov/DSA/Resources/Page-Content/Resources-List-Folder/Overview-Title-24-Building-Standards-Code#:~:text=PART%206%20%2D%20CALIFORNIA%20ENERGY%20CODE,including%20schools%20and%20community%20colleges (accessed September 25, 2024), page 2, emphasis added. See also Public Resources Code section 25488.

[141] *L & S Framing, Inc. v. Occupational Safety and Health Appeals Bd.* (2023) 93 Cal.App.5th 995, 1008-1009.

[142] California Code of Regulations, title 8, section 5142 (Register 87, No. 2). Section 5142 is a general industrial safety order (see Cal. Code Regs., tit. 8, § 3200 et. seq.). GISOs apply to ". . . all employments and places of employment in California as defined by Labor Code Section 6303. . . "

[143] California Code of Regulations, title 8, section 3200 et seq. The General Industrial Safety Orders are "to make full provision for securing safety in places of employment, . . . [and] are promulgated for the guidance of employers and employees alike." (Cal. Code Regs., tit. 8, § 3200).

[144] Public schools are "employers" for purposes of the Labor Code (Lab. Code, §§ 6304, 3300), which the title 8 regulations implement.

(1) The HVAC system shall be maintained and operated to provide at least the quantity of outdoor air required by the State Building Standards Code, Title 24, Part 2, California Administrative Code, in effect at the time the building permit was issued.[145]

[¶ ] . . . [¶]

(b) Inspection and Maintenance:

(1) The HVAC system shall be inspected at least annually, and problems found during these inspections shall be corrected within a reasonable time.

(2) Inspections and maintenance of the HVAC system shall be documented in writing. The employer shall record the name of the individual(s) inspecting and/or maintaining the system, the date of the inspection and/or maintenance, and the specific findings and actions taken. The employer shall ensure that such records are retained for at least five years.

(3) The employer shall make all records required by this section available for examination and copying, within 48 hours of a request, to any authorized representative of the Division (as defined in Section 3207), to any employee of the employer affected by this section, and to any designated representative of said employee of the employer affected by this section.

Similarly, Education Code sections 17002 and 17070.75, in the Leroy F. Greene School Facilities Act of 1998 and the State School Building Lease Purchase Law of 1976, require school construction project plans for "major maintenance, repair and replacement," to keep school facilities in "good repair," including heating and cooling systems.[146] As a condition of receiving funds for new construction or modernization projects, schools are required to provide for ongoing and major building maintenance.[147] According to section 17002(d),[148] "good repair" means:

> [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

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[145] It is inconsequential that section 5142 references "part 2" of title 24 rather than part 6. At the time the title 8 regulation was adopted in 1987, the energy regulations were in part 2 and were not codified into part 6 until 1992. Exhibit F (6), California Energy Commission, *The 1992 Efficiency Standards for New Residential and Non-Residential Buildings*, July 1, 1992, footnote 1.

[146] Education Code sections 17014(c), 17070.77(a) – (b).

[147] Education Code section 17075(a).

[148] See also Education Code, section 17070.75, which addresses facilities maintenance and incorporates by reference the definition of 'good repair' in section 17002(d).

> Construction and approved by the board or a local evaluation instrument that meets the same criteria.[149]

The "evaluation instrument" used to determine good repair is the Facility Inspection Tool (FIT), developed by the Office of Public School Construction.[150] Section 17002(d) requires the FIT to include the following minimum criteria for mechanical and HVAC systems: "(i) functional and unobstructed; (ii) appear to supply adequate amount of air to all classrooms, work spaces, and facilities; and (iii) maintain interior temperatures within normally acceptable ranges."[151] Consistent with these criteria in section 17002(d), the FIT as revised in April 2022 states:

> Heating, ventilation, and air conditioning systems (HVAC) as applicable are functional and unobstructed. Examples include but are not limited to the following:
>
> a. The HVAC system is operable.
>
> b. The facilities are ventilated (via mechanical or natural ventilation).
>
> c. The ventilation units are unobstructed and vents and grills are without evidence of excessive dirt or dust.
>
> d. There appears to be an adequate air supply to all classrooms, work spaces, and facilities (i.e. no strong odor is present, air is not stuffy)
>
> e. Interior temperatures appear to be maintained within normally accepted ranges.
>
> f. The ventilation units are not generating any excessive noise or vibrations.
>
> [¶] . . . [¶]
>
> [and] Surfaces (including floors, ceilings, walls, window casings, HVAC grills) appear to be free of mildew, mold odor and visible mold.[152]

The FIT is to assist county superintendents of schools in their statutory duty to annually visit their schools and to assess or inspect for:

> The accuracy of data reported on the school accountability report card with respect to the availability of sufficient textbooks and instructional materials, as defined by Section 60119, *and the safety, cleanliness, and*

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[149] Education Code section 17002(d)(1). Emphasis added.

[150] Exhibit F (9), Office of Public School Construction, Facility Inspection Tool, revised April 2022, https://www.dgs.ca.gov/-/media/Divisions/OPSC/Forms/Facility-Inspection-Tool---SAB-Approved-04-27-2022.pdf (accessed on May 1, 2024).

[151] Education Code section 17002(d)(1)(B).

[152] Exhibit F (9), Office of Public School Construction, Facility Inspection Tool, revised April 2022, https://www.dgs.ca.gov/-/media/Divisions/OPSC/Forms/Facility-Inspection-Tool---SAB-Approved-04-27-2022.pdf (accessed on May 1, 2024), pages 3, 4.

*adequacy of school facilities, including good repair,* as required by Sections 17014, 17032.5, 17070.75, and 17089.[153]

Thus, the requirement in section 17661(b)(2), for a school to "[e]nsure that its HVAC system meets the minimum ventilation rates *in effect at the time the building permit for installation of that HVAC system was issued*" is not new and does not impose a new program or higher level of service on school districts.[154]

However, the requirements imposed by section 17661(b)(1) and (2) to inspect the HVAC systems to ensure compliance with the *current* minimum ventilation rates in Table 120.1-A of part 6, and if the existing HVAC system is "not capable of safely and efficiently providing the minimum ventilation rate" to document the system's inability to meet the *current* standards, goes beyond the scope of the existing requirements and is new for school districts with HVAC systems approved under the 2016 or earlier Energy Codes.

Table 120.1-A in the 2019 Energy Code is the same as Table 120.1-A in the 2022 Energy Code, so the requirements to inspect the system to ensure compliance with *current* minimum ventilation rates and document the inspection in writing is *not* new to the extent a school district received a permit for an HVAC installation under the 2019 Energy Code, effective January 1, 2020.[155] Existing law already required schools to conduct annual inspections to ensure the HVAC system provides "at least the quantity of outdoor air required by . . . Title 24, . . . *in effect at the time the building permit was issued"* and to document that inspection in writing.[156] Since Table 120.1-A in the 2019 and 2022 Energy Codes are the same, the requirements in the test claim statute to perform the same activities are not new and do not increase the level of service for HVAC systems approved for installation on or after January 1, 2020.

Unlike the 2019 and 2022 versions, Table 120.1-A in the 2016 Energy Code only identifies the minimum ventilation rates per square foot of conditioned floor area and does not identify the minimum ventilation air rate for systems with demand control ventilation devices or the air class.[157] Discussing the difference between Table 120.1-A

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[153] Education Code section 1240(c)(2)(E)(iii). Emphasis added. Also see Exhibit F (9), Office of Public School Construction, Facility Inspection Tool, revised April 2022, https://www.dgs.ca.gov/-/media/Divisions/OPSC/Forms/Facility-Inspection-Tool---SAB-Approved-04-27-2022.pdf (accessed on May 1, 2024), page 1.

[154] Emphasis added.

[155] California Code of Regulations, title 24, part 6, section 120.1(h), Table 120.1-A. In the 2019 code, Table 120.1-A is at section 120.1(g).

[156] California Code of Regulations, title 8, section 5142. Emphasis added.

[157] California Code of Regulations, title 24, part 6, section 120.1(e), Table 120.1-A, effective January 1, 2017. See also Exhibit F (3), California Energy Commission, 2016 Building Energy Efficiency Standards for Residential and Nonresidential Buildings, page 137.

in the 2019 Energy Code and earlier (2016 and before) Energy Codes, one publication explained:

> New minimum ventilation rate calculations have been added to Table 120.1-A. The table includes significantly more information, reducing the need to cross reference between the Building or and [sic] Energy Code to determine the minimum ventilation rates. It includes many additional space types (occupancy categories) and identifies the "air classifications" referenced by §120.1(g).[158]
>
> [¶] . . . [¶]
>
> This change [to section 120.1(g)] adds air classifications and recirculation limits for ventilation air. Previously, the Energy Code did not give direction on these two concepts, although they may have a significant impact on indoor air quality. They are present in ASHRAE standards that were incorporated by reference but not directly stated in the Energy Code.[159]

In addition, the 2016 and earlier versions of Table 120.1-A do not contain DCV standards because, as stated in the 2016 Energy Code: "Classrooms . . with occupant density greater than 2.5 people per 1000 $ft^2$. . . are not required to have demand control ventilation."[160] According to the 2016 Nonresidential Compliance Manual, classrooms and other spaces "are exempted either due to concerns about equipment maintenance practices (schools and public buildings) or concerns about high levels of pathogens (social service buildings, medical buildings, healthcare facilities and to some extent classrooms)."[161] However, the 2016 exception for DCV in classrooms was removed in the 2019 Energy Code.[162]

Thus, Table 120.1-A changed since the 2016 Energy Code and the requirements in section 17661(b)(1) and (2) to ensure compliance with *current* minimum ventilation rates and to "document the HVAC system's inability to meet the *current* ventilation standards set forth in paragraph (1) in the annual HVAC inspection report required by section 5142" of the title 8 regulations goes beyond the scope of prior law for schools that received a permit for an HVAC installation under the 2016 or earlier Energy Code (i.e., *before* January 1, 2020).

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[158] Exhibit F (8), International Code Council, *Significant Changes to the California Energy Code*, 2019 Edition, May 2021, page 97.

[159] Exhibit F (8), International Code Council, *Significant Changes to the California Energy Code*, 2019 Edition, May 2021, page 105.

[160] California Code of Regulations, title 24, part 6, section 120.1(c)(3), effective January 1, 2016.

[161] Exhibit F (4), California Energy Commission, 2016 Nonresidential Compliance Manual, Chapter 4, page 4-45.

[162] Exhibit F (8), International Code Council, *Significant Changes to the California Energy Code*, 2019 Edition, May 2021, page 101.

However, the claimant has not requested reimbursement for inspection and documentation activities and there is no evidence in the record school districts incurred costs mandated by the state to comply with these requirements. The Government Code defines "costs mandated by the state" as any increased cost 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.[163] Further, no claim nor any payment shall be made unless the claim exceeds $1,000.[164] The Commission's regulations require "[a]ll representations of fact shall be supported by documentary or testimonial evidence in accordance with section 1187.5 of the Commission's regulations."[165] The Test Claim and the declarations in the record describe the process to replace MERV 9 air filters with new MERV 13 air filters, which the claimant alleges is required to comply with the test claim statute.[166] Although installing MERV 13 filters is addressed in Education Code section 17661(c), which is discussed below, it is not a requirement imposed by section 17661(b). The claimant identifies no costs in the Test Claim or the declarations to comply with the section 17661(b) requirements to inspect the HVAC systems for compliance with current standards and document the system's inability to meet current standards.

Therefore, the Commission finds Education Code section 17661(b) does not impose a reimbursable state-mandated program because:

- The requirement in section 17661(b)(2), for a school inspection to "[e]nsure that its HVAC system meets the minimum ventilation rates *in effect at the time the building permit for installation of that HVAC system was issued*" is *not* new and does not impose a new program or higher level of service.
- The requirements in section 17661(b)(1) and (b)(2), to inspect HVAC systems to ensure compliance with the *current* minimum ventilation rates in Table 120.1-A of the Energy Code, as amended in 2022, and to document the system's inability to meet the *current* ventilation standards in the annual inspection report required by section 5142 of the title 8 regulations, are *not* new and do not impose a new program or higher level of service for school districts that received a permit for an HVAC installation under the 2019 or 2022 Energy Codes (for HVAC systems approved *on or after* January 1, 2020).
- There is no evidence of costs mandated by the state to comply with section 17661(b)(1) and (b)(2), for school districts that received a permit for HVAC installation under the 2016 or earlier Energy Code (approved *before* January 1, 2020), to inspect HVAC systems to ensure compliance with the

[163] Government Code section 17514.

[164] Government Code section 17564(a).

[165] California Code of Regulations, title 2, section 1183.1(e).

[166] Exhibit A, Test Claim, filed November 17, 2023, pages 13, 18-19 (Landon Declaration); Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed September 23, 2024, pages 7-8 (Landon Declaration).

*current* minimum ventilation rates in Table 120.1-A of the Energy Code, as amended in 2022, and to document the system's inability to meet the *current* ventilation standards in the annual inspection report required by section 5142 of the title 8 regulations.[167]

**3. Reimbursement Is Not Required to Comply with Education Code Section 17661(c) Because There Is No Evidence in the Record of Increased Costs Mandated by the State to Comply with the One-Time New Requirement to Install MERV 13 Filtration, or the Highest MERV Filtration Feasible, *Only* at Schools with HVAC Systems Approved for Installation *Before* January 1, 2020 and Only to the Extent the District's Schools Did *Not* Have a COVID-19 Outbreak.**

Section 17661(c), as added by the test claim statute, requires school districts to install MERV 13 air filtration or the highest filtration feasible in their HVAC systems:

- [I]nstall filtration that achieves "MERV levels of 13 or higher to the extent determined to be feasible and appropriate for the existing HVAC system, as determined by the school.
- If . . . it is determined that the existing HVAC system is not designed to achieve MERV levels of 13 or higher, a covered school shall . . . install filtration that achieves the highest MERV level that the school determines is feasible without significantly reducing the lifespan or performance of the existing HVAC system.[168]

As indicated above, MERV is an acronym for minimum efficiency reporting value.[169] MERV air filtration was explained as follows in an Energy Commission publication:

> Air filtration is used in forced air systems to protect the equipment from dust accumulation that could reduce the capacity or efficiency of the system. Preventing dust buildup may also prevent the system from becoming a host to biological contaminants such as mold, especially if dust is deposited on cooling coils that become wet from water condensation during comfort cooling operation. Air filter efficiencies of Minimum Efficiency Reporting Value (MERV) 6 to MERV 8 are sufficient for protection from these large airborne dust particles. Air filter efficiencies of at least MERV 13 are needed to protect occupants from exposure to the smaller airborne particles that are known to adversely affect respiratory

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[167] Government Code section 17514, California Code of Regulations, title 2, section 1183.1(e).

[168] Education Code section 17661(c) (Stats 2022, ch. 777).

[169] Education Code section 17661(a)(3) (Stats 2022, ch. 777). MERV is the minimum efficiency reporting value as determined by ASHRAE [American Society of Heating, Refrigerating, and Air Conditioning Engineers] Standard 52.2 Method of Testing General Ventilation Air-Cleaning Devices for Removal Efficiency by Particle Size. (Cal. Code Regs., tit. 23, pt. 6, § 100.1(b)).

> health. These smaller particles are often referred to as PM 2.5 which refers to particulate matter of 2.5 microns. PM2.5 is produced from combustion such as that resulting from cooking in the kitchen and from exhaust from motor vehicles that enters a dwelling through ventilation openings and infiltration.[170]

As discussed below, the Commission finds reimbursement is not required to comply with Education Code section 17661(c) because there is no evidence in the record of increased costs mandated by the state to comply with the one-time new requirement to install MERV 13 or the highest filtration feasible *only* at schools with HVAC systems approved for installation *before* January 1, 2020, and only to the extent the district's schools did *not* have a COVID-19 outbreak.

a. Education Code section 17661(c) imposes a *one-time* new requirement to install filtration that achieves MERV levels of 13 or higher, or install filtration that achieves the highest MERV level feasible without reducing the lifespan of the existing HVAC system, *only* for schools with HVAC systems approved for installation before January 1, 2020 (under the 2016 or earlier Energy Code) and only to the extent the district's schools did not have a COVID-19 outbreak as defined.

The current Energy Code requires filters shall have a designated efficiency equal to or greater than MERV 13.[171] The same requirement is in the 2019 Energy Code (eff. Jan. 1, 2020).[172] But the 2016 Energy Code (eff. Jan. 1, 2017) did not require filters rated at MERV 13 or higher.[173] The 2019 Energy Code amendment increased the minimum requirement to MERV 13:

> The extensive changes to Section 120.1 address outdoor air ventilation and indoor air quality (IAQ) with new requirements for air filtration and system designs. Subsection (c) applies to the occupiable spaces in high-rise [and] nonresidential buildings, and hotels/motels. Subsection (c)1 addresses air filtration. It specifies the types of mechanical systems that must have air filters, air filter efficiency, and sizes. The 2019 Energy Code ensures that HVAC systems are designed to accommodate higher MERV filters so that occupants can improve filtration without inadvertently

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[170] Exhibit F (7), California Energy Commission, 2022 Residential Compliance Manual, https://www.energy.ca.gov/filebrowser/download/5126 (accessed on May 2, 2024), pages 4-39 to 4-40.

[171] California Code of Regulations, title 24, part 6, section 120.1(c)(1)(B) (eff. Jan. 1, 2023).

[172] California Code of Regulations, title 24, part 6, section 120.1(c)(1)(B) (eff. Jan. 1, 2020).

[173] Exhibit F (3), California Energy Commission, 2016 Building Energy Efficiency Standards for Residential and Nonresidential Buildings, page 241.

> harming the energy efficiency, lifespan, or overall performance of their HVAC system.
>
> [¶] . . . [¶]
>
> To improve indoor air quality, the air filtration particle size efficiency requirement has increased from MERV 6 to MERV 13. A MERV 13 filter effectively filters out fine particulate matter (PM 2.5).[174]

Therefore, the MERV 13 requirement in Education Code section 17661(c) is *not* new to the extent a school received a permit to install a new HVAC system under the 2019 or 2022 Energy Code (i.e., on or after Jan. 1, 2020) because those Codes already required the HVAC system to have filters with a designated efficiency equal to or greater than MERV 13.[175] Prior law also required these filters be replaced or cleaned regularly, as the title 8 regulation states:

> Where the air supply is filtered, the filters shall be replaced or cleaned regularly to prevent significant reductions in airflow. A pressure gauge shall be installed to show the pressure drop across the filters. This gauge shall be marked to show the pressure drop at which filters require cleaning or replacement.[176]

As indicated above, this title 8 regulation is a GISO that applies to employers, including school districts.[177] The claimant acknowledges that title 8 "generally deals with workplace safety," and does not specifically dispute its applicability to schools. However, the claimant puts no evidence in the record of any of its HVAC systems being approved for installation prior to January 1, 2020.[178]

In addition, the MERV 13 requirement is *not* new if there was a COVID-19 outbreak in the school. When the test claim statute became effective on January 1, 2023, MERV 13 filters were required for schools that had a COVID-19 outbreak (meaning three or more *employee* COVID-19 cases within an exposed group, as defined, who visited the worksite during their infectious period any time during a 14-day period).[179] Under these

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[174] Exhibit F (8), International Code Council, *Significant Changes to the California Energy Code*, 2019 Edition, May 2021, pages 91-92.

[175] California Code of Regulations, title 24, part 6, section 120.1(c)(1)(B).

[176] California Code of Regulations, title 8, section 5143(d)(3) (Register 80, No. 8).

[177] Public schools are "employers" for purposes of the Labor Code (Lab. Code, §§ 6304, 3300), which the title 8 regulations implement.

[178] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed September 23, 2024, pages 4, 7-8 (Landon Declaration). Exhibit A, Test Claim, filed November 17, 2023, pages 6-7, 13-14, 18-20 (Landon Declaration).

[179] See California Code of Regulations, title 8, section 3205.1(a)(1). (Register 2022, No. 18.) Section 3205(b)(7) of title 8 defines "exposed group" to mean "all employees at a work location, working area, or a common area at work, within employer-provided transportation covered by section 3205.3, or residing within housing covered by section

circumstances, existing regulations in section 3205.1(f) of title 8 required the school to comply with the same filtration requirements as the test claim statute:

> (f) In buildings or structures with mechanical ventilation, employers shall filter recirculated air with Minimum Efficiency Reporting Value (MERV) 13 or higher efficiency filters if compatible with the ventilation system. If MERV-13 or higher filters are not compatible with the ventilation system, employers shall use filters with the highest compatible filtering efficiency. . . .[180]

Although this title 8 regulation expires by its own terms on February 3, 2025, the ventilation requirements in subdivision (f) continue pursuant to section 3205(h)(4) in title 8 that states; "A place of employment subject to section 3205.1 after February 3, 2023 shall continue to comply with the ventilation requirements of subsection 3205.1(f) even after the outbreak has passed and section 3205.1 is no longer applicable."[181] And, as stated above, schools were required by prior law to regularly replace or clean these filters.[182]

Therefore, the requirement in Education Code section 17661(c) to install filtration that achieves MERV levels of 13 or higher, or install filtration that achieves the highest MERV level the school determines is feasible without significantly reducing the lifespan

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3205.2, where an employee COVID-19 case was present at any time during the infectious period. A common area at work includes bathrooms, walkways, hallways, aisles, break or eating areas, and waiting areas. The following exceptions apply:

(A) For the purpose of determining the exposed group, a place where persons momentarily pass through, without congregating, is not a work location, working area, or a common area at work.

(B) If the COVID-19 case was part of a distinct group of employees who are not present at the workplace at the same time as other employees, for instance a work crew or shift that does not overlap with another work crew or shift, only employees within that distinct group are part of the exposed group.

(C) If the COVID-19 case visited a work location, working area, or a common area at work for less than 15 minutes during the infectious period, and the COVID-19 case was wearing a face covering during the entire visit, other people at the work location, working area, or common area are not part of the exposed group.

[180] California Code of Regulations, title 8, section 3205.1(f) (Register 2022, No. 18, eff. May 5, 2022).

[181] California Code of Regulations, title 8, sections 3205(h)(4) (Register 2023, No. 29, eff. Feb. 2, 2023), 3205.1(a) (Register 2023, No. 29, eff. Feb. 2, 2023). Thus, the claimant's statement that the requirements in section 3205.1(f) of the title 8 regulations sunsets on February 3, 2025, is not correct. Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed September 23, 2024, page 4.

[182] California Code of Regulations, title 8, section 5143(d)(3) (as last amended by Register 2003, No. 24).

or performance of the existing HVAC system, is new only for schools with HVAC systems approved for installation *before* January 1, 2020 (under the 2016 or earlier Energy Code), and only to the extent these schools did *not* have a COVID-19 outbreak as defined in section 3205.1 of the title 8 regulations. Although the claimant alleges the test claim statute requires school districts to replace the MERV 13 filters more often and every three months,[183] the requirement imposed by Education Code section 17661(c) is a *one-time* requirement to purchase and install the required filters since prior law already required employers, including school districts, to regularly replace or clean filters, regardless of the filter efficiency level.[184] On-going filter purchase and installation is not new.[185]

b. The one-time new requirement imposed by Education Code section 17661(c) is mandated by the state.

The California Supreme Court has made it clear there is a state-mandate when a statute or executive order uses mandatory language that 'require[s]' or 'command[s]' a local entity to participate in a program or service"; in other words, local government "has the legally enforceable duty to obey."[186] Section 17661(c) states: "a covered school *shall*, . . . install filtration that achieves MERV levels of 13 or higher to the extent determined to be feasible and appropriate for the existing HVAC system." According to Education Code section 75: ""Shall" is mandatory and "may" is permissive."

Therefore, the new one-time requirement imposed by section 17661(c) is mandated by the state only on school districts with HVAC systems approved for installation in their schools before January 1, 2020 (under the 2016 or earlier Energy Code) and only to the extent these district's schools did *not* have a COVID-19 outbreak as defined in section 3205.1 of the title 8 regulations, to install MERV 13 or higher or filtration that achieves the highest MERV level the school determines is feasible without significantly reducing the lifespan or performance of the existing HVAC system.

This finding also applies to school districts that applied for grant funding under the School Energy Efficiency Stimulus Program,[187] which includes the School Reopening

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[183] Exhibit A, Test Claim, filed November 17, 2023, page 13.

[184] California Code of Regulations, title 8, section 5143 (as last amended by Register 2003, No. 24).

[185] Even if installing MERV 13 filters is more costly, as asserted by the claimant, increased costs alone do not establish the right to reimbursement under article XIII B, section 6 of the California Constitution. (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 54; *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 735; *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877.)

[186] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815.

[187] Public Utilities Code section 1600 et seq. (AB 841, Stats. 2020, ch. 372).

Ventilation and Energy Efficiency Verification and Repair Program (SRVEVR).[188] As described in the background, school districts, as a condition of receiving grant funds, are required to install MERV 13 filtration or higher where feasible, and have qualified testing personnel review system capacity and airflow to determine the highest MERV filtration that can be installed without adversely impacting the equipment, replace or upgrade filters where needed, and verify those filters are installed correctly.[189] Participating in that grant program is optional and not mandated by the state. The Government Code states "If 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."[190]

Thus, the one-time new requirement imposed by Education Code section 17661(c) is mandated by the state as described above.

c. The one-time new requirement imposed by Education Code section 17661(c) constitutes a new program or higher level of service.

The one-time mandated activity imposed by section 17661(c) must also constitute a new program or higher level of service within the meaning of article XIII B, section 6. "New program or higher level of service" is defined as "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."[191] Only one of these alternatives is required to establish a new program or higher level of service.[192] Courts have found a

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[188] Public Utilities Code section 1620 et seq. SRVEVR is the acronym defined in the bill. See Public Utilities Code section 1601(b) (Stats. 2020, ch. 372).

[189] Public Utilities Code section 1623(a)(1) (Stats. 2020, ch. 372).

[190] Government Code section 17565. However, any grant funding received under the program would have to be identified as offsetting revenues and the claimant would be required to provide evidence it incurred costs mandated by the state of its proceeds of taxes above and beyond the use of the grant funds. (*County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487.) Reimbursement under article XIII B, section 6 is only required when a mandated new program or higher level of service forces local government to incur "increased actual expenditures of limited tax proceeds that are counted against the local government's spending limit." (*County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1185.)

[191] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 557.

[192] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 557.

reimbursable "higher level of service" concerning an existing "program" when a state law or executive order mandates not merely some change that increases the cost of providing services, but an increase in the actual level or quality of governmental services provided.[193]

Here, school districts purchased and installed MERV filters before the test claim statute was enacted based on the Energy Code requirements in effect when their permits were approved. However, as stated above, the test claim statute imposes a newly mandated requirement to increase the MERV efficiency level, by installing a higher rated filter if feasible without significantly reducing the lifespan or performance of the existing HVAC system, for schools with HVAC systems approved for installation before January 1, 2020, that did *not* have a COVID-19 outbreak. The intent of the test claim statute is for "school facilities [to] provide healthy indoor air quality, including adequate ventilation, to students, teachers, and other occupants in order to protect occupant health, reduce sick days, and improve student productivity and performance."[194] Filters with higher MERV ratings are generally better at capturing smaller particles.[195] Protecting the health and improving the productivity and performance of pupils are governmental services to the public, and the increase in the MERV efficiency increases the level or quality of service provided. That the test claim statute also applies to private schools does not change this conclusion. As the courts have said, "although numerous private schools exist, education in our society is considered to be a peculiarly governmental function."[196]

Thus, the one-time new requirement imposed by section 17661(c) constitutes a new program or higher level of service within the meaning of article XIII B, section 6.

d. <u>There is no evidence in the record the claimant has incurred increased costs mandated by the state to comply with the new state-mandated activity.</u>

The last issue is whether the new activity mandated by section 17661(c) results in increased costs mandated by the state, which are defined as any increased cost 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.[197] And no claim nor any payment shall be made unless the claim exceeds $1,000.[198] All representations of fact shall be

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[193] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.App.4th 859, 877.

[194] Education Code section 17660 (Stats. 2022, ch. 777).

[195] Exhibit F (7), California Energy Commission, 2022 Residential Compliance Manual, https://www.energy.ca.gov/filebrowser/download/5126 (accessed on May 2, 2024), pages 4-39 to 4-40.

[196] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d. 155, 172.

[197] Government Code section 17514.

[198] Government Code section 17564(a).

supported by documentary or testimonial evidence in accordance with the Commission's regulations.[199] In addition, a finding of costs mandated by the state means none of the exceptions in Government Code section 17556 apply to deny the claim.

The Test Claim does not acknowledge any prior requirements to install MERV 13 filters when a new HVAC system is approved for installation under the 2019 or 2022 Energy Code or when a COVID outbreak occurs, or the existing requirement to regularly replace or clean these filters. Instead the Test Claim alleges increased costs, supported by a declaration from the claimant's Deputy Superintendent of Business Services, for the following costs to install MERV 13 filters in *all* of its schools' HVAC systems.[200] The claimant also alleges it hired two employees to replace and install the MERV 13 air filters every three months.[201]

| Year | Costs |
|---|---|
| January 1, 2023, to June 30, 2023 | $27,443.12 labor to install filters<br>$66,236.22, for MERV 13 filters.[202] |
| July 1, 2023, to June 30, 2024 | $81,669.06 estimated labor to install filters<br>$100,119.04 estimated for MERV 13 filters[203] |
| July 1, 2024, to June 30, 2025 | $120,624.56 estimated labor to install filters<br>$151,920.32 estimated for MERV 13 filters.[204] |

In response to the Draft Proposed Decision, the claimant filed a second declaration from the claimant's Deputy Superintendent of Business Services identifying the following one-time costs to purchase and install MERV 13 filters:

> 7. The Claimant first incurred increased one-time labor costs to replace and install the MERV 13 air filters on about January 1, 2023 in the amount of **$18,681.16.** (Assembly Bill No. 2232, Statutes 2022, Chapter 777, Section 2, Education Code Section 17661 ( c )(1) ).
> 8. The Claimant first incurred increased one-time costs on about January 1, 2023 for purchasing the MERV 13 air filters in the amount

[199] California Code of Regulations, title 2, sections 1183.1(e), 1187.5.

[200] Exhibit A, Test Claim, filed November 17, 2023, pages 13, 18-19 (Landon Declaration).

[201] Exhibit A, Test Claim, filed November 17, 2023, pages 14, 19 (Landon Declaration). In rebuttal comments, the claimant states it replaces its HVAC rooftop units every six months and portable wall units every three months. Exhibit C, Claimant's Rebuttal Comments, filed March 14, 2024, pages 2, 5 (Landon Declaration).

[202] Exhibit A, Test Claim, filed November 17, 2023, pages 14, 19 (Landon Declaration).

[203] Exhibit A, Test Claim, filed November 17, 2023, pages 14, 19 (Landon Declaration).

[204] Exhibit A, Test Claim, filed November 17, 2023, pages 15, 20 (Landon Declaration).

of **$16,559.06.** (Assembly Bill No. 2232, Statutes 2022, Chapter 777, Section 2, Education Code Section 1766l(c)(l)).[205]

The Declaration submitted with the Test Claim also identifies revenues received under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) that provides funding to Local Education Agencies through the Elementary and Secondary School Emergency Relief (ESSER) Fund to address the impact of COVID-19 on elementary and secondary schools. The claimant used these funds to *replace* HVAC systems, beginning in June 2021, and to purchase MERV 13 filters as follows:

> 14. The Claimant received Elementary and Secondary School Emergency Relief (ESSER) II funds in the amount of $26,295,815. These funds were distributed from June 2021 to August 2023 towards the Districtwide HVAC project to remove and replace HVAC systems at elementary, middle, and high schools. Prior to January 1, 2023, ESSER funds were used to purchase MERV 13 filters in the initial implementation of the new HVAC systems.
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> 15. The Claimant received Elementary and Secondary School Emergency Relief (ESSER) III funds in the amount of $58,852,535. The Claimant allocated $13 million towards the Districtwide HVAC project to remove and replace HVAC systems at elementary, middle, and high schools. The difference is due to the Claimant having other priorities in spending the remainder of ESSER III funds. The Claimant has until September 30, 2024, to spend this allocation. There will be no additional allocations of ESSER funds. Attached are Department of General Services, Division of the State Architect approval plans for the replacement of the District's HVAC.[206]

This evidence shows the claimant has schools *not* subject to the newly mandated requirement since any new HVAC installation approved beginning in June 2021 would have been approved under the 2019 and 2022 Energy Codes. As indicated above, the MERV 13 requirement in section 17661(c) is *not* new and does not mandate a new program or higher level of service to the extent a school received a permit to install a new HVAC system after January 1, 2020 (under the 2019 or 2022 Energy Code) because those Codes already required the HVAC system to have filters equal to or greater than MERV 13.[207]

However, there is *no* evidence in the record of increased costs mandated by the state to perform the mandated new program or higher level of service. As stated above, the mandated activity is the one-time installation of MERV 13 or higher filters or installing

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[205] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed September 23, 2024, pages 7-8 (Landon Declaration).

[206] Exhibit A, Test Claim, filed November 17, 2023, page 20 (Landon Declaration).

[207] California Code of Regulations, title 24, part 6, section 120.1(c)(1)(B). The citation is the same under both the 2019 and 2022 Energy Codes.

filtration that achieves the highest MERV level the school determines is feasible without significantly reducing the lifespan or performance of the existing HVAC system, in schools with HVAC systems that were approved for installation *before* January 1, 2020 (under the 2016 or earlier Energy Code), and only to the extent these district's schools did *not* have a COVID-19 outbreak as defined in section 3205.1 of the title 8 regulations. The Commission cannot make a finding of increased costs mandated by the state without evidence in the record.[208]

Therefore, the Commission finds there is no evidence of increased costs mandated by the state within the meaning of Government Code section 17514 to perform the mandated new activity imposed by Education Code section 17661(c).

## V. Conclusion

Accordingly, the Commission finds the test claim statute does not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 and denies this Test Claim.

[208] Government Code section 17514; California Code of Regulations, title 2, section 1183.1(e).