BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

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| IN RE TEST CLAIM ON:<br><br>Health and Safety Code Sections 121361, 121362, 121363, 121364, 121365, 121366, 121367, 121368, and 121369, as added or amended by Statutes 1993, Chapter 676; Statutes 1994, Chapter 685; Statutes 1997, Chapters 116 and 294; and Statutes 2002, Chapter 763<br><br>Filed on September 26, 2003 by<br><br>County of Santa Clara, Claimant | Case No.: 03-TC-14<br><br>*Tuberculosis Control*<br><br>STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5. ARTICLE 7<br><br>*(Adopted October 27, 2011)* |

## STATEMENT OF DECISION

The attached statement of decision of the Commission on State Mandates is hereby adopted in the above-entitled matter.

Dated: November 1, 2011

Drew Bohan, Executive Director

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COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

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# STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on October 27, 2011. Juliana Gmur, MAXIMUS, testified on behalf of claimant, County of Santa Clara, Lehoa Nguyen and Jan Young testified on behalf of the Department of Public Health and Donna Ferebee and Jeff Carosone testified on behalf of Department of Finance.

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 the proposed statement of decision to partially approve the test claim at the hearing by a vote of 5-0.

**Summary of the Findings**

This test claim addresses the activities required of local detention facilities and local health officers (LHOs) relating to tuberculosis (TB) control. Eligible claimants for state-mandated costs imposed on LHOs include counties and the following specified cities: Berkeley, Long Beach, and Pasadena. Eligible claimants for state-mandated costs imposed on local detention facilities include all cities and counties with local detention facilities as defined by Penal Code section 6031.4. Although the test claim statutes also impose duties on health care providers, health facilities, and outpatient clinics, those activities will not be discussed in this analysis because the claimant has not requested reimbursement for those activities. Finally, duties are imposed on state correctional facilities and state parole agents and officials, but those duties are not imposed on local government and will not be addressed.

The Commission finds that Health and Safety Code sections 121361, 121362, and 121366 as added or amended by Statutes 1993, chapter 676, Statutes 1994, chapter 685, Statutes 1997, chapter 116, and Statutes 2002, chapter 763 mandate a new program or higher level of service for counties and cities and within the meaning of article XIII B, section 6 of the California Constitution, and impose costs mandated by the state pursuant to Government Code section 17514, subject to offsetting revenues described in the analysis above, only for the following activities:

- For local detention facilities to:
    - Submit notification and a written treatment plan that includes the information required by Health and Safety Code section 121362 to the LHO when a person with active TB or reasonably believed to have active TB is discharged or released from the detention facility; and
    - Submit notification and a written treatment plan that includes the information required by Health and Safety Code section 121362 to the LHO and the medical officer of the local detention facility receiving the person when a person with active TB or reasonably believed to have active TB is transferred to a local detention facility in another jurisdiction.
- For LHOs to:
    - Review for approval within 24 hours of receipt only those treatment plans submitted by a health facility; and
    - Notify the medical officer of a parole region or a physician or surgeon designated by the Department of Corrections when there are reasonable grounds to believe that a parolee has active TB and ceases treatment for TB.[1]
- For counties or specified cities to provide counsel to non-indigent TB patients who are subject to an order of detention.[2]

The Commission further concludes that all other statutes pled in this claim do not constitute reimbursable state-mandated programs because the activities are mandated by federal law or they do not impose a new program or higher level of service.

## COMMISSION FINDINGS

[1] With the exception of preparing the written treatment plans, the other activities requested by the claimant pursuant to sections 121361 and 121362 may be considered during the adoption of the parameters and guidelines. The Commission's regulations allow the Commission to consider and include activities in the parameters and guidelines that are reasonably necessary to comply with the mandated activities if there is substantial evidence in the record to support the finding. (Cal. Code Regs., tit. 2, § 1183.1(a)(4).)

[2] Health and Safety Code section 121366.

**Chronology**

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| 9/26/2003 | Claimant, County of Santa Clara, filed the test claim with the Commission on State Mandates ("Commission")[3] |
| 10/07/2003 | Commission staff issued a completeness review letter for the test claim and requested comments from state agencies |
| 11/03/2003 | Department of Finance (DOF) submitted comments on the test claim |
| 02/05/2004 | Claimant submitted a response to DOF's comments on test claim |
| 02/22/2004 | Department of Health Services (DHS) requested an extension to file comments on test claim |
| 02/25/2004 | The Commission granted DHS an extension to March 26, 2004 |
| 03/26/2004 | DHS requested an extension to file comments on test claim |
| 04/08/2004 | The Commission granted DHS an extension to May 25, 2004 |
| 05/21/2004 | DHS requested an extension to file comments on test claim |
| 05/26/2004 | The Commission granted DHS an extension to June 24, 2004 |
| 06/14/2004 | DHS requested an extension to file comments on test claim |
| 06/29/2004 | The Commission granted DHS an extension to July 26, 2004 |
| 07/26/2004 | DHS requested a 60-day extension to file comments on test claim |
| 07/27/2004 | The Commission granted DHS an extension to August 25, 2004 |
| 08/25/2004 | DHS submitted comments on the test claim |
| 04/18/2011 | Commission staff issued a request to parties, interested parties and affected state agencies for additional information |
| 05/02/2011 | Department of Public Health (DPH) submitted a response to the request for additional information |
| 05/03/2011 | Claimant requested an extension to submit a response to the request for additional information |
| 05/04/2011 | The Commission granted claimant an extension to May 16, 2011 |
| 05/16/2011 | Claimant submitted a response to the request for additional information |
| 08/16/2011 | Commission staff issued the draft staff analysis |
| 09/12/2011 | Claimant submitted a letter concurring in the draft staff analysis |

[3] Based on the filing date of September 23, 2003, the period of reimbursement for this test claim begins on July 1, 2002.

## I. Background

This test claim addresses the activities required of local detention facilities[4] and local health officers[5] (LHOs) relating to tuberculosis (TB) control. Eligible claimants for state-mandated costs imposed on LHOs include counties and the following specified cities: Berkeley, Long Beach, and Pasadena.[6] Eligible claimants for state-mandated costs imposed on local detention facilities include all cities and counties with local detention facilities as defined by Penal Code section 6031.4. Although the test claim statutes also impose duties on health care providers, health facilities,[7] and outpatient clinics, those activities will not be discussed in this analysis because the claimant has not requested reimbursement for those activities.[8] Finally, duties are imposed on state correctional facilities and state parole agents and officials, but those duties are not imposed on local government and will not be addressed.

Tuberculosis (TB) is a contagious disease that is transmitted through the air from one person to another by tiny infectious airborne particles expelled when a person with active TB coughs,

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[4] A "local detention facility" is a jail or other local penal institution and is defined by Penal Code section 6031.4. (Exhibit J.) Private penal institutions are excluded from the definition of "local detention facility."

[5] A local "health officer," as used in the Communicable Disease Prevention and Control Act, includes county, city, and district health officers, and city and district health boards, but does not include advisory health boards. (Health & Saf. Code § 120100 (Exhibit J.).)

[6] References in this analysis to "specified cities" mean the cities of Berkeley, Long Beach, and Pasadena. Fifty-eight counties have LHOs as do the three cities of Berkeley, Long Beach, and Pasadena. Note that cities are required to appoint a LHO except when the city has conferred the powers and duties of the City LHO on the County LHO. (Health & Saf. Code § 101460 (Exhibit J.).) The three cities of Berkeley, Long Beach, and Pasadena are currently the only cities which have not conferred the powers and duties on the county LHO.

[7] A "health facility" is "any facility, place or building that is organized, maintained, and operated for the diagnosis, care, prevention, and treatment of human illness, physical or mental, including convalescence and rehabilitation and including care during and after pregnancy, or for any one or more of these purposes, for one or more persons, to which the persons are admitted for a 24-hour stay or longer . . ." (Health & Saf. Code § 1250 (Exhibit J.).) Both public and private facilities are included in this definition.

[8] The activities imposed on public and private health care providers, health facilities and outpatient clinics arguably do not impose a program subject to reimbursement under article XIII B, section 6 of the California Constitution because they are not unique to government. See *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal. App.3d 1538, 1545 (holding "[p]roviding elevators equipped with fire and earthquake safety features simply is not 'a governmental function of providing services to the public' and 'does not impose a unique requirement on local government'").

sneezes, or talks.[9] Anyone inhaling the air containing these particles may become infected. In most people, the immune system keeps the TB bacteria in check, so the person infected does not feel sick and cannot spread TB to others. This is known as latent TB infection. If untreated, the latent TB bacteria can become active and cause TB disease. If active TB develops, TB bacteria attack the lungs or other parts of the body. It usually takes six months of treatment to cure the disease, which helps to ensure that the patient does not die or remain infectious and spread TB to others. Multi drug-resistant TB, active TB caused by bacteria resistant to our most powerful drugs, is much more difficult and costly to treat and can be incurable. Extensively drug-resistant TB is from strains of TB resistant to most, if not all, available treatment, may be impossible to treat, and has a high mortality rate.[10]

California reports the most TB cases of any state, 21 percent of the nation's total.[11] A total of 2,472 new cases of TB were reported in California in 2009.[12] Roughly nine percent of California TB patients have died with TB each year over the past decade.[13] California also reports the most multi-drug resistant TB cases of any state, and one or two cases of virtually untreatable, extensively drug resistant strains of TB have been reported each year in California since 2000.[14]

## A. Overview of California Tuberculosis Control Law

California has had TB control laws since the early 1900s. In 1957, the law was amended to give local health departments lead responsibility for TB control.[15]

### 1. Powers and Duties of Department of Public Health (DPH)

DPH has a range of responsibilities for communicable disease, including TB control. Mandatory duties include examining the causes of communicable diseases, establishing a list of reportable diseases (of which TB is one), acting as the lead agency for TB response, working with local health departments to identify detention sites, and maintaining a program for the control of TB.[16] DPH also has discretion to advise LHOs; adopt regulations about isolation and quarantine; and require inspection, disinfection, isolation, or quarantine when necessary to protect the public health.[17] The TB control statutes place DPH in an administrative, supervisory, and support role,

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[9] California Department of Public Health (DPH), Fact Sheet, Tuberculosis Control Branch, March 2008, p. 1 (Exhibit J.).

[10] *Ibid* (Exhibit J.).

[11] DPH, Fact Sheet, Tuberculosis Control Branch, *supra*, p. 2 (Exhibit J).

[12] DPH, *Report on Tuberculosis in California*, Tuberculosis Control Branch, August 2011, p. 2 (Exhibit J).

[13] *Id*, p. 5 (Exhibit J).

[14] *Ibid* (Exhibit J).

[15] Health and Safety Code section 3285 (Statutes 1957, chapter 205).

[16] Health and Safety Code sections 120125, 120130, 121357, 121358(b), and 121350 (Exhibit J).

[17] Health and Safety Code sections 131080, 120130, and 120145 (Exhibit J).

leaving the bulk of the on-the-ground work to local health departments. Specifically, the statutes require DPH to maintain a TB control program and state that DPH is the "lead agency" for all TB control and prevention activities at the state level.[18]

### 2. Powers and Duties of Local Health Officers

LHOs bear primary responsibility for TB control in California. An LHO is a city or county physician required by California law to oversee public health.[19] LHO duties vary by city and county, according to local ordinance; some act as the head of the county health department, others work within the department. However, all LHOs are ultimately responsible for ensuring that California's public health laws are implemented locally. Each county is required to have an LHO, and cities are required to appoint an LHO except when the city has conferred the powers and duties of the city LHO on the county LHO.[20] The three cities of Berkeley, Long Beach, and Pasadena are currently the only cities which have not conferred the powers and duties on the county LHO.

With regard to prevention of the spread of disease, including TB, California law has long provided:

> Each [LHO] knowing or having reason to believe that any case . . . exists, or has recently existed, within the territory under his or her jurisdiction, shall take such measures as may be necessary to prevent the spread of the disease or occurrence of additional cases.[21]

Thus, while LHOs are charged with mandatory duties, they are also granted substantial discretionary authority to protect the public health. Health and Safety Code section 121365 requires LHOs to use every available means to investigate reported or suspected cases of active TB in their jurisdiction. Under Health and Safety Code section 121364, LHOs have discretion to perform compulsory examinations of persons they have reasonable grounds to believe are at heightened risk of TB exposure. Moreover, under section 121365 they have broad discretionary authority to issue *any order* deemed necessary to protect the public health or the health of any individual, including but not limited to the following specified orders:

- Of detention for purposes of examination;
- To complete a prescribed course of medication and if necessary, to follow infection control precautions;
- To follow a course of directly observed therapy (DOT) (if an active TB patient is unable or unwilling to complete a prescribed course of medication);

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[18] Health and Safety Code sections 121350 and 121357 (Exhibit J).

[19] Health and Safety Code sections 101000 and 101005 (Exhibit J).

[20] See Health and Safety Code section 101460 (Exhibit J).

[21] See Health and Safety Code section 120175 (Former Health and Safety Code section 3110 added by Statutes 1957, chapter 205 and repealed, renumbered and reenacted as section 120175 by Statutes 1995, chapter 415) (Exhibit J).

- Of detention in a health or other treatment facility if a person is substantially likely to have infectious TB and to transmit the disease;
- Of detention in a health or other treatment facility if (1) a person has active TB and shows no evidence of having completed treatment and (2) there is a substantial likelihood, based on past or present behavior, that the patient cannot be relied upon to complete treatment and follow infection control precautions;
- For the exclusion from attendance at the workplace; and
- For home isolation.

### 3. Powers and Duties of Health Care Providers and Health Facilities

For purposes of background only, public and private health care providers and health facilities also have TB control related duties under the TB control statutes. Health care providers have a mandatory duty to report to the LHO (1) when they encounter a suspected or actual active TB patient and (2) when the patient ceases treatment for TB.[22] They have a mandatory duty to maintain written documentation of an active TB patient's adherence to an individual treatment plan.[23] In addition, a health care provider who treats an active TB patient is required either to examine all household contacts or refer them to the LHO for examination.[24] Finally, health facilities have a duty not to discharge or release a suspected or actual active TB patient until a written treatment plan has been approved by the LHO.[25]

### 4. Constitutional and Statutory Limits on the Powers and Duties of TB Control Professionals

The powers and duties of TB control professionals in California have the potential to infringe on a patient's constitutional rights. For example, an isolation or detention order may interfere with a TB patient's liberty interests. Liberty is a fundamental right under the United States and California Constitutions. The United State Supreme Court has held that a civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.[26] The analysis discusses these issues, as well as other federal statutory protections, with respect to the test claim requirements.

#### a. Contents of Health Orders

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[22] Health and Safety Code section 121362.

[23] *Ibid*.

[24] Health and Safety Code section 121363.

[25] Health and Safety Code section 121361.

[26] *Addington v. Texas* (1979) 441 U.S. 418, 425 (Exhibit J). Note that there are hundreds of state and federal cases holding that the liberty interest is a fundamental right and is protected by the due process requirements of the fifth and fourteenth amendments to the United State Constitution. *Addington* is but one example and others will be discussed in the analysis below.

The test claim statutes require that any TB control related health order must state the legal authority on which the order was based.[27] In addition, it must include an individualized assessment of the person's situation or behavior that justifies the order and either: (1) the less restrictive alternatives that were attempted and were unsuccessful; or (2) the less restrictive alternatives that were considered and rejected, and why they were rejected.[28]

**b. Special Civil Detention Procedures**

An LHO has the authority to detain a TB patient without prior court authorization under Health and Safety Code section 121365, but sections 121366, 121367, and 121368 codify the following rights of detainees:

- Upon a detainee's request, the LHO must apply for a court order authorizing continued detention within 72 hours of the request.
- Whether or not a detainee makes a request, a court order is required for detentions of more than 60 days.
- The LHO must seek further court review of a detention within 90 days of the initial court order and within 90 days of each subsequent court review.
- Where a court order is required, the LHO must prove the necessity of the detention by "clear and convincing" evidence.
- A person subject to detention has the right to counsel and to have counsel provided upon request.
- Orders must advise detainees of their rights regarding release requests, court orders, court review, and legal representation.
- Orders must be in writing and contain: the purpose of the detention; the legal authority under which the order is issued; an individualized assessment of the detainee's circumstances or behavior that is the basis for the order; and the less restrictive treatment alternatives that were unsuccessfully attempted or considered and rejected, and the reasons the alternatives were rejected.
- Orders must be accompanied by a separate notice that explains the detainee's right to request release; lists the phone number the detainee may call to request release; explains the detainee's right to counsel; and informs the detainee that, at the detainee's request, the LHO will notify two individuals of the detention.
- A detainee may only be detained for the amount of time necessary to fulfill the purpose of the detention.

**c. Location of detention**

[27] Health and Safety Code section 121367(a).

[28] Health and Safety Code section 121367.

Health and Safety code section 121358(a) provides that "individuals detained through the tuberculosis control, housing, and detention program shall not reside in correctional facilities."

### d. Interpreters

Health and Safety Code section 121369(a) specifies that "language interpreters and persons skilled in communicating with vision and hearing impaired individuals shall be provided" for the purposes of executing TB related investigations and orders. Though the law does not specifically require health orders to be translated in writing, the translation of health orders (either orally or in writing) for non-English speakers is required.

### e. Involuntary Treatment

With regard to compulsory testing and treatment, Health and Safety Code Section 121369(b) provides that nothing in sections 121365, 121366, or 121367 "shall be construed to permit or require the forcible administration of any medication without a prior court order." Sections 121365(b) and (c) authorize orders requiring active TB patients to complete a course of medication or undergo directly observed therapy, with the caveat that the section "does not allow the forcible or involuntary administration of medication." Section 121365(a) authorizes LHOs to order the detention of patients for examination, but the section explicitly "does not authorize the [LHO] to mandate involuntary anergy testing." [29]

### f. Religious Exemption

Since 1957, the law has provided, with limited exception, "no examination or inspection shall be required of any person who depends exclusively on prayer for healing in accordance with the teachings of any well recognized religious sect, denomination, or organization and claims exemption on that ground."[30] [31] Moreover, such person "shall not be required to submit to any medical treatment, or to go to or be confined in a hospital or other medical institution; provided, he or she can be safely quarantined and/or isolated in his or her own home or other suitable place of his or her choice."[32]

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[29] "Anergy testing" is an additional test performed on HIV-infected or otherwise immune-compromised patients who test negative for TB, but are at high risk for infection with TB. Because the TB test relies upon the patient's immune response, it can result in false negatives for immune-compromised patients.

[30] Health and Safety Code section 121370 (Exhibit J).

[31] See Health and Safety Code section 3286, Statutes 1957, chapter 205, repealed, renumbered as Health and Safety Code section 121370, and reenacted by Statutes 1995, chapter 415 (Exhibit J).

[32] *Id*. Courts have ruled that states are not constitutionally obliged to offer religious exemptions under the United States Constitution. See, e.g., *Prince v. Massachusetts* (1944) 321 U.S. 158, p.p. 166-167; *Boone v. Boozman* (E.D. Ark. 2002) 217 F. Supp. 2d 938. Staff found no case law regarding whether such an exemption is required under the California Constitution. Nonetheless,

### g. Criminal Sanctions for Failure to Comply With TB Health Orders

Failure to comply with a TB health order is a misdemeanor under Health and Safety Code section 120280 punishable by a fine and/or imprisonment in the county jail for a period of up to one year. Civil and criminal detainees are subject to different standards of due process and different types of confinement.

Health and Safety Code section 121365 specifies what must be done in response to noncompliance with TB control related orders. The LHO is required to report violations of section 121365 orders to the district attorney.[33] Upon receipt of a report, the district attorney is required to prosecute violations of section 121365 and is required to prosecute violations of other orders, if requested by the LHO.[34] If a persistently nonadherent active TB patient is convicted of a misdemeanor for failing to comply with a section 121365 order, the court may order the offender to be confined for up to one year.[35] Section 120280 states that the confinement may take place in "any appropriate facility, penal institution, or dwelling approved for the specific case by the [LHO]." As an alternative to confinement, the court may place the offender on probation for up to two years upon condition that the offender complies with the 121365 order.[36] The court can terminate probation and order the confinement of an offender who violates the terms of probation.[37]

## 5. Funding for TB Control

California law has long authorized state funding to counties for treatment of TB patients.[38] The 1994 Budget Act contained $17,418,000 to fund the Governor's Initiative to implement the Strategic Plan for Control and Elimination of Tuberculosis in California, portions of which were implemented through AB 803 and AB 804.[39] The state appears to have continued to appropriate funds in various amounts for tuberculosis control activities since that time. Health and Safety

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the California Legislature has provided the exemption to those belonging to "well recognized" religions since before 1957 and so those exemptions are not new.

[33] Health and Safety Code section 121365.

[34] Health and Safety Code section 120300 (Exhibit J).

[35] Health and Safety Code section 120280 (Exhibit J).

[36] *Ibid* (Exhibit J).

[37] *Ibid* (Exhibit J).

[38] See *County of Sacramento v. Chambers* (1917) 33 Cal.App. 142 (Exhibit J) (finding that a state subsidy to counties for TB treatment was not an unconstitutional transfer of a state function to a local government or a gift of public funds).

[39] DOF, analysis of AB 804, dated August 9, 1994, p. 1 (Exhibit J), see also Assembly Committee on Health analyses of AB 803 and AB 804.

Code Sections 121350, 121355, 121357, 121380, 121390, 121450, 121455, and 121460 authorize the TB "subvention program" and charge DPH with establishing standards and procedures with which to condition the awarding of funds. In 2009, a new multi-variable funding formula modeled after the national TB allocation formula was developed by DPH in collaboration with the California Tuberculosis Controllers Association.[40] Based on information received from claimant, claimant received $4,579,366 from the state for TB control related activities for 2010 and claimant absorbed the remaining $565,066 of its TB control related costs.[41] This funding is discussed in greater detail in the analysis below under the issue of whether the new program or higher level of service imposes costs mandated by the state.

## B. The Legislative History of California Tuberculosis Control Law

### 1. Early TB Control Laws

California has had TB control laws since the early 1900s. In 1957, the law was amended to give local health departments lead responsibility for TB control.[42] It required LHOs to investigate suspected TB cases[43] and directed them to examine persons reasonably suspected of active TB and isolate or quarantine active cases when necessary to protect public health.[44] The required procedure for doing so was to serve a written examination, quarantine, or isolation order on the person containing: "the name of the person to be isolated, the period of time during which the order would remain effective, the place of isolation or quarantine, and such other terms as may be necessary to protect the public health."[45] As under current law, there was no statutory requirement for the LHO to apply to court for civil enforcement of an order.[46] However, if a person violated a quarantine or isolation order, the LHO was required to notify the district attorney.[47] The district attorney was required to prosecute the alleged violation.[48] Violation of an examination or isolation order was a misdemeanor, punishable by confinement until

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[40] DPH, Tuberculosis Control Local Assistance Funds Policies and Procedures Manual, Fiscal Year 2010-2011, p. 1 (Exhibit J).

[41] Claimant, response to request for additional information, *supra*, p.1 (Exhibit G).

[42] Health and Safety Code section 3285 (Statutes 1957, chapter 205) (Exhibit J).

[43] Health and Safety Code section 3110 (Statutes 1957, chapter 205) (Exhibit J); repealed, renumbered and reenacted as Health and Safety Code section 120175 by Statutes 1995, chapter 415 (Exhibit J).

[44] Health and Safety Code section 3285 (Statutes 1957, chapter 205) (Exhibit J).

[45] Health and Safety Code section 3285 (Statutes 1957, chapter 205 (Exhibit J) and Statutes 1993, chapter 676 (Exhibit A)).

[46] Compare Health and Safety Code section 3285(f) (Stats. 1957, ch. 205 (Exhibit J) and Stats. 1993, chapter 676 (Exhibit A) with section 121365 (Stats.1995, ch. 415 (Exhibit J).

[47] Health and Safety Code section 3285 (1957) (Exhibit J).

[48] Health and Safety Code section 3355 (1957 (Exhibit J) & 1993 (Exhibit A)).

compliance with the order but for no longer than six months.[49] California law has authorized state funding to counties for treatment of TB patients since at least 1915.[50] The 1957 law required the state health department to lease "any facilities it deems necessary to care for persons afflicted with active contagious tuberculosis who violate the quarantine or isolation orders of the [LHO]," with the cost of care in state leased facilities deducted from the county subsidy.[51]

### 2. 1993 Amendments: AB 803 (Gotch)

In 1992, a California TB Elimination Task Force was convened by DHS, the California Conference of Local Health Officers[52] (CCLHO), the California Tuberculosis Controllers Association, and the American Lung Association of California. TB incidence had increased significantly in the United States in the 1980s, and there was a prevailing sense that California needed to redouble its TB control efforts. Additionally, the courts required that TB patients receive procedural due process protections not unlike those afforded mentally ill persons.[53] In 1994, the task force released a Strategic Plan for Tuberculosis Control and Elimination with a number of recommendations for improving TB control in California. AB 803 and AB 804 (collectively referred to as the Gotch legislation) implement the plan and were sponsored by the Health Officers Association of California (HOAC).[54]

AB 803 added the due process and other federal law protections relating to TB orders and detention that, with minor modifications, are a key feature of the current statute. While authorizing LHOs to detain persons without a court order, the bill also included a provision, new to California law, authorizing LHOs to apply to court for civil enforcement of TB orders.

Thus, AB 803 provided LHOs a range of enforcement options. The Assembly Committee on Health's analysis of AB 803 indicated that the intent was to establish a procedure "more in tune with current civil rights expectations that allow for gradually more restrictive measures for persistently nonadherent patients who threaten to spread infection because they do not respond to specific treatment orders. . . ."[55] The Assembly Ways and Means Committee analysis stated that

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[49] Health and Safety Code section 3351 (1957 (Exhibit J) & 1993 (Exhibit A)).

[50] See *County of Sacramento v. Chambers* (1917) 33 Cal.App. 142 (Exhibit J) (finding that a state subsidy to counties for TB treatment was not an unconstitutional transfer of a state function to a local government or a gift of public funds).

[51] Health and Safety Code section 3295 (1957) (Exhibit J). Current law, Health and Safety Code section 121390 (Exhibit J) requires DPH to lease the facilities it deems necessary for persons convicted of a section 120280 (Exhibit J) misdemeanor (3295 was repealed, renumbered and reenacted by Statutes 1995, chapter 415 (Exhibit J)).

[52] The membership of CCLHO includes the 61 California LHOs: one from each of the 58 counties and one each from the three cities of Berkeley, Long Beach, and Pasadena.

[53] See, e.g., *Newark v. J.S.* (N.J. Super. Ct. Law Div. 1993) 652 A.2d 265 (Exhibit J).

[54] See HOAC letters dated April 15, 1993, March 12, 1997 and June 14, 2002 (Exhibit J).

[55] Assembly Committee on Health, Committee Analysis of AB 803, p. 3 (Exhibit J).

the new procedures for enforcement would generate savings by "preventing the use of misdemeanor penalties and incarceration in jail." The bill also amended the reporting obligations of local detention facilities and the authority and responsibility of DHS (now DPH) and LHOs with respect to prisoners with TB.

**3. 1994 Clean-up Legislation: AB 804 (Gotch)**

AB 804 was introduced at the same time as AB 803 and was enacted in September 1994. HOAC sponsored and CCLHO supported it. AB 804 clarified the law enacted by AB 803 by: (1) allowing the transfer of TB patients without prior approval of treatment plans, to a general acute care hospital when an immediate need for higher care is required, or from any health facility to a state correctional institution; and (2) requiring that treatment plans for patients being discharged from a health facility be reviewed by the LHO within 24 hours from the time of receipt.

**4. 1995 Reorganization of the Health and Safety Code**

SB 1360, Statutes 1995, chapter 415 repealed, reorganized, renumbered, and reenacted the Health and Safety Code including the pre-1975 Health and Safety Code sections included in this test claim.

**5. 1997 Amendments Shielding Health Care Providers From Civil and Criminal Liability; Prohibiting Housing TB Patients, Other Than Criminal Offenders, in Correctional Facilities; and Requiring Identification of a Site in Each Jurisdiction to House Recalcitrant TB Patients**

Statutes 1997, chapter 116 (SB 362) added a provision to Health and Safety Code section 121361 specifying that no health facility that declines to discharge, release, or transfer a person pursuant to section 121361 shall be civilly or criminally liable or subject to administrative sanction as a result if the health facility complies with section 121361 and acts in good faith.

Statutes 1997, chapter 294 (SB 391) added section 121358 to the Health and Safety Code prohibiting housing TB Patients, other than criminal offenders, in correctional facilities and requiring identification of a site in each jurisdiction to house recalcitrant TB patients by January 1, 1998.

**6. 2002 Amendment Permitting an LHO to Certify Unlicensed Public Health TB Workers as TB Skin Test Technicians and Requiring LHOs to Notify The Parole Agent Or Regional Parole Administrator When the LHO Has Reasonable Grounds to Believe The Parolee Has Active TB and the Parolee Ceases Treatment**

Statutes 2002, chapter 763 (SB 843) amended Health and Safety Code sections 121361 and 121362 and repealed and reenacted section 121360.5 to:

- Provide for certification of unlicensed TB skin test technicians as a cost-saving measure;
- Require that, in addition to the requirement in prior law to submit notice and a written treatment plan to the LHO in the county to which a parolee is being released upon

discharge, a state correctional facility must submit notice to the LHO in the county that the parolee is being released from;

- Require Department of Corrections (DOC) to inform the parole agent, and other parole officials as necessary that the parolee has active or suspected active TB;
- Require the parole agent and other parole officials to coordinate with the LHO in supervising compliance with the treatment plan and notify the LHO if the parole is suspended because the parolee absconded from supervision; and
- Change the requirement that the LHO notify the medical officer of a parole region or the physician and surgeon designated by DOC when there are reasonable grounds to believe that the parolee has active TB and the parolee ceases treatment to a requirement that the LHO notify the parole agent or regional parole administrator.

## II. Positions of the Parties and Interested Parties

### A. Claimant's Position

Claimant alleges that the following activities are new and reimbursable under article XIII B, section 6 of the California Constitution:

Health and Safety Code sections 121361 and 121362

- Communication between LHOs, their staff, detention facility staff, and others;
- Preparation of a treatment plan by medical staff of the detention facility prior to discharge, release or transfer of a TB patient;
- Transmission of the treatment plan to the LHO;
- LHO review of the treatment plan; and
- Drafting, reviewing, and establishing policies, procedures, forms, and protocols and training to implement them for LHOs, their staff, detention facility staff, and others.

Health and Safety Code section 121363

- Examination of the contacts of a TB patient by the LHO when a health care provider will not do so; and
- LHO oversight of the case to ensure the contacts are reexamined properly which means increased communication between the LHO and health care providers.

Health and Safety Code section 121364

- LHO preparation of written orders for examination.

Health and Safety Code section 121365

- Drafting, reviewing, and establishing policies, procedures, forms, and protocols regarding LHO orders and the training to implement them for LHOs, their staff, and others;

- Staff time to: locate and detain TB patients; transport them to and from places of examination and housing; ensure that TB patients remain at home or are excluded from the workplace; and
- Costs of detention including but not limited to housing and use of security or law enforcement personnel.

Health and Safety Code section 121366

- LHO application for court order for continued detention upon TB patient's request for release or if detention will be more than 60 days;
- LHO application to the court for further review within 90 days of initial order;
- Counsel for LHO and detainee;
- Drafting, reviewing, and establishing policies, procedures, forms, and protocols regarding this court process and training to implement them for LHOs, their staff, their counsel, counsel's staff, and counsel for the detainee such as the public defender and the public defender's staff and others;
- The following activities on an expedited calendar: preparation of declarations; review of records; preparation of witnesses; assembling evidence; exchanging discovery; drafting pleadings; and, any other procedures necessary to ensure the matter is well prepared, placed on calendar, and timely heard;
- Attendance of counsel for both sides at hearing and witnesses from the LHO's staff and the detainee; and
- Transportation of detainee to and from court, security costs, copy costs, witness fees, and filing fees.

Health and Safety Code section 121367

- Ensuring that LHO orders are in writing and include the following information: reasons for the detention, right to counsel, and right to request release from detention;
- Preparing the following additional separate notices: right to counsel; right to request release; and right to have up to two individuals notified of the detention;
- Reasonable efforts of the LHO to contact the individuals designated by the detainee; and
- Drafting, reviewing, and establishing policies, procedures, forms, and protocols regarding LHO orders and notices and training to implement them, especially training on the proper service of legal documents, for LHOs, their staff, their counsel, counsel's staff, and others.

Health and Safety Code section 121368

- Drafting, reviewing, and establishing policies, procedures, forms, and protocols regarding the situations that trigger release from detention and the training to implement them,

especially training on the proper service of legal documents, for LHOs, their staff, their counsel, counsel's staff, and others.

Health and Safety Code section 121369

- Use of interpreters, when necessary;
- Delegation of LHO duties to the head of medical treatment in penal institutions; and
- Drafting, reviewing, and establishing policies, procedures, forms, and protocols regarding the use of interpreters and delegation of LHO duties and the training to implement them for LHOs, their staff, detention facility staff, and others.[56]

On September 12, 2011, claimant submitted a letter concurring in the draft staff analysis.

**B. Department of Finance's Position**

DOF states that the claimant has identified a number of new activities related to the manner in which local health officials manage and control the spread and treatment of TB which it asserts are new and reimbursable mandates. If the Commission reaches the same conclusion, the nature and extent of the specific activities required can be addressed in the parameters and guidelines. DOF notes that it expects the county to be very specific regarding the activities necessary to comply with the test claim statutes since the they were effective nearly ten years prior to the test claim filing.[57] DOF did not comment on the draft staff analysis.

**C. Department of Health Services' Position**

DHS contends that this test claim should be denied because:

- Many of the statutory requirements predate January 1, 1975 and thus do not meet Government Code section 17514's definition of costs mandated by the state.[58]
- Claimant, through the Health Officer's Association of California (HOAC), requested the test claim statutes. HOAC is the separate non-profit body of the statutorily established California Conference of Local Health Officers (CCLHO). HOAC was the sponsor of AB 803, Statutes 1993, chapter 676 and also sponsored all three of the subsequent amendments of the test claim statutes that are at issue in this test claim. HOAC could not have sponsored those bills without the consent of the member counties. Therefore, HOAC's request should be imputed to its member counties under Government Code section 17556(a).[59]

[56] Claimant, test claim, p.p. 5-13 (Exhibit A).

[57] DOF, comments on the test claim, dated November 3, 2003, p. 1 (Exhibit B).

[58] DHS, comments on the test claim, *supra*, p.1 (Exhibit D).

[59] DHS, comments on the test claim, *supra*, p.1-2 (Exhibit D).

- The due process rights required by the test claim statutes were declared existing state law (Art. 1 §7(a) of the California Constitution) and federal law (Fifth and Fourteenth Amendments to the United States Constitution) by action of the courts.[60]
- The non-criminal detention proceedings are discretionary and thus the hearing costs for such proceedings do not impose a state-mandated "new program or higher level of service" which would trigger the right to reimbursement.[61]
- Offsetting savings may result in no net cost, for example: the option of outpatient treatment instead of confinement in a facility, as required under prior law; the reduction in the number of TB examinations required to be performed by the LHO; Medi-Cal or Medicare subsidized examinations for eligible beneficiaries; reduced exposure to monetary damages resulting from violation of due process rights.[62]

If the Commission finds there is a "new program or higher level of service," costs to the local agency are reduced because the State has provided instructions, model documents, and materials both in hard copy and on-line.[63]

**D. Department of Public Health's Position**

DPH has replaced DHS as the state agency responsible for TB control. DPH reasserts the arguments made by DHS discussed above, including the argument that the "activities described in the test claim statutes predate January 1, 1975," and adds the following:

- The State provides an annual award of funds to jurisdictions reporting an average of six or greater cases of TB which are intended to augment, not supplant, the funding for TB control that the locals have been historically responsible for.[64]
- State funding is currently being provided by the state for requirements imposed by the test claim statutes including: "food, shelter, incentives and enabler funds reimbursement," and reimbursement for civil detention.[65]
- Eligible local jurisdictions receive one or more of the following three types of local assistance funding: base awards and housing awards which are both issued as annual

[60] DHS, comments on the test claim, *supra*, p. 2 (Exhibit D), citing *Bloom v. State of Ill*., U.S. Ill., *supra*, 88 S. Ct. 1477; *U.S. v. Crouch*, C.A.5 (Tex.), *supra*, 84 F.3d 1487, *cert*. denied 117 S.Ct. 736.

[61] DHS, comments on the test claim, *supra*, p. 2 (Exhibit D), citing Health and Safety Code sections 121365, 121367, 121368, 121369 citing *San Diego Unified v. Commission on State Mandates, supra,* 33 Cal.4th 859 and *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727.

[62] DHS, comments on the test claim, *supra*, p. 2 (Exhibit D).

[63] DHS, comments on the test claim, *supra*, p. 2 (Exhibit D).

[64] DPH, response to request for additional information, May 2, 2011, p. 1 (Exhibit F).

[65] *Ibid.* (Exhibit F).

awards; and civil detention awards, which are invoiced and reimbursed throughout the year on a flow basis:

a. Base awards to fund staff and expenses related to completion of treatment and contact investigation are awarded annually to jurisdictions that report six or more TB cases using five-year surveillance data and are held constant for two years. Under some circumstances, they may be used for targeted testing in high risk populations in order to detect and treat latent TB. Eligible expenditures include salaries, benefits, equipment, supplies, training materials, local mileage and in state travel to TB related trainings. Jurisdictions reporting 6-19 cases receive a fixed award amount. Jurisdictions reporting 20 or more cases receive an award based on a formula that uses a five-year average of reported cases and case characteristics (e.g. homelessness, disease site, infectiousness, drug resistance).

b. Housing allocations are provided to jurisdictions with sizable TB patient populations based on historic costs of housing and related expenses for TB patients who are homeless or at-risk of homelessness. Housing allocations have two components:

    - Food, Shelter, Incentives and Enablers (FSIE) funds are used to provide services to enhance adherence, prevent homelessness, and allow the use of less restrictive alternatives to decrease or eliminate the need for detention. Eligible expenses include food, shelter, other "incentives and enablers," and personnel and costs for conducting designated activities.

    - Housing Personnel supports salaries and benefits for staff working directly with patients that are homeless, at risk of homelessness, or at risk for civil detention (e.g. outreach workers, social workers, public health nurses). Jurisdictions that do not receive a regular Housing Personnel allotment may submit requests for reimbursement. Those that do receive an allotment may submit supplemental invoices for expenses that exceed their allotment.[66]

c. Civil Detention awards from the state are provided through a regional facility in San Mateo County for unlimited use by jurisdictions that need a site to detain persistently non-adherent patients. Civil detention funds are also available to reimburse for the use of local facilities for civil detention of recalcitrant patients. Jurisdictions that opt to civilly detain recalcitrant TB patients are reimbursed for all eligible expenses submitted in accordance with the state guidance and reimbursement procedure. Consideration for reimbursement for detention is made on a case-by-case basis. Health and Safety Code section 121358(a) prohibits the use of these funds for costs of detention in correctional facilities.[67]

DPH did not comment on the draft staff analysis.

**III. Discussion**

[66] DPH, response to request for additional information, May 2, 2011, p. 2 (Exhibit F).

[67] DPH, response to request for additional information, May 2, 2011, p. 3 (Exhibit F).

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

> 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 such local government for the costs of such programs or increased level of service.

The purpose of article XIII B, section 6 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."[68] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[69]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[70]
2. The mandated activity either:
    a. Carries out the governmental function of providing a service to the public; or
    b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[71]
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[72]
4. The mandated activity results in the local agency or school district incurring increased costs. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity. [73]

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.[74] The determination

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

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

[70] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

[71] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[72] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

[73] *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; Government Code sections 17514 and 17556.

whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[75] 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."[76]

This analysis addresses the following issues:

- Do the test claim statutes mandate a new program or higher level of service?
- Do the activities that mandate a new program or higher level of service result in increased cost mandated by the state?

**A. Do the Test Claim Statutes Mandate a New Program or Higher Level of Service?**

The TB control program has been in existence since shortly after the beginning of California statehood.[77] Many of the activities required by the test claim statutes are not new, since they have been constantly required since before January 1, 1975 under former Health and Safety Code sections 3000-3355.[78] These pre-1975 requirements include the requirements for LHOs to:

- "Take such measures as may be necessary to prevent the spread of any communicable disease or occurrence of additional cases;"[79]
- "Enforce orders, ordinances and statutes related to public health;[80]

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

[75] *County of San Diego, supra,* 15 Cal.4th 68, 109.

[76] *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.

[77] Public Health Institute, TB and the Law Project, *California Tuberculosis Control Law*, James B. Simpson, J.D., M.P.H., Samantha Graff, J.D., and Marice Ashe, J.D., M.P.H, 2003, pp. 8-9 (Exhibit J).

[78] References to former sections 3000-3355 refer to those sections from 1957 to 1993 and not to versions that postdate the 1993 test claim legislation. Note that many of these former Health and Safety Code sections are actually renumbered and reenacted code sections that pre-dated 1957, but there is no need to trace them to their origins for purposes of mandate analysis. Many of these former Health and Safety Code sections were constantly in effect since before 1975 and were repealed, renumbered, and reenacted by Statutes 1995, chapter 415 (Exhibit J) and thus are not new.

[79] Former 3110 (Stats. 1957, ch. 205 (Exhibit J))/current section 120165.

[80] See former Health and Safety Code section 452, repealed and renumbered as 101030 by Statutes 1995, chapter 415 (Exhibit J).

- "Use every available means to ascertain the existence of, and immediately to investigate, all reported or suspected cases of [TB] in the infectious stages within his jurisdiction and to ascertain the sources of such infections;"[81]
- Make any order to examine in writing;[82]
- Make any order to isolate or quarantine in writing;[83]
- Serve the isolation or quarantine order upon the TB patient;[84] and
- Report violations of orders issued to the district attorney in writing and include information in the LHOs possession relating to the isolation or quarantine order.[85]

Prior law also required the district attorney to prosecute all violations of former Health and Safety Code sections 3285 and 3351.[86]

**1. Requirements imposed on local detention facilities[87] and LHOs relating to notice and written treatment plans prior to the discharge, release, or transfer, or upon the discontinuance of treatment of a person known or reasonably believed to have active TB. (Health and Safety Code sections 121361 and 121362)[88]**

Health and Safety Code section 121361(a) and (e) prohibit local detention facilities from discharging or releasing from the facility a person with active TB or reasonably believed to have active TB unless notification and a written treatment plan have been received by the LHO. Section 121361(d) and (e) also prohibit a local detention facility from transferring a person with active TB or reasonably believed to have active TB to a local detention facility in another jurisdiction unless notification and a written treatment plan are received by the LHO and the chief medical officer of the detention facility receiving the person. When prior notification

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[81] Compare former section 3285 (Stats. 1957, ch. 205 (Exhibit J)) to current section 121365 which only changes the word "his" to "the."

[82] Former 3285(a) (Stats. 1957, ch. 205 (Exhibit J))/current section 121364.

[83] Former 3285(c) (Stats. 1957, ch. 205 (Exhibit J))/current section 121367(a)(4).

[84] Former 3285(d) (Stats. 1957, ch. 205 (Exhibit J))/current section 121367(a)(4).

[85] Former 3285(e) (Stats. 1957, ch. 205 (Exhibit J))/current section 121365.

[86] Health and Safety Code section 3355 (as amended by Stats. 1963, ch. 278 (Exhibit J))/current section 120300 (Exhibit J).

[87] A "local detention facility" as defined by Penal Code section 6031.4 (Exhibit J) is a jail or other local penal institution. Private penal institutions are excluded from the definition of "local detention facility."

[88] Originally sections 3281 and 3282, as added by Statutes 1993, chapter 676, amended by Statutes, 1994, chapter 65, repealed, renumbered and reenacted as current section 121361 by Statutes 1995, chapter 415, amended by Statutes 1997, chapter 116, and Statutes 2002, chapter 763.

would jeopardize the person's health, the public safety, or the safety and security of the penal institution, then the notification and treatment plan "*shall be submitted"* within 24 hours of discharge, release, or transfer. (Emphasis added.)

Section 121361(a)(2) further requires the LHO to review for approval, within 24 hours of receipt, treatment plans submitted by a health facility.

Health and Safety Code section 121362 describes the contents of the written treatment plan to include the following information: patient name; address; date of birth; tuberculin skin test results; pertinent radiologic, microbiologic, and pathologic reports that are final or pending; updated clinical status and laboratory results at the time of discharge, release, or transfer; and any other information required by the LHO.

Section 121362 further requires the LHO to notify the medical officer of a parole region or a physician or surgeon designated by the Department of Corrections when there are reasonable grounds to believe that a parolee has active TB and ceases treatment for TB. A parolee may be presumed to have ceased TB treatment when the parolee fails to keep an appointment, relocates without transferring care, or discontinues care.

Claimant alleges the following activities are required by Health and Safety Code sections 121361and 121362 and are new, reimbursable activities:

- "Communication between [LHOs], their staff, [local] detention facility staff and/or detention facility medical staff, and others";
- Preparation of "a treatment plan…by medical staff of the [local] detention facility prior to discharge, release or transfer of a [TB patient]";
- Transmission of the treatment plan to the LHO;
- LHO review of the treatment plan; and
- "Drafting, reviewing, and establishing policies, procedures, forms, and protocols and training to implement them for [LHOs], their staff, local detention facility staff and/or detention facility medical staff, and others."

The plain language of sections 121361 and 121362 mandate the following activities on local detention facilities and LHOs:

- Local detention facilities are mandated to:
    - Submit notification and a written treatment plan that includes the information required by Health and Safety Code section 121362 to the LHO when a person with active TB or reasonably believed to have active TB is discharged or released from the detention facility; and
    - Submit notification and a written treatment plan that includes the information required by Health and Safety Code section 121362 to the LHO and the medical officer of the local detention facility receiving the person when a person with active TB or reasonably believed to have active TB is transferred to a local detention facility in another jurisdiction,

- LHOs are mandated to:
    - Review for approval within 24 hours of receipt only those treatment plans submitted by a health facility; and
    - Notify the medical officer of a parole region or a physician or surgeon designated by the Department of Corrections when there are reasonable grounds to believe that a parolee has active TB and ceases treatment for TB.

Immediately before the enactment of sections 121361 and 121362, local detention facilities were required to prepare written treatment plans for the medical care of any inmate in need of medical care pursuant to the minimum standards for state and local correctional facilities. Title 15 of the California Code of Regulations provided the following:

> According to the procedures established by the responsible physician and the facility administrator, a pre-screen is performed on all inmates prior to housing in the living area. The pre-screening shall be performed by a medically licensed person or trained non-medical staff per the order of the written order of the physician responsible for health care at the facility.
>
> *There shall be a written plan to provide medical care* for any inmate who appears at pre-screening to be in need of medical treatment or who requests medical treatment.[89]

Therefore, the Commission finds that the preparation of a written treatment plan for the person with TB, as requested by the claimant, does not constitute a new program or higher level of service.

However, submitting notification and the written treatment plan upon release, discharge, or transfer to the LHO and to the medical officer of the receiving facility are new requirements. In addition, the requirements imposed on the LHO to review for approval, within 24 hours of receipt, treatment plans submitted by a health facility and to notify the medical officer of a parole region or a physician or surgeon designated by the Department of Corrections when there are reasonable grounds to believe that a parolee has active TB and ceases treatment for TB are new. These requirements are unique to local government and are intended to increase the communication between public officials to prevent the further spread of the disease.[90]

Accordingly, the Commission finds that Health and Safety Code sections 121361 and 121362 mandate a new program or higher level of service for following activities:

- For local detention facilities to:
    - Submit notification and a written treatment plan that includes the information required by Health and Safety Code section 121362 to the LHO when a person

[89] Title 15, California Code of Regulations, section 1207 (Register 82 No. 40) (Exhibit J).

[90] See generally the Assembly and Senate Committee and Floor analyses for AB 803 Stats. 1993, ch. 676), AB 804 (Stats. 1994, ch. 685) and SB 843 (Stats. 2002, ch. 763).

with active TB or reasonably believed to have active TB is discharged or released from the detention facility; and

- Submit notification and a written treatment plan that includes the information required by Health and Safety Code section 121362 to the LHO and the medical officer of the local detention facility receiving the person when a person with active TB or reasonably believed to have active TB is transferred to a local detention facility in another jurisdiction.

- For LHOs to:
  - Review for approval within 24 hours of receipt only those treatment plans submitted by a health facility; and
  - Notify the medical officer of a parole region or a physician or surgeon designated by the Department of Corrections when there are reasonable grounds to believe that a parolee has active TB and ceases treatment for TB.[91]

**2. The requirements for health care providers who treat a TB patient to examine the contacts of the TB patient or to refer those contacts to the LHO (Health and Safety Code section 121363)[92]**

Section 121363 generally requires public and private health care providers who treat a TB patient to examine the contacts of the TB patient or to refer those contacts to the LHO. As mentioned in the Introduction, this analysis does not address requirements imposed on public and private health care providers. However, claimant alleges that Health and Safety Code section 121363 imposes the following new, reimbursable activities:

- Examination of the contacts of a TB patient by the LHO when a health care provider will not do so.
- LHO oversight of the case to ensure the contacts are reexamined properly which means increased communication between the LHO and health care providers.

The test claim statutes added the provisions of Health and Safety Code section 121363 which provides:

> Each health care provider who treats a person for active tuberculosis disease shall examine, or cause to be examined, all household contacts or shall refer them to

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[91] With the exception of preparing the written treatment plans, the other activities requested by the claimant pursuant to sections 121361 and 121362 may be considered during the adoption of the parameters and guidelines. The Commission's regulations allow the Commission to consider and include activities in the parameters and guidelines that are reasonably necessary to comply with the mandated activities if there is substantial evidence in the record to support the finding. (Cal. Code Regs., tit. 2, § 1183.1(a)(4).)

[92] (Originally section 3283) as added by Statutes 1993, chapter 676, amended by Statutes, 1994, chapter 65, repealed, renumbered and reenacted as current section 121363 by Statutes 1995, chapter 415.

> the local health officer for examination. Each health care provider shall promptly notify the local health officer of the referral. When required by the local health officer, nonhousehold contacts and household contacts not examined by a health care provider shall submit to examination by the local health officer or designee. If any abnormality consistent with tuberculosis disease is found, steps satisfactory to the local health officer shall be taken to refer the person promptly to a health care provider for further investigation, and if necessary, treatment. Contacts shall be reexamined at times and in a manner as the local health officer may require. When requested by the local health officer, a health care provider shall report the results of any examination related to tuberculosis of a contact.

The plain language of Health and Safety Code section 121363 does not impose *any* requirements on LHOs. Rather, it imposes requirements on public and private health care providers to examine contacts or to refer them to the LHO for examination. Nor is there a specific requirement in any other state law that LHOs perform such examinations. Moreover, even if one were to infer the alleged activities from the LHOs general duties in sections 121075 and 121365 to prevent the spread of contagious, infectious, or communicable diseases and to investigate reported or suspected cases of TB, those duties have continuously been the law since 1957 and are not new.[93] LHOs have had the following duties since at least 1957 and they remain in law today:

> Each [LHO] knowing or having reason to believe that any case . . . exists, or has recently existed, within the territory under his or her jurisdiction, shall take such measures as may be necessary to prevent the spread of the disease or occurrence of additional cases.[94]

This statutory provision alone authorizes all manner of measures taken by LHOs, provided that the measures are necessary to prevent the spread of disease.

> Each [LHO] is hereby directed to use every available means to ascertain the existence of, and immediately to investigate, all reported or suspected cases of tuberculosis in the infectious stages in the jurisdiction, and to ascertain the sources of those infections.[95]

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[93] Former section 3285(c) (Stats. 1957, ch. 205 (Exhibit J).) as amended by statutes 1961, chapter 30, statutes 1966, chapter 1344, statutes 1965, chapter 1552.

[94] See Health and Safety Code section 3110 Statutes 1957, chapter 205 (Exhibit J); repealed, renumbered and reenacted as Health and Safety Code section 120175 by Statutes 1995, chapter 415 (Exhibit J).

[95] See former Health and Safety Code section 3285 added by Statutes 1957, chapter 205, amended by Statutes 1961, chapter 30; Statutes 1965, chapter 1344, Statutes 1965, chapter 1552, Statutes 1993, chapter 676 (non-substantively to modernize and eliminate sexist usage), Statutes 1994, chapter 685 (but did not amend language quoted here), repealed, renumbered and reenacted as 121365 by Statutes 1995, chapter 415 (Exhibit J).

LHOs have long had the duties to investigate cases of TB, take measures to prevent the spread of TB and have been authorized, if not required, to examine suspected TB patients when necessary for the preservation and protection of the public health (as discussed below under section 121364).

Therefore, the Commission finds that the plain language of section 121363 (originally section 3283), as added by Statutes 1993, chapter 676, amended by Statutes, 1994, chapter 65, and repealed, renumbered and reenacted as current section 121363 by Statutes 1995, chapter 415, does not mandate a new program or higher level of service on the LHO.

**3. The authority of LHOs to order TB examinations (Health and Safety Code section 121364)[96]**

Health and Safety Code section 121364 generally authorizes the LHO to order TB examinations and requires such orders to be in writing. Claimant alleges the activity of "LHO preparation of written orders for examination" is a new, reimbursable activity imposed by Health and Safety Code section 121364.

Since January 1, 1995, Health and Safety Code section 121364 has stated the following:

> (a) Within the territory under his or her jurisdiction, each [LHO] *may* order examinations for tuberculosis infection for the purposes of directing preventive measures for persons in the territory, except those incarcerated in a state correctional institution, for whom the [LHO] has reasonable grounds to determine are at heightened risk of tuberculosis exposure.
>
> (b) An order for examination pursuant to this section *shall* be in writing and shall include other terms and conditions as may be necessary to protect the public health.[97]

(Emphasis added.)

The Commission finds that the requirements imposed by section 121364, as amended by the test claim statutes, are not new. Prior law, former Health and Safety Code section 3285(c) (which was last amended by Statutes1965, chapter 1552) stated in pertinent part:

> Whenever the [LHO] *shall* determine on reasonable grounds that an examination of any person is necessary for the preservation and protection of the public health, he *shall* make an examination order in writing, setting forth the name of the person to be examined, the time and place of the examination, and such other terms and

[96] (Originally section 3284) as added by Statutes 1993, chapter 676; amended by Statutes 1994, chapter 685; and repealed, renumbered and reenacted as 121364 by Statutes 1995, chapter 415 (Exhibit J)**.**

[97] Health and Safety Code section 121364. Former 3285(c) added by Statutes 1957, chapter 205 (Exhibit J)., repealed and reenacted as 3284 by Statutes 1993, chapter 676; amended by Statutes 1994, chapter 685; and repealed, renumbered as 121364 and reenacted by Statutes 1995, chapter 415.

conditions as may be necessary to protect the public health. [98]

(Emphasis added.)

Thus, under prior law, whenever the LHO "determined on reasonable grounds that an examination of any person [was] necessary" for the preservation and protection of public health, the LHO was required to make an examination order in writing, setting forth the name of the person to be examined, the time and place of the examination, and such other terms as may be necessary to protect the public health. Although the language in the test claim statutes is slightly different now (e.g. saying "may" instead of the former "shall" which arguably makes it discretionary), the authority to issue an order for examination is not new; it still must be on reasonable grounds that there is a heightened risk of TB exposure. Additionally, the requirement that the order be in writing and include terms and conditions necessary to protect the public health is the same.

The Commission finds that Health and Safety Code section 121364[99] is not new and, thus, does not mandate a new program or higher level of service.

**4. Authority of an LHO to issue various orders to protect the public health or the health of a particular person (Health and Safety Code section 121365)[100]**

Health and Safety Code section 121365 requires the LHO to:

- "Use every available means to ascertain the existence of, and immediately investigate, all reported or suspected cases of active tuberculosis disease in the jurisdiction, and to ascertain the sources of those infections."
- "Follow applicable local rules and regulations and all general and special rules, regulations, and orders of the state department."

If the LHO determines that the public health in general or the health of a particular person is endangered by exposure to a person who is known to have active tuberculosis disease, or to a person for whom there are reasonable grounds to believe has active tuberculosis disease, the LHO is authorized by section 121365 to issue any orders deemed necessary to protect the public

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[98] Former section 3285(c) as amended by Statutes 1965, chapter 1552 (Exhibit J). This language was deleted from section 3285(c) and amended into a new section 3284 by Statutes 1993, chapter 676 and was non-substantively amended by Statutes 1994, chapter 685; and repealed, renumbered as 121364, and reenacted by Statutes 1995, chapter 415.

[99] (Former section 3285(c)) repealed, renumbered and reenacted as 3284 by Statutes 1993, chapter 676; amended by Statutes 1994, chapter 685; and repealed, renumbered as 121364 and reenacted by Statutes 1995, chapter 415.)

[100] Originally codified in former section 3285 as amended by Statutes 1993, chapter 676 and Statutes 1994, chapter 685 and repealed, renumbered and reenacted as 121365 by Statutes 1995, chapter 415 (Exhibit J).

health or the health of any other person. These orders include but are not limited to the following specific orders:

- Of detention for purposes of examination;
- To complete a prescribed course of medication and if necessary, to follow infection control precautions;
- To follow a course of directly observed therapy (DOT) (if an active TB patient is unable or unwilling to complete a prescribed course of medication);
- Of detention in a health or other treatment facility if a person is substantially likely to have infectious TB and to transmit the disease;
- Of detention in a health or other treatment facility if (1) a person has active TB and shows no evidence of having completed treatment and (2) there is a substantial likelihood, based on past or present behavior, that the patient cannot be relied upon to complete treatment and follow infection control precautions;
- For the exclusion from attendance at the workplace; and
- For home isolation.

If the TB patient fails to comply with an order issued by the LHO, the LHO is authorized to request the court to enforce the order. In addition, if the order is violated, the LHO is required to "advise the district attorney of the county in which the violation has occurred, in writing, and shall submit to the district attorney the information in his or her possession relating to the subject matter of the order, and of the violation or violations thereof."

Claimant alleges that Health and Safety Code section 121365 imposes a reimbursable state-mandated program and also requests reimbursement for the following activities and costs:

- "Drafting, reviewing, and establishing policies, procedures, forms, and protocols regarding LHO orders and training to implement them for LHOs, their staff and others;"
- "Staff time to locate and detain TB patients; transport them to and from places of examination and housing; ensure that TB patients remain at home or are excluded from the workplace;" and
- "Costs of detention itself including but not limited to housing and use of security or law enforcement personnel."

For the reasons below, the Commission finds that Health and Safety Code section 121365, as added and amended by the test claim statutes, does not mandate a new program or higher level of service.

**a. Authority given to the LHO to issue "less restrictive" orders to protect public health implements federal law and does not mandate a new program or higher level of service.**

Before the enactment of the test claim statutes, former Health and Safety Code section 3285 (as last amended in 1965) required the LHO to issue orders of examination, quarantine, or isolation when necessary to protect public health. Section 3285 stated in relevant part the following:

> (c) Whenever the health officer shall determine on reasonable grounds that an examination of any person is necessary for the preservation and protection of public health, he shall make an examination order in writing, setting forth the name of the person to be examined, the time and place of the examination, and such other terms and conditions as may be necessary to the protect the public health. Nothing contained in this subdivision shall be construed to prevent any person whom the health officer determines should have an examination for infectious tuberculosis from having such an examination made by a physician of his own choice who is licensed to practice medicine under the provisions of Chapter 5 (commencing with Section 2000), Division 2 of the Business and Professions Code under such terms and conditions as the health officer shall determine on reasonable grounds to be necessary to protect the public health.
>
> (d) Whenever the health officer shall determine that quarantine or isolation in a particular case is necessary for the preservation and protection of the public health, he shall make an isolation or quarantine order in writing, setting forth the name of the person to be examined, the period of time during which the order shall remain effective, the place of the isolation or quarantine, and such other terms and conditions as may be necessary to the protect the public health.

Prior law also gave the LHO broad authority to take "such measures as may be necessary to prevent the spread of the disease or occurrence of additional cases" when the LHO had reason to believe that any case exists, or has recently existed, within the territory under his or her jurisdiction.[101]

The test claim statutes amended the provisions now found Health and Safety Code section 121365 to add language authorizing the LHO to issue the following additional orders when necessary to protect the public health or the health of any other person: to complete a prescribed course of medication, to follow a course of directly observed therapy, to be detained in a health or treatment facility, to be excluded from work, and any other "orders [the LHO] deems necessary to protect the public health or the health of any other person."

These additional orders were added "for the purpose of establishing a procedure 'more in tune with current civil rights expectations that allows for gradually more restricted measures for

[101] See Health and Safety Code section 3110 Statutes 1957, chapter 205; repealed, renumbered and reenacted as Health and Safety Code section 120175 by Statutes 1995, chapter 415 (Exhibit J).

recalcitrant patients who threaten to spread infection because they do not respond to specific treatment orders'"[102] Health and Safety Code section 1213167, which is discussed later in this analysis, clarifies that the written orders issued by the LHO pursuant to section 121365 must set forth the "the less restrictive alternatives that were attempted and were unsuccessful, or the less restrictive treatment alternatives that were considered and rejected, and the reasons the alternatives were rejected."

The plain language of the statute gives the discretion to the LHO to issue the orders when necessary to protect the public health. In addition, the LHO's authority to issue the orders identified in section 121365 has been deemed "discretionary" by the court in a case alleging the negligence of a health officer in performing his duties.[103] Although it is recognized that there may be circumstances where the LHO has no true choice but to issue an order identified in section 121365 to protect public health, and those circumstances may reach the level of practical compulsion for purposes of mandates law, the Commission does not need to address that issue.[104]

As discussed below, the additional orders specified in section 121365 implement existing state and federal requirements under the Due Process Clause of the United States Constitution and the American with Disabilities Act (ADA) to achieve public health goals by using the least restrictive means to protect the public and the health of the person with TB. "When the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies' taxing and spending limitations" under article XIII B.[105] Thus, the Commission finds that Health and Safety Code section 121365 does not mandate a new program or higher level of service.

i. Existing State and Federal Due Process Law

When government takes an action against an individual that directly deprives that individual of a life, liberty, or property interest, government must comply with substantive due process protections afforded under the U.S. Constitution.[106] Substantive due process protects the

[102] Assembly Committee on Health, Analysis of AB 803, as amended April 15, 1993, page 3.

[103] *Jones v. Czapkay* (1960) 182 Cal.App.2d 192, 200-202 (Exhibit J); see also, "TB Control and the Law, Frequently Asked Questions on Civil Commitment" (Exhibit J) issued by the Public Health Institute, which describes the broad discretion of the LHO.

[104] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 888, where the court conducted a similar analysis for due process hearings following the discretionary expulsion of a student.

[105] *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593, citing *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 76; see also, Government Code sections 17513, 17556(c).

[106] *Addington v. Texas* (1979) 441 U.S. 418, 425 (Exhibit J); United States Constitution, 5th and 14th amendments (Exhibit J); see also, due process provisions of the California Constitution, article 1, sections 7 and 15 (Exhibit J).

individual against arbitrary action by government and, thus, requires government to have an appropriate justification for the deprivation.[107]

Civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.[108,109] Courts, including those in California, have long held that placing someone under quarantine restrictions for infectious or contagious diseases like tuberculosis infringes upon the individual's right of liberty. In such cases, personal restraint can only be imposed where, under the facts of each case, reasonable grounds exist to justify the action taken.[110] In addition, due process requires that the restriction imposed on the individual be the least restrictive alternative available under the circumstances.[111]

> Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.[112]

Thus, under existing federal due process law, local government is required to impose the least restrictive alternative available under the circumstances. The authority granted in Health and Safety Code section 121365 to issue less restrictive orders complies with, and implements this due process requirement.

ii. Existing Requirements under the Rehabilitation Act and the ADA

The least restrictive alternative requirement is also found in section 504 of the Rehabilitation Act and the Americans with Disabilities Act (ADA). In 1973, Congress enacted the section 504 of the Rehabilitation Act of 1973 to extend the protections of the Civil Rights Act of 1964 to the

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[107] *County of Sacramento v. Lewis* (1998) 523 U.S. 833, 845 (Exhibit J).

[108] *Addington v. Texas* (1979) 441 U.S. 418, 425 (Exhibit J).

[109] See also, *Meyer v. Nebraska* (1923) 262 U.S. 390, 398 (Exhibit J) (liberty "denotes not merely freedom from bodily restraint but also the right of the individual to contract [and] . . . engage in any of the common occupations of life"); *Smith v. Texas* (1914) 233 U.S. 630, 636 (Exhibit J) ("In so far as a man is deprived of the right to labor, his liberty is restricted [and] his capacity to earn wages and acquire property is lessened.").

[110] *Jacobson v. Massachusetts* (1905) 197 U.S. 11 (Exhibit J), which upheld a compulsory vaccination program, finding that "the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint . . . as the safety of the general public may demand."; *In re Halko* (1966) 246 Cal.App.2d 553, 558 (Exhibit J), which addressed a challenge by a individual who had TB and was served with a quarantine order of isolation confining him to a hospital pursuant to former Health and Safety Code section 3285.

[111] *Covington v. Harris* (1969) 419 F.2d 617, 623 (Exhibit J).

[112] *Shelton v. Tucker* (1960) 364 U.S. 479, 488 (Exhibit J).

disabled.[113] The Rehabilitation Act prohibits discrimination on the basis of physical or mental disability with respect to "any program or activity receiving federal financial assistance."

In 1990, Congress enacted the ADA, which extended the requirements of the Rehabilitation Act to all services, programs, and activities of all public entities, including those that do not receive federal financial assistance.[114] A "public entity" under the ADA is defined to include "any State or local government," and "any department, agency, [or] special purpose district."[115] "There is no significant difference in the analysis of the rights and obligations created by the ADA and the Rehabilitation Act."[116]

The Rehabilitation Act and the ADA commonly protect against discrimination in employment, housing, education, transportation, and public accommodations. These federal laws, however, also broadly prohibit a public entity from discriminating against "a qualified individual with a disability" on account of the individual's disability when providing a service. Title II of the ADA states the following:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, *or be subjected to discrimination by any such entity*. (Emphasis added.)[117]

In 1987, the United States Supreme Court determined that a person suffering from TB is a "qualified individual with a disability" under the Rehabilitation Act, and in 1993, the Code of Federal Regulations that implement the ADA explicitly mandated that TB be deemed a disability under the ADA.[118]

In 1999, the U.S. Supreme Court decided the *Olmstead* case, which addressed the least restrictive alternative requirement in Title II of the ADA regarding the confinement of mentally disabled patients in Georgia. The court held that the unjustified placement or retention of persons in institutions, severely limiting their exposure to the outside community, constitutes a form of discrimination prohibited by Title II of the ADA.[119] The court noted Congress' findings when

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[113] 29 U.S.C. section 794 (Exhibit J); 34 C.F.R. section 104 *et seq*. (Exhibit J); *Lloyd v. Regional Transp. Authority* (1977) 548 F.2d 1277, 1285 (Exhibit J).

[114] 42 U.S.C. section 12101 (Exhibit J), 28 C.F.R. section 35.101 *et seq*. (Exhibit J).

[115] 42 U.S.C. section 12132(1)(A)(B) (Exhibit J).

[116] *Zuckle v. University of California* (1999) 166 F.3d 1041, 1045, fn. 11 (Exhibit J).

[117] 42 U.S.C. section 12132 (Exhibit J).

[118] *School Board of Nassau County v. Arline* (1987) 480 U.S. 273, 289 (*Arline*) (Exhibit J); 28 Code of Federal Regulations, section 35.104 (Exhibit J).

[119] *Olmstead v. Zimring* (1999) 527 U.S. 581, 596-597 (Exhibit J).

enacting the ADA that "unjustified segregation" of persons with disabilities is a form of discrimination.[120]

The court also noted two regulations that implement the ADA that: (1) require each public entity to administer services and programs in the most integrated setting appropriate to the needs of qualified individuals with disabilities, and (2) require each public entity to make reasonable accommodations in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.[121] The court held that the reasonable accommodations standard can be met when the state "demonstrates that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in *less restrictive settings*." (Emphasis added.)[122] The court further held that Georgia law expressed a preference for treatment in the most integrated setting appropriate by providing that "[i]t is the policy of the state that the *least restrictive alternative placement* be secured for every client at every state of his habilitation." (Emphasis added.)[123] The court remanded the case to the lower courts for consideration of the facts to these standards.

The due process and ADA requirement to consider the least restrictive alternatives available was addressed in *City of Newark v. J.S.*, a case involving the involuntary civil commitment of a homeless person with active TB.[124] Hospital authorities requested the city to intervene and issue an order of hospital confinement when J.S., a noncompliant patient with active TB, tried to leave the hospital against medical advice. J.S. had a prior history of disappearances and of releases against medical advice, and would return to the emergency room only when his health deteriorated. J.S. also failed to follow proper infection control guidelines or take proper medication when in the hospital and failed to complete treatment regimens following his prior releases.[125] The court, after summarizing the due process and ADA requirements, determined that a health officer seeking to infringe upon a person's liberty by imposing detention, confinement, isolation, or quarantine, must first establish by clear and convincing evidence that the person poses a significant risk of transmitting disease to others with serious consequences. The court explained that courts must guard against the risk that governmental action may be grounded in popular myths or irrational fears and, thus, the court must demand an individualized, fact-specific determination as to the person under consideration, which is "the key to all decision-making under the ADA."[126]

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[120] *Id.* at page 600, citing 42 U.S.C. 12101(a)(2).

[121] *Id*. at page 592, citing 28 Code of Federal Regulations, sections 35.130(b)(7) and (d).

[122] *Id*. at page 605.

[123] *Id.* at page 603, fn. 13.

[124] *City of Newark v. J.S.* (1993) 652 A.2d 265 (Exhibit J). This case is not precedential, but is used to explain how the rules of due process and the ADA apply to TB control cases.

[125] *Id.* at page 268-269.

[126] *Id*. at pages 274-275.

In addition, the least restrictive means should be used to achieve the clearly defined public health goal.[127] With respect to TB control, the court noted that compulsory directly observed therapy (which assures that the patient takes medication while being directly observed by a health care worker) should be used "only as a last resort; conceptually, it should be used as a less restrictive alternative to isolation or commitment."[128] After considering the evidence in the case, and based on the individual circumstances of the homeless, noncompliant TB patient, the court found that hospital confinement was the least restrictive mode of isolation.[129]

Accordingly, the test claim statute, Health and Safety Code section 121365, which authorizes the LHO to issue orders less restrictive than quarantine, isolation, or detention (e.g. orders for exclusion from the workplace, completion of medication, or directly observed therapy) to meet the public health goals of treating the TB patient and protecting the public from exposure to TB simply codifies the existing ADA requirement to consider the less restrictive alternatives available. Thus, the Commission finds that the authority in Health and Safety Code section 121365 to issue these orders does not mandate a new program or higher level of service.

**b. The requirements in section 121365 to use every available means to ascertain and investigate cases, to follow state and local rules, and to advise and report to the district attorney when orders are violated are not new.**

During the period of reimbursement, the first paragraph of Health and Safety Code section 121365 has stated the following:

> Each local health officer is hereby directed to use every available means to ascertain the existence of, and immediately investigate all reported or suspected cases of active tuberculosis disease in the jurisdiction, and to ascertain the sources of those infections. In carrying out the investigations, each local health officer shall follow applicable local rules and regulations and all general and special rules, regulations, and orders of the state department. If the local health officer determines that the public health in general or the health of a particular person is endangered by exposure to a person who is known to have active tuberculosis disease, or to a person for whom there are reasonable grounds to believe has active tuberculosis disease, the local health officer *may* issue any orders he or she deems necessary to protect the public health or the health of any other person, and *may* make application to a court for enforcement of the orders. Upon the receipt of information that any order has been violated, the health officer shall advise the district attorney of the county in which the violation has occurred, in writing, and shall submit to the district attorney the information in his or her possession relating to the subject matter of the order, and of the violation or violations thereof. (Emphasis added.)

[127] *Id.* at page 275.

[128] *Id.* at page 276.

[129] *Id.* at page 278.

The requirements to use every available means to ascertain and investigate cases of TB in the jurisdiction, to follow state and local rules, and to advise and report violations of orders to the district attorney are not new. Since at least 1965, state law has continuously imposed the same requirements on the LHO. Former Health and Safety Code section 3285, as amended in 1965, stated the following:

> *Each local health officer is hereby directed to use every available means to ascertain the existence of, and immediately investigate, all reported or suspected cases of tuberculosis in the infectious stages within his jurisdiction, and to ascertain the sources of such infections*. In carrying out the investigations, each health officer is invested with full powers of inspection, examination and quarantine or isolation of all persons known to be infected with tuberculosis in an infectious stage and is hereby directed:
>
> (a) To make examinations as are deemed necessary of persons reasonably suspected of having tuberculosis in an infectious stage and to isolate or isolate and quarantine such persons, whenever deemed necessary for the protection of public health.
>
> (b) *Follow local rules and regulations regarding examinations, quarantine, or isolation, and all general and special rules, regulations, and orders of the state department* in carrying out such examination, quarantine or isolation.
>
> (c) Whenever the health officer shall determine on reasonable grounds that an examination of any person is necessary for the preservation and protection of public health, he shall make an examination order in writing, setting forth the name of the person to be examined, the time and place of the examination, and such other terms and conditions as may be necessary to the protect the public health. Nothing contained in this subdivision shall be construed to prevent any person whom the health officer determines should have an examination for infectious tuberculosis from having such an examination made by a physician of his own choice who is licensed to practice medicine under the provisions of Chapter 5 (commencing with Section 2000), Division 2 of the Business and Professions Code under such terms and conditions as the health officer shall determine on reasonable grounds to be necessary to protect the public health.
>
> (d) Whenever the health officer shall determine that quarantine or isolation in a particular case is necessary for the preservation and protection of the public health, he shall make an isolation or quarantine order in writing, setting forth the name of the person to be examined, the period of time during which the order shall remain effective, the place of the isolation or quarantine, and such other terms and conditions as may be necessary to the protect the public health.
>
> (e) Upon the making of an examination, isolation or quarantine order as provided in this section, a copy of such order shall be served upon the person named in such order.

> (f) *Upon the receipt of information that any examination, quarantine or isolation order, made and served as herein provided, has been violated, the health officer shall advise the district attorney of the county in which the violation occurred, in writing, and shall submit to such district attorney the information in his possession relating to the subject matter of the examination, isolation, or quarantine order, and of such violation or violations thereof. . . .* (Emphasis added.) [130]

Accordingly, the Commission finds that the requirements to use every available means to ascertain and investigate cases of TB in the jurisdiction, to follow state and local rules, and to advise and report violations of orders to the district attorney do not mandate a new program or higher level of service.

**c. The authority in section 121365 to make application to a court for enforcement of orders does not mandate a new program or higher level of service.**

Health and Safety Code section 121365 authorizes the LHO to apply to the court for the enforcement of any orders issued under the TB control statutes as follows:

> If the local health officer determines that the public health in general or the health of a particular person is endangered by exposure to a person who is known to have active tuberculosis disease, or to a person for whom there are reasonable grounds to believe has active tuberculosis disease, the local health officer *may* issue any orders he or she deems necessary to protect the public health or the health of any other person, and *may* make application to a court for enforcement of the orders. (Emphasis added.)

The authority to "make application to a court for enforcement of the orders" is not a mandated activity. Health and Safety Code section 16 states: "'shall' is mandatory and 'may' is permissive." Thus, the fact that section 121365 says the LHO "may" make application to the court does not require performance of any activities mandated by the state. Rather the plain language of section 121365 authorizes, but does not require, the LHO to make such an application. Though LHOs have long been required to "enforce orders, ordinances, and statutes related to public health,"[131] they can do so by reporting the violation to the district attorney as they have been required to do since 1965.[132] This new statutory authority to make application to a court merely provides an additional means of enforcement. In fact, this authority is arguably not even new since an LHO could always file a civil complaint seeking a court order to compel compliance with any LHO order and requesting the imposition of civil penalties. Civil actions also can be used to obtain an injunction to prohibit an action that is contrary to the public health.

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[130] Former Health and Safety Code section 3285 as amended by Statutes 1965, chapter 1552 (Exhibit J.).

[131] See former Health and Safety Code section 452, repealed and renumbered as 101030 by Statutes 1995, chapter 415 (Exhibit J.).

[132] Health and Safety Code section 3285(f), as amended by Statutes 1965, chapter 1552, repealed and renumbered as 121365(f) by Statutes 1995, chapter 415 (Exhibit J.).

Therefore, the Commission finds that the authority to "make application to a court for enforcement of the orders" does not impose a new program or higher level of service.

**5. Requirements imposed to protect the rights of the TB patient when an order is issued pursuant to Health and Safety Code section 121365 (Health and Safety Code sections 121366-121369)[133]**

When an LHO issues an order under the authority provided by section 121365, sections 121366 through 121369 impose various requirements to protect the rights of the TB patient. The following requirements are imposed by sections 121367 and 121369 when the LHO issues any order under section 121365:

- That the orders be in writing and contain the following:
  - The legal authority under which the order is issued, including the particular sections of state law or regulations;[134]
  - An individualized assessment of the person's circumstances or behavior constituting the basis for the issuance of the order; [135]
  - The less restrictive treatment alternatives that were attempted and were unsuccessful, or the less restrictive treatment alternatives that were considered and rejected, and the reasons the alternatives were rejected; [136]
  - The name of the person, the period of time during which the order shall remain effective, the location, payer source if known, and other terms and conditions as may be necessary to protect the public health; [137]
- That a copy of the order shall be served upon the person named in the order; and[138]
- "If necessary, language interpreters and persons skilled in communicating with vision and hearing impaired individuals shall be provided in accordance with applicable law."[139]

In addition, sections 121366-121368 impose the following requirements when the LHO issues an order of detention pursuant to section 121365:

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[133] (Originally sections 3285.1-3285.4) as added by Statutes 1993, chapter 676 and amended by Statutes 1994, chapter 685, and repealed, renumbered, and reenacted as sections 121366-121369 by Statutes 1995, chapter 415 (Exhibit J.).

[134] Health and Safety Code section 121367(a)(1).

[135] Health and Safety Code section 121367(a)(2).

[136] Health and Safety Code section 121367(a)(3).

[137] Health and Safety Code section 121367(a)(4).

[138] *Ibid*.

[139] Health and Safety Code section 121369(a).

- Upon a detainee's request, the LHO must apply for a court order authorizing continued detention within 72 hours of the request.[140]
- Whether or not a detainee makes a request, a court order is required for detentions of more than 60 days.[141]
- The LHO must seek further court review of a detention within 90 days of the initial court order and within 90 days of each subsequent court review. [142]
- The LHO must prove the necessity of the detention by "clear and convincing" evidence.[143]
- A person subject to detention has the right to counsel and to have counsel provided.[144]
- Each health order must advise the detainee of the purpose of the detention and of his or her rights regarding release requests, court orders, court review, and legal representation.[145]
- Each health order must be accompanied by a separate notice that: explains the detainee's right to request release; lists the phone number the detainee may call to request release; explains the detainee's right to counsel; and informs the detainee that the LHO will notify two individuals specified by the detainee of the detention.[146]
- A detainee may only be detained for the amount of time necessary to fulfill the purpose of the detention. [147]

These bulleted requirements were added to the Health and Safety Code for the first time by the test claim statutes. However, except for the requirement to provide counsel to non-indigent persons, these requirements are mandated by federal law, under the ADA and the procedural due process requirements, and, thus, do not mandate a new program or higher level of service within the meaning of article XIII B, section 6.[148]

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[140] Health and Safety Code section 121366.

[141] *Ibid.*

[142] *Ibid.*

[143] *Ibid.*

[144] *Ibid.*

[145] Health and Safety Code section 121367(b)(1)-(4).

[146] Health and Safety Code section 121367(b)(5).

[147] Health and Safety Code section 121368.

[148] *Hayes, supra,* 1 Cal.App.4th 1564, 1593, citing *City of Sacramento, supra,* 50 Cal.3d 51, 76; see also, Government Code sections 17513, 17556 (b) and (c).

**a. The ADA requires the provision of language interpreters and persons skilled in communicating with vision and hearing impaired individuals.**

Health and Safety Code section 121369(a) requires that when an order is issued under the TB control statutes and "if necessary," language interpreters and persons skilled in communicating with vision and hearing impaired individuals shall be provided "in accordance with applicable law." Federal law, under the ADA, requires a public entity to provide reasonable accommodations, including interpreters, when necessary to avoid discrimination.

Title II of the ADA prohibits a "public entity" from discriminating against "a qualified individual with a disability" on account of the individual's disability:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.[149]

The courts have explained that the final clause of the quoted language "protects qualified individuals with a disability from being 'subjected to discrimination by any such entity,' and is not tied directly to the 'services, programs, or activities' of the public entity."[150] Thus, in instances of detention or arrest, the courts have found that the person detained may state a claim for discrimination under the ADA, even though no service was provided to the individual.[151]

Federal regulations adopted to implement the ADA require a public entity to make reasonable modifications in policies, practices, and procedures when the modifications are necessary to avoid discrimination.[152] The ADA regulations further provide that "[a] public entity shall take appropriate steps to ensure that communications with ... members of the public with disabilities are as effective as communications with others."[153] These steps include furnishing "appropriate auxiliary aids and services" to afford a disabled individual equal opportunity to participate in an activity of the public entity, as follows:

> A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.[154]

The ADA defines "auxiliary aids and services" to include "qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing

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[149] 42 United States Code, section 12132 (Exhibit J.).

[150] *Bircoll v. Miami-Dade County* (2007) 480 F.3d 1072, 1084-1085 (Exhibit J.).

[151] *Id.* at pages 1083-1085 (Exhibit J.).

[152] 28 Code of Federal Regulations, section 35.130(b)(7) (Exhibit J.).

[153] 28 Code of Federal Regulations, section 35.160(a) (Exhibit J.).

[154] 28 Code of Federal Regulations, section 35.104(1) (Exhibit J.).

impairments."[155] The ADA regulations further provide that "auxiliary aids and services" include, among other things, "[q]ualified interpreters" and "telecommunications devices for deaf persons (TDD's)."[156]

Accordingly, the requirement in Health and Safety Code section 121369(a) to provide language interpreters and persons skilled in communicating with vision and hearing impaired individuals when issuing an order for TB control does not mandate a new program or higher level of service.

**b. Except for providing counsel to non-indigent persons when an order of detention is issued, the remaining requirements are mandated by existing state and federal procedural due process requirements.**

Except for the requirement to provide counsel to non-indigent persons, the remaining requirements in sections 121366 through 121369 are mandated by the procedural due process requirements of state and federal law.

Under mandates law, when the federal government imposes costs on local agencies those costs are not mandated by the state and do not require state subvention.[157] Moreover, reimbursement is not required for state rules or procedures that are intended to implement federal due process law, and whose costs are in context de minimis. Such rules enacted by the state, even if they allegedly exceed the minimum due process requirements of federal law, are considered part and parcel of the underlying federal mandate and are not reimbursable.[158] The California Supreme Court in *San Diego Unified School Dist.*, a case addressing a request for reimbursement of due process hearing costs following a discretionary expulsion order, explained the rationale as follows:

> The record reveals that in the extended proceedings before the Commission, the parties spent numerous hours producing voluminous pages of analysis directed toward determining whether various provisions of Education Code section 48918 exceeded federal due process requirements. That task below was complicated by the circumstances that this area of federal due process law is not well developed. The Commission, which is not a judicial body, did as best it could and concluded that in certain respects the various provisions (as observed ante, footnote 11, predominately concerning notice, right of inspection, and recording requirements) "exceeded" the requirements of federal due process.
>
> Even for an appellate court, it would be difficult and problematic in this setting to categorize the various notice, right of inspection, and recording requirements here at issue as falling either within or without the general federal due process mandate. The difficulty results not from the circumstances that, as noted, the case

[155] 42 United States Code, section 12102(1)(A) (Exhibit J.).

[156] 28 Code of Federal Regulations, section 35.160(b)(1) (Exhibit J).

[157] *Hayes, supra,* 1 Cal.App.4th 1564, 1593, citing *City of Sacramento, supra,* 50 Cal.3d 51, 76; see also, Government Code sections 17513, 17556(b) and (c).

[158] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 889.

> law in the area of due process procedures concerning expulsion matters is relatively undeveloped, but also from the circumstance that when such an issue is raised in an action for reimbursement, as opposed to its being raised in litigation challenging an actual expulsion on the ground of allegedly inadequate hearing procedures, the issue inevitably is presented in the abstract, without any factual context that might help frame the legal issue. In such circumstances, courts are – and should be – wary of venturing pronouncements (especially concerning matters of constitutional law).
>
> In light of those considerations, . . . challenged state rules or procedures that are intended to implement an applicable federal law- and whose costs are , in context, de minimis- should be treated as part and parcel of the underlying federal mandate.
>
> Applying that approach to the case now before us, we conclude there can be no doubt that the assertedly "excessive due process" aspects of Education Code section 48918 for which the District seeks reimbursement in connection with hearings triggered by discretionary expulsions . . . fall within the category of matters that are merely incidental to the underlying federal mandate, and that produce at most a de minimis cost. Accordingly, for purposes of the District's reimbursement claim, all hearing costs incurred under Education Code section 48918, triggered by the District's exercise of discretion to seek expulsion, should be treated as having been incurred pursuant to a mandate of federal law, and hence all such costs are nonreimbursable under Government Code section 17556, subdivision (c).[159]

Similarly here, the requirements imposed by sections 121366 through 131369 are intended to implement federal due process law.

The due process clause provides that the state shall not "deprive any person of life, liberty, or property without due process of law."[160] When an individual's liberty or property interest is affected by governmental action, due process applies and requires that certain procedural safeguards be provided to the individual. The United States Supreme Court has not yet addressed the due process requirements required in TB control cases. However, in cases involving the involuntary detention for medical treatment, the United States Supreme Court held that due process requires the individual be given written notice; an opportunity to be heard before a neutral decision maker; the ability to review and challenge the evidence supporting the action; a written statement of reasons for the decision; the availability of legal counsel, furnished by the state if the individual is indigent; and timely notice of these rights.[161]

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[159] *Id*. at page 890.

[160] U.S. Constitution, 5th and 14th Amendment; see also, due process provisions in the California Constitution, article 1, sections 7 and 15 (Exhibit J).

[161] *Vitek v. Jones* (1980) 445 U.S. 480, 494-495 (Exhibit J).

Adequate notice under the due process clause has two components. It must inform affected parties of the action about to be taken against them and the procedures available for challenging that action.[162] In addition, government is generally required by the due process clause to provide an opportunity to object to the action before it deprives an individual of his or her liberty or property interest. However, in the context of communicable disease orders, "post-deprivation" objections are constitutional if the individual is considered an immediate danger to self or others and if the opportunity to object takes place within a reasonable time after the deprivation.[163] In addition, the United States Supreme Court determined that in cases dealing with the indefinite civil detention of mentally ill persons, due process requires the state to justify confinement by clear and convincing evidence – "a middle level of burden of proof that strikes a fair balance between the rights of the individual and the legitimate concern of the state."[164]

All of the orders an LHO is authorized to issue under Health and Safety Code section 121365 for purposes of TB control implicate an individual's liberty or property interest. As indicated above, civil commitments of any kind, including those for detention, isolation, or quarantine, infringe upon the individual's right of liberty.[165] The right to liberty extends to the right of the individual to contract and to engage in any of the common occupations of life.[166] Thus, by directing a patient to stay at home, a home isolation order implicates the patient's basic liberty interest in being free from physical confinement.[167] By ordering a patient to stay away from his or her workplace, a work exclusion order could have an impact on liberty and property interests associated with being free to fulfill contractual obligations, engage in an occupation, and earn a living. It is well-settled law that even temporary deprivations of an individual's liberty or property interest triggers due process protections. The length or severity of the deprivation must be weighed in determining what kind of process is due -- not *whether* process is due.[168]

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[162] *Atkins v. Parker* (1985) 472 U.S. 115, 152 (Exhibit J).

[163] *Menefee & Son v. Dept. of Food and Ag.* (1988) 199 Cal.App.3d 774, 781 (Exhibit J).

[164] *Addington v. Texas* (1979) 441 U.S. 418, 431 (Exhibit J).

[165] *Id*. at page 425 (Exhibit J).

[166] See *Meyer v. Nebraska*, *supra*, 262 U.S. 390, 398 (Exhibit J) (liberty "denotes not merely freedom from bodily restraint but also the right of the individual to contract [and] . . . engage in any of the common occupations of life"); *Smith v. Texas*, supra, 233 U.S. 630, 636 ("In so far as a man is deprived of the right to labor, his liberty is restricted [and] his capacity to earn wages and acquire property is lessened.")

[167] See also, *Demore v. Hyung Joon Kim* (2003) 538 U.S. 510, 541 (Exhibit J) ("the basic liberty from physical confinement l[ies] at the heart of due process").

[168] See *Fuentes v. Shevin* (1972) 407 U.S. 67, p. 86 (Exhibit J) ("The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property"); *Goss v. Lopez* (1975) 419 U.S. 565, p. 576 (holding that a 10-day suspension from school is a cognizable deprivation of liberty and property). Note that due process standards apply equally to liberty and property deprivations. See *Wolff v. McDonnell* (1974) 418 U.S. 539, p. 558 and *Zinermon v. Burch* (1990) 494 U.S. 113, p. 131.

In 2007, the Second District Court of Appeal in *Levin v. Adalberto M.* addressed a case challenging a civil order of detention issued by an LHO to a TB patient. Following an analysis of the cases summarized above, the court held that the "procedures mandated by [Health and Safety Code] sections 121365 through 121369 satisfy federal and state due process requirements."[169,170] Thus, under the Supreme Court's decision in *San Diego Unified School Dist.*, the requirements identified in sections 121366 through 121369 following the issuance of an order by the LHO pursuant to section 121365 are mandated by federal law and are not reimbursable under article XIII B, section 6.

However, the requirement in Health and Safety Code section 121366 to provide counsel to *non-indigent* TB patients subject to a detention order goes beyond the requirements of federal due process law and is not considered "part and parcel" of the federal due process requirements. Section 121366 states that "any person who is subject to detention order shall have the right to be represented by counsel *and upon the request of the person, counsel shall be provided*." (Emphasis added.)

In *Vitek*, the United States Supreme Court held that the right to be represented by counsel is a requirement of due process law, but only must be furnished at no cost to the individual if the individual is indigent.[171] The plain language of section 121366 provides the right to counsel in the first part of the sentence – "any person who is subject to detention order shall have the right to be represented by counsel." The first part tracks federal due process. Section 121366 further provides, without limitation regarding the ability of the person to pay for counsel, that upon the request of "any" person, "counsel shall be provided." Thus, the plain language f section 121366 requires that counsel be provided at no cost to any individual, including non-indigent individuals subject to a detention order. Absent the requirement in section 121366, counties would not be required to provide counsel to non-indigent patients in TB control cases. The cost of providing counsel to appear in court to argue that the detention is not reasonable under the circumstances of the case and to represent the individual subject to a TB detention order, is not the same as the extra notice requirements following an expulsion order that were deemed "part and parcel" in the *San Diego Unified School Dist.* case, whose costs were considered "de minimis."

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[169] *Levin v. Adalberto M.* (2007) 156 Cal.App.4th 288, 302 (Exhibit J).

[170] See also, "Menu of Suggested Provisions for State Tuberculosis Prevention and Control Laws," issued by the Centers for Disease Control and Prevention (CDC), which summarizes the constitutional due process requirements involved when issuing TB orders and identified the due process requirements codified by other state's statutes and regulations that comply with the due process clause that are the same or similar to those codified in the test claim statutes. Differences occur in the number of days that the LHO must seek a court order to continue the detention of a TB patient. (Exhibit J.) See also, "TB Control and the Law, Frequently Asked Questions on Civil Commitment" issued by the Public Health Institute, describing the procedures in sections 121366 through 121269 as the "hallmark of procedural due process." (Exhibit J.)

[171] *Vitek v. Jones* (1980) 445 U.S. 480, 495 (Exhibit J.).

Thus, the Commission finds that the requirement in Health and Safety Code section 121366 to provide counsel to *non-indigent* TB patients subject to a detention order mandates a new program or higher level of service within the meaning of article XIII B, section 6.

### B. There Are Costs Mandated by the State Within the Meaning of Article XIII B, Section 6 and Government Code Section 17514 Which May Be Partially Offset by Local Fee Authority.

The final issue is whether the state-mandated activities impose costs mandated by the state,[172] and whether any statutory exceptions listed in Government Code section 17556 apply to the test claim. 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." Government Code section 17564 requires reimbursement claims to exceed $1,000 to be eligible for reimbursement. Claimant asserts that it has costs exceeding one-thousand dollars per year.[173] In 2010, claimant had $5,144,431 in TB control related expenses. The state provided claimant with $4,579,366 for TB control related activities for 2010 and the claimant absorbed the remaining $565,066 of the costs.[174] The Commission, however, cannot find "costs mandated by the state" within the meaning of Government Code section 17514 if any exceptions in Government Code section 17556 apply, as discussed below. Claimant asserts that none of the exceptions to finding a reimbursable state-mandated program under Government Code section 17556 apply here.[175]

#### 1. There is No Evidence in the Record to Support a Finding That Claimant Requested the Test Claim Statutes Within the Meaning of Government Code Section 17556(a).

DHS asserts that if the Commission finds that there is a state-mandated program or higher level of service that it should deny the claim because the exception under Government Code section 17556(a) should apply in this case.[176] Government Code section 17556(a) prohibits the Commission from finding costs mandated by the state if the test claim is submitted by a local entity that requested the test claim statutes. Government Code section 17556(a) requires a specific request for the test claim legislation in the form of a resolution of the governing body of the city, county or school district claimant or a letter from the delegated representative of the governing body. However, there is no evidence in the record to support a finding that Government Code section 17556(a) applies in this case.

Government Code section 17556(a) defines a "request by the local agency" and prohibits reimbursement if a claim:

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[172] *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

[173] Claimant, test claim, *supra*, p. 14 (Exhibit A).

[174] Claimant, response to request for additional information, *supra*, p.1 (Exhibit G).

[175] Claimant, test claim, *supra*, p.p. 15-16 (Exhibit A).

[176] DHS, comments on the test claim, *supra*, p.p. 1-2 (Exhibit D).

> …is submitted by a local agency or school district which requested legislative authority for that local agency …to implement the program specified in the statute, and that statute imposes costs upon that local agency… requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency… which requests authorization for that local agency …to implement a given program shall constitute a request within the meaning of this paragraph.

In support of its contention that Government Code section 17556(a) precludes reimbursement for counties that expressed support for the test claim statutes, DHS points to the fact that the legislation was specifically requested by the Health Officer's Association of California (HOAC). DHS argues that because claimant is a member of HOAC, HOAC's request of the legislation should be imputed to claimant.

The Commission reviewed the author's bill file and the committee files and found evidence that the test claim legislation was sponsored by HOAC and supported by the claimant and numerous other counties.[177] In fact, the legislation was drafted by the Santa Cruz County LHO at the time, Ira Lubell, MD, who was also the chair of the California Medical Association's (CMA's) Advisory Panel on Preventative Medicine at that time. However, a search of the County of Santa Clara Board of Supervisors Resolutions for the period of January 1993 to December 1994 showed no evidence of a specific request for this legislation or a delegation of authority to HOAC to advocate on its behalf.[178]

A local agency or school district must "request" legislative authority. The verb request means, "to make a request to or of; to ask for."[179] The resolutions and letters from counties make no request, but merely support the bill or the concepts therein. The word "support" is not synonymous with "request," and the statute is clear: making a "request" is the governing standard to trigger the exception to reimbursement. The Commission finds that DHS's argument is incorrect and not supported by the plain meaning of Government Code section 17556(a); and that the letters submitted in support of the test claim legislation do not constitute a "request" within the meaning of section 17556(a).

If a statute cannot be understood based on its plain meaning, only then is it correct to refer to its legislative history.[180] For Government Code section 17556, even if the meaning were ambiguous regarding whether local government resolutions that support a bill constitute a request to implement a program, its legislative history emphasizes the distinction between requesting and supporting legislation.

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[177] See letter from HOAC sponsoring the legislation and letters of support from various counties, including claimant (Exhibit J).

[178] Claimant, response to request for additional information, *supra*, declaration of Jenny Yelin, May 13, 2011 (Exhibit G).

[179] The Merriam-Webster Dictionary (1997) page 627. Even though the plain meaning should be clear, a dictionary definition will sometimes emphasize that clarity.

[180] *In re York* (1995) 9 Cal.4th 1133, p. 1142 (Exhibit J.).

Government Code section 17556 originated in Statutes 1977, chapter 1135, also known as Senate Bill No. 90 (1977-1978 Reg. Sess.), in former Revenue and Taxation Code section 2253.2.[181] The original bill precluded reimbursement for a "chaptered bill … requested by or on behalf of the local agency … which desired legislative authority to implement the program specified in the bill." The following year, section 2253.2 was amended by Statutes 1978, chapter 794 (Sen. Bill No. 1490 (1977-1978 Reg. Sess.)). The May 8, 1978 version of Senate Bill 1490 added the definition of request as follows:

> "*For purposes of this paragraph, a resolution from the governing body or a letter from a member or delegated representative of the governing body of a local agency …which expresses a desire for and support of legislation to authorize that local agency …to implement a given program shall constitute a "request"…*"

(Emphasis added). However, the June 21, 1978 version amended the sentence to be nearly identical[182] to its current form, as follows:

> "For purposes of this paragraph, a resolution from the governing body or a letter from a ~~member or~~ delegated representative of the governing body of a local agency …which ~~expresses a desire for and support of legislation to authorize~~ *requests legislative authorization for* that local agency …to implement a given program shall constitute a "request"..." (added italicized text in original).

Rejection of a specific provision contained in an act as originally introduced is persuasive that the act should not be interpreted to include what was left out.[183] Here, deleting the phrase "expresses a desire for and support of legislation," means that a "request of legislative authorization" should not be interpreted to include an expression of "desire for and support of legislation" because this phrase was left out of the final bill. In other words, the Legislature did not intend to preclude reimbursement for counties or other local entities that support legislation.

Though many local governments, including the claimant, supported the test claim legislation, support of a bill does not constitute a specific request for legislation under Government Code section 17556(a). Therefore, the Commission finds that the exception in Government Code section 17556(a) does not apply here.

**2. Claimant Has Fee Authority For the Test Claim Activities Requiring Voter Approval Under Proposition 218 Which May Offset Some of Claimant's Costs But Which Does Not Eliminate the Mandate.**

Government Code section 17556(d), states:

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[181] The provisions of Senate Bill No. 90 (1977-1978 Reg. Sess.) governed the mandates process for the Board of Control, the Commission on State Mandate's predecessor. This former Revenue and Taxation Code section was repealed by Statutes 1988, chapter 160, a code maintenance bill.

[182] The word "legislative" was later amended out of the provision.

[183] *Bollinger v. San Diego Civil Service Comm.* (1999) 71 Cal. App. 4th 568, 575 (Exhibit J).

> The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency … if, after a hearing, the commission finds any one of the following: [¶]…[¶] (d) The local agency … has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

Health and Safety Code section 101325 authorizes the imposition of a fee to pay the reasonable expenses of the LHO or other officers or employees incurred in the enforcement of any statute, order, quarantine, or regulation prescribed by a state officer or department relating to public health. Health and Safety Code section 101325 provides:

> Whenever the governing body of any city or county determines that the expenses of the [LHO] or other officers or employees in the enforcement of any statute, order, quarantine, or regulation prescribed by a state officer or department relating to public health, requires or authorizes its [LHO] or other officers or employees to perform specified acts that are not met by fees prescribed by the state, the governing body may adopt an ordinance or resolution prescribing fees to pay the reasonable expenses of the [LHO] or other officers or employees incurred in the enforcement. . . . The schedule of fees prescribed by ordinance or resolution of the governing body shall be applicable in the area in which the [LHO] or other officers and employees enforce any statutes, order, quarantine, or regulation prescribed by a state officer or department relating to public health.

The plain language of Health and Safety Code section 101325 authorizes the imposition of a fee to pay the reasonable expenses of the LHO or other officers or employees incurred in the enforcement of any statute, order, quarantine, or regulation prescribed by a state officer or department relating to public health. "Any statutes" by definition includes the test claim statutes. However, the plain language of the statutes limits this fee authority to situations where the LHO or other officers or employees are required or authorized to perform specified acts that are not met by other fees prescribed by the state. Therefore, any fee imposed pursuant to Health and Safety Code section 101325 cannot exceed a city or county's reasonable expenses for the required activities in excess of other fees prescribed by the state. However, this fee is subject to voter approval under Proposition 218 because it is imposed on a parcel and does not directly benefit the parcel. Thus, as explained below, Government Code section 17556(d) does not apply to deny the claim. Any fees recovered through section 101330, would be identified as offsetting revenue.

Health and Safety Code section 101330 specifies that the officer designated "to collect fees authorized by Section 101325, shall prepare a list of *parcels of real property subject to these fees*." Further, although it is called a "fee" in section 101325 but an "assessment" under section 101335 (which addresses the duties of the tax collector with regard to the fee), it does not meet the "special benefit" and "proportionality" requirements in Article XIII D, section 4 (a) for a special assessment and thus is a fee for purposes of Proposition 218 analysis. With some exceptions, local government fees or assessments that are incident to property ownership are subject to voter approval under article XIII D of the California Constitution, as added by Proposition 218 in 1996. Article XIII D defines a fee as "any levy

other than an ad valorem tax, a special tax, or an assessment, imposed by an agency on a parcel or a person as an incident of property ownership, including a user fee or charge for a property-related service." It defines an assessment as "any levy or charge upon real property by an agency for a special benefit conferred upon the real property [and] includes, but is not limited to, 'special assessment,' 'benefit assessment,' 'maintenance assessment,' and 'special assessment tax.'"

However, it also imposes "special benefit" and "proportionality" requirements on special assessments. These requirements are set forth in Article XIII D, section 4(a):

> An agency which proposes to levy an assessment shall identify all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed. The proportionate special benefit derived by each identified parcel shall be determined in relationship to the entirety of the capital cost of a public improvement, the maintenance and operation expenses of a public improvement, or the cost of the property related service being provided. No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel. Only special benefits are assessable, and an agency shall separate the general benefits from the special benefits conferred on a parcel....

Because the health fee authorized by section 101325 would arguably provide a general benefit to all people in the jurisdiction by preventing the spread of TB, but not provide any special benefit to a parcel, it does not meet the special assessment requirements of article XIII D, section 4(a) of the California Constitution. Therefore, for purposes of Proposition 218, it would be treated as a property-related fee. Among other procedures, new or increased property-related fees require a majority-vote of the affected property owners, or two-thirds registered voter approval, or weighted ballot approval by the affected property owners.[184] Assessments must also be approved by owners of the affected parcels.[185]

The plain language of Government Code section 17556(d) prohibits the Commission from finding that the permit imposes "costs mandated by the state" if "[t]he local agency … has the *authority* to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." [Emphasis added.] Under Proposition 218, the local agency has no authority to impose the fee without the consent of the voters or property owners.

Additionally, it is possible that the local agency's voters or property owners may never adopt the proposed fee or assessment, but the local agency would still be required to comply with the state mandate. Denying reimbursement under these circumstances would violate the purpose of article XIII B, section 6, which is to "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

[184] California Constitution, article XIII D, section 6(c).

[185] California Constitution, article XIII D, section 4 (d).

XIII A and XIII B impose."[186] Though some of the eligible claimants may have passed a fee under this provision which may be used to fund the costs of the TB program, the amount of the fee may not be sufficient to fund the program or they may not be able to increase the fee as the costs of the program increase.

In *Connell v. Superior Court*,[187] water districts argued that they lacked "sufficient" fee authority because it was not economically feasible for them to levy fees that were sufficient to pay the mandated costs. The court rejected the districts' argument that "authority" as used in the statute should be construed as a "practical ability in light of surrounding economic circumstances" because that construction cannot be reconciled with the plain language of section 17556, and would create a vague standard not capable of reasonable adjudication. The court also said that nothing in the fee authority statute in that case (Wat. Code, § 35470) limited the authority of the districts to levy fees "sufficient" to cover their costs. Thus, the court concluded that the plain language of section 17556 made the fee authority issue solely a question of law, and that the water districts could not be reimbursed due to that fee authority.[188] The *Connell* court determined that "the plain language of the statute [Gov. Code, § 17556, subd. (d)] precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program."[189] However, the Proposition 218 election requirement is not like the economic hurdle to fees in *Connell*. Absent compliance with the Proposition 218 election and other procedures, there is no legal authority to impose or raise fees within the meaning of Government Code section 17556(d). The voting requirement of Proposition 218 does not impose a mere practical or economic hurdle, as in *Connell*, but a legal and constitutional one. Without voter or property owner approval, the local agency lacks the "authority, i.e., the right or power, to levy fees sufficient to cover the costs of the state-mandated program."[190]

For these reasons, the Commission finds that local agencies do not have fee authority that is sufficient within the meaning of Government Code section 17556(d) to deny the test claim since the fee or assessment is conditioned on voter or property-owner approval under Proposition 218 (article XIII D). This conclusion is consistent with other recent test claim decisions. [191]

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[186] *County of San Diego, supra*, 15 Cal.4th 68, 81.

[187] *Connell v. Superior Court, supra*, 59 Cal.App.4th 382.

[188] *Connell v. Superior Court, supra*, 59 Cal.App.4th 382, 398-402.

[189] *Id.* at page 401.

[190] *Connell v. Superior Court, supra*, 59 Cal.App.4th 382, 401.

[191] The issue of whether a local agency has sufficient fee authority for the mandated activities under Government Code section 17556(d), in light of the voter approval requirement for fees under article XIII D (Proposition 218) was decided by the Commission in *Municipal Storm Water and Urban Runoff Discharges* (03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21) on July 30, 2009, and in *Discharge of Stormwater Runoff - Order No. R9-2007-0001*(07-TC-09) on March 26, 2010. In those test claim decisions, the Commission found that a local agency does not have sufficient fee authority within the meaning of Government Code section 17556 if the fee or

However, the parameters and guidelines should identify a fee or assessment imposed pursuant to Health and Safety Code section 101325, at any time during the reimbursement period, as revenue that may offset the claimant's costs in performing the mandated activities.

### 3. Current State Funding For TB Control Activities Is Not Authorized for Use to Fund the Costs of the State Mandated New Program or Higher Level of Service.

State funding is currently being provided by the state for activities relating to TB control including "food, shelter, incentives and enabler funds reimbursement" and reimbursement for civil detention. Claimant provided information indicating that, at least for 2010, the state provided about 89 percent of the county's TB control costs.[192] Reimbursement is available for the cost of detentions for isolation (Health and Safety Code section 121365(d)) and completion of therapy (Health and Safety Code section 121365(e)).

However, these funds are specifically prohibited from being "dispersed to, or used by, correctional facilities" (Health and Safety Code section 121358(a)). In addition, based on the comments submitted to the Commission by DPH, the costs of the LHO notification of and coordination with parole agents and parole officers, the activities imposed on local detention facilities, or the provision of counsel for non-indigent persons subject to an order to detain, do not appear to be authorized uses of the funds currently distributed by the state. These are the activities that the Commission finds to be new and subject to reimbursement pursuant to article XIII B, section 6 of the California Constitution.

## IV. Conclusion

The Commission finds that Health and Safety Code sections 121361 and 121362 and 121366 as added or amended by Statutes 1993, chapter 676, Statutes 1994, chapter 685, Statutes 1997, chapter 116, and Statutes 2002, chapter 763 mandate a new program or higher level of service for counties and cities and within the meaning of article XIII B, section 6 of the California Constitution, and impose costs mandated by the state pursuant to Government Code section 17514, subject to offsetting revenues described in the analysis above, only for the following activities:

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assessment is contingent on the outcome of an election by voters or property owners. These decisions are being challenged on the issue of fee authority sufficiency in light of Proposition 218, among other issues, and are set for hearing later this summer. (*State of California Department of Finance, State Water Resources Control Board, et al v. Commission on State Mandates, County of Los Angeles, et al. Los Angeles County Superior Court*, Case No. BS130730 [Municipal Storm Water and Urban Runoff Discharges (03-TC-04, 03-TC-19, 03-TC-20, and 03-TC-21)], *State of California Department of Finance, State Water Resources Control Board, et al. v. Commission on State Mandates and County of San Diego, et al.,* Sacramento County Superior Court, Case No. 34-2010-80000604 [Discharge of Stormwater Runoff (07-TC-09)].)

[192] In 2010 claimant had $5,144,431 in unspecified TB control related expenses. The state provided $4, 579, 366 and the claimant absorbed $565,066 of the costs. (See Claimant, response to request for additional information, May 16, 2011, p.1 (Exhibit G).)

- For local detention facilities to:
    - Submit notification and a written treatment plan that includes the information required by Health and Safety Code section 121362 to the LHO when a person with active TB or reasonably believed to have active TB is discharged or released from the detention facility; and
    - Submit notification and a written treatment plan that includes the information required by Health and Safety Code section 121362 to the LHO and the medical officer of the local detention facility receiving the person when a person with active TB or reasonably believed to have active TB is transferred to a local detention facility in another jurisdiction.
- For LHOs to:
    - Review for approval within 24 hours of receipt only those treatment plans submitted by a health facility; and
    - Notify the medical officer of a parole region or a physician or surgeon designated by the Department of Corrections when there are reasonable grounds to believe that a parolee has active TB and ceases treatment for TB.[193]
- For counties or specified cities to provide counsel to non-indigent TB patients who are subject to an order of detention.[194]

The Commission further concludes that all other statutes pled in this claim do not constitute reimbursable state-mandated programs.

[193] With the exception of preparing the written treatment plans, the other activities requested by the claimant pursuant to sections 121361 and 121362 may be considered during the adoption of the parameters and guidelines. The Commission's regulations allow the Commission to consider and include activities in the parameters and guidelines that are reasonably necessary to comply with the mandated activities if there is substantial evidence in the record to support the finding. (Cal. Code Regs., tit. 2, § 1183.1(a)(4).)

[194] Health and Safety Code section 121366.