J:/mandates/4000/4313/PropSOD
Hearing Date: April 16, 2007

ITEM 5

TEST CLAIM
PROPOSED STATEMENT OF DECISION

Welfare and Institutions Code Sections 12301, 12302, and 12306

Statutes 1981, Chapter 69 (Senate Bill 633)

Department of Social Services Manual Letter No. 81-30 (Dated July 19, 1981) and Interim Instruction Notice (Dated January 19, 1982)

In-Home Support Services

(CSM 4314)

County of San Bernardino, Claimant

Executive Summary

The sole issue before the Commission on State Mandates ("Commission") is whether the Proposed Statement of Decision accurately reflects the Commission's decision on the *In-Home Support Services* test claim.[1]

Recommendation

Staff recommends that the Commission adopt the Proposed Statement of Decision, beginning on page three, which accurately reflects the staff analysis and recommendation on this test claim. Minor changes, including those that reflect the hearing testimony and vote count, will be included when issuing the final Statement of Decision.

If the Commission's vote on item 4 modifies the staff analysis, staff recommends that the motion to adopt the proposed Statement of Decision reflect those changes, which will be made before issuing the final Statement of Decision. Alternatively, if the changes are significant, staff recommends that adoption of a proposed Statement of Decision be continued to the May 2007 Commission hearing.

[1] California Code of Regulations, title 2, section 1188.1, subdivision (a).

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM: Welfare and Institutions Code Sections 12301, 12302, and 12306; Statutes 1981, Chapter 69 (Senate Bill 633); Department of Social Services Manual Letter No. 81-30 (Dated July 19, 1981) and Interim Instruction Notice (Dated January 19, 1982) Filed on September 6, 1988, by the Counties of Los Angeles and Fresno; Substitution of Claimants on September 25, 2000, by the County of San Bernardino, Claimant.	Case No.: CSM 4313 ***In-Home Support Services*** PROPOSED STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 (*Proposed for Adoption on April 16, 2007*)

PROPOSED STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on April 16, 2007. [Witness list will be included in the final Statement of Decision.]

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., and related case law.

The Commission [adopted/modified] the staff analysis at the hearing by a vote of [vote count will be included in the final Statement of Decision] to deny this test claim.

Summary of Findings

The In-Home Support Services (IHSS) program was created by the Legislature in 1973 to qualify for federal funds pursuant to Title XVI of the Social Security Act for services to the aged, blind or disabled. (Welf. & Inst. Code, §§ 12000 et seq., added by Stats. 1973, ch. 1216.) The program was created to provide such services as grocery shopping, laundry, cleaning, and housekeeping, which make it possible for the recipient to live in comfort and safety under an independent living arrangement. (Former Welf. & Inst. Code, §§ 12300-12306.)

The test claim statutes were enacted in 1981 to limit expenditures for the (IHSS) program to the amount appropriated in the Budget Act. The statutes required specified reductions in services when the amount appropriated was insufficient. The test claim statutes further required the state to pay 90 percent and the counties to pay 10 percent of the program costs *in excess* of the federal/state funding for the program. The Department of Social Services Manual Letter No. 81-30 and the Interim Instruction Notice dated January 19, 1982, implemented the program reductions required by the test claim statutes.

The Commission finds that:

- Welfare and Institutions Code sections 12301 and 12302, as amended by Statutes 1981, chapter 69, the Department of Social Services Manual Letter No. 81-30, and the Interim Instruction Notice dated January 19, 1982. The Commission finds that the activities of assessment, screening cases, providing notice to IHSS recipients about the reduction of comfort services, participation in a fair hearing requested by a recipient whose services are reduced, and including specific information in the county plan about the program reductions do not impose costs mandated by the state pursuant to Government Code section 17514.

  The plain language of Welfare and Institutions Code section 12301, as amended by the test claim statute, and the executive orders filed by the claimant required a reduction or elimination of non-essential comfort services if the amount appropriated in the Budget Act was insufficient to meet service needs. Government Code section 17517.5 defines "cost savings authorized by statute" as "any decreased costs that a local agency or school district realizes as a result of any statute enacted or any executive order adopted that permits or *requires* the discontinuance of *or a reduction in the level of service of an existing program that was mandated before January 1, 1975*." (Emphasis added.) The provision of services under the IHSS program was initially mandated by the Legislature in 1973. Thus, the Commission finds that the test claim statutes, and the executive orders filed by the claimant, resulted in "cost savings authorized by statute." Although the County of San Bernardino argues it has incurred increased costs mandated by the state, it acknowledges that its IHSS comfort services and associated costs were partially reduced in accordance with the test claim statutes. Neither the County of San Bernardino, nor the original claimant, provides cost data of increased costs for the potential period of reimbursement (fiscal year 1987-1988) in its filings, however.

  In order for the Commission to approve this test claim for these activities, the claimant would have to show that the offsetting savings occurring as a result of the reduction of comfort services still resulted in net costs to the local agency for fiscal year 1987-1988.[2] That showing has not been made here.

- Welfare and Institutions Code section 12306. The Commission finds that Welfare and Institutions Code section 12306, as amended by Statutes 1981, chapter 69, does not mandate a new program or higher level of service and, thus, does not constitute a reimbursable state-mandated program. Welfare and Institutions Code section 12306 does not shift financial responsibility for the IHSS to the counties. Rather, as more fully described in the analysis, the responsibility to pay for the actual costs of the IHSS program that exceed the federal funding formula has historically been a county responsibility. When the state enacted the test claim statute, the state assumed 90 percent of the costs exceeding the federal funding formula, resulting in cost savings to the counties.

[2] Government Code section 17556, subdivision (e), states that the Commission shall not find costs mandated by the state if the Commission finds that "[t]he statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no net costs to the local agencies or school districts …."

COMMISSION FINDINGS

Background

This test claim was filed in September 1988 on the In-Home Support Services program, commonly abbreviated as "IHSS." In 1989, the test claim was placed on the Commission's inactive list to allow the original claimants, the Counties of Fresno and Los Angeles, to submit additional comments on the claim. In 2000, when no action had been taken by the original claimants on the test claim, the test claim was scheduled to be dismissed. On August 15, 2000, the County of Fresno filed a notice that it would not pursue the claim. On September 25, 2000, the County of San Bernardino took over the test claim and became the test claimant.

The potential period of reimbursement for this claim, if approved, would begin July 1, 1987.[3]

A revised draft staff analysis was issued on January 12, 2007. Comments were due on the revised draft by February 2, 2007. No comments have been received, however.

Prior Law

The IHSS program was created by the Legislature in 1973 to qualify for federal funds pursuant to Title XVI of the Social Security Act for services to the aged, blind or disabled. (Welf. & Inst. Code, §§ 12000 et seq., added by Stats. 1973, ch. 1216.) The program was created to provide such services as grocery shopping, laundry, cleaning, and housekeeping, which make it possible for the recipient to live in comfort and safety under an independent living arrangement. (Former Welf. & Inst. Code, §§ 12300-12306.) IHSS was one of ten social services programs required in every county by California's "Statewide Social Services Plan," which was adopted to conform to federal law.[4] The Department of Social Services was required to supervise every phase of the administration of social services, including the IHSS program, but the implementation of the IHSS program was delegated to the counties. Pursuant to former Welfare and Institutions Code section 12302, each county was required to submit a plan to the Department of Social Services that provides for the delivery of services. In order to implement the plan, a county was authorized to contract with private individuals or agencies for the purchase of services.[5]

Seventy-five percent (75%) of the funding for IHSS was provided by the federal government up to the amount federally appropriated and allocated to the state. The amount of federal dollars appropriated and allocated to California was matched by $1 of state money for every $3 of federal money. The Third District Court of Appeal explained the funding formula as follows:

> The federal funding formula provides for funding of "75 percent of the total expenditures" of the in-home supportive services program (42 U.S.C. § 1391a(a)(1), but since federal funds are limited by budget restrictions, the

[3] At the time this test claim was filed, Government Code section 17557, which established the period of reimbursement, stated in relevant part the following: "A test claim shall be submitted on or before December 31 following a fiscal year in order to establish eligibility for that fiscal year."

[4] *County of Sacramento v. State* (1982) 134 Cal.App.3d 428, 431.

[5] See *City and County of San Francisco v. State* (1978) 87 Cal.App.3d 959, 961-962, for a summary of the program.

> formula is read as requiring $1 of state funds for each $3 of federal funds *appropriated and allocated* to the state. (Emphasis in original.)[6]

If federal funds met 75 percent of the *actual* program costs, then the state's required match of 25 percent covered the entire cost of the program. As more fully discussed in the analysis, however, disputes arose between the state and the counties regarding the actual costs exceeding the funding formula when the 75 percent federal share did not cover 75 percent of the actual program costs.

Test Claim Statutes and Alleged Executive Orders

The test claim statutes were enacted in 1981 to limit expenditures for the IHSS program to the amount appropriated in the Budget Act, to require specified reductions in services when the amount appropriated was insufficient, and to require the state to pay 90 percent and the counties to pay 10 percent of the program costs in excess of the federal/state funding for the program. (Stats. 1981, ch. 69.)

Specifically, former Welfare and Institutions Code section 12301 was amended to clarify legislative intent that "in home supportive services shall be provided in a uniform manner in every county based on individual need consistent with the appropriations provided for such services in the annual Budget Act and the provisions of this chapter …." (Underlined language was added by the test claim statute.) The test claim statute also added language that deemed an able spouse who is available to assist the IHSS recipient willing to provide any services under the program at no cost, except for non-medical personal services and paramedical services.

Section 12301, as amended by the test claim statute, further provided for the reduction or elimination of non-essential comfort services if the amount appropriated in the Budget Act was insufficient to meet all service needs. The test claim statute added the following language to section 12301:

> If the amount appropriated by the annual Budget Act is insufficient to meet all service needs, program reductions shall occur. The department [of Social Services] shall notify counties and the Joint Legislative Budget Committee whenever the department's estimate of the cost of providing all the service needs exceed the amount appropriated in the Budget Act.
>
> The following priorities are established to direct counties and the department on how to implement needed program reductions:
>
> (a) Reduction in the frequency with which non-essential services are provided.
>
> (b) Elimination of non-essential service categories.
>
> (c) Termination or denial of eligibility to persons requiring only domestic services.
>
> (d) Termination or denial of eligibility to persons who, in the absence of services, would not require placement in a medical out-of-home care facility.
>
> (e) Per capita reduction in the cost of services authorized.
>
> Any program reductions shall be implemented so as to avoid, to the extent feasible within budgetary constraints, out-of-home placements.

[6] *County of Sacramento, supra*, 134 Cal.App.3d 428, 431, fn. 2; former Welfare and Institutions Code section 12306.

> The counties and the State Department of Social Services shall utilize these options in the order of their appearance. In no event shall services be terminated or denied to any eligible person who in the absence of services would require medical out-of-home care. In no event shall services be terminated or denied to any person who in the absence of such services would become unemployed.
>
> Nonessential services are routine mending, ironing, heavy cleaning, domestic services, yard hazard abatement except for snow removal, teaching and demonstration and any other services specified by the department. Restrictions on nonessential services shall be excepted on a case by case basis when denial or termination of services would result in placement in a medical out-of-home facility or in a loss of employment, in a life threatening situation in conditions which present a substantial threat to health or safety, or in any other condition specified by the department. Essential services shall at a minimum include those services listed in subdivision (e) of Section 12304.[7]

Welfare and Institutions Code section 12302 was also amended to require that the counties' plan indicate specifically how the county planned to reduce costs. That statute as amended stated in relevant part the following (added language is underlined):

> Each county welfare department shall develop and submit a plan to the State Department of Social Services that provides for the delivery of services to meet objectives and conditions of this article with regard to in-home supportive services. A county may reduce services in accordance with Section 12301 at the beginning of the fiscal year; however, the county shall indicate specifically how they plan to reduce costs to the allocated amount, including the 10 percent match. A county shall, to the extent feasible make any reductions in services evenly throughout the year and shall not wait until the end of the fiscal year to make massive reductions in services to eligible recipients. Each county is obligated to ensure that services are provided to all eligible recipients during each month of the year in accordance with the county plans.
>
> [¶]

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[7] Former Welfare and Institutions Code section 12304, subdivision (e), defined essential services as follows: "…one who requires in-home supportive care of at least 20 hours per week to carry out any or all of the following:

(1) Routine bodily functions, such as bowel and bladder care;

(2) Dressing;

(3) Preparation and consumption of food;

(4) Moving into and out of bed;

(5) Routine bed bath; or

(6) Ambulation;

(7) Paramedical services;

(8) Or for any other function of daily living as determined by the director. This determination of need must be supported by a medical report when requested and at the expense of the State Department of Social Services."

> County plans are effective upon submission to the department. Counties which institute reductions at the beginning of the fiscal year shall submit a plan by July 30 of that fiscal year. In reviewing county plans the department shall assure that plans are in compliance with provisions of this article including compliance with Section 12301. In the event the department finds a county plan is not in compliance it shall take appropriate action to assure compliance.

With respect to funding, the test claim statute amended Welfare and Institutions Code section 12306 by establishing a funding cap on the federal/state appropriations for the program and required the state and the counties to share in the payment of expenditures exceeding the cap. The test claim statute added the following language to Welfare and Institutions Code section 12306:

> If the federal social services funds allocated by the department are insufficient, the state, beginning with the 1981-82 fiscal year, shall also reimburse the counties for all services provided under this article up to the sum of the amounts expended by the counties and those payroll taxes paid by the state on behalf of the counties under Section 12302.2 as determined by the department during the 1980-81 fiscal year. In no event shall this sum exceed two hundred sixty-three million dollars ($263,000,000). Counties shall provide 10 percent of the costs in excess of this sum expended in the 1980-81 fiscal year. The state shall reimburse from the General Fund or any available federal funds 90 percent of the costs expended in the 1980-81 fiscal year which exceed this sum. The obligation of the state's General Fund under this article is limited to the amount appropriated in the annual Budget Act.

In 2001, the claimant filed a 1981 Department of Social Services Manual Letter No. 81-30 and a Department of Social Services Interim Instruction Notice, dated January 19, 1982, regarding the IHSS program. The claimant's 2001 filing is considered an amendment to the test claim.[8]

As the Department of Social Services points out in comments to the draft staff analysis, the claimant mistakenly refers to the Interim Instruction Notice as emergency regulations adopted on July 10, 1981, to implement the test claim statutes. The Department of Social Services filed the emergency regulations adopted in response to the test claim statutes with its comments on the draft staff analysis. These regulations (§§ 30-450, 30-453, 30-457, 30-458, 30-461, 30-463, and 30-466, eff. July 10, 1981) have not been pled by the claimant as part of this test claim, and the Commission makes no findings on the regulations.

The Department of Social Services' Manual Letter No. 81-30 states in relevant part the following:

> On June 17, 1981, SB 633 (Chapter 69, Statutes of 1981) became law. Implementation of this law has necessitated adoption of the attached regulations. The regulations revise the definition of the IHSS program to eliminate the comfort aspect of the program, and to direct it solely towards eligible aged, blind, and disabled persons who are unable to perform IHSS services themselves and cannot safely remain in their own homes unless the services are provided.
>
> These regulation revisions were adopted on an emergency basis …

[8] Section 1181.1, subdivision (b), of the Commission's regulations defines "amendment" as the "addition of new allegations based on new statutes or executive orders to an existing test claim."

The Interim Instruction Notice was issued on January 19, 1982, and describes the use of form notices that are sent to IHSS recipients regarding their service reductions. The Interim Instruction Notice states in relevant part the following:

> Purpose
>
> The above referenced forms shall be used by IHSS staff to notify IHSS recipients in compliance with a Modified Preliminary Injunction (court action) in the case of Disabled Union vs. Woods. This notice provides instructions for the completion of the SPECIAL NOTICES OF ACTION, based on a series of All-County letters which have been issued on the handling of Senate Bill (SB) 633 fair hearing cases, the implementation of the SB 633 regulations and the issuance of Court approved Notice of Action. Because a Superior Court Judge ruled that the Notices of Action sent out in August 1981, (DPSS/IHSS 269 (SB 633)) were not acceptable, all IHSS recipients who received improper notice will have to be notified again by IHSS using the state and court approved forms. These forms shall be used only for those clients whose services were reduced 9-1-81 and who received notice via DPSS/IHSS 269 (SB 633).
>
> The Modified Preliminary Injunction requires that the following be done:
>
> 1.# Those IHSS grants which were terminated or reduced using the State notices which were found to be inadequate because they must receive new notices.
>
> 2.# That a hearing not be denied to any IHSS recipient who properly and timely requests a hearing;
>
> 3.# That payment of aid pending state hearings be provided;
>
> 4.# That the court approved special notices of reduction or termination for able and available spouse, domestic service and heavy cleaning be used; and
>
> 5.# That severely impaired recipients are to continue to receive benefits until reductions are made which are consistent with the court approved notices.

Page 6 of the Interim Instruction Notice (Section II (C)) states the following:

> IHSS Notice of Action forms, TEMP 1503 AND TEMP 1504 NSI, have been developed by the State Department of Social Services for recipients whose services have been or will be reduced pursuant to SB 633's elimination of comfort as a program objective. These notices were developed to be consistent with the other recently adopted Notices of Action for use in implementing SB 633 actions. They are based on the following provisions:
>
> a.# State hearings are available to all recipients who so request within 90 days following the mailing date of these notices when properly completed;
>
> b.# Aid paid pending is available, at the service level the recipient would have received had the action eliminating comfort not been taken, for all recipients who file a timely request for a state hearing;
>
> c.# Individual case assessment must be made to insure that no county action is taken that would cause recipients to be placed in a medical out-of-home care facility, become unemployed, be placed in a life threatening situation, or be placed in a situation that would substantially threaten their health and safety. These specific exceptions appear on the notices;

d.# The notices must show the type and hours of specific services being reduced or eliminated.

Page 7 of the Interim Instruction Notice describes the use of form TEMP 1505 for those non-severely impaired recipients who have received comfort reductions pursuant to the test claim statute. The Notice states the following:

> This notice will be used for non-severely impaired recipients who have received "comfort reductions." Its purpose is to ensure that these recipients are advised of hearing rights and receive a clear explanation of the nature of the county's action.
>
> Recipients requesting a hearing within 10 days of the mailing date of the notice will receive aid pending the hearing as of the effective date of the county's original action. The retroactive aid will take the form of a cash payment of equivalent value to all "comfort" services the recipient would have received had the county made no reduction.
>
> This notice is also for all recipients who have not yet received those "comfort reductions" which counties are required to implement. The recipient will receive aid paid pending if a hearing is requested prior to the effective date of the action.
>
> These notices must be processed and mailed to all affected recipients as described in paragraph II.A.1.a and f.

Page 8 of the Interim Instruction Notice (Section IV) states that the "IHSS supervisor shall screen all cases in their respective caseloads by asking the following questions …" The questions ask whether each recipient received services in August 1981, the date of the last non-reduction evaluation, and whether a "SB 633 Mandated Program Reduction Evaluation" was made. Following the questions, the Interim Instruction Notice provides a note on page 9 stating the following:

> All clients, … whose hours of domestic service are reduced, shall be notified of this change by use of the appropriate Notice of Action, even if there is no change in the total hours of service overall.
>
> A case might need more than one special notice of action. If you feel you have found a case where this is true, contact your In-Home Supportive Services Supervisor II.

Claimant's Position

The County of San Bernardino claims that Statutes 1981, chapter 69 mandated two new activities. First, with the elimination of comfort services pursuant to Welfare and Institutions Code sections 12301 and 12302, as amended by the test claim statute, the county was required to screen all of its cases to determine which cases were receiving comfort services only. This resulted in significant costs of reviewing every case and going through the fair hearing process requested by the applicant when the comfort services were denied. The County states that:

> … about 60% of the comfort cases were closed. About 25% of those recipients whose services were discontinued as a result of this legislation, applied for fair hearings, which are provided for by the State. Approximately 70% of those who applied for fair hearings were reinstated and thus again provided services.
>
> Thus, the first result of the change in legislation did not result in that many individuals being removed from the program, notwithstanding the significant cost

of reviewing every case and the process of going through fair hearings on those initially denied services.[9]

Second, the County alleges that the test claim legislation that amended Welfare and Institutions Code section 12306 required a change in the funding contribution, which "for the first time" required the counties to contribute ten percent (10%) of the costs that exceeded the funding cap imposed by the state. This resulted in significant costs to the County of San Bernardino since it had an increasing caseload of recipients receiving benefits under the IHSS program. In 1986, the County sought a legislative proposal that mandated the state to pay the matching funds necessary to obtain federal funds and also reimburse counties for all services provided under the program. In its legislative proposal, the County of San Bernardino describes "the problem" as follows:

> At the present time, the Welfare and Institutions Code, Section 12306, requires the county to provide a 10% match to the federal and state allocation for expenditures exceeding the 1981-82 Fiscal Year funding level of 100% federal and state money in In-Home Supportive Services Program. The IHSS program is an open ended program based on client eligibility determination with a closed end allocation. Counties cannot control expenditure when eligibility criteria is determined by federal and state government.
>
> As a result, the percent of county cost increases disproportionately between counties based on the increased number of IHSS recipients in each county and/or increased cost factors. Counties experiencing a rapid growth rate are adversely affected as a larger county match is required. Counties are unable to accurately budget for the IHSS Program as the amount of county dollars is determined by the number of recipients and the number of hours of service required. The counties have no control over the number of recipients or the number of hours of service provided.
>
> In 1985-86, the county match for San Bernardino was $256,570 and in 1986-87 it will be $604,130 due to increased caseload and increased costs resulting from contract negotiations and union demands. This is an increase of 135% in one year!
>
> Rapid growth counties, including San Bernardino County, do not have adequate resources to meet the required match. The counties cannot make reductions in the program without state approval which to date has only been approved for the entire state when the state allocation was not adequate. Program reductions for individual counties have not been approved. The counties are therefore mandated to provide an open ended 10% match.[10]

The original claimant, the County of Fresno, contended that the test claim legislation resulted in increased costs to the county totaling $1,155,000 in fiscal year 1987-1988.[11]

In response to the draft staff analysis, the claimant continues to disagree with the finding denying reimbursement relating to the funding pursuant to Welfare and Institutions Code section 12306.

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[9] Comments received June 29, 2001, page 2.

[10] Attached to Claimant's comments received June 29, 2001.

[11] Test claim filed by County of Fresno on September 6, 1988, page 3.

State Agency Position

Department of Finance

The Department of Finance filed comments on December 27, 1988, and on November 13, 2006, contending that the test claim legislation does not impose a reimbursable state-mandated program since the legislation results in cost savings to the county. The Department of Finance provides with its original comments a June 1981 Local Cost Estimate the Department prepared on the bill that chaptered the test claim legislation. The Local Cost Estimate states in relevant part the following:

> This bill makes numerous changes to the California public assistance program.
>
> The intent of this bill is to save the State and counties millions of dollars annually through the imposition of more stringent requirements for public assistance recipients, the elimination of special consideration for specified recipients, and various other changes.
>
> [¶]
>
> Although some additional administrative functions may be associated with the provisions of this bill, the cost, if any, would be insignificant compared with the savings. Therefore, there should be no reimbursable mandate associated with this bill.

Department of Social Services

The Department of Social Services filed comments on December 22, 1988, contending that the test claim legislation does not impose a reimbursable state-mandated program. The Department of Social Services contends that the legislation resulted in cost savings authorized by the state, rather than costs mandated by the state by eliminating comfort services as a program requirement. In addition, the recipient's able and available spouse was expressly deemed willing to perform certain tasks for the recipient without pay. Furthermore, the test claim legislation included a mechanism whereby counties could avoid costs in excess of the amount appropriated "via the systematic reduction of services" pursuant to Welfare and Institutions Code section 12301.

In addition, the Department states that the 90%/10% cost sharing ratio was not a shifting to the County of costs that were not required to be incurred before the enactment of the test claim legislation, but a formal assumption by the state of the "lion's share of the costs which had always been a County responsibility." The Department contends that before the test claim legislation, *all* IHSS costs above the federal/state matching level were the responsibility of the counties (citing Welf. & Inst. Code, §§ 10800 and 12306, and *County of Sacramento v. State* (1982) 134 Cal.App.3d 428.) The Department states the following:

> Chapter 69 did not reduce the state's financial obligation from what it was prior to 1981. With Chapter 69 the state's obligation remained to match the federal allocations. However, in addition to that the state had obliged itself to pay a large part of those County costs in excess of the federal/state match. The state had obligated itself to pay 100% of those excess costs up to the amount expended by the Counties during the 1980/81 fiscal year, and an additional 90% of all remaining excess costs.
>
> With this background it is not difficult to see that by enacting into law a funding structure whereby the county would no longer be legally responsible for all IHSS costs in excess of the state/federal match but rather only 10% of those costs, the

Legislature, far from imposing state mandated costs with Chapter 69, created state authorized savings for all the counties …

On November 13, 2006, the Department of Social Services filed comments on the draft staff analysis raising similar arguments, and also contending the following:

- The equitable doctrine of laches bars the test claim and, thus, the Commission should dismiss the test claim based on unreasonable delay resulting in prejudice to the state.
- The documents filed by the claimant with Manual Letter No. 81-30 to amend the test claim are not the regulations adopted by the Department of Social Services that implemented the test claim statutes.
- Reimbursement for participation in fair hearings requested by recipients of IHSS should be limited only to reimbursement for those costs incurred for the hearing when the County prevails and the Administrative Law Judge upholds the service reductions made by the County. Hearing costs for county reductions found by an Administrative Law Judge to have been inconsistent with and not authorized by statute should not be reimbursable.
- Since the purpose of the test claim statutes was to reduce costs, there is no evidence in the record that supports a finding of increased net costs to the counties and, thus, the test claim should be denied.
- The analysis should acknowledge other areas of savings, in addition to the savings related to the reduction of services. Savings were also generated where the recipient had an able and available spouse at home to perform the IHSS services. In addition, the emergency regulations that were adopted to implement the test claim statutes expressly provided counties with relief from other mandatory administrative duties specifically to cover the administrative cost of implementation of the statute and regulations. (Section 30-466.4.)
- Costs incurred to review cases, notify recipients, and defend reductions in fair hearings are one-time costs. Once the decisions are issued by an Administrative Law Judge, no further defense activity is required. Cost savings under the program, however, are ongoing.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[12] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[13] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial

[12] Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) provides: "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, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[13] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[14] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[15] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[16]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[17] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[18] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[19]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[20]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[21] 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."[22]

Issue 1 Should the Commission dismiss this test claim based on the equitable doctrine of laches?

The Department of Social Services argues that this test claim should be dismissed based on the doctrine of laches. Laches is an equitable principle that allows the dismissal of a claim when the

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[14] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[15] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[16] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.)*; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

[17] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

[18] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[19] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[20] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

[21] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

[22] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

party defending the action alleges that it has been prejudiced by an unreasonable delay in hearing the claim. The courts have applied the doctrine of laches to quasi-judicial administrative proceedings as a common law policy pursuant to the "inherent power of courts independent of statutory provisions to dismiss an action on motion of the defendant where it is not diligently prosecuted."[23] The Department of Social Services states that laches applies and, thus, this claim should be barred for the following reasons:

> This claim has certainly been allowed to slumber. It was filed in 1988, almost twenty years ago. It concerns a statute and implementing regulations enacted in 1981 and 1982, almost twenty five years ago. The rules in effect today provide that timely processing of a test claim takes 12 months. (2 CCR § 1183.07.) This claim has been around twenty times that long. Twenty years is an unreasonable delay.
>
> The delay in prosecution has prejudiced the State. None of the key persons involved in the development and promulgation of the regulations at issue, who could testify about their intent or the extent of county involvement in their development, can be located twenty years later. Records of county expenditures and state participation in those expenditures that could have shed light on the nature and extent of offsetting savings that undoubtedly accrued are no longer retrievable. These are precisely the ill effects that laches is designed to alleviate. Laches should bar the claim.[24]

Although this test claim has been pending since 1988, the facts of this case do not support a finding of dismissal based on the doctrine of laches.

When ruling on a laches defense, the courts have held that a delay, alone, is not enough to dismiss a case. Rather, the delay is a bar only when "it works to the *disadvantage or prejudice* of other parties." (Emphasis in original.)[25]

When the Counties of Fresno and Los Angeles filed this test claim in 1988, the Government Code did not contain a statute of limitations regarding the filing of a test claim. Local agencies and school districts could file a claim on any statute or executive order enacted on or after January 1, 1975. In addition, there was no express time limitation imposed on the Commission to hear a test claim. The public hearing had to simply be conducted within "a reasonable time." Government Code section 17555, as it existed in 1988, stated the following:

> The commission, within 10 days after receipt of a test claim based upon a statute or executive order, shall set a date for a public hearing on the claim within a reasonable time. The test claim may be based upon estimated costs that a local agency or school district may incur as a result of the statute or executive order and may be filed at any time after the statute is enacted or the executive order is adopted. …[26]

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[23] *Brown v. State Personnel Board* (1985) 166 Cal.App.3d 1151, 1158.

[24] Department of Social Services comments to draft staff analysis, dated November 8, 2006, page 1.

[25] *Brown, supra,* 166 Cal.App.3d at page 1159.

[26] The twelve month period of time to process a test claim was not included in the Government Code until 1998. (Stats. 1998, ch. 681.)

Former Government Code section 17553 also stated that a "[h]earing of a claim may be postponed at the request of the claimant, without prejudice."

In this case, the Commission originally set a hearing date six months after the filing of the test claim. But, in accordance with Government Code section 17553, the hearing was postponed at the request of the claimants, and the item was placed on the inactive list. In 2000, the Commission sent notice to the original claimants that the claim would be dismissed if they did not file additional comments, or withdraw the claim. A notice of dismissal was issued, and the County of San Bernardino took over the claim in September 2000.[27] The Department of Social Services was on the mailing list for all of these notices.

It was not until 2002, two years after the County of San Bernardino took over the claim, that the Legislature enacted a statute of limitations on test claims. Government Code section 17551, as amended by Statutes 2002, chapter 1124, required the claimant to file a test claim "three years following the date the mandate became effective, or in the case of mandates that became effective before January 1, 2002, the time limit shall be one year from the effective date of this subdivision."[28] Statutes 2002, chapter 1124 was enacted prospectively and affected test claims filed on or after January 1, 2002. Test claims filed before January 1, 2002, could be filed on statutes or executive orders that were enacted as early as 1975.

Thus, at the time the test claim was filed in the present case and in 2000, when the County of San Bernardino substituted as the test claimant, the Government Code subjected the State to potential liability under article XIII B, section 6 as a result of the 1981 test claim statute and alleged executive orders. Therefore, the Department of Social Services cannot claim any equitable disadvantage or prejudice when the delay was authorized by law.

Moreover, there is no showing of disadvantage or prejudice to the Department of Social Services or the State after the County of San Bernardino took over the claim in 2000. In 2001, the County of San Bernardino filed its first substantive comments on the claim as the new test claimant and added alleged executive orders to the claim. San Bernardino's comments were sent out to the state agencies, including the Department of Social Services, for comment.[29] No comments on the San Bernardino filing came in from the State until after the draft staff analysis was issued in August 2006.

Accordingly, the Commission finds that the equitable doctrine of laches does not apply to dismiss this test claim.

Issue 2 Do the test claim statutes and alleged executive orders constitute a federal mandate, which does not require reimbursement under article XIII B, section 6?

As indicated in the Background, the Legislature created the IHSS program in 1973 to qualify for federal grant funds pursuant to Title XVI of the Social Security Act for services to the aged, blind or disabled. At the time the test claim statute was enacted, federal law provided the following:

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[27] The Commission adopted section 1183.09 of the regulations in 2001 governing the dismissal of inactive test claims following a sixty day notice period and an opportunity for another interested party to take over the claim and substitute in as the claimant.

[28] Statutes 2004, chapter 890 changed the statute of limitations to "12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later."

[29] See Exhibit K to Item 4, April 16, 2007 Commission Hearing, page 285.

"For the purpose of encouraging each state, as far as practicable under the conditions in the state, to furnish services directed at the goal of … there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this title."[30] Each state that participated in the program was required to report to the federal government regarding the use of the federal social services funds.[31] In addition, each state was required to have a plan to implement the program. The plans were required to contain a number of elements, including the following: an opportunity for a fair hearing before the appropriate state agency for individuals whose claim for service is denied or not acted upon with reasonable promptness; a designation by the state of an appropriate agency that will administer or supervise the administration of the state's program for the provision of services; and a statement that the state's program will be in effect in all political subdivisions of the state.[32] In 1981, federal law was amended to provide that a state may use a portion of the amount received for the purpose of purchasing technical assistance from public or private entities if the state determines that such assistance is required in developing, implementing, or administering the program.[33] Federal law did not require counties or other local agencies to administer the IHSS program.

In 1990, the California Supreme Court addressed the federal mandate issue with respect to article XIII B, section 6 of the California Constitution in the *City of Sacramento* case.[34] The *City of Sacramento* case involved test claim legislation that extended mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations. The state legislation was enacted to conform to a 1976 amendment to the Federal Unemployment Tax Act, which required for the first time that a "certified" state plan include unemployment coverage of employees of public agencies. States that did not comply with the federal amendment faced a loss of a federal tax credit and an administrative subsidy.[35] The local agencies, knowing that federally mandated costs are not eligible for state subvention, argued against a federal mandate. The local agencies contended that article XIII B, section 9 requires clear legal compulsion not present in the Federal Unemployment Tax Act.[36] The state, on the other hand, contended that California's failure to comply with the federal "carrot and stick" scheme was so substantial that the state had no realistic "discretion" to refuse. Thus, the state contended that the test claim statute merely implemented a federal mandate.[37]

The Court concluded that the test claim statute in *City of Sacramento* constituted a federal mandate and agreed that the definition of federal mandate does not require strict legal compulsion. Rather, the Court defined a federal mandate to include situations where the state has no reasonable alternative to the federal scheme or no true choice but to participate in it.[38]

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[30] Public Law 93-647, section 2001, which amended 42 USC 1397 (1975 HR 17045).

[31] Public Law 93-647, section 2003.

[32] *Ibid*.

[33] Public Law 97-35, section 2002, which amended 42 USC 1397A (1981 HR 3982).

[34] *City of Sacramento v. State* (1990) 50 Cal.3d 51.

[35] *Id.* at pages 57-58.

[36] *Id*. at page 71.

[37] *Ibid.*

[38] *Id*. at pages 73-76.

The parties here have not raised any law or facts to suggest that the federal law in this case constitutes a federal mandate on the state to provide IHSS services. The Commission, however, does not need to address that issue. Even if there was a federal mandate on the state, the test claim statutes and alleged executive orders may still be subject to article XIII B, section 6 and impose a reimbursable state-mandated program on local agencies. Federal law did not require counties or other local agencies to administer the IHSS program, or require counties to reduce or eliminate non-essential comfort services under the IHSS program if the amount appropriated in the Budget Act was insufficient to meet all service needs. The court in *Hayes v. Commission on State Mandates* held that if the state freely chose to impose the costs upon the local agency as a means of implementing a federally mandated program, regardless of whether the costs were imposed on the state by the federal government, then the costs are the result of a reimbursable state mandate pursuant to article XIII B, section 6.[39] Thus, the Commission finds that the test claim statutes and alleged executive orders do not constitute a federal mandate on the counties.

Accordingly, the analysis must continue to determine if the test claim statute and alleged executive orders mandate a new program or higher level of service and impose costs mandated by the state within the meaning of article XIII B, section 6.

Issue 3: Do Welfare and Institutions Code sections 12301 and 12302, as amended by the test claim statute, and the alleged executive orders issued by Department of Social Services constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution?

Welfare and Institutions Code section 12301, Department of Social Services Manual Letter No. 81-30 (Dated July 19, 1981) and Interim Instruction Notice (Dated January 19, 1982)

As indicated above, the test claim statute (Stats. 1981, ch. 69) amended Welfare and Institutions Code section 12301 to limit expenditures for the IHSS program to the amount appropriated in the Budget Act and to require specified reductions in services when the amount appropriated was insufficient.

Specifically, former Welfare and Institutions Code section 12301 was amended to clarify legislative intent that "in home supportive services shall be provided in a uniform manner in every county based on individual need consistent with the appropriations provided for such services in the annual Budget Act and the provisions of this chapter …." (Underlined language was added by the test claim legislation.) To limit expenditures, the test claim statute also deemed the spouse of the IHSS recipient willing to provide services, except non-medical personal services and paramedical services, at no cost.

Section 12301, as amended by the test claim statute, further provided for the reduction or elimination of non-essential comfort services if the amount appropriated in the Budget Act was insufficient to meet all service needs. The test claim legislation added the following language to section 12301:

> If the amount appropriated by the annual Budget Act is insufficient to meet all service needs, program reductions shall occur. The department [of Social Services] shall notify counties and the Joint Legislative Budget Committee whenever the department's estimate of the cost of providing all the service needs exceed the amount appropriated in the Budget Act.

[39] *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593-1594.

> The following priorities are established to direct counties and the department on how to implement needed program reductions:
>
> (a) Reduction in the frequency with which non-essential services are provided.
>
> (b) Elimination of non-essential service categories.
>
> (c) Termination or denial of eligibility to persons requiring only domestic services.
>
> (d) Termination or denial of eligibility to persons who, in the absence of services, would not require placement in a medical out-of-home care facility.
>
> (e) Per capita reduction in the cost of services authorized.
>
> Any program reductions shall be implemented so as to avoid, to the extent feasible within budgetary constraints, out-of-home placements.
>
> The counties and the State Department of Social Services shall utilize these options in the order of their appearance. In no event shall services be terminated or denied to any eligible person who in the absence of services would require medical out-of-home care. In no event shall services be terminated or denied to any person who in the absence of such services would become unemployed.
>
> Nonessential services are routine mending, ironing, heavy cleaning, domestic services, yard hazard abatement except for snow removal, teaching and demonstration and any other services specified by the department. Restrictions on nonessential services shall be excepted on a case by case basis when denial or termination of services would result in placement in a medical out-of-home facility or in a loss of employment, in a life threatening situation in conditions which present a substantial threat to health or safety, or in any other condition specified by the department. Essential services shall at a minimum include those services listed in subdivision (e) of Section 12304.

In June 2001, the claimant submitted comments alleging that with the elimination of comfort services, the county was required to screen all of its cases to determine which cases were receiving comfort services only. The claimant contends that significant costs were incurred to review every case and go through the fair hearing process requested by the applicant when the comfort services were denied. The claimant states the following:

> The first significant change that occurred as a result of the legislation was the elimination of "comfort services." Comfort services were those strictly domestic services, and what is normally referred to as routine housekeeping services. The formal regulations implementing this change were a result of Chapter 69, Statutes 1981. The Department of Social Services issued Manual Letter No. 81-30 on July 29, 1981. [Footnote omitted.] It stated that implementation of this law necessitated the adoption of the regulations which were attached.
>
> The regulations revised the definition of the IHSS program to eliminate the "comfort services" in the program, and to direct it solely towards the eligible aged, blind and disabled who are unable to perform IHSS services themselves, and could not remain safely in their own home unless IHSS services were provided.

> The practical result of this was that throughout the state, each and every county had to go through all of their existing IHSS cases, and identify those which were receiving domestic services only. …
>
> As a result of the change in the law and implementing regulations, we were required to screen all of our cases to determine which cases were receiving "comfort services" only. After screening these cases, the County of San Bernardino closed a significant number of cases, perhaps as many as 60%. However, the law and regulations did have provisions that if one or more comfort services were needed to make sure someone stay in their home, exceptions could be made.
>
> … About 25% of those recipients whose services were discontinued as a result of this legislation, applied for fair hearings, which are provided for by the State. Approximately 70% of those who applied for fair hearings were reinstated and thus again provided services.
>
> Thus, the first result of the change in legislation did not result in that many individuals being removed from the program, notwithstanding the significant cost of reviewing every case and the process of going through fair hearings on those initially denied services.[40]

The claimant attached to the June 2001 filing a Department of Social Services Manual Letter No. 81-30 and a Department of Social Services Interim Instruction Notice dated January 19, 1982, which implement the test claim statute. The letter states in relevant part that "[t]he regulations revise the definition of the IHSS program to eliminate the comfort aspect of the program, and to direct it solely towards eligible aged, blind, and disabled persons who are unable to perform IHSS services themselves and cannot safely remain in their own homes unless the services are provided." Page 6 of the Interim Instruction Notice (Section II (C)) further states the following:

> IHSS Notice of Action forms, TEMP 1503 and TEMP 1514 NSI, have been developed by the State Department of Social Services for recipients whose services have been or will be reduced pursuant to SB 633's elimination of comfort as a program objective. These notices were developed to be consistent with the other recently adopted Notices of Action for use in implementing SB 633 actions. They are based on the following provisions:
>
> a.# State hearings are available to all recipients who so request within 90 days following the mailing date of these notices when properly completed;
>
> b.# Aid paid pending is available, at the service level the recipient would have received had the action eliminating comfort not been taken, for all recipients who file a timely request for a state hearing;
>
> c.# Individual case assessment must be made to insure that no county action is taken that would cause recipients to be placed in a medical out-of-home care facility, become unemployed, be placed in a life threatening situation, or be placed in a situation that would substantially threaten their health and safety. These specific exceptions appear on the notices;

[40] Claimant comments filed June 29, 2001.

d.# The notices must show the type and hours of specific services being reduced or eliminated.

Page 7 of the Interim Instruction Notice describes the use of form TEMP 1505 for those non-severely impaired recipients that received comfort reductions pursuant to the test claim statute. The Notice states the following:

> This notice will be used for non-severely impaired recipients who have received "comfort reductions." Its purpose is to ensure that these recipients are advised of hearing rights and receive a clear explanation of the nature of the county's action.
>
> Recipients requesting a hearing within 10 days of the mailing date of the notice will receive aid pending the hearing as of the effective date of the county's original action. The retroactive aid will take the form of a cash payment of equivalent value to all "comfort" services the recipient would have received had the county made no reduction.
>
> This notice is also for all recipients who have not yet received those "comfort reductions" which counties are required to implement. The recipient will receive aid paid pending if a hearing is requested prior to the effective date of the action.
>
> These notices must be processed and mailed to all affected recipients as described in paragraph II.A.1.a and f.

Page 8 of the Interim Instruction Notice (Section IV) states that the "IHSS supervisor shall screen all cases in their respective caseloads by asking the following questions" related to a recipient's last non-reduction evaluation.

The Departments of Finance and Social Services contend that the test claim legislation does not constitute a reimbursable state-mandated program since it resulted in cost savings authorized by the state, rather than costs mandated by the state by eliminating comfort services as a program requirement. The Commission agrees with the state that the program costs of the IHSS following the enactment of the test claim legislation are not reimbursable. Reimbursement under article XIII B, section 6 is required only if a claimant can show increased costs mandated by the state.[41] Here, the test claim statute required a reduction or elimination of non-essential comfort services if the amount appropriated in the Budget Act was insufficient to meet all service needs. Thus, there is no showing of increased IHSS program costs as a result of the statute.

The question remains whether Welfare and Institutions Code section 12301, as amended by the test claim statute and the alleged executive orders issued by the Department of Social Services constitute a partial reimbursable state-mandated program for the administrative activities of assessing and screening all cases, issuing the appropriate notice to the IHSS recipient about the reduction of services, and participating in a fair hearing requested by the recipient on the reductions.

Welfare and Institutions Code section 12301, as amended by the test claim statute, requires IHSS program reductions if the amount appropriated by the annual Budget Act is insufficient to meet all service needs. The statute further states that "[i]n no event shall services be terminated or denied to any eligible person who in the absence of services would require medical out-of-home care" and "[i]n no event shall services be terminated or denied to any person who in the absence of such

[41] Government Code section 17514; *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1284.

services would become unemployed." Thus, the section 12301 requires counties to *not* reduce services in the following circumstances:

> Restrictions on nonessential services shall be excepted on a case by case basis when denial or termination of services would result in placement in a medical out-of-home facility or in a loss of employment, in a life threatening situation in conditions which present a substantial threat to health or safety, or in any other condition specified by the department.

To implement section 12301, the Interim Instruction Notice issued by the Department of Social Services requires counties to screen and assess all cases. The notice states the following:

- "Individual assessment must be made to insure that no county action is taken that would cause recipients to be placed in a medical out-of-home care facility, become unemployed, be placed in a life threatening situation, or be placed in a situation that would substantially threaten their health and safety. These specific exceptions appear on the notices."
- The "IHSS supervisor shall screen all cases in their respective caseloads …"

The Interim Instruction Notice also requires counties to issue notices to all recipients whose benefits are reduced. The notice must include information regarding the type and hours of specific services being reduced or eliminated; that the state hearings are available to all recipients who timely request a hearing; and that IHSS funds are paid pending a fair hearing. The Commission finds that the Interim Instruction Notice constitutes an "executive order" as defined in Government Code section 17516, since it an "order, plan, requirement, [or] rule" issued by a state agency.

The Commission further finds that the screening, assessment, and notice activities are new activities mandated by the state and, thus, constitute a new program or higher level of service for the period between July 1, 1987 (the beginning of the reimbursement period for this claim) and June 30, 1988, when the requirement to reduce program services was deleted by new legislation that became effective on July 1, 1988. (Stats. 1987, ch. 1438, §§ 2 and 7, eff. July 1, 1988.)

The Departments of Finance and Social Services contend, however, that reimbursement is not required since the test claim statute and executive orders result in cost savings to the county and, thus, there are no increased costs mandated by the state. Based on the evidence in the record, the Commission finds that the claimant has not provided a showing of increased costs mandated by the state pursuant to Government Code section 17514.

Government Code section 17514 defines "costs mandated by the state" as "any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution." In 1988, when this test claim was filed, and in 2000, when the County of San Bernardino took over the claim, the Government Code stated that test claims could only be filed if a claimant could show increased costs exceeding $200 on the alleged mandate.[42] Thus,

[42] At the time this test claim was filed, Government Code section 17564, subdivision (a), stated in relevant part the following: "No claim shall be made pursuant to Sections 17551 [hearings and decisions on test claims] and 17561 [reimbursement claims], nor shall any payment be made on claims submitted pursuant to Sections 17551 and 17561, unless these claims exceed two hundred dollars ($200) …" Statutes 2002, chapter 1124, increased the minimum filing cost to $1000.

the claimant has the burden of showing increased costs incurred at minimum amount of $200 for the alleged mandated activities.

Here, there is no evidence in the record of increased costs for the screening, assessment, and notice activities for fiscal year 1987-1988. The original claimant, the County of Fresno, alleged increased costs of $1,155,000 for fiscal year 1987-1988 as a result of the alleged shift of funding from the state to the counties for the IHSS program. The analysis of the shift of funding argument is addressed in Issue 4, where the Commission finds that there has been no shift of funding from the state to the counties when compared to prior law and, thus, any costs alleged are not reimbursable under article XIII B, section 6 of the California Constitution. The County of Fresno did not claim any costs for screening, assessment, and providing notice of the reduction of comfort services to IHSS recipients.[43] Similarly, the County of Los Angeles claimed increased costs based on the alleged shift of funding in the amount of $7,310,062 for fiscal year 1987-1988. The County of Los Angeles did not claim any costs for screening, assessment, and providing notice to recipients about the reduction of comfort services.[44] Although the current claimant, the County of San Bernardino, argues it has incurred increased costs mandated by the state, it acknowledges that comfort services and associated costs were reduced pursuant to the test claim statute.[45] The County of San Bernardino provides no cost data of increased costs in its filings, however.

The plain language of Welfare and Institutions Code section 12301, as amended by the test claim statute, and the executive orders filed by the claimant required a reduction or elimination of non-essential comfort services if the amount appropriated in the Budget Act was insufficient to meet service needs. Government Code section 17517.5 defines "cost savings authorized by statute" as "any decreased costs that a local agency or school district realizes as a result of any statute enacted or any executive order adopted that permits or *requires* the discontinuance of *or a reduction in the level of service of an existing program that was mandated before January 1, 1975*." (Emphasis added.) As indicated in the Background, the provision of services under the IHSS program was mandated by the Legislature in 1973. Thus, the Commission finds that Welfare and Institutions Code section 12301, as amended by the test claim statute, and the executive orders filed by the claimant, resulted in "cost savings authorized by statute." In order for the Commission to approve this test claim, the claimant would have to show that the offsetting savings occurring as a result of the reduction of comfort services still resulted in net costs to the local agency for the activities of screening, assessment, and notice of the reduction of comfort services to the IHSS recipient for fiscal year 1987-1988.[46] That showing has not been made here.

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[43] Exhibit A to Item 4, April 16, 2007 Commission Hearing.

[44] Exhibits A and D to Item 4, April 16, 2007 Commission Hearing.

[45] See Exhibit J to Item 4, April 16, 2007 Commission Hearing, San Bernardino comments filed June 29, 2001. San Bernardino states the following on pages 1 and 2: "After screening these cases, the County of San Bernardino closed a significant number of cases, perhaps as many as 60%. …[¶] About 25% of those recipients whose services were discontinued as a result of this legislation, applied for fair hearings, which are provided for by the State. Approximately 70% of those who applied for fair hearings were reinstated and thus again provided services."

[46] Government Code section 17556, subdivision (e), states that the Commission shall not find costs mandated by the state if the Commission finds that "[t]he statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no net costs to the local agencies or school districts …."

Therefore, the Commission finds that the activities of screening, assessment, and providing notice to IHSS recipients about the reduction of comfort services do not impose costs mandated by the state and, thus, reimbursement is not required pursuant to article XIII B, section 6 of the California Constitution.

Finally, the claimant seeks reimbursement to participate in the fair hearings requested by recipients whose services were reduced pursuant to Welfare and Institutions Code section 12301. Since 1965, recipients of public social services have been authorized, pursuant to Welfare and Institutions Code sections 10950, to request a state hearing when the recipient is dissatisfied with any action of the county department relating to the receipt of public social services. The fair hearings are conducted by an administrative law judge. (Welf. & Inst. Code, § 10953.) In the present case, the test claim statute required counties to reduce services if the amount appropriated by the annual Budget Act is insufficient to meet all service needs. Page 2 of the Interim Instruction Notice issued by the Department of Social Services states that the superior court, in the case of *Disabled Union v. Woods*, issued a preliminary injunction requiring that a fair hearing *not* be denied to any IHSS recipient who properly and timely requests a hearing after the services are reduced pursuant to Welfare and Institutions Code section 12301. Since the fair hearing is triggered by the requirement imposed by the test claim statute to reduce services, the Commission finds that the counties' participation in a fair hearing triggered by a section 12301 reduction constitutes a new program or higher level of service for the period between July 1, 1987 (the beginning of the reimbursement period for this claim) and June 30, 1988, when the requirement to reduce program services was deleted by new legislation that became effective on July 1, 1988. (Stats. 1987, ch. 1438, §§ 2 and 7, eff. July 1, 1988.). This finding is supported by the Supreme Court's decision in *San Diego Unified School District v. Commission on State Mandates*, where the court held that all of the due process hearing costs following a state-mandated expulsion are reimbursable pursuant to article XIII B, section 6, even though the due process procedures were required by federal law before the enactment of the test claim statute.[47] The court held that "[i]n the absence of the operation of [the test claim statute's] mandatory provision (specifically, compulsory immediate suspension and a mandatory expulsion recommendation), a school district would not automatically incur the due process hearing costs that are mandated by federal law …."[48]

The Commission finds, however, that the activity of participating in a fair hearing triggered by Welfare and Institutions Code section 12301 does not impose increased costs mandated by the state pursuant to Government Code section 17514. Although the County of San Bernardino argues it has incurred increased costs mandated by the state for its participation in the fair hearings, it acknowledges that IHSS comfort services and associated costs were reduced pursuant to the test claim statute. The claimant has not shown that the offsetting savings occurring as a result of the reduction of comfort services still resulted in net costs to the local agency for its participation in the fair hearings for fiscal year 1987-1988.

Therefore, the Commission finds that the activity of participating in a fair hearing triggered by Welfare and Institutions Code section 12301 does not impose costs mandated by the state and, thus, reimbursement is not required pursuant to article XIII B, section 6 of the California Constitution.

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[47] *San Diego Unified School Dist., supra*, 33 Cal.4th at page 881.

[48] *Id.* at page 880.

Welfare and Institutions Code section 12302

Since 1973, Welfare and Institutions Code section 12302 has required counties to develop and submit a plan to the Department of Social Services that provides for the delivery of services to meet the objectives of the IHSS program. As described below, this code section was amended by the test claim statute. Although the current claimant has not alleged any reimbursable costs associated with section 12302, the original claimant, the County of Fresno, contended that section 12302 imposed a reimbursable state-mandated activity.[49] Therefore, this section is analyzed below.

In 1981, the test claim statute added the following language to Welfare and Institutions Code section 12302 to require that the plans submitted to the Department of Social Services specifically indicate how the county intends to reduce costs, pursuant to Welfare and Institutions Code section 12301, to the allocated amount budgeted for the program, including the county's share of funding (the counties' share of funding is analyzed under Issue 4):

> A county may reduce services in accordance with Section 12301 at the beginning of the fiscal year; however, *each county shall indicate specifically how they plan to reduce costs to the allocated amount, including the 10 percent match* [required by section 12306]. A county shall, to the extent feasible make any reductions in services evenly throughout the year and shall not wait until the end of the fiscal year to make massive reductions in services to eligible recipients. Each county is obligated to ensure that services are provided to all eligible recipients during each month of the year in accordance with the county plan. (Emphasis added.)
>
> [¶]
>
> County plans are effective upon submission to the department. Counties which institute reductions at the beginning of the fiscal year shall submit a plan by July 30 of that fiscal year. In reviewing county plans the department shall assure that plans are in compliance with provisions of this article including compliance with Section 12301. In the event the department finds a county plan is not in compliance it shall take appropriate action to assure compliance.

The Commission finds that Welfare and Institutions Code section 12302, as amended by the test claim statute, mandates a new program or higher level of service by requiring counties to include specific information in their plan submitted to the Department of Social Services that indicates how the county plans to reduce costs to the allocated amount pursuant to Welfare and Institutions Code section 12301 for only the period between July 1, 1987 (the beginning of the reimbursement period for this claim) and June 30, 1988, when the requirement to include information in the county plan regarding the reduction of program services was deleted by new legislation that became effective on July 1, 1988. (Stats. 1987, ch. 1438, §§ 3 and 7, eff. July 1, 1988.).

The Commission finds, however, that the activity of including specific information in the county plan to reduce costs to the allocated amount does not impose increased costs mandated by the state pursuant to Government Code section 17514. Although the original claimant, the County of Fresno argued that this activity was reimbursable, neither the Counties of Fresno nor San Bernardino have shown that the offsetting savings occurring as a result of the reduction of comfort services still resulted in net costs to the local agency for the inclusion of specific information on the reduction of costs in the county plan for fiscal year 1987-1988.

[49] See test claim filed by County of Fresno, page 2.

Accordingly, the Commission finds that the activity of including specific information in the county plan submitted to the Department of Social Services that indicates how the county plans to reduce costs to the allocated amount does not impose costs mandated by the state and, thus, reimbursement is not required pursuant to article XIII B, section 6 of the California Constitution.

Issue 4: Does Welfare and Institutions Code section 12306, as amended by the test claim statute, constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution?

Welfare and Institutions Code section 12306 addresses the funding of the IHSS program. Welfare and Institutions Code section 12306, as amended by the test claim statute (Stats. 1981, ch. 69), states the following:

> As regards in-home supportive services, the state shall pay the matching funds required for federal social services funds from the state's General fund. If the federal social services funds allocated by the department are insufficient, the state, beginning with the 1981-82 fiscal year, shall also reimburse the counties for all services provided under this article up to the sum of the amounts expended by the counties and those payroll taxes paid by the state on behalf of the counties under Section 12302.2 as determined by the department during the 1980-81 fiscal year. In no event shall this sum exceed two hundred sixty-three million dollars ($263,000,000). Counties shall provide 10 percent of the costs in excess of this sum expended in the 1980-81 fiscal year. The state shall reimburse from the General Fund or any available federal funds 90 percent of the costs expended in the 1980-81 fiscal year which exceed this sum. The obligation of the state's General Fund under this article is limited to the amount appropriated in the annual Budget Act.

The claimant alleges that this test claim statute required a change in the funding contribution, which "for the first time" shifted costs to the counties by requiring a local contribution of ten percent (10%) of the costs that exceeded the funding cap imposed by the state for the IHSS program. Claimant alleges the test claim statute resulted in significant costs since the county had an increasing caseload of recipients receiving benefits under the IHSS program. Thus, claimant argues that Welfare and Institutions Code section 12306, as amended by the 1981 test claim statute, constitutes a reimbursable state-mandated program.

For the reasons below, the Commission finds that Welfare and Institutions Code section 12306, as amended by Statutes 1981, chapter 69, does not mandate a new program or higher level of service and, thus, does not constitute a reimbursable state-mandated program.

The courts have found a mandated new program or higher level of service when the state shifts financial responsibility to local entities for programs funded and administered by the state before the advent of article XIII B, section 6. For example, in *Lucia Mar Unified School Dist., supra*, 44 Cal.3d 830, 835-836, the Supreme Court found a new program or higher level of service when the state shifted the partial cost of educating pupils at state schools for the severely handicapped to local school districts. The court held that the state-mandated a new program or higher level of service because the cost of the program had been shifted from the state to a local entity. (*Ibid.*) In November 2004, the voters amended article XIII B, section 6 to provide that "a mandated new program or higher level of service includes a transfer by the Legislature from the State to cities, counties, cities and counties, or special districts of complete or partial financial responsibility for a required program for which the State previously had complete or partial financial responsibility." (Cal. Const., art. XIII B, § 6, subd. (c), as amended by Prop. 1A [Nov. 2, 2004].)

In the present case, the test claim statute does not shift financial responsibility for the IHSS to the counties. Rather, as more fully described below, the responsibility to pay for the actual costs of the IHSS program that exceed the federal funding formula has historically been a county responsibility. When the state enacted the test claim statute, the state assumed 90 percent of the costs exceeding the federal funding formula, resulting in cost savings to the counties.

As indicated in the background, seventy-five percent (75%) of the funding for IHSS was provided by the federal government up to the amount federally appropriated and allocated to the state. The amount of federal dollars appropriated and allocated to California was matched by $1 of state money for every $3 of federal money. *If* federal funds met the 75 percent of the *actual* program costs, then the state's required match of 25 percent covered the entire cost of the program.

Before the enactment of the test claim statute, however, a dispute arose between the state and the counties when the 75 percent federal match did not cover 75 percent of the actual program costs. In *County of Sacramento v. State of California* (1982) 134 Cal.App.3d 428, counties filed a claim with the State Board of Control asserting a right to reimbursement of all expenditures, including administrative expenses, to carry out the IHSS program pursuant to Welfare and Institutions Code section 12306, as added by statutes 1973, chapter 1216. The 1973 statute existed immediately before the enactment of the test claim statute in the present case. The 1973 statute provided the following: "As regards in-home supportive services, the state shall pay the matching funds required for federal social services funds from the state's General fund." The Board of Control denied the claim, and the case was ultimately decided by the Third District Court of Appeal in *County of Sacramento v. State of California* (1982) 134 Cal.App.3d 428. The court concluded that Welfare and Institutions Code section 12306, as added in 1973, only required the state to pay the matching requirement of $1 for each $3 of federal money actually appropriated and allocated to the state for the IHSS program, and that the statute did not require the state to assume the unfunded portion of the actual costs of the program. Rather, the actual costs of the program that exceeded the federal and state money actually appropriated and allocated under the federal funding formula fell within the counties' residual responsibility.[50] The court held as follows:

> Section 12306 provided: "As regards in-home supportive services, the state shall pay the matching funds required for federal social services funds from the state's General fund," including administrative costs. [Footnote omitted.] The state is therefore directed to provide the funds necessary to match the federal funding of the costs of administering social services. The matching requirement is $1 for each $3 of federal money actually appropriated and allocated to California for the in-home supportive services program. [Footnote omitted.] Section 12306 would have worked a complete state assumption of the nonfederal share of program expenditures if federal funds had met 75 percent of the actual program costs. They did not due to federal budget strictures. Section 12306 does not "require" state assumption of the federally unfunded portion of actual costs. [Footnote omitted.] Accordingly, the county must look elsewhere for financial surcease or is thrust back upon its basic and residual responsibility …
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> Two other statutes confirm this interpretation of section 12306. Section 12304, as applicable here …, made special provision for "severely impaired persons," a

[50] *Ibid.* The court determined that Welfare and Institutions Code section 10800 imposes upon the counties the basic responsibility for the administration of public social services, including IHSS. *(Id.* at p. 432.)

> subclass of those eligible for in-home supportive services. It provided, in subdivision (g): "Funding for the in-home supportive services under this section shall qualify, where possible, for the maximum federal reimbursement. In the event … that federal funds prove inadequate, the state shall provide funding for services under this section." Such funding is inclusive of administrative costs. These provisions are superfluous given the county's interpretation of section 12306. Plainly, it would not be necessary to specify state assumption of the federally unfunded costs of part of the program if section 12306 provided for state reimbursement for all costs.
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> More illuminating is section 12303.2 …, which funds for unemployment benefits for providers of in-home services: "(b) Funding for the costs of administering this section and for contributions, premiums, and taxes paid or transmitted on the recipient's behalf as an employer pursuant to this section shall qualify, where possible, for the maximum federal reimbursement. To the extent that federal funds are inadequate, notwithstanding Section 12306, the state shall provide funding for the purposes of this section." The inference in inescapable that section 12306 does not provide for state assumption of all administrative costs of in-home services.[51]

Thus, under prior law, counties were fully responsible for the actual costs of the program that exceeded the federal and state money actually appropriated and allocated under the federal funding formula.

Despite the court's holding in the *County of Sacramento* case, the claimant, citing Welfare and Institutions Code section 12304, subdivision (g), argues that the state was fully responsible for funding the services of the IHSS program before the enactment of the test claim statute.[52] As indicated in the court's decision, however, Welfare and Institutions Code section 12304, subdivision (g), is a special provision for "severely impaired persons" and does not address the general funding requirements for the IHSS program. The court's holding that counties were fully responsible for the costs exceeding the federal funding formula for the IHSS program under prior law is a final decision and binding on the parties.

Thus, under the law immediately preceding the enactment of the test claim statute, counties assumed the full responsibility for the costs exceeding the federal funding formula to pay the actual costs of the IHSS program.

The test claim statute (Stats. 1981, ch. 69) amended Welfare and Institutions Code section 12306 by adding the following underlined language to the statute to require the state to share in the cost of paying for the excess costs (costs exceeding $263,000,000) of the IHSS program:

> As regards in-home supportive services, the state shall pay the matching funds required for federal social services funds from the state's General fund. <u>If the federal social services funds allocated by the department are insufficient, the state, beginning with the 1981-82 fiscal year, shall also reimburse the counties for all services provided under this article up to the sum of the amounts expended by the counties and those payroll taxes paid by the state on behalf of the counties under Section 12302.2 as determined by the department during the 1980-81 fiscal year.</u>

[51] *Id*. at pages 433-434.

[52] Claimant's comments filed June 29, 2001, page 5.

> In no event shall this sum exceed two hundred sixty-three million dollars ($263,000,000). Counties shall provide 10 percent of the costs in excess of this sum expended in the 1980-81 fiscal year. The state shall reimburse from the General Fund or any available federal funds 90 percent of the costs expended in the 1980-81 fiscal year which exceed this sum. The obligation of the state's General Fund under this article is limited to the amount appropriated in the annual Budget Act.

The claimant alleges that the test claim statute requires counties to "pay a portion of the state's match of federal funding."[53] Claimant's position, however, contradicts the plain language of the statute. Under the statute, the state continues to pay the matching funds required for federal social services. (Welf. & Inst. Code, § 12306, first sentence.) The new cost sharing formula between the state and the counties comes into play if the federal and state matching funds are not sufficient to pay the actual costs of the program; i.e., "if the federal social services funds allocated by the department are insufficient …"

Therefore, with the enactment of the test claim statute, counties are no longer fully responsible for the actual costs of the program that exceed the federal funding formula, but instead are saving costs as a result of the statute. As correctly argued by the Department of Social Services:

> Chapter 69 did not reduce the state's financial obligation from what it was prior to 1981. With Chapter 69 the state's obligation remained to match the federal allocations. However, in addition to that the state had obliged itself to pay a large part of those County costs in excess of the federal/state match. The state had obligated itself to pay 100% of those excess costs up to the amount expended by the Counties during the 1980/81 fiscal year, and an additional 90% of all remaining excess costs.
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> With this background it is not difficult to see that by enacting into law a funding structure whereby the county would no longer be legally responsible for all IHSS costs in excess of the state/federal match but rather only 10% of those costs, the Legislature, far from imposing state mandated costs with Chapter 69, created state authorized savings for all the counties …

Accordingly, Welfare and Institutions Code section 12306, as amended by Statutes 1981, chapter 69, does not mandate a new program or higher level of service and, thus, does not impose a reimbursable state-mandated program.

CONCLUSION

The Commission concludes that Welfare and Institutions Code sections 12301 and 12302, as amended by Statutes 1981, chapter 69, the Department of Social Services Manual Letter No. 81-30, and the Interim Instruction Notice dated January 19, 1982, do not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 because there is no showing of increased costs mandated by the state.

The Commission further concludes that Welfare and Institutions Code section 12306 does not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 because it does not mandate a new program or higher level of service.

[53] Claimant's comments filed June 29, 2001, page 7.