

ITEM 5
MANDATE REDETERMINATION
FIRST HEARING: ADEQUATE SHOWING
PROPOSED DECISION

Education Code Sections 60850 and 60851
Statutes 1999x, Chapter 1 (SB 2) and Statutes 1999, Chapter 135 (AB 2539)
California Code of Regulations, Title 5, Sections 1200, 1203, 1205, 1206, 1207, 1208, 1209,
1210, 1211, 1211.5, 1212, 1215, 1217, 1220, and 1225, Register 01, No. 25, effective
July 20, 2001 and Register 03, No. 18, effective May 1, 2003¹

High School Exit Examination (00-TC-06)

As Alleged to be Modified by:

Statutes 2015, Chapter 572 (SB 172) and Statutes 2017, Chapter 641 (AB 830)

17-MR-01

Department of Finance, Requester

¹ The captions for the Test Claim Decision and Parameters and Guidelines for *High School Exit Examination*, 00-TC-06 included Education Code sections 60853 and 60855 and Sections “1200-1225” of the Title 5 regulations, all of which implement the California High School Exit Examination. However, sections 60853 and 60855 were denied by the Commission as not imposing any state-mandated duties on school districts and thus should not have been included in the caption for the Parameters and Guidelines. (Exhibit B, Test Claim Statement of Decision, pages 12, 15, 32.) In addition, the Parameters and Guidelines identify only the following regulations as imposing reimbursable state-mandated activities: California Code of Regulations, title 5, sections 1200, 1203, 1205, 1206, 1207, 1208, 1209, 1210, 1211, 1211.5, 1212, 1215, 1217, and 1220. (Exhibit B, Test Claim Statement of Decision, pages 43-47, 48; Exhibit C, Parameters and Guidelines, pages 3-7.) The Parameters and Guidelines, however, mistakenly omit a citation to section 1225 of the Title 5 regulations. As determined in the Test Claim Decision, section 1225 of the Title 5 regulations mandated the district superintendent to certify the accuracy of information regarding the number of exams for each test cycle to the California Department of Education (CDE) within a specified time. (Exhibit B, Test Claim Statement of Decision, pages 36, 48.) The Commission approved the activity mandated by section 1225 as a reimbursable state-mandated activity, and CDE did not later amend or move that activity to another regulation. (Exhibit B, Test Claim Statement of Decision, page 48.) Although that activity is correctly included in the Parameters and Guidelines, it is followed by an incorrect citation to section 1207. Therefore, the caption to this Mandate Redetermination includes all regulations mandating the activities approved by the Commission for reimbursement.

EXECUTIVE SUMMARY

Overview

On March 25, 2004, the Commission on State Mandates (Commission) adopted the Test Claim Decision finding that Education Code sections 60850 and 60851, as added by Statutes 1999x, Chapter 1 (SB 2) and Statutes 1999, Chapter 135 (AB 2539), and California Code of Regulations, title 5, sections 1200, 1203, 1205, 1206, 1207, 1208, 1209, 1210, 1211, 1211.5, 1212, 1215, 1217, 1220, and 1225 as added by Register 01, No. 25, effective July 20, 2001 and Register 03, No. 18, effective May 1, 2003 which implement the Education Code sections, impose a reimbursable state-mandated new program on school districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.² The Commission approved the Test Claim and Parameters and Guidelines for activities which generally included providing notice to parents of transfer students informing them of the High School Exit Examination (HSEE) and its requirements; maintaining documentation of that notice; determining whether English-learning pupils possessed sufficient English language skills at the time of the HSEE to be assessed with the HSEE; administration of the HSEE to all pupils in grade 10, beginning in the 2001-2002 school year; maintaining security during the HSEE and preventing cheating; and providing HSEE data to the Superintendent of Public Instruction (SPI).³

Effective January 1, 2016, Statutes 2015, chapter 572 added sections 60851.5 and 60851.6 to the Education Code. Section 60851.5 provides that “Notwithstanding Section 60851, the administration of the high school exit examination, and the requirement that each pupil completing grade 12 successfully pass the high school exit examination as a condition of receiving a diploma of graduation or a condition of graduation from high school, shall be suspended for the 2015-16, 2016-17, and 2017-18 school years.” Section 60851.6 provides that “Notwithstanding Section 60851 or any other law, the governing board or body of a local educational agency, and the department on behalf of state special schools, shall grant a diploma of graduation from high school to any pupil who completed grade 12 in the 2003–04 school year or a subsequent school year and has met all applicable graduation requirements other than the passage of the high school exit examination.”

Effective January 1, 2018, Statutes 2017, chapter 641, repealed Chapter 9 of Part 33 of Division 4 of Title 2 of the Education Code, commencing with section 60850 and including sections 60851, 60853, and 60855, all pertaining to the HSEE.

After the request for Mandate Redetermination was filed, California Code of Regulations, title 5, sections 1200, 1203, 1205, 1206, 1207, 1208, 1209, 1210, 1211, 1211.5, 1212, 1215, 1217, 1220, and 1225, as added by Register 01, No. 25 and Register 03, No. 18, which were found to impose a reimbursable state mandate by the Commission in *High School Exit Examination*, 00-TC-06, were repealed in accordance with the repeal of the test claim statutes.⁴

² Exhibit B, Test Claim Statement of Decision.

³ Exhibit B, Test Claim Statement of Decision; and Exhibit C, Parameters and Guidelines.

⁴ California Code of Regulations, title 5, sections 1200-1225 were repealed effective February 19, 2019, pursuant to California Code of Regulations, title 1, section 100. (Register 2019, No. 8.)

The Department of Finance (Finance) contends that the state's liability pursuant to article XIII B, section 6(a) of the California Constitution, for the *High School Exit Examination*, 00-TC-06 mandate has been modified, and is no longer required, based on Statutes 2015, chapter 572 and Statutes 2017, chapter 641, the subsequent change in law.⁵

Procedural History

On June 28, 2018, Finance filed the Request for Mandate Redetermination.⁶ On August 31, 2018, the State Controller (Controller) filed comments concurring with Finance's request.⁷ On April 30, 2019, Commission Staff issued the Draft Proposed Decision for the first hearing.⁸ No comments were filed on the Draft Proposed Decision.

Commission Responsibilities

Government Code section 17570 provides a process whereby a previously determined mandate finding can be redetermined by the Commission, based on a subsequent change in law. The redetermination process provides for a two hearing process. The Commission's regulations state:

The first hearing shall be limited to the issue of whether the requester has made an adequate showing which identifies a subsequent change in law as defined by Government Code section 17570, material to the prior test claim decision, that may modify the state's liability pursuant to article XIII B, section 6(a) of the California Constitution. The Commission shall find that the requester has made an adequate showing if it finds that the request, when considered in light of all of the written comments and supporting documentation in the record of this request, has a substantial possibility of prevailing at the second hearing.⁹

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

[A] change in law that requires a finding that an incurred cost is a cost mandated by the state, as defined by Section 17514, or is not a cost mandated by the state pursuant to Section 17556, or a change in mandates law, except that a "subsequent change in law" does not include the amendments to Section 6 of Article XIII B of the California Constitution that were approved by the voters on November 2, 2004. A "subsequent change in law" also does not include a change in the statutes or executive orders that impose new state-mandated activities and require a finding pursuant to subdivision (a) of Section 17551.¹⁰

An "adequate showing" is determined in the Commission's regulations as follows:

⁵ Exhibit A, Request for Mandate Redetermination, pages 5-6.

⁶ Exhibit A, Request for Mandate Redetermination.

⁷ Exhibit D, Controller's Comments on the Request for Mandate Redetermination.

⁸ Exhibit E, Draft Proposed Decision, First Hearing.

⁹ California Code of Regulations, title 2, section 1190.5(a)(1) (Register 2014, No. 21).

¹⁰ Government Code section 17570(a)(2).

The Commission shall find that the requester has made an adequate showing if it finds that the request, when considered in light of all of the written comments and supporting documentation in the record of this request, has a substantial possibility of prevailing at the second hearing.¹¹

If the Commission finds, at the first hearing, that:

The requester has made an adequate showing, when considered in light of all of the written comments, rebuttals and supporting documentation in the record and testimony at the hearing, the Commission shall publish a decision finding that an adequate showing has been made and setting the second hearing on whether the Commission shall adopt a new test claim decision to supersede the previously adopted test claim decision.¹²

Thus, the first hearing in the mandate redetermination process is to determine, pursuant to the Government Code and the Commission's regulations, only whether the requester has made an adequate showing that the state's liability may be modified based on a subsequent change in law, as defined. Therefore, this analysis will be limited to whether "the request, when considered in light of all of the written comments and supporting documentation in the record of this request, has a substantial possibility of prevailing at the second hearing."¹³ If the Commission finds that there has been an adequate showing, a thorough mandates analysis to determine whether and to what extent the state's liability has been modified, considering the applicable law, the arguments put forth by the parties and interested parties, and the facts in the record, will be prepared for the second hearing on this matter.

Staff Analysis

Staff finds that Finance has made an adequate showing that the state's liability pursuant to article XIII B, section 6(a) of the California Constitution, for the *High School Exit Examination*, 00-TC-06 mandate may be modified based on a subsequent change in law, such that Finance has a substantial probability of prevailing at the second hearing.

Specifically, Statutes 2015, chapter 572, section 2 suspended administration of the high school exit examination (HSEE, or CAHSEE) for the 2015-2016, 2016-2017, and 2017-2018 school years, and also suspended the requirement that each pupil completing grade 12 in said years successfully pass the high school exit examination in order to receive a diploma of graduation or to graduate from high school. Statutes 2017, chapter 641, section 16, effective January 1, 2018, then expressly repealed the statutes that impose the mandate.

After the Request for Mandate Redetermination was filed, the regulations were repealed effective February 19, 2019.¹⁴ And though the repealed regulations were not pled in the Request for Mandate Redetermination, it is established law that "[w]hensoever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret,

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

¹² California Code of Regulations, title 2, section 1190.5(a)(5)(B) (Register 2014, No. 21).

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

¹⁴ Register 2019, No. 8.

make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.”¹⁵ As the statutes giving rise to the test claim regulations were suspended and then repealed by the 2015 and 2017 statutes, the regulations thus became invalid at that time.

Pursuant to Government Code section 17570(d)(4), staff recommends that the Commission hold a second hearing to determine if a new test claim decision shall be adopted to supersede the previously adopted Test Claim Decision.

Staff Recommendation

Staff recommends that the Commission adopt the Proposed Decision and, pursuant to Government Code sections 17570(b) and 17570(d)(4), direct staff to notice the second hearing to determine if a new test claim decision shall be adopted to supersede the previously adopted Test Claim Decision. If the Commission adopts the attached Proposed Decision, the second hearing for this matter will be set for September 27, 2019.

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

¹⁵ Government Code, section 11342.2.

COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

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

Education Code Sections 60850, 60851, Statutes of 1999x, Chapter 1 (SB 2) and Statutes of 1999, Chapter 135 (AB 2539) California Code of Regulations, Title 5, Sections 1200, 1203, 1205, 1206, 1207, 1208, 1209, 1210, 1211, 1211.5, 1212, 1215, 1217, 1220, and 1225, Register 01, No. 25, effective July 20, 2001 and, Register 03, No. 18, effective May 1, 2003¹⁶

As Alleged to be Modified by:

Statutes 2015, Chapter 572 (SB 172) and Statutes 2017, Chapter 641 (AB 830)

Filed on June 28, 2018

By the Department of Finance, Requester

Case No.: 17-MR-01

High School Exit Examination (00-TC-06)

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

(Adopted July 26, 2019)

¹⁶ The captions for the Test Claim Decision and Parameters and Guidelines for *High School Exit Examination*, 00-TC-06 included Education Code sections 60853 and 60855 and Sections “1200-1225” of the Title 5 regulations, all of which implement the California High School Exit Examination. However, sections 60853 and 60855 were denied by the Commission as not imposing any state-mandated duties on school districts and thus should not have been included in the caption for the Parameters and Guidelines. (Exhibit B, Test Claim Statement of Decision, pages 12, 15, 32.) In addition, the Parameters and Guidelines identify only the following regulations as imposing reimbursable state-mandated activities: California Code of Regulations, title 5, sections 1200, 1203, 1205, 1206, 1207, 1208, 1209, 1210, 1211, 1211.5, 1212, 1215, 1217, and 1220. (Exhibit B, Test Claim Statement of Decision, pages 43-47, 48; Exhibit C, Parameters and Guidelines, pages 3-7.) The Parameters and Guidelines, however, mistakenly omit a citation to section 1225 of the Title 5 regulations. As determined in the Test Claim Decision, section 1225 of the Title 5 regulations mandated the district superintendent to certify the accuracy of information regarding the number of exams for each test cycle to CDE within a specified time. (Exhibit B, Test Claim Statement of Decision, pages 36, 48.) The Commission approved the activity mandated by section 1225 as a reimbursable state-mandated activity, and the California Department of Education (CDE) did not later amend or move that activity to another regulation. (Exhibit B, Test Claim Statement of Decision, page 48.) Although that activity is correctly included in the Parameters and Guidelines, the activity is followed by an incorrect citation to section 1207. Therefore, the caption to this Mandate Redetermination includes all regulations mandating the activities approved by the Commission for reimbursement.

DECISION

The Commission on State Mandates (Commission) heard and decided this Mandate Redetermination during a regularly scheduled hearing on July 26, 2019. [Witness list will be included in the adopted Decision.]

Government Code section 17570 and section 1190.1 et seq. of the Commission's regulations establish the mandate redetermination process. In addition, the laws applicable to the Commission's determination of a reimbursable state-mandated program are article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., title 2, California Code of Regulations 1181.1 et seq., and related case law.

The Commission adopted the Proposed Decision at the hearing by a vote of [vote will be included in the adopted Decision], and [directed/did not direct] staff to notice a second hearing to determine whether to adopt a new Test Claim Decision to supersede the previously adopted Test Claim Decision as follows:

Member	Vote
Lee Adams, County Supervisor	
Keely Bosler, Director of the Department of Finance, Chairperson	
Mark Hariri, Representative of the State Treasurer	
Jeannie Lee, Representative of the Director of the Office of Planning and Research	
Sarah Olsen, Public Member	
Carmen Ramirez, City Council Member	
Jacqueline Wong-Hernandez, Representative of the State Controller, Vice Chairperson	

Summary of the Findings

The Commission finds that the Department of Finance (Finance) has made an adequate showing that the state's liability pursuant to article XIII B, section 6(a) of the California Constitution, for the *High School Exit Examination*, 00-TC-06 mandate may be modified based on a subsequent change in law, such that Finance has a substantial probability of prevailing at the second hearing. Specifically, Statutes 2015, chapter 572, section 2 suspended administration of the high school exit examination (HSEE, or CAHSEE) for the 2015-2016, 2016-2017, and 2017-2018 school years, and also suspended the requirement that each pupil completing grade 12 in said years successfully pass the high school exit examination in order to receive a diploma of graduation or to graduate from high school. Statutes 2017, chapter 641, section 16, effective January 1, 2018, then expressly repealed the statutes that impose the mandate.

After the Request for Mandate Redetermination was filed, the regulations were repealed effective February 19, 2019. And though the repealed regulations were not pled in the Request for Mandate Redetermination, it is established law that "[w]henver by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid

or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.”¹⁷ As the statutes giving rise to the test claim regulations were suspended and then repealed by the 2015 and 2017 statutes, the regulations thus became invalid at that time. Pursuant to Government Code section 17570(d)(4), the Commission will hold a second hearing to determine if a new test claim decision shall be adopted to supersede the previously adopted Test Claim Decision.

COMMISSION FINDINGS

I. Chronology

- | | |
|------------|---|
| 06/28/2018 | Finance filed the Request for Mandate Redetermination. ¹⁸ |
| 08/31/2018 | The State Controller’s Office (Controller) filed comments on the Request for Mandate Redetermination. ¹⁹ |
| 04/30/2019 | Commission staff issued the Draft Proposed Decision, First Hearing. ²⁰ |

II. Background

On March 25, 2004, the Commission adopted the Test Claim Statement of Decision in *High School Exit Examination*, 00-TC-06, finding that Education Code sections 60850 and 60851, Statutes 1999x, Chapter 1 (SB 2) and Statutes 1999, Chapter 135 (AB 2539), and Regulations, title 5, sections 1200, 1203, 1205, 1206, 1207, 1208, 1209, 1210, 1211, 1211.5, 1212, 1215, 1217, 1220, and 1225, as added by Register 01, No. 25 and Register 03, No. 18, which implement the Education Code sections, impose a reimbursable state-mandated new program on school districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. On April 26, 2006, the Commission adopted the Parameters and Guidelines approving reimbursement for the following reimbursable activities:

- A. Adequate notice:** Notifying parents of *transfer* students who enroll after the first semester or quarter of the regular school term that, commencing with the 2003-04 school year, and each school year thereafter, each pupil completing 12th grade will be required to successfully pass the HSEE. The notification shall include, at a minimum, the date of the HSEE, the requirements for passing the HSEE, the consequences of not passing the HSEE, and that passing the HSEE is a condition of graduation (Ed. Code, § 60850, subds. (e)(1) & (f)(1)). Reimbursement is provided for notices delivered by the student or by U.S. Mail.
- B. Documentation of adequate notice:** Maintaining documentation that the parent or guardian of each pupil received written notification of the HSEE. (Cal. Code Regs., tit. 5, § 1208.) Documentation may include a written copy of the notice or a record of mailing the notice.

¹⁷ Government Code, section 11342.2.

¹⁸ Exhibit A, Request for Mandate Redetermination.

¹⁹ Exhibit D, Controller’s Comments on the Request for Mandate Redetermination.

²⁰ Exhibit E, Draft Proposed Decision, First Hearing.

- C. Determining English language skills:** Determining whether English-learning pupils²¹ possess sufficient English language skills at the time of the HSEE to be assessed²² with the HSEE (Cal. Code Regs., tit. 5, § 1217.)
- D. HSEE administration:** Administration of the HSEE on SPI designated dates to all pupils in grade 10 beginning in the 2001-2002 school year, and subsequent administrations for students who do not pass until each section of the HSEE has been passed, and administration of the HSEE on SPI designated dates to pupils in grade 9 only in the 2000-2001 school year who wish to take the HSEE (Ed. Code, § 60851, subd. (a)).

A teacher's time administering the HSEE during the school day is not reimbursable for any of the following activities. Administration is limited to the following activities specified in the regulations:

1. Training a test examiner either by a test site or district coordinator as provided in the test publisher's manual (Cal. Code Regs., tit. 5, §§ 1200, subd. (g) and 1210, subd. (c)(3)).
2. Allowing pupils to have additional time to complete the HSEE within the test security limits provided in section 1211, but only if additional time is not specified in the pupil's Individual Education Program (IEP) (§ 1215, subd. (a)(1)).
3. Accurately identifying eligible pupils who take the HSEE by school personnel at the test site through the use of photo-identification, positive recognition by the test examiner, or some equivalent means of identification. (Cal. Code Regs., tit. 5, § 1203.)
4. Maintaining a record of all pupils who participate in each test cycle of the HSEE, including the date each section was offered, the name and grade level of each pupil who took each section, and whether each pupil passed or did not pass the section or sections of the HSEE taken. (Cal. Code Regs., tit. 5, § 1205.)
5. Maintaining in each pupil's permanent record and entering in it prior to the subsequent test cycle the following: the date the pupil took each section of the HSEE and whether or not the pupil passed each section of the HSEE. (Cal. Code Regs., tit. 5, § 1206.)
6. Designation by the district superintendent, on or before July 1 of each year, of a district employee as the HSEE district coordinator, and notifying the publisher of the HSEE of the identity and contact information of that individual. (Cal. Code Regs., tit. 5, § 1209.)
7. For the district coordinator and superintendent, within seven days of completion of the district testing, to certify to CDE that the district has maintained the security and integrity of the exam, collected all data and information as required, and returned all test materials, answer documents, and other materials included as

²¹ As defined in Education Code section 435, subdivision (a).

²² Criteria are identified in Education Code section 313.

part of the HSEE in the manner required by the publisher. (Cal. Code Regs., tit. 5, § 1209.)

8. Designation annually by the district superintendent a HSEE test site coordinator for each test site (as defined) from among the employees of the school district who is to be available to the HSEE district coordinator to resolve issues that arise as a result of administration of the HSEE. (Cal. Code Regs., tit. 5, § 1210.)
9. The HSEE district coordinator's duties listed in section 1209 and referenced below.

District Coordinator duties are: (1) responding to inquiries of the publisher, (2) determining district and school HSEE test material needs, (3) overseeing acquisition and distribution of the HSEE, (4) maintaining security over the HSEE using the procedures in section 1211, (5) overseeing administration of the HSEE in accordance with the manuals or other instructions provided by the test publisher for administering and returning the test, (6) overseeing collection and return of test material and test data to the publisher, (7) assisting the publisher in resolving discrepancies in the test information and materials, (8) ensuring all exams and materials are received from school test sites no later than the close of the school day on the school day following administration of the HSEE, (9) ensuring all exams and materials received from school test sites have been placed in a secure district location by the end of the day following administration of those tests, (10) ensuring that all exams and materials are inventoried, packaged, and labeled in accordance with instructions from the publisher and ensuring the materials are ready for pick-up by the publisher no more than five working days following administration of either section in the district, (11) ensuring that the HSEE and test materials are retained in a secure, locked location in the unopened boxes in which they were received from the publisher from the time they are received in the district until the time of delivery to the test sites; (12) within seven days of completion of the district testing, certifying with the Superintendent to CDE that the district has maintained the security and integrity of the exam, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the HSEE in the manner required by the publisher.

10. The HSEE test site coordinator's duties listed in section 1210 and referenced below. This individual is to be available to the HSEE district coordinator to resolve issues that arise as a result of administration of the HSEE.

Test site coordinator's duties are: (1) determining site examination and test material needs; (2) arranging for test administration at the site; (3) training the test examiner(s) as provided in the test publisher's manual; (4) completing the Test Security Agreement and Test Security Affidavit prior to the receipt of test materials; (5) overseeing test security requirements, including collecting and filing all Test Security Affidavit forms from the test examiners and other site personnel involved with testing; (6) maintaining security over the examination and test data as required by section 1211; (7) overseeing the acquisition of

examinations from the school district and the distribution of examinations to the test examiner(s); (8) overseeing the administration of the HSEE to eligible pupils at the test site; (9) overseeing the collection and return of all testing materials to the HSEE district coordinator no later than the close of the school day on the school day following administration of the high school exit examination; (10) assisting the HSEE district coordinator and the test publisher in the resolution of any discrepancies between the number of examinations received from the HSEE district coordinator and the number of examinations collected for return to the HSEE district coordinator; (11) overseeing the collection of all pupil data as required to comply with sections 1205, 1206 and 1207 of the title 5 regulations; (12) within three (3) working days of completion of site testing, certifying with the principal to the HSEE district coordinator that the test site has maintained the security and integrity of the examination, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the HSEE in the manner and as otherwise required by the publisher. The principal's activities may or may not be reimbursable, depending on whether the principal is acting as an HSEE district or test-site coordinator or test examiner.

11. Delivery of HSEE booklets to the school test site no more than two working days before the test is to be administered. (Cal. Code Regs., tit. 5, § 1212.) **This activity was repealed on May 19, 2004, therefore this activity is not reimbursable after May 18, 2004.**

E. Test security/cheating: Doing the following to maintain security:

1. For HSEE test site coordinators to ensure that strict supervision is maintained over each pupil being administered the HSEE, both while in the testing room and during any breaks (§ 1210, subd. (c)(7)(B)).
2. Limiting access to the HSEE to pupils taking it and employees responsible for its administration (§ 1211, subd. (a)).
3. Having all HSEE district and test site coordinators sign the HSEE Test Security Agreement set forth in subdivision (b) of section 1211.5 of the title 5 regulations. (Cal. Code Regs., tit. 5, § 1210, subd. (c)(5).)
4. Abiding by the Test Security Agreement by limiting access to persons in the district with a responsible, professional interest in the test's security. The Agreement also requires the coordinator to keep on file the names of persons having access to exam and test materials, and who are required to sign the HSEE Test Security Affidavit, and requires coordinators to keep the tests and test materials in a secure, locked location, limiting access to those responsible for test security, except on actual testing dates. (Cal. Code Regs., tit. 5, § 1210 (c)(5), § 1211, subd. (a), § 1211.5 (b)(4).)
5. HSEE test site coordinators deliver the exams and test materials only to those actually administering the exam on the date of testing and only on execution of the HSEE Test Security Affidavit (Cal. Code Regs., tit. 5, § 1210, subd. (c)(7)(A)).

6. For persons with access to the HSEE (including test site coordinators and [sic] testexaminers) to acknowledge the limited purpose of their access to the test by signing the HSEE Test Security Affidavit set forth in subdivision (g). (Cal. Code Regs., tit. 5, § 1211.5, subd. (c).)
7. HSEE district and test site coordinators control of inventory and use of appropriate inventory control forms to monitor and track test inventory. (Cal. Code Regs., tit. 5, § 1211 subd. (b).)
8. Being responsible for the security of the test materials delivered to the district until the materials have been inventoried, accounted for, and delivered to the common or private carrier designated by the publisher. (Cal. Code Regs., tit. 5, § 1211, subd. (c).)
9. Providing secure transportation within the district for test materials once they have been delivered to the district. (Cal. Code Regs., tit. 5, § 1211, subd. (d).)
10. Not scoring the test for any pupil found to have cheated or assisted others in cheating, or who has compromised the security of the HSEE, and notifying each eligible pupil before administration of the HSEE of these consequences of cheating. (Cal. Code Regs., tit. 5, § 1220.)

F. Reporting data to the SPI: Providing HSEE data to the SPI or independent evaluators or the publisher is reimbursable. Specifically, providing the following information on each pupil tested: (1) date of birth, (2) grade level, (3) gender, (4) language fluency and home language, (5) special program participation, (6) participation in free or reduced priced meals, (7) enrolled in a school that qualifies for assistance under Title 1 of the Improving America's School Act of 1994, (8) testing accommodations, (9) handicapping condition or disability, (10) ethnicity, (11) district mobility, (12) parent education, (13) post-high school plans. (§ 1207); and reporting to the CDE the number of examinations for each test cycle within 10 working days of completion of each test cycle in the school district, and for the district superintendent to certify the accuracy of this information submitted to CDE (§ 1207).

The regulation (§1207) was amended in May 2004 and August 2005 to add the following data that must be submitted to the state (which are not reimbursable under these parameters and guidelines): (1) pupil's full name; (2) date of English proficiency reclassification; (3) if R-FEP pupil scored proficient or above on the California English-Language Arts Standards Test three (3) times since reclassification; (4) use of modifications during the exam [accommodations are reimbursed]; (5) participation in California Alternate Performance Assessment (CAPA); (6) school and district CBEDS enrollment; (7) district and county of residence for students with disabilities; (8) California School Information Services (CSIS) Student Number, once assigned.²³

The Alleged Subsequent Change in Law

Effective January 1, 2016, Statutes 2015, chapter 572 added sections 60851.5 and 60851.6 to the Education Code. Section 60851.5 provides that "Notwithstanding Section 60851, the

²³ Exhibit C, Parameters and Guidelines.

administration of the high school exit examination, and the requirement that each pupil completing grade 12 successfully pass the high school exit examination as a condition of receiving a diploma of graduation or a condition of graduation from high school, shall be suspended for the 2015-16, 2016-17, and 2017-18 school years.” Section 60851.6 provides that “Notwithstanding Section 60851 or any other law, the governing board or body of a local educational agency, and the department on behalf of state special schools, shall grant a diploma of graduation from high school to any pupil who completed grade 12 in the 2003–04 school year or a subsequent school year and has met all applicable graduation requirements other than the passage of the high school exit examination.”

Effective January 1, 2018, Statutes 2017, chapter 641 repealed Chapter 9 of Part 33 of Division 4 of Title 2 of the Education Code, commencing with section 60850, all pertaining to the HSEE.

After the request for Mandate Redetermination was filed, California Code of Regulations, title 5, sections 1200, 1203, 1205, 1206, 1207, 1208, 1209, 1210, 1211, 1211.5, 1212, 1215, 1217, 1220, and 1225, as added by Register 01, No. 25 and Register 03, No. 18, which were found to impose reimbursable state mandate by the Commission in *High School Exit Examination*, 00-TC-06, were repealed effective February 19, 2019, in accordance with the repeal of the test claim statutes.²⁴

Mandate Redetermination Process under Section 17570

Government Code section 17570 provides a process for a test claim decision to be redetermined and superseded by a new test claim decision if a subsequent change in law, as defined, has modified the state’s liability for reimbursement. The redetermination process calls for a two-hearing process. At the first hearing, the requester must make “an adequate showing which identifies a subsequent change in law as defined by Government Code section 17570, material to the prior test claim decision, that may modify the state’s liability pursuant to Article XIII B, section 6(a) of the California Constitution.”²⁵ A subsequent change in law is defined in section 17570 as follows:

[A] change in law that requires a finding that an incurred cost is a cost mandated by the state, as defined by Section 17514, or is not a cost mandated by the state pursuant to Section 17556, or a change in mandates law, except that a “subsequent change in law” does not include the amendments to Section 6 of Article XIII B of the California Constitution that were approved by the voters on November 2, 2004. A “subsequent change in law” also does not include a change in the statutes or executive orders that impose new state-mandated activities and require a finding pursuant to subdivision (a) of Section 17551.²⁶

An “adequate showing” is determined in the Commission’s regulations as follows:

²⁴ California Code of Regulations, title 5, sections 1200-1225 were repealed effective February 19, 2019, pursuant to California Code of Regulations, title 1, section 100. (Register 2019, No. 8.)

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

²⁶ Government Code section 17570, as added by Statutes 2010, chapter 719 (SB 856).

The Commission shall find that the requester has made an adequate showing if it finds that the request, when considered in light of all of the written comments and supporting documentation in the record of this request, has a substantial possibility of prevailing at the second hearing.²⁷

If the Commission finds, at the first hearing, that:

The requester has made an adequate showing, when considered in light of all of the written comments, rebuttals and supporting documentation in the record and testimony at the hearing, the Commission shall publish a decision finding that an adequate showing has been made and setting the second hearing on whether the Commission shall adopt a new test claim decision to supersede the previously adopted test claim decision.²⁸

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

A. Department of Finance, Requester

Finance asserts that Statutes 2015, chapter 572, effective January 1, 2016, “suspended the administration of the [HSEE] and the requirement that students must pass the [HSEE] to graduate high school for school years 2015-16 through 2017-18, and retroactively granted high school diplomas to grade 12 students who successfully fulfilled graduation requirements but did not graduate as a result of not passing the [HSEE].”²⁹ Finance also asserts that Statutes 2017, chapter 641, effective January 1, 2018, “repealed the authorizing statutes for the [HSEE], effectively terminating the administration of the [HSEE].”³⁰

Accordingly, Finance states that “[g]iven the suspension and repeal of the authorizing statute, any required activities pursuant to the California Code of Regulations related to the [HSEE] are unsupported by statute and should no longer be a basis for mandated activities.”³¹ Finance concludes that “the reimbursable activities identified in the High School Exit Examination Statement of Decision (00-TC-06) cease to be eligible for reimbursements effective January 1, 2016. Therefore, based on the change in law, the state’s liability for mandate reimbursement pursuant to Article XIII B, Section 6 of the California Constitution should be zero.”³² Finance did not comment on the Draft Proposed Decision.

B. State Controller’s Office

The Controller concurs with Finance’s request to adopt a new test claim decision “to supersede the prior decision on the High School Exit Examination mandate program based upon the

²⁷ California Code of Regulations, title 2, section 1190.5(a)(1) (Register 2014, No. 21).

²⁸ California Code of Regulations, title 2, section 1190.5(a)(5)(B) (Register 2014, No. 21).

²⁹ Exhibit A, Request for Mandate Redetermination, page 5.

³⁰ Exhibit A, Request for Mandate Redetermination, page 5.

³¹ Exhibit A, Request for Mandate Redetermination, page 5.

³² Exhibit A, Request for Mandate Redetermination, page 6.

suspension and repeal of the authorizing statute.”³³ The Controller did not comment on the Draft Proposed Decision.

C. School Districts

No comments have been filed by any of the eligible claimant school districts or any of the school district associations that represent them.

IV. Discussion

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

The first hearing in the mandate redetermination process is to determine, pursuant to the Government Code and the Commission’s regulations, only whether the requester has made an adequate showing that the state’s liability has been modified based on a subsequent change in law, as defined. Therefore, the analysis will be limited to whether “the request, when considered in light of all of the written comments and supporting documentation in the record of this request, has a substantial possibility of prevailing at the second hearing.”³⁴ If answered in the affirmative, a thorough mandates analysis to determine whether and to what extent the state’s liability has been modified, considering the applicable law, the arguments put forth by the parties and interested parties, and the facts in the record, will then be prepared for the second hearing on this matter.

A. Statutes 2015, Chapter 572 and Statutes 2017, Chapter 641 Constitute a Subsequent Change in Law, Within the Meaning of Government Code Section 17570.

Government Code section 17570(b) states that the Commission may adopt a new test claim decision to supersede a previously adopted test claim decision only upon a showing that, pursuant to article XIII B section 6, the state’s liability has been modified based on a subsequent change in law. A subsequent change in law is defined in Government Code section 17570(a)(2) as:

A change in law that requires a finding that an incurred cost is a cost mandated by the state, as defined by Section 17514, or is not a cost mandated by the state pursuant to Section 17556, or a change in mandates law, except that a

³³ Exhibit D, Controller’s Comments on the Request for Mandate Redetermination.

³⁴ California Code of Regulations, title 2, section 1190.5(a)(1) (Register 2014, No. 21). This regulation describes the standard for the first hearing as follows:

The first hearing shall be limited to the issue of whether the requester has made an adequate showing which identifies a subsequent change in law as defined by Government Code section 17570, material to the prior test claim decision, that may modify the state’s liability pursuant to article XIII B, section 6(a) of the California Constitution. The Commission shall find that the requester has made an adequate showing if it finds that the request, when considered in light of all of the written comments and supporting documentation in the record of this request, has a substantial possibility of prevailing at the second hearing.

“subsequent change in law” does not include the amendments to Section 6 of Article XIII B of the California Constitution that were approved by the voters on November 2, 2004. A “subsequent change in law” also does not include a change in the statutes or executive orders that impose new state-mandated activities and require a finding pursuant to subdivision (a) of Section 17551.³⁵

Finance, in its request, alleges that a subsequent change in law requires a finding that there are no longer any costs mandated by the state, in that Statutes 2015, chapter 572 suspended, and Statutes 2017, chapter 641 repealed the statutory provisions that make up the mandate, and thus all force and effect of the regulatory provisions implementing the test claim statutes has been removed.³⁶

The Test Claim Decision found that certain provisions in sections 60850 and 60851 imposed reimbursable activities – specifically, to provide adequate notice to parents or guardians of transfer students about the HSEE and to administer the HSEE.³⁷

The Commission finds that Statutes 2015, chapter 572, and Statutes 2017, chapter 641, constitute a subsequent change in law within the meaning of Government Code section 17570.

Statutes 2015, chapter 572 became effective January 1, 2016, and added section 60851.5 to the Education Code to provide that “Notwithstanding Section 60851, the administration of the high school exit examination, and the requirement that each pupil completing grade 12 successfully pass the high school exit examination as a condition of receiving a diploma of graduation or a condition of graduation from high school, shall be suspended for the 2015-16, 2016-17, and 2017-18 school years.” The statute also added section 60851.6, which provides that “Notwithstanding Section 60851 or any other law, the governing board or body of a local educational agency, and the department on behalf of state special schools, shall grant a diploma of graduation from high school to any pupil who completed grade 12 in the 2003–04 school year or a subsequent school year and has met all applicable graduation requirements other than the passage of the high school exit examination.”

On that same day, the California Department of Education sent a letter to all county and district school superintendents, and copied the letter to “CAHSEE District Coordinators,” which stated the following:

[SB 172] suspends the administration of the California High School Exit Examination (CAHSEE) and the requirement that students completing grade twelve successfully pass the high school exit examination as a condition of receiving a diploma of graduation from high school for the 2015–16, 2016–17, and 2017–18 school years. The law also requires local educational agencies (LEAs) to grant a diploma to any student who completed grade twelve in the 2003–04 school year, or a subsequent school year, and has met all applicable graduation requirements other than passage of the high school exit examination.

³⁵ Government Code section 17570(a)(2).

³⁶ Exhibit A, Request for Mandate Redetermination, pages 5-6.

³⁷ Exhibit B, Test Claim Statement of Decision, pages 16-27.

The law will not take effect until January 1, 2016, at which time LEAs shall be permitted to issue diplomas to eligible students.³⁸

The letter also stated that “With the signing of SB 172, there will be no administrations of the CAHSEE for the 2015–16, 2016–17, and 2017–18 school years. Students are encouraged to work with their local school district and adult education program to meet local and state graduation requirements.”³⁹

Statutes 2017, chapter 641, effective January 1, 2018, then repealed all the sections in the Education Code regarding the creation and administration of the HSEE, and was specifically intended to “eliminate the [HSEE]” and “remove it as a condition of receiving a diploma of graduation or a condition of graduation from high school.”⁴⁰

The Statement of Decision and the Parameters and Guidelines for *High School Exit Examination*, 00-TC-06 found reimbursable activities imposed by California Code of Regulations, title 5, sections 1200(g), 1203, 1205, 1206, 1207, 1208, 1209, 1210, 1210(c)(3), 1210(c)(5), 1210(c)(7)(A), 1210(c)(7)(B), 1211(a), 1211.5(b), 1211.5(b)(4), 1211.5(c), 1212, 1215(a)(1) 1217, 1220, and 1225.⁴¹ All these regulatory sections are located in Subchapter 6 of Chapter 2 of Division 1 of Title 5 of the California Code of Regulations, with Subchapter 6 pertaining solely to the HSEE.⁴² In addition, the entirety of Chapter 9 of Part 33 of Division 4 of Title 2 of the Education Code, which pertained solely to the creation and administration of the HSEE, and included sections 60850 and 60851, has been repealed.⁴³ These two statutory sections were the only test claim statutes approved in the Commission’s March 25, 2004 Statement of Decision,⁴⁴ and were the reference and authority for the regulations found to constitute reimbursable activities in the Parameters and Guidelines.⁴⁵ Therefore, all regulatory sections found to impose reimbursable state-mandated activities in the Test Claim were suspended for the 2015-2016, 2016-2017, and 2017-2018 school years when the program was suspended by Statutes 2015, chapter 572, and the Education Code sections approved by the Commission were repealed by Statutes 2017, chapter 641, thus removing the authority for the regulations.

³⁸ Exhibit F, California Department of Education, Letter from Keric Ashley, Deputy Superintendent, District, School, and Innovation Branch, October 7, 2015; <https://www.cde.ca.gov/ta/tg/hs/cahseesuspendltr.asp> (accessed on Nov. 28, 2018).

³⁹ Exhibit F, California Department of Education, Letter from Keric Ashley, Deputy Superintendent, District, School, and Innovation Branch, October 7, 2015; <https://www.cde.ca.gov/ta/tg/hs/cahseesuspendltr.asp> (accessed on Nov. 28, 2018).

⁴⁰ Exhibit A, Request for Mandate Redetermination, page 14.

⁴¹ See, Exhibit B, Test Claim Statement of Decision, pages 42-48; and Exhibit C, Parameters and Guidelines, pages 2-6.

⁴² Register 01, No. 25 and Register 03, No. 18.

⁴³ Stats. 2017, ch. 641 (AB 830), effective January 1, 2018.

⁴⁴ Exhibit B, Test Claim Statement of Decision.

⁴⁵ Exhibit C, Parameters and Guidelines, pages 2-6.

Based on the foregoing, the Commission finds that Statutes 2015, chapter 572, and Statutes 2017, chapter 641, constitute a subsequent change in law, as defined.

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

At this hearing, the Commission is required only to determine whether “the request, when considered in light of all of the written comments and supporting documentation in the record of this request, has a substantial possibility of prevailing at the second hearing.”⁴⁶ If the Commission determines that the request has a substantial possibility of prevailing at the second hearing, the Government Code provides that the Commission shall notice a second hearing to determine if a new test claim decision shall be adopted to supersede the previously adopted Test Claim Decision.⁴⁷

Here, the subsequent changes in law are Statutes 2015, Chapter 572 and Statutes 2017, Chapter 641, which added sections to the Education Code expressly suspending the administration of the HSEE program for the 2015–2016, 2016–2017, and 2017–2018 school years, then repealing the sections serving as the basis for the HSEE regulations. After the request for Mandate Redetermination was filed, the regulations were repealed effective February 19, 2019.⁴⁸ And though the repealed regulations were not pled, it is established law that “[w]henver by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.”⁴⁹ As the statutes giving rise to the test claim regulations were suspended and then repealed by 2015 and 2017 statutes, the regulations thus became invalid at that time.

Therefore, Finance has made an adequate showing that the state's liability may be modified based on Statutes 2015, chapter 572, and Statutes 2017, chapter 641, such that there is a substantial possibility that the request for a new test claim decision will prevail at the second hearing on this matter.

V. Conclusion

Based on the foregoing, the Commission finds that the requester has made an adequate showing that the state's liability for the *High School Exit Examination*, 00-TC-06, mandate may be modified based on a subsequent change in law and that Finance has a substantial probability of prevailing at the second hearing. The Commission hereby directs Commission staff to notice the second hearing for September 27, 2019 to determine whether to adopt a new test claim decision to supersede the Commission's previously adopted Test Claim Decision on *High School Exit Examination*, 00-TC-06.

⁴⁶ California Code of Regulations, title 2, section 1190.5(a)(1) (Register 2014, No. 21).

⁴⁷ Government Code, section 17570(d)(4) (Stats. 2010, ch. 719 (SB 856)).

⁴⁸ Register 2019, No. 8.

⁴⁹ Government Code, section 11342.2.