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Commission on
State Mandates

County of San Bernardino
Office of the District Attorney
MICHAEL A. RAMOS, District Attorney

March 18, 2013

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

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

Dear Commissioners:

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

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

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

The Department of Finance contention that the mere recitation of any portion of a statute contained in a proposition, brings it within the "expressly included in" language of Government Code § 17556(f) regardless of whether the sections mandating local activity were amended or not, and whether or not the intent of the initiative and purpose of the initiative was to eliminate the subvention requirements of Article XIII B §6 by operation of Government Code § 17566(f), is not warranted. Such an interpretation would make the application of the statute so overbroad 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.

303 West Third Street, Sixth Floor, San Bernardino, California 92415-0502 (909) 382-7664 • Fax (909) 382-7674
Web site: www.district-attorney.org • E-mail: da@sbcda.org

Such overbreath and vagueness is constitutionally impermissible. This interpretation and effect would also violate the constitutional governmental transparency provisions of Article 1 § 3(b)(1). This interpretation of the statute would not only clearly be in conflict with the express language of the California Constitution, *"Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State* ***shall provide a subvention of funds to reimburse that local government*** *for the costs of the program or increased level of service..."* (emphasis added) but, also, make it meaningless.

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

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

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

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

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

Activities 4, 5, and 6 addressed in the application deal with preparation and attendance of the district attorney and defense counsel at various hearings. The Department of Finance application concludes that these activities are no longer mandated because they are necessary to implement Proposition 83. This argument is spurious; the mandated activities are legal representation by the district attorney and defense counsel at *whatever* hearings are required in Sexually Violent Predator Act cases. It is the mandate to represent that was created in the original legislation and remains unchanged in Proposition 83. The names of the hearing or the intervals between hearings are procedural changes having nothing to do with the termination of the mandated representation. The legal representation is necessary to implement the original and continuing Sexually Violent Predator Act passed by the legislature, not to specifically implement Proposition 83. Nothing in the language of the initiative addresses the specific termination of state reimbursement for these activities. For similar reasons, the application to terminate reimbursement for Activity 7, the retention of experts, investigators and professionals for trials and hearings are not necessary to implement Proposition 83, but are necessary for competent legal representation mandated by the SVP act.

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

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

The ballot pamphlet summary of proposition reads:

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

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

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

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

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

For these reasons, the San Bernardino County District Attorney's office, respectfully urges this Commission on State Mandates to determine that the there is no valid legal basis to adopt the application for a new test claim regarding sexually violent predator activity.

Sincerely,

MICHAEL A. RAMOS
District Attorney

Attachment