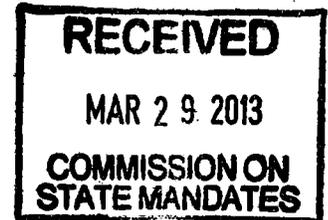


March 26, 2013

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



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

Dear Commissioners:

As District Attorney of Alameda County, I am writing to express my objection to the Department of Finance's request to adopt a new test claim effectively ending state-mandated reimbursement for county services under the Sexually Violent Predators Act (Welfare and Institutions Code sections 6600, et seq.).

The Mandate

The Sexually Violent Predators Act ("SVPA") established a framework for the civil commitment of persons adjudged to be sexually violent predators under the law. The SVPA was created by the Legislature in 1995 and became law on January 25, 1996. Because the SVPA was a mandated program enacted on or after January 1, 1975 that increased costs to local government, the State was, and is, required to reimburse local government for those services pursuant to section 6 of Article XIII B of the California Constitution and California Government Code sections 17510 et seq.

The SVPA places clear duties on county prosecutors. Specifically, Welfare and Institutions Code sections 6601(h) and (i) provide:

- (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 for 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 and Rehabilitation. *The petition shall be filed, and the proceedings shall be handled, by either the district attorney or the county counsel of that county. (Emphasis added).*

The county board of supervisors shall designate either the district attorney or the county counsel to assume responsibility for proceedings under this article.

My office performs this state-mandated function for Alameda County. Pursuant to long-established California law, my office submits annual claims for reimbursement to the State for these services and has received reimbursement.

The Department of Finance contends that Proposition 83 – a ballot initiative passed by the voters in November 2006 that made very limited enhancements to the SVPA – removed the SVPA in its entirety from the mandatory reimbursement requirements of State Constitution. I disagree.

Proposition 83 –Jessica’s Law

What did Proposition 83 do? At the time Proposition 83 was passed, the SVPA consisted of twenty-one sections, all part of the Welfare and Institutions Code. Of those twenty-one sections, fourteen were completely untouched by Proposition 83. Most notably, Welfare and Institution Code sections 6601(h) and (i) – the very sections that created the mandate in the first place – were not changed in any way. The following list summarizes the changes to the SVPA as a direct result of Proposition 83:

Section 6600:

- * Changed the definition of a “Sexually Violent Predator” to include persons with as little as one “sexually violent offense” qualifying conviction;
- * Changed the definition of “conviction of a sexually violent offense” to include juvenile proceedings that resulted in commitments to the California Youth Authority and convictions resulting in an indeterminate prison term;
- * Changed the definition of “sexually violent offense” to include offenses inexplicably omitted in the SVPA, including the aggravated sexual assault of a child; continuous sexual abuse of a child; kidnapping with intent to commit a sexual offense and sexual offenses committed in the course of a residential burglary.
- * Expanded the force/fear elements necessary for a “sexually violent offense” to include threats to retaliate against the victim or another in the future.

Section 6600.1:

- * Eliminated the requirement that a “sexually violent offense” involving a victim under the age of 14 involve “substantial sexual contact” in addition to force or fear.

Section 6601:

* Provided that a civil placement pursuant to the SVPA would toll the term of parole of a person otherwise subject to parole.

6601.3: Unchanged.

6601.5: Unchanged.

6602: Unchanged.

6602.5: Unchanged.

6603: Unchanged.

6604:

* Changed the previous two-year term of commitment under the SVPA to an indeterminate term of commitment – *thereby potentially saving the State millions of dollars in court expenses.*

6604.1:

* Eliminated wording related to prior two-year commitments and substituted wording related to indeterminate term of commitment.

6605:

* Made changes to the yearly evaluation of SVPs by the Department of Mental Health -based on the new indeterminate commitments - and changed procedures to petition for release or discharge of a previously committed SVP.

6606: Unchanged.

6607: Unchanged.

6608:

* Changed “petitions for conditional release and subsequent unconditional discharge” to “petitions for conditional release or an unconditional discharge”.

6608.5: Unchanged.

6608.7: Unchanged.

6609: Unchanged.

6609.1: Unchanged.

6609.2: Unchanged.

6609.3: Unchanged.

Those are the very limited changes to the SVPA as a result of Proposition 83. No where in that list is any change to the fundamental duty that the Legislature placed on the counties in its original SVPA to receive the requests for commitment from the State's Director of Mental Health, to review them and to pursue them in the superior courts. That obligation remains unchanged by Proposition 83.

I also think it important to understand what Proposition 83 did not do.

What Proposition 83 did NOT do

- * SVPA established procedures for screening and evaluation of potential SVPs.
Prop. 83 did not change this.
- * SVPA established a procedure whereby the State Director of Mental Health could refer requests for civil commitments of SVPs to the counties and where the District Attorney or County Counsel for those counties would file petitions in the superior courts and conduct proceedings to obtain the civil commitments.
Prop. 83 did not change this.
- * SVPA established the procedures for the judicial adjudication of petitions to commit SVPs.
Prop. 83 did not change this.

Government Code Section 17556(f)

The Department of Finance relies on Government Code section 17556(f) in support of its request for a new test claim. That section provides, in pertinent part:

The commission shall not find costs mandated by the state ... if, after a hearing, the commission finds any one of the following:

(f) 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.

The Department of Finance observes that Proposition 83 was a ballot measure approved by the voters that "expressly included" portions of the SVPA. Accordingly, the Department interprets section 17556(f) to now require removal of the SVPA from the reimbursement requirement of Article XIII B, section 6. This cannot be the correct interpretation of section 17556(f).

As noted above, Proposition 83 did not change the original intent or purpose of the SVPA. Neither did it change the obligations and duties imposed upon the counties, and county prosecutors in particular. The specific changes to the SVPA were minor. In the end, the electorate gave us a clearer, more efficient, and ultimately more cost-effective way of handling the civil commitments of SVPs. To now penalize the counties and strip them of reimbursement is contrary to public policy and common sense.

If the Commission accepts the Department's interpretation of section 17556(f), then any time the voters of this State act to clarify a law with mandated reimbursement, regardless of the voters' intent or the scope of the proposed change, all local reimbursement would automatically terminate. That is an absurd result. It would chill good government and create a conflict for counties between supporting an appropriate ballot initiative or forfeiting reimbursement.

Laches and Estoppel

The Department of Finance request for a new test claim, filed some six and one-half years after the passage of Proposition 83, is untimely and should be rejected on common law principles of laches and estoppel.

The State has continued to treat the SVPA as a reimbursable mandate for the six and one-half years since Proposition 83 was passed. During that time, my office has performed its obligations under the SVPA without exception. We have allocated personnel and resources to these proceedings, invested in the training and expertise of our prosecutors and incurred expenses to provide for their continuing education. We have done so in good faith and in detrimental reliance on the earlier decisions of this Commission and the promise of eventual reimbursement by the State.

That expectation of reimbursement was bolstered by the actions of the Commission, the Legislature and Governors Schwarzenegger and Brown over the last six and one-half years. Although many mandates were suspended, set aside or even cancelled during that time, reimbursement to county prosecutors for their efforts in furtherance of the SVPA has not faltered. The counties have continued to perform these mandates and the State has reimbursed us. Even the State's current budget includes appropriations for these expenses. All of these factors directly contradict the Department of Finance's position that Proposition 83 created a change in the state mandate and act as an estoppel against a new test claim.

Finally, I note that this Commission's January 24, 2013 hearing notice indicates reimbursement or loss of reimbursement would be decided for fiscal year 2011-2012. I object to that. As noted above, my office continues to incur expenses to meet our mandated obligations under the SVPA. We have done so in reliance on the previous decisions of this Commission and with expectation of eventual reimbursement from the State. If this Commission does ultimately decide a new test claim that terminates reimbursement for these same expenses, such a decision should be prospective only.

In conclusion, and for the reasons stated above, I urge the Commission to determine that there is no legal basis to adopt the application for a new test claim.

Respectfully submitted,

A handwritten signature in black ink that reads "Nancy E. O'Malley". The signature is written in a cursive style with a long vertical line extending downwards from the end of the name.

Nancy E. O'Malley
District Attorney
Alameda County