Exhibit B

DEPARTMENT OF FINANCE
ARNOLD SCHWARZENEGGER, GOVERNOR
915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

March 24, 2005

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Higashi:

As requested in your letter of January 11, 2005, the Department of Finance has reviewed the test claim submitted by the Los Angeles Unified School District (claimant) requesting the Commission to determine whether specified costs incurred under Chapter No. 358, Statutes of 2003, (AB 1124, Nunez) and Chapter No. 909, Statutes of 2003, (SB 892, Murray) are reimbursable state mandated costs (Claim No. CSM-04-TC-01 "Clean School Restrooms"). Commencing with page 8, of the test claim, claimant has identified the following new activities, which it asserts are reimbursable state mandates:

A. Maintaining and cleaning restrooms, keeping restrooms stocked with supplies, and keeping restrooms open for use as needed.
B. Responding to restroom maintenance complaints, including responding directly with the person who complained, participation in resolution procedures, hearings with the State Allocation Board and cost of resolving the deficiency.
C. Taking actions necessary to certify to the State Allocation Board as a condition of receiving deferred maintenance funds, that the district has made a priority use of both restricted maintenance account funding and deferred maintenance funds for keeping restrooms functional and meeting local hygiene standards.

As the result of our review, we have the following comments. First, we agree with the legislative finding referenced on page 2 of the claim and the Governor's signing message referenced on page 3 of the test claim, that it is reasonable to interpret current laws (Education Code Section 17576) to apply to requirements that restrooms be open, clean, operational and supplied with water, soap, toilet paper, and a method for hand drying. It is our understanding that Senator Murray (author of SB 892) assured the Governor's Office that the Legislative Counsel provided a legal opinion that fully supported this reasoning and with that understanding, the bill was signed. A copy of that opinion is attached as Attachment B. We believe the arguments in that opinion fully explain why the activities are not a new program, nor higher level of service.

Second, activities A and B above, as identified by the claimant as resulting in reimbursable state mandates, start out by stating, "Under the penalty of the loss of state deferred maintenance funds, ..." and activity C cites " ... annual applications for state deferred maintenance funds, ..." We note that the deferred maintenance program is a voluntary program as evidenced by the permissive language in Education Code Section 17582(a) (referenced by claimant and attached to the test claim as Exhibit 3, page 306) which states, "The governing board of each school district **may** establish a restricted fund to be known as the "district deferred maintenance fund" for the purpose of ..." (emphasis added).

Additionally, in Section 3 of Part III of the test claim (page 10), claimant makes the following statement: "Education Code Section 17070.75 requires school districts to establish a restricted general fund account to fund the maintenance and repairs of school buildings." We would point out that Education Code Section 17070.75 requires only that an "applicant" school district would need to establish such an account. An applicant school district would be one that would be applying for funds under the School Facilities Program as established by Chapter 407, Statutes of 1998 (SB 50, Greene). We have always maintained that the School Facilities Program is a discretionary program and any requirements of the program are a condition of receiving funds.

Further, we note that the courts have held that costs to a local entity resulting from an action undertaken at the option of the local entity are not reimbursable as "costs mandated by the state". Specifically, in City of Merced v. State of California, 153 Cal. App. 3d 777 (1984), the court said:

> "We agree that the Legislature intended for payment of goodwill to be discretionary. ...whether a city or county decides to exercise eminent domain is, essentially, an option of the city or county, rather than a mandate of the state. The fundamental concept is that the city or county is not required to exercise eminent domain. If, however, the power of eminent domain is exercised, then the city will be required to pay for loss of goodwill. Thus, payment for loss of goodwill is not a state-mandated cost."

In County of Contra Costa v State of California, 177 Cal App. 3d 62,79(1986) the court affirmed the City of Merced decision. Additionally, in Department of Finance v. Commission on State Mandates, 30 Cal.4th 727 (2003), the courts found the no reimbursement is required if the underlying program is voluntary. Based on these court cases, the Department of Finance believes that the activities identified by the claimant are not reimbursable because they are not costs mandated by the state.

In conclusion, the LAUSD tries to make a case that the two new statutes that are subject of this test claim make the state liable for funding all costs in keeping restrooms functioning and open for use as intended. In reality, the two relatively new statutes were a response to negligent practices by school districts in violation of their existing duties. Long standing law (former Education Code Section 18009, enacted by Chapter 362, Statutes of 1947 and subsequently renumbered on various occasions, most recently as Section 17576 by Chapter 277, Statutes of 1996) requires school districts to provide adequate restrooms for the use of students and staff. Merely clarifying that hours of operation should coincide with the students' needs and specifying restrooms should be reasonably clean and operational cannot be considered new duties under any reasonable stretch of the law.

Moreover, explicit in school district agreements to participate in the optional school facility financing programs are requirements to both maintain facilities in good repair and to set aside a minimum (but not a maximum) amount of funds to ensure that outcome. However, the claimant asserts that the optional repair assistance program funding provided by the state in the form of deferred maintenance funding and a school district's own restricted maintenance account funding (intended for maintaining facilities) do not constitute adequate funding for keeping restrooms functional and clean. This is intuitively untrue. The state is not required to provide separate funding for assisting schools with maintenance nor repairs but does so at its option and may condition receipt of those supplementary funds with reasonable expectations such as included in both pieces of legislation. A district setting aside even a minimum amount of money for operational maintenance of all facilities and applying for matching funds for deferred

maintenance assistance should have no problems keeping restrooms in good repair as they constitute a small fraction of the space at any school site. Because adequate restrooms are a health necessity, they are unquestionably a fundamental priority for maintenance. The legislation merely reminds schools of the obvious in this respect, and makes the optional funding program at risk if this duty is ignored.

As required by the Commission's regulations, we are including a "Proof of Service" indicating that the parties included on the mailing list which accompanied your January 11, 2005 letter have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Walt Schaff, Principal Program Budget Analyst at (916) 445-0328 or Keith Gmeinder, state mandates claims coordinator for the Department of Finance, at (916) 445-8913.

Sincerely,

Jeannie Oropeza

Jeannie Oropeza
Program Budget Manager

Attachments

Attachment A

DECLARATION OF WALT SCHAFF
DEPARTMENT OF FINANCE
CLAIM NO. CSM-04-TC-01

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

2. We concur that the Chapter No. 358, Statutes of 2003, (AB 1124, Nunez) and Chapter No. 909, Statutes of 2003, (SB 892, Murray) sections relevant to this claim are accurately quoted in the test claim submitted by claimants and, therefore, we do not restate them in this declaration.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

3/24/05
at Sacramento, CA

Walt Schaff

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Legislative Counsel of California

September 24, 2003

Honorable Kevin Murray
4082 State Capitol

S.B. 892: SCHOOL RESTROOMS - #20250

Dear Senator Murray:

QUESTION

Would Section 35292.5, as proposed to be added to the Education Code by Senate Bill No. 892, as amended September 8, 2003, if enacted, impose a state-mandated local program on school districts for which the state must provide reimbursement under Section 6 of Article XIII B of the California Constitution?

OPINION

Section 35292.5, as proposed to be added to the Education Code by Senate Bill No. 892, as amended September 8, 2003, would not, if enacted, impose a state-mandated local program on school districts for which the state must provide reimbursement under Section 6 of Article XIII B of the California Constitution.

ANALYSIS

Section 6 of Article XIII B of the California Constitution (hereafter Article XIII B) provides that if the Legislature or any agency of the state mandates a new program or higher level of service on any entity of local government, the state is required, with certain exceptions, to provide a subvention of funds to reimburse the local governmental entity for the costs of the new program or higher level of service. An entity of local government is defined for these purposes to include a school district (subd. (a), Sec. 8, Art. XIII B).

Statutory provisions implementing this constitutional reimbursement requirement are contained in Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code and provide a procedure by which local governmental agencies, including school districts, may file with the Commission on State Mandates a claim for reimbursement for costs mandated by the state. Those reimbursable costs are defined for this purpose to mean "any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B..." (Sec. 17514, Gov. C.).

Although the term "program" is not defined for this purpose by statute or the California Constitution, the courts have concluded that it means "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" (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56). Moreover, the phrase "higher level of service" is not defined by statute or the California Constitution. The courts have observed, however, that costs resulting from compliance with a state requirement that goes beyond existing constitutional or case law requirements are reimbursable as a mandated higher level of service (*Long Beach Unified Sch. Dist. v. State of California* (1990) 225 Cal.App.3d 155, 173).

Further, the state may, but is not required to, provide a subvention of funds for, among other things, costs of legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975 (subd. (c), Sec. 6, Art. XIII B; see *Los Angeles Unified School Dist. v. State of California* (1991) 229 Cal.App.3d 552, 558).

With this background in mind, we consider whether Section 35292.5, as proposed to be added to the Education Code[1] by S.B. 892, as amended September 8, 2003 (hereafter S.B. 892), would create a new program or impose a higher level of service requiring state reimbursement under Section 6 of Article XIII B.

Section 35292.5 would provide, in relevant part, as follows:

> "35292.5. (a) Every public and private school maintaining any combination of classes from kindergarten to grade 12, inclusive, shall comply with all of the following:
>
> "(1) Every restroom shall at all times be maintained and cleaned regularly, fully operational and stocked at all times with toilet paper, soap, and paper towels or functional hand dryers.

[1] All further section references are to the Education Code, unless otherwise indicated.

"(2) The school shall keep all restrooms open during school hours when pupils are not in classes, and shall keep a sufficient number of restrooms open during school hours when pupils are in classes.

"(b) Notwithstanding subdivision (a), a school may temporarily close any restroom as necessary for pupil safety or as necessary to repair the facility.

* * *"

In this regard, existing Section 17576 requires school districts to provide "sufficient patent flush water closets for the use of the pupils." Section 17576 provides as follows:

"17576. The governing board of every school district shall provide, as an integral part of each school building, or as part of at least one building of a group of separate buildings, sufficient patent flush water closets[2] for the use of the pupils. In school districts where the water supply is inadequate, chemical water closets may be substituted for patent flush water closets by the board.

"This section shall apply to all buildings existing on September 19, 1947, or constructed after such date."

Section 17576 was added by Chapter 277 of the Statutes of 1996. However, Section 17576 is substantially identical to former Section 18009, which was enacted by Chapter 362 of the Statutes of 1947 and subsequently renumbered on various occasions (see former Sec. 39612, as added by Ch. 1010, Stats. 1976; Sec. 15810, as added by Ch. 2, Stats. 1959; see also Sec. 3). Thus, because the requirement that school districts provide sufficient water closets for the use of pupils was in effect prior to January 1, 1975, S.B. 892 would not, in our view, result in costs associated with a new program for which reimbursement is owed by the state pursuant to Section 6 of Article XIII B unless the effect of that bill is to expand that statutory requirement (see subd. (c), Sec. 6, Art. XIII B).

Because S.B. 892 would expressly require that the water closets be open, and that they be maintained as specified, it may be argued that the Legislature, by enacting S.B. 892, would increase the level of service that a school district must provide for pupils. In this regard, it could be argued that the previous statutory requirement mandated that a school have a sufficient number of water closets but did not establish a duty to keep them open, stocked, or operational in the manner specified by S.B. 892.

In our view, such an argument is not persuasive. We think that Section 17576 requires not only that the water closets available on a school campus be sufficient in number to service the particular pupil population, but that the condition and operation of the water closets also be sufficient, such that they are readily usable by the pupils. Although the term "sufficient"

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[2] Although the term "water closet" is not statutorily defined for purposes of Section 17576, the ordinary meaning of "water closet" is "a closet, compartment, or room for defecation and excretion into a hopper... and its accessories" (Webster's Third New International Dictionary (1986) at p. 2582; emphasis added).

is not statutorily defined for purposes of Section 17576, the ordinary meaning of the term "sufficient" is "marked by quantity, scope, power, or quality to meet with the demands, wants, or needs of a situation or of a proposed use or end" (Webster's Third New International Dictionary (1986) at p. 2284).

To begin with, in our view, the duties enumerated by S.B. 892 that restrooms actually be open and functional are necessarily implied in Section 17576. We think that Section 17576 would be meaningless if it were construed to require school districts to construct a sufficient number of water closets, but permit the schools to keep them closed. Section 17576 requires that the water closets be available "for the use of the pupils." Moreover, the water closets would be made unavailable for pupil use, in effect, if they are not cleaned and maintained properly. Therefore, in our view, the existing duty of Section 17576 to have "sufficient" water closets "for the use of the pupils" necessarily requires that the water closets be open at appropriate times, as well as properly cleaned and maintained.

In addition, Section 17565 requires, in part, that the governing board of a school district "furnish and repair" school property of the district. This statutory requirement has a similar history that also predates January 1, 1975 (see former Sec. 18001, Ch. 71, Stats. 1943). In an analogous context, the scope of the duty to repair a water closet or toilet was addressed in *People v. Tufts* (1979) 97 Cal.App.3d Supp. 37. The defendant landlord in that case appealed her conviction for violating a local public health code on the basis that the conduct required of her by the code was unconstitutionally vague (Id., at pp. 43-44). The court noted that the requirement of the code to maintain a toilet "in a state of good repair" clearly was violated where a toilet on the premises of the defendant was inoperative (Ibid.). The court further concluded that "[c]ommon sense is sufficient to tell anyone that a toilet which does not work is not in a state of good repair. Persons of ordinary intelligence should be able to understand this. . . . 'The words "good repair" have a well known and definite meaning . . . . They sufficiently inform the ordinary owner that his property must be fit for the habitation of those who would ordinarily use his dwelling'" (Ibid.). Applying that rationale here, we conclude that the duty of a school district to furnish and repair its water closets as required under existing law would include, at a minimum, providing and maintaining the restroom in a condition that permits its use by pupils in the manner specified by S.B. 892.

Similarly, in order to be "sufficient ... for the use of pupils," water closets must be properly supplied. Thus, we conclude that the existing duty imposed by Section 17576 requires a school district to provide water closets that are equipped with accessories appropriate to their use (see fn. 2, supra).

Consistent with this analysis, Section 3 of S.B. 892 provides as follows:

> "The Legislature finds and declares that, as regards public schools, a principal purpose of this act is to clarify the preexisting requirements of Section 17576 of the Education Code by specifying the minimum requirements necessary

> to provide sufficient patent flush water closets for the use of pupils in a manner that is consistent with those requirements that apply to other public and private persons or agencies pursuant to Section 118505 of the Health and Safety Code.[3] Because the local mandate established pursuant to Section 17576, which was enacted on January 1, 1948, was enacted prior to January 1, 1975, no reimbursement is required under this act pursuant to Section 6 of Article XIII B of the California Constitution."(Emphasis added.)

Unsupported legislative disclaimers are generally insufficient to defeat the duty to reimburse under Section 6 of Article XIII B (see *Long Beach Unified Sch. Dist. v. State of California*, supra, at p. 184). However, in this case, we think that a school district's preexisting duty to provide water closets that are available and "sufficient" for pupil use supports the declaration in Sec. 3 of S.B. 892 that no new program or higher level of service results from the enumeration of those items set forth in proposed Section 35292.5.

Unlike the federal Constitution, which is a grant of power to Congress, the California Constitution is a limitation or restriction on the powers of the Legislature (*Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691). Thus, except for the people's right of initiative and referendum, the Legislature is vested with the whole of the legislative power and may act unless constitutionally or otherwise limited (*Dean v. Kuchel* (1951) 37 Cal.2d 97, 100). In other words, we do not look to the Constitution to determine whether the Legislature is authorized to act, but only to see if it is prohibited from acting (*Fitts v. Superior Court* (1936) 6 Cal.2d 230, 234). If there is any doubt of the power of the Legislature to act in a given case, all doubts should be resolved in favor of the Legislature's power to act (*Dean v. Kuchel*, supra, at p. 100). Conversely, a constitutional provision removing those restrictions and limitations should, in case of doubt, be construed in favor of the Legislature's action (see *Methodist Hosp. of Sacramento v. Saylor*, supra, at p. 691). Thus, we think that, by removing costs mandated by legislation enacted prior to January 1, 1975, from the reimbursement requirement, subdivision (c) of Section 6 of Article XIII B removes the restriction on the exercise of power by the Legislature and thereby exposes that subject matter to the full power of the Legislature.

Consequently, we think that the courts would uphold the declaration in Section 3 of S.B. 892 insofar as it characterizes the bill as a reasonable attempt to clarify a preexisting statutory duty, because S.B. 892 would not add requirements that are not inherent in scope of the statutory duty that predated January 1, 1975, under Sections 17565 and 17576 and their predecessors.

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[3] Section 118505 of the Health and Safety Code requires publicly and privately owned facilities where the public congregates to be equipped with sufficient temporary or permanent restrooms to meet the needs of the public at peak hours (subd. (a), Sec. 118505. H.& S.C.). A public or private elementary or secondary school is expressly exempted from this requirement (para. (3), subd. (f), Sec. 118505, H.& S.C.).

For the reasons set forth above, the original duty upon which the specific standards set forth in Section 35292.5 would be based, which predated January 1, 1975, includes the requirements set forth in the bill. Expressly setting forth specific standards to implement that duty after January 1, 1975, would not, in our opinion, change the nature of that duty as regards Section 6 of Article XIII B if the standards merely provide clarification of the preexisting statutes.[4]

To summarize, in our opinion, a reviewing court would find that the preexisting statutory duty to provide, furnish, and repair water closets under Sections 17565 and 17576 and their predecessors reasonably requires that the water closets be open, clean, operational, and supplied with water, soap, toilet paper, and a method for hand-drying. Therefore, we conclude that, by specifically setting forth in statute these necessarily included components of that preexisting duty, Section 35292.5 would not create a new program or establish a higher level of service under Section 6 of Article XIII B.

Therefore, it is our opinion that Section 35292.5, as proposed to be added to the Education Code by Senate Bill No. 892, as amended September 8, 2003, would not, if enacted, impose a state-mandated local program on school districts for which the state must provide reimbursement under Section 6 of Article XIII B of the California Constitution.

Very truly yours,

Diane F. Boyer-Vine
Legislative Counsel

By
Francisco A. Martin
Deputy Legislative Counsel

FAM:syl

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[4] See, for example, *Los Angeles Unified School Dist. v. State of California*, supra, at page 558, where the court implied that regulations adopted after January 1, 1975, specifying requirements under a statute that predated January 1, 1975, would not create a new program or higher level of service under Section 6 of Article XIII B because the regulations were implementing a preexisting statutory requirement.

PROOF OF SERVICE

Test Claim Name: Clean School Restrooms
Test Claim Number: CSM-04-TC-01

I, the undersigned, declare as follows:
I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, 7th Floor, Sacramento, CA 95814.

On March 24, 2005, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, 7th Floor, for Interagency Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
Facsimile No. 445-0278

B-29
Legislative Analyst's Office
Attention Marianne O'Malley
925 L Street, Suite 1000
Sacramento, CA 95814

Sixten & Associates
Attention: Keith Petersen
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

Mandated Cost Systems, Inc.
Attention: Steve Smith
2275 Watt Avenue, Suite C
Sacramento, CA 95825

E-8
State Board of Education
Attention: Bill Lucia, Executive Director
721 Capitol Mall, Room 532
Sacramento, CA 95814

B-8
State Controller's Office
Division of Accounting & Reporting
Attention: Ginny Brummels
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Sacramento, CA 95816

Education Mandated Cost Network
C/O School Services of California
Attention: Dr. Carol Berg, PhD
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Sacramento, CA 95814

E-8
Department of Education
Attention: Gerald Shelton
Fiscal and Administrative Services Division
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Sacramento, CA 95814

San Diego Unified School District
Attention: Arthur Palkowitz
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San Diego, CA 92103-2682

California Teachers Association
Attention: Steve DePue
2921 Greenwood Road
Greenwood, CA 95635

Girard & Vinson
Attention: Paul Minney
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Walnut Creek, CA 95496

Los Angeles Unified School District
Attention: Ruben Rojas
333 South Beaudry, 26th Floor (125-1)
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Reynolds Consulting Group, Inc.
Attention: Sandy Reynolds
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Sun City, CA 92586

Mandate Resource Services
Attention: Harmeet Barkschat
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Sacramento, CA 95842

San Juan Unified School District
Attention: Diana Halpenny
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Cost Recovery Systems
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Centration, Inc.
Attention: Beth Hunter
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Rancho Cucamonga, CA 91730

School Services of California, Inc.
Mr. Robert Miyashiro
1121 L Street, Suite 1060
Sacramento, CA 95814

Department of General Services
Attention: Bruce B. Hancock
Office of Public School Construction
State Allocation Board
1130 K Street, Suite 400
Sacramento, CA 95814-2928

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on March 24, 2005, at Sacramento, California.

Clad Fotus for

Jennifer Nelson