CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION

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March 19, 2013

Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814

RE: 12-4509-MR-01- Sexually Violent Predators (CSM 4509)

Dear Commissioners:

As President of the California District Attorneys Association (CDAA), I am responding to the California Department of Finance request to adopt a new test claim, asking this commission to find that the state mandated reimbursement for specified sexually violent predator (SVP) activities mandated by Welfare and Institutions Code § 6601 through § 6604 are no longer state reimbursable activities.

I strongly disagree with the Department of Finance conclusion that the 2006 passage of Proposition 83 - Jessica's Law - has ended the state's obligation to reimburse pursuant to California Constitution Article XIII B § 6. The application of Government Code § 17556(f) to Proposition 83 in order to terminate state subvention of mandated sexually violent predators is legally incorrect.

With the enactment of Proposition 4 containing Article XIII B § 6, the electorate made a direct statement to the legislative and executive branches of government that they could not force non-discretionary programs on local government without paying for them. The intent was to require reimbursement to local agencies for the costs involved in carrying out functions peculiar to government. *See County of Los Angeles v State of California* (1987) 43 Cal. 3d 46, 56-57.

The Department of Finance contention that the mere recitation of any portion of a statute contained in a proposition, brings it within the "expressly included in" language of Government Code § 17556(f) regardless of whether the sections mandating local activity were amended or not, and whether or not the intent of the initiative and purpose of the initiative was to eliminate the subvention requirements of Article XIII B §6 by operation of Government Code § 17566(f), is not warranted. Such an interpretation would make the application of the statute so over broad and vague that no voter, local official, or legal analyst could accurately predict whether state mandated subvention would cease to exist as they voted to pass any ballot initiative that referenced existing law.

Such overbreath and vagueness is constitutionally impermissible. This interpretation and effect would also violate the constitutional governmental transparency provisions of Article 1 § 3(b)(1). This interpretation of the statute would not only clearly be in conflict with the express language of the California Constitution, *"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..."* (emphasis added) but, also, make it meaningless.

In *California School Boards Assn. v. State of California (2009) 171 Cal.App.4th 1183* the Court of Appeal noted, that in the context of *Open Meetings Act* and *Brown Act Reform* test claims, and the enactment of Proposition 59's transparency in government provisions, the "reasonably within the scope" language of former Government Code § 17556(f) would bring virtually any statute that has anything to do with open government within the scope of Proposition 59. The Court of Appeal struck out this language in former Government Code § 17556(f) as unconstitutionally overbroad.

The Department of Finance's flawed interpretation of the "expressly included" language of Government Code § 17556(f) fails to consider whether the ballot language intended to enact or change the state reimbursement of mandated activities. This reading would give current Government Code § 17556(f) the same legal effect as the "expressly included" language in *California School Boards Assn. v. State of California* which the court of appeal found overbroad and unconstitutional.

With the Department of Finance's interpretation of Government Code § 17556(f), there could be no mention of the Sexually Violent Predator Act, in whatever context, in whatever ballot measure, that would not bring it within the reimbursement exclusions of section 17556(f). Such an interpretation "so clearly contravenes the intent of the voters in passing Proposition 4" that it must be limited. *see* California *School Boards Assn. v. State of California (2009) 171 Cal.App.4th 1183,1215-1216.* In order to not violate these constitutional provisions, the interpretation of Government Code § 17556(f) suggested by the Department of Finance must be denied.

In addition, the text of statutory changes in Proposition 83 contained no language that existing state reimbursement for current locally mandated activities pursuant to the Sexually Violent Predator Act would terminate with the passage of Proposition 83. Government Code § 17556(f) is not referenced at all in the initiative. The textual changes to the Sexually Violent Predator Act were: procedural changes to expand the class of felons eligible to be declared sexually violent predators, extension of the period of commitment between hearings and changing the court procedures for hearings and trials. The statutory changes in the initiative do not relieve the counties of their preexisting state mandated activities.

In the analysis submitted by the Department of Finance, there is no assertion that the voters intended by these procedural changes to relieve the state of its constitutional requirement of subvention. Significantly, the Department of Finance, in its application to adopt a new test claim, concedes in section 5, page 2 that as to Mandated Activity 2, pertaining to the review of reports by the counties' designated attorney, and Mandated Activity 3, pertaining to the preparation and filing of petitions, the proposition made no change to the statutory language.

Activities 4, 5, and 6 addressed in the application deal with preparation and attendance of the district attorney and defense counsel at various hearings. The Department of Finance

application concludes that these activities are no longer mandated because they are necessary to implement Proposition 83. This argument is spurious; the mandated activities are legal representation by the district attorney and defense counsel at *whatever* hearings are required in Sexually Violent Predator Act cases. It is the mandate to represent that was created in the original legislation and remains unchanged in Proposition 83. The names of the hearing or the intervals between hearings are procedural changes having nothing to do with the termination of the mandated representation. The legal representation is necessary to implement the original and continuing Sexually Violent Predator Act passed by the legislature, not to specifically implement Proposition 83. Nothing in the language of the initiative addresses the specific termination of state reimbursement for these activities. For similar reasons, the application to terminate reimbursement for Activity 7, the retention of experts, investigators and professionals for trials and hearings are not necessary to implement Proposition 83, but are necessary for competent legal representation mandated by the SVP act.

In addition to the absence of language in Proposition 83 indicating that the SVP act activities would no longer be reimbursable, examination of the ballot materials, arguments, and Department of Finance fiscal analysis provided to the Attorney General for preparation of the distributed ballot materials provide ample evidence that no termination of the state's Article XIII B § 6 responsibility to reimburse was intended.

In interpreting the intent of the voters, an examination of the ballot summary, arguments and analysis presented to the electorate may be examined. *see Amador Valley Joint Union High Sch. Dist.* v. *State Bd. of Equalization* (1978) 22 Cal.3d 208, 245-246.

The ballot pamphlet summary of proposition reads:

> "Increases penalties for violent and habitual sex offenders and child molesters. Prohibits residence near schools and parks. Requires Global Positioning System monitoring of registered sex offenders. Fiscal Impact: Net state operating costs within ten years of up to a couple hundred million dollars annually; potential one-time state construction costs up to several hundred million dollars; *unknown net fiscal impact on local governments*" [emphasis added] (The voter pamphlet is attached to the department of finance application).

The Attorney General's summary and the accompanying legislative analyst's estimate make no statement indicating the fiscal impact on local government would be to terminate the reimbursement for SVP activities.

Clearly, absent an intent to deceive the voters, any indication that the SVP activities would no longer be reimbursable and would constitute a large increase to local government would have necessarily replaced the circulated ballot pamphlet language had that been the intended effect of Proposition 83.

The strongest evidence that Proposition 83 would not and did not eliminate the state mandate for reimbursement is contained in a September 2, 2005 joint letter from Elizabeth Hill, the State Legislative Analyst, and Tom Campbell, the Director of Finance, to Attorney General Bill Lockyer.

The letter, prepared pursuant to Elections Code § 9005 analyzes the fiscal impact of the proposed Sexual Predator Punishment and Control Act: Jessica's Law. (A copy of the letter retrieved from the LAO online Proposition 83 materials is attached). The unequivocal conclusion of both officials is that the costs of the SVP program would remain a reimbursable by the state. "The portion of costs related to changes in the Sexual Violent Predators program would be reimbursed by the state." Since official duties are presumed to be correctly performed (Evidence Code § 664), the Director of Finance, the Legislative Analyst and the Attorney General must have been aware of the interaction of Government Code § 17556(f) on Proposition 83 and the state mandate in Article XIII B §6 in drawing their conclusion that the SVP program would remain reimbursable. Strong weight should be given to this conclusion, despite the Department of Finance's now changed opinion.

For these reasons, the California District Attorneys Association respectfully urges this Commission on State Mandates to determine that the there is no valid legal basis to adopt the application for a new test claim regarding sexually violent predator activity.

Sincerely,

Carl V. Adams

Carl V. Adams
President

Attachment

LAO
60 YEARS OF SERVICE

September 2, 2005

Hon. Bill Lockyer
Attorney General
1300 I Street, 17th Floor
Sacramento, California 95814

Attention: Ms. Tricia Knight
Initiative Coordinator

Dear Attorney General Lockyer:

Pursuant to Elections Code Section 9005, we have reviewed the proposed statutory initiative cited as the "Sexual Predator Punishment and Control Act: Jessica's Law" (File No. SA2005RF0092).

PROPOSAL

The proposed initiative amends current law related to sex offenses. The measure would (1) increase penalties for some sex offenses, (2) require certain sex offenders to wear global positioning system (GPS) devices for life after release from prison, (3) limit where registered sex offenders can live, and (4) make more offenders subject to commitment to state mental hospitals as Sexually Violent Predators (SVPs). Each of these changes is described in more detail below.

Increase Penalties for Sex Offenses. Current law defines sex-related crimes and specifies the penalties for such offenses. This measure increases the penalties for specified sex offenses. It does this in several ways. In some cases, it broadens the definition of what constitutes certain sex offenses. In other cases, it increases existing penalties for specified sex offenses. In addition, the measure prohibits probation in lieu of prison for some sex offenses, eliminates the ability of some inmates convicted of certain sex offenses to earn early release credits, and extends parole for specified sex offenders. Each of these changes would result in longer prison and parole terms for the affected offenders. This measure would also impose additional fees (through an increase in an existing court-imposed fee and a new fee for parolees) for offenders who are required to register as sex offenders.

Require GPS Devices. Current law requires certain convicted sex offenders to register with local law enforcement officials. Under this measure, all individuals who

have been convicted and sent to prison for the commission of, or an attempt to commit, a felony sex offense that requires registration would be monitored by GPS devices for life. The Department of Corrections and Rehabilitation (CDCR) would be authorized to collect fees from affected sex offenders for the costs of GPS monitoring.

Limit Where Registered Sex Offenders May Live. Current law bars anyone convicted of specified sex offenses against a child from residing within one-quarter mile of an elementary or middle school while on parole. This measure would broaden this prohibition to bar any person required to register as a sex offender from living within 2,000 feet (about four-tenths of a mile) of any school or park. In addition, the measure authorizes local governments to further limit these residency restrictions.

Changes in SVP Laws. Under current law, an SVP is defined as "a person who has been convicted of a sexually violent offense against two or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent behavior." Certain inmates who are completing their prison sentences are referred by CDCR to the Department of Mental Health (DMH) for screening and psychiatric evaluation to determine whether they meet the criteria for an SVP. Those offenders who meet the criteria are referred to district attorneys, who determine whether to pursue their commitment by the courts in a civil proceeding as an SVP. Offenders subject to SVP proceedings are often represented by public defenders. While these court proceedings are pending, an offender may be in prison. However, if his prison sentence has been completed, he may be housed either in a county jail or in a state mental hospital. Offenders designated as an SVP by the courts are committed to a state mental hospital for up to two years. An offender can be recommitted by the courts in subsequent court proceedings.

This measure would generally make more sex offenders eligible for an SVP commitment by (1) reducing from two to one the number of prior victims of sexually violent crimes needed to qualify as an offender for an SVP commitment, and (2) making additional prior offenses, such as certain crimes committed by a person while a juvenile, "countable" for purposes of an SVP commitment. Also, SVPs would receive an indeterminate commitment to a state mental hospital from a court rather than the renewable two-year commitment allowed for under existing law. In addition, the measure would change the standard that courts would consider for release of SVPs from a state mental hospital.

FISCAL EFFECT

This measure would have a number of significant fiscal effects on both state and county governments. The major fiscal effects are discussed below.

Fiscal Impact on the State

Net Prison Operating and Capital Outlay Costs. Several of this measure's provisions would likely result in a significant, though unknown, increase in prison operating costs due to increased prison population. In particular, the measure's provisions that increase sentences for sex offenders would result in some sex offenders being sentenced to and remaining in prison for longer periods, resulting in a greater prison population over time. In addition, the provisions requiring some parolees and other registered sex offenders to wear GPS devices could result in an increase in the number of offenders who are identified as (1) violating the conditions of their parole and therefore are returned to prison or (2) committing new crimes. An increase in parolee revocations would also result in an increase in revocation hearing workload. In addition, it is possible that in the longer term this measure could result in unknown, but potentially significant, additional capital outlay costs to accommodate the increase in the inmate population.

There could be some unknown, but potentially significant, offsetting savings in prison and revocation hearing costs to the extent that the GPS requirement reduces the likelihood that sex offenders commit new crimes or violations of parole that return offenders to prison.

As noted above, this measure would likely result in significant costs and some unknown, but potentially significant, savings. These savings are not likely to offset the costs.

Net Parole and Monitoring Costs. The initiative's provisions requiring GPS devices for some registered sex offenders for life—including additional parole staff to track offenders in the community—would likely result in an increase in state parole operating costs in the several tens of millions of dollars annually within a few years. These costs would grow to about $100 million annually after ten years, with costs continuing to increase significantly in subsequent years. Because the measure does not specify whether the state or local governments would be responsible for monitoring sex offenders who have been discharged from state parole supervision, it is unclear the degree to which local governments would bear some of these long-term costs.

Also, the state may incur initial unknown costs to relocate parolees who currently would be in violation of the 2,000 foot restriction around schools and parks. The initiative could also result in significant, though unknown, parole supervision costs for increases in the parole population. These costs would occur to the extent that the potential deterrent effect of GPS monitoring keeps more parolees under parole supervision instead of being returned to prison for new crimes or violations of parole.

On the other hand, the measure could result in reductions in the parole population—and, therefore, parole supervision savings—to the extent that (1) the longer prison sentences and changes to the SVP law result in fewer releases of sex offenders to parole, and (2) the GPS requirement results in more parolees being returned to prison for new crimes or violations of parole.

The measure would result in additional fee revenues that would partially offset the monitoring costs. Specifically, the measure's provisions that (1) allow the department to collect fees from affected parolees and (2) require some of the increased court penalty fees to go to the department could provide as much as a few million dollars annually, depending in large part on offenders' ability to pay these costs.

The net fiscal impact on parole operations is likely to be increased costs of several tens of millions of dollars annually for the first few years, probably reaching at least $100 million in about ten years, and increasing significantly thereafter.

State SVP Program Net Costs. This measure is likely to result in an increase in state operating costs in the tens of millions of dollars annually to (1) conduct preliminary screenings of additional sex offenders referred to DMH by CDCR for an SVP commitment, (2) complete full evaluations by psychiatrists or psychologists to ascertain the mental condition of criminal offenders being further considered for an SVP commitment, (3) provide court testimony in SVP commitment proceedings, and (4) reimburse counties for their costs for participation in the SVP commitment process.

This measure would result in increased commitments of SVPs to state mental hospitals. Also, some additional offenders who had completed their prison sentences would be held in state mental hospitals while the courts considered whether they should receive an SVP commitment. The resulting net costs to the state for operating these additional state mental hospital beds could eventually reach $100 million annually after a few years and would continue to grow significantly thereafter. In addition, this measure could result in one-time net capital outlay costs amounting to the low hundreds of millions of dollars for the construction of additional state hospital beds for SVPs.

All of these operating and capital outlay costs would be partly offset in the long term, to the extent that the longer prison sentences required by this measure for certain crimes eventually resulted in fewer SVP referrals and commitments to state mental hospitals. These offsetting savings are unknown but are likely to be significant in the long term. In addition, the state is likely to save on the costs of evaluations and court testimony related to recommitments because of the provisions in this measure that would impose indeterminate commitments for persons found to be SVPs. These state savings would probably be more than $1 million annually.

Taking both the costs and savings identified above into consideration, we believe that the SVP-related provisions of this measure could result in a net increase in state operating costs of at least $100 million after a few years. It is also likely to result in net capital outlay costs within a few years in the low hundreds of millions of dollars.

Fiscal Impact on Court Operations. An increase in the number of DMH referrals to county district attorneys would result in increased court costs related to the commitment process. However, the measure would potentially result in court savings by eliminating recommitment hearings, since it allows for indeterminate commitments instead of the two-year recommitment process currently in place.

In addition, various provisions of this measure could increase or decrease court workload to the extent that they affect the number of sex offenders who are tried for new crimes. For example, the GPS requirements could result in more offenders being caught and tried for new offenses, thereby increasing court workload. On the other hand, to the extent that sex offenders are serving longer terms in prison and mental hospitals because of this measure, those individuals would not be in the community able to commit and be prosecuted for new crimes. Given the potential for these factors to offset each other, the net fiscal impact of this measure on state court costs is indeterminable.

Fiscal Impact on Local Governments

This measure would also likely have a significant, though unknown, net fiscal impact on county governments. Specifically, the provisions of this measure related to increased criminal penalties and GPS monitoring of sex offenders could result in additional savings and costs for counties. The provisions related to the SVP program could also result in county savings and costs, with these costs subsequently being reimbursed by the state.

Changes to Criminal Penalties and Supervision. The provisions of this measure that increase criminal penalties and require GPS monitoring of sex offenders could affect county jail, probation, district attorney, and public defender costs. Several provisions of this measure require stricter penalties for certain sex offenses, making it more likely that some offenders will be housed in state prisons and mental hospitals who would otherwise be in local jails or on probation under current law. To the extent that this occurs, local governments would likely experience some criminal justice system savings. The provisions regarding GPS tracking could affect local government expenditures due primarily to more offenders being prosecuted for crimes, thereby increasing costs.

SVP Program. The provisions of this measure related to the SVP program could increase county costs. The additional SVP commitment petitions that are likely to result

from this measure would increase costs for district attorneys and public defenders to handle these civil cases. Also, county jail operating costs would increase to the extent that offenders who have court decisions pending on their SVP cases were held in local jail facilities instead of state mental hospitals. Counties would be reimbursed in full for all of these costs after they had filed and processed claims with the state.

Finally, the provisions in this measure allowing for the indeterminate commitment of SVPs instead of the current two-year recommitment process could reduce county costs for SVP commitment proceedings and the claims that counties would file with the state for reimbursement of such costs.

SUMMARY OF FISCAL EFFECT

This measure would have the following net fiscal effects:

- Unknown net costs to the state, within a few years, potentially in the low hundreds of millions of dollars annually due primarily to increased state prison, parole supervision, and mental health program costs. These costs would grow significantly in the long term.
- Potential one-time state capital outlay costs, within a few years, in the low hundreds of millions of dollars for construction of additional state mental hospital and prison beds.
- Unknown but potentially significant net operating costs or savings to counties for jail, probation supervision, district attorneys, and public defenders. The portion of costs related to changes in the Sexual Violent Predators program would be reimbursed by the state.

Sincerely,

Elizabeth G. Hill
Legislative Analyst

Tom Campbell
Director of Finance