Hearing Date: September 27, 2007
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ITEM 17

TEST CLAIM
FINAL STAFF ANALYSIS

Family Code Section 6228; Penal Code Sections 12028.5 and 13730
Statutes 1984, Chapter 901; Statutes 2001, Chapter 483;
Statutes 2002, Chapters 377, 830 and 833

Crime Victims' Domestic Violence Incident Reports II
(02-TC-18)

County of Los Angeles, Claimant

EXECUTIVE SUMMARY

This test claim was filed as an amendment to an earlier test claim, *Crime Victims' Domestic Violence Incident Reports,*99-TC-08, by the County of Los Angeles in April 2003. The Commission's executive director severed it from the original test claim pursuant to authority in Government Code section 17530.

The test claim statutes (Pen. Code, § 13730 & Fam. Code, § 6228) add information regarding firearms or weapons to the domestic violence incident report form, and require giving a copy of the incident report or the face sheet to a representative of the domestic violence victim if the victim is deceased. Penal Code section 12028.5 requires officers "at the scene of a domestic violence incident involving a threat to human life or a physical assault"[1] to take temporary custody of firearms or weapons in plain sight or discovered pursuant to a consensual or other lawful search, and provides a procedure for return or disposal of the weapon.

For reasons discussed in the analysis, staff finds that effective January 1, 2002, Penal Code section 13730, subdivision (c)(3) (Stats. 2001, ch. 483) imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for local agencies, on all domestic violence-related calls for assistance:

- To include on the domestic violence incident report form a notation of whether the officer or officers who responded to the domestic violence call found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser, or both, whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether that inquiry disclosed the presence of a firearm or other deadly weapon (Pen. Code, § 13730, subd. (c)(3).

Effective January 1, 2003, in accordance with Penal Code section 12028.5 (Stats. 2002, ch. 833) staff finds that the activities listed below are a reimbursable state-mandated program within the

[1] Penal Code section 12028.5, subdivision (b).

meaning of article XIII B, section 6 and Government Code section 17514, when firearms or other deadly weapons are discovered during any other lawful search at the scene of a domestic violence incident involving a threat to human life or a physical assault. Any other lawful search includes but is not limited to the following searches: (1) a search incident to arrest, or of people the officer has legal cause to arrest; (3) a search pursuant to a warrant; or (3) a search based on statements of persons who do not have authority to consent, but have indicated to law enforcement that a weapon is present at the scene.

- To take temporary custody of any firearm or other deadly weapon when necessary for the protection of the peace officer or other persons present. (Pen. Code, § 12028.5, subd. (b).)
- To give the owner or person in lawful possession of the firearm or other deadly weapon a receipt that describes the firearm or deadly weapon and lists any identification or serial number on the firearm, and indicates where the firearm or weapon can be recovered, the time limit for recovery, and the date after which the owner or possessor can recover it. (Pen. Code, § 12028.5, subd. (b).)
- To make the firearm or other deadly weapon available to the owner or person who was in lawful possession 48 hours after seizure or as soon as possible, but no later than five business days following the seizure. Reimbursement for this activity is not required if either: (1) the firearm or other deadly weapon confiscated is retained for use as evidence related to criminal charges as a result of domestic violence incident; or (2) if the firearm or other deadly weapon is retained because it was illegally possessed, or (3) if the firearm or other deadly weapon is retained because of a court petition filed pursuant to subdivision (f) of section 12028.5.[2] (Pen. Code, § 12028.5, subd. (b).)
- To sell or destroy, as provided in subdivision (c) of Section 12028,[3] any firearm or other deadly weapon taken into custody and held for longer than 12 months and not recovered by the owner or person in lawful possession at the time it was taken into custody. Reimbursement for this activity is not required for firearms or other deadly weapons not recovered within 12 months due to an extended hearing process as provided in subdivision (j) of section 12028.5. (Pen. Code, § 12028.5, subd. (e).)

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[2] Subdivision (f) of section 12028.5 authorizes, within 60 days of seizure, the law enforcement agency to initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned in cases "in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat." This provision also requires notifying the owner.

[3] Section 12028, subdivision (c) requires specified weapons to be surrendered to law enforcement and authorizes disposal of them by sale at public auction or (in subd. (d)) by destruction.

- If the local agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, for the agency to advise the owner of the firearm or other deadly weapon, and within 60 days of the date of seizure (or 90 days if an extension is granted) initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned. (Pen. Code, § 12028.5, subd. (f).)
- To inform the owner or person who had lawful possession of the firearm or other deadly weapon, at that person's last known address by registered mail, return receipt requested, that he or she has 30 days from the date of receipt of the notice to respond to the court clerk to confirm his or her desire for a hearing, and that the failure to respond shall result in a default order forfeiting the confiscated firearm or other deadly weapon. If the person whose firearm or other deadly weapon was seized does not reside at the last address provided to the local agency, for the agency to make a diligent, good faith effort to learn the whereabouts of the person and to comply with the notification requirements in subdivision (g) of section 12028.5. (Pen. Code, § 12028.5, subd. (g).)
- If the owner or person who had lawful possession of the firearm or other deadly weapon requests a hearing, to show in court by a preponderance of evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat. If the court orders the firearm or other deadly weapon returned to the owner or person who had lawful possession, the local agency upon order of the court shall pay reasonable attorney's fees to the prevailing party. (Pen. Code, § 12028.5, subd. (h).)
- If the owner or person who had lawful possession of the firearm or other deadly weapon does not request a hearing or does not respond within 30 days of the receipt of notice, to file a petition in court for an order of default. (Pen. Code, § 12028.5, subd. (i).)

Effective January 1, 2003, in accordance with Penal Code section 12028.5 (Stats. 2002, ch. 833) staff finds that the following activities are a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514, for local agencies, when firearms or other deadly weapons are taken into temporary custody at the scene of a domestic violence incident involving a threat to human life or a physical assault, and the firearm or other deadly weapon is discovered in plain sight or pursuant to a consensual or other lawful search.

- The one-time activity of amending the receipt for a confiscated firearm or other deadly weapon to include "the time limit for recovery as required" by section 12028.5. (Pen. Code, § 12028.5, subd. (b).)
- If the person who owns or had lawful possession of the firearm or other deadly weapon petitions the court for a second hearing within 12 months of the date of the initial hearing, showing by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat. If the court orders the firearm or other

deadly weapon returned to the owner or person who had lawful possession, the local agency upon order of the court shall pay reasonable attorney's fees to the prevailing party. (Pen. Code, § 12028.5, subd. (j).)

Staff also finds that Family Code section 6228 (Stats. 2002, ch. 377) and Penal Code section 12028.5 (Stats. 1984, ch. 901 & Stats. 2002, ch 830)[4] are not a reimbursable state mandated program within the meaning of article XIII B, section 6 and Government Code section 17514 because they do not mandate a new program or higher level of service.

Recommendation

Staff recommends that the Commission adopt this analysis to partially approve the test claim for the activities listed above.

[4] Statutes 2002, chapter 833 was double joined to Statutes. 2002, chapter 830, but only chapter 833 amended section 12028.5 because it was chaptered last (Gov. Code, § 9605).

STAFF ANALYSIS

Claimant

County of Los Angeles

Chronology

4/02/03	Claimant files proposed amendment (02-TC-18) to test claim 99-TC-08, *Crime Victims' Domestic Violence Incident Reports*
4/11/03	Commission staff deems proposed amendment incomplete
4/18/03	Claimant refiles amendment to test claim
4/22/03	The Commission's executive director severs test claim amendment (02-TC-18) from original test claim (99-TC-08), deems test claim amendment complete, and requests comments
8/06/07	Commission staff issues draft staff analysis
8/24/07	Claimant submits comments on the draft staff analysis
8/30/07	Department of Finance submits comments on the draft staff analysis
9/13/07	Commission issues final staff analysis and proposed Statement of Decision

Background

This test claim alleges activities based on Penal Code sections 13730 (Stats. 2001, ch. 483), 12028.5 (Stats. 1984, ch. 901; Stats. 2002, chs. 830 & 833), and Family Code section 6228 (Stats. 2002, ch. 377). These statutes add weapons information to the domestic violence incident report form, require giving a copy of the form to the victim's representative, as defined, if the victim is deceased, and require law enforcement officers at the scene of a domestic violence incident "involving a threat to human life or a physical assault"[5] to take temporary custody of weapons, including a process for their return or disposal.

Test Claim Statutes

Penal Code section 13730: This section was originally added by Chapter 1609, Statutes of 1984, and requires local law enforcement agencies to develop a system for recording all domestic violence-related calls for assistance. Subdivision (c) requires law enforcement agencies to develop an incident report form for the domestic violence calls, with specified content. It was amended (Stats. 2001, ch. 483) in subdivision (c) to add the following to the form:

> (3) A notation of whether the officer or officers who responded to the domestic violence call found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser, or both, whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether that inquiry disclosed the presence of a firearm or other deadly weapon. Any firearm or other deadly weapon discovered by an officer at the

[5] Penal Code section 12028.5, subdivision (b).

scene of a domestic violence incident shall be subject to confiscation pursuant to Section 12028.5.

Family Code section 6228: This section requires giving, without charging a fee, a copy of the domestic violence incident report or the incident report face sheet, or both, to the victim. The test claim statute (Stats. 2002, ch. 377) amended this section to require giving a copy of the report to a representative of the victim, as defined, if the victim is deceased. Specifically, it was amended to add the underlined text as follows:

> (a) State and local law enforcement agencies shall provide, without charging a fee, one copy of all domestic violence incident report face sheets, one copy of all domestic violence incident reports, or both, to a victim of domestic violence, <u>or to his or her representative if the victim is deceased, as defined in subdivision (g)</u>, upon request. For purposes of this section, "domestic violence" has the definition given in Section 6211.[6]

Other subdivisions of section 6228 were amended similarly. Subdivision (d), which specifies that the person requesting copies of the incident report must present identification, was amended to require the representative to present a certified copy of the death certificate of the victim at the time of the request. Subdivision (g) defines the representative of the victim as any of the following:

> (1) (A) The surviving spouse.
> (B) A surviving child of the decedent who has attained 18 years of age.
> (C) A domestic partner, as defined in subdivision (a) of Section 297.
> (D) A surviving parent of the decedent.
> (E) A surviving adult relative.

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[6] Family Code section 6211 defines domestic violence as "abuse perpetrated against any of the following persons:

(a) A spouse or former spouse.
(b) A cohabitant or former cohabitant, as defined in Section 6209.
(c) A person with whom the respondent is having or has had a dating or engagement relationship.
(d) A person with whom the respondent has had a child, where the presumption applies that the male parent is the father of the child of the female parent under the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12).
(e) A child of a party or a child who is the subject of an action under the Uniform Parentage Act, where the presumption applies that the male parent is the father of the child to be protected.
(f) Any other person related by consanguinity or affinity within the second degree."

Family Code section 6203 defines abuse as any of the following:

"(a) Intentionally or recklessly to cause or attempt to cause bodily injury.
(b) Sexual assault.
(c) To place a person in reasonable apprehension of imminent serious bodily injury to that person or to another.
(d) To engage in any behavior that has been or could be enjoined pursuant to Section 6320."

(F) The public administrator if one has been appointed.

(2) A representative of the victim does not include any person who has been convicted of murder in the first degree, as defined in Section 189 of the Penal Code, of the victim, or any person identified in the incident report face sheet as a suspect. Domestic violence incident report face sheets may not be provided to a representative of the victim unless the representative presents his or her identification, such as a current, valid driver's license, a state-issued identification card, or a passport and a certified copy of the death certificate or other satisfactory evidence of the death of the victim at the time of the request.

The purpose of Family Code section 6228 is to assist domestic violence victims to obtain a temporary restraining order against the accused.[7] The amendment regarding the victim representative was in response to a case in which a domestic violence victim committed suicide, and the victim's mother had difficulty obtaining the incident report when seeking custody of her grandchildren.[8]

Penal Code section 12028.5: This section was enacted in 1984 and has been amended several times. The original 1984 statute authorized a law enforcement officer to take temporary custody of a firearm "at the scene of a domestic violence incident involving a threat to human life or a physical assault."[9] The original statute also defined domestic violence, abuse, and family household member.[10]

Statutes 1999, chapter 662, not pled by claimant, amended section 12028.5 to require law enforcement officers to take temporary custody of any firearm or other deadly weapon[11] at a domestic violence[12] scene involving a threat to human life or a physical assault. Section 12028.5 also includes definitions of domestic violence and abuse, and specifies a procedure for making the firearm or other deadly weapon available to the owner, or disposing of it.

Statutes 2002, chapter 833 was double joined to Statutes. 2002, chapter 830, but only chapter 833 amended section 12028.5 because it was chaptered last.[13] This amendment to section 12028.5 pled by claimant adds "other lawful searches" (to preexisting plain sight or consensual search) during which law enforcement officers must confiscate firearms or other deadly weapons

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[7] Assembly Committee on Judiciary, Analysis of Assem. Bill No. 403 (1999-2000 Reg. Sess.) as amended on March 18, 1999, page 2.

[8] Senate Committee on Public Safety, Analysis of Senate Bill No. 1265 (2001-2002 Reg. Sess.) as amended on April 2, 2002, page 4.

[9] Former Penal Code section 12028.5, subdivision (b) (Stats. 1984, ch. 901).

[10] The definitions were amended by Statutes 1992, chapter 1136 and Statutes 1993, chapter 1098. These amendments were not pled by claimant, so staff makes no findings on them.

[11] "Deadly weapon means any weapon, the possession or concealed carrying of which is prohibited by Section 12020." (Pen. Code, § 12028.5, subd. (a)(3)).

[12] Penal Code section 12028.5, subdivision (b).

[13] Government Code section 9605.

at the scene of a domestic violence incident. The amendment requires including on the receipt for the confiscated firearm or weapon "the time limit for recovery as required by this section."[14] It expands the maximum time the firearm or weapon can be held from 72 hours to five days (the minimum time remained 48 hours).[15] It also lengthens the time local government has to file a petition to determine whether the firearm or weapon should be returned, extending it from 30 to 60 days after the seizure, or from 60 to 90 days with extensions.[16] In addition, the amendment lowered the standard of evidence needed to keep the firearm or weapon from being returned to the owner, from clear and convincing to a preponderance of evidence "that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat."[17]

The 2002 amendment also added a provision requiring the court to order returning the firearm or weapon to the owner, and to award reasonable attorney's fees to the prevailing party if there is a petition for a second hearing, "unless it is shown by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat."[18]

Prior Commission Decisions

CSM 4222: In 1987, the Commission approved a test claim on Penal Code section 13730, as added by Statutes 1984, chapter 1609 (*Domestic Violence Information*). The parameters and guidelines for *Domestic Violence Information* authorize reimbursement for local law enforcement agencies for the "costs associated with the development of a Domestic Violence Incident Report form used to record and report domestic violence calls," and "for the writing of mandated reports which shall include domestic violence reports, incidents or crime reports directly related to the domestic violence incident."

Beginning in fiscal year 1992-93, the Legislature suspended Penal Code section 13730 (as added by Stats. 1984, ch. 1609) pursuant to Government Code section 17581. Suspending a statute means the Legislature assigns a zero-dollar appropriation to the program and makes it optional.

CSM 96-362-01: In February 1998, the Commission considered a test claim on the 1995 amendment to Penal Code section 13730 (*Domestic Violence Training and Incident Reporting*).

In 1995, the Legislature amended Penal Code section 13730, subdivision (c) (Stats. 1995, ch. 965) to require law enforcement agencies to include in the domestic violence incident report information relating to the use of alcohol or controlled substances by the alleged abuser, and any prior domestic violence responses to the same address.

The Commission determined that the additional information on the domestic violence incident report was not mandated by the state because the suspension of the statute under Government

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[14] Penal Code section 12028.5, subdivision (b).

[15] *Ibid.*

[16] Penal Code section 12028.5, subdivision (f).

[17] *Ibid.*

[18] Penal Code section 12028.5, subdivision (j).

Code section 17581 made the completion of the incident report optional, so the additional information under the test claim statute came into play only after a local agency elected to complete the incident report.

Based on the language of the suspension statute (Gov. Code, § 17581), the Commission determined, however, that during periods when the state operates without a budget, the original suspension of the mandate would not be in effect. Thus, for the periods when the state operates without a budget until the Budget Act is chaptered and makes the domestic violence incident reporting program optional under Government Code section 17581, the Commission determined the activities required by the 1995 amendment to Penal Code section 13730 are reimbursable.

In 1998, Government Code section 17581 was amended to close the gap and continue the suspension of programs during periods when the state operates without a budget.[19] The *Domestic Violence Information and Incident Reporting* program has been suspended in every Budget Act since 1992 except for 2003-2004.[20]

99-TC-08: The current test claim was originally submitted as an amendment to (and severed from) test claim 99-TC-08, *Crime Victims' Domestic Violence Incident Reports,* which the Commission decided on May 29, 2003 (corrected decision issued in September 2003).[21] The Commission found it had no jurisdiction over Penal Code section 13730 (Stats. 1984, ch. 1609, Stats. 1995, ch. 965) because it had already adjudicated the statute in CSM 4222, *Domestic Violence Information,* and in CSM 96-362-01, *Domestic Violence Training and Incident Reporting.* The Commission also found that the mandate had been suspended by the Legislature every year since 1992-1993, making the activities discretionary on the part of local government.

Also decided in 99-TC-08 was Family Code section 6228 (Stats. 1999, ch. 1022), which the Commission found is a reimbursable mandate for storing domestic violence incident reports and face sheets for three years (Fam. Code, § 6228, subd. (e)). The Commission also found that section 6228 does not mandate or require local law enforcement agencies to prepare a domestic violence incident report or a face sheet, and that other activities related to providing the incident reports to victims were already required under Government Code section 6254 of the California Public Records Act, and were therefore not reimbursable.

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[19] Government Code section 17581, subdivision (a), now states the following: "No local agency shall be required to implement or give effect to any statute or executive order, or portion thereof, during any fiscal year *and the for the period immediately following that fiscal year for which the Budget Act has not been enacted for the subsequent fiscal year . . .*" (Emphasis added.)

[20] 2006-2007 Budget Act (Stats. 2006, chs. 46 & 47) Item 8885-295-0001, Schedule (3) (aa); 2005-2006 Budget Act (Stats. 2005, chs. 38 & 39) Item 8885-295-0001, Schedule (3) (hh); 2004-2005 Budget Act (Stats. 2004, ch. 208) Item 9210-295-0001, Provision 3, Schedule (5); 2002-2003 Budget Act (Stats. 2002, ch. 379), Item 9210-295-0001, Provision 3, Schedule (8); 2001-2002 Budget Act (Stats. 2001, ch. 106), Item 210-295-0001, Provision 3, Schedule (8); 2000-2001 Budget Act (Stats. 2000, ch. 52), Item 210-295-0001, Provision 3, Schedule (8); 1999-2000 Budget Act (Stats. 1999, ch. 50), Item 210-295-0001, Provision 2, Schedule (8).

[21] To avoid confusing this test claim with the original *Crime Victims' Domestic Violence Incident Reports,* this test claim is renamed *Crime Victims' Domestic Violence Incident Reports II.*

Test claim 99-TC-08 did not include Penal Code section 12028.5, which is part of this claim.

Claimant Position

Claimant alleges that the test claim statutes impose a reimbursable state mandate under article XIII B, section 6 of the California Constitution. Claimant requests reimbursement for local law enforcement agencies to do the following based on Statutes 2001, chapter 483 that added subdivision (c)(3) to Penal Code section 13730: [22]

1. When "necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser or both, whether a firearm or other deadly weapon was present at the location."
2. To report if an inquiry was made "whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether the inquiry disclosed the presence of a firearm or other deadly weapon."
3. To confiscate "[a]ny firearm or other deadly weapon discovered by an officer at the scene of a domestic violence incident … pursuant to Section 12028.5"

Claimant requests reimbursement for local law enforcement agencies to do the following based on Penal Code section 12028.5:[23]

1. A peace officer "… shall take temporary custody of any firearm or other deadly weapon in plain sight or discovered pursuant to a consensual or other lawful search as necessary for the protection of the peace officer or other persons present." (§ 12028.5 (b).)
2. "Upon taking custody of a firearm or other deadly weapon, the officer shall give the owner or person who possessed the firearm a receipt. The receipt shall describe the firearm or other deadly weapon and list any identification or serial number on the firearm. The receipt shall indicate where the firearm or other deadly weapon can be recovered, the time limit for recovery as required by this section, and the date after which the owner or possessor can recover the firearm or other deadly weapon. (§ 12028.5 (b).)
3. The confiscated "… firearm or other deadly weapon shall be held [not less than] 48 hours." (§ 12028.5 (b).)
4. "[T]he firearm or other deadly weapon shall be made available to the owner or person who was in lawful possession [as specified] 48 hours after the seizure or as soon thereafter as possible, but no later than 5 business days after the seizure." (§ 12028.5 (b).)
5. A "peace officer, as defined in subdivisions (a) and (b) of Section 830.32, who takes custody of a firearm or deadly weapon pursuant to this section shall deliver the firearm within 24 hours to the city police department or county sheriff's office in the jurisdiction where the college or school is located." (§ 12028.5 (c).)

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[22] Test Claim 02-TC-18, pages 2-3.

[23] Test Claim 02-TC-18, pages 7-10

6. Any "firearm or other deadly weapon that has been taken into custody that has been stolen shall be restored to the lawful owner, as soon as its use for evidence has been served, upon his or her identification of the firearm or other deadly weapon and proof of ownership." (§ 12028.5 (d).)
7. Any "firearm or other deadly weapon taken into custody and held by police, university police, or sheriff's department or by a marshal's office, by a peace officer of the Department of the California Highway Patrol, as defined ... for longer than 12 months and not recovered by the owner or person who has lawful possession at the time it was taken into custody, shall be considered a nuisance and sold or destroyed as provided in subdivision (c) of Section 12028." (§ 12028.5 (e).)
8. "In those cases in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, the agency shall advise the owner of the firearm or other deadly weapon, and within 60 days of the date of seizure, initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned." (§ 12028.5 (f).)
9. "The law enforcement agency shall inform the owner or person who had lawful possession of the firearm or other deadly weapon, at the person's last known address by registered mail, return receipt requested, that he or she has 30 days from the date of receipt of the notice to respond to the court clerk to confirm his or her desire for a hearing, and that the failure to respond shall result in a default order forfeiting the confiscated firearm or other deadly weapon. For the purposes of this subdivision, the person's last known address shall be presumed to be the address provided to the law enforcement officer by that person at the time of the family violence incident. In the event the person whose firearm or other deadly weapon was seized does not reside at the last address provided to the agency, the agency shall make a diligent, good faith effort to learn the whereabouts of the person and to comply with these notification requirements." (§ 12028.5 (g).)
10. Local law enforcement agencies and the district attorney shall participate in hearings "... if the person requests a hearing" in which case, "... the court clerk shall set a hearing no later than 30 days from receipt of that request. The court clerk shall notify the person, the law enforcement agency involved, and the district attorney of the date, time, and place of the hearing. Unless it is shown by a preponderance of the evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party." (§ 12028.5 (h).)
11. Local law enforcement agencies and the district attorney shall participate in hearings "...[i]f there is a petition for a second hearing, and, "... unless it is shown by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat," the duty of local law enforcement agencies to "... return of the firearm or other deadly weapon" and, as specified, pay "... reasonable attorney's fees to the prevailing party." (§ 12028.5 (j).)

Claimant also requests reimbursement for local law enforcement agencies to, based on Family Code section 6228, to prepare and provide domestic violence incident reports for the "representatives" of domestic violence victims, as provided in statute.[24]

Claimant alleges that the duty to provide requested domestic violence incident reports and face sheets to victims and their representatives under Family Code section 6228 is not excused even if the general duty to prepare such reports and face sheets under Statutes 1984, chapter 1609 is made optional by the Legislature's suspension of the mandate pursuant to Government Code section 17581. Claimant submits that it has no reasonable alternative but to prepare the incident report or face sheet.

Claimant also submitted a declaration that it will incur "costs well in excess of $1,000 during the 2002-03 fiscal year to implement" the test claim statutes.[25] Another declaration includes the time required for the alleged activities: "on average, an additional 5 minutes to inquire of the victim whether a firearm or other deadly weapon is present, an additional 30 minutes to search for and obtain the weapon; an additional 5 minutes to report the results, and, where the weapon is confiscated pursuant to Penal Code Section 12028.5, an additional 90 minutes to perform" the duties listed in nos. 1-11 above.[26]

Claimant submitted comments concurring with the draft staff analysis.

State Agency Position

The Department of Finance, in comments filed August 20, 2007, concurs in part with the draft staff analysis. Finance disagrees with the discussion of Penal Code 13730, subdivision (c)(3), and argues that the finding should conform to the Commission's decision in CSM-96-362-01. Finance also disagrees that activities in Penal Code section 12028.5, subdivisions (f) and (i), should be reimbursable because, according to Finance, they are discretionary. These comments are further detailed and addressed below.

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[24] Test Claim 02-TC-18, pages 10-12.

[25] Test Claim 02-TC-18, Exhibit 8, Declaration of Bernice Abram, page 1; Exhibit 9, Declaration of Wendy Watanabe, page 1.

[26] Test Claim 02-TC-18, Exhibit 8, Declaration of Bernice Abram, page 2; Exhibit 9, Declaration of Wendy Watanabe, page 2.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[27] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[28] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[29] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[30]

In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[31]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[32] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim

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[27] Article XIII B, section 6, subdivision (a), (as amended in Nov. 2004) provides:

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

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

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

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

[31] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.)*; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

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

legislation.[33] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[34]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[35]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[36] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[37]

Issue 1: Does Penal Code section 13730, as amended by Statutes 2001, chapter 483, constitute a reimbursable state-mandated program?

Section 13730 requires local law enforcement agencies to develop and complete incident report forms for all domestic violence calls. As stated in subdivision (c) "In all incidents of domestic violence, *a report shall be written* and shall be identified on the face of the report as a domestic violence incident." [Emphasis added.] The report is required to include notations of officer observations regarding (in subd. (c)(1)) whether the alleged abuser was under the influence of alcohol or a controlled substance, and (in subd. (c)(2)) whether any law enforcement agency had previously responded to a domestic violence call at the same address involving the same alleged abuser or victim.

It was amended (Stats. 2001, ch. 483) in subdivision (c)(3) to add the following to the form:

> A notation of whether the officer or officers who responded to the domestic violence call found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser, or both, whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether that inquiry disclosed the presence of a firearm or other deadly weapon. Any firearm or other deadly weapon discovered by an officer at the scene of a domestic violence incident shall be subject to confiscation pursuant to Section 12028.5.

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

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

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

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

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

Read together, the plain language of subdivisions (c) and (c) (3) requires local law enforcement agencies to include this firearm information on the domestic violence incident report form. Moreover, it constitutes a program within the meaning of article XIII B, section 6 because it carries out the governmental function of providing a service to the public[38] by adding information to the domestic violence incident report form. It is also an activity that is unique to local government.

For a statute that had not been suspended by the Legislature, the above criteria would be enough to determine that the 2001 amendment is a state mandate subject to article XIII B, section 6. The 1984 version of section 13730 (Stats. 1984, ch. 1609) however, has been suspended by the Legislature. Thus, the issue is whether the 2001 requirement to include firearm and weapon information on the domestic violence incident form is a state mandate in light of the Legislature's annual budget-act suspension of Statutes 1984, chapter 1609.

The 1984 version of section 13730, subdivision (c), includes the following sentence: "In all incidents of domestic violence, a report shall be written and shall be thus identified on the face of the report as a domestic violence incident." This was determined to be a reimbursable activity in the Commission's decision CSM 4222, as discussed above.

As provided in Government Code section 17581, subdivisions (a) and (b), before suspending a statute, the following criteria must be met:

> (a) No local agency shall be required to implement or give effect to any statute or executive order, or portion thereof, during any fiscal year and for the period immediately following that fiscal year for which the Budget Act has not been enacted for the subsequent fiscal year if all of the following apply:
>
> (1) The statute or executive order, or portion thereof, has been determined by the Legislature, the commission, or any court to mandate a new program or higher level of service requiring reimbursement of local agencies pursuant to Section 6 of Article XIIIB of the California Constitution.
>
> (2) The statute or executive order, or portion thereof, or the commission's test claim number, has been specifically identified by the Legislature in the Budget Act for the fiscal year as being one for which reimbursement is not provided for that fiscal year.
>
> (b) Notwithstanding any other provision of law, if a local agency elects to implement or give effect to a statute or executive order described in subdivision (a), the local agency may assess fees to persons or entities which benefit from the statute or executive order. Any fee assessed pursuant to this subdivision shall not exceed the costs reasonably borne by the local agency.

The requirement in subdivision (c) of section 13730 to prepare a written domestic violence incident report has been suspended each year,[39] except for fiscal year 2003-2004,[40] since fiscal

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[38] *County of Los Angeles, supra,* 43 Cal.3d 46, 56.

[39] 2006-2007 Budget Act (Stats. 2006, chs. 46 & 47) Item 8885-295-0001, Schedule (3) (aa); 2005-2006 Budget Act (Stats. 2005, chs. 38 & 39) Item 8885-295-0001, Schedule (3) (hh); 2004-

year 1992-1993. The Legislature specifically identified Statutes 1984, chapter 1609 in the Budget Act and assigned a zero dollar appropriation to it. By suspending Statutes 1984, chapter 1609, the Legislature made preparing the written domestic violence incident report form an optional activity for local government.

Statutes 1993, chapter 1230 added the following to subdivision (a) of section 13730: "All domestic violence related calls for assistance shall be supported with a written incident report, as described in subdivision (c), identifying the domestic violence incident." This 1993 amendment has never been determined by the Legislature, the Commission, or any court to mandate a new program or higher level of service requiring local agency reimbursement, as required by Government Code section 17581. In sum, the 1993 amendment is not eligible for suspension.

This means, in essence, that the provisions of subdivision (c) in section 13730, when suspended by the Budget Act, are permissive, but the plain language of the 1993 amendment requires a written incident report for all domestic violence calls for assistance in subdivision (a). When statutory provisions conflict in this way, the Commission, like a court, relies on the following rule of statutory construction: "[W]hen two laws, upon the same subject, passed at different times, are inconsistent with each other, the one last passed must prevail."[41] Accordingly, the 1993 amendment to subdivision (a) prevails over the suspension of subdivision (c).[42] Thus, preexisting law requires that every domestic violence related call for assistance be supported with a written domestic violence incident report. Consequently, staff finds that including the firearm and weapon information in the domestic violence incident report form, as required by the 2001 amendment to Penal Code section 13730, subdivision (c), is state-mandated.

Finance disagrees. In comments filed August 30, 2007, Finance argues that this conclusion is inconsistent with the Commission's February 1998 decision in the *Domestic Violence Training and Incident Reporting* test claim (CSM-96-362-01) in which the Commission found that additional information on the domestic violence incident report was not mandated because the suspension of the statute made completion of the incident report optional, so the additional information under the test claim statute came into play only after a local agency elected to complete the incident report. Finance indicates in its comments that the Commission's 1998 decision "found that the 1993 amendment to Penal Code section 13730 (a), (Stats. 1993, ch. 1230) 'merely clarifies' the reporting requirement of subdivision (c) rather than mandating a new or additional requirement."

2005 Budget Act (Stats. 2004, ch. 208) Item 9210-295-0001, Provision 3, Schedule (5); 2002-2003 Budget Act (Stats. 2002, ch. 379), Item 9210-295-0001, Provision 3, Schedule (8); 2001-2002 Budget Act (Stats. 2001, ch. 106), Item 210-295-0001, Provision 3, Schedule (8); 2000-2001 Budget Act (Stats. 2000, ch. 52), Item 210-295-0001, Provision 3, Schedule (8); 1999-2000 Budget Act (Stats. 1999, ch. 50), Item 210-295-0001, Provision 2, Schedule (8).

[40] 2003-2004 Budget Act (Stats. 2003, ch. 157) Final Change Book, p.655, Item 9210-295-0001, Provision 3.

[41] *People v. Kuhn* (1963) 216 Cal.App.2d 695, 700.

[42] This does not mean that the suspensions in the Budget Acts are idle acts of the Legislature, since there were other findings in the Commission's decision (CSM 4222) that are suspended.

Staff acknowledges that the analysis herein departs from the 1998 Commission decision. However, the plain language of the 1993 amendment to Penal Code section 13730, subdivision (a), requires a written incident report for all domestic violence calls. This amendment has never been the subject of a test claim, has never been determined by the Legislature or any court to mandate a new program or higher level of service, and is not pled here. Thus, it has not met the requirements of Government Code section 17581 to suspend a statute.

Moreover, since 1953, the California Supreme Court has held that the failure of a quasi-judicial agency to consider and apply prior decisions on the same subject is not a violation of due process and does not constitute an arbitrary action by the agency.[43] In *Weiss v. State Board of Equalization*, the plaintiffs brought mandamus proceedings to review the refusal of the State Board of Equalization to issue an off-sale beer and wine license at their premises. Plaintiffs contended that the action of the board was arbitrary and unreasonable because the board granted similar licenses to other businesses in the past. The California Supreme Court disagreed with the plaintiffs' contention and found that the board did *not* act arbitrarily. The Court stated:

> [P]laintiffs argument comes down to the contention that because the board may have erroneously granted licenses to be used near the school in the past it must continue its error and grant plaintiffs' application. That problem has been discussed: *Not only does due process permit omission of reasoned administrative opinions but it probably also permits substantial deviation from the principle of stare decisis.* Like courts, agencies may overrule prior decisions or practices and may initiate new policy or law through adjudication. (Emphasis added.) [44]

In 1989, the Attorney General's Office issued an opinion, citing the *Weiss* case, agreeing that claims previously approved by the Commission have no precedential value. Rather, "[a]n agency may disregard its earlier decision, provided that its action is neither arbitrary nor unreasonable [citing *Weiss, supra*, 40 Cal.2d. at 777]."[45] While opinions of the Attorney General are not binding, they are entitled to great weight.[46]

Staff finds, therefore, that existing law in Penal Code section 13730, subdivision (a), requires a written incident report for each domestic violence call. Therefore, including the firearm and weapon information in the domestic violence incident report form, as required by the 2001 amendment to Penal Code section 13730, subdivision (c)(3), is state-mandated.

The next issue is whether the provision in subdivision (c)(3) is a new program or higher level of service. To determine this, the test claim statute is compared to the legal requirements in effect immediately before enacting the test claim statute.[47]

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[43] *Weiss v. State Board of Equalization* (1953) 40 Cal.2d 772, 776-777.

[44] *Id.* at page 776.

[45] 72 Opinions of the California Attorney General 173, 178, footnote 2 (1989).

[46] *Rideout Hospital Foundation, Inc. v. County of Yuba* (1992) 8 Cal.App.4th 214, 227.

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

Although preexisting law required filing an incident report for all domestic violence incident-related calls, as discussed above, preexisting law did not require the incident report to contain the following:

> A notation of whether the officer or officers who responded to the domestic violence call found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser, or both, whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether that inquiry disclosed the presence of a firearm or other deadly weapon. (Pen. Code, § 13730, subd. (c)(3).)

Therefore, staff finds that the following is a new program or higher level of service within the meaning of article XIII B, section 6: including on the domestic violence incident report form a notation of whether the officer who responded to the domestic violence call found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser, or both, whether a firearm or other deadly weapon was present at the location, and if there is an inquiry, whether that inquiry disclosed the presence of a firearm or other deadly weapon.

The final issue is whether the 2001 amendment to section 13730 imposes costs mandated by the state,[48] and whether any statutory exceptions listed in Government Code section 17556 apply to the claim. Government Code section 17514 defines "cost mandated by the state" as follows:

> [A]ny 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 of the California Constitution.

In the test claim exhibits,[49] claimant declares that it will incur costs in excess of $1,000 during the 2002-2003 fiscal year to implement the claim statutes.[50] Therefore, staff finds that section 13730, subdivision (c)(3) (Stats. 2001, ch. 483) imposes costs mandated by the state within the meaning of Government Code section 17514, and that no exceptions to reimbursement in Government Code section 17556 apply.

All the elements having been met, staff finds that Penal Code section 13730, subdivision (c)(3), as amended (by Stats. 2001, ch. 483), is a reimbursable state-mandated program within the meaning of article XIII B, section 6 and Government Code section 17514, for all domestic violence-related calls for assistance, to include the following on the domestic violence incident report: A notation of whether the officer or officers who responded to the domestic violence call found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser, or both, whether a firearm or other deadly weapon was present at

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[48] *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

[49] Test Claim 02-TC-18, Exhibit 8, declaration of Bernice K. Abram, and Exhibit 9, declaration of Wendy Watanabe.

[50] Government Code section 17564.

the location, and, if there is an inquiry, whether that inquiry disclosed the presence of a firearm or other deadly weapon.

Issue 2: Does Family Code section 6228, as amended by Statutes 2002, chapter 377, constitute a reimbursable state-mandated program?

Family Code section 6228 requires the local law enforcement agency to provide, without charging a fee, one copy of a domestic violence incident report face sheet, or one copy of a domestic violence incident report, or both, to a victim of domestic violence. The test claim statute amended this section to also require providing a copy to the victim's representative if the victim is deceased. The victim representative is defined as any of the following:

(A) The surviving spouse.
(B) A surviving child of the decedent who has attained 18 years of age.
(C) A domestic partner, as defined in subdivision (a) of Section 297.
(D) A surviving parent of the decedent.
(E) A surviving adult relative.
(F) The public administrator if one has been appointed.

Claimant alleges that section 6228 requires law enforcement agencies to prepare the incident report or face sheet.

The plain language of Family Code section 6228, however, does not mandate or require local law enforcement agencies to prepare a domestic violence incident report or a face sheet. Rather, the express language states that local law enforcement agencies "shall *provide*, without charging a fee, one copy of all domestic violence incident report face sheets, one copy of all domestic violence incident reports, or both, to a victim of domestic violence, or to his or her representative if the victim is deceased, as defined in subdivision (g), upon request." [Emphasis added.]

Therefore, staff finds that Family Code section 6228 is a state mandate for a local law enforcement agency to provide upon request, without charging a fee, one copy of the domestic violence incident report face sheet, or one copy of the domestic violence incident report, or both, to the victim's representative, as defined, if the victim is deceased.

Doing so, however, is not a new program or higher level of service.

The Public Records Act, in Government Code section 6254, subdivision (f) requires giving a copy of a police report "to the victim of an incident or *an authorized representative thereof*..." [Emphasis added.] And one California appellate court held, with respect to records of law enforcement investigations, that "While the general public is denied access to this information such is not true with respect to parties involved in the incident or others who have a proper interest in the subject matter."[51]

Moreover, subdivision (f) of Government Code section 6254 requires the following:

> [S]tate and local law enforcement agencies shall make public the following information, except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or

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[51] *Vallejos v. California Highway Patrol* (1979) 89 Cal.App.3d 781, 786.

would endanger the successful completion of the investigation or a related investigation:

(1) The full name, current address, and occupation of every individual arrested by the agency, the individual's physical description ..., the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, ... all charges the individual is being held upon ....

(2) Subject to the restrictions imposed by Section 841.5 of the Penal Code, the time, substance, and location of all complaints or requests for assistance received by an agency and the time and nature of the response thereto, including, to the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, the time, date, and location of occurrence, ...

Because preexisting Government Code section 6254, subdivision (f), requires releasing the same information as the domestic violence incident report to persons who would be authorized representatives, staff finds that providing the report or face sheet to the authorized victim representative (as required by Fam. Code, § 6228) is not a new program or higher level of service within the meaning of article XIII B, section 6.

Family Code section 6228 differs from the Public Records Act in one major aspect. Under the Public Records Act, local governments may charge a fee to recover the costs of making the police report information available, whereas the test claim statute prohibits charging a fee for the information. Increased costs alone, however, without the test claim statute mandating a new program or higher level of service to the public does not require reimbursement under article XIII B, section 6.[52]

Accordingly, staff finds that Family Code section 6228 (Stats. 2002, ch. 377) does not constitute a new program or higher level of service for a local law enforcement agency to provide, without charging a fee, one copy of the domestic violence incident report face sheet, or one copy of the domestic violence incident report, or both, to the victim's representative, as defined, if the victim is deceased.

Therefore, staff finds that that Family Code section 6228, as amended (Stats. 2002, ch. 377) is not a reimbursable state mandated program within the meaning of article XIII B, section 6 and Government Code section 17514.

Issue 3: Does Penal Code section 12028.5 constitute a reimbursable state-mandated program?

This section describes the procedure for a law enforcement officer to confiscate a firearm or other deadly weapon at the scene of a domestic violence incident "involving a threat to human life or a physical assault"[53] and describes the procedure for the destruction or return of the

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[52] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 877. *Kern High School Dist., supra,* 30 Cal.4th 727, 735.

[53] Penal Code section 12028.5, subdivision (b).

weapon. Although Section 12028.5 has been amended almost annually since 1984,[54] claimant pled only the 1984 version (Stats. 1984, ch. 901), and the 2002 amendment (Stats. 2002, chs. 830 & 833), so this analysis is limited to only those two versions of the statute.[55]

The 1999 amendment (Stats. 1999, ch. 662) to section 12028.5 stands out because it changed the "may take temporary custody" phrase in subdivision (b) to "shall take temporary custody." But because neither the 1999 amendment, nor any of the others before 2002 were pled by claimant, staff makes no findings on them.

A. Does Penal Code section 12028.5 (Stats. 1984, ch. 901) impose a state-mandated program?

As originally enacted in 1984, section 12028.5 read as follows:

> (a) As used in this section, the following words have the following meanings:[56]
>
> (1) "Abuse" means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself, herself, or another.
>
> (2) "Domestic Violence" is abuse perpetrated against a family or household member.
>
> (3) "Family or household member" means a spouse, former spouse, parent, child, any other person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who, within the last six months, regularly resided in the household.
>
> (b) A sheriff, undersheriff, deputy sheriff, or police officer of a city at the scene of a domestic violence incident involving a threat to human life or a physical assault *may* take temporary custody of any firearm described in Section 12001 in plain sight or discovered pursuant to a consensual search as necessary for the protection of the peace officer or other persons present. Upon taking custody of a firearm, the officer shall give the owner or person who possessed the firearm a receipt.

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[54] Statutes 1985, chapter 311, Statutes 1987, chapters 131 & 1362, Statutes 1989, chapters 850 & 1165, Statutes 1990, chapter 1695, Statutes 1991, chapter 866, Statutes 1992, chapters 163 & 1136, Statutes 1993, chapters 219 & 1098, Statutes 1994, chapters 871 & 872, Statutes 1996, chapter 305, Statutes 1998, chapter 606, Statutes 1999, chapters 659 & 662, Statutes 2000, chapter 254.

[55] Subdivision (c) of section 12028.5 (as amended by Stats. 1999, ch. 659) requires a community college or school district peace officer who takes custody of a firearm or deadly weapon pursuant to this section to deliver it within 24 hours to the city police department or county sheriff's office in the jurisdiction where the college or school is located. Because there is no community college or school district claimant and college declaration alleging increased costs in this test claim, staff does not discuss or make any findings on this provision in subdivision (c).

[56] The definitions were amended by Statutes 1992, chapter 1136 and Statutes 1993, chapter 1098. Staff makes no findings on those amendments.

> The receipt shall describe the firearm and identification or serial number on the firearm. The receipt shall indicate where the firearm can be recovered and the date after which the owner or possessor can recover the firearm. No firearm shall be held less than 48 hours. If a firearm is not retained for use as evidence related to criminal charges brought as a result of the domestic violence incident or is not retained because it was illegally possessed, the firearm shall be made available to the owner or person who was in lawful possession 48 hours after the seizure or as soon thereafter as possible, but no later than 72 hours after the seizure. [Emphasis added.]
>
> (c) Any firearm which has been taken into custody which has been stolen shall be restored to the lawful owner, as soon as its use for evidence has been served, upon his or her identification of the firearm and proof of ownership.
>
> (d) Any firearm taken into custody and held by a police or sheriff's department for longer than 12 months and not recovered by the owner or person who has lawful possession at the time it was taken into custody, shall be considered a nuisance and sold or destroyed as provided in subdivision (c) of Section 12028.

Because the plain language in subdivision (b) of the 1984 version is permissive as to taking custody of the firearm, staff finds that local agencies are not legally compelled to take custody of a firearm at the scene of a domestic violence incident involving a threat to human life or a physical assault. Staff also finds that local agencies are not practically compelled to take custody of a firearm under those circumstances. The statute on its face does not impose "certain and severe penalties such as double taxation or other draconian consequences"[57] for not confiscating the firearm. And there is no evidence in the record that local agencies are practically compelled to confiscate the firearm. Rather, under the 1984 statute, taking a firearm at the scene of a domestic violence incident was a policy decision of the local agency. Therefore, staff finds that confiscating the firearm under the circumstances described in subdivision (b) of section 12028.5 (Stats. 1984, ch. 901) is not a state mandate.

As to the remaining downstream activities in the 1984 statute, the issue is whether they are state mandated (e.g., giving a receipt, holding the weapon for 48 to 72 hours, returning it to the owner if stolen, and final disposal if unclaimed) if the triggering event is not state mandated.

In the *Kern High School Dist.* case,[58] the California Supreme Court considered whether school districts have a right to reimbursement for costs in complying with statutory notice and agenda requirements for various education-related programs that are funded by the state and federal government. The court held that in eight of the nine programs at issue, the claimants were not entitled to reimbursement for notice and agenda costs because district participation in the underlying program was voluntary. As the court stated, "if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the

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[57] *Kern High School Dist., supra,* 30 Cal.4th 727, 751. In another part of the opinion, the court stated an example of practical compulsion as a substantial penalty (independent of the program funds at issue) for not complying with the statute. (*Id.* at p. 731).

[58] *Id.*.

district's obligation to comply with the notice and agenda requirement related to that program does not constitute a reimbursable mandate."[59]

Therefore, based on the plain language of the statute and the reasoning in *Kern High School Dist.,* staff finds that there is no legal compulsion in section 12028.5, as added by Statutes 1984, chapter 901, for law enforcement officer to perform the downstream activities related to confiscating a firearm at a domestic violence scene (e.g., giving a receipt, holding the weapon for 48 to 72 hours, returning it to the owner if stolen, and final disposal if unclaimed). Absent any evidence in the record, staff also finds that there is no practical compulsion to perform these activities. Therefore, staff finds that section 12028.5, as added by Statutes 1984, chapter 901, is not a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

B. Does Penal Code section 12028.5 (Stats. 2002, ch. 833) impose a state-mandated new program or higher level of service?

We begin by summarizing the 2002 amendments to section 12028.5 (Stats. 2002, ch. 833, § 1.5). Subdivision (b) was amended as follows:

> [Law enforcement officers] shall take temporary custody of any firearm or other deadly weapon in plain sight or discovered pursuant to a consensual or other lawful search as necessary for the protection of the peace officer or other persons present. Upon taking custody of a firearm, the officer shall give the owner or person who possessed the firearm a receipt. The receipt shall describe the firearm and identification or serial number on the firearm. The receipt shall indicate where the firearm can be recovered, and the time limit for recovery as required by this section, and the date after which the owner or possessor can recover the firearm. No firearm or other deadly weapon shall be held less than 48 hours. Except as provided in subdivision (f), if a firearm or other deadly weapon is not retained for use as evidence related to criminal charges brought as a result of the domestic violence incident or is not retained because it was illegally possessed, the firearm or other deadly weapon shall be made available to the owner or person who was in lawful possession 48 hours after the seizure or as soon thereafter as possible, but no later than ~~72 hours~~ 5 business days after the seizure. In any civil action or proceeding for the return of firearms or ammunition or other deadly weapon seized by any state or local law enforcement agency and not returned within ~~72 hours~~ 5 business days following the initial seizure, except as provided in subdivision (d), the court shall allow reasonable attorney's fees to the prevailing party.

Subdivision (f) was amended to extend law enforcement deadlines as follows:

> In those cases ~~where~~ in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, the agency shall advise the owner of the firearm or other deadly weapon, and within

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[59] *Id.* at page 743. Emphasis in original.

~~30~~ 60 days of the date of seizure, initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned. The law enforcement agency may make an ex parte application stating good cause for an order extending the time to file a petition. Including any extension of time granted in response to an ex parte request, a petition must be filed within ~~60~~ 90 days of the date of seizure of the firearm or other deadly weapon.

Subdivision (h) was amended to lower the standard of proof required to prevent owners from recovering their firearms or weapons, as follows:

> If the person requests a hearing, the court clerk shall set a hearing no later than 30 days from receipt of that request. The court clerk shall notify the person, the law enforcement agency involved, and the district attorney of the date, time, and place of the hearing. Unless it is shown by ~~clear and convincing~~ a preponderance of the evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party.

Subdivision (j) authorizes the person to petition the court a second time if the court does not order the return of the firearm or other deadly weapon to the owner or person who had lawful possession. The 2002 amendment added the following:

> If, at the hearing, the court does not order the return of the firearm or other deadly weapon to the owner or person who had lawful possession, that person may petition the court for a second hearing within 12 months from the date of the initial hearing. If there is a petition for a second hearing, unless it is shown by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party. If the owner or person who had lawful possession does not petition the court within this 12-month period for a second hearing or is unsuccessful at the second hearing in gaining return of the firearm or other deadly weapon, the firearm or other deadly weapon may be disposed of as provided in Section 12028.

As a preliminary matter, staff finds that section 12028.5 constitutes a program within the meaning of article XIII B, section 6 because firearm or weapon confiscation is a governmental service to the public, in that it is done "as necessary for the protection of the peace officer or other persons present."[60]

1. Firearms or other deadly weapons taken in plain sight or during a consensual search

Amending the receipt for confiscated weapon: Penal Code section 12028.5, subdivision (b) requires law enforcement, on taking custody of the firearm or other deadly weapon at the scene of a domestic violence incident, to give the owner or person in possession a receipt. The receipt describes the firearm or deadly weapon and lists any identification or serial number on the

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[60] Penal Code section 12028.5, subdivision (b).

firearm, and indicates where the firearm or weapon can be recovered, and the date after which the owner or possessor can recover it (Pen. Code, § 12028.5, subd. (b)). The 2002 amendment requires the receipt to include information regarding "the time limit for recovery as required by this section."

Adding "the time limit for recovery as required by this section" to the information on the receipt is a new requirement. As such, staff finds that this is a state mandate, and a new program or higher level of service for law enforcement to make a one-time amendment to the receipt to include this information for a firearm or other deadly weapon confiscated at the scene of a domestic violence incident. (Pen. Code, § 12028.5, subd. (b), Stats. 2002, ch. 833.)).

Extending the period to make the firearm or weapon available after seizure: Subdivision (b) of section 12028.5 was amended further as follows:

> Except as provided in subdivision (f), [61] if a firearm or other deadly weapon is not retained for use as evidence related to criminal charges brought as a result of the domestic violence incident or is not retained because it was illegally possessed, the firearm or other deadly weapon shall be made available to the owner or person who was in lawful possession 48 hours after the seizure or as soon thereafter as possible, but no later than ~~72 hours~~ 5 business days after the seizure. In any civil action or proceeding for the return of firearms or ammunition or other deadly weapon seized by any state or local law enforcement agency and not returned within ~~72 hours~~ 5 business days following the initial seizure, except as provided in subdivision (d), the court shall allow reasonable attorney's fees to the prevailing party.

Preexisting law (before the 2002 amendment) required making the firearm or weapon available to the owner or person in lawful possession 48 hours after seizure or as soon thereafter as possible, but no later than 72 hours after the seizure. Staff finds that extending the period before a firearm or other deadly weapon may be made available from 72 hours to five business days does not mandate a new program or higher level of service. Although this may result in longer storage of the firearm or weapon, the storage is at the discretion of the local agency since nothing prevents making the firearm available within the 48 hours after seizure. Therefore, staff finds that this amendment does not mandate a new activity on a local agency within the meaning of article XIII B, section 6.

Extending the time to initiate a petition in court to determine if weapon should be returned: Subdivision (f) was amended by Statutes 2002, chapter 833 to extend law enforcement deadlines as follows:

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[61] Subdivision (f) of section 12028.5 authorizes, within 60 days of seizure, the law enforcement agency to initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned in cases "in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat." This provision also requires notifying the owner.

> In those cases ~~where~~ in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, the agency shall advise the owner of the firearm or other deadly weapon, and within ~~30~~ 60 days of the date of seizure, initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned. The law enforcement agency may make an ex parte application stating good cause for an order extending the time to file a petition. Including any extension of time granted in response to an ex parte request, a petition must be filed within ~~60~~ 90 days of the date of seizure of the firearm or other deadly weapon.

Staff finds that the 2002 amendment increasing the time from 30 to 60 days to initiate a petition, and from 60 to 90 days if the court grants an extension to file the petition, does not mandate a new program or higher level of service because the amendment gives the local law enforcement agency *more* time than in preexisting law to initiate the petition, but does not require a new activity of a local agency.

Lowering the standard of evidence to deny returning the firearm or weapon: Subdivision (h) of section 12028.5 was amended by the test claim statute to lower the standard of proof required to prevent owners from recovering their firearms or weapons, as follows:

> If the person requests a hearing, the court clerk shall set a hearing no later than 30 days from receipt of that request. The court clerk shall notify the person, the law enforcement agency involved, and the district attorney of the date, time, and place of the hearing. Unless it is shown by ~~clear and convincing~~ a preponderance of the evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party.

Staff finds that the 2002 amendment does not mandate a new program or higher level of service. The amendment lowers the standard of proof from clear and convincing to a preponderance of the evidence that the local government is required to show in order to keep the firearm or weapon from being returned to the owner. This amendment does not, however, require a new activity of the local agency, or increase the level service for an existing activity. Therefore, staff finds that the 2002 amendment to subdivision (h) that lowers the standard of proof does not mandate a new program or higher level of service.

Petition for second hearing and attorney's fees: Subdivision (j) states (with the 2002 amendments shown) the following:

> If, at the hearing, the court does not order the return of the firearm or other deadly weapon to the owner or person who had lawful possession, that person may petition the court for a second hearing within 12 months from the date of the initial hearing. If there is a petition for a second hearing, unless it is shown by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party. If the owner or

> person who had lawful possession does not petition the court within this 12-month period for a second hearing or is unsuccessful at the second hearing in gaining return of the firearm or other deadly weapon, the firearm or other deadly weapon may be disposed of as provided in Section 12028.

Although this provision in subdivision (j) does not expressly contain mandatory language, the local agency would have a duty to respond to the owner's petition to return the firearm or weapon if the facts present themselves. Subdivision (f) of section 12028.5 requires the local agency to file the petition to prevent the return of the firearm if "a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat." This statutory duty in (f) to keep the weapon from being returned to someone dangerous carries over to the petition for a second hearing in subdivision (j). This is consistent with the general duty of local law enforcement and district attorneys to protect the public.[62] Therefore, in cases where the firearm or weapon owner petitions for a second hearing within 12 months of the date of the initial hearing, staff finds that it is a state mandate for the local agency to show by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat.

As to attorney's fees, staff also finds that it is a mandate, since the court is required to impose them, and the local agency is required to pay them, if it does not prevail in keeping the firearm or other deadly weapon from being returned to the owner or person who was in lawful possession after the second petition. Therefore, staff finds that paying the attorney's fees in subdivision (j) to the prevailing party is a state mandate upon order of the court.

Preexisting law (before the 2002 amendment) authorizes the owner or person in possession to petition the court a second time for return of the firearm or other deadly weapon. Preexisting law also authorizes local law enforcement to dispose of the firearm or other deadly weapon if the person does not petition the court or is unsuccessful at the second hearing in gaining the return of the firearm or other deadly weapon. Preexisting law did not, however, require a local government to show by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, nor did it require the local agency to pay attorney's fees on order of the court. Therefore, if the facts so dictate, staff finds that these activities are a new program or higher level of service if there is a petition for a second hearing for firearms or other deadly weapons confiscated in plain sight or during a consensual search.

2. Firearms or other deadly weapons taken during "other lawful searches"

Firearm or weapon seizure: The 2002 amendment to section 12028.5 (Stats. 2002, ch. 833, § 1.5) adds the following underlined text to subdivision (b):

> [Law enforcement officers] shall take temporary custody of any firearm or other deadly weapon in plain sight or discovered pursuant to a consensual or other lawful search as necessary for the protection of the peace officer or other persons present.

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[62] *Fagan v. Superior Court* (2003) 111 Cal.App.4th 607, 615.

Sponsored by the City of Santa Rosa, the legislative history of this amendment indicates that its purpose was "to add any "lawful" search to the existing "plain sight or consensual" search required in domestic violence circumstances for the mandated seizure of firearms and weapons."[63] Adding "any lawful search" to the consensual or plain sight searches already in the statute means that firearm or weapon confiscation is now also required for searches incident to arrest, or of people the officer has legal cause to arrest,[64] or searches pursuant to a warrant, or searches based on statements of persons who do not have authority to consent but have indicated to law enforcement that a weapon is present at the scene.[65]

Staff finds that the plain language of this subdivision mandates a law enforcement officer at a domestic violence scene involving a threat to human life or a physical assault to take temporary custody of any firearm or other deadly weapon during an "other lawful search" as necessary for the protection of the peace officer or other persons present (Pen. Code, § 12028.5, subd. (b)).

Adding "or other lawful search" to subdivision (b) also creates a new program or higher level of service by increasing the quantity of searches during which taking temporary custody of the weapon is required. Adding "other lawful search" to the statute means that firearm or weapon confiscation is now also required for searches incident to arrest, or of people the officer has legal cause to arrest,[66] or searches pursuant to a warrant, or searches based on statements of persons who do not have authority to consent but have indicated to law enforcement that a weapon is present at the scene.[67]

Therefore, staff finds that Penal Code section 12028.5, subdivision (b), is a new program or higher level of service for law enforcement to take temporary custody of a firearm or other deadly weapon at a scene of domestic violence, as defined in section 12028.5, subdivision (a), if the firearm or weapon is confiscated during an "other lawful search."

The remainder of the analysis of section 12028.5 is limited to conditions of "other lawful searches" which, for purposes of this analysis, is defined as searches that are not plain sight or consensual.

Give receipt for confiscated weapon: The next activity in Penal Code section 12028.5, subdivision (b) is, upon taking custody of the firearm or deadly weapon at the scene of domestic violence, giving the owner or person in possession a receipt for the item. The receipt describes the firearm or deadly weapon and lists any identification or serial number on the firearm, and indicates where the firearm or weapon can be recovered, the time limit for recovery, and the date after which the owner or possessor can recover it (Pen. Code, § 12028.5, subd. (b)). Based on

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[63] Senate Committee on Public Safety, Analysis of Sen. Bill No. 1807 (2001-2002 Reg. Sess.) as introduced, page 2.

[64] Penal Code section 833.

[65] Senate Committee on Public Safety, Analysis of Sen. Bill No. 1807 (2001-2002 Reg. Sess.) as introduced, page 6.

[66] Penal Code section 833.

[67] Senate Committee on Public Safety, Analysis of Sen. Bill No. 1807 (2001-2002 Reg. Sess.) as introduced, page 6.

the plain language of this provision, staff finds that giving a receipt to the owner or person in lawful possession of the firearm or other deadly weapon, with contents as specified, is a state mandate.

Preexisting law requires, when a weapon or personal property is taken from an arrested person, giving a receipt to the person for the property taken.[68] And there is a similar requirement for arrested persons for property alleged to have been stolen or embezzled.[69] Although these statutes indicate that law enforcement officers have a longstanding duty to give a receipt to arrested persons for confiscated property, the receipt requirement for weapons taken at the scene of a domestic violence incident in the test claim statute is different in that more detail is required regarding the firearm or other deadly weapon seized.

Staff finds that the entire content of the receipt is a new program or higher level of service for other lawful searches, because no confiscation or receipt was required for those searches under preexisting law.

Therefore, staff finds that, upon taking custody of the firearm or other deadly weapon at the scene of domestic violence during any other lawful search, it is a new program or higher level of service to give the owner or person in possession a receipt for the firearm or other deadly weapon. The receipt must contain a description of the firearm or deadly weapon and list any identification or serial number on the firearm, and must indicate where the firearm or weapon can be recovered, the time limit for recovery, and the date after which the owner or possessor can recover it. (Pen. Code, § 12028.5, subd. (b)).

Hold and make firearm or weapon available to owner: Subdivision (b) requires local law enforcement to make the firearm or other deadly weapon available to the owner or person who was in lawful possession 48 hours after seizure or as soon as possible, but "no later than five business days" following the seizure (Pen. Code, § 12028.5, subd. (b)). Returning the firearm or weapon is not required if it is retained for use as evidence related to criminal charges as a result of domestic violence incident, or it is retained because it was illegally possessed, or if the law enforcement agency files a petition to prevent returning the firearm or weapon because the agency has reasonable cause to believe the return would endanger the victim or person reporting the assault. Staff finds that, based on the language in subdivision (b), it is a state mandate to make the firearm or other deadly weapon available to the owner or person who was in lawful possession between 48 hours and five business days after the seizure.

Preexisting law did not require holding firearms or other deadly weapons for weapons seized under section 12028.5 during other lawful searches.

Staff finds, therefore, it is a new program or higher level of service for local law enforcement, for firearms or other deadly weapons confiscated during any other lawful search, to make the firearm or other deadly weapon available to the owner or person who was in lawful possession 48 hours after seizure or as soon as possible, but no later than five business days following the seizure (Pen. Code, § 12028.5, subd. (b)). This finding does not apply if the firearm or other

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[68] Penal Code section 4003.

[69] Penal Code section 1412. This apparently refers to property, alleged to have been stolen or embezzled (see Pen. Code, § 1407).

deadly weapon confiscated is retained for use as evidence related to criminal charges as a result of domestic violence incident, or is retained because it was illegally possessed, or is retained because of a court petition filed pursuant to subdivision (f) of section 12028.5.[70]

Return stolen firearm: Subdivision (d) of section 12028.5 requires any stolen firearm or other deadly weapon to be returned to its lawful owner, as soon as its use for evidence has been served, upon proof of ownership. Staff finds that the plain language of subdivision (d) makes this provision a state mandate to return a stolen firearm.

Preexisting law, in Penal Code sections 1407 and 1408, requires stolen property in the custody of a peace officer to be returned to its owner "on the application of the owner and on satisfactory proof of his ownership of the property." More specifically, preexisting Penal Code section 12028, subdivisions (c) and (f) require returning a stolen firearm to its owner.

Because returning a stolen firearm or weapon to its owner is a preexisting duty of law enforcement, regardless of the type of search under which it is confiscated, staff finds that returning a stolen firearm or other deadly weapon to its owner is not a new program or higher level of service.

Dispose of firearm or weapon: Subdivision (e) of Penal Code section 12028.5 requires:

> Any firearm or other deadly weapon taken into custody and held by ...[law enforcement] for longer than 12 months and not recovered by the owner or person in lawful possession at the time it was taken into custody, shall be considered a nuisance and sold or destroyed as provided in subdivision (c) of Section 12028.[71] Firearms or other deadly weapons not recovered within 12 months due to an extended hearing process as provided in subdivision (j), are not subject to destruction until the court issues a decision, and then only if the court does not order the return of the firearm or other deadly weapon to the owner.

Staff finds that the plain language in the first sentence of subdivision (e) makes it a state mandate to sell or destroy a firearm held for longer than 12 months as specified. The second sentence regarding firearms or weapons not recovered "due to an extended hearing process" prevent destruction of the firearm or weapon until the court issues a decision on a second petition to prevent the return of the firearm or other deadly weapon as specified in subdivision (j). Subdivision (j), as discussed below, authorizes destruction of the firearm or other deadly weapon after the petition process is complete and the court does not order the firearm or other deadly weapon returned to the owner or person in lawful possession.

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[70] Subdivision (f) of section 12028.5 authorizes, within 60 days of seizure, the law enforcement agency to initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned in cases "in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat." This provision also requires notifying the owner.

[71] Section 12028, subdivision (c) requires specified weapons to be surrendered to law enforcement and authorizes disposal of them by sale at public auction or (in subd. (d)) by destruction.

Preexisting law did not require firearms or other deadly weapons confiscated, at the scene of a domestic violence incident involving a threat to human life or a physical assault, during any other lawful search, and held for 12 months, to be sold or destroyed as provided in subdivision (c) of section 12028. Therefore, staff finds that this activity is a new program or higher level of service.

Advise owner and petition court: Subdivision (f) of section 12028.5 states in part:

> In those cases in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, the agency shall advise the owner of the firearm or other deadly weapon, and within 60 days of the date of seizure, initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned.

Because of the plain language of this subdivision, staff finds that this is a state mandate to notify the owner and petition the court as specified if the agency has reasonable cause to believe that the return of the firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat.

Preexisting law did not require notice to the owner or the initiation of a court petition in cases where a firearm or other deadly weapon was taken at the scene of a domestic violence incident during any other lawful search.

Therefore, staff finds that it is a new program or higher level of service, for firearms or other deadly weapons confiscated during any other lawful search, if the law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, for a local law enforcement agency to advise the owner of the firearm or other deadly weapon, and within 60 days of the date of seizure (or 90 days if an extension is granted) to initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned.

Ex parte application: Subdivision (f) of section 12028.5 also states in part:

> The law enforcement agency may make an ex parte application stating good cause for an order extending the time to file a petition. Including any extension of time granted in response to an ex parte request, a petition must be filed within 90 days of the date of seizure of the firearm or other deadly weapon.

The Department of Finance, in comments filed August 30, 2007, argues that the language that the local agency "may make an ex parte application stating good cause for an order extending the time to file a petition" in subdivision (f) is permissive and this is therefore not a state mandate.

Staff finds that, based on its plain language, this ex parte application provision in subdivision (f) is discretionary and not a state mandate.

Notify owner: Subdivision (g) of section 12028.5 requires the law enforcement agency to inform the owner or person who had lawful possession of the firearm or other deadly weapon, at that person's last known address by registered mail, return receipt requested, that he or she has 30 days from the date of receipt of the notice to respond to the court clerk to confirm his or her desire for a hearing, and that the failure to respond shall result in a default order forfeiting the

confiscated firearm or other deadly weapon. The agency is also required, if the person whose firearm or other deadly weapon was seized does not reside at the last address provided to the agency, to make a diligent, good faith effort to learn the whereabouts of the person and to comply with the notification requirements in subdivision (g). Staff finds that the plain language of subdivision (g) requires these activities, so the owner notification and effort to learn the owner's whereabouts, as specified, impose a state mandate.

Preexisting law did not require these activities. Therefore, staff finds that it is a new program or higher level of service for firearms or other deadly weapons confiscated during any other lawful search, for a law enforcement agency to inform the owner or person who had lawful possession of the firearm or other deadly weapon, at that person's last known address by registered mail, return receipt requested, that he or she has 30 days from the date of receipt of the notice to respond to the court clerk to confirm his or her desire for a hearing, and that the failure to respond shall result in a default order forfeiting the confiscated firearm or other deadly weapon.

It is also a new program or higher level of service, for firearms or other deadly weapons confiscated during any other lawful search, if the owner or possessor whose firearm or other deadly weapon was seized does not reside at the last address provided to the law enforcement agency, for the agency to make a diligent, good faith effort to learn the whereabouts of the owner or possessor and to comply with the notification requirements in subdivision (g) of section 12028.5.

Court hearing and attorney's fees: Subdivision (h) requires the court clerk, if the owner or possessor of the firearm or weapon requests a hearing, to set a hearing no later than 30 days from the receipt of the request, and requires the clerk to notify the owner or possessor, law enforcement agency, and district attorney of the date, time and place of the hearing. If the owner or possessor requests a hearing, the local agency must show by a preponderance of evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat. The court is required to award attorney's fees to the prevailing party.

Although the language in subdivision (h) for this activity is not expressly mandatory, law enforcement and district attorneys have a duty to make this showing regarding return of the firearm or weapon if the facts present themselves. Subdivision (f) of section 12028.5 requires the local agency to file the petition to prevent the return of the firearm if "a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat." If the owner requests a hearing, the duty in subdivision (f) to file the petition is extended to responding to the request for a hearing in subdivision (h). Therefore, staff finds that making the showing by a preponderance of the evidence regarding the return of the weapon is a state mandate.

As to awarding attorney's fees, staff also finds that is a mandate, since the court is required to impose them, and the local agency is required to pay them, if it does not prevail in keeping the firearm or other deadly weapon from being returned to the owner or person who was in lawful possession. Therefore, staff finds that paying the attorney's fees in subdivision (h) to the prevailing party is a state mandate upon order of the court.

Because this was not previously required for firearms or weapons confiscated at a scene of domestic violence during any other lawful search, staff also finds that this provision is a new

program or higher level of service. Specifically, for firearms or other deadly weapons confiscated during any other lawful search, staff finds that it is a new program or higher level of service to show at a hearing by a preponderance of evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat. Staff also finds, since it was not previously required for any other lawful search, that it is a new program or higher level of service for the local agency to pay attorney's fees to the owner or person in lawful possession if the court orders the firearm or other deadly weapon returned to the owner or person who was in lawful possession (Pen. Code, § 12028.5, subd. (h.).

Petition for default and disposal of firearm or weapon: Subdivision (i) states that if the person does not request a hearing or does not respond within 30 days of receipt of the notice, the local law enforcement agency may file a petition for an order of default and to dispose of the firearm or other deadly weapon as provided in section 12028.

Staff finds that subdivision (i) is a state mandate to file the default petition, as an extension of the agency's duty in subdivision (f) to petition the court to not return the firearm or other deadly weapon if it "has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat."

In its August 30 comments on the draft staff analysis, Finance argues that filing a petition for an order of default is discretionary because the statute states that the local agency *may* do so, but does not require filing the petition. According to Finance, if no default petition is filed, after 12 months the weapons are disposed of pursuant to subdivision (e), which authorizes a weapon or firearm held by law enforcement for longer than 12 months and not recovered by the owner or possessor to be sold or destroyed, as specified.

Staff disagrees. Under subdivision (f), the law enforcement agency has already "initiat[ed] a petition in superior court to determine if the firearm or other deadly weapon should be returned." And the required notice must include, according to subdivision (g), that "failure to respond shall result in a default order forfeiting the confiscated firearm or other deadly weapon." Also, under subdivision (e), "firearms or other deadly weapons not recovered within 12 months due to an extended hearing process as provided in subdivision (j), are not subject to destruction until the court issues a decision." In other words, once the petition is filed, the court must make a decision regarding the firearm or weapon and it cannot simply be disposed of after 12 months. Thus, staff finds that subdivision (i) is a state mandate to file a petition for an order of default.

Staff also finds that since filing a default petition was not previously required, it is a new program or higher level of service for any other lawful searches. Therefore, for firearms or other deadly weapons confiscated pursuant to any other lawful search, staff finds that it is a new program or higher level of service for local agencies, if the owner or person who had lawful possession of the firearm or other deadly weapon does not request a hearing or does not otherwise respond within 30 days of the receipt of the notice, to file a petition for an order of default. (Pen. Code, § 12028.5, subd. (i).)

As to disposal of the firearm or other deadly weapon, the permissive language in subdivision (i) indicates that the local agency is not required to do so. Although other statutes govern disposal of firearms or weapons (e.g., Pen. Code, §§ 12032 or 12028) staff finds that the test claim statute does not require a local agency to dispose of them.

Petition for second hearing, dispose of firearm or weapon, attorney's fees: Subdivision (j) authorizes the person (owner) to petition the court a second time if the court does not order the return of the firearm or other deadly weapon to the owner or person who had lawful possession. Subdivision (j) requires the court to award reasonable attorney's fees to the prevailing party.

In the analysis above of subdivision (h), staff found that this provision is a new program or higher level of service, if there is a petition for a second hearing, to show by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, and to pay attorney's fees to the prevailing party upon the order of the court. The same reasoning applies here.

Therefore, if there is a petition for a second hearing for firearms or other deadly weapons confiscated during any other lawful search, it is a mandated new program or higher level of service to show by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, and to pay attorney's fees to the prevailing party upon the order of the court.

Subdivision (j) also authorizes law enforcement to dispose of the firearm or weapon if the person does not petition the court or is unsuccessful at the second hearing in gaining the return of the firearm or other deadly weapon. Because the language regarding disposal of the firearm or weapon is permissive, staff finds that disposing of the firearm or weapon is not a state mandate.

C. Does section 12028.5 impose costs mandated by the state?

Having discussed whether all the state mandated provisions of section 12028.5 constitute a new program or higher level of service, the final issue is whether they impose costs mandated by the state within the meaning of Government Code sections 17514 and 17556.

Claimant submitted a declaration that it will incur "costs well in excess of $1,000 during the 2002-03 fiscal year to implement" the test claim statutes.[72] Another declaration includes the time required for the alleged activities: "on average, an additional 5 minutes to inquire of the victim whether a firearm or other deadly weapon is present, an additional 30 minutes to search for and obtain the weapon; an additional 5 minutes to report the results, and, where the weapon is confiscated pursuant to Penal Code Section 12028.5, an additional 90 minutes to perform the other duties in the statute.[73]

Staff finds, therefore, that section 12028.5 imposes costs mandated by the state within the meaning of Government Code section 17514. Staff also finds that no exceptions to reimbursement in Government Code section 17556 apply.

All the elements having been met, staff finds that Penal Code section 12028.5, as amended by Statutes 2002, chapter 833, is a reimbursable state mandated program within the meaning of article XIII B, section 6 and Government Code section 17514, for the activities listed above.

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[72] Test Claim 02-TC-18, Exhibit 8, Declaration of Bernice Abram, page 1; Exhibit 9, Declaration of Wendy Watanabe, page 1.

[73] Test Claim 02-TC-18, Exhibit 8, Declaration of Bernice Abram, page 2; Exhibit 9, Declaration of Wendy Watanabe, page 2.

Issue 4: What is the period of reimbursement for the test claim?

The period of reimbursement for an approved test claim is the fiscal year before the fiscal year in which the claim is filed.[74] As for a test claim amendment: "The claimant may thereafter amend the test claim at any time, *but before the test claim is set for a hearing*, without affecting the original filing date as long as the amendment substantially relates to the original test claim."[75]

The original test claim, 99-TC-08, was filed May 15, 2000 (reimbursement period beginning July 1, 1998), and this test claim amendment was filed in April 2003. The test claim was set for hearing when the draft staff analysis for 99-TC-08 was issued on March 6, 2003. The claimant, however, amended the test claim in April 2003, *after* the test claim was set for a hearing. Because the amendment was not filed before the test claim was set for a hearing, as required by Government Code section 17557, subdivision (e), the period of reimbursement does not go back to the original reimbursement period of 99-TC-08. Thus, staff finds that the test claim amendment is deemed filed in April 2003 and if approved, claimants are eligible for reimbursement beginning July 1, 2001 (or later, depending on the effective date of the test claim statutes).

CONCLUSION

In sum, staff finds that effective January 1, 2002, Penal Code section 13730, subdivision (c)(3) (Stats. 2001, ch. 483) imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for local agencies, on all domestic violence-related calls for assistance:

- To include on the domestic violence incident report form a notation of whether the officer or officers who responded to the domestic violence call found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser, or both, whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether that inquiry disclosed the presence of a firearm or other deadly weapon (Pen. Code, § 13730, subd. (c)(3).

Effective January 1, 2003, in accordance with Penal Code section 12028.5 (Stats. 2002, ch. 833) staff finds that the activities listed below are a reimbursable state-mandated program within the meaning of article XIII B, section 6 and Government Code section 17514, when firearms or other deadly weapons are discovered during any other lawful search at the scene of a domestic violence incident involving a threat to human life or a physical assault. Any other lawful search includes but is not limited to the following searches: (1) a search incident to arrest, or of people the officer has legal cause to arrest; (3) a search pursuant to a warrant; or (3) a search based on statements of persons who do not have authority to consent, but have indicated to law enforcement that a weapon is present at the scene.

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[74] Government Code section 17557, subdivision (e).

[75] *Ibid.* [Emphasis added.] At the time this amendment was filed, this same provision was in Government Code section 17557, subdivision (c).

- To take temporary custody of any firearm or other deadly weapon when necessary for the protection of the peace officer or other persons present. (Pen. Code, § 12028.5, subd. (b).)
- To give the owner or person in lawful possession of the firearm or other deadly weapon a receipt that describes the firearm or deadly weapon and lists any identification or serial number on the firearm, and indicates where the firearm or weapon can be recovered, the time limit for recovery, and the date after which the owner or possessor can recover it. (Pen. Code, § 12028.5, subd. (b).)
- To make the firearm or other deadly weapon available to the owner or person who was in lawful possession 48 hours after seizure or as soon as possible, but no later than five business days following the seizure. Reimbursement for this activity is not required if either: (1) the firearm or other deadly weapon confiscated is retained for use as evidence related to criminal charges as a result of domestic violence incident; or (2) if the firearm or other deadly weapon is retained because it was illegally possessed, or (3) if the firearm or other deadly weapon is retained because of a court petition filed pursuant to subdivision (f) of section 12028.5.[76] (Pen. Code, § 12028.5, subd. (b).)
- To sell or destroy, as provided in subdivision (c) of Section 12028,[77] any firearm or other deadly weapon taken into custody and held for longer than 12 months and not recovered by the owner or person in lawful possession at the time it was taken into custody. Reimbursement for this activity is not required for firearms or other deadly weapons not recovered within 12 months due to an extended hearing process as provided in subdivision (j) of section 12028.5. (Pen. Code, § 12028.5, subd. (e).)
- If the local agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, for the agency to advise the owner of the firearm or other deadly weapon, and within 60 days of the date of seizure (or 90 days if an extension is granted) initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned. (Pen. Code, § 12028.5, subd. (f).)

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[76] Subdivision (f) of section 12028.5 authorizes, within 60 days of seizure, the law enforcement agency to initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned in cases "in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat." This provision also requires notifying the owner.

[77] Section 12028, subdivision (c) requires specified weapons to be surrendered to law enforcement and authorizes disposal of them by sale at public auction or (in subd. (d)) by destruction.

- To inform the owner or person who had lawful possession of the firearm or other deadly weapon, at that person's last known address by registered mail, return receipt requested, that he or she has 30 days from the date of receipt of the notice to respond to the court clerk to confirm his or her desire for a hearing, and that the failure to respond shall result in a default order forfeiting the confiscated firearm or other deadly weapon. If the person whose firearm or other deadly weapon was seized does not reside at the last address provided to the local agency, for the agency to make a diligent, good faith effort to learn the whereabouts of the person and to comply with the notification requirements in subdivision (g) of section 12028.5. (Pen. Code, § 12028.5, subd. (g).)
- If the owner or person who had lawful possession of the firearm or other deadly weapon requests a hearing, to show in court by a preponderance of evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat. If the court orders the firearm or other deadly weapon returned to the owner or person who had lawful possession, the local agency upon order of the court shall pay reasonable attorney's fees to the prevailing party. (Pen. Code, § 12028.5, subd. (h).)
- If the owner or person who had lawful possession of the firearm or other deadly weapon does not request a hearing or does not respond within 30 days of the receipt of notice, to file a petition in court for an order of default. (Pen. Code, § 12028.5, subd. (i).)

Effective January 1, 2003, in accordance with Penal Code section 12028.5 (Stats. 2002, ch. 833) staff finds that the following activities are a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514, for local agencies, when firearms or other deadly weapons are taken into temporary custody at the scene of a domestic violence incident involving a threat to human life or a physical assault, and the firearm or other deadly weapon is discovered in plain sight or pursuant to a consensual or other lawful search.

- The one-time activity of amending the receipt for a confiscated firearm or other deadly weapon to include "the time limit for recovery as required" by section 12028.5. (Pen. Code, § 12028.5, subd. (b).)
- If the person who owns or had lawful possession of the firearm or other deadly weapon petitions the court for a second hearing within 12 months of the date of the initial hearing, showing by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat. If the court orders the firearm or other deadly weapon returned to the owner or person who had lawful possession, the local agency upon order of the court shall pay reasonable attorney's fees to the prevailing party. (Pen. Code, § 12028.5, subd. (j).)

Staff also finds that Family Code section 6228 (Stats. 2002, ch. 377) and Penal Code section 12028.5 (Stats. 1984, ch. 901 & Stats. 2002, ch 830)[78] are not a reimbursable state mandated program within the meaning of article XIII B, section 6 and Government Code section 17514 because they do not mandate a new program or higher level of service.

Recommendation

Staff recommends that the Commission adopt this analysis to partially approve the test claim for the activities listed above.

[78] Statutes 2002, chapter 833 was double joined to Statutes. 2002, chapter 830, but only chapter 833 amended section 12028.5 because it was chaptered last (Gov. Code, § 9605).

Hearing Date: September 27, 2007
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ITEM 18

TEST CLAIM
PROPOSED STATEMENT OF DECISION

Family Code Section 6228; Penal Code Sections 12028.5 and 13730
Statutes 1984, Chapter 901; Statutes 2001, Chapter 483;
Statutes 2002, Chapters 377, 830 and 833

Crime Victims' Domestic Violence Incident Reports II
(02-TC-18)

County of Los Angeles, Claimant

EXECUTIVE SUMMARY

The sole issue before the Commission is whether the Proposed Statement of Decision accurately reflects any decision made by the Commission at the September 27, 2007 hearing on the above named test claim.[1]

Recommendation

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

However, if the Commission's vote on Item 17 modifies the staff analysis, staff recommends that the motion on adopting the Proposed Statement of Decision reflect those changes, which would be made before issuing the final Statement of Decision. In the alternative, if the changes are significant, it is recommended that adoption of a Proposed Statement of Decision be continued to the December 2007 Commission hearing.

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

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON:	Case No.: 02-TC-18
Family Code Section 6228 and Penal Code Sections 12028.5 and 13730	*Crime Victims' Domestic Violence Incident Reports II*
Statutes 1984, Chapter 901; Statutes 2001, Chapter 483; Statutes 2002, Chapters 377, 830 and 833	STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7.
Filed on April 2, 2003	(*Proposed for adoption September 27, 2007*)
By County of Los Angeles, Claimant	

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on September 27, 2007. [Witness list will be included in the final Statement of Decision.]

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission [adopted/modified] the staff analysis to [approve/deny] the test claim at the hearing by a vote of [vote count will be included in the final Statement of Decision].

Summary of Findings

The Commission finds that effective January 1, 2002,[2] Penal Code section 13730, subdivision (c)(3) (Stats. 2001, ch. 483) imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for local agencies, on all domestic violence-related calls for assistance:

- To include on the domestic violence incident report form a notation of whether the officer or officers who responded to the domestic violence call found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser, or both, whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether that inquiry disclosed the presence of a firearm or other deadly weapon (Pen. Code, § 13730, subd. (c)(3).

[2] Government Code section 17556, subdivision (e).

Effective January 1, 2003, in accordance with Penal Code section 12028.5 (Stats. 2002, ch. 833) the Commission finds that the activities listed below are a reimbursable state-mandated program within the meaning of article XIII B, section 6 and Government Code section 17514, when firearms or other deadly weapons are discovered during any other lawful search at the scene of a domestic violence incident involving a threat to human life or a physical assault. Any other lawful search includes but is not limited to the following searches: (1) a search incident to arrest, or of people the officer has legal cause to arrest; (3) a search pursuant to a warrant; or (3) a search based on statements of persons who do not have authority to consent, but have indicated to law enforcement that a weapon is present at the scene.

- To take temporary custody of any firearm or other deadly weapon when necessary for the protection of the peace officer or other persons present. (Pen. Code, § 12028.5, subd. (b).)
- To give the owner or person in lawful possession of the firearm or other deadly weapon a receipt that describes the firearm or deadly weapon and lists any identification or serial number on the firearm, and indicates where the firearm or weapon can be recovered, the time limit for recovery, and the date after which the owner or possessor can recover it. (Pen. Code, § 12028.5, subd. (b).)
- To make the firearm or other deadly weapon available to the owner or person who was in lawful possession 48 hours after seizure or as soon as possible, but no later than five business days following the seizure. Reimbursement for this activity is not required if either: (1) the firearm or other deadly weapon confiscated is retained for use as evidence related to criminal charges as a result of domestic violence incident; or (2) if the firearm or other deadly weapon is retained because it was illegally possessed, or (3) if the firearm or other deadly weapon is retained because of a court petition filed pursuant to subdivision (f) of section 12028.5.[3] (Pen. Code, § 12028.5, subd. (b).)
- To sell or destroy, as provided in subdivision (c) of Section 12028,[4] any firearm or other deadly weapon taken into custody and held for longer than 12 months and not recovered by the owner or person in lawful possession at the time it was taken into custody. Reimbursement for this activity is not required for firearms or other deadly weapons not recovered within 12 months due to an extended hearing

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[3] Subdivision (f) of section 12028.5 authorizes, within 60 days of seizure, the law enforcement agency to initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned in cases "in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat." This provision also requires notifying the owner.

[4] Section 12028, subdivision (c) requires specified weapons to be surrendered to law enforcement and authorizes disposal of them by sale at public auction or (in subd. (d)) by destruction.

process as provided in subdivision (j) of section 12028.5. (Pen. Code, § 12028.5, subd. (e).)

- If the local agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, for the agency to advise the owner of the firearm or other deadly weapon, and within 60 days of the date of seizure (or 90 days if an extension is granted) initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned. (Pen. Code, § 12028.5, subd. (f).)
- To inform the owner or person who had lawful possession of the firearm or other deadly weapon, at that person's last known address by registered mail, return receipt requested, that he or she has 30 days from the date of receipt of the notice to respond to the court clerk to confirm his or her desire for a hearing, and that the failure to respond shall result in a default order forfeiting the confiscated firearm or other deadly weapon. If the person whose firearm or other deadly weapon was seized does not reside at the last address provided to the local agency, for the agency to make a diligent, good faith effort to learn the whereabouts of the person and to comply with the notification requirements in subdivision (g) of section 12028.5. (Pen. Code, § 12028.5, subd. (g).)
- If the owner or person who had lawful possession of the firearm or other deadly weapon requests a hearing, to show in court by a preponderance of evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat. If the court orders the firearm or other deadly weapon returned to the owner or person who had lawful possession, the local agency upon order of the court shall pay reasonable attorney's fees to the prevailing party. (Pen. Code, § 12028.5, subd. (h).)
- If the owner or person who had lawful possession of the firearm or other deadly weapon does not request a hearing or does not respond within 30 days of the receipt of notice, to file a petition in court for an order of default. (Pen. Code, § 12028.5, subd. (i).)

Effective January 1, 2003, in accordance with Penal Code section 12028.5 (Stats. 2002, ch. 833) the Commission finds that the following activities are a reimbursable state-mandated program within the meaning of article XIII B, section 6 and Government Code section 17514, for local agencies, when firearms or other deadly weapons are taken into temporary custody at the scene of a domestic violence incident involving a threat to human life or a physical assault, and the firearm or other deadly weapon is discovered in plain sight or pursuant to a consensual or other lawful search.

- The one-time activity of amending the receipt for a confiscated firearm or other deadly weapon to include "the time limit for recovery as required" by section 12028.5. (Pen. Code, § 12028.5, subd. (b).)
- If the person who owns or had lawful possession of the firearm or other deadly weapon petitions the court for a second hearing within 12 months of the date of

> the initial hearing, showing by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat. If the court orders the firearm or other deadly weapon returned to the owner or person who had lawful possession, the local agency upon order of the court shall pay reasonable attorney's fees to the prevailing party. (Pen. Code, § 12028.5, subd. (j).)

The Commission also finds that Family Code section 6228 (Stats. 2002, ch. 377) and Penal Code section 12028.5 (Stats. 1984, ch. 901 & Stats. 2002, ch 830)[5] are not a reimbursable state mandated program within the meaning of article XIII B, section 6 and Government Code section 17514 because they do not mandate a new program or higher level of service.

BACKGROUND

This test claim alleges activities based on Penal Code sections 13730 (Stats. 2001, ch. 483), 12028.5 (Stats. 1984, ch. 901; Stats. 2002, chs. 830 & 833), and Family Code section 6228 (Stats. 2002, ch. 377). These statutes add weapons information to the domestic violence incident report form, require giving a copy of the form to the victim's representative, as defined, if the victim is deceased, and require law enforcement officers at the scene of a domestic violence incident "involving a threat to human life or a physical assault"[6] to take temporary custody of weapons, including a process for their return or disposal.

Test Claim Statutes

Penal Code section 13730: This section was originally added by Chapter 1609, Statutes of 1984, and requires local law enforcement agencies to develop a system for recording all domestic violence-related calls for assistance. Subdivision (c) requires law enforcement agencies to develop an incident report form for the domestic violence calls, with specified content. It was amended (Stats. 2001, ch. 483) in subdivision (c) to add the following to the form:

> (3) A notation of whether the officer or officers who responded to the domestic violence call found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser, or both, whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether that inquiry disclosed the presence of a firearm or other deadly weapon. Any firearm or other deadly weapon discovered by an officer at the scene of a domestic violence incident shall be subject to confiscation pursuant to Section 12028.5.

Family Code section 6228: This section requires giving, without charging a fee, a copy of the domestic violence incident report or the incident report face sheet, or both, to the victim. The test claim statute (Stats. 2002, ch. 377) amended this section to require giving a copy of the report to a representative of the victim, as defined, if the victim is deceased. Specifically, it was amended to add the underlined text as follows:

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[5] Statutes 2002, chapter 833 was double joined to Statutes. 2002, chapter 830, but only chapter 833 amended section 12028.5 because it was chaptered last (Gov. Code, § 9605).

[6] Penal Code section 12028.5, subdivision (b).

(a) State and local law enforcement agencies shall provide, without charging a fee, one copy of all domestic violence incident report face sheets, one copy of all domestic violence incident reports, or both, to a victim of domestic violence, or to his or her representative if the victim is deceased, as defined in subdivision (g), upon request. For purposes of this section, "domestic violence" has the definition given in Section 6211.[7]

Other subdivisions of section 6228 were amended similarly. Subdivision (d), which specifies that the person requesting copies of the incident report must present identification, was amended to require the representative to present a certified copy of the death certificate of the victim at the time of the request. Subdivision (g) defines the representative of the victim as any of the following:

(1) (A) The surviving spouse.
(B) A surviving child of the decedent who has attained 18 years of age.
(C) A domestic partner, as defined in subdivision (a) of Section 297.
(D) A surviving parent of the decedent.
(E) A surviving adult relative.
(F) The public administrator if one has been appointed.

(2) A representative of the victim does not include any person who has been convicted of murder in the first degree, as defined in Section 189 of the Penal Code, of the victim, or any person identified in the incident report face sheet as a suspect. Domestic violence incident report face sheets may not be provided to a representative of the victim unless the representative presents his or her identification, such as a current, valid driver's license, a state-issued identification

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[7] Family Code section 6211 defines domestic violence as "abuse perpetrated against any of the following persons:

(a) A spouse or former spouse.
(b) A cohabitant or former cohabitant, as defined in Section 6209.
(c) A person with whom the respondent is having or has had a dating or engagement relationship.
(d) A person with whom the respondent has had a child, where the presumption applies that the male parent is the father of the child of the female parent under the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12).
(e) A child of a party or a child who is the subject of an action under the Uniform Parentage Act, where the presumption applies that the male parent is the father of the child to be protected.
(f) Any other person related by consanguinity or affinity within the second degree."

Family Code section 6203 defines abuse as any of the following:

"(a) Intentionally or recklessly to cause or attempt to cause bodily injury.
(b) Sexual assault.
(c) To place a person in reasonable apprehension of imminent serious bodily injury to that person or to another.
(d) To engage in any behavior that has been or could be enjoined pursuant to Section 6320."

card, or a passport and a certified copy of the death certificate or other satisfactory evidence of the death of the victim at the time of the request.

The purpose of Family Code section 6228 is to assist domestic violence victims to obtain a temporary restraining order against the accused.[8] The amendment regarding the victim representative was in response to a case in which a domestic violence victim committed suicide, and the victim's mother had difficulty obtaining the incident report when seeking custody of her grandchildren.[9]

Penal Code section 12028.5: This section was enacted in 1984 and has been amended several times. The original 1984 statute authorized a law enforcement officer to take temporary custody of a firearm "at the scene of a domestic violence incident involving a threat to human life or a physical assault."[10] The original statute also defined domestic violence, abuse, and family household member.[11]

Statutes 1999, chapter 662, not pled by claimant, amended section 12028.5 to require law enforcement officers to take temporary custody of any firearm or other deadly weapon[12] at a domestic violence[13] scene involving a threat to human life or a physical assault. Section 12028.5 also includes definitions of domestic violence and abuse, and specifies a procedure for making the firearm or other deadly weapon available to the owner, or disposing of it.

Statutes 2002, chapter 833 was double joined to Statutes. 2002, chapter 830, but only chapter 833 amended section 12028.5 because it was chaptered last.[14] This amendment to section 12028.5 pled by claimant adds "other lawful searches" (to preexisting plain sight or consensual search) during which law enforcement officers must confiscate firearms or other deadly weapons at the scene of a domestic violence incident. The amendment requires including on the receipt for the confiscated firearm or weapon "the time limit for recovery as required by this section."[15] It expands the maximum time the firearm or weapon can be held from 72 hours to five days (the minimum time remained 48 hours).[16] It also lengthens the time local government has to file a

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[8] Assembly Committee on Judiciary, Analysis of Assem. Bill No. 403 (1999-2000 Reg. Sess.) as amended on March 18, 1999, page 2.

[9] Senate Committee on Public Safety, Analysis of Senate Bill No. 1265 (2001-2002 Reg. Sess.) as amended on April 2, 2002, page 4.

[10] Former Penal Code section 12028.5, subdivision (b) (Stats. 1984, ch. 901).

[11] The definitions were amended by Statutes 1992, chapter 1136 and Statutes 1993, chapter 1098. These amendments were not pled by claimant, so the Commission makes no findings on them.

[12] "Deadly weapon means any weapon, the possession or concealed carrying of which is prohibited by Section 12020." (Pen. Code, § 12028.5, subd. (a)(3)).

[13] Penal Code section 12028.5, subdivision (b).

[14] Government Code section 9605.

[15] Penal Code section 12028.5, subdivision (b).

[16] *Ibid.*

petition to determine whether the firearm or weapon should be returned, extending it from 30 to 60 days after the seizure, or from 60 to 90 days with extensions.[17] In addition, the amendment lowered the standard of evidence needed to keep the firearm or weapon from being returned to the owner, from clear and convincing to a preponderance of evidence "that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat."[18]

The 2002 amendment also added a provision requiring the court to order returning the firearm or weapon to the owner, and to award reasonable attorney's fees to the prevailing party if there is a petition for a second hearing, "unless it is shown by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat."[19]

Prior Commission Decisions

CSM 4222: In 1987, the Commission approved a test claim on Penal Code section 13730, as added by Statutes 1984, chapter 1609 (*Domestic Violence Information*). The parameters and guidelines for *Domestic Violence Information* authorize reimbursement for local law enforcement agencies for the "costs associated with the development of a Domestic Violence Incident Report form used to record and report domestic violence calls," and "for the writing of mandated reports which shall include domestic violence reports, incidents or crime reports directly related to the domestic violence incident."

Beginning in fiscal year 1992-93, the Legislature suspended Penal Code section 13730 (as added by Stats. 1984, ch. 1609) pursuant to Government Code section 17581. Suspending a statute means the Legislature assigns a zero-dollar appropriation to the program and makes it optional.

CSM 96-362-01: In February 1998, the Commission considered a test claim on the 1995 amendment to Penal Code section 13730 (*Domestic Violence Training and Incident Reporting*).

In 1995, the Legislature amended Penal Code section 13730, subdivision (c) (Stats. 1995, ch. 965) to require law enforcement agencies to include in the domestic violence incident report information relating to the use of alcohol or controlled substances by the alleged abuser, and any prior domestic violence responses to the same address.

The Commission determined that the additional information on the domestic violence incident report was not mandated by the state because the suspension of the statute under Government Code section 17581 made the completion of the incident report optional, so the additional information under the test claim statute came into play only after a local agency elected to complete the incident report.

Based on the language of the suspension statute (Gov. Code, § 17581), the Commission determined, however, that during periods when the state operates without a budget, the original suspension of the mandate would not be in effect. Thus, for the periods when the state operates

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[17] Penal Code section 12028.5, subdivision (f).

[18] *Ibid.*

[19] Penal Code section 12028.5, subdivision (j).

without a budget until the Budget Act is chaptered and makes the domestic violence incident reporting program optional under Government Code section 17581, the Commission determined the activities required by the 1995 amendment to Penal Code section 13730 are reimbursable.

In 1998, Government Code section 17581 was amended to close the gap and continue the suspension of programs during periods when the state operates without a budget.[20] The *Domestic Violence Information and Incident Reporting* program has been suspended in every Budget Act since 1992 except for 2003-2004.[21]

99-TC-08: The current test claim was originally submitted as an amendment to (and severed from) test claim 99-TC-08, *Crime Victims' Domestic Violence Incident Reports,* which the Commission decided on May 29, 2003 (corrected decision issued in September 2003).[22] The Commission found it had no jurisdiction over Penal Code section 13730 (Stats. 1984, ch. 1609, Stats. 1995, ch. 965) because it had already adjudicated the statute in CSM 4222, *Domestic Violence Information,* and in CSM 96-362-01, *Domestic Violence Training and Incident Reporting.* The Commission also found that the mandate had been suspended by the Legislature every year since 1992-1993, making the activities discretionary on the part of local government.

Also decided in 99-TC-08 was Family Code section 6228 (Stats. 1999, ch. 1022), which the Commission found is a reimbursable mandate for storing domestic violence incident reports and face sheets for three years (Fam. Code, § 6228, subd. (e)). The Commission also found that section 6228 does not mandate or require local law enforcement agencies to prepare a domestic violence incident report or a face sheet, and that other activities related to providing the incident reports to victims were already required under Government Code section 6254 of the California Public Records Act, and were therefore not reimbursable.

Test claim 99-TC-08 did not include Penal Code section 12028.5, which is part of this claim.

Claimant Position

Claimant alleges that the test claim statutes impose a reimbursable state mandate under article XIII B, section 6 of the California Constitution. Claimant requests reimbursement for local law

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[20] Government Code section 17581, subdivision (a), now states the following: "No local agency shall be required to implement or give effect to any statute or executive order, or portion thereof, during any fiscal year *and the for the period immediately following that fiscal year for which the Budget Act has not been enacted for the subsequent fiscal year . . .*" (Emphasis added.)

[21] 2006-2007 Budget Act (Stats. 2006, chs. 46 & 47) Item 8885-295-0001, Schedule (3) (aa); 2005-2006 Budget Act (Stats. 2005, chs. 38 & 39) Item 8885-295-0001, Schedule (3) (hh); 2004-2005 Budget Act (Stats. 2004, ch. 208) Item 9210-295-0001, Provision 3, Schedule (5); 2002-2003 Budget Act (Stats. 2002, ch. 379), Item 9210-295-0001, Provision 3, Schedule (8); 2001-2002 Budget Act (Stats. 2001, ch. 106), Item 210-295-0001, Provision 3, Schedule (8); 2000-2001 Budget Act (Stats. 2000, ch. 52), Item 210-295-0001, Provision 3, Schedule (8); 1999-2000 Budget Act (Stats. 1999, ch. 50), Item 210-295-0001, Provision 2, Schedule (8).

[22] To avoid confusing this test claim with the original *Crime Victims' Domestic Violence Incident Reports,* this test claim is renamed *Crime Victims' Domestic Violence Incident Reports II.*

enforcement agencies to do the following based on Statutes 2001, chapter 483 that added subdivision (c)(3) to Penal Code section 13730:[23]

1. When "necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser or both, whether a firearm or other deadly weapon was present at the location."
2. To report if an inquiry was made "whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether the inquiry disclosed the presence of a firearm or other deadly weapon."
3. To confiscate "[a]ny firearm or other deadly weapon discovered by an officer at the scene of a domestic violence incident … pursuant to Section 12028.5"

Claimant requests reimbursement for local law enforcement agencies to do the following based on Penal Code section 12028.5:[24]

1. A peace officer "… shall take temporary custody of any firearm or other deadly weapon in plain sight or discovered pursuant to a consensual or other lawful search as necessary for the protection of the peace officer or other persons present." (§ 12028.5 (b).)
2. "Upon taking custody of a firearm or other deadly weapon, the officer shall give the owner or person who possessed the firearm a receipt. The receipt shall describe the firearm or other deadly weapon and list any identification or serial number on the firearm. The receipt shall indicate where the firearm or other deadly weapon can be recovered, the time limit for recovery as required by this section, and the date after which the owner or possessor can recover the firearm or other deadly weapon. (§ 12028.5 (b).)
3. The confiscated "… firearm or other deadly weapon shall be held [not less than] 48 hours." (§ 12028.5 (b).)
4. "[T]he firearm or other deadly weapon shall be made available to the owner or person who was in lawful possession [as specified] 48 hours after the seizure or as soon thereafter as possible, but no later than 5 business days after the seizure." (§ 12028.5 (b).)
5. A "peace officer, as defined in subdivisions (a) and (b) of Section 830.32, who takes custody of a firearm or deadly weapon pursuant to this section shall deliver the firearm within 24 hours to the city police department or county sheriff's office in the jurisdiction where the college or school is located." (§ 12028.5 (c).)
6. Any "firearm or other deadly weapon that has been taken into custody that has been stolen shall be restored to the lawful owner, as soon as its use for evidence has been served, upon his or her identification of the firearm or other deadly weapon and proof of ownership." (§ 12028.5 (d).)

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[23] Test Claim 02-TC-18, pages 2-3.

[24] Test Claim 02-TC-18, pages 7-10

7. Any "firearm or other deadly weapon taken into custody and held by police, university police, or sheriff's department or by a marshal's office, by a peace officer of the Department of the California Highway Patrol, as defined ... for longer than 12 months and not recovered by the owner or person who has lawful possession at the time it was taken into custody, shall be considered a nuisance and sold or destroyed as provided in subdivision (c) of Section 12028." (§ 12028.5 (e).)
8. "In those cases in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, the agency shall advise the owner of the firearm or other deadly weapon, and within 60 days of the date of seizure, initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned." (§ 12028.5 (f).)
9. "The law enforcement agency shall inform the owner or person who had lawful possession of the firearm or other deadly weapon, at the person's last known address by registered mail, return receipt requested, that he or she has 30 days from the date of receipt of the notice to respond to the court clerk to confirm his or her desire for a hearing, and that the failure to respond shall result in a default order forfeiting the confiscated firearm or other deadly weapon. For the purposes of this subdivision, the person's last known address shall be presumed to be the address provided to the law enforcement officer by that person at the time of the family violence incident. In the event the person whose firearm or other deadly weapon was seized does not reside at the last address provided to the agency, the agency shall make a diligent, good faith effort to learn the whereabouts of the person and to comply with these notification requirements." (§ 12028.5 (g).)
10. Local law enforcement agencies and the district attorney shall participate in hearings "... if the person requests a hearing" in which case, "... the court clerk shall set a hearing no later than 30 days from receipt of that request. The court clerk shall notify the person, the law enforcement agency involved, and the district attorney of the date, time, and place of the hearing. Unless it is shown by a preponderance of the evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party." (§ 12028.5 (h).)
11. Local law enforcement agencies and the district attorney shall participate in hearings "...[i]f there is a petition for a second hearing, and, "... unless it is shown by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat," the duty of local law enforcement agencies to "... return of the firearm or other deadly weapon" and, as specified, pay "... reasonable attorney's fees to the prevailing party." (§ 12028.5 (j).)

Claimant also requests reimbursement for local law enforcement agencies to, based on Family Code section 6228, to prepare and provide domestic violence incident reports for the "representatives" of domestic violence victims, as provided in statute.[25]

Claimant alleges that the duty to provide requested domestic violence incident reports and face sheets to victims and their representatives under Family Code section 6228 is not excused even if the general duty to prepare such reports and face sheets under Statutes 1984, chapter 1609 is made optional by the Legislature's suspension of the mandate pursuant to Government Code section 17581. Claimant submits that it has no reasonable alternative but to prepare the incident report or face sheet.

Claimant also submitted a declaration that it will incur "costs well in excess of $1,000 during the 2002-03 fiscal year to implement" the test claim statutes.[26] Another declaration includes the time required for the alleged activities: "on average, an additional 5 minutes to inquire of the victim whether a firearm or other deadly weapon is present, an additional 30 minutes to search for and obtain the weapon; an additional 5 minutes to report the results, and, where the weapon is confiscated pursuant to Penal Code Section 12028.5, an additional 90 minutes to perform" the duties listed in nos. 1-11 above.[27]

Claimant submitted comments concurring with the draft staff analysis.

State Agency Position

The Department of Finance, in comments filed August 20, 2007, concurs in part with the draft staff analysis. Finance disagrees with the discussion of Penal Code 13730, subdivision (c)(3), and argues that the finding should conform to the Commission's decision in CSM-96-362-01. Finance also disagrees that activities in Penal Code section 12028.5, subdivisions (f) and (i), should be reimbursable because, according to Finance, they are discretionary. These comments are further detailed and addressed below.

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[25] Test Claim 02-TC-18, pages 10-12.

[26] Test Claim 02-TC-18, Exhibit 8, Declaration of Bernice Abram, page 1; Exhibit 9, Declaration of Wendy Watanabe, page 1.

[27] Test Claim 02-TC-18, Exhibit 8, Declaration of Bernice Abram, page 2; Exhibit 9, Declaration of Wendy Watanabe, page 2.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[28] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[29] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[30] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[31]

In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[32]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[33] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim

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[28] Article XIII B, section 6, subdivision (a), (as amended in Nov. 2004) provides:

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

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

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

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

[32] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.)*; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

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

legislation.[34] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[35]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[36]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[37] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[38]

Issue 1: Does Penal Code section 13730, as amended by Statutes 2001, chapter 483, constitute a reimbursable state-mandated program?

Section 13730 requires local law enforcement agencies to develop and complete incident report forms for all domestic violence calls. As stated in subdivision (c) "In all incidents of domestic violence, *a report shall be written* and shall be identified on the face of the report as a domestic violence incident." [Emphasis added.] The report is required to include notations of officer observations regarding (in subd. (c)(1)) whether the alleged abuser was under the influence of alcohol or a controlled substance, and (in subd. (c)(2)) whether any law enforcement agency had previously responded to a domestic violence call at the same address involving the same alleged abuser or victim.

It was amended (Stats. 2001, ch. 483) in subdivision (c)(3) to add the following to the form:

> A notation of whether the officer or officers who responded to the domestic violence call found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser, or both, whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether that inquiry disclosed the presence of a firearm or other deadly weapon. Any firearm or other deadly weapon discovered by an officer at the scene of a domestic violence incident shall be subject to confiscation pursuant to Section 12028.5.

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

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

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

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

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

Read together, the plain language of subdivisions (c) and (c) (3) requires local law enforcement agencies to include this firearm information on the domestic violence incident report form. Moreover, it constitutes a program within the meaning of article XIII B, section 6 because it carries out the governmental function of providing a service to the public[39] by adding information to the domestic violence incident report form. It is also an activity that is unique to local government.

For a statute that had not been suspended by the Legislature, the above criteria would be enough to determine that the 2001 amendment is a state mandate subject to article XIII B, section 6. The 1984 version of section 13730 (Stats. 1984, ch. 1609) however, has been suspended by the Legislature. Thus, the issue is whether the 2001 requirement to include firearm and weapon information on the domestic violence incident form is a state mandate in light of the Legislature's annual budget-act suspension of Statutes 1984, chapter 1609.

The 1984 version of section 13730, subdivision (c), includes the following sentence: "In all incidents of domestic violence, a report shall be written and shall be thus identified on the face of the report as a domestic violence incident." This was determined to be a reimbursable activity in the Commission's decision CSM 4222, as discussed above.

As provided in Government Code section 17581, subdivisions (a) and (b), before suspending a statute, the following criteria must be met:

> (a) No local agency shall be required to implement or give effect to any statute or executive order, or portion thereof, during any fiscal year and for the period immediately following that fiscal year for which the Budget Act has not been enacted for the subsequent fiscal year if all of the following apply:
>
> (1) The statute or executive order, or portion thereof, has been determined by the Legislature, the commission, or any court to mandate a new program or higher level of service requiring reimbursement of local agencies pursuant to Section 6 of Article XIIIB of the California Constitution.
>
> (2) The statute or executive order, or portion thereof, or the commission's test claim number, has been specifically identified by the Legislature in the Budget Act for the fiscal year as being one for which reimbursement is not provided for that fiscal year.
>
> (b) Notwithstanding any other provision of law, if a local agency elects to implement or give effect to a statute or executive order described in subdivision (a), the local agency may assess fees to persons or entities which benefit from the statute or executive order. Any fee assessed pursuant to this subdivision shall not exceed the costs reasonably borne by the local agency.

The requirement in subdivision (c) of section 13730 to prepare a written domestic violence incident report has been suspended each year,[40] except for fiscal year 2003-2004,[41] since fiscal

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[39] *County of Los Angeles, supra,* 43 Cal.3d 46, 56.

[40] 2006-2007 Budget Act (Stats. 2006, chs. 46 & 47) Item 8885-295-0001, Schedule (3) (aa); 2005-2006 Budget Act (Stats. 2005, chs. 38 & 39) Item 8885-295-0001, Schedule (3) (hh); 2004-

year 1992-1993. The Legislature specifically identified Statutes 1984, chapter 1609 in the Budget Act and assigned a zero dollar appropriation to it. By suspending Statutes 1984, chapter 1609, the Legislature made preparing the written domestic violence incident report form an optional activity for local government.

Statutes 1993, chapter 1230 added the following to subdivision (a) of section 13730: "All domestic violence related calls for assistance shall be supported with a written incident report, as described in subdivision (c), identifying the domestic violence incident." This 1993 amendment has never been determined by the Legislature, the Commission, or any court to mandate a new program or higher level of service requiring local agency reimbursement, as required by Government Code section 17581. In sum, the 1993 amendment is not eligible for suspension.

This means, in essence, that the provisions of subdivision (c) in section 13730, when suspended by the Budget Act, are permissive, but the plain language of the 1993 amendment requires a written incident report for all domestic violence calls for assistance in subdivision (a). When statutory provisions conflict in this way, the Commission, like a court, relies on the following rule of statutory construction: "[W]hen two laws, upon the same subject, passed at different times, are inconsistent with each other, the one last passed must prevail."[42] Accordingly, the 1993 amendment to subdivision (a) prevails over the suspension of subdivision (c).[43] Thus, preexisting law requires that every domestic violence related call for assistance be supported with a written domestic violence incident report. Consequently, the Commission finds that including the firearm and weapon information in the domestic violence incident report form, as required by the 2001 amendment to Penal Code section 13730, subdivision (c), is state-mandated.

Finance disagrees. In comments filed August 30, 2007, Finance argues that this conclusion is inconsistent with the Commission's February 1998 decision in the *Domestic Violence Training and Incident Reporting* test claim (CSM-96-362-01) in which the Commission found that additional information on the domestic violence incident report was not mandated because the suspension of the statute made completion of the incident report optional, so the additional information under the test claim statute came into play only after a local agency elected to complete the incident report. Finance indicates in its comments that the Commission's 1998 decision "found that the 1993 amendment to Penal Code section 13730 (a), (Stats. 1993, ch.

2005 Budget Act (Stats. 2004, ch. 208) Item 9210-295-0001, Provision 3, Schedule (5); 2002-2003 Budget Act (Stats. 2002, ch. 379), Item 9210-295-0001, Provision 3, Schedule (8); 2001-2002 Budget Act (Stats. 2001, ch. 106), Item 210-295-0001, Provision 3, Schedule (8); 2000-2001 Budget Act (Stats. 2000, ch. 52), Item 210-295-0001, Provision 3, Schedule (8); 1999-2000 Budget Act (Stats. 1999, ch. 50), Item 210-295-0001, Provision 2, Schedule (8).

[41] 2003-2004 Budget Act (Stats. 2003, ch. 157) Final Change Book, p.655, Item 9210-295-0001, Provision 3.

[42] *People v. Kuhn* (1963) 216 Cal.App.2d 695, 700.

[43] This does not mean that the suspensions in the Budget Acts are idle acts of the Legislature, since there were other findings in the Commission's decision (CSM 4222) that are suspended.

1230) 'merely clarifies' the reporting requirement of subdivision (c) rather than mandating a new or additional requirement."

The Commission acknowledges that the analysis herein departs from the 1998 Commission decision. However, the plain language of the 1993 amendment to Penal Code section 13730, subdivision (a), requires a written incident report for all domestic violence calls. This amendment has never been the subject of a test claim, has never been determined by the Legislature or any court to mandate a new program or higher level of service, and is not pled here. Thus, it has not met the requirements of Government Code section 17581 to suspend a statute.

Moreover, since 1953, the California Supreme Court has held that the failure of a quasi-judicial agency to consider and apply prior decisions on the same subject is not a violation of due process and does not constitute an arbitrary action by the agency.[44] In *Weiss v. State Board of Equalization*, the plaintiffs brought mandamus proceedings to review the refusal of the State Board of Equalization to issue an off-sale beer and wine license at their premises. Plaintiffs contended that the action of the board was arbitrary and unreasonable because the board granted similar licenses to other businesses in the past. The California Supreme Court disagreed with the plaintiffs' contention and found that the board did *not* act arbitrarily. The Court stated:

> [P]laintiffs argument comes down to the contention that because the board may have erroneously granted licenses to be used near the school in the past it must continue its error and grant plaintiffs' application. That problem has been discussed: *Not only does due process permit omission of reasoned administrative opinions but it probably also permits substantial deviation from the principle of stare decisis.* Like courts, agencies may overrule prior decisions or practices and may initiate new policy or law through adjudication. (Emphasis added.) [45]

In 1989, the Attorney General's Office issued an opinion, citing the *Weiss* case, agreeing that claims previously approved by the Commission have no precedential value. Rather, "[a]n agency may disregard its earlier decision, provided that its action is neither arbitrary nor unreasonable [citing *Weiss, supra*, 40 Cal.2d. at 777]."[46] While opinions of the Attorney General are not binding, they are entitled to great weight.[47]

The Commission finds, therefore, that existing law in Penal Code section 13730, subdivision (a), requires a written incident report for each domestic violence call. Therefore, including the firearm and weapon information in the domestic violence incident report form, as required by the 2001 amendment to Penal Code section 13730, subdivision (c)(3), is state-mandated.

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[44] *Weiss v. State Board of Equalization* (1953) 40 Cal.2d 772, 776-777.

[45] *Id.* at page 776.

[46] 72 Opinions of the California Attorney General 173, 178, footnote 2 (1989).

[47] *Rideout Hospital Foundation, Inc. v. County of Yuba* (1992) 8 Cal.App.4th 214, 227.

The next issue is whether the provision in subdivision (c)(3) is a new program or higher level of service. To determine this, the test claim statute is compared to the legal requirements in effect immediately before enacting the test claim statute.[48]

Although preexisting law required filing an incident report for all domestic violence incident-related calls, as discussed above, preexisting law did not require the incident report to contain the following:

> A notation of whether the officer or officers who responded to the domestic violence call found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser, or both, whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether that inquiry disclosed the presence of a firearm or other deadly weapon. (Pen. Code, § 13730, subd. (c)(3).)

Therefore, the Commission finds that the following is a new program or higher level of service within the meaning of article XIII B, section 6: including on the domestic violence incident report form a notation of whether the officer who responded to the domestic violence call found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser, or both, whether a firearm or other deadly weapon was present at the location, and if there is an inquiry, whether that inquiry disclosed the presence of a firearm or other deadly weapon.

The final issue is whether the 2001 amendment to section 13730 imposes costs mandated by the state,[49] and whether any statutory exceptions listed in Government Code section 17556 apply to the claim. Government Code section 17514 defines "cost mandated by the state" as follows:

> [A]ny 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 of the California Constitution.

In the test claim exhibits,[50] claimant declares that it will incur costs in excess of $1,000 during the 2002-2003 fiscal year to implement the claim statutes.[51] Therefore, the Commission finds that section 13730, subdivision (c)(3) (Stats. 2001, ch. 483) imposes costs mandated by the state within the meaning of Government Code section 17514, and that no exceptions to reimbursement in Government Code section 17556 apply.

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

[49] *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

[50] Test Claim 02-TC-18, Exhibit 8, declaration of Bernice K. Abram, and Exhibit 9, declaration of Wendy Watanabe.

[51] Government Code section 17564.

All the elements having been met, the Commission finds that Penal Code section 13730, subdivision (c)(3), as amended (by Stats. 2001, ch. 483), is a reimbursable state-mandated program within the meaning of article XIII B, section 6 and Government Code section 17514, for all domestic violence-related calls for assistance, to include the following on the domestic violence incident report: A notation of whether the officer or officers who responded to the domestic violence call found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser, or both, whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether that inquiry disclosed the presence of a firearm or other deadly weapon.

Issue 2: Does Family Code section 6228, as amended by Statutes 2002, chapter 377, constitute a reimbursable state-mandated program?

Family Code section 6228 requires the local law enforcement agency to provide, without charging a fee, one copy of a domestic violence incident report face sheet, or one copy of a domestic violence incident report, or both, to a victim of domestic violence. The test claim statute amended this section to also require providing a copy to the victim's representative if the victim is deceased. The victim representative is defined as any of the following:

(A) The surviving spouse.
(B) A surviving child of the decedent who has attained 18 years of age.
(C) A domestic partner, as defined in subdivision (a) of Section 297.
(D) A surviving parent of the decedent.
(E) A surviving adult relative.
(F) The public administrator if one has been appointed.

Claimant alleges that section 6228 requires law enforcement agencies to prepare the incident report or face sheet.

The plain language of Family Code section 6228, however, does not mandate or require local law enforcement agencies to prepare a domestic violence incident report or a face sheet. Rather, the express language states that local law enforcement agencies "shall *provide*, without charging a fee, one copy of all domestic violence incident report face sheets, one copy of all domestic violence incident reports, or both, to a victim of domestic violence, or to his or her representative if the victim is deceased, as defined in subdivision (g), upon request." [Emphasis added.]

Therefore, the Commission finds that Family Code section 6228 is a state mandate for a local law enforcement agency to provide upon request, without charging a fee, one copy of the domestic violence incident report face sheet, or one copy of the domestic violence incident report, or both, to the victim's representative, as defined, if the victim is deceased.

Doing so, however, is not a new program or higher level of service.

The Public Records Act, in Government Code section 6254, subdivision (f) requires giving a copy of a police report "to the victim of an incident or *an authorized representative thereof* ..." [Emphasis added.] And one California appellate court held, with respect to records of law enforcement investigations, that "While the general public is denied access to this information

such is not true with respect to parties involved in the incident or others who have a proper interest in the subject matter."[52]

Moreover, subdivision (f) of Government Code section 6254 requires the following:

> [S]tate and local law enforcement agencies shall make public the following information, except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation:
>
> (1) The full name, current address, and occupation of every individual arrested by the agency, the individual's physical description ..., the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, ... all charges the individual is being held upon ....
>
> (2) Subject to the restrictions imposed by Section 841.5 of the Penal Code, the time, substance, and location of all complaints or requests for assistance received by an agency and the time and nature of the response thereto, including, to the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, the time, date, and location of occurrence, ...

Because preexisting Government Code section 6254, subdivision (f), requires releasing the same information as the domestic violence incident report to persons who would be authorized representatives, the Commission finds that providing the report or face sheet to the authorized victim representative (as required by Fam. Code, § 6228) is not a new program or higher level of service within the meaning of article XIII B, section 6.

Family Code section 6228 differs from the Public Records Act in one major aspect. Under the Public Records Act, local governments may charge a fee to recover the costs of making the police report information available, whereas the test claim statute prohibits charging a fee for the information. Increased costs alone, however, without the test claim statute mandating a new program or higher level of service to the public does not require reimbursement under article XIII B, section 6.[53]

Accordingly, the Commission finds that Family Code section 6228 (Stats. 2002, ch. 377) does not constitute a new program or higher level of service for a local law enforcement agency to provide, without charging a fee, one copy of the domestic violence incident report face sheet, or one copy of the domestic violence incident report, or both, to the victim's representative, as defined, if the victim is deceased.

Therefore, the Commission finds that that Family Code section 6228, as amended (Stats. 2002, ch. 377) is not a reimbursable state mandated program within the meaning of article XIII B, section 6 and Government Code section 17514.

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[52] *Vallejos v. California Highway Patrol* (1979) 89 Cal.App.3d 781, 786.

[53] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 877. *Kern High School Dist., supra,* 30 Cal.4th 727, 735.

Issue 3: Does Penal Code section 12028.5 constitute a reimbursable state-mandated program?

This section describes the procedure for a law enforcement officer to confiscate a firearm or other deadly weapon at the scene of a domestic violence incident "involving a threat to human life or a physical assault"[54] and describes the procedure for the destruction or return of the weapon. Although Section 12028.5 has been amended almost annually since 1984,[55] claimant pled only the 1984 version (Stats. 1984, ch. 901), and the 2002 amendment (Stats. 2002, chs. 830 & 833), so this analysis is limited to only those two versions of the statute.[56]

The 1999 amendment (Stats. 1999, ch. 662) to section 12028.5 stands out because it changed the "may take temporary custody" phrase in subdivision (b) to "shall take temporary custody." But because neither the 1999 amendment, nor any of the others before 2002 were pled by claimant, the Commission makes no findings on them.

A. Does Penal Code section 12028.5 (Stats. 1984, ch. 901) impose a state-mandated program?

As originally enacted in 1984, section 12028.5 read as follows:

> (a) As used in this section, the following words have the following meanings:[57]
>
> (1) "Abuse" means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself, herself, or another.
>
> (2) "Domestic Violence" is abuse perpetrated against a family or household member.
>
> (3) "Family or household member" means a spouse, former spouse, parent, child, any other person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who, within the last six months, regularly resided in the household.

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[54] Penal Code section 12028.5, subdivision (b).

[55] Statutes 1985, chapter 311, Statutes 1987, chapters 131 & 1362, Statutes 1989, chapters 850 & 1165, Statutes 1990, chapter 1695, Statutes 1991, chapter 866, Statutes 1992, chapters 163 & 1136, Statutes 1993, chapters 219 & 1098, Statutes 1994, chapters 871 & 872, Statutes 1996, chapter 305, Statutes 1998, chapter 606, Statutes 1999, chapters 659 & 662, Statutes 2000, chapter 254.

[56] Subdivision (c) of section 12028.5 (as amended by Stats. 1999, ch. 659) requires a community college or school district peace officer who takes custody of a firearm or deadly weapon pursuant to this section to deliver it within 24 hours to the city police department or county sheriff's office in the jurisdiction where the college or school is located. Because there is no community college or school district claimant and college declaration alleging increased costs in this test claim, the Commission does not discuss or make any findings on this provision in subdivision (c).

[57] The definitions were amended by Statutes 1992, chapter 1136 and Statutes 1993, chapter 1098. The Commission makes no findings on those amendments.

(b) A sheriff, undersheriff, deputy sheriff, or police officer of a city at the scene of a domestic violence incident involving a threat to human life or a physical assault *may* take temporary custody of any firearm described in Section 12001 in plain sight or discovered pursuant to a consensual search as necessary for the protection of the peace officer or other persons present. Upon taking custody of a firearm, the officer shall give the owner or person who possessed the firearm a receipt. The receipt shall describe the firearm and identification or serial number on the firearm. The receipt shall indicate where the firearm can be recovered and the date after which the owner or possessor can recover the firearm. No firearm shall be held less than 48 hours. If a firearm is not retained for use as evidence related to criminal charges brought as a result of the domestic violence incident or is not retained because it was illegally possessed, the firearm shall be made available to the owner or person who was in lawful possession 48 hours after the seizure or as soon thereafter as possible, but no later than 72 hours after the seizure. [Emphasis added.]

(c) Any firearm which has been taken into custody which has been stolen shall be restored to the lawful owner, as soon as its use for evidence has been served, upon his or her identification of the firearm and proof of ownership.

(d) Any firearm taken into custody and held by a police or sheriff's department for longer than 12 months and not recovered by the owner or person who has lawful possession at the time it was taken into custody, shall be considered a nuisance and sold or destroyed as provided in subdivision (c) of Section 12028.

Because the plain language in subdivision (b) of the 1984 version is permissive as to taking custody of the firearm, the Commission finds that local agencies are not legally compelled to take custody of a firearm at the scene of a domestic violence incident involving a threat to human life or a physical assault. The Commission also finds that local agencies are not practically compelled to take custody of a firearm under those circumstances. The statute on its face does not impose "certain and severe penalties such as double taxation or other draconian consequences"[58] for not confiscating the firearm. And there is no evidence in the record that local agencies are practically compelled to confiscate the firearm. Rather, under the 1984 statute, taking a firearm at the scene of a domestic violence incident was a policy decision of the local agency. Therefore, the Commission finds that confiscating the firearm under the circumstances described in subdivision (b) of section 12028.5 (Stats. 1984, ch. 901) is not a state mandate.

As to the remaining downstream activities in the 1984 statute, the issue is whether they are state mandated (e.g., giving a receipt, holding the weapon for 48 to 72 hours, returning it to the owner if stolen, and final disposal if unclaimed) if the triggering event is not state mandated.

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[58] *Kern High School Dist., supra,* 30 Cal.4th 727, 751. In another part of the opinion, the court stated an example of practical compulsion as a substantial penalty (independent of the program funds at issue) for not complying with the statute. (*Id.* at p. 731).

In the *Kern High School Dist.* case,[59] the California Supreme Court considered whether school districts have a right to reimbursement for costs in complying with statutory notice and agenda requirements for various education-related programs that are funded by the state and federal government. The court held that in eight of the nine programs at issue, the claimants were not entitled to reimbursement for notice and agenda costs because district participation in the underlying program was voluntary. As the court stated, "if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirement related to that program does not constitute a reimbursable mandate."[60]

Therefore, based on the plain language of the statute and the reasoning in *Kern High School Dist.,* the Commission finds that there is no legal compulsion in section 12028.5, as added by Statutes 1984, chapter 901, for law enforcement officer to perform the downstream activities related to confiscating a firearm at a domestic violence scene (e.g., giving a receipt, holding the weapon for 48 to 72 hours, returning it to the owner if stolen, and final disposal if unclaimed). Absent any evidence in the record, the Commission also finds that there is no practical compulsion to perform these activities. Therefore, the Commission finds that section 12028.5, as added by Statutes 1984, chapter 901, is not a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

B. Does Penal Code section 12028.5 (Stats. 2002, ch. 833) impose a state-mandated new program or higher level of service?

We begin by summarizing the 2002 amendments to section 12028.5 (Stats. 2002, ch. 833, § 1.5). Subdivision (b) was amended as follows:

> [Law enforcement officers] shall take temporary custody of any firearm or other deadly weapon in plain sight or discovered pursuant to a consensual or other lawful search as necessary for the protection of the peace officer or other persons present. Upon taking custody of a firearm, the officer shall give the owner or person who possessed the firearm a receipt. The receipt shall describe the firearm and identification or serial number on the firearm. The receipt shall indicate where the firearm can be recovered, and the time limit for recovery as required by this section, and the date after which the owner or possessor can recover the firearm. No firearm or other deadly weapon shall be held less than 48 hours. Except as provided in subdivision (f), if a firearm or other deadly weapon is not retained for use as evidence related to criminal charges brought as a result of the domestic violence incident or is not retained because it was illegally possessed, the firearm or other deadly weapon shall be made available to the owner or person who was in lawful possession 48 hours after the seizure or as soon thereafter as possible, but no later than ~~72 hours~~ 5 business days after the seizure. In any civil action or proceeding for the return of firearms or ammunition or other deadly weapon seized by any state or local law enforcement agency and not returned

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[59] *Id.*.

[60] *Id.* at page 743. Emphasis in original.

> within ~~72 hours~~ 5 business days following the initial seizure, except as provided in subdivision (d), the court shall allow reasonable attorney's fees to the prevailing party.

Subdivision (f) was amended to extend law enforcement deadlines as follows:

> In those cases ~~where~~ in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, the agency shall advise the owner of the firearm or other deadly weapon, and within ~~30~~ 60 days of the date of seizure, initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned. The law enforcement agency may make an ex parte application stating good cause for an order extending the time to file a petition. Including any extension of time granted in response to an ex parte request, a petition must be filed within ~~60~~ 90 days of the date of seizure of the firearm or other deadly weapon.

Subdivision (h) was amended to lower the standard of proof required to prevent owners or possessors from recovering their firearms or weapons, as follows:

> If the person requests a hearing, the court clerk shall set a hearing no later than 30 days from receipt of that request. The court clerk shall notify the person, the law enforcement agency involved, and the district attorney of the date, time, and place of the hearing. Unless it is shown by ~~clear and convincing~~ a preponderance of the evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party.

Subdivision (j) authorizes the owner or possessor to petition the court a second time if the court does not order the return of the firearm or other deadly weapon to the owner or person who had lawful possession. The 2002 amendment added the following:

> If, at the hearing, the court does not order the return of the firearm or other deadly weapon to the owner or person who had lawful possession, that person may petition the court for a second hearing within 12 months from the date of the initial hearing. If there is a petition for a second hearing, unless it is shown by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party. If the owner or person who had lawful possession does not petition the court within this 12-month period for a second hearing or is unsuccessful at the second hearing in gaining return of the firearm or other deadly weapon, the firearm or other deadly weapon may be disposed of as provided in Section 12028.

As a preliminary matter, the Commission finds that section 12028.5 constitutes a program within the meaning of article XIII B, section 6 because firearm or weapon confiscation is a

governmental service to the public, insofar as it is "necessary for the protection of the peace officer or other persons present."[61]

1. Firearms or other deadly weapons taken in plain sight or during a consensual search

Amending the receipt for confiscated weapon: Penal Code section 12028.5, subdivision (b) requires law enforcement, on taking custody of the firearm or other deadly weapon at the scene of a domestic violence incident, to give the owner or person in possession a receipt. The receipt describes the firearm or deadly weapon and lists any identification or serial number on the firearm, and indicates where the firearm or weapon can be recovered, and the date after which the owner or possessor can recover it (Pen. Code, § 12028.5, subd. (b)). The 2002 amendment requires the receipt to include information regarding "the time limit for recovery as required by this section."

Adding "the time limit for recovery as required by this section" to the information on the receipt is a new requirement. As such, the Commission finds that this is a state mandate, and a new program or higher level of service for law enforcement to make a one-time amendment to the receipt to include this information for a firearm or other deadly weapon confiscated at the scene of a domestic violence incident. (Pen. Code, § 12028.5, subd. (b), Stats. 2002, ch. 833.)).

Extending the period to make the firearm or weapon available after seizure: Subdivision (b) of section 12028.5 was amended further as follows:

> Except as provided in subdivision (f), [62] if a firearm or other deadly weapon is not retained for use as evidence related to criminal charges brought as a result of the domestic violence incident or is not retained because it was illegally possessed, the firearm or other deadly weapon shall be made available to the owner or person who was in lawful possession 48 hours after the seizure or as soon thereafter as possible, but no later than ~~72 hours~~ 5 business days after the seizure. In any civil action or proceeding for the return of firearms or ammunition or other deadly weapon seized by any state or local law enforcement agency and not returned within ~~72 hours~~ 5 business days following the initial seizure, except as provided in subdivision (d), the court shall allow reasonable attorney's fees to the prevailing party.

Preexisting law (before the 2002 amendment) required making the firearm or weapon available to the owner or person in lawful possession 48 hours after seizure or as soon thereafter as possible, but no later than 72 hours after the seizure. The Commission finds that extending the period before a firearm or other deadly weapon may be made available from 72 hours to five business days does not mandate a new program or higher level of service. Although this may

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[61] Penal Code section 12028.5, subdivision (b).

[62] Subdivision (f) of section 12028.5 authorizes, within 60 days of seizure, the law enforcement agency to initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned in cases "in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat." This provision also requires notifying the owner.

result in longer storage of the firearm or weapon, the storage is at the discretion of the local agency since nothing prevents making the firearm or weapon available within the 48 hours after seizure. Therefore, the Commission finds that this amendment does not mandate a new activity on a local agency within the meaning of article XIII B, section 6.

Extending the time to initiate a petition in court to determine if weapon should be returned: Subdivision (f) was amended by Statutes 2002, chapter 833 to extend law enforcement deadlines as follows:

> In those cases ~~where~~ in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, the agency shall advise the owner of the firearm or other deadly weapon, and within ~~30~~ 60 days of the date of seizure, initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned. The law enforcement agency may make an ex parte application stating good cause for an order extending the time to file a petition. Including any extension of time granted in response to an ex parte request, a petition must be filed within ~~60~~ 90 days of the date of seizure of the firearm or other deadly weapon.

The Commission finds that the 2002 amendment increasing the time from 30 to 60 days to initiate a petition, and from 60 to 90 days if the court grants an extension to file the petition, does not mandate a new program or higher level of service because the amendment gives the local law enforcement agency *more* time than in preexisting law to initiate the petition, but does not require a new activity of a local agency.

Lowering the standard of evidence to deny returning the firearm or weapon: Subdivision (h) of section 12028.5 was amended by the test claim statute to lower the standard of proof required to prevent owners or possessors from recovering their firearms or weapons, as follows:

> If the person requests a hearing, the court clerk shall set a hearing no later than 30 days from receipt of that request. The court clerk shall notify the person, the law enforcement agency involved, and the district attorney of the date, time, and place of the hearing. Unless it is shown by ~~clear and convincing~~ a preponderance of the evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party.

The Commission finds that the 2002 amendment does not mandate a new program or higher level of service. The amendment lowers the standard of proof from clear and convincing to a preponderance of the evidence that the local government is required to show in order to keep the firearm or weapon from being returned to the owner or person in lawful possession. This amendment does not, however, require a new activity of the local agency, or increase the level service for an existing activity. Therefore, the Commission finds that the 2002 amendment to subdivision (h) that lowers the standard of proof does not mandate a new program or higher level of service.

Petition for second hearing and attorney's fees: Subdivision (j) states (with the 2002 amendments shown) the following:

> If, at the hearing, the court does not order the return of the firearm or other deadly weapon to the owner or person who had lawful possession, that person may petition the court for a second hearing within 12 months from the date of the initial hearing. If there is a petition for a second hearing, unless it is shown by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party. If the owner or person who had lawful possession does not petition the court within this 12-month period for a second hearing or is unsuccessful at the second hearing in gaining return of the firearm or other deadly weapon, the firearm or other deadly weapon may be disposed of as provided in Section 12028.

Although this provision in subdivision (j) does not expressly contain mandatory language, the local agency would have a duty to respond to the owner's or possessor's petition to return the firearm or weapon if the facts present themselves. Subdivision (f) of section 12028.5 requires the local agency to file the petition to prevent the return of the firearm if "a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat." This statutory duty in (f) to keep the weapon from being returned to a dangerous owner or possessor carries over to the petition for a second hearing in subdivision (j). This is consistent with the general duty of local law enforcement and district attorneys to protect the public.[63] Therefore, in cases where the firearm or weapon owner or possessor petitions for a second hearing within 12 months of the date of the initial hearing, the Commission finds that it is a state mandate for the local agency to show by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat.

As to attorney's fees, the Commission also finds that this is a mandate, since the court is required to impose them, and the local agency is required to pay them, if the local agency does not prevail in keeping the firearm or other deadly weapon from being returned to the owner or person who was in lawful possession after the second petition. Therefore, the Commission finds that paying the attorney's fees in subdivision (j) to the prevailing party is a state mandate upon order of the court.

Preexisting law (before the 2002 amendment) authorizes the owner or person in possession to petition the court a second time for return of the firearm or other deadly weapon. Preexisting law also authorizes local law enforcement to dispose of the firearm or other deadly weapon if the person does not petition the court or is unsuccessful at the second hearing in gaining the return of the firearm or other deadly weapon. Preexisting law did not, however, require a local government to show by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or

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[63] *Fagan v. Superior Court* (2003) 111 Cal.App.4th 607, 615.

threat, nor did it require the local agency to pay attorney's fees on order of the court. Therefore, if the facts so dictate, the Commission finds that these activities are a new program or higher level of service if there is a petition for a second hearing for firearms or other deadly weapons confiscated in plain sight or during a consensual search.

2. Firearms or other deadly weapons taken during "other lawful searches"

Firearm or weapon seizure: The 2002 amendment to section 12028.5 (Stats. 2002, ch. 833, § 1.5) adds the following underlined text to subdivision (b):

> [Law enforcement officers] shall take temporary custody of any firearm or other deadly weapon in plain sight or discovered pursuant to a consensual or other lawful search as necessary for the protection of the peace officer or other persons present.

Sponsored by the City of Santa Rosa, the legislative history of this amendment indicates that its purpose was "to add any "lawful" search to the existing "plain sight or consensual" search required in domestic violence circumstances for the mandated seizure of firearms and weapons."[64] Adding "any lawful search" to the consensual or plain sight searches already in the statute means that firearm or weapon confiscation is now also required for searches incident to arrest, or of people the officer has legal cause to arrest,[65] or searches pursuant to a warrant, or searches based on statements of persons who do not have authority to consent but have indicated to law enforcement that a weapon is present at the scene.[66]

The Commission finds that the plain language of this subdivision mandates a law enforcement officer at a domestic violence scene involving a threat to human life or a physical assault to take temporary custody of any firearm or other deadly weapon during an "other lawful search" as necessary for the protection of the peace officer or other persons present (Pen. Code, § 12028.5, subd. (b)).

Adding "or other lawful search" to subdivision (b) also creates a new program or higher level of service by increasing the quantity of searches during which taking temporary custody of the weapon is required. Adding "other lawful search" to the statute means that firearm or weapon confiscation is now also required for searches incident to arrest, or of people the officer has legal cause to arrest,[67] or searches pursuant to a warrant, or searches based on statements of persons who do not have authority to consent but have indicated to law enforcement that a weapon is present at the scene.[68]

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[64] Senate Committee on Public Safety, Analysis of Sen. Bill No. 1807 (2001-2002 Reg. Sess.) as introduced, page 2.

[65] Penal Code section 833.

[66] Senate Committee on Public Safety, Analysis of Sen. Bill No. 1807 (2001-2002 Reg. Sess.) as introduced, page 6.

[67] Penal Code section 833.

[68] Senate Committee on Public Safety, Analysis of Sen. Bill No. 1807 (2001-2002 Reg. Sess.) as introduced, page 6.

Therefore, the Commission finds that Penal Code section 12028.5, subdivision (b), is a new program or higher level of service for law enforcement to take temporary custody of a firearm or other deadly weapon at a scene of domestic violence, as defined in section 12028.5, subdivision (a), if the firearm or weapon is confiscated during any "other lawful search."

The remainder of the analysis of section 12028.5 is limited to conditions of "other lawful searches" which, for purposes of this analysis, is defined as searches that are not plain sight or consensual.

Give receipt for confiscated weapon: The next activity in Penal Code section 12028.5, subdivision (b) is, upon taking custody of the firearm or deadly weapon at the scene of domestic violence, giving the owner or person in possession a receipt for the item. The receipt describes the firearm or deadly weapon and lists any identification or serial number on the firearm, and indicates where the firearm or weapon can be recovered, the time limit for recovery, and the date after which the owner or possessor can recover it (Pen. Code, § 12028.5, subd. (b)). Based on the plain language of this provision, the Commission finds that giving a receipt to the owner or person in lawful possession of the firearm or other deadly weapon, with contents as specified, is a state mandate.

Preexisting law requires, when a weapon or personal property is taken from an arrested person, giving a receipt to the person for the property taken.[69] And there is a similar requirement for arrested persons for property alleged to have been stolen or embezzled.[70] Although these statutes indicate that law enforcement officers have a longstanding duty to give a receipt to arrested persons for confiscated property, the receipt requirement for weapons taken at the scene of a domestic violence incident in the test claim statute is different in that more detail is required regarding the firearm or other deadly weapon seized.

The Commission finds that the entire content of the receipt is a new program or higher level of service for other lawful searches, because no confiscation or receipt was required for those searches under preexisting law.

Therefore, the Commission finds that, upon taking custody of the firearm or other deadly weapon at the scene of domestic violence during any other lawful search, it is a new program or higher level of service to give the owner or person in possession a receipt for the firearm or other deadly weapon. The receipt must contain a description of the firearm or deadly weapon and list any identification or serial number on the firearm, and must indicate where the firearm or weapon can be recovered, the time limit for recovery, and the date after which the owner or possessor can recover it. (Pen. Code, § 12028.5, subd. (b)).

Hold and make firearm or weapon available to owner: Subdivision (b) requires local law enforcement to make the firearm or other deadly weapon available to the owner or person who was in lawful possession 48 hours after seizure or as soon as possible, but "no later than five business days" following the seizure (Pen. Code, § 12028.5, subd. (b)). Returning the firearm or weapon is not required if it is retained for use as evidence related to criminal charges as a result

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[69] Penal Code section 4003.

[70] Penal Code section 1412. This apparently refers to property, alleged to have been stolen or embezzled (see Pen. Code, § 1407).

of domestic violence incident, or it is retained because it was illegally possessed, or if the law enforcement agency files a petition to prevent returning the firearm or weapon because the agency has reasonable cause to believe the return would endanger the victim or person reporting the assault. The Commission finds that, based on the language in subdivision (b), it is a state mandate to make the firearm or other deadly weapon available to the owner or person who was in lawful possession between 48 hours and five business days after the seizure.

Preexisting law did not require holding firearms or other deadly weapons for weapons seized under section 12028.5 during other lawful searches.

The Commission finds, therefore, it is a new program or higher level of service for local law enforcement, for firearms or other deadly weapons confiscated during any other lawful search, to make the firearm or other deadly weapon available to the owner or person who was in lawful possession 48 hours after seizure or as soon as possible, but no later than five business days following the seizure (Pen. Code, § 12028.5, subd. (b)). This finding does not apply if the firearm or other deadly weapon confiscated is retained for use as evidence related to criminal charges as a result of domestic violence incident, or is retained because it was illegally possessed, or is retained because of a court petition filed pursuant to subdivision (f) of section 12028.5.[71]

Return stolen firearm: Subdivision (d) of section 12028.5 requires any stolen firearm or other deadly weapon to be returned to its lawful owner, as soon as its use for evidence has been served, upon proof of ownership. The Commission finds that the plain language of subdivision (d) makes this provision a state mandate to return a stolen firearm.

Preexisting law, in Penal Code sections 1407 and 1408, requires stolen property in the custody of a peace officer to be returned to its owner "on the application of the owner and on satisfactory proof of his ownership of the property." More specifically, preexisting Penal Code section 12028, subdivisions (c) and (f) require returning a stolen firearm to its owner.

Because returning a stolen firearm or weapon to its owner is a preexisting duty of law enforcement, regardless of the type of search under which it is confiscated, the Commission finds that returning a stolen firearm or other deadly weapon to its owner is not a new program or higher level of service.

Dispose of firearm or weapon: Subdivision (e) of Penal Code section 12028.5 requires:

> Any firearm or other deadly weapon taken into custody and held by ...[law enforcement] for longer than 12 months and not recovered by the owner or person in lawful possession at the time it was taken into custody, shall be considered a

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[71] Subdivision (f) of section 12028.5 authorizes, within 60 days of seizure, the law enforcement agency to initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned in cases "in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat." This provision also requires notifying the owner.

> nuisance and sold or destroyed as provided in subdivision (c) of Section 12028.[72] Firearms or other deadly weapons not recovered within 12 months due to an extended hearing process as provided in subdivision (j), are not subject to destruction until the court issues a decision, and then only if the court does not order the return of the firearm or other deadly weapon to the owner.

The Commission finds that the plain language in the first sentence of subdivision (e) makes it a state mandate to sell or destroy a firearm held for longer than 12 months as specified. The second sentence regarding firearms or weapons not recovered "due to an extended hearing process" prevent destruction of the firearm or weapon until the court issues a decision on a second petition to prevent the return of the firearm or other deadly weapon as specified in subdivision (j). Subdivision (j), as discussed below, authorizes destruction of the firearm or other deadly weapon after the petition process is complete and if the court does not order the firearm or other deadly weapon returned to the owner or person in lawful possession.

Preexisting law did not require firearms or other deadly weapons confiscated, at the scene of a domestic violence incident involving a threat to human life or a physical assault, during any other lawful search, and held for 12 months, to be sold or destroyed as provided in subdivision (c) of section 12028. Therefore, the Commission finds that this activity is a new program or higher level of service.

Advise owner and petition court: Subdivision (f) of section 12028.5 states in part:

> In those cases in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, the agency shall advise the owner of the firearm or other deadly weapon, and within 60 days of the date of seizure, initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned.

Because of the plain language of this subdivision, the Commission finds that this is a state mandate to notify the owner and petition the court as specified if the agency has reasonable cause to believe that the return of the firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat.

Preexisting law did not require notice to the owner or the initiation of a court petition in cases where a firearm or other deadly weapon was taken at the scene of a domestic violence incident during any other lawful search.

Therefore, the Commission finds that it is a new program or higher level of service, for firearms or other deadly weapons confiscated during any other lawful search, if the law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, for a local law enforcement agency to advise the owner of the firearm or other deadly weapon, and

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[72] Section 12028, subdivision (c) requires specified weapons to be surrendered to law enforcement and authorizes disposal of them by sale at public auction or (in subd. (d)) by destruction.

within 60 days of the date of seizure (or 90 days if an extension is granted) to initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned.

Ex parte application: Subdivision (f) of section 12028.5 also states in part:

> The law enforcement agency may make an ex parte application stating good cause for an order extending the time to file a petition. Including any extension of time granted in response to an ex parte request, a petition must be filed within 90 days of the date of seizure of the firearm or other deadly weapon.

The Department of Finance, in comments filed August 30, 2007, argues that the language that the local agency "may make an ex parte application stating good cause for an order extending the time to file a petition" in subdivision (f) is permissive and this is therefore not a state mandate.

The Commission finds that, based on its plain language, this ex parte application provision in subdivision (f) is discretionary and not a state mandate.

Notify owner: Subdivision (g) of section 12028.5 requires the law enforcement agency to inform the owner or person who had lawful possession of the firearm or other deadly weapon, at that person's last known address by registered mail, return receipt requested, that he or she has 30 days from the date of receipt of the notice to respond to the court clerk to confirm his or her desire for a hearing, and that the failure to respond shall result in a default order forfeiting the confiscated firearm or other deadly weapon. The agency is also required, if the person whose firearm or other deadly weapon was seized does not reside at the last address provided to the agency, to make a diligent, good faith effort to learn the whereabouts of the person and to comply with the notification requirements in subdivision (g). The Commission finds that the plain language of subdivision (g) requires these activities, so the owner notification and effort to learn the owner's whereabouts, as specified, impose a state mandate.

Preexisting law did not require these activities. Therefore, the Commission finds that it is a new program or higher level of service for firearms or other deadly weapons confiscated during any other lawful search, for a law enforcement agency to inform the owner or person who had lawful possession of the firearm or other deadly weapon, at that person's last known address by registered mail, return receipt requested, that he or she has 30 days from the date of receipt of the notice to respond to the court clerk to confirm his or her desire for a hearing, and that the failure to respond shall result in a default order forfeiting the confiscated firearm or other deadly weapon.

It is also a new program or higher level of service, for firearms or other deadly weapons confiscated during any other lawful search, if the owner or possessor whose firearm or other deadly weapon was seized does not reside at the last address provided to the law enforcement agency, for the agency to make a diligent, good faith effort to learn the whereabouts of the owner or possessor and to comply with the notification requirements in subdivision (g) of section 12028.5.

Court hearing and attorney's fees: Subdivision (h) requires the court clerk, if the owner or possessor of the firearm or weapon requests a hearing, to set a hearing no later than 30 days from the receipt of the request, and requires the clerk to notify the owner or possessor, law enforcement agency, and district attorney of the date, time and place of the hearing. If the owner or possessor requests a hearing, the local agency must show by a preponderance of evidence that

the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat. The court is required to award attorney's fees to the prevailing party.

Although the language in subdivision (h) for this activity is not expressly mandatory, law enforcement and district attorneys have a duty to make this showing regarding return of the firearm or weapon if the facts present themselves. Subdivision (f) of section 12028.5 requires the local agency to file the petition to prevent the return of the firearm if "a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat." If the owner requests a hearing, the duty in subdivision (f) to file the petition is extended to responding to the request for a hearing in subdivision (h). Therefore, the Commission finds that making the showing by a preponderance of the evidence regarding the return of the weapon is a state mandate.

As to awarding attorney's fees, the Commission also finds that is a mandate, since the court is required to impose them, and the local agency is required to pay them, if it does not prevail in keeping the firearm or other deadly weapon from being returned to the owner or person who was in lawful possession. Therefore, the Commission finds that paying the attorney's fees in subdivision (h) to the prevailing party is a state mandate upon order of the court.

Because this was not previously required for firearms or weapons confiscated at a scene of domestic violence during any other lawful search, the Commission also finds that this provision is a new program or higher level of service. Specifically, for firearms or other deadly weapons confiscated during any other lawful search, the Commission finds that it is a new program or higher level of service to show at a hearing by a preponderance of evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat. The Commission also finds, since it was not previously required for any other lawful search, that it is a new program or higher level of service for the local agency to pay attorney's fees to the owner or person in lawful possession if the court orders the firearm or other deadly weapon returned to the owner or person who was in lawful possession (Pen. Code, § 12028.5, subd. (h.).

Petition for default and disposal of firearm or weapon: Subdivision (i) states that if the person does not request a hearing or does not respond within 30 days of receipt of the notice, the local law enforcement agency may file a petition for an order of default and to dispose of the firearm or other deadly weapon as provided in section 12028.

The Commission finds that subdivision (i) is a state mandate to file the default petition, as an extension of the agency's duty in subdivision (f) to petition the court to not return the firearm or other deadly weapon if it "has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat."

In its August 30 comments on the draft staff analysis, Finance argues that filing a petition for an order of default is discretionary because the statute states that the local agency *may* do so, but does not require filing the petition. According to Finance, if no default petition is filed, after 12 months the weapons are disposed of pursuant to subdivision (e), which authorizes a weapon or

firearm held by law enforcement for longer than 12 months and not recovered by the owner or possessor to be sold or destroyed, as specified.

The Commission disagrees. Under subdivision (f), the law enforcement agency has already "initiat[ed] a petition in superior court to determine if the firearm or other deadly weapon should be returned." And the required notice must include, according to subdivision (g), that "failure to respond shall result in a default order forfeiting the confiscated firearm or other deadly weapon." Also, under subdivision (e), "firearms or other deadly weapons not recovered within 12 months due to an extended hearing process as provided in subdivision (j), are not subject to destruction until the court issues a decision." In other words, once the petition is filed, the court must make a decision regarding the firearm or weapon and it cannot simply be disposed of after 12 months. Thus, the Commission finds that subdivision (i) is a state mandate to file a petition for an order of default.

The Commission also finds that since filing a default petition was not previously required, it is a new program or higher level of service for any other lawful searches. Therefore, for firearms or other deadly weapons confiscated pursuant to any other lawful search, the Commission finds that it is a new program or higher level of service for local agencies, if the owner or person who had lawful possession of the firearm or other deadly weapon does not request a hearing or does not otherwise respond within 30 days of the receipt of the notice, to file a petition for an order of default. (Pen. Code, § 12028.5, subd. (i).)

As to disposal of the firearm or other deadly weapon, the permissive language in subdivision (i) indicates that the local agency is not required to do so. Although other statutes govern disposal of firearms or weapons (e.g., Pen. Code, §§ 12032 or 12028) the Commission finds that the test claim statute does not require a local agency to dispose of them.

Petition for second hearing, dispose of firearm or weapon, attorney's fees: Subdivision (j) authorizes the person (owner) to petition the court a second time if the court does not order the return of the firearm or other deadly weapon to the owner or person who had lawful possession. Subdivision (j) requires the court to award reasonable attorney's fees to the prevailing party.

In the analysis above of subdivision (h), the Commission found that this provision is a new program or higher level of service, if there is a petition for a second hearing, to show by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, and to pay attorney's fees to the prevailing party upon the order of the court. The same reasoning applies here.

Therefore, if there is a petition for a second hearing for firearms or other deadly weapons confiscated during any other lawful search, it is a mandated new program or higher level of service to show by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, and to pay attorney's fees to the prevailing party upon the order of the court.

Subdivision (j) also authorizes law enforcement to dispose of the firearm or weapon if the person does not petition the court or is unsuccessful at the second hearing in gaining the return of the firearm or other deadly weapon. Because the language regarding disposal of the firearm or weapon is permissive, the Commission finds that disposing of the firearm or weapon is not a state mandate.

C. Does section 12028.5 impose costs mandated by the state?

Having discussed whether all the state mandated provisions of section 12028.5 constitute a new program or higher level of service, the final issue is whether they impose costs mandated by the state within the meaning of Government Code sections 17514 and 17556.

Claimant submitted a declaration that it will incur "costs well in excess of $1,000 during the 2002-03 fiscal year to implement" the test claim statutes.[73] Another declaration includes the time required for the alleged activities: "on average, an additional 5 minutes to inquire of the victim whether a firearm or other deadly weapon is present, an additional 30 minutes to search for and obtain the weapon; an additional 5 minutes to report the results, and, where the weapon is confiscated pursuant to Penal Code Section 12028.5, an additional 90 minutes to perform the other duties in the statute.[74]

The Commission finds, therefore, that section 12028.5 imposes costs mandated by the state within the meaning of Government Code section 17514. The Commission also finds that no exceptions to reimbursement in Government Code section 17556 apply.

All the elements having been met, the Commission finds that Penal Code section 12028.5, as amended by Statutes 2002, chapter 833, is a reimbursable state mandated program within the meaning of article XIII B, section 6 and Government Code section 17514, for the activities listed above.

Issue 4: What is the period of reimbursement for the test claim?

The period of reimbursement for an approved test claim is the fiscal year before the fiscal year in which the claim is filed.[75] As for a test claim amendment: "The claimant may thereafter amend the test claim at any time, *but before the test claim is set for a hearing*, without affecting the original filing date as long as the amendment substantially relates to the original test claim."[76]

The original test claim, 99-TC-08, was filed May 15, 2000 (reimbursement period beginning July 1, 1998), and this test claim amendment was filed in April 2003. The test claim was set for hearing when the draft staff analysis for 99-TC-08 was issued on March 6, 2003. The claimant, however, amended the test claim in April 2003, *after* the test claim was set for a hearing. Because the amendment was not filed before the test claim was set for a hearing, as required by Government Code section 17557, subdivision (e), the period of reimbursement does not go back to the original reimbursement period of 99-TC-08. Thus, the Commission finds that the test claim amendment is deemed filed in April 2003, and claimants are eligible for reimbursement beginning July 1, 2001 (or later, depending on the effective date of the test claim statutes).

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[73] Test Claim 02-TC-18, Exhibit 8, Declaration of Bernice Abram, page 1; Exhibit 9, Declaration of Wendy Watanabe, page 1.

[74] Test Claim 02-TC-18, Exhibit 8, Declaration of Bernice Abram, page 2; Exhibit 9, Declaration of Wendy Watanabe, page 2.

[75] Government Code section 17557, subdivision (e).

[76] *Ibid.* [Emphasis added.] At the time this amendment was filed, this same provision was in Government Code section 17557, subdivision (c).

CONCLUSION

In sum, the Commission finds that effective January 1, 2002, Penal Code section 13730, subdivision (c)(3) (Stats. 2001, ch. 483) imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for local agencies, on all domestic violence-related calls for assistance:

- To include on the domestic violence incident report form a notation of whether the officer or officers who responded to the domestic violence call found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser, or both, whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether that inquiry disclosed the presence of a firearm or other deadly weapon (Pen. Code, § 13730, subd. (c)(3).

Effective January 1, 2003, in accordance with Penal Code section 12028.5 (Stats. 2002, ch. 833) the Commission finds that the activities listed below are a reimbursable state-mandated program within the meaning of article XIII B, section 6 and Government Code section 17514, when firearms or other deadly weapons are discovered during any other lawful search at the scene of a domestic violence incident involving a threat to human life or a physical assault. Any other lawful search includes but is not limited to the following searches: (1) a search incident to arrest, or of people the officer has legal cause to arrest; (3) a search pursuant to a warrant; or (3) a search based on statements of persons who do not have authority to consent, but have indicated to law enforcement that a weapon is present at the scene.

- To take temporary custody of any firearm or other deadly weapon when necessary for the protection of the peace officer or other persons present. (Pen. Code, § 12028.5, subd. (b).)
- To give the owner or person in lawful possession of the firearm or other deadly weapon a receipt that describes the firearm or deadly weapon and lists any identification or serial number on the firearm, and indicates where the firearm or weapon can be recovered, the time limit for recovery, and the date after which the owner or possessor can recover it. (Pen. Code, § 12028.5, subd. (b).)
- To make the firearm or other deadly weapon available to the owner or person who was in lawful possession 48 hours after seizure or as soon as possible, but no later than five business days following the seizure. Reimbursement for this activity is not required if either: (1) the firearm or other deadly weapon confiscated is retained for use as evidence related to criminal charges as a result of domestic violence incident; or (2) if the firearm or other deadly weapon is retained because it was illegally possessed, or (3) if the firearm or other deadly weapon is retained because of a court petition filed pursuant to subdivision (f) of section 12028.5.[77] (Pen. Code, § 12028.5, subd. (b).)

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[77] Subdivision (f) of section 12028.5 authorizes, within 60 days of seizure, the law enforcement agency to initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned in cases "in which a law enforcement agency has reasonable cause to believe

- To sell or destroy, as provided in subdivision (c) of Section 12028,[78] any firearm or other deadly weapon taken into custody and held for longer than 12 months and not recovered by the owner or person in lawful possession at the time it was taken into custody. Reimbursement for this activity is not required for firearms or other deadly weapons not recovered within 12 months due to an extended hearing process as provided in subdivision (j) of section 12028.5. (Pen. Code, § 12028.5, subd. (e).)
- If the local agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, for the agency to advise the owner of the firearm or other deadly weapon, and within 60 days of the date of seizure (or 90 days if an extension is granted) initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned. (Pen. Code, § 12028.5, subd. (f).)
- To inform the owner or person who had lawful possession of the firearm or other deadly weapon, at that person's last known address by registered mail, return receipt requested, that he or she has 30 days from the date of receipt of the notice to respond to the court clerk to confirm his or her desire for a hearing, and that the failure to respond shall result in a default order forfeiting the confiscated firearm or other deadly weapon. If the person whose firearm or other deadly weapon was seized does not reside at the last address provided to the local agency, for the agency to make a diligent, good faith effort to learn the whereabouts of the person and to comply with the notification requirements in subdivision (g) of section 12028.5. (Pen. Code, § 12028.5, subd. (g).)
- If the owner or person who had lawful possession of the firearm or other deadly weapon requests a hearing, to show in court by a preponderance of evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat. If the court orders the firearm or other deadly weapon returned to the owner or person who had lawful possession, the local agency upon order of the court shall pay reasonable attorney's fees to the prevailing party. (Pen. Code, § 12028.5, subd. (h).)
- If the owner or person who had lawful possession of the firearm or other deadly weapon does not request a hearing or does not respond within 30 days of the receipt of notice, to file a petition in court for an order of default. (Pen. Code, § 12028.5, subd. (i).)

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that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat." This provision also requires notifying the owner.

[78] Section 12028, subdivision (c) requires specified weapons to be surrendered to law enforcement and authorizes disposal of them by sale at public auction or (in subd. (d)) by destruction.

Effective January 1, 2003, in accordance with Penal Code section 12028.5 (Stats. 2002, ch. 833) the Commission finds that the following activities are a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514, for local agencies, when firearms or other deadly weapons are taken into temporary custody at the scene of a domestic violence incident involving a threat to human life or a physical assault, and the firearm or other deadly weapon is discovered in plain sight or pursuant to a consensual or other lawful search.

- The one-time activity of amending the receipt for a confiscated firearm or other deadly weapon to include "the time limit for recovery as required" by section 12028.5. (Pen. Code, § 12028.5, subd. (b).)
- If the person who owns or had lawful possession of the firearm or other deadly weapon petitions the court for a second hearing within 12 months of the date of the initial hearing, showing by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat. If the court orders the firearm or other deadly weapon returned to the owner or person who had lawful possession, the local agency upon order of the court shall pay reasonable attorney's fees to the prevailing party. (Pen. Code, § 12028.5, subd. (j).)

The Commission also finds that Family Code section 6228 (Stats. 2002, ch. 377) and Penal Code section 12028.5 (Stats. 1984, ch. 901 & Stats. 2002, ch 830)[79] are not a reimbursable state mandated program within the meaning of article XIII B, section 6 and Government Code section 17514 because they do not mandate a new program or higher level of service.

[79] Statutes 2002, chapter 833 was double joined to Statutes. 2002, chapter 830, but only chapter 833 amended section 12028.5 because it was chaptered last (Gov. Code, § 9605).

Commission on State Mandates

Original List Date: 4/22/2003
Last Updated: 7/7/2006
List Print Date: 09/11/2007
Claim Number: 02-TC-18
Issue: Crime Victims' Domestic Violence Incident Reports

Mailing Information: Proposed SOD

Mailing List

Related Matter(s)

99-TC-08 Crime Victims' Domestic Violence Incident Reports

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