

ITEM 11
FINAL STAFF ANALYSIS
PROPOSED PARAMETERS AND GUIDELINES

Penal Code Section 2966

Statutes 1985, Chapter 1419¹

Statutes 1986, Chapter 858

Statutes 1987, Chapter 687

Statutes 1988, Chapter 658

Statutes 1989, Chapter 228

Statutes 1994, Chapter 706

*Mentally Disordered Offenders:
Treatment as a Condition of Parole*
00-TC-28, 05-TC-06

County of San Bernardino, Claimant

EXECUTIVE SUMMARY

Summary of the Mandate

The test claim statutes set forth procedures for civil court hearings that are initiated by a prisoner or parolee who wishes to contest a finding, made at the time of parole or upon termination of parole, that he or she meets the mentally disordered offender criteria, as defined. If the person requests it, the court shall conduct such a hearing; the district attorney is required to represent the people and the public defender is required to represent the person if he or she is indigent.

On July 28, 2006, the Commission adopted the Statement of Decision for *Mentally Disordered Offenders (MDO): Treatment as a Condition of Parole* (00-TC-28, 05-TC-06). The Commission found that the test claim legislation constitutes a new program or higher level of service and imposes a state-mandated program on local agencies within the meaning of article XIII B, section 6, of the California Constitution and Government Code section 17514 to perform the following activities resulting from Penal Code section 2966 hearings:

- district attorney services to represent the people; and
- public defender services to represent indigent prisoners or parolees.

¹ The test claim was amended on March 2, 2006 to add this statute. The amendment was accepted based on provisions of Government Code section 17557, subdivision (c), that were in effect on the date of the filing of the original test claim.

Discussion

Commission staff prepared and issued the draft parameters and guidelines and the claimant submitted a detailed listing of additional reimbursable activity components, stating that these components serve to break down the reimbursable activities approved in the Statement of Decision to measurable pieces and represent reasonable methods of complying with the mandate. The Department of Finance submitted comments on the claimant's proposal. Staff modified the draft parameters and guidelines to include the components proposed by the claimant and to address Finance's comments. Substantive changes are discussed below.

Eligible Claimants

Staff deleted cities as eligible claimants because they do not implement this program.

One-Time Activities

1. Claimant proposed employee training on the program. Staff finds that training regarding a county's internal policies and procedures on Penal Code section 2966 hearings for each employee, including district attorneys, public defenders, investigators, and all administrative staff, such as secretaries and paralegals, who work on this program is necessary to carry out the mandated program and is reimbursable. However, staff limited training to one time per employee.

On-going Activities

1. Claimant proposed retaining necessary experts, investigators and professionals to prepare for and testify at any civil trial and any subsequent petition hearings. Staff revised this activity to remove the language "and any subsequent petition hearings" because it exceeds the scope of the Commission's findings in the Statement of Decision. The reference to "any civil trial" was changed to "*the* civil trial conducted pursuant to Penal Code section 2966 hearings" in order to limit reimbursable activities to the hearings at issue.
2. Claimant proposed providing transportation, care and custody of Penal Code Section 2966 petitioners before, during and after the civil hearings by the County Sheriff's Department. Finance recommends that this activity be limited to transportation of Penal Code 2966 petitioners, because care and custody of said petitioners is not found in the Statement of Decision.

Staff finds that the activities of transporting and custodial service of Penal Code section 2966 petitioners is necessary to carry out the mandated program. The law authorizes incarcerated prisoners to request the hearings, and since they are incarcerated, the county is responsible for transporting and caring for them while they are at the court facility for the hearing, and then returning them to the prison facility. However, staff clarified that transportation is limited to transporting to and from the court facility where the civil hearing is being conducted, and reimbursement for care and custody is limited to the time during the civil hearing. Staff also clarified that reimbursement for this activity is limited to incarcerated prisoners, since counties would not be responsible for transport, care and custody of parolees who have requested Penal Code section 2966 hearings.

Deleted Proposed Activities

Staff did not include the following activities proposed by claimant because they exceeded the scope of the Statement of Decision or the period of reimbursement, were already reimbursable in other MDO programs, or there was no evidence in the record to show that the activity was necessary to carry out the mandated program:

1. Developing policies and procedures to implement Penal Code section 2966.
2. Developing or procuring computer software to track Penal Code 2966 petitioner status.
3. Psychiatrist and Psychologist attendance and participation in continuing training necessary to retain professional competence in MDO cases, civil trial skills, and associated mental health issues.
4. Preparing and representing the state and indigent prisoners or parolees in civil hearings on the petition regarding the appeal of the petitioner's MDO status under Penal Code section 2962.
5. Travel to and from court.

Offsetting Revenues

The Statement of Decision made a specific finding that there were no offsetting reimbursements for this program. However, after the Statement of Decision was adopted, Statutes 2006, chapter 812 amended Welfare and Institutions Code section 4117 to provide some state reimbursement for Penal Code section 2966 hearings:

Therefore, staff finds that any reimbursement allowed for Penal Code section 2966 hearings under Welfare and Institutions Code section 4117, as enacted by Statutes 2006, chapter 812, is effective on January 1, 2007 and shall be offset from any reimbursement claims.

Staff Recommendation

Staff recommends that the Commission adopt the proposed parameters and guidelines, as modified by staff, beginning on page 11.

Staff also recommends that the Commission authorize staff to make any non-substantive, technical corrections to the parameters and guidelines following the hearing.

STAFF ANALYSIS

Claimant

County of San Bernardino

Chronology

07/05/01 County of San Bernardino filed test claim with Commission (00-TC-28)

08/03/01 The Department of Corrections submitted comments

08/09/01 The Department of Finance submitted comments

09/05/01 County of San Bernardino requested an extension of time through October 25, 2001 to respond to comments

09/07/01 Commission staff granted request for extension to respond to comments on or before October 25, 2001

11/08/01 County of San Bernardino requested an extension of time until December 3, 2001 to respond to comments

11/09/01 Commission staff granted request for extension to respond to comments on or before December 3, 2001

02/05/02 County of San Bernardino requested an extension of time until February 22, 2002 to respond to comments

02/06/02 Commission staff granted request for extension to respond to comments on or before March 8, 2002

02/27/02 County of San Bernardino filed reply to Department of Finance comments

01/19/06 Commission staff issued draft staff analysis

02/03/06 County of San Bernardino filed comments on draft staff analysis

03/02/06 County of San Bernardino filed amendment to test claim (05-TC-06)

05/26/06 Department of Finance waived its comment period on the amendment

05/26/06 Commission staff issued draft staff analysis based on amended test claim

06/23/06 County of San Bernardino filed comments on amended draft staff analysis

07/11/06 Commission staff issued final staff analysis

07/28/06 Commission adopted Statement of Decision

08/07/06 Commission staff issued draft parameters and guidelines

08/22/06 Claimant submitted comments on draft parameters and guidelines

10/27/06 Department of Finance issued comments on draft parameters and guidelines

11/08/07 Commission staff issued draft staff analysis and proposed parameters and guidelines

11/20/07 Commission staff issued final staff analysis and proposed parameters and guidelines

Summary of the Mandate

The test claim statutes set forth procedures for civil court hearings that are initiated by a prisoner or parolee who wishes to contest a finding, made at the time of parole or upon termination of parole, that he or she meets the mentally disordered offender criteria, as defined. If the person requests it, the court shall conduct such a hearing; the district attorney is required to represent the people and the public defender is required to represent the person if he or she is indigent.

On July 28, 2006, the Commission adopted the Statement of Decision for *Mentally Disordered Offenders (MDO): Treatment as a Condition of Parole* (00-TC-28, 05-TC-06).² The Commission found that the test claim legislation constitutes a new program or higher level of service and imposes a state-mandated program on local agencies within the meaning of article XIII B, section 6, of the California Constitution and Government Code section 17514 to perform the following activities resulting from Penal Code section 2966 hearings:

- district attorney services to represent the people; and
- public defender services to represent indigent prisoners or parolees.

Discussion

Commission staff prepared and issued the draft parameters and guidelines on August 7, 2006.³ The proposed reimbursable activities were limited to those approved in the Statement of Decision.

On August 22, 2006, the claimant submitted comments on the draft.⁴ In their comments they proposed a detailed listing of the reimbursable activity components, stating that these components serve to break down the reimbursable activities approved in the Statement of Decision to measurable pieces and represent reasonable methods of complying with the mandate. On October 27, 2006, the Department of Finance submitted comments on the claimant's proposal.⁵ Staff modified the draft parameters and guidelines to include the components proposed by the claimant and to address Finance's comments as discussed below. On November 13, 2007, staff issued the draft staff analysis and proposed parameters and guidelines. No comments were filed on the draft staff analysis. However, staff did make one minor clarification to reimbursable activities as discussed below.

I. Summary of the Mandate

Staff added a paragraph to summarize the mandated program, upon request of the claimant.

II. Eligible Claimants

Staff deleted cities as eligible claimants because they do not implement this program.

² Exhibit A.

³ Exhibit A.

⁴ Exhibit B.

⁵ Exhibit C.

IV. *Reimbursable Activities*

A. One-Time Activities

Claimant proposed adding the following one-time activities:

1. *Developing policies and procedures to implement Penal Code section 2966.*

Department of Finance commented that district attorneys and public defenders have existing policies and procedures regarding involuntary committal of potential parolees under Penal Code section 2972. Therefore, this activity should be limited to updating the existing policies and procedures to add the new procedure for civil court filings under Penal Code section 2966. However, staff finds that since this program was implemented between 1985 and 1994, and reimbursement for the program does not begin until 2000, policies and procedures would have been updated outside of the period of reimbursement. Thus, staff did not include this activity.

2. *Developing or procuring computer software to track Penal Code 2966 petitioner status.*

Finance recommended that this activity be deleted because all California sheriffs' facilities have existing computer software systems to track their own inmates as well as inmates in transit to other jurisdictions. Counties are already being reimbursed under a similar program (*Mentally Disordered Offenders' (MDO) Extended Commitment Proceedings*, 98-TC-09) to develop or procure computer software to track the status of committed persons. There is no evidence in the record that a new system is necessary to track persons for the program here, or that counties could not use the existing computer software. Therefore, staff did not include this activity in the proposed parameters and guidelines.

3. *Initial training of staff on the mandated Penal Code Section 2966 activities.*

Department of Finance recommended that training be deleted. Counties are already implementing a similar MDO program, and therefore training on the program here is not necessary.

Staff makes the following findings regarding one-time employee training:

- *Psychiatrists and Psychologists.* Participating psychiatrists and psychologists attend continuing education each year to retain their licenses, and therefore, staff finds that training of psychiatrists and psychologists is not necessary to carry out the mandated program.
- *District attorneys and Public Defenders.* Rule 3-110 of the California Rules of Professional Conduct, enacted in 1975⁶, requires all attorneys to be competent in the area of practice and obligates attorneys to acquire sufficient learning and skill before performance is required.⁷ Therefore, sufficient training for attorneys on the handling of Penal Code section 2966 hearings is not an activity imposed by the test claim statute, but a *pre-existing* obligation imposed by the California Rules of Professional Conduct. Accordingly, staff finds that attorney training regarding the Penal Code section 2966 hearings is not required, nor reimbursable.

⁶ This rule was originally numbered Rule 6-101, and later renumbered as 3-110.

⁷ Exhibit D.

However, staff finds that *one-time* training regarding a county's internal policies and procedures on Penal Code section 2966 hearings for each employee, including district attorneys, public defenders, investigators, and all administrative staff, such as secretaries and paralegals, who work on this program is necessary to carry out the mandated program and is reimbursable.

Staff limited training to initial training of district attorneys, public defenders, and administrative staff including paralegal and secretarial staff on mandated activities, and further limited the training to one time per employee.

B. Ongoing Activities

Claimant proposed the following ongoing activities that were included by staff without substantive change. Claimants declared under penalty of perjury in their test claim that these ongoing activities are necessary to conduct and participate in the hearings required by the test claim statutes. In addition, these activities are similar to the activities approved in the other MDO mandated program (*Mentally Disordered Offenders' Extended Commitment Proceedings*, 98-TC-09). Therefore, staff finds that the following ongoing activities are necessary to carry out the mandate, and included them in the proposed parameters and guidelines.

1. *Review relevant documentation, including pertinent Board of Prison Terms hearing and appeal documents; pertinent medical records; Conditional Release Program records, police and probation reports; criminal histories, pertinent evaluations of petitioner and records of prior MDO proceedings.*
2. *Review and file motions with superior court.*
3. *Travel to and from state hospitals, prisons and county jails where detailed medical records and case files are maintained.*
4. *Travel to and from state hospitals, prisons and county jails by the defense counsel in order to meet with the prisoner client.*
5. *Prepare and represent the state and the indigent prisoner or parolee in a bench or jury trial to decide whether or not the petitioner meets the criteria to be committed under Penal Code Section 2966.*
6. *Copying charges and long distance telephone charges related to the above activities.*

Claimants also proposed the following activities. Staff did make substantive changes to these activities:

1. *Prepare and represent the state and indigent prisoner or parolee in civil hearings on the petition regarding the appeal of the petitioner's MDO status under Penal Code section 2962.*

Staff did not include this activity because counties are already reimbursed for this activity under the other MDO program: *Mentally Disordered Offenders' Extended Commitment Proceedings*, 98-TC-09. In addition, this activity goes beyond the scope of the Commission's findings in the Statement of Decision.

2. *Retain necessary experts, investigators and professionals to prepare for and testify at any civil trial and any subsequent petition hearings.*

Staff revised this activity to remove the language “and any subsequent petition hearings” because it exceeds the scope of the Commission’s findings in the Statement of Decision. The reference to “any civil trial” was changed to “the civil trial conducted pursuant to Penal Code section 2966 hearings” in order to limit reimbursable activities to the hearings at issue.

3. *Travel to and from court.*

Staff did not include this activity. The activity below provides reimbursement for transportation of petitioners, and travel for county employees would be claimed under indirect costs. Therefore, the activity is not necessary to carry out the mandated program.

4. *Provide transportation, care and custody of Penal Code Section 2966 petitioners before, during and after the civil hearings by the County Sheriff’s Department.*

Finance recommends that this activity be limited to transportation of Penal Code 2966 petitioners, because care and custody of said petitioners is not found in the Statement of Decision.

The Statement of Decision indicates that although sheriffs’ department transportation and custodial services may in fact be reasonably necessary to comply with the mandate, the plain meaning of the test claim statute is limited to district attorney and public defender services. The statute does not include sheriff’s department services, and therefore, these activities can only be considered for reimbursement, when claimant proposes them, at the parameters and guidelines phase. Claimant did propose them at the parameters and guidelines phase. Staff finds that the activities of transporting and custodial service of Penal Code section 2966 petitioners is necessary to carry out the mandated program. The law authorizes incarcerated prisoners to request the hearings, and since they are incarcerated, the county is responsible for transporting and caring for them while they are at the court facility for the hearing, and then returning them to the prison facility. In addition, this activity was approved for the other MDO program: *Mentally Disordered Offenders’ Extended Commitment Proceedings*, 98-TC-09. Following issuance of the draft staff analysis,⁸ staff further clarified that transportation of Penal Code section 2966 petitioners is limited to incarcerated prisoners, since counties would not be responsible for transporting parolees who have requested Penal Code section 2966 hearings.

5. *Attendance and participation in continuing training necessary to retain professional competence in MDO cases, civil trial skills, and associated mental health issues.*

Finance recommends this activity be deleted because psychiatrists and psychologists are required to attend a specific number of continuing education hours per year to retain their licenses. And, county district attorneys and public defenders participate in civil forfeiture, probate, and conservatorship cases, thus making ongoing training a current expectation for the general duties of their employment. Staff agrees and deleted ongoing training for any employee. As stated previously, staff also clarified that *no* training for psychiatrists or psychologists is reimbursable.

⁸ Exhibit F.

VII. Offsetting Revenue and Reimbursements

On page 15 of the Statement of Decision, the Commission made a specific finding that there were no offsetting reimbursements for this program:

Neither [Welfare and Institutions Code] section 4117, nor any other statutory or Budget Act provisions, provide for reimbursement for costs incurred by counties for hearings conducted pursuant to Penal Code section 2966. Therefore, Government Code section 17556, subdivision (e), is inapplicable to deny the test claim.

However, after the Statement of Decision was adopted, Statutes 2006, chapter 812 amended Welfare and Institutions Code section 4117 as follows to provide some state reimbursement for Penal Code section 2966 hearings:

(a) Whenever a trial is had of any person charged with escape or attempt to escape from a state hospital, whenever a hearing is had on the return of a writ of habeas corpus prosecuted by or on behalf of any person confined in a state hospital except in a proceeding to which Section 5110 applies, whenever a hearing is had on a petition under Section 1026.2, subdivision (b) of Section 1026.5, Section 2972, or Section 2966 of the Penal Code, Section 7361 of this code, or former Section 6316.2 of this code for the release of a person confined in a state hospital, and whenever a person confined in a state hospital is tried for any crime committed therein, the appropriate financial officer or other designated official of the county in which the trial or hearing is had shall make out a statement of all mental health treatment costs and shall make out a separate statement of all nontreatment costs incurred by the county for investigation and other preparation for the trial or hearing, and the actual trial or hearing, all costs of maintaining custody of the patient and transporting him or her to and from the hospital, and costs of appeal, which statements shall be properly certified by a judge of the superior court of that county and the statement of mental health treatment costs shall be sent to the State Department of Mental Health and the statement of all nontreatment costs shall be sent to the Controller for approval. After approval, the department shall cause the amount of mental health treatment costs incurred on or after July 1, 1987 to be paid to the county of mental health director or his or her designee where the trial or hearing was held out of the money appropriated for this purpose by the Legislature. In addition, the Controller shall cause the amount of all nontreatment costs incurred on and after July 1, 1987, to be paid out of the money appropriated by the Legislature, to the county treasurer of the county where the trial or hearing was had.

(b) Whenever a hearing is held pursuant to Section 1604, 1608, ~~or 1609~~, or 2966 of the Penal Code, all transportation costs to and from a state hospital or a facility designated by the community program director during the hearing shall be paid by the Controller as provided in this subdivision. The appropriate financial officer or other designated official of the county in which a hearing is held shall make out a statement of all transportation costs incurred by the county, which statement shall be properly certified by a judge of the superior court of that county and sent to the Controller for approval.

The Controller shall cause the amount of transportation costs incurred on and after July 1, 1987, to be paid to the county treasurer of the county where the hearing was had out of the money appropriated by the Legislature.

As used in this subdivision the community program director is the person designated pursuant to Section 1605 of the Penal Code.

Welfare and Institutions Code section 4117 was added in 1967⁹ and amended in 1986¹⁰ to add, among other things, state reimbursement for Penal Code section 2970 hearings on and after July 1, 1987. Although the plain language of the statute as it reads with the 2006 amendment – adding reimbursement for Penal Code section 2966 hearings – indicates the Controller should reimburse for costs incurred on and after July 1, 1987, the rules of statutory construction call for a presumption against the retroactive application of the statute as it applies to Penal Code section 2966 unless the intention to make it retroactive clearly appears from the act itself or by unavoidable implication.¹¹ Here, there is no indication from the 2006 statutory language or the legislative history that the Legislature intended to make reimbursement for Penal Code section 2966 hearings retroactive. Moreover, Penal Code section 2966 was in effect in 1986 when reimbursement for section 2970 hearings was first provided; the Legislature could have included reimbursement for section 2966 hearings at that time but did not.

Therefore, staff finds that any reimbursement allowed for Penal Code section 2966 hearings under Welfare and Institutions Code section 4117, as enacted by Statutes 2006, chapter 812, is effective on January 1, 2007, and shall be offset from reimbursement claims.

Staff Recommendation

Staff recommends that the Commission adopt the proposed parameters and guidelines, as modified by staff, beginning on page 11.

Staff also recommends that the Commission authorize staff to make any non-substantive, technical corrections to the parameters and guidelines following the hearing.

⁹ Statutes 1967, chapter 1667.

¹⁰ Statutes 1986, chapter 1020.

¹¹ *In re Marriage of McClellan* (2005) 130 Cal.App.4th 247, 254.