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May 24, 2013

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

Re: Mandate Redetermination Request 12-MR-01
Sexually Violent Predator (CSM-4509)

Dear Ms. Halsey:

The California Public Defender's Association (CPDA) hereby files the following response to the Draft Staff Analysis and Proposed Statement of Decision issued May 9, 2013, hereinafter "Draft Staff Analysis." Although CPDA disputes all reasoning, authority, and conclusions contained in the Draft Staff Analysis, for the purpose of this response CPDA will only address the issue pertaining to the viability of defenses set forth in CPDA's Opposition dated March 16, 2013.

The Draft Staff Analysis erroneously rejects the equitable defense of unclean hands. Specifically, the Draft Staff Analysis incorrectly states that "[w]hen Proposition 83 was enacted, there was no process or mechanism by which to redetermine a test claim; thus there would have been no effect on mandate reimbursement. Only after the mandate redetermination process embodied in section 17570 was added to the code in 2010 was there any possibility of utilizing Proposition 83 to change a prior mandate finding. Therefore, any representation that might have been alleged to have misled voters was provided in good faith, and cannot now support a defense of 'unclean hands.'" (*Id.*, at pp. 22-23, footnote omitted.) Similar rational was also utilized in the Draft Staff Analysis in its erroneous rejection of the equitable defense of estoppel and the defense of misrepresentation. (*Id.*, at pp. 25-26.)

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During the relevant periods surrounding the passage of Proposition 83 (2005 through 2006), Government Code sections 17570 and 17556, subdivision (f), expressly provided for the redetermination of test claims.

Government Code section 17570, which permitted redetermination of sustained test claims, was originally enacted in 1986 (Stats. 1986, c. 879, § 13) and amended in 1990 (Stats. 1990, c. 582 (S.B.340), § 6). Specifically, Government Code section 17570 provided “[t]he Legislative Analyst shall review each unfunded statutory or regulatory mandate for which claims have been approved by the Legislature pursuant to a claims bill during the preceding fiscal year. Any recommendations by the Legislative Analyst to eliminate or modify the mandates shall be contained in the annual analysis of the Budget Bill prepared by the Legislative Analyst.” (Emphasis added.)

Significantly, Government Code section 17570 was in full force and effect at least 4 years prior to the Legislative Analyst Office (LAO) Letter dated September 2, 2005, which stated Proposition 83 would not affect state reimbursement to counties, and the November 8, 2006, effective date of Proposition 83. The viability of Government Code section 17570 during the relevant time periods of 2005-2006 is not diminished by the fact that it was subsequently repealed on August 24, 2007 (Stats. 2007, c. 179 (S.B. 86) § 21).

Further evidence of the power of the Commission on State Mandates (CSM) to redetermine test claims in 2005 through 2006 can be found within the California School Boards Ass’n v. State (2009) 171 Cal.App.4th 1183 (California School Boards) decision. The Legislature passed A.B. 138 (Stats. 2005, ch. 72, §§ 11-14), on July 19, 2005, which changed the wording of Government Code section 17556, subdivision (f), to state that costs are not reimbursable if “[t]he statute or executive order imposes duties that are necessary to implement, reasonably within the scope of, or 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.” (Emphasis added.) Notably, Government Code section 17556, subdivision (f), was in effect at the time of the September 2, 2005 LAO Letter issued and prior to Proposition 83’s passage on November 8, 2006.

Three distinct redetermination made prior to the effective date of Proposition 83 were addressed by the decision in California School Boards—i.e., the “Open Meeting Act” and the “Brown Reform Act” test claims; the “Mandate Reimbursement Process” test claims; and, the “School Accountability Report Cards” test claim. (California School Boards Ass’n v. State, supra, 171 Cal.App.4th 1183, 1193-1198.) In 1988 and 2001 the CSM upheld the test claims submitted under the “Open Meeting Act” and the “Brown Reform Act.” Pursuant to Legislative directive contained in A.B. 138 the CSM redetermined and set aside the “Open Meetings Act” and “Brown Reform Act” test claims in September, 2005.

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In 1986 the CSM upheld the "Mandate Reimbursement Process" test claim which it subsequently redetermined and set aside in May, 2006. In 1988 the CSM upheld the test claim submitted under the "School Accountability Report Cards" which it subsequently redetermined and set aside in 2005. (Ibid.)

When Proposition 83 took effect on November 8, 2006, the CSM had completed reconsideration of the foregoing three test claim redeterminations. The assertion that there was "no process or mechanism by which to redetermine a test claim" during the time period of 2005 through 2006 is disingenuous. Although the court in California School Boards reversed these redeterminations, the ruling was not handed down until March 9, 2009, nearly three years after the passage of Proposition 83. Therefore, the Draft Staff Analysis erroneously and inaccurately portrayed the state of the law vis-a-vis redetermination of test claims during the relevant period of 2005 through 2006 surrounding the passage of Proposition 83.

Based on the forgoing analysis and CPDA's Letter dated March 16, 2013, CPDA respectfully requests the CSM to deny the DOF's January 15, 2013, request for a redetermination of the CSM's Statement of Decisions for the Sexually Violent Predator mandate (CSM-4509) dated June 25, 1988.

Sincerely,

Winston Peters

Winston Peters
President, California Public Defender's Association