ITEM 8

TEST CLAIM
FINAL STAFF ANALYSIS

Penal Code Section 2966
Statutes 1985, Chapter 1419[1]
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

Background

This test claim addresses the Mentally Disordered Offender law, codified in Penal Code sections 2960 et seq., which establishes continued mental health treatment and civil commitment procedures for persons with severe mental disorders, following termination of their sentence or parole.

Penal Code section 2966 sets 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.

The test claim presents the following issues:

- Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?
- Does the test claim legislation impose a "new program or higher level of service" on local agencies within the meaning of article XIII B, section 6 of the California Constitution?
- Does the test claim legislation impose "costs mandated by the state" within the meaning of article XIII B, section 6 and Government Code section 17514?

[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.

Staff Analysis

The test claim legislation mandates an activity on local agencies because it requires the district attorney to represent the people and the public defender to represent the prisoner or parolee, when he or she is indigent, at the subject court hearings. Further, since such representation is a peculiarly governmental function administered by a local agency – the county district attorney's office and the county public defender's office – as a service to the public, and imposes unique requirements upon counties that do not apply generally to all residents and entities in the state, it constitutes a "program."

Moreover, the test claim legislation imposes a "new program or higher level of service" because the requirements are new in comparison to the preexisting scheme and they provide an enhanced service to the public by protecting the public from severely mentally disordered persons while ensuring a fair hearing for the prisoner or parolee.

Finally, the test claim legislation imposes "costs mandated by the state" and none of the statutory exemptions are applicable to deny the claim.

Conclusion

Staff finds that Penal Code section 2966 imposes a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for the following activities resulting from such hearings:

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

Recommendation

Staff recommends that the Commission adopt this analysis, which finds district attorney and public defender services for Penal Code section 2966 hearings are reimbursable.

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	Request for extension to respond to comments on or before October 25, 2001 was granted
11/08/01	County of San Bernardino requested an extension of time until December 3, 2001 to respond to comments
11/09/01	Request for extension to respond to comments on or before December 3, 2001 was granted
02/05/02	County of San Bernardino requested an extension of time until February 22, 2002 to respond to comments
02/06/02	Request for extension to respond to comments was granted; comments due 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

Background

This test claim addresses the Mentally Disordered Offender law, codified in Penal Code sections 2960 et seq., which establishes continued mental health treatment and civil commitment procedures for persons with severe mental disorders, following termination of their sentence or parole.

Overview of Mentally Disordered Offender Program

Since 1969, the Mentally Disordered Offender law has required certain offenders who have been convicted of specified violent crimes to receive treatment by the Department

of Mental Health as a condition of parole.[2] Penal Code section 2960 establishes the Legislature's intent to protect the public by requiring those prisoners who received a determinate sentence and who have a treatable, severe mental disorder at the time of their parole, or upon termination of parole, to receive mental health treatment until the disorder is in remission and can be kept in remission. Section 2960 further states that "the Department of Corrections should evaluate each prisoner for severe mental disorders during the first year of the prisoner's sentence, and that severely mentally disordered prisoners should be provided with an appropriate level of mental health treatment while in prison and when returned to the community."

To impose mental health treatment as a condition of parole, the prospective parolee must have: 1) a severe mental disorder that is not in remission or cannot be kept in remission without treatment, and the disorder was one of the causes of or was an aggravating factor in the commission of the crime for which the prisoner was sentenced to prison; 2) been in treatment for 90 days or more within the year prior to his or her parole or release; and 3) been certified by designated mental health professionals as meeting conditions 1 and 2 above, in addition to representing a substantial danger of physical harm to others by reason of the severe mental disorder.[3]

Prior to release on parole or prior to termination of parole, such a person must be evaluated and certified by mental health professionals as to whether he or she meets the mentally disordered offender criteria set forth in Penal Code section 2962.[4] The person has the right to a hearing before the Board of Prison Terms to contest such a finding that he or she meets the mentally disordered offender criteria.[5] If the person is dissatisfied with the results of the Board of Prison Terms hearing, the person may petition the superior court for a civil hearing to determine whether he or she meets the mentally disordered offender criteria.[6]

The evaluation must also be submitted to the district attorney of the county in which the person is being treated, incarcerated or committed not later than 180 days prior to termination of parole or release from parole.[7] The district attorney may then file a petition in superior court for continued involuntary treatment for one year and the court shall conduct a civil hearing on the matter.[8]

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[2] Penal Code section 2962, subdivisions (a) through (f).

[3] Penal Code section 2962, subdivisions (a) through (d).

[4] Penal Code section 2962, subdivision (d).

[5] Penal Code section 2966, subdivision (a).

[6] Penal Code section 2966, subdivision (b).

[7] Penal Code section 2970.

[8] Penal Code sections 2970 and 2972, subdivision (a).

If the person's severe mental disorder is put into remission during the parole period, and can be kept in remission during the parole period, the Department of Mental Health must discontinue treatment.[9]

Major legislation affecting the mentally disordered offender program came forward in 1985. That year, the Legislature enacted Statutes 1985, chapter 1418 (Senate Bill No. (SB) 1054) and Statutes 1985, chapter 1419 (SB 1296), which were double-joined. Chapter 1418 added Penal Code section 2970, to set forth procedures for the *local district attorney* to petition the court for a hearing when a mentally disordered offender is scheduled to be released from prison or parole. Penal Code section 2970 hearings were addressed in a prior test claim (98-TC-09).

Chapter 1419 amended Penal Code section 2960, adding subdivision (d) text to set forth procedures for allowing a *prisoner or parolee* to petition the court for a hearing to contest a Board of Prison Terms determination that he or she meets the mentally disordered offender criteria. Although chapter 1419 was not pled in the original test claim, the test claim was amended on March 2, 2006 to add it.

The two types of hearing and the statutes affecting them are further described below.

Prior Test Claim -- District Attorney-Initiated Court Hearings (Pen. Code, §§ 2970, 2972 and 2972.1)

District Attorney-initiated court hearings under the Mentally Disordered Offender law, established by Statutes 1985, chapter 1418, were the subject of a prior test claim[10] in which the Commission on State Mandates found a reimbursable state-mandated program was imposed on local agencies. That prior test claim addressed Penal Code sections 2970, 2972 and 2972.1, which established court procedures initiated by the local district attorney to extend for one year the involuntary treatment of a mentally disordered offender. The district attorney may extend involuntary treatment if the offender's severe mental disorder is not in remission or cannot be kept in remission without treatment.

Not later than 180 days prior to the termination of parole, the professionals treating the prisoner or parolee are required to submit a written evaluation to the district attorney in the county of treatment or commitment. The district attorney reviews the evaluation and files a Penal Code section 2970 petition in the superior court for continued involuntary treatment for one year and the court conducts a civil hearing on the matter.

For that test claim, the following activities were determined to be reimbursable:

1. review the state's written evaluation and supporting affidavits indicating that the offender's severe mental disorder is not in remission or cannot be kept in remission without continued treatment (Pen. Code, § 2970);
2. prepare and file petitions with the superior court for the continued involuntary treatment of the offender (Pen. Code, § 2970);

[9] Penal Code section 2968.

[10] *Mentally Disordered Offenders' Extended Commitment Proceedings*, Test Claim number 98-TC-09.

3. represent the state and the indigent offender in civil hearings on the petition and any subsequent petitions or hearings regarding recommitment (Pen. Code, §§ 2972, 2972.1);
4. retain necessary experts, investigators, and professionals to prepare for the civil trial and any subsequent petitions for recommitment;
5. travel to and from state hospitals where detailed medical records and case files are maintained; and
6. provide transportation and custody of each potential mentally disordered offender before, during, and after the civil proceedings by the County Sheriff's Department.

Prisoner- or Parolee-Initiated Court Hearings [Pen. Code, § 2960, subdivision (d), & Pen. Code § 2966]

Prisoner- or parolee-initiated court hearings under the Mentally Disordered Offender law, established by Statutes 1985, chapter 1419, are the subject of this test claim. Codified originally in Penal Code section 2960, subdivision (d), the provisions for these court hearings are currently set forth in Penal Code section 2966. Such hearings 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. Section 2960, subdivision (d), as it was originally enacted, provided that:

- A prisoner or parolee may request a hearing before the Board of Prison Terms, and the Board shall conduct a hearing if so requested, for the purpose of the prisoner proving that he or she does not meet the mentally disordered offender criteria.
- At the hearing the burden of proof shall be on the person or agency who certified the prisoner or parolee as meeting the mentally disordered offender criteria.
- If the prisoner or parolee, or any person appearing on his or her behalf at the hearing requests it, the Board of Prison Terms shall appoint two independent professionals for further evaluation.
- The prisoner or parolee shall be informed at the Board of Prison Terms hearing of his or her right to file a petition in the superior court for a trial on whether he or she meets the mentally disordered offender criteria. The Board of Prison Terms shall provide a prisoner or parolee who requests a trial a petition form and instructions for filing the petition.
- A prisoner or parolee who disagrees with the determination of the Board of Prison Terms that he or she meets the mentally disordered offender criteria may file a petition for a hearing in the superior court of the county in which he or she is incarcerated or is being treated.
- The court shall conduct a hearing on the petition within sixty calendar days after the petition is filed, unless either: 1) time is waived by the petitioner or his counsel; or 2) good cause is shown to delay the hearing.

- The order of the Board of Prison Terms shall be in effect until the completion of the court proceedings.
- The court shall advise the petitioner of his or her right to be represented by an attorney and of the right to a jury trial.
- The attorney for the petitioner shall be given a copy of the petition, and any supporting documents.
- The hearing shall be a civil hearing; however, in order to reduce costs, the rules of criminal discovery, as well as civil discovery, shall be applicable.
- The standard of proof shall be beyond a reasonable doubt, and if the trial is by jury, the jury shall be unanimous in its verdict. The trial shall be by jury unless waived by both the petitioner and the district attorney.
- The hearing procedures are applicable to a continuation of a parole pursuant to Penal Code section 3001, which provides for discharge from parole unless the Department of Corrections recommends to the Board of Prison Terms that the person be retained on parole, and the Board, for good cause, determines that the person will be retained.

These basic provisions were subsequently modified as follows:

1. Statutes 1986, Chapter 858, Section 4 (SB 1845) – This statute renumbered the existing provisions of section 2960, and in so doing created section 2966.

2. Statutes 1987, Chapter 687, Section 8 (SB 425) **–** This statute modified the provisions to specify the time frame for examining the person's mental state.

3. Statutes 1988, Chapter 658, Section 1 (SB 538) – This statute clarified the scope of the Penal Code section 2966 hearing.

4. Statutes 1989, Chapter 228, Section 2 (SB 1625) **–** This statute enacted an additional requirement for finding a severe mental disorder, i.e., that the prisoner or parolee represents a substantial danger of physical harm to others, as a result of *People v. Gibson* (1988) 204 Cal.App.3d 1425. The *Gibson* court found that the mentally disordered offender legislation violated the equal protection clause of the United States and California Constitutions by not requiring current proof of dangerousness as required of other adult persons involuntarily committed for mental health treatment.

5. Statutes 1994, Chapter 706, Section 1 (SB 1918) – This statute modified Penal Code section 2966 regarding admissible evidence, and to provide that, if the court reverses the Board's decision, the court shall stay execution of decision for five working days to allow for orderly release of the prisoner.

Claimant's Position

The County of San Bernardino contends that the test claim statutes constitute a reimbursable state-mandated local program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

The County is seeking reimbursement for the following activities:

- District Attorney services to represent the people, and Public Defender services to represent indigent petitioners, both of which are specialized to deal with complex psychiatric issues, including travel time for these personnel.
- Forensic expert witness and investigator services.
- Sheriff's department services for transporting inmates between prison or the state hospital and court house, care and custody associated with confinement awaiting, during and after the court proceeding.

Claimant filed comments in response to Department of Finance, rejecting the Department's assertions that costs to implement the test claim legislation are related to enforcement of a changed penalty for a crime, and therefore must be denied under Government Code section 17556, subdivision (g). This is addressed in Issue 3 of the following analysis.

Claimant filed an amendment to the test claim to include the original legislation (Stats. 1985, ch. 1419) which established the provisions allowing the prisoner or parolee to initiate a hearing contesting a finding that he or she meets the mentally disordered offender criteria.

In response to the subsequent draft staff analysis that was issued, claimant commented that the analysis "did not acknowledge in the conclusion, nor discuss within the document body, the fact that both [district attorney and public defender] services are specialized to deal with complex psychiatric issues." Claimant further asserted:

> MDO commitment trials pursuant to Penal Code §2966, address the diagnosis of a mental disorder, its remission status, and an assessment of risk stemming from the diagnosed mental disorder. These are precisely the issues addressed in MDO commitment trials pursuant to Penal Code §2970 and 2972, for which the above referenced 'activities' have been found to be reimbursable. MDO adjudications, whether pursuant to 2966 or 2970/2972, are by definition, expert driven. Representation without the assistance of expert witnesses would constitute ineffective assistance of counsel.

Claimant then asserted that the term 'activities' as referenced regarding district attorney and public defender services "is a broader term and encompasses more than the District Attorney 'services' and Public Defender 'services' as listed in the conclusion of the draft staff analysis." As a result, claimant stated it is "interpreting the 'Activities' as referenced above to include expert witnesses, investigators, and sheriff's department and custodial services, based on Footnote 25" of the draft staff analysis. These comments are addressed in Issue 1 of the following analysis.

Position of Department of Corrections

The Department of Corrections filed comments on August 3, 2001, citing additional workload and subpoenas for mental health professionals at the Department resulting from mentally disordered offender evaluations. Hearings are particularly increasing in San Bernardino County as a result of mentally disordered offenders being placed in Patton State Hospital, which is located within that county. The Department stated that it had received approximately 20 such subpoenas in the last year, and "[i]t is evident that

county resources are impacted by the necessity of conducting these hearings as well." The comments further noted that "[t]he Department of Mental Health has indicated that increasing numbers of [mentally disordered offender] cases will be placed at [Patton State Hospital], at least over the next year or so."

The Department stated that it "appears the County's claim for reimbursement does have merit."

Position of Department of Finance

The Department of Finance filed comments on August 9, 2001, stating that the test claim legislation should not be considered a reimbursable mandate because "the costs claimed for reimbursement are related to enforcement of a changed penalty for a crime or infraction, as specified in Government Code section 17556(g)."

The basis for the Department's argument is that when a petitioner is requesting a hearing to contest a condition of parole, in effect he or she is petitioning to change the penalty for a crime. The county is responsible to provide a sentencing hearing, which determines the penalty for a crime. In this case, the hearing requested by the inmate is a "continuation of the pre-incarceration hearing that is the responsibility of the county." Therefore the costs should not be reimbursable under article XIII B, section 6 of the California Constitution.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[11] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[12] "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 responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[13] 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.[14] In addition, the required activity or task must be

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[11] 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."

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

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

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

new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[15]

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."[16] 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.[17] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[18]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[19]

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.[20] 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."[21]

This test claim presents the following issues:

- Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?
- Does the test claim legislation impose a "new program" or "higher level of service" on local agencies within the meaning of article XIII B, section 6 of the California Constitution?

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[15] *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*).

[16] *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.).

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

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

[19] *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.

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

[21] *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.

- Does the test claim legislation impose "costs mandated by the state" within the meaning of article XIII B, section 6 and Government Code section 17514?

Issue 1: Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

In order for a test claim statute to impose a reimbursable state mandated program under article XIII B, section 6, the statutory language must mandate an activity or task upon local governmental agencies. If the statutory language does not mandate or require local agencies to perform a task, then article XIII B, section 6, is not triggered.

Here, claimant is seeking reimbursement for services of the district attorney to represent the people, services of the public defender to represent indigent prisoners or parolees, forensic expert witness and investigative services, and sheriff's department services for transportation and custodial matters. The Penal Code provides that, when a prisoner or parolee initiates a court hearing under the mentally disordered offender program, the "court shall conduct a hearing on the petition…,"[22] the "court shall advise the petitioner of his or her right to be represented by an attorney and of the right to a jury trial"[23] and "the trial shall be by jury unless waived by both the person and the district attorney."[24]

Thus, once the prisoner or parolee petitions the court for a Penal Code section 2966 hearing, the court shall conduct it. The test claim legislation requires the district attorney to represent the people in any such hearing. Because the statute also gives the prisoner or parolee "the right to be represented by an attorney," the public defender is required to represent the prisoner or parolee when he or she is indigent. Therefore, staff finds that activities of the district attorney, representing the people, and public defender, representing indigent offenders, are mandated by the test claim legislation.

Claimant asserts that, based on the statements in footnote number 25 of the draft staff analysis, it is more broadly interpreting the 'activities' of the district attorney and public defender to include expert witnesses, investigators, and sheriff's department transportation and custodial services. In the draft staff analysis, the text of footnote number 25 read:

> The Commission can consider claimant's request for reimbursement for expert witnesses, investigators, and sheriff's department transportation and custodial services at the parameters and guidelines stage to determine whether these services are needed as a reasonable method of complying with the mandate pursuant to California Code of Regulations, title 2, section 1183.1, subdivision (a)(4).

California Code of Regulations, title 2, section 1183.1 states that parameters and guidelines shall describe the claimable reimbursable costs and include a "description of the specific costs and types of costs that are reimbursable, … and a description of the most reasonable methods of complying with the mandate." Section 1183.1,

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[22] Penal Code section 2966, subdivision (b).

[23] *Ibid.*

[24] *Ibid.*

subdivision (a)(4), defines "the most reasonable methods of complying with the mandate" as "those methods not specified in statute or executive order that are necessary to carry out the mandated program." Government Code section 17557 requires successful test claimants to submit proposed parameters and guidelines within 30 days of adoption of a statement of decision on a test claim.

Although the expert witness, investigator, and sheriff's 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 the district attorney and public defender services. The statute *does not* include expert witnesses, investigators, or sheriff's department services. Therefore, these activities can *only* be considered for reimbursement, when claimant proposes them, at the parameters and guidelines stage.

The test claim legislation must also constitute a "program" in order to be subject to article XIII B, section 6 of the California Constitution. Commission staff finds representation by the district attorney and public defender at the subject hearings does constitute a program for the reasons stated below.

The relevant tests regarding whether test claim legislation constitutes a "program" within the meaning of article XIII B, section 6 are set forth in case law. The California Supreme Court, in the case of *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, defined the word "program" within the meaning of article XIII B, section 6 as a program that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[25]

Here, the district attorney represents the people at the subject hearings, and the public defender represents the prisoner or parolee. Such representation is a peculiarly governmental function administered by a local agency – the county district attorney's office and the county public defender's office – as a service to the public. Moreover, the test claim legislation imposes unique requirements upon counties that do not apply generally to all residents and entities in the state.

Accordingly, staff finds that the test claim legislation mandates an activity or task upon local agencies and constitutes a "program." Therefore, the test claim legislation is subject to article XIII B, section 6 of the California Constitution.

Issue 2: Does the test claim legislation impose a "new program or higher level of service" on local agencies within the meaning of article XIII B, section 6 of the California Constitution?

The courts have held that legislation imposes a "new program" or "higher level of service" when: a) the requirements are new in comparison with the preexisting scheme; and b) the requirements were intended to provide an enhanced service to the public.[26] To

[25] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56 (*County of Los Angeles)*.

[26] *San Diego Unified School Dist. v. Commission on State Mandates, supra*, 33 Cal.4th 859, 878; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

make this determination, the test claim legislation must initially be compared with the legal requirements in effect immediately prior to its enactment.[27]

The test claim statutes require counties to provide district attorney and public defender services — for indigent persons — when a prisoner or parolee requests a court hearing to contest a finding that he or she meets the mentally disordered offender criteria. The law in effect immediately prior to the test claim statutes allowed for commitment of inmates or parolees to a state hospital under the Welfare and Institutions Code, but did not require any of the activities or procedures set forth in the test claim legislation. Therefore, staff finds that the requirements of the test claim legislation are new in comparison with the preexisting scheme.

Staff further finds that the requirements in the test claim legislation were intended to provide an enhanced service to the public by protecting the public from severely mentally disordered persons while ensuring a fair hearing for the prisoner or parolee.

Issue 3: Does the test claim legislation impose "costs mandated by the state" within the meaning of article XIII B, section 6 and Government Code section 17514?

For the mandated activities to impose a reimbursable, state-mandated program under article XIII B, section 6, two additional elements must be satisfied. First, the activities must impose costs mandated by the state pursuant to Government Code section 17514. Second, the statutory exceptions to reimbursement listed in Government Code section 17556 cannot apply.

Government Code section 17514 defines "costs mandated by the state" as any increased cost a local agency is required to incur as a result of a statute that mandates a new program or higher level of service. The test claim alleged costs of $110,000 for a district attorney, $130,000 for a public defender, and $50,000 for sheriff's office services for a complete fiscal year of 2000/2001. Thus, there is evidence in the record, signed under penalty of perjury, that there are increased costs as a result of the test claim legislation.

Government Code section 17556 lists several exceptions which preclude the Commission from finding costs mandated by the state. For the reasons stated below, staff finds that none of the exceptions apply to deny this test claim.

Government Code section 17556, subdivision (b), requires the Commission to deny the test claim where the test claim statute "affirmed for the state a mandate that had been declared existing law or regulation by action of the courts." In *People v. Gibson* (1988) 204 Cal.App.3d 1425, the court found that the test claim legislation violated the equal protection clause of the United States and California Constitutions by not requiring current proof of dangerousness as required of other adult persons involuntarily committed for mental health treatment.[28] In response to *Gibson,* Penal Code section 2966, subdivision (c), was modified to add another condition that must be met in order to

[27] *Ibid.*

[28] *Gibson, supra,* 204 Cal.App.3d 1425, 1437.

continue involuntary mental health treatment.[29] The condition is whether, by reason of his or her severe mental disorder, the prisoner or parolee represents a substantial danger of physical harm to others.

Although this new provision expands the scope of the Penal Code section 2966 hearing by requiring proof of an additional element, i.e., current proof of dangerousness, staff finds that the first test claim statute actually created the mandate for district attorney and public defender services. This additional element cannot feasibly be considered a separate, mandated activity, but instead is "part and parcel" to the original mandated hearing activities.[30] Therefore, Government Code section 17556, subdivision (b), is inapplicable to deny the test claim.

Government Code section 17556, subdivision (c), requires the Commission to deny the test claim where the test claim statute "imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute … mandates costs that exceed the mandate in that federal law or regulation."

Here, the hearing can result in involuntary commitment and treatment of the prisoner or parolee beyond the parole termination date. Although the Mentally Disordered Offender legislation is located in the Penal Code, the California Appellate Court has held that the statutory scheme is civil rather than penal.[31] The U.S. Supreme Court has repeatedly found that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection,[32] and some courts have determined that the assistance of counsel under those circumstances is required to meet federal due process standards.[33] Moreover, California courts recognize that legal services for indigent persons at public expense are mandated in civil proceedings relating to mental health matters where restraint of liberty is possible.[34]

Thus, the question is whether public defender services for indigent prisoners or parolees results in costs mandated by the federal government — in the form of constitutional rights to counsel under the Sixth Amendment and rights to due process under the Fourteenth Amendment. Staff finds the public defender services do not result in costs mandated by the federal government for the reasons stated below.

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[29] Statutes 1989, chapter 228; Senate Bill 1625 (as amended April 27, 1989), Senate Committee on Judiciary Analysis (1989-90 Regular Session), May 2, 1989, pages 1-2.

[30] Cf. *San Diego Unified School Dist. v. Commission on State Mandates, supra,* 33 Cal.4th 859, 881-882.

[31] *People v. Robinson* (1998) 63 Cal.App.4th 348, 352 *(Robinson)*; *People v. Superior Court (Myers)* (1996) 50 Cal.App.4th 826 *(Myers)*.

[32] *Addington v. Texas* (1979) 441 U.S. 418.

[33] *Heryford v. Parker* (10th Cir. 1968) 396 F.2d 393, where the court held that a civil proceeding resulting in involuntary treatment commands observance of the constitutional safeguards of due process, including the right to counsel.

[34] *Phillips v. Seely* (1974) 43 Cal.App.3d 104, 113; *Waltz v. Zumwalt* (1985) 167 Cal.App.3d 835, 838.

The California Supreme Court in *San Diego Unified School Dist.*[35] addressed the issue of costs mandated by the federal government in the context of school expulsion due process hearings. There, the relevant test claim statute compelled suspension and mandated a recommendation of expulsion for certain offenses, which then triggered a mandatory expulsion hearing.[36] It was not disputed that the resulting expulsion hearing was required to "comply with basic federal due process requirements, such as notice of charges, a right to representation by counsel, an explanation of the evidence supporting the charges, and an opportunity to call and cross-examine witnesses and to present evidence."[37]

The court stated that in the absence of the mandatory provision, a school district would not automatically incur the due process hearing costs that are mandated under federal law.[38] Further, the mandatory expulsion provision did not implement a federal law or regulation, since the federal law did not at the time mandate an expulsion recommendation or expulsion for the cited offenses.[39] Even the provisions setting forth expulsion hearing *procedures* did not in themselves require the school district to incur any costs, since neither those provisions nor federal law required that any such expulsion recommendation be made in the first place.[40] The court concluded:

> Because it is state law [the mandatory expulsion provision], and not federal due process law, that requires the District to take steps that in turn require it to incur hearing costs, it follows … that we cannot characterize *any* of the hearing costs incurred by the District, triggered by the mandatory [state] provision …, as constituting a federal mandate (and hence being nonreimbursable). We conclude that under the statutes existing at the time of the test claim in this case …, *all* such hearing costs—those designed to satisfy the minimum requirements of federal due process, and those that may exceed those requirements—are, with respect to the mandatory expulsion provision …, state mandated costs, fully reimbursable by the state. (Emphasis in original.)[41]

Like the test claim legislation in the *San Diego Unified School Dist.* case, there is no pre-existing federal statutory scheme requiring the states to implement civil commitment proceedings for mentally disordered offenders. Rather, the civil proceedings set forth in the test claim statute constitute a new state program, and counties would not otherwise be compelled to provide defense services to indigent persons wishing to contest involuntary treatment or commitment if the new program had not first been created by the state.

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

[36] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 879.

[37] *Ibid.*

[38] *Id.* at 880.

[39] *Id.* at 881.

[40] *Ibid.*

[41] *Id.* at 881-882.

Therefore, Government Code section 17556, subdivision (c), is inapplicable to deny the test claim.

Government Code section 17556, subdivision (e), requires the Commission to deny the test claim if the "statute … or an appropriation in the Budget Act or other bill provides for offsetting savings to local agencies … that result in no net costs to the local agencies …, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate." Welfare and Institutions Code section 4117 allows reimbursement to local agencies for certain mental health trials or hearings involving inmates of state mental hospitals. Section 4117 specifically allows for reimbursement of costs incurred by counties for hearings conducted as a result of district attorney-initiated petitions to continue involuntary treatment as a continuation of parole, pursuant to Penal Code section 2972.

Neither 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.

Government Code section 17556, subdivision (g), requires the Commission to deny the test claim if the "statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction." The Department of Finance, in its comments of August 9, 2001, asserted that the test claim legislation should not be considered a reimbursable mandate because "the costs claimed for reimbursement are related to enforcement of a changed penalty for a crime or infraction, as specified in Government Code section 17556 (g)."

However, as noted above, the test claim statute itself identifies the subject hearings as "civil hearings,"[42] and California courts have reaffirmed that the Mentally Disordered Offender legislation is civil rather than penal.[43] In the *Robinson* case, the Second District Court of Appeal overruled its previous determination that the Mentally Disordered Offender law was penal in nature. Citing an earlier case, it stated that the Mentally Disordered Offender scheme is "concerned with two objectives, neither of which is penal: protection of the public, and providing mental heath treatment for certain offenders who are dangerous and suffering from severe mental illnesses."[44] Based on the case law interpreting the Mentally Disordered Offender law, Government Code section 17556, subdivision (g), is inapplicable to deny the test claim.

Conclusion

Based on the foregoing, staff finds that Penal Code section 2966 imposes a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6

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[42] Penal Code section 2966, subdivision (b).

[43] *People v. Robinson, supra,* 63 Cal.App.4th 348; *People v. Superior Court (Myers)* (1996) 50 Cal.App.4th 826.

[44] *People v. Robinson, supra,* 63 Cal.App.4th 348, 352.

of the California Constitution and Government Code section 17514 for the following activities resulting from such hearings:

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

Recommendation

Staff recommends that the Commission adopt this analysis, which finds district attorney and public defender services for Penal Code section 2966 hearings are reimbursable.