



WENDY L. WATANABE
AUDITOR-CONTROLLER

**COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER**

KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET, ROOM 525
LOS ANGELES, CALIFORNIA 90012-3873
PHONE: (213) 974-8301 FAX: (213) 626-5427

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Commission on
State Mandates

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

Dear Ms. Halsey:

**LOS ANGELES COUNTY'S COMMENTS ON
SEXUALLY VIOLENT PREDATORS (SVP) REDETERMINATION**

The County of Los Angeles respectfully submits its comments on the Commission on State Mandates' (CSM) Redetermination of the Sexually Violent Predators Program.

We are e-filing our comments pursuant to Section 1181.2, subd. (c)(1)(E) of the California Code of Regulations, "Documents e-filed with the Commission need not be otherwise served on the persons that have provided an e-mail address for the mailing list."

If you have any questions, please contact Hasmik Yaghobyan at (213) 893-0792 or hyaghobyan@auditor.lacounty.gov.

Very truly yours,

Wendy L. Watanabe
Auditor-Controller

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Attachment

LOS ANGELES COUNTY'S COMMENTS ON SEXUALLY VIOLENT PREDATORS REDETERMINATION

On June 25, 1998, the Commission on State Mandates (CSM) adopted the Statement of Decision (SOD) for the Sexually Violent Predators (SVP) Program (CSM-450) and approved reimbursement for the activities mandated under Welfare and Institutions Code sections 6601-6608 pursuant to California Constitution Article XIII B, Section 6.

On January 24, 2013, CSM issued a notice requesting comments for the State Department of Finance's (DOF) January 15, 2013, Mandate Redetermination Request, (12-MR-01), to adopt a new test claim. DOF's request to adopt a new test claim argues that the passage of Proposition 83 (Prop 83) resulted in a "subsequent change in law," a precondition to the filing of a request for a new test claim pursuant to Government Code Section 17570 (Section 17570). However, the request is without merit and mischaracterizes the substantive content of Prop 83 and its effect on the existing legislation.

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.

Proposition 83 did not effectuate a "Subsequent change in law" as contemplated by Government Code Section 17570.

In 2006, the legislature passed Senate Bill 1128 (SB 1128), urgency legislation that went into effect on September 20, 2006. Among other provisions, many of which redefined and increased the consequences for various sex offenses, SB 1128 broadened existing SVP laws. Specifically, **SB 1128: 1) added specified juvenile offenses and other crimes to the definition of a "sexually violent offense"; 2) provided that a finding that a person is an SVP would toll his or her period of parole; and 3) changed terms of commitment for SVPs from renewable two year periods to indeterminate terms.**

Two months later, the voters passed Proposition 83 (Prop 83), commonly known as "Jessica's Law." Prop 83 simply reaffirmed many of the changes already effectuated by SB 1128, redefining and increasing the consequences for enumerated sex offenses and expanding existing SVP laws. Mirroring the changes already codified by SB 1128, **Prop 83 added various juvenile offenses to the definition of a "sexually violent offense" and restated terms of commitment for SVPs from renewable two year periods to indeterminate terms.**

The only two significant changes Prop 83 made to post- SB 1128 SVP laws concern standards for the release of SVPs from State mental hospitals and the number of prior victims of SVP offenses necessary to qualify an offender for an SVP commitment. Importantly, the added requirement that the Department of Mental Health consider the interests of an SVP and the community at the time of release, and an expansion of the category of those who would be eligible for an SVP commitment, did not affect the foundational operation of SVP laws. The procedures in place at the county level for the evaluation, prosecution, and processing of sexually violent offenders – and, importantly, the specified activities for which the State has acknowledged its obligation to reimburse Los Angeles County – did not change.

The Request submitted by the Department of Finance argues that, first, "[t]he enactment of Prop 83 constituted a 'subsequent change in law' . . . because all of the Welfare and Institutions Code

sections of the SVP mandate are either expressly included in Prop 83 or are necessary to implement Prop 83.” It further suggests that “[b]ecause voters approved all of the text in Prop 83, including divisions not amended, the sections that formed the SVP mandate are no longer reimbursable”

This argument is misleading. 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 SB 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.

The Department of Finance’s secondary argument that the fundamental SVP-related services recognized by the Commission serve to facilitate the implementation of the statutory revisions effected by Prop 83 grossly mischaracterizes the body of statutes that govern SVP commitment procedures. As the only SVP-related changes made by Prop 83 concern the two provisions discussed above, the SVP laws unaffected by Prop 83 cannot fairly or accurately be described as existing for purposes of implementation.

Statement of Decision by Commission on State Mandates (SOD)

On June 25, 1998, the Commission adopted the SOD for the SVP mandate and approved reimbursement to Los Angeles County for specified activities. The Commission found that the test claim legislation imposed a new program or higher level of service pursuant to California Constitution article XIII B, Section 6.

The Commission approved reimbursement for the following activities, each of which is substantively and procedurally identical to SVP services that continue to be provided through the present day. As will be explained, the Department of Finance’s analysis of each of the mandated activities, and the alleged effect Prop 83 had on the respective activities, is simply untenable:

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, subd. (i).)

DOF concedes that Prop 83 did not affect this activity, but argues that the pertinent code section was “reenacted” by the voters and, therefore, this is no longer a reimbursable activity.

The inclusion, within the text of an initiative, of language that is unaffected by proposed revisions to the law does not constitute a change in the law. As Section 17570 is inapplicable, this mandated activity may not be the subject of a new test claim decision. Under article XIII B, § 6, of the California Constitution, this activity remains reimbursable.

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

DOF concedes that Prop 83 did not affect this activity, but argues that the pertinent code section was “reenacted” by the voters and, therefore, this is no longer a reimbursable activity.

The inclusion, within the text of an initiative, of language that is unaffected by proposed revisions to the law does not constitute a change in the law. As Section 17570 is inapplicable, this mandated activity may not be the subject of a new test claim decision. Under article XIII B, § 6, of the California Constitution, this activity remains reimbursable.

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

DOF concedes that Prop 83 did not affect this activity, but argues that the pertinent code section was "reenacted" by the voters and, therefore, this is no longer a reimbursable activity.

The inclusion, within the text of an initiative, of language that is unaffected by proposed revisions to the law does not constitute a change in the law. As Section 17570 is inapplicable, this mandated activity may not be the subject of a new test claim decision. Under article XIII B, § 6, of the California Constitution, this activity remains reimbursable.

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

DOF argues that this activity, which pertains exclusively to the need for counsel at probable cause hearings (Welf. & Inst. Code, § 6602), is no longer reimbursable because Prop 83 amended a code section (Welf. & Inst. Code, § 6604) that changed commitment terms from renewable two year periods to indeterminate terms. DOF contends that preparation and attendance by a prosecutor and a defense attorney at a probable cause hearing was thus converted from being a reimbursable activity to an activity "necessary to implement" lengthier commitment terms.

An 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. This argument also fails in that there was no change in the law. The statutory revision proposed in Prop 83 involving the length of an SVP's commitment (Welf. & Inst. Code, § 6604) had already been made by SB 1128 when Prop 83 passed. Prop 83's mere reaffirmation of legislative action does not constitute a change in the law. As Section 17570 is inapplicable, this mandated activity may not be the subject of a new test claim decision. Under article XIII B, § 6, of the California Constitution, this activity remains reimbursable.

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

DOF argues that providing constitutional rights to SVPs is a necessary component to the implementation of Prop 83 and therefore not reimbursable. (Welf. & Inst. Code, § 6603).

This activity concerns the need for prepared counsel to participate in an SVP's trial and is analogous to the Commission's recognition of the mandate to reimburse services provided at probable cause hearings, identified in Activity 4. A reimbursable activity does not cease to be a reimbursable activity because it happens to have constitutional implications. Indeed, the Commission recognized in its SOD that "what sets the 6th and 14th Amendments in motion and causes the public defender to safeguard the rights of the indigent defendant, is the State's enactment of the sexually violent predator legislation."

Also, Prop 83 did not result in any pertinent changes in the law. The amendment proposed in Prop 83 involving the length of an SVP's commitment (Welf. & Inst. Code, § 6604) had already been made by SB 1128 when Prop 83 passed. Prop 83's mere reaffirmation of legislative action does not constitute a change in the law. As Section 17570 is inapplicable, this mandated activity may not be the subject of a new test claim decision. Under article XIII B, § 6, of the California Constitution, this activity remains reimbursable.

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, subds. (b) through (d) and Welf. & Inst. Code, § 6608, subds. (a) through (d).)

DOF argues that the rights of a committed SVP were affected by Prop 83's restatement of an existing code section (Welf. & Inst. Code, § 6605(d)) that involved constitutional protections. DOF also notes that another section (Welf. & Inst. Code, § 6608) was similarly "amended and reenacted" by Prop 83. For each reason, the DOF maintains, the activity is no longer reimbursable.

Prop 83 did not affect the need for the prosecution and appointed defense counsel to prepare for and attend hearings regarding the condition of an SVP. Again, a reimbursable activity does not cease to be a reimbursable activity because it happens to have constitutional implications.

Finally, the inclusion, within the text of an initiative, of language that is unaffected by proposed revisions to the law does not constitute a change in the law. As Section 17570 is inapplicable, this mandated activity may not be the subject of a new test claim decision. Under article XIII B, § 6, of the California Constitution, this activity remains reimbursable.

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, 6604.)

DOF argues that providing constitutional rights to SVPs is inherently a necessary component to the implementation of Prop 83 and is thus not reimbursable. DOF also insists that this activity, which pertains exclusively to trials and subsequent hearings (Welf. & Inst. Code, § 6602), is no longer reimbursable because Prop 83 amended a code section (Welf. & Inst. Code, § 6604) that changed commitment terms from renewable two year periods to indeterminate terms.

The need for the county to provide constitutional protections was the basis of the Commission's 1998 finding that State reimbursement was necessary and appropriate. As noted by the Commission, "case law is clear that where there is a right to representation by counsel, necessary ancillary services, such as experts and investigative services, are within the scope of that right." (Statement of Decision, at p.11, Citing *Mason v. State of Arizona* (9th Cir.1974) 504 F.2d 1345; *People v. Worthy* (1980) 109 Cal.app.3d 514), The Commission continued: "[L]ocal agencies would *not* be compelled to provide defense and ancillary services to indigent persons accused of being a sexually violent offender following completion of their prison term if the new program had not been created by the state."

Also, a mandated service 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. As previously stated, the amendment proposed in Prop 83 involving the length of an SVP's commitment (Welf. & Inst. Code, § 6604) had already been made by SB 1128 when Prop 83 passed. Prop 83's mere reaffirmation of legislative action does not constitute a change in the law. As Section 17570 is inapplicable, this mandated activity may not be the subject of a new test claim decision. Under article XIII B, § 6, of the California Constitution, this activity remains reimbursable.

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.)

DOF did not submit an argument challenging the appropriateness of continued subvention with respect to this SVP -related activity.

Section 17570 is Unconstitutional

Section 17570 is unconstitutional as a violation of the separation of powers doctrine. In *California School Board Association v. State* (2009)171Cal.App.1183 (SCBA) , the court struck down legislation (Chapter 72, Statutes of 2005 (AB 138) and determined that the legislature could neither direct nor request that the Commission reconsider a previous test claim decision. The Commission was a quasi-judicial decision-maker, the court found, working independently of the legislature; for the legislature to direct or request the Commission to reconsider its prior ruling was a violation of the separation of powers doctrine.

In an apparent attempt to circumvent this holding, the next year, the legislature passed Section 17570, which codified that which remains constitutionally impermissible. Section 17570 provides that a request that the Commission adopt a new test claim decision may be filed by any of various enumerated government entities, including those within the executive branch of government: the Department of Finance, the Controller, or “any other affected state agency.” Yet, if the separation of powers doctrine precludes the legislature from petitioning the Commission to reconsider an earlier decision, as was established in the *CSBA’s* case, the prohibition applies also to the executive branch.

Additionally, Section 17570 is unconstitutional as an infringement of article XIII B, section 6, of the California Constitution, which was designed “to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ‘ill equipped’ to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.” (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 79) Section 17570 provides a procedure for a new test claim where there is a “subsequent change in the law,” which is all-inclusively defined to require a “finding that an incurred cost is a cost mandated by the state . . . or is not a cost mandated by the state”

While ostensibly clarifying a constitutional mandate, Section 17570 quietly eviscerated it. Under the provisions of Section 17570, the legislature can avoid paying for a program by making minor changes in that program, then calling for a new test claim decision based on the “subsequent change in the law.” This opportunity allows the State to attempt to shift the costs of an entire legislatively-enacted program to local governments, undermining the very purpose of California Constitution article XIII B, section 6. The State has every incentive to attempt to reduce its financial obligation to local government and can always find a use for extra money.

Conclusion

Contrary to the assertions of the DOF, Prop 83 did not affect the SVP laws that pertain to the subvention mandate adopted by the Commission on State Mandates in 1998. Prop 83 changed SVP laws in two very limited areas, neither of which substantively altered any of the eight activities identified by the Commission in its Statement of Decision. Each of the services for which reimbursement was found to be necessary and appropriate continues to be performed, is

an integral component of the county's handling and prosecution of SVP cases, and remains in need of State funding.

DOF's activity-by-activity analysis of Prop 83's effect on SVP laws is based largely on two highly dubious arguments: (1) that extraneous text included in the body of Prop 83 constituted a change in the law; and (2) that Prop 83 converted services identified in the Commission's 1998 Statement of Decision from being reimbursable activities, many of which are constitutionally mandated, to being mere instruments of implementation. Neither position is supportable. Absent a "subsequent change in law," Section 17570 is not available to the State in support of its request for a new, superseding test claim decision, therefore, DOF's request to adopt a new test claim should be denied.