

ITEM ____
MANDATE REDETERMINATION
SECOND HEARING: NEW TEST CLAIM DECISION
DRAFT STAFF ANALYSIS AND
PROPOSED STATEMENT OF DECISION

Welfare and Institutions Code Sections 6601, 6602, 6603, 6604, 6605, and 6608

Statutes 1995, Chapter 762 (SB 1143); Statutes 1995, Chapter 763 (AB 888);
Statutes 1996, Chapter 4 (AB 1496)

Sexually Violent Predators, (CSM-4509)

As Alleged to be Modified by:

Proposition 83, General Election, November 7, 2006

12-MR-01

Department of Finance, Requester

Attached is the draft proposed statement of decision for this matter. This Executive Summary and draft proposed statement of decision also function as the draft staff analysis on the issue of whether the Commission shall adopt a new test claim decision.

EXECUTIVE SUMMARY

Overview

On June 25, 1998, the Commission adopted a statement of decision approving reimbursement for the *Sexually Violent Predators* (SVP) program, CSM-4509, which established civil commitment procedures for the civil detention and treatment of sexually violent predators following completion of the individual's criminal sentence for certain sex-related offenses. Before civil detention and treatment are imposed, the county counsel or district attorney is required to file a petition for civil commitment. A trial is then conducted to determine beyond a reasonable doubt if the person is a sexually violent predator. If the person alleged to be a sexually violent predator is indigent, the county is required to provide the indigent person with the assistance of counsel and experts necessary to prepare the defense.

In the CSM-4509 test claim decision, the Commission determined that Welfare and Institutions Code sections 6601(i), 6602, 6603, 6604, 6605(b)-(d), and 6608(a)-(d) as enacted or amended by the 1995 and 1996 test claim statutes, imposed the following reimbursable state-mandated activities on counties:

- Designation by the County Board of Supervisors of the appropriate District Attorney or County Counsel who will be responsible for the sexually violent predator civil commitment proceedings. (Welf. & Inst. Code, § 6601(i).)

- Initial review of reports and records by the county’s designated counsel to determine if the county concurs with the state’s recommendation. (Welf. & Inst. Code, § 6601(i).)
- Preparation and filing of the petition for commitment by the county’s designated counsel. (Welf. & Inst. Code, § 6601(i).)¹
- Preparation and attendance by the county’s designated counsel and indigent defense counsel at the probable cause hearing. (Welf. & Inst. Code, § 6602.)
- Preparation and attendance by the county’s designated counsel and indigent defense counsel at trial. (Welf. & Inst. Code, §§ 6603 and 6604.)
- Preparation and attendance by the county’s designated counsel and indigent defense counsel at subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, §§ 6605(b-d), and 6608(a-d).)
- Retention of necessary experts, investigators, and professionals for preparation for trial and subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, §§ 6603 and 6605(d).)
- Transportation and housing for each potential sexually violent predator at a secured facility while the individual awaits trial on the issue of whether he or she is a sexually violent predator. (Welf. & Inst. Code, § 6602.)²

On September 24, 1998, the Commission adopted parameters and guidelines for the approved activities. On October 30, 2009 the parameters and guidelines were amended to update the boilerplate language to conform to more recent Commission decisions and usage.

On November 7, 2006 the voters approved Proposition 83, also known as Jessica’s law, which, among other changes made, amended and reenacted several sections of the Welfare and Institutions Code, including sections approved for reimbursement in the CSM-4509 test claim.

On January 15, 2013, the Department of Finance (DOF) filed a request for redetermination of the CSM-4509 decision pursuant to Government Code section 17570.³ DOF asserts that Proposition 83 constitutes a subsequent change in the law, as defined in section 17570, which results in the state’s liability under the test claim statutes being modified. Specifically, DOF argues that sections 6601, 6604, 6605, and 6608 were included in their entirety in Proposition 83, and that “[t]he remainder of the mandate’s Welfare and Institutions Code sections that were not expressly included in the ballot measure [i.e., sections 6602 and 6603] are, nevertheless, necessary to

¹ The Test Claim Statement of Decision cites subdivision (j), but subdivision (j) addresses time limits, not a petition for commitment. The Commission therefore assumes that this is a typographical error, and that subdivision (i) was the intended citation for this activity.

² The title of the parameters and guidelines for the *Sexually Violent Predators* program refers to Welfare and Institutions Code sections 6250 and 6600 through 6608. However, the Commission approved reimbursement for only the activities required by sections 6601, 6602, 6603, 6604, 6605, and 6608.

³ Based on the January 15, 2013 filing date, the potential period of reimbursement affected by this redetermination begins July 1, 2011.

implement the ballot measure.” DOF concludes that “all activities found to be reimbursable by the Commission in the *Sexually Violent Predator* mandate are no longer reimbursable pursuant to Government Code section 17556, subdivision (f), as they are either: (1) expressly included in Prop 83 or, (2) necessary for the implementation of Prop 83.”

Section 17570 provides a process whereby a previously determined mandate finding can be redetermined by the Commission based on a subsequent change in law. The Government Code provides for a two-step hearing. The Commission’s regulations state that “the first hearing shall be limited to the issue of whether the requester has made an adequate showing which identifies a subsequent change in law as defined by Government Code section 17570, material to the prior test claim decision, that may modify the state’s liability pursuant to Article XIII B, section 6, subdivision (a) of the California Constitution.” The regulations state that “[i]f the commission proceeds to the second hearing, it shall consider whether the state’s liability...has been modified based on the subsequent change in law alleged by the requester, thus requiring adoption of a new test claim decision to supersede the previously adopted test claim decision.”⁴ If the Commission adopts a new test claim decision that supersedes the previously adopted test claim decision, the Commission is required to adopt new parameters and guidelines or amend existing parameters and guidelines.⁵

On July 26, 2013, the Commission heard the first step of the two-step hearing process. The Commission found that DOF had made an adequate showing that the request has a substantial possibility of prevailing at the second hearing, and the Commission therefore directed staff to set the matter for hearing on a new test claim decision. The issue in this hearing, pursuant to the code and the applicable regulations, is whether to adopt a new test claim decision to supersede the previously adopted test claim decision. If a new test claim decision is adopted, new parameters and guidelines must also be adopted.

Because the determination of this matter will have significant budgetary impacts on the state and eligible local agency claimants beginning in the 2011-2012 fiscal year, requests have been made by DOF and some of the eligible local agency claimants to expedite this matter. Those requests were granted and, as a result, this matter has been scheduled for hearing ahead of other matters which were filed before it.

Staff Analysis

Government Code section 17570 provides, with respect to mandate redetermination, that:

“Subsequent change in law” is a change in law that requires a finding that an incurred cost is a cost mandated by the state, as defined by Section 17514, or is not a cost mandated by the state pursuant to section 17556, or a change in mandates law...⁶

Government Code section 17556(f) provides that the Commission *shall not find* costs mandated by the state, within the meaning of article XIII B, section 6, if a test claim statute or executive order “imposes duties that are necessary to implement, or are expressly included in, a ballot

⁴ Code of Regulations, Title 2, section 1190.05 (Register 2010, No. 48).

⁵ Government Code section 17570(i).

⁶ Government Code section 17570(a)(2) (Stats. 2010, ch. 719 (SB 856)).

measure approved by the voters in a statewide or local election.” Section 17556(f) also states that this rule “applies regardless of whether the statute or executive order was enacted or adopted before or after the date on which the ballot measure was approved by the voters.”⁷

Staff finds that Proposition 83, by which the voters amended and reenacted Welfare and Institutions Code sections 6601, 6604, 6605, and 6608, constitutes a subsequent change in law, as defined in section 17570. Pursuant to Government Code section 17556(f), the Commission shall not find costs mandated by the state for the activities imposed by sections 6601, 6604, 6605, and 6608, as determined in the original test claim decision, which are now expressly included in a ballot measure approved by the voters in a statewide election. Therefore a new test claim decision is required.

Additionally, the original test claim decision found that the following activities were imposed by code sections as added or amended by the test claim statutes that were not expressly reenacted by Proposition 83:

- Preparation and attendance by the county’s designated counsel and indigent defense counsel at the probable cause hearing. (Welf. & Inst. Code, § 6602.)
- Preparation and attendance by the county’s designated counsel and indigent defense counsel at trial. (Welf. & Inst. Code, §§ 6603 and 6604.)
- Retention of necessary experts, investigators, and professionals for preparation for trial and subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, §§ 6603 and 6605(d).)
- Transportation and housing for each potential sexually violent predator at a secured facility while the individual awaits trial on the issue of whether he or she is a sexually violent predator. (Welf. & Inst. Code, § 6602.)

Staff finds that there is no requirement, either implicit in Proposition 83 or required by due process, to hold a probable cause hearing; the requirement arises only from section 6602, and is not expressly included in or necessary to implement Proposition 83. Therefore, preparation and attendance of the county’s designated counsel and indigent defense counsel at a probable cause hearing is required by a policy decision made by the Legislature. And, accordingly, staff finds that transportation between designated secured housing and the court, *for purposes of a probable cause hearing* required under section 6602, is not expressly included in or necessary to implement Proposition 83, and therefore remains reimbursable as a state-mandated cost.

Therefore the following activities, required for purposes of probable cause hearings remain reimbursable state-mandated costs.

- Preparation and attendance by the county’s designated counsel and indigent defense counsel at the probable cause hearing. (Welf. & Inst. Code, § 6602.)
- Transportation for each potential sexually violent predator to and from a secured facility only to the *probable cause hearing* on the issue of whether he or she is a sexually violent predator. (Welf. & Inst. Code, § 6602.)

⁷ Government Code section 17556 (As amended by Stats. 2010, ch. 719 (SB 856)).

This activity does not include transportation for purposes other than the probable cause hearing for potential sexually violent predators awaiting trial.

Staff further finds that the remaining activities described above are necessary to implement the voter-approved program. The preparation and attendance of the county's designated counsel and indigent defense counsel at trial are necessary to implement the civil commitments provided for in Proposition 83. And the retention of experts or investigators for trial is necessary to implement Proposition 83. The Commission cannot find costs mandated by the state pursuant to these activities consistent with the provisions of section 17556(f) and article XIII B, section 6.

Section 17570 provides that a request for adoption of a new test claim decision shall be filed on or before June 30 following a fiscal year in order to establish eligibility for reimbursement for that fiscal year. This request was filed on January 15, 2013, establishing eligibility beginning July 1, 2011. Therefore, as a result of this proposed decision, staff finds that several of the approved activities in the prior test claim decision are no longer reimbursable as of July 1, 2011.

Staff Recommendation

Staff recommends that the Commission adopt this analysis as its new test claim decision, ending reimbursement for several of the test claim activities as of July 1, 2011.

Staff further recommends that the Commission authorize staff to make any non-substantive, technical changes to the proposed new test claim decision and amended parameters and guidelines following the hearing.

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE MANDATE REDETERMINATION:
SECOND HEARING: NEW TEST CLAIM
DECISION FOR:

Welfare and Institutions Code sections 6601,
6602, 6603, 6604, 6605, and 6608;

As added or amended by Statutes 1995,
Chapter 762 (SB 1143); Statutes 1995, Chapter
763 (AB 888); Statutes 1996, Chapter 4 (AB
1496);

Sexually Violent Predators (CSM-4509), As
Modified by:

Proposition 83, General Election,
November 7, 2006

Filed on January 15, 2013

By the Department of Finance, Requester.

Case No.: 12-MR-01

Sexually Violent Predators (CSM-4509)

STATEMENT OF DECISION
PURSUANT TO GOVERNMENT
CODE SECTION 17500, ET SEQ.;
CALIFORNIA CODE OF
REGULATIONS, TITLE 2, DIVISION
2, CHAPTER 2.5, ARTICLE 7.
[Gov. Code, § 17570; Cal. Code Regs.,
tit. 2, § 1190.05]

(Adopted September 27, 2013)

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this mandate redetermination during a regularly scheduled hearing on September 27, 2013. [Witness list will be included in the final statement of decision.]

Government Code section 17570 and section 1190 et seq. of the Commission's regulations establish the mandate redetermination process. In addition, 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., title 2, California Code of Regulations 1181 et seq., and related case law.

The Commission [adopted/modified] the proposed decision as its new test claim decision, granting the request for redetermination and partially approving the request to end reimbursement for the test claim activities by a vote of [vote count will be included in the final statement of decision].

Summary of the Findings

The Commission finds that the state's liability pursuant to article XIII B, section 6(a) of the California Constitution for the *Sexually Violent Predators*, CSM-4509 mandate has been modified based on a subsequent change in law, and a new test claim decision is required. Specifically, Welfare and Institutions Code sections 6601, 6604, 6605, and 6608, as added or amended by Statutes 1995, Chapter 762 (SB 1143); Statutes 1995, Chapter 763 (AB 888); and

Statutes 1996, Chapter 4 (AB 1496) impose duties expressly included in Proposition 83, adopted by the voters on November 7, 2006. Additionally the duties imposed by section 6603 are necessary to implement the requirements of Proposition 83. Government Code section 17556(f) provides that the Commission shall not find “costs mandated by the state” for costs incurred as a result of statutes that impose duties that are expressly included in or necessary to implement a ballot measure approved by the voters. Based on the filing date of this request, and pursuant to Government Code section 17570, the following activities are no longer reimbursable beginning July 1, 2011 (the numbering of the activities utilized in DOF’s request for redetermination is adopted):

Activity 1 – Designation by the County Board of Supervisors of the appropriate District Attorney or County Counsel who will be responsible for the sexually violent predator civil commitment proceedings. (Welf. & Inst. Code, § 6601(i).)

Activity 2 – Initial review of reports and records by the county’s designated counsel to determine if the county concurs with the state’s recommendation. (Welf. & Inst. Code, § 6601(i).)

Activity 3 – Preparation and filing of the petition for commitment by the county’s designated counsel. (Welf. & Inst. Code, § 6601(j).)

Activity 5 – Preparation and attendance by the county’s designated counsel and indigent defense counsel at trial. (Welf. & Inst. Code, §§ 6603 and 6604.)

Activity 6 – Preparation and attendance by the county’s designated counsel and indigent defense counsel at subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, §§ 6605(b-d), and 6608(a-d).)

Activity 7 – Retention of necessary experts, investigators, and professionals for preparation for trial and subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, §§ 6603 and 6605(d).)

However, the preparation and attendance by the county’s designated counsel and indigent defense counsel at the probable cause hearing (**Activity 4**), and the portion of **Activity 8** that includes transportation of each sexually violent predator from a secured facility to the *probable cause hearing*, remain reimbursable as state-mandated costs, as explained below. The activities related to holding a probable cause hearing are found to be neither expressly included in, nor necessary to implement Proposition 83, but are mandated by the state in section 6602 of the Welfare and Institutions Code.

Therefore, the following activities are required as modified, only for probable cause hearings:

Activity 4- Preparation and attendance by the county’s designated counsel and indigent defense counsel at the probable cause hearing. (Welf. & Inst. Code, § 6602.)

Activity 8 – Transportation ~~and housing~~ for each potential sexually violent predator from at a secured facility to the probable cause hearing while the individual awaits trial on the issue of whether he or she is a sexually violent predator. (Welf. & Inst. Code, § 6602.)

COMMISSION FINDINGS

Chronology

- 6/25/1998 The Commission adopted the test claim statement of decision for *Sexually Violent Predators*, (CSM-4509), approving reimbursement for certain activities under Welfare and Institutions Code sections 6601, 6602, 6603, 6604, 6605, and 6608.⁸
- 9/24/1998 The Commission adopted parameters and guidelines.⁹
- 11/08/2006 California voters approved Proposition 83, which amended and reenacted several sections of the Welfare and Institutions Code.¹⁰
- 10/30/2009 The Commission adopted amended parameters and guidelines, pursuant to the Controller's request to amend the boilerplate language of a number of existing parameters and guidelines.¹¹
- 1/15/2013 The Department of Finance (DOF) filed a request for redetermination of CSM-4509.¹²
- 1/24/2013 Commission staff deemed the filing complete.
- 2/13/2013 The State Controller's Office (SCO) submitted comments.¹³
- 2/13/2013 The County of Los Angeles requested an extension of time to file comments.
- 2/13/2013 The California State Association of Counties (CSAC) requested an extension of time to file comments.
- 2/14/2013 The County of San Diego requested an extension of time to file comments.
- 2/15/2013 The Executive Director granted an extension of time for the submittal of all comments until March 27, 2013, and set the matter for the first hearing on July 26, 2013.
- 3/19/2013 California District Attorneys' Association (CDAA) submitted comments on the request for redetermination.¹⁴
- 3/22/2013 CSAC submitted comments on the request for redetermination.¹⁵

⁸ Exhibit B, Test Claim Statement of Decision.

⁹ Exhibit C, Test Claim Parameters and Guidelines.

¹⁰ See Exhibit A, Request for Redetermination.

¹¹ Exhibit D, Test Claim Amended Parameters and Guidelines.

¹² Exhibit A, Request for Redetermination.

¹³ Exhibit E, SCO Comments on Request for Redetermination.

¹⁴ Exhibit F, CDAA Comments on Request for Redetermination.

¹⁵ Exhibit G, CSAC Comments on Request for Redetermination.

3/25/2013 California Public Defenders' Association (CPDA) submitted comments on the request for redetermination.¹⁶

3/25/2013 District Attorney of San Bernardino County submitted comments on the request for redetermination.¹⁷

3/25/2013 County of San Bernardino submitted comments on the request for redetermination.¹⁸

3/26/2013 District Attorney of Sacramento County submitted comments on the request for redetermination.¹⁹

3/26/2013 District Attorney of Los Angeles County submitted comments on the request for redetermination.²⁰

3/27/2013 County of Los Angeles submitted comments on the request for redetermination.²¹

3/27/2013 Alameda County Public Defender submitted comments on the request for redetermination.²²

3/27/2013 County Counsel of San Diego County submitted comments on the request for redetermination.²³

3/29/2013 Alameda County District Attorney submitted comments on the request for redetermination.²⁴

5/09/2013 Commission staff issued the draft staff analysis and proposed statement of decision.²⁵

5/17/2013 DOF submitted comments on the draft staff analysis.²⁶

5/28/2013 CPDA submitted comments on the draft staff analysis.²⁷

¹⁶ Exhibit H, CPDA Comments on Request for Redetermination.

¹⁷ Exhibit I, County of San Bernardino District Attorney Comments on Request for Redetermination.

¹⁸ Exhibit J, County of San Bernardino Comments on Request for Redetermination.

¹⁹ Exhibit K, County of Sacramento District Attorney Comments on Request for Redetermination.

²⁰ Exhibit L, Los Angeles County District Attorney Comments on Request for Redetermination.

²¹ Exhibit M, County of Los Angeles Comments on Request for Redetermination.

²² Exhibit N, Alameda County Public Defender Comments on Request for Redetermination.

²³ Exhibit O, County Counsel of San Diego Comments on Request for Redetermination.

²⁴ Exhibit P, Alameda County District Attorney Comments on Request for Redetermination.

²⁵ Exhibit Q, Draft Staff Analysis and Proposed Statement of Decision.

²⁶ Exhibit R, DOF Comments on Proposed Statement of Decision.

- 5/31/2013 County of LA submitted late comments on the draft staff analysis.²⁸
- 7/26/2013 The Commission determined that the requester made an adequate showing for redetermination and directed staff to set the matter for a second hearing.²⁹
- 8/02/2013 Commission staff issued the draft staff analysis for the second hearing.

I. Background

The Sexually Violent Predators Program and the Subsequent Change in Law

The Sexually Violent Predators (SVP) program established civil commitment procedures for the civil detention and treatment of sexually violent predators (SVPs) following the completion of an individual’s criminal sentence imposed for certain sex-related offenses. Before civil detention and treatment are imposed, the county counsel or district attorney is required to file a petition for civil commitment. A trial is then conducted to determine beyond a reasonable doubt if the person is an SVP. If the person alleged to be an SVP is indigent, the county is required to provide the indigent person with the assistance of counsel and experts necessary to prepare the defense.

The Commission concluded, in the CSM-4509 test claim statement of decision, that Welfare and Institutions Code sections 6601(i), 6602, 6603, 6604, 6605(b)-(d), and 6608(a)-(d) as enacted or amended by the 1995 and 1996 test claim statutes, imposed a reimbursable state-mandated program on counties within the meaning of article XIII B, section 6, of the California Constitution.³⁰

On November 7, 2006, the voters approved Proposition 83, also known as “Jessica’s Law.” Proposition 83 effected a number of amendments to the Penal Code, including strengthening penalties for kidnapping and sexual offenses perpetrated upon children, and especially removing the requirement of “force, violence, duress, menace, or fear of immediate and unlawful bodily injury” from the definitional elements of several crimes.³¹ Proposition 83 also mandated consecutive sentences for a number of sexual offenses,³² mandated a minimum 25 year sentence for a “habitual sexual offender,” as defined,³³ and required persons released on parole from a “registerable sex offense” to be monitored for the duration of their parole by a global positioning system device, for which the parolee is responsible to pay unless granted a waiver by the Department of Corrections.³⁴

²⁷ Exhibit S, CPDA Comments on Draft Staff Analysis.

²⁸ Exhibit T, County of LA Comments on Draft Staff Analysis.

²⁹ Exhibit U, Statement of Decision, First Hearing, July 26, 2013.

³⁰ Exhibit B, Test Claim Statement of Decision, at p. 12.

³¹ See, e.g., Penal Code sections 209, 220, 269, as amended by Proposition 83 (adopted November 7, 2006).

³² See Penal Code section 667.6, as amended by Proposition 83.

³³ Penal Code section 667.71, as amended by Proposition 83.

³⁴ Penal Code section 3000.07, as added by Proposition 83.

As directly relevant here, Proposition 83 also amended and reenacted provisions of the Welfare and Institutions Code, including sections 6601, 6604, 6605, and 6608 which were among the test claim statutes approved by the Commission in CSM-4509.

Section 6601(k) was amended by Proposition 83 to provide that a civil commitment under article 4 *shall toll the term of an existing parole*, where applicable. Under the amended section, if a person were granted parole but subsequently civilly committed, that individual's parole would not run concurrently, but would be "tolled," and the remaining term of parole would be served after the civil commitment ends. The test claim statute, as approved in CSM-4509, provided that a civil commitment "*shall not toll, discharge or otherwise affect the term of parole,*" meaning that a term of parole *could* run concurrently with a civil commitment, but that release from civil commitment would not discharge any remaining term of parole. The remainder of section 6601 was reenacted by Proposition 83 without amendment.

Section 6604 was amended by Proposition 83 to provide that if a court or jury determined that a person is a sexually violent predator, the person "shall be committed for an indeterminate term." The test claim statute, as approved in CSM-4509 had provided for a two year civil commitment, with an option for an extended commitment order from the court.

Section 6605 was amended by Proposition 83 to provide that if the Department of Mental Health (DMH) deems that the person's condition has changed, and that unconditional release or a conditional release to a less restrictive environment is appropriate and in the best interests of the person and conditions can be imposed to adequately protect the community, the Director "*shall authorize the person to petition the court*" for conditional release or unconditional discharge. The test claim statute, as approved by the Commission, required an annual notice to the person of his or her right to petition the court for release, and provided for an annual examination of his or her mental condition, but not, as the more recently amended section requires: "consideration of whether the committed person currently meets the definition of a sexually violent predator" and whether conditional release is appropriate in a particular case. Based on the plain language, the prior section 6605 was focused on the right of the individual to be annually evaluated for release, and to petition for release. As the section reads after Proposition 83, the focus is on the Department of State Hospitals making a determination that a person's condition has changed, and "authorizing" that person to petition for release.

And finally, Proposition 83 amended section 6608 to provide that, notwithstanding the provisions of section 6605, a person may petition the court for "*conditional release or an unconditional discharge*" without approval from the director of the DMH. The test claim statute stated "*conditional release and subsequent unconditional discharge.*"³⁵

On January 15, 2013, DOF filed a request for redetermination of the *Sexually Violent Predator* program based on Proposition 83, arguing that the program no longer imposes costs mandated by the state.

³⁵ Compare Penal Code sections 6601, 6604, 6605, and 6608 (as added or amended by Stats. 1995, ch. 762; Stats. 1995, ch. 763; Stats. 1996, ch. 4) with Penal Code sections 6601, 6604, 6605, and 6608, as amended by Proposition 83; full text of amended sections found in Exhibit X, 2006 Ballot Pamphlet, at pp. 136-138.

Mandate Redetermination Process under Section 17570

Government Code section 17570 provides a process whereby a test claim decision may be redetermined and superseded by a new test claim decision if a subsequent change in law, as defined, has altered the state's liability for reimbursement. The redetermination process calls for a two stage hearing; at the first stage, the requester must make "an adequate showing which identifies a subsequent change in law as defined by Government Code section 17570, material to the prior the claim decision, that may modify the state's liability pursuant to Article XIII B, section 6, subdivision (a) of the California Constitution."³⁶ At the second stage, the Commission shall determine whether a new test claim decision shall be adopted to supersede the previously adopted test claim decision.³⁷

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

[A] change in law that requires a finding that an incurred cost is a cost mandated by the state, as defined by Section 17514, or is not a cost mandated by the state pursuant to Section 17556, or a change in mandates law...³⁸

On July 26, 2013, the Commission determined, pursuant to a hearing, that DOF had made an adequate showing that the state's liability had been modified based on a subsequent change in law. The Commission directed staff to set the matter for a second hearing to determine whether to adopt a new test claim decision.

II. Positions of the Requester, Test Claimant, and Interested Parties and Persons

A. Department of Finance, Requester

On January 15, 2013, DOF submitted a request to adopt a new test claim decision regarding Welfare and Institutions Code sections 6601, 6602, 6603, 6604, 6605, and 6608, pursuant to Government Code section 17570. DOF asserts that Proposition 83 constitutes a subsequent change in the law, as defined in section 17570, which, when analyzed in light of section 17556, results in the state's liability under the test claim statutes being modified. DOF argues that "the state's obligation to reimburse affected local agencies has ceased."³⁹ Specifically, DOF argues that because sections 6601, 6604, 6605, and 6608 were included in their entirety in Proposition 83, the voters reenacted the entirety of those sections, "including the portions not amended," and therefore the test claim statutes impose duties expressly included in the voter-enacted ballot measure. DOF also argues that "[t]he remainder of the mandate's Welfare and Institutions Code sections that were not expressly included in the ballot measure are, nevertheless, necessary to implement the ballot measure." DOF concludes that "all activities found to be reimbursable by the Commission in the *Sexually Violent Predator* mandate are no longer reimbursable pursuant to Government Code section 17556, subdivision f, as they are either: (1) expressly included in Prop 83 or, (2) necessary for the implementation of Prop 83."⁴⁰

³⁶ Code of Regulations, Title 2, section 1190.05(a)(1).

³⁷ Government Code section 17570(d)(4) (as added by Stats. 2010, ch. 719 (SB 856)).

³⁸ Government Code section 17570(a)(2) (as added by Statutes 2010, chapter 719 (SB 856)).

³⁹ Exhibit A, Request for Redetermination, at p. 2.

⁴⁰ *Ibid.*

B. County of Los Angeles, Claimant for CSM-4509

LA County filed comments on the redetermination request, summarized as follows:

The County opposes the DOF's request to adopt a new test claim on the basis that: 1) the extraneous text included in the body of Prop 83 did not constitute a change in the law; 2) Prop 83 did not convert activities identified in the Commission's 1998 Statement of Decision to activities necessary to implement Prop 83, therefore, no longer reimbursable; and 3) Government Code Section 17570 is unconstitutional.⁴¹

LA County's position relies on its reasoning that Statutes 2006, chapter 337 (SB 1128), enacted as urgency legislation on September 20, 2006, made most of the same substantive amendments to the code that would be enacted by Proposition 83 less than two months later. LA County argues that because the law in effect immediately prior to the passage of Proposition 83 was substantially the same, Proposition 83 cannot constitute a subsequent change in law:

The changes actually proposed by Prop 83 were few and narrow, particularly in light of revisions to SVP laws that had recently been codified by S8 1128. The Secretary of State's practice of giving textual context to a ballot proposal by including unaffected statutory provisions is a benign protocol intended to fully inform the voters. Affirmation of existing law most certainly does not give rise to the change in law contemplated by Section 17570.⁴²

Thus, LA County also implies, in the excerpt above, that sections 6601, 6604, 6605, and 6608 were reproduced in the ballot measure in their entirety as a matter of "protocol," and not because the ballot measure was intended to effect substantive or pervasive changes. Finally, LA County argues that section 17570 is unconstitutional on separation of powers grounds, and because it is "an infringement of article XIII B, section 6, of the California Constitution."⁴³

In response to the draft staff analysis and proposed statement of decision at the first hearing, LA County argued in late comments that DOF's delay of "nearly six and a half years after the passage of Proposition 83" in bringing this reconsideration request was unreasonable because the Legislature in 2008 directed the Commission to set aside and reconsider the SVPs mandate "upon final resolution of any pending litigation challenging the constitutionality of subdivision (f) of section 17556." LA County also states that the current redetermination process was made effective October 19, 2010, but that DOF "waited until January 2013." Finally, LA County argues that Proposition 83's standards for defining a person as an SVP and for releasing an SVP, once adjudicated, should not be applied to "pre Prop 83 offenders."⁴⁴ LA County argues that to end mandate reimbursement for offenders determined to be SVPs prior to the adoption of Proposition 83 would violate the rights of offenders and "nullify judges' sentencing orders." LA

⁴¹ Exhibit M, County of Los Angeles Comments, at p. 1.

⁴² Exhibit M, County of Los Angeles Comments, at pp. 1-2.

⁴³ Exhibit M, County of Los Angeles Comments, at p 5.

⁴⁴ Exhibit T, County of Los Angeles Comments, at pp. 1-2.

County concludes that “[r]etroactive application of the Prop 83 SVP law (a violation of Ex Post Facto Law) would be unconstitutional.⁴⁵

C. State Controller’s Office

The SCO agrees with DOF “that the eight activities previously determined to be reimbursable in the Statement of Decision adopted on June 25, 1998 cease to be reimbursable.”⁴⁶

D. Other Interested Parties and Persons

1. California District Attorneys’ Association; San Bernardino County District Attorney’s Office

The CDAA and the San Bernardino County DA argue that “[t]he application of Government Code § 17556(f) to Proposition 83 in order to terminate state subvention of mandated sexually violent predators is legally incorrect.” CDAA continues:

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.⁴⁷

They also argue that there is no evidence, including in the ballot materials, that the voters intended Proposition 83 to terminate the state’s liability under article XIII B, section 6, to reimburse the test claim statutes. To support this argument they cite a letter from the Legislative Analyst’s Office (LAO) and DOF to then-Attorney General Lockyer, in which “[t]he unequivocal conclusion of both officials is that the costs of the SVP program would remain a

⁴⁵ This assertion is not relevant to the issue at hand: whether this program imposes a reimbursable state mandate when analyzed in the context of Proposition 83. “Ex post facto” describes a law which alters the legal consequences of an act after the act is committed, which is proscribed by the United States Constitution. (Article I, section 9; Article I, section 10.) However, the United States Supreme Court has held that the prohibition only applies to criminal statutes. A change in mandate reimbursement does not violate the prohibition, or affect in any way how an individual alleged to be a sexually violent predator is treated under the law, or what process is due. The redetermination of the test claim does not impact the rights of criminal defendants, rather it resolves who must pay for the costs of implementing the law: the state, if it is a state-mandated program; or the county, if it is not. The suggestion that a mandate redetermination would result in retroactive application of the SVP program is misleading, and will not be addressed further.

⁴⁶ Exhibit E, SCO Comments, at p. 1.

⁴⁷ Exhibit F, CDAA Comments, at p. 1; Exhibit I, San Bernardino County DA Comments, at p. 1.

reimbursable by the state.” They assert that this conclusion should be given great weight, “despite the Department of Finance’s now changed opinion.”⁴⁸

2. California State Association of Counties

CSAC argues that the state’s liability has not been affected by Proposition 83. Specifically, CSAC argues that the California Constitution mandates reimbursement for new programs or higher levels of service, subject to “four exceptions, but none of them are relevant in this case.” CSAC argues that “[i]n particular, there is no exception for a ballot measure that voters pass years later that does not substantively amend any of the language that established the mandate in the first place.”⁴⁹ CSAC further argues that the SVP program was unaffected by the passage of Proposition 83: “[b]ecause the ballot measure made no substantive changes to the reimbursable aspects of the program, the SVP program established by the Legislature would have remained in place whether voters approved or disapproved Proposition 83.” CSAC also notes that “SB 1128, by Senator Alquist, amended Sections 6600, 6601, 6604, 6604.1, and 6605 of the Welfare and Institutions Code, among many others,” less than two months prior to the election in which Proposition 83 was adopted, and that therefore Proposition 83 made no substantive changes to the law in effect at that time. Finally, CSAC argues that the request should be rejected because the Director of DOF “told the voters that counties would be reimbursed.” CSAC cites the ballot materials and the analysis published leading up to the election:

At the time Proposition 83 went to the ballot, the chief analysts representing both the Administration and the Legislature- the Director of Finance and the Legislative Analyst- agreed that all county costs related to the SVP commitment process would be reimbursed by the state. They stated the fact that counties would be reimbursed four times in their official fiscal analysis provided to the Attorney General, and voters decided the outcome of Proposition 83 based in part on that assurance.

In their official fiscal analysis of the ballot measure required by law, the Legislative Analyst and Director of Finance state unequivocally that Proposition 83 would increase state costs to, among other things, "reimburse counties for their costs for participation in the SVP commitment process."⁵⁰

CSAC implies that these analyses constitute evidence of voter intent, which in turn should be given substantial weight in evaluating whether a subsequent change in law has occurred.

3. California Public Defenders’ Association and Alameda County Public Defender’s Office

CPDA and Alameda County Public Defender’s Office submitted substantially identical comments opposing the request for redetermination, in which they argue:

(1) The 2012 legislative amendment and re-enactment of the Sexually Violent Predator Act (SVP A) either confirmed the viability of the Sexually Violent

⁴⁸ Exhibit F, CDAA Comments, at p. 4; Exhibit I, San Bernardino County DA Comments, at p. 4.

⁴⁹ Exhibit G, CSAC Comments, at p. 1.

⁵⁰ Exhibit G, CSAC Comments, at p. 3.

Predator Mandate (CSM-4509), or, *arguendo*, superseded any impact that Proposition 83 may have affected on the mandate; (2) Misrepresentation and the doctrines of estoppel and unclean hands bar the DOF's redetermination request; (3) Proposition 83 did not effectuate a "subsequent change in the law" as contemplated by Government Code section 17570; and (4) Government Code section 17570 is unconstitutional.⁵¹

The comments note that in 2012, the Legislature enacted substantive amendments to the SVP program, which, it is argued, "superseded any impact" of Proposition 83. CPDA and the Alameda County Public Defender's Office argue that due to the 2012 amendments to the relevant codes sections "Proposition 83 is no longer the statutory authority supporting the SVPA; consequently the cost incurred by local agencies to comply with the 2012 legislatively enacted SVPA is a cost mandated by the state."⁵² The comments cite the LAO and DOF analysis of Proposition 83, and argue that DOF should now be estopped from seeking redetermination of the SVP mandate because of the position taken prior to the election on Proposition 83.⁵³ The comments also focus on the 2006 legislative amendment to the SVP program, arguing that DOF's request for redetermination "is misleading because the statutory language quoted from the SVPA by the DOF's January 15, 2013, request, as well as that include [sic] in the actual proposition, was not the statutory language in effect at the time Proposition 83 was passed on November 7, 2006."⁵⁴ The comments also assert that section 17570 is unconstitutional, because it is unconstitutionally vague, with respect to the term "subsequent change in law," and because it violates separation of powers doctrine.⁵⁵

Finally, in comments submitted on the draft staff analysis for the first hearing, CPDA argues that prior reconsiderations conducted at the direction of the Legislature with respect to four prior test claims, and ultimately struck down by the court of appeal, demonstrate that a legal process or mechanism for reconsidering a test claim was in effect at the time Proposition 83 was adopted, and that therefore the analysis included in the ballot materials was incorrect and misleading to voters, and that estoppel principles, or unclean hands doctrine, should be applied to bar DOF from bringing its redetermination request under section 17570.⁵⁶

⁵¹ Exhibit H, CPDA Comments, at p. 1; Exhibit N, Alameda County Public Defender's Comments, at p. 2.

⁵² Exhibit H, CPDA Comments, at p. 2; Exhibit N, Alameda County Public Defender's Comments, at p. 3.

⁵³ Exhibit H, CPDA Comments, at pp. 3-4; Exhibit N, Alameda County Public Defender's Comments, at pp. 4-5.

⁵⁴ Exhibit H, CPDA Comments, at p. 4; Exhibit N, Alameda County Public Defender's Comments, at p. 5.

⁵⁵ Exhibit H, CPDA Comments, at p. 6; Exhibit N, Alameda County Public Defender's Comments, at p. 7.

⁵⁶ Exhibit S, CPDA Comments on Draft Staff Analysis.

4. County of San Bernardino

The County of San Bernardino argues that DOF's interpretation of section 17556 is legally incorrect. San Bernardino focuses on the intent of the voters in adopting Proposition 83, stating:

The Department of Finance's flawed interpretation of the "expressly included" language of Government Code Section 17556(f) fails to consider whether the ballot language intended to enact or change the state reimbursement of mandated activities.

San Bernardino also implies that no subsequent change in law has occurred, reasoning that "[t]he statutory changes in the initiative did not relieve counties of their preexisting state mandated activities per Welfare and Institutions Code section 6601 through 6604."⁵⁷

5. Sacramento County District Attorney's Office

The Sacramento County DA argues that no subsequent change in law has occurred, and that "the legislature still retains a true choice in whether to have the duties imposed on local government in the statute remain with local governments, or change the statutes so that the mandated duties are performed at the state level." The Sacramento County DA focuses on the fact that Proposition 83 permits the Legislature "to amend, by a statute passed by a roll call vote of two-thirds of each house," and implies that the failure to relieve local agencies of the duties imposed by Proposition 83 constitutes a reimbursable state mandate.

The Sacramento County DA argues further that "[t]he fact that pre-existing law has simply been recited again, either in a statute re-enacted by the legislature, or as part of a new ballot measure...does not amount to a change in the law for § 17570 purposes." The Sacramento County DA focuses on the fact that "the mandated activities at issue here were in place before the initiative was enacted," and concludes that "there has been no change in the applicable law."⁵⁸

Finally, the Sacramento County DA argues that DOF's redetermination request was never intended by the voters, and that a new test claim decision eliminating reimbursement would provide a windfall to the state, and impose a hardship on local governments.⁵⁹

6. Los Angeles County District Attorney's Office

The LA County DA argues that "[t]he activities for which the county is being reimbursed, the basis for the Commission's Statement of Decision, and the need for reimbursement from the State in order to comply with SVP laws have not changed since the Statement of Decision was adopted."

The LA County DA argues that Proposition 83 "simply reaffirmed many of the changes already effectuated by SB 1128," that "the changes actually proposed by Prop 83 were few and narrow," and that "[a]ffirmation of existing law certainly does not give rise to the change in law contemplated by Section 17570."⁶⁰ The LA County DA argues that "inclusion, within the text of

⁵⁷ Exhibit J, County of San Bernardino Comments.

⁵⁸ Exhibit K, Sacramento County District Attorney's Office Comments, at pp. 1-2.

⁵⁹ Exhibit K, Sacramento County District Attorney's Office Comments, at p. 3.

⁶⁰ Exhibit L, Los Angeles County District Attorney's Office Comments, at pp. 2-3.

an initiative, of language that is unaffected by proposed revisions to the law does not constitute a change in the law.”⁶¹ The LA County DA further asserts that “[a]n activity may not fairly be recharacterized as “necessary to implement” another activity simply because an antecedent activity may have been affected by a change in the law,” and that “a reimbursable activity does not cease to be a reimbursable activity because it happens to have constitutional implications.” And the LA County DA argues that “Prop 83’s mere reaffirmation of legislative action does not constitute a change in the law.”⁶² Additionally, the LA County DA proffers a theory of equitable estoppel, based on the LAO and DOF analysis of Proposition 83 leading up to the election, discussed below, and the conclusion that Proposition 83 would not affect mandates.⁶³ Finally, LA County DA asserts that section 17570 is unconstitutional, as a violation of separation of powers doctrine.⁶⁴

7. County Counsel of San Diego

The County Counsel of San Diego argues that “Jessica’s Law [Proposition 83] did not make any changes material to the relevant statutes as they existed immediately before the adoption of Jessica’s Law,” that the 2012 reenactment “supersedes any effects that Jessica’s Law may have had on the state’s obligation,” that “DOF’s request is based on the unconstitutionally broad language in Section 17556(f) that impermissibly directs the commission to apply the ballot measure exception to previously enacted legislation.” The County Counsel of San Diego further argues that “DOF’s Request relies on the unconstitutionally broad definition of what constitutes a ‘subsequent change in the law’ set forth in Section 17570.”⁶⁵

8. Alameda County District Attorney’s Office

The Alameda County DA argues that Proposition 83 did not make any material changes to the responsibilities of county counsel offices or district attorneys’ offices; that DOF’s interpretation of section 17556(f) “cannot be the correct interpretation;” and that DOF’s request “should be rejected on common law principles of laches and estoppel.”⁶⁶

III. Discussion

Under article XIII B, section 6 of the California Constitution, local agencies and school districts are entitled to reimbursement for the increased costs of state-mandated new programs or higher levels of service. In order for local government to be eligible for reimbursement, one or more similarly situated local agencies or school districts must file a successful test claim with the Commission. “Test claim” means the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state. Test claims function similarly to class actions and all members of the class have the opportunity to participate in the

⁶¹ Exhibit L, Los Angeles County District Attorney’s Office Comments, at pp. 4-5.

⁶² Exhibit L, Los Angeles County District Attorney’s Office Comments, at pp. 4-8.

⁶³ Exhibit L, Los Angeles County District Attorney’s Office Comments, at pp. 8-10.

⁶⁴ Exhibit L, Los Angeles County District Attorney’s Office Comments, at pp. 11-12.

⁶⁵ Exhibit O, County Counsel of San Diego Comments, at p. 2.

⁶⁶ Exhibit P, Alameda County District Attorney’s Comments, at pp. 2-5.

test claim process and all are bound by the final decision of the Commission for purposes of that test claim.

The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.⁶⁷ The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.⁶⁸ 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.”⁶⁹

Under Government Code section 17570, upon request, the Commission may consider the adoption of a new test claim decision to supersede a prior test claim decision based on a subsequent change in law which modifies the states liability. If the Commission adopts a new test claim decision that supersedes the previously adopted test claim decision, the Commission is required to adopt new parameters and guidelines or amend existing parameters and guidelines.

A. Finance’s Argument for the Adoption of a New Test Claim Decision to Supersede the Prior Decision in Test Claim (CSM-4509).

On May 28, 1998, the Commission heard the CSM-4509 test claim on the SVP program. That test claim alleged that the following Welfare and Institutions Code sections imposed reimbursable state-mandates: 6250, and 6600 through 6608, as amended by Statutes 1995, chapter 762; Statutes 1995, chapter 763; and Statutes 1996, chapter 4.⁷⁰

The Commission approved reimbursement only for the following activities under sections 6601, 6602, 6603, 6604, 6605, and 6608:

1. Designation by the County Board of Supervisors of the appropriate District Attorney or County Counsel who will be responsible for the sexually violent predator civil commitment proceedings. (Welf. & Inst. Code, § 6601(i).)
2. Initial review of reports and records by the county’s designated counsel to determine if the county concurs with the state’s recommendation. (Welf. & Inst. Code, § 6601(i).)
3. Preparation and filing of the petition for commitment by the county’s designated counsel. (Welf. & Inst. Code, § 6601(i).)⁷¹

⁶⁷ *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487; Government Code sections 17551; 17552.

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

⁶⁹ *County of Sonoma v. Commission on State Mandates*, (2000) 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

⁷⁰ Exhibit B, Test Claim Statement of Decision.

⁷¹ The Test Claim Statement of Decision cites subdivision (j), but subdivision (j) addresses time limits, not a petition for commitment. The Commission therefore assumes that this is a typographical error, and that the citation intended is to subdivision (i).

4. Preparation and attendance by the county's designated counsel and indigent defense counsel at the probable cause hearing. (Welf. & Inst. Code, § 6602.)
5. Preparation and attendance by the county's designated counsel and indigent defense counsel at trial. (Welf. & Inst. Code, §§ 6603 and 6604.)
6. Preparation and attendance by the county's designated counsel and indigent defense counsel at subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, §§ 6605(b-d), and 6608(a-d).)
7. Retention of necessary experts, investigators, and professionals for preparation for trial and subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, §§ 6603 and 6605(d).)
8. Transportation and housing for each potential sexually violent predator at a secured facility while the individual awaits trial on the issue of whether he or she is a sexually violent predator. (Welf. & Inst. Code, § 6602.)

All remaining provisions of the test claim statutes were denied.⁷²

DOF asserts that activities 1, 2, 3, and 6, approved in the test claim statement of decision, were expressly included in Proposition 83. Activities 1, 2, and 3 involve the county's role in filing and litigating a civil commitment hearing on behalf of the state. These activities are required by section 6601(i), and while DOF concedes that Proposition 83 did not make amendments to subdivision (i), specifically, it amended and reenacted the entirety of section 6601, including the activities approved under subdivision (i). Activity 6 is required by sections 6605 and 6608. The sections encompassing these activities were reenacted and amended also by Proposition 83.⁷³ DOF asserts that the reenactment of sections 6601, 6604, 6605, and 6608 is sufficient to implicate the "expressly included in" limitation of section 17556(f), prohibiting the Commission from finding "costs mandated by the state," and in turn supporting the adoption of a new test claim decision.

DOF asserts as well that Activities 4, 5, 7 and 8 are "necessary to implement" Proposition 83, within the meaning of section 17556(f), and therefore these requirements also have been superseded by the ballot initiative.⁷⁴ DOF therefore brings this request to adopt a new test claim decision, in accordance with the provisions of section 17570.

B. Section 17556(f) Prohibits the Commission from Finding Costs Mandated by the State for Most of the Duties Imposed by the Test Claim Statutes Because those Duties are Necessary to Implement or Expressly Included in a Ballot Measure Approved by the Voters in a Statewide Election.

⁷² Exhibit B, Test Claim Statement of Decision, at p. 12. The numbers attached to the activities above are assigned by DOF, in its request for redetermination; the same numbering is adopted in this analysis, for purposes of expedience and clarity, rather than utilizing the bulleted list adopted by the Commission in the test claim statement of decision.

⁷³ Exhibit A, Redetermination Request, at pp. 1-2.

⁷⁴ Exhibit A, Redetermination Request, at pp. 2-3 and Exhibit R, DOF Comments on Draft Staff Analysis, at p. 1. where DOF corrected the original inadvertent omission of activity number 8.

Government Code section 17556(f) provides that the Commission “shall not find” costs mandated by the state if:

The statute or executive order imposes duties that are necessary to implement, or are expressly included in, a ballot measure approved by the voters in a statewide or local election. This subdivision applies regardless of whether the statute or executive order was enacted or adopted before or after the date on which the ballot measure was approved by the voters.⁷⁵

CSBA I makes clear that this statutory exclusion from reimbursement is consistent with the subvention requirements of article XIII B, section 6.⁷⁶ The court in *CSBA I* reasoned that the subvention requirement applies to mandates imposed by the Legislature, not by the voters; the voters’ powers of initiative and referendum are reserved powers, not vested in the Legislature, and are therefore not limited by article XIII B, section 6. *CSBA I* holds that the reimbursement requirement applies only to *state-mandated* costs, not costs incurred by way of “the people acting pursuant to the power of initiative.”⁷⁷

“Having established that costs imposed on local governments by ballot measure mandates need not be reimbursed by the state,” and thus approving the statutory exclusion to the extent of statutes imposing duties “expressly included in” a ballot measure, the court considered also whether reimbursement is required for activities embodied in a test claim statute that are “necessary to implement” a voter-enacted ballot measure. In *San Diego Unified*, costs that were incidental to a federal mandate were not reimbursable under section 17556(c), because those costs were imposed under Education Code provisions “adopted to implement a federal due process mandate.”⁷⁸ The *CSBA I* court therefore concluded that “[t]he language of [section 17556(f)] relieving the State of the obligation to reimburse a local government for duties ‘necessary to implement’ a ballot measure is *unobjectionable* because it corresponds to the Supreme Court’s holding in *San Diego Unified* that state statutes codifying federal mandates are not reimbursable.”⁷⁹ The court rejected, however, the “reasonably within the scope of” test also provided in subdivision (f) at that time as being overbroad, and the Legislature amended the code section the following year to excise the offending language.⁸⁰

Section 17556(f) also states that the rule “applies regardless of whether the statute or executive order was adopted prior to or after the date on which the statute or executive order was enacted

⁷⁵ As amended by Statutes 2010, chapter 719 (SB 856).

⁷⁶ *California School Boards Association v. State of California (CSBA I)* (Cal. Ct. App. 3d Dist. 2009) 171 Cal.App.4th 1183, 1206-1207; 1210.

⁷⁷ *Ibid.*

⁷⁸ *San Diego Unified School District v. Commission on State Mandates* (2004) 33 Cal.4th 859.

⁷⁹ *California School Boards Association v. State, supra, (CSBA I)* (Cal. Ct. App. 3d Dist. 2009) 171 Cal.App.4th 1183, at p. 1213 [emphasis added], citing *San Diego Unified, supra, (2004) 33 Cal.4th 859*.

⁸⁰ Government Code section 17556(f) (Stats. 2010, ch. 719 (SB 856) [amended to remove “reasonably within the scope of,” as an alternative test to “expressly included in,” or “necessary to implement,” consistent with the court’s decision in *CSBA I, supra*]).

or issued.” This provision, like the “reasonably within the scope of,” and “necessary to implement” tests, first appeared in section 17556 in 2005.⁸¹ This last provision, stating that the order of enactment is not material to the analysis under section 17556(f), has not yet been determined in the courts,⁸² but the Commission must presume that the statutes enacted by the Legislature are constitutional until the courts declare otherwise.⁸³

For the following reasons, the Commission finds that section 17556(f) applies in this case to end reimbursement for most of the activities, as specified, beginning July 1, 2011.

1. The test claim statutes impose duties that are expressly included in Proposition 83.

The original test claim decision assumed jurisdiction over Welfare and Institutions Code sections 6601, 6602, 6603, 6604, 6605, and 6608, as amended by Statutes 1995, Chapter 762 (SB 1143); Statutes 1995, Chapter 763 (AB 888); and Statutes 1996, Chapter 4 (AB 1496).⁸⁴ Here, the Commission’s jurisdiction is confined to the statutes pled in the original test claim.⁸⁵ Proposition 83 amended and reenacted, wholesale, sections 6601, 6604, 6605, and 6608 of the Welfare and Institutions Code, and made other changes which likely impact the operation of the remaining sections. By amending the code sections, Proposition 83 does not *expressly include the test claim statutes* exactly as amended by Statutes 1995, chapters 762 and 763, and Statutes 1996, chapter 4; but the focus of Government Code section 17556(f) is not whether *the test claim statute* is expressly included in a ballot measure, but whether the *duties imposed by the test claim statute* are expressly included in a voter-enacted ballot measure.⁸⁶ Therefore it is incumbent upon the Commission to consider the activities approved (duties imposed by the statute) in the earlier test claim, and whether those activities have been subsumed within the requirements of Proposition 83. If so, then the *duties imposed by the test claim statute*, as determined in the original test claim decision, are *expressly included* in the approved ballot measure.

In the original test claim statement of decision, the Commission approved reimbursement for the following activities, numbered one through eight for purposes of this analysis:

Activity 1 – Designation by the County Board of Supervisors of the appropriate District Attorney or County Counsel who will be responsible for the sexually violent predator civil commitment proceedings. (Welf. & Inst. Code, § 6601(i).)

⁸¹ As discussed above, the “reasonably within the scope of” test has been disapproved by the courts and removed from the code; compare Statutes 2004, chapter 895 (AB 2855) to Statutes 2005, chapter 72 (AB 138).

⁸² The constitutionality of Government Code sections 17570, in conjunction with section 17556, is being challenged in *California School Boards Assoc., et al. v. State of California, Commission on State Mandates, John Chiang, as State Controller, and Ana Matosantos, as Director of the Department of Finance*, Alameda County Superior Court, Case No. RG11554698.

⁸³ *California School Boards Association v. State of California, (CSBA II)* (Cal. Ct. App. 4th Dist. 2011) 192 Cal.App.4th 770, 795; *Porter v. City of Riverside* (1968) 261 Cal.App.2d 832, 837.

⁸⁴ Exhibit B, Test Claim Statement of Decision.

⁸⁵ Exhibit A, Redetermination Request.

⁸⁶ Government Code section 17556(f).

Activity 2 – Initial review of reports and records by the county’s designated counsel to determine if the county concurs with the state’s recommendation. (Welf. & Inst. Code, § 6601(i).)

Activity 3 – Preparation and filing of the petition for commitment by the county’s designated counsel. (Welf. & Inst. Code, § 6601(j).)

Activity 4 – Preparation and attendance by the county’s designated counsel and indigent defense counsel at the probable cause hearing. (Welf. & Inst. Code, § 6602.)

Activity 5 – Preparation and attendance by the county’s designated counsel and indigent defense counsel at trial. (Welf. & Inst. Code, §§ 6603 and 6604.)

Activity 6 – Preparation and attendance by the county’s designated counsel and indigent defense counsel at subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, §§ 6605(b-d), and 6608(a-d).)

Activity 7 – Retention of necessary experts, investigators, and professionals for preparation for trial and subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, §§ 6603 and 6605(d).)

Activity 8 – Transportation and housing for each potential sexually violent predator at a secured facility while the individual awaits trial on the issue of whether he or she is a sexually violent predator. (Welf. & Inst. Code, § 6602.)⁸⁷

Activities 1, 2, and 3 derive from section 6601, as amended by Statutes 1995, chapter 762 (SB 1143); Statutes 1995, chapter 763 (AB 888); and Statutes 1996, chapter 4 (AB 1496), and are expressly included in section 6601, as amended by Proposition 83. Section 6601, as amended, provides, in pertinent part:

(h) If the State Department of Mental Health determines that the person is a sexually violent predator as defined in this article, the Director of Mental Health shall forward a request for a petition to be filed for commitment under this article to the county designated in subdivision (i). Copies of the evaluation reports and any other supporting documents shall be made available to the attorney designated by the county pursuant to subdivision (i) who may file a petition for commitment in the superior court.

(i) If the county’s designated counsel concurs with the recommendation, a petition for commitment shall be filed in the superior court of the county in which the person was convicted of the offense for which he or she was committed to the jurisdiction of the Department of Corrections. The petition shall be filed, and the proceedings shall be handled, by either the district attorney or the county counsel of that county. The county board of supervisors shall designate either the district attorney or the county counsel to assume responsibility for proceedings under this article.⁸⁸

⁸⁷ Exhibit B, Test Claim Statement of Decision, at p. 13.

⁸⁸ Exhibit X, Ballot Pamphlet, November 7, 2006, at p. 137.

Section 6601(i) requires the county board of supervisors to designate counsel to assume responsibility for proceedings “under this article.” Activity 1 is the requirement that the county designate counsel to assume responsibility for civil commitment proceedings.⁸⁹ Activity 1 is thus expressly included in Proposition 83. Sections 6601(h) and 6601(i) provide for a recommendation to be made by DMH, and copies of mental health evaluations and other documents to be made available to the designated counsel, who, if he or she concurs with the recommendation, shall file a petition.⁹⁰ Activity 2 is the requirement that the designated counsel review the reports and records to determine whether he or she agrees with the recommendation of DMH.⁹¹ Activity 2 is thus expressly included in the provisions of Proposition 83. Section 6601(i) requires the designated counsel to file a petition and “assume responsibility for proceedings.” Activity 3 is the requirement that designated counsel prepare and file a petition for civil commitment.⁹² Thus, Activity 3 is expressly included in Proposition 83.

Activities 6 and 7 are also expressly included in the provisions of Proposition 83. Activity 6 requires “[p]reparation and attendance by the county’s designated counsel and indigent defense counsel at subsequent hearings regarding the condition of the sexually violent predator.”⁹³ Sections 6605 and 6608, as amended by Proposition 83, provide for a subsequent hearing to determine whether a person continues to fit the definition of a sexually violent predator, and whether release to a less-restrictive environment is appropriate. That hearing is triggered in one of two ways: either by a petition from the person committed, or by the recommendation of DMH. In either case, the designated counsel identified in section 6601(i) is required to represent the state, and the committed person is entitled to the assistance of counsel.

Section 6605, as amended by Proposition 83, provides, in pertinent part:

(b) If the Department of Mental Health determines that either: (1) the person’s condition has so changed that the person no longer meets the definition of a sexually violent predator, or (2) conditional release to a less restrictive alternative is in the best interest of the person and conditions can be imposed that adequately protect the community, the director shall authorize the person to petition the court for conditional release to a less restrictive alternative or for an unconditional discharge.

¶...¶

(d) *At the hearing, the committed person shall have the right to be present and shall be entitled to the benefit of all constitutional protections that were afforded to him or her at the initial commitment proceeding. The attorney designated by the county pursuant to subdivision (i) of Section 6601 shall represent the state and shall have the right to demand a jury trial and to have the committed person evaluated by experts chosen by the state. The committed person also shall have*

⁸⁹ Exhibit B, Test Claim Statement of Decision, at p. 13.

⁹⁰ Exhibit X, Ballot Pamphlet, November 7, 2006, at p. 137.

⁹¹ Exhibit B, Test Claim Statement of Decision, at p. 13.

⁹² *Ibid.*

⁹³ Exhibit B, Test Claim Statement of Decision, at p. 13.

the right to demand a jury trial and to have experts evaluate him or her on his or her behalf. The court shall appoint an expert if the person is indigent and requests an appointment...⁹⁴

And section 6608, as amended by Proposition 83, provides:

Nothing in this article shall prohibit the person who has been committed as a sexually violent predator from petitioning the court for conditional release or an unconditional discharge without the recommendation or concurrence of the Director of Mental Health...The person petitioning for conditional release and unconditional discharge under this subdivision shall be entitled to assistance of counsel.

¶...¶

The court shall give notice of the hearing date to the attorney designated in subdivision (i) of Section 6601, the retained or appointed attorney for the committed person, and the Director of Mental Health at least 15 court days before the hearing date.⁹⁵

Thus Activity 6, as approved in the original test claim decision, is expressly included in Proposition 83: the preparation and attendance of both the county's designated counsel and indigent defense counsel are expressly included in the voter-approved ballot measure.

Activity 7 includes "[r]etention of necessary experts, investigators, and professionals for preparation for trial and subsequent hearings regarding the condition of the sexually violent predator."⁹⁶ Activity 7 is expressly included in Proposition 83 *to the extent* of retaining experts for subsequent hearings recommended by DMH. Section 6605, as amended by Proposition 83, provides:

At the hearing, the committed person shall have the right to be present and shall be entitled to the benefit of all constitutional protections that were afforded to him or her at the initial commitment proceeding. The attorney designated by the county pursuant to subdivision (i) of Section 6601 shall represent the state and shall have the right to demand a jury trial and to have the committed person evaluated by experts chosen by the state. The committed person also *shall have the right to demand a jury trial and to have experts evaluate him or her on his or her behalf*. The court *shall appoint an expert if the person is indigent and requests an appointment*.⁹⁷

Similar language regarding the appointment of an expert to evaluate the person on his or her behalf is not found in section 6608, with respect to a hearing initiated on petition of the committed person. But the California Supreme Court held, in *People v. McKee*, that "[w]e do not believe, however, that the statute needs to be interpreted in this narrow manner." The court

⁹⁴ Exhibit X, Ballot Pamphlet, November 7, 2006, at p. 137.

⁹⁵ Exhibit X, Ballot Pamphlet, November 7, 2006, at p. 138.

⁹⁶ Exhibit B, Test Claim Statement of Decision, at p. 13.

⁹⁷ Exhibit X, Ballot Pamphlet, November 7, 2006, at p. 137.

held that “[a]lthough section 6605, subdivision (a) does not explicitly provide for the appointment of the expert in conjunction with a section 6608 petition, such appointment may be reasonably inferred.”⁹⁸ The court concluded that “[t]here is no indication that the Legislature that authorized these expert appointments on behalf of an indigent SVP believed that such experts should be disallowed from testifying at an SVP’s section 6608 hearing, nor that an SVP’s indigence should serve as an obstacle to such testimony.”⁹⁹ Therefore, to the extent of retaining experts for subsequent hearings only, activity 7, as approved in the original test claim decision, is expressly included in the provisions of Proposition 83.

Many of the interested parties and persons to this redetermination request have suggested that the “expressly included in” language of section 17556(f) should apply only to a substantive amendment of a test claim statute.¹⁰⁰ LA County in particular argues that the amendments to the test claim statutes made by the November 2006 ballot measure had already been effected by the Legislature in Statutes 2006, chapter 337 (SB 1128), and that the Welfare and Institutions Code sections were included in the ballot measure because it is the Secretary of State’s practice to give “textual context to a ballot proposal by including unaffected statutory provisions.”¹⁰¹ However, the Commission has already determined, in the first hearing on this redetermination request, that statutory changes made prior to the ballot measure are irrelevant to the analysis of the existence of a subsequent change in law.¹⁰² The Commission does not have jurisdiction over Welfare and Institutions Code sections 6600-6608, as amended by Statutes 2006, chapter 337 (SB 1128), and in any event, the analysis of a subsequent change in law is more narrowly circumscribed: “Here, with respect to the code sections reenacted in Proposition 83, it must be said that the test claim statutes impose duties that are expressly included in a voter enacted ballot measure.”¹⁰³

In addition, some commenters have suggested that reimbursement should continue for this program because the voters had no express or implied intent, or indeed notice, that adoption of Proposition 83 would result in termination of mandate reimbursement; the comments rely on representations made by the LAO and DOF to then-Attorney General Lockyer, concluding that

⁹⁸ *People v. McKee* (2010) 47 Cal.4th 1172, at p. 1192.

⁹⁹ *Id.*, at p. 1193.

¹⁰⁰ See, e.g., Exhibit F, CDAA Comments, at p. 1; Exhibit I, San Bernardino County DA Comments, at p. 1. See also Exhibit G, CSAC Comments at p. 1 [“[T]here is no exception [to the reimbursement requirement] for a ballot measure that voters pass years later that does not substantively amend any of the language that established the mandate in the first place.”].

¹⁰¹ Exhibit M, County of Los Angeles Comments, at pp. 1-2; 5; Exhibit L, LA County District Attorney’s Office, at pp. 2-3. See also Exhibit G, CSAC Comments, at p. 3 [noting that SB 1128 made many, or most, of the same substantive changes less than two months prior to the November 2006 ballot measure]. See also Exhibit K, Sacramento County District Attorney’s Office Comments, at pp. 1-2 [“[T]he mandated activities at issue here were in place before the initiative was enacted.”].

¹⁰² Exhibit U, Statement of Decision, First Hearing, July 27, 2013, at p. 18.

¹⁰³ *Ibid.*

the SVP program would remain reimbursable.¹⁰⁴ The County of San Bernardino argues: “[t]he Department of Finance’s flawed interpretation of the ‘expressly included’ language of Government Code Section 17556(f) fails to consider whether the ballot language intended to enact or change the state reimbursement of mandated activities.”¹⁰⁵ Furthermore, CPDA charges that the electorate was “misled by the foregoing analysis,” and local government officials who supported Proposition 83 were “lulled into a false sense of security.”¹⁰⁶ These arguments, raised by multiple parties and interested parties, are tantamount to a plea for estoppel, based on an inaccurate statement of the effect of the ballot measure, and an imputed lack of intent of the voters to impact mandate reimbursement. However, the Commission found in the first hearing on this redetermination request as follows:

[W]hatever representations were made regarding the effect on mandate reimbursement prior to the adoption of Proposition 83, and however local governments might have detrimentally relied on those representations, they were *true when made*, and only later did the circumstances allow for mandate reimbursement to be modified. Moreover, to apply estoppel against DOF in this case would “contravene directly” the statutory and constitutional limitations on reimbursement, and would effectively “nullify” the mandate redetermination process created in the Government Code.

Accordingly, the arguments alleging misrepresentation, unclean hands, and equitable estoppel do not apply in this case.¹⁰⁷

Based on the foregoing, the Commission finds that the following requirements of the test claim statutes are expressly included in Proposition 83, and therefore do not constitute a reimbursable state mandate within the meaning of article XIII B, section 6 and Government Code section 17556(f), beginning July 1, 2011:

- Designation by the County Board of Supervisors of the appropriate District Attorney or County Counsel who will be responsible for the sexually violent predator civil commitment proceedings.¹⁰⁸
- Initial review of reports and records by the county’s designated counsel to determine if the county concurs with the state’s recommendation.¹⁰⁹
- Preparation and filing of the petition for commitment by the county’s designated counsel.¹¹⁰

¹⁰⁴ Exhibit F, CDAA Comments, at p. 4; Exhibit I, San Bernardino County DA Comments, at p. 4; Exhibit G, CSAC Comments, at p. 3.

¹⁰⁵ Exhibit J, County of San Bernardino Comments.

¹⁰⁶ Exhibit H, CPDA Comments, at pp. 3-4.

¹⁰⁷ Exhibit U, Statement of Decision, First Hearing, July 27, 2013, at p. 25 [citing *Transamerica Occidental Life Insurance Co. v. State Board of Equalization* (Cal. Ct. App. 2d Dist. 1991) 232 Cal.App.3d 1048, at p. 1054].

¹⁰⁸ Welfare and Institutions Code section 6601(i) (as amended by Proposition 83 (2006)).

¹⁰⁹ Welfare and Institutions Code section 6601(i) (as amended by Proposition 83 (2006)).

- Preparation and attendance by the county’s designated counsel and indigent defense counsel at subsequent hearings regarding the condition of the sexually violent predator.¹¹¹
 - Retention of necessary experts, investigators, and professionals for preparation for *subsequent hearings* regarding the condition of the sexually violent predator.¹¹²
2. Civil Commitments Provided for Under Proposition 83 Implicate Significant Due Process Considerations, and to the Extent the Test Claim Statutes Satisfy Due Process Requirements Triggered by Proposition 83, Those Statutes Impose Duties That are Necessary to Implement a Voter-Enacted Ballot Measure.

Activities 4, 5, 8, and the remaining elements of activity 7, above, are not expressly included in Proposition 83, but some of these activities are necessary to implement Proposition 83.

Activities 4 and 5, as approved in the original test claim decision, require the preparation and attendance of counsel designated by the county pursuant to section 6601(i), and of indigent defense counsel, at the probable cause hearing and at trial. These activities were found to arise from Welfare and Institutions Code sections 6602, 6603, and 6604, as amended by Statutes 1995, chapter 762 (SB 1143); Statutes 1995, chapter 763 (AB 888); and Statutes 1996, chapter 4 (AB 1496).¹¹³ Activity 8, as approved in the original test claim decision, requires the local government to provide “[t]ransportation and housing for each potential sexually violent predator at a secured facility while the individual awaits trial on the issue of whether he or she is a sexually violent predator.” That activity was found by the Commission to arise from section 6602, as amended by Statutes 1995, chapters 762 and 763, and Statutes 1996, chapter 4.¹¹⁴ And the portion of activity 7 not expressly included in Proposition 83, as discussed above, requires local government to retain experts, investigators, and professionals for trial to testify on the issue of whether an individual is or is not a sexually violent predator. That activity is attributed, in the test claim statement of decision, to section 6603, as amended by Statutes 1995, chapters 762 and 763.

Welfare and Institutions Code section 6602, as amended by Statutes 1995, chapter 763 (AB 888) and Statutes 1996, chapter 4 (AB 1496), provides:

A judge of the superior court shall review the petition and shall determine whether there is probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release. The person named in the petition shall be entitled to assistance of counsel at the probable cause hearing. If the judge determines there is not probable cause, he or she shall dismiss the petition and any person subject to parole shall report to parole. If the judge determines that there is probable cause,

¹¹⁰ Welfare and Institutions Code section 6601(i) (as amended by Proposition 83 (2006)).

¹¹¹ Welfare and Institutions Code sections 6605(b-d); 6608(a-b) (as amended by Proposition 83 (2006)).

¹¹² Welfare and Institutions Code section 6605(d) (as amended by Proposition 83 (2006)).

¹¹³ Exhibit B, Test Claim Statement of Decision, at p. 13.

¹¹⁴ *Ibid.*

the judge shall order that the person remain in custody in a secure facility until a trial is completed and shall order that a trial be conducted to determine whether the person is, by reason of a diagnosed mental disorder, a danger to the health and safety of others in that the person is likely to engage in acts of sexual violence upon his or her release from the jurisdiction of the Department of Corrections or other secure facility.

And Section 6603, as amended by Statutes 1995, chapters 762 and 763, provides:

A person subject to this article shall be entitled to a trial by jury, the assistance of counsel, the right to retain experts or professional persons to perform an examination on his or her behalf, and have access to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court shall appoint counsel to assist him or her, and, upon the person's request, assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person's behalf.

These sections were not amended and reenacted by Proposition 83, and therefore continue to provide a statutory requirement that a person alleged to be a sexually violent predator be accorded a probable cause hearing, and trial by jury, and shall be entitled to the assistance of counsel. Section 6603 also requires that the person alleged to be a sexually violent predator is entitled to experts or professional persons to perform an examination on his or her behalf.

The issue is whether those requirements, as approved in the test claim statement of decision, constitute duties *necessary to implement* Proposition 83, or are additional requirements imposed as a matter of policy by the Legislature, thus requiring a finding that the requirements remain reimbursable under article XIII B, section 6. As discussed above, where mandated activities are imposed by the voters, not the Legislature, the courts have held that those activities are not reimbursable under article XIII B, section 6.¹¹⁵ In this context, reimbursement is required, consistent with article XIII B, section 6, only if the requirements of the test claim statutes go beyond what is necessary to implement the ballot initiative.

The due process clause of the United States Constitution provides that the state shall not “deprive any person of life, liberty, or property without due process of law.”¹¹⁶ When an individual's liberty or property interest is impacted by governmental action, due process protections attach, and require that certain procedural safeguards be provided to the individual. Although the SVPs program entails a *civil* commitment, not a *criminal conviction*, the person identified as a sexually violent predator is subject to a deprivation of liberty. And under Proposition 83, that deprivation is highly significant, being of indeterminate duration, rather than a two year commitment as provided under the prior statutes. Proposition 83 provides for indeterminate civil commitment of a person found to be a sexually violent predator, as follows:

The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. If the court or jury is not satisfied beyond a

¹¹⁵ *California School Boards Association v. State of California (CSBA I)* (Cal. Ct. App. 3d Dist. 2009) 171 Cal.App.4th 1183, 1206-1207; 1210.

¹¹⁶ U.S. Constitution, 5th and 14th Amendments; see also, due process provisions in the California Constitution, article 1, sections 7 and 15.

reasonable doubt that the person is a sexually violent predator, the court shall direct that the person be released at the conclusion of the term for which he or she was initially sentenced, or that the person be unconditionally released at the end of parole, whichever is applicable. *If the court or jury determines that the person is a sexually violent predator, the person shall be committed for an indeterminate term to the custody of the State Department of Mental Health for appropriate treatment and confinement in a secure facility designated by the Director of Mental Health.* The facility shall be located on the grounds of an institution under the jurisdiction of the Department of Corrections.¹¹⁷

It is well-settled law that even temporary deprivations of an individual's liberty or property interest trigger due process protections. The length or severity of the deprivation must be weighed in determining what kind of process is due—not *whether* process is due.¹¹⁸

In *San Diego Unified*,¹¹⁹ the California Supreme Court addressed whether procedures instituted to provide a hearing and some modicum of due process to public school students under threat of expulsion constituted a reimbursable state mandate, or merely codified federal law, rendering such procedures not subject to reimbursement under article XIII B, section 6. The court reasoned as follows:

[T]he Legislature, in adopting specific statutory procedures to comply with the general federal mandate [to provide due process protections], reasonably articulated various incidental procedural protections. These protections are designed to make the underlying federal right enforceable and to set forth procedural details that were not expressly articulated in the case law establishing the respective rights; viewed singly or cumulatively, they did not significantly increase the cost of compliance with the federal mandate. The Court of appeal in *County of Los Angeles II*^{120]} concluded that, for purposes of ruling upon a claim for reimbursement, such incidental procedural requirements, producing at most de minimis added cost, should be viewed as part and parcel of the underlying federal mandate, and hence nonreimbursable under Government Code, section 17556, subdivision (c).

¹¹⁷ Welfare and Institutions Code section 6604, as amended by Proposition 83 (2006); Exhibit X, Ballot Pamphlet, at p. 137.

¹¹⁸ See *Fuentes v. Shevin* (1972) 407 U.S. 67, p. 86 (“The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property”); *Goss v. Lopez* (1975) 419 U.S. 565, p. 576 (holding that a 10-day suspension from school is a cognizable deprivation of liberty and property). Note that due process standards apply equally to liberty and property deprivations. See *Wolff v. McDonnell* (1974) 418 U.S. 539, p. 558 and *Zinerman v. Burch* (1990) 494 U.S. 113, p. 131.

¹¹⁹ *San Diego Unified School District v. Commission on State Mandates*, *supra*, (2004) 33 Cal.4th 859.

¹²⁰ *County of Los Angeles v. Commission on State Mandates* (Cal. Ct. App. 2d Dist. 1995) 32 Cal.App.4th 805.

Also in *San Diego Unified, supra*, the California Supreme Court considered whether due process procedures involved in a *state-mandated* pre-expulsion hearing were fully reimbursable, or whether the procedures merely implemented federal due process requirements.¹²¹ The court held that even though some of the requirements of the test claim statute, “the parties agree, codif[ied] requirements of federal due process,”¹²² “a school district would not automatically incur the due process hearing costs that are mandated by federal law” in the absence of the test claim statute triggering the due process requirements.¹²³ The court therefore concluded that all hearing costs associated with the mandatory expulsion provisions of the test claim statutes were state-mandated, as follows:

Because it is state law, . . . and not federal due process law, that requires the District to take steps that in turn require it to incur hearing costs, it follows, contrary to the view of the Commission and the Department, that we cannot characterize any of the hearing costs incurred by the District, triggered by the mandatory provision of Education Code section 48915, as constituting a federal mandate (and hence being nonreimbursable).¹²⁴

The court concluded that: “state rules or procedures that are intended to implement an applicable federal law – and whose costs are, in context, de minimis – should be treated as part and parcel of the underlying federal mandate.”¹²⁵ *CSBA I*¹²⁶ “established that costs imposed on local governments by ballot measure mandates need not be reimbursed by the state,” and concluded that the “necessary to implement” test of section 17556(f) is “even more restrictive” than the “adopted to implement” language of *San Diego Unified, supra*.¹²⁷

Therefore the analysis that results from the two findings in *San Diego Unified, supra*, and the holding in *CSBA I, supra*, that section 17556(f) is applied similarly to, if more restrictively than, section 17556(c), is as follows: if costs incurred to satisfy due process protections are triggered by a state statute or executive order, reimbursement is required, whether or not the due process protections exceed federal due process requirements; but if costs incurred to satisfy due process protections are triggered by other than a state statute or executive order (such as a voter-enacted ballot measure), then reimbursement is required only if the state’s due process requirements truly exceed federal due process requirements and are not part and parcel of the federal requirements.

Activities 4, 5, 7, and 8, discussed below, were determined to be imposed by state law in the prior test claim decision.¹²⁸ However, elements of these activities may also be required to satisfy

¹²¹ *San Diego Unified, supra*, 33 Cal.4th 859.

¹²² *Id.*, at p. 868.

¹²³ *Id.*, at p. 880.

¹²⁴ *Id.*, at p. 881.

¹²⁵ *Id.*, at p. 890.

¹²⁶ *California School Boards Association v. State of California, supra*, (Cal. Ct. App. 3d Dist. 2009) 171 Cal.App.4th 1183

¹²⁷ *Id.*, at pp. 1210; 1214.

¹²⁸ Exhibit B, Test Claim Statement of Decision, at p. 13.

the due process protections implicated by Welfare and Institutions Code sections 6601, 6604, 6605, and 6608, as those sections were adopted by the voters in Proposition 83. This is so because even due process protections expressly included in the test claim statutes intended to satisfy federal due process requirements were triggered, prior to Proposition 83, entirely by a state-mandated local program. Thus, requirements of the code sections not expressly included in Proposition 83 may nevertheless be “necessary to implement” the provisions of Proposition 83 to the extent that due process protections must be satisfied in order to validly enforce and administer the voter-approved SVP program consistently with the Constitution.

- a. *Activity 4, preparation and attendance by the county’s designated counsel and indigent defense counsel at the probable cause hearing, is not necessary to implement Proposition 83, and is therefore reimbursable.*

Penal Code section 6602 establishes a probable cause hearing requiring the court to determine whether there is probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release. The person named in the petition shall be entitled to assistance of counsel at the probable cause hearing.

As discussed above, the liberty interest at stake in implementing the SVP program triggers due process protections; but what process is due can vary depending on the importance of the governmental interest, and the severity of the deprivation. The Supreme Court of California has held that “[t]here is no question that civil commitment itself is constitutional so long as it is accompanied by the appropriate constitutional protections.”¹²⁹ In criminal cases, the appropriate constitutional protections have been explored and defined through decades of case law, but in the case of a civil commitment for the safety of the public and treatment of the committed person, due process requirements remain less defined. In *People v. Dean*,¹³⁰ the court of appeal articulated the appropriate constitutional protections, holding that due process in proceedings under the Sexually Violent Predators Act (SVPA) requires application of a balancing test, rather than strict adherence to the constitutional rights commonly afforded criminal defendants:

The measure of due process that is due in civil proceedings, including proceedings under the SVPA, is a complex determination that depends upon several factors: “(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail; and (4) the dignitary interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story before a responsible government official.”¹³¹

Activity 4, as cited above, requires the “[p]reparation and attendance by the county’s designated counsel and indigent defense counsel at the probable cause hearing.” A probable cause hearing

¹²⁹ *People v. McKee* (2010) 47 Cal.4th 1172, at p. 1188 [internal citations and quotations omitted].

¹³⁰ *People v. Dean* (Cal. Ct. App. 4th Dist. 2009) 174 Cal.App.4th 186.

¹³¹ 174 Cal.App.4th 186, at p. 204 [citing *People v. Otto* (2001) 26 Cal.4th 200].

is required by Welfare and Institutions Code section 6602, one of two sections of the test claim statutes *not adopted by the voters in Proposition 83*. Proposition 83 makes *no other reference to a probable cause hearing*, such as would render such a hearing necessary to implement the program. In addition, no case law on point, nor any other reference to state or federal due process jurisprudence, provides a clear and unambiguous statement that a probable cause hearing is required to satisfy due process in this context.

Applying the balancing test above, the liberty interest at stake is significant, but the risk of an erroneous deprivation of that liberty is less so, given that each person held must be screened and evaluated at several levels before a petition is filed,¹³² and the process is required to begin before an individual's prison term is expired; moreover, the deprivation of liberty absent a probable cause hearing would be of limited duration, because a trial would still follow after, pursuant to section 6604, as amended by Proposition 83 (2006); furthermore, the government's interest in holding persons suspected to be SVPs is compelling, and the administrative burdens involved in providing a due process hearing and counsel for that hearing are significant: counsel must be appointed, and the county's designated counsel must prepare for and attend the hearing. Finally, the "dignitary interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story before a responsible government official" will be fully vindicated at trial, and does not necessitate substantial consideration. This balancing test shows that whether a probable cause hearing is required by due process is a close issue.

A number of cases of the California courts of appeal and the Supreme Court address due process requirements of providing counsel and expert witnesses, furnished at the state's expense, to indigent persons alleged to be sexually violent predators.¹³³ Another slate of precedents address the due process requirements of analogous civil commitment programs, such as committing persons who are "mentally disordered" for treatment and confinement in a secured mental health facility.¹³⁴ But in none of those cases is there any direct statement that the probable cause

¹³² Welfare and Institutions Code section 6601, as amended by Proposition 83 (2006) [Director of Corrections refers a person for evaluation who may be a sexually violent predator; person is "screened by the Department of Corrections and the Board of Prison Terms," the screening instrument to be "developed and updated by the State Department of Mental Health;" Department of Mental Health "shall evaluate the person in accordance with a standardized assessment protocol;" two practicing psychiatrists or psychologists must concur, or further evaluation must be ordered by independent professionals, who must also concur, or a petition cannot be filed; county's designated counsel only files the petition "[i]f the county's designated counsel concurs with the recommendation."].

¹³³ E.g., *People v. Otto* (2001) 26 Cal.4th 200, at p. 210 [outlining four part test of due process applicable to Sexually Violent Predators Act proceedings]; *People v. Fraser* (Cal. Ct. App. 6th Dist. 2006) 138 Cal.App.4th 1430, at pp. 1449-1451 [assuming, without deciding, that SVPs have a right to counsel pursuant to the four part test of *Otto, supra*, but holding that there is no right to self-representation]; *People v. Dean, supra*, 174 Cal.App.4th 186, at p. 204 [Based on balancing test concluding: "Here, even though an SVPA proceeding is a civil proceeding, due process requires the provision of a qualified expert for defendant."];

¹³⁴ E.g., *People v. McKee* (2010) 47 Cal.4th 1172, at pp. 1188-1192 [SVP determination "functional equivalent" of not guilty by reason of insanity commitment, for due process

hearing provided for under section 6602 is necessary to satisfy due process.¹³⁵ Given the lack of precedent supporting a probable cause hearing as an essential feature of due process, and the fact that the activity is not part and parcel of either the federal mandate or the voter-enacted ballot measure or that the costs would most obviously not be “de minimis,” the Commission must conclude that provision of a probable cause hearing is not necessary to implement the civil commitment procedures outlined in Proposition 83.

Based on the foregoing, the Commission finds that Activity 4, preparation and attendance by the county’s designated counsel and indigent defense counsel at the probable cause hearing, is not necessary to implement Proposition 83, and remains reimbursable state-mandated cost.

b. Activity 5, preparation and attendance by the county’s designated counsel and indigent defense counsel at trial, is necessary to implement Proposition 83.

Penal Code section 6603, as amended by Statutes 1995, chapter 762 and 763, provides:

A person subject to this article shall be entitled to a trial by jury, the assistance of counsel, the right to retain experts or professional persons to perform an examination on his or her behalf, and have access to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court shall appoint counsel to assist him or her, and, upon the person’s request, assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person’s behalf.

In the test claim statement of decision, the Commission attributed activity 5, the preparation and attendance by the county’s designated counsel and indigent defense counsel at trial, and activity 7, the retention of necessary experts, investigators, and professionals for preparation for trial, to section 6603, as amended by Statutes 1995, chapters 762 and 763. However, there is precedent indicating that the provision of counsel and of an expert to assist a person alleged to be an SVP is required in order to satisfy due process.

The involuntary civil commitment of a person determined to be a sexually violent predator, as defined, is not meaningfully distinct from involuntary detention for medical treatment, insofar as the liberty interests thereby imperiled. The United States Supreme Court has held, in cases involving the involuntary detention for medical treatment, that due process requires the individual be given written notice; an opportunity to be heard before a neutral decision maker; the ability to review and challenge the evidence supporting the action; a written statement of reasons for the decision; the availability of legal counsel, furnished by the state if the individual is indigent; and timely notice of these rights.¹³⁶ This finding applies equally to commitments under the SVPA; the indeterminate civil commitments provided for by Proposition 83 implicate

purposes]; *Vitek v. Jones* (1980 445 U.S. 480, at pp. 494-495 [United States Supreme Court found a right to counsel for mentally disordered offenders, furnished by the state.]

¹³⁵ See *Cooley v. Superior Court* (2002) 29 Cal.4th 228, at p. 246 [discussing standards of proof for probable cause hearing under section 6602, but relying only on section 6602, and not federal or state due process jurisprudence].

¹³⁶ *Vitek v. Jones* (1980) 445 U.S. 480, 494-495. See also, *People v. Hayes* (Cal. Ct. App. 1st Dist. 2006) 137 Cal.App.4th 34, at pp. 42-44 [describing probable cause hearing as “mandatory,” but relying only on section 6602].

significant due process protections including the right to counsel, furnished by the state if a person is indigent.¹³⁷ Therefore, the provision of indigent defense counsel is required to satisfy federal due process requirements, as those requirements are triggered by the voter-enacted Proposition 83.

Furthermore, Proposition 83 provides specifically that a “court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator,”¹³⁸ and requires the county to designate counsel to “assume responsibility for proceedings under this article.”¹³⁹ Thus the county’s designated counsel is clearly expected to prepare for and attend the trial that is necessary to determine “whether, beyond a reasonable doubt, the person is a sexually violent predator.” Although there is no apparent *due process* consideration met by requiring that the state’s representative prepare for and attend the trial, that requirement is “necessary to implement” other express provisions of Proposition 83.

Based on the foregoing, Activity 5, preparation and attendance by the county’s designated counsel and indigent defense counsel at trial, is necessary to implement Proposition 83, and is not reimbursable.

c. Activity 7, retention of necessary experts, investigators, and professionals for preparation for trial regarding the condition of the sexually violent predator, is necessary to implement Proposition 83.

In *People v. Dean, supra*, the court of appeal articulated the appropriate constitutional protections, holding:

Here, even though an SVPA proceeding is a civil proceeding, due process requires the provision of a qualified expert for defendant. An SVP commitment directly affects a defendant's liberty interest. The provision of an expert allows a defendant the opportunity to present his side of the story before the trier of fact, which in turn reduces the risk of an erroneous deprivation of defendant's liberty. (Emphasis added.)¹⁴⁰

The court thus held, pursuant to the balancing test borrowed from *People v. Otto*,¹⁴¹ that an expert witness, furnished by the state, is required to satisfy due process in conducting proceedings under the SVP program.

As discussed above, the portion of Activity 7 that requires experts, investigators, and professionals for “subsequent hearings” is expressly included in section 6605, as amended by Proposition 83. The remaining portion of the approved Activity 7 under consideration here is only the provision of experts or investigators for trial, which is not expressly provided for in any

¹³⁷ See *People v. Fraser* (Cal. Ct. App. 6th Dist. 2006) 138 Cal.App.4th 1430, at pp. 1449-1451 [assuming, without deciding, that SVPs have a right to counsel pursuant to the four part test of *Otto, supra*, but holding that there is no right to self-representation].

¹³⁸ Section 6604, as amended by Proposition 83 (2006).

¹³⁹ Section 6601(i), as amended by Propostion 83 (2006).

¹⁴⁰ *Ibid.*

¹⁴¹ *People v. Otto* (2001) 26 Cal.4th 200, at p. 210.

of the provisions amended and reenacted by Proposition 83, but which has been clearly held by the courts to be necessary to satisfy due process.

Based on the foregoing, the Commission finds that Activity 7, retention of necessary experts, investigators, and professionals for preparation for trial regarding the condition of the sexually violent predator, is necessary to implement Proposition 83, and is not reimbursable.

d. Activity 8, transportation and housing of each potential sexually violent predator at a secured facility while the individual awaits trial on the issue of whether he or she is a sexually violent predator, is necessary to implement Proposition 83.

The purpose and intent of Proposition 83 is to protect the public from dangerous felony offenders with mental disorders and to provide mental health treatment for their disorders.¹⁴² The efficient operation of the program requires therefore that persons must be held in custody while awaiting trial to determine whether long-term (or permanent) commitment is appropriate. To release persons alleged to be dangerous and unable to control their violent sexual impulses would seriously blunt the effectiveness of the program. Accordingly, a more recent addition to the chapter (over which the Commission does not have jurisdiction) provides that if a judge of the superior court determines that the petition supports a finding of probable cause, the judge “shall order that person be detained in a secure facility until a hearing can be completed pursuant to section 6602” (the probable cause hearing). The same section also provides that the probable cause hearing “shall commence within 10 calendar days,” in respect of a person’s right to a speedy trial.¹⁴³ And, because persons so situated generally have a right to be present at trial and other hearings,¹⁴⁴ they must be transported to and from the courthouse. Given the dual purpose of Proposition 83, to provide mental health treatment to SVPs, and to protect the public, there is ample reason to hold individuals awaiting trial, rather than releasing those individuals to parole.

However, as discussed above, holding a probable cause hearing for each alleged SVP is a requirement mandated by the Legislature, and not necessary to implement Proposition 83. Therefore, while holding an individual pending trial is considered necessary to implement Proposition 83, and transportation to and from the court for trial is necessary as well, transportation to and from the court for a *state-mandated probable cause hearing* is not necessary to implement the ballot measure approved by the voters, and must remain a reimbursable state-mandated cost.

Based on the foregoing, the Commission finds that Activity 8, the transportation and housing of each potential sexually violent predator at a secured facility *while the individual awaits trial* on the issue of whether he or she is a sexually violent predator, is necessary to implement

¹⁴² *People v. McKee* (2010) 47 Cal.4th 1172, at p. 1203.

¹⁴³ See Welfare and Institutions Code section 6601.5 (added, Stats. 1998, ch. 19 (SB 536); amended, Stats. 2000, ch. 41 (SB 451)).

¹⁴⁴ Section 6605, as amended by Proposition 83 [“the committed person shall have the right to be present at the [subsequent] hearing”]; California Constitution, article 1, section 15 [“defendant in a criminal case has the right to...be personally present with counsel”]. As discussed above, the Sexually Violent Predators Act provides for civil commitments, not criminal conviction, but the due process protections are nearly as strong under the balancing test.

Proposition 83, and is not reimbursable; but transportation to and from the courthouse *for a probable cause hearing* required by the statute remain reimbursable state-mandated costs.

IV. CONCLUSION

Based on the foregoing, the Commission partially approves the request for redetermination and concludes that the following activities do not constitute reimbursable state-mandated activities within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17556(f), beginning July 1, 2011:

- Designation by the County Board of Supervisors of the appropriate District Attorney or County Counsel who will be responsible for the sexually violent predator civil commitment proceedings. (Welf. & Inst. Code, § 6601(i).)
- Initial review of reports and records by the county's designated counsel to determine if the county concurs with the state's recommendation. (Welf. & Inst. Code, § 6601(i).)
- Preparation and filing of the petition for commitment by the county's designated counsel. (Welf. & Inst. Code, § 6601(i).)¹⁴⁵
- Preparation and attendance by the county's designated counsel and indigent defense counsel at trial. (Welf. & Inst. Code, §§ 6603 and 6604.)
- Preparation and attendance by the county's designated counsel and indigent defense counsel at subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, §§ 6605(b-d), and 6608(a-d).)
- Retention of necessary experts, investigators, and professionals for preparation for trial and subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, §§ 6603 and 6605(d).)
- Transportation and housing for each potential sexually violent predator at a secured facility while the individual awaits trial on the issue of whether he or she is a sexually violent predator. (Welf. & Inst. Code, § 6602.)

The Commission further finds that the activity of preparation and attendance of county's designated counsel and indigent defense counsel at the probable cause hearing is not expressly included in or necessary to implement Proposition 83, and therefore remains a reimbursable state-mandated activity. Additionally, the transportation to and from court *for a probable cause hearing* on whether the person is a sexually violent predator is not expressly included in or necessary to implement Proposition 83, and remains a reimbursable state-mandated activity.

Therefore the following activities, required for purposes of probable cause hearings, remain reimbursable state-mandated costs.

- Preparation and attendance by the county's designated counsel and indigent defense counsel at the probable cause hearing. (Welf. & Inst. Code, § 6602.)

¹⁴⁵ The Test Claim Statement of Decision cites subdivision (j), but subdivision (j) addresses time limits, not a petition for commitment. The Commission therefore assumes that this is a typographical error, and that subdivision (i) was the intended citation for this activity.

- Transportation for each potential sexually violent predator to and from a secured facility only to the *probable cause hearing* on the issue of whether he or she is a sexually violent predator. (Welf. & Inst. Code, § 6602.)

This activity does not include transportation for purposes other than the probable cause hearing for potential sexually violent predators awaiting trial.