



June 1, 2016

Ms. Lisa Macchione  
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County of San Diego  
1600 Pacific Highway, Room 355  
San Diego, CA 92101

Ms. Jill Kanemasu  
State Controller's Office  
Accounting and Reporting  
3301 C Street, Suite 700  
Sacramento, CA 95816

*And Parties, Interested Parties, and Interested Persons (See Mailing List)*

Re: **Decision**

*Seriously Emotionally Disturbed Pupils: Out-of-State Mental Health Services,*  
10-9705-I-01 and 13-9705-I-05  
Government Code Section 7576, as amended by Statutes 1996, Chapter 654;  
California Code of Regulations, Title 2, Division 9, Chapter 1, Sections 60100 and 60110  
Fiscal Years: 2001-2002, 2002-2003, 2003-2004, 2004-2005, and 2005-2006  
County of San Diego, Claimant

Dear Ms. Macchione and Ms. Kanemasu:

On May 26, 2016, the Commission on State Mandates adopted the decision on the above-entitled matter.

Sincerely,

Heather Halsey  
Executive Director

BEFORE THE  
 COMMISSION ON STATE MANDATES  
 STATE OF CALIFORNIA

**IN RE INCORRECT REDUCTION CLAIM  
 ON:**

Government Code Section 7576 as amended  
 by Statutes 1996, Chapter 654 (AB 2726);

California Code of Regulations, Title 2,  
 Division 9, Chapter 1, Sections 60100 and  
 60110<sup>1</sup>

Fiscal Years 2001-2002, 2002-2003,  
 2003-2004, 2004-2005, and 2005-2006

County of San Diego, Claimant

Case Nos.: 10-9705-I-01 and 13-9705-I-05

*Seriously Emotionally Disturbed Pupils:  
 Out-of-State Mental Health Services*

**DECISION PURSUANT TO  
 GOVERNMENT CODE SECTION 17500  
 ET SEQ.; CALIFORNIA CODE OF  
 REGULATIONS, TITLE 2, DIVISION 2,  
 CHAPTER 2.5, ARTICLE 7**

*(Adopted May 26, 2016)*

*(Served June 1, 2016)*

**DECISION**

The Commission on State Mandates (Commission) heard and decided these consolidated Incorrect Reduction Claims (IRCs) during a regularly scheduled hearing on May 26, 2016. Lisa Macchione and Kyle Sand appeared on behalf of the County of San Diego. Jim Spano and Chris Ryan appeared on behalf of the State Controller’s Office (Controller).

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 decision to deny these IRCs by a vote of 5-0 as follows:

<b>Member</b>	<b>Vote</b>
Ken Alex, Director of the Office of Planning and Research	Yes
Richard Chivaro, Representative of the State Controller	Yes
Mark Hariri, Representative of the State Treasurer, Vice Chairperson	Yes
Sarah Olsen, Public Member	Yes
Eraina Ortega, Representative of the Director of the Department of Finance, Chairperson	Yes
Carmen Ramirez, City Council Member	Absent
Don Saylor, County Supervisor	Absent

<sup>1</sup> Note that this caption differs from the test claim and parameters and guidelines captions in that it includes only those sections that were approved for reimbursement in the test claim and decision. Generally, a parameters and guidelines caption should include only the statutes and executive orders and the specific sections approved in the test claim decision. However, that was an oversight in the case of the parameters and guidelines at issue in this case.

## **Summary of the Findings**

These consolidated IRCs challenge the State Controller's Office's (Controller's) reductions totaling \$2,626,697 claimed for fiscal years 2001-2002 through 2005-2006 by the County of San Diego (claimant) for the *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* program. The Controller reduced vendor costs claimed for board and care and treatment services for out-of-state residential placement of SED pupils in facilities organized and operated for-profit. The parameters and guidelines and state law only allow vendor payments for SED pupils placed in an out-of-state group home organized and operated on a *nonprofit* basis.

The Commission finds that the Controller's reduction of costs claimed for fiscal years 2001-2002 through 2005-2006 is correct as a matter of law.

During the entire reimbursement period for this program, state law and the parameters and guidelines required that out-of-state residential programs that provide board and care and treatment services to SED pupils shall meet the requirements of Welfare and Institutions Code section 11460(c)(2) through (3), which specified that reimbursement shall only be provided to facilities organized and operated on a nonprofit basis. The claimant contends that state law conflicted with federal law during this time period and that federal law did not limit the placement of SED pupils to nonprofit facilities. Absent a decision from the courts on this issue, however, the Commission is required by law to presume that state statutes and regulations adopted in accordance with the Administrative Procedures Act, are valid.<sup>2</sup> Accordingly, pursuant to state law and the Commission's parameters and guidelines, reimbursement is required only if the out-of-state service vendor is organized and operated on a nonprofit basis. Costs claimed for out-of-state service vendors that operate on a for-profit basis are beyond the scope of the mandate and are not eligible for reimbursement.

In this case, the Controller concluded, based on a service agreement provided by the claimant, that the vendor payments made by the claimant to Mental Health Systems, Inc., a California nonprofit corporation are not reimbursable because Mental Health Systems, Inc. contracted with Charter Provo Canyon School, a Delaware for-profit limited liability company, to provide the board and care and treatment services for SED pupils. Since the facility providing the treatment and board and care is a for-profit facility, the Controller correctly found that the costs were not eligible for reimbursement under the parameters and guidelines and state law. The decisions issued by the Office of Administrative Hearings (OAH) and the United States Supreme Court that claimant relies upon to argue for subvention are not applicable in this case because those cases do not address the subvention requirement of Article XIII B section 6 of the California Constitution. Moreover, claimant has provided no documentation or evidence that the costs claimed in the subject reimbursement claims were incurred as a result of a court order finding that no other alternative placement was identified for a SED pupil during the audit years in question. Further, unlike the court's equitable powers under IDEA, the reimbursement requirements of article XIII B, section 6, must be strictly construed and not applied as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."

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<sup>2</sup> California Constitution, article III, section 3.5; *Robin J. v. Superior Court* (2004) 124 Cal.App.4th 414, 425.

Therefore, the Commission denies these IRCs.

## **I. Chronology**

- 11/14/2007 Controller issued the final audit report for fiscal years 2001-2002 through 2004-2005.<sup>3</sup>
- 09/10/2010 Controller issued the final audit report for fiscal year 2005-2006.<sup>4</sup>
- 11/10/2010 Claimant filed IRC 10-9705-I-01.<sup>5</sup>
- 09/09/2013 Claimant filed IRC 13-9705-I-05.<sup>6</sup>
- 10/03/2014 Controller filed late comments on IRC 10-9705-I-01.<sup>7</sup>
- 10/03/2014 Controller filed late comments on IRC 13-9705-I-05.<sup>8</sup>
- 11/05/2014 Claimant filed request for an extension of time to file rebuttal comments on both IRCs.<sup>9</sup>
- 02/04/2016 Commission staff issued the Notice of Proposed Consolidation of IRCs 10-9705-I-01 and 13-9705-I-05.
- 03/15/2016 Commission staff issued the Draft Proposed Decision.<sup>10</sup>
- 04/01/2016 Controller filed comments on the Draft Proposed Decision.<sup>11</sup>
- 04/05/2016 Claimant filed request for an extension of time to file comments on the Draft Proposed Decision, which was approved for good cause.
- 04/15/2016 Claimant filed comments on the Draft Proposed Decision.<sup>12</sup>

## **II. Background**

### **A. Seriously Emotionally Disturbed Pupils: Out-of-State Mental Health Services Program**

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<sup>3</sup> Exhibit A, Incorrect Reduction Claim 10-9705-I-01, page 41. On October 25, 2013, in response to a Commission notice of incomplete filing, claimant resubmitted the claim form, specifying county as the claimant and providing an authorized signature of the county's Auditor-Controller on the claim certification. Exhibit A reflects the completed test claim filing.

<sup>4</sup> Exhibit B, Incorrect Reduction Claim 13-9705-I-05, page 42.

<sup>5</sup> Exhibit A, Incorrect Reduction Claim 10-9705-I-01, page 1

<sup>6</sup> Exhibit B, Incorrect Reduction Claim 13-9705-I-05, page 1.

<sup>7</sup> Exhibit C, Controller's Late Comments on IRC 10-9705-I-01, page 1.

<sup>8</sup> Exhibit D, Controller's Late Comments on IRC 13-9705-I-05, page 1.

<sup>9</sup> Exhibit E, Claimant's Request for Extension to file Rebuttal to Controller's Comments on IRCs, filed November 5, 2014.

<sup>10</sup> Exhibit F, Draft Proposed Decision.

<sup>11</sup> Exhibit G, Controller's Comments on the Draft Proposed Decision, filed April 1, 2016.

<sup>12</sup> Exhibit H, Claimant's Comments on the Draft Proposed Decision, filed April 15, 2016.

On May 25, 2000, the Commission approved the *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services*, 97-TC-05 test claim as a reimbursable state-mandated program (hereafter referred to as “SEDS”).<sup>13</sup> The test claim statute and regulations were part of the state’s response to the federal Individuals with Disabilities Education Act, or IDEA, that guaranteed to disabled pupils, including those with mental health needs, the right to receive a free and appropriate public education, including psychological and other mental health services, designed to meet the pupil’s unique educational needs. The test claim statute shifted to counties the responsibility and funding of mental health services required by a pupil’s individualized education plan (IEP). The test claim statute and regulations address the counties’ responsibilities for out-of-state placement of seriously emotionally disturbed pupils.

Parameters and guidelines for the SEDS program were adopted on October 26, 2000,<sup>14</sup> and corrected on July 21, 2006,<sup>15</sup> with a period of reimbursement beginning January 1, 1997. As relevant to these IRCs, the parameters and guidelines, as originally adopted, authorize reimbursement for the following cost:

To reimburse counties for payments to service vendors providing mental health services to SED pupils in out-of-state residential placements as specified in Government Code section 7576 and Title 2, California Code Regulations, [sections] 60100 and 60110.<sup>16</sup>

The correction adopted on July 21, 2006 added the following sentence: “Included in this activity is the cost for out-of-state residential board and care of SED pupils.” The correction was necessary to clarify the Commission’s finding when it adopted the parameters and guidelines, that the term “payments to service vendors providing mental health services to SED pupils in out-of-state residential placements” includes reimbursement for “residential costs” of out-of-state placements.<sup>17</sup>

Thus, the parameters and guidelines authorize reimbursement for payments to out-of-state service vendors providing board and care and treatment services for SED pupils “*as specified in Government Code section 7576 and Title 2, California Code Regulations, [sections] 60100 and 60110.*” Former section 60100(h) required that “[o]ut-of-state placements shall only be made in residential programs that meet the requirements of Welfare and Institutions Code sections 11460(c)(2) through (c)(3).” Welfare and Institutions Code section 11460, as amended by Statutes of 1995, chapter 724, governed the foster care program from 1996 to 2010 which includes all of the fiscal years at issue in these IRCs. During those years, Welfare and Institutions Code section 11460(c)(3) provided that “State reimbursement for an AFDC-FC rate paid on or after January 1, 1993, shall only be paid to a group home *organized and operated on a*

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<sup>13</sup> Exhibit C, Controller’s Late Comments on IRC 10-9705-I-01, pages 25-33.

<sup>14</sup> Exhibit A, Incorrect Reduction Claim 10-9705-I-01, pages 28-32; Exhibit C, Controller’s Late Comments on IRC 10-9705-I-01, pages 37-41.

<sup>15</sup> Exhibit C, Controller’s Late Comments on IRC 10-9705-I-01, pages 49-55.

<sup>16</sup> Exhibit A, Incorrect Reduction Claim 10-9705-I-01, page 29; Exhibit B, Incorrect Reduction Claim 13-9705-I-05, page 30.

<sup>17</sup> Exhibit I, Corrected Parameters and Guidelines, dated July 21, 2006.

*nonprofit basis.*” (Emphasis added.) Thus, the nonprofit rule applicable to out-of-state foster care group homes was made expressly applicable to out-of-state residential placements of SED pupils.

The Commission amended the parameters and guidelines on October 26, 2006 to consolidate the parameters and guidelines for SEDS with the parameters and guidelines for the Reconsideration of *Handicapped and Disabled Students*, 04-RL-4282-10, and *Handicapped and Disabled Students II*, 02-TC-40/02-TC-49, for costs incurred commencing with the 2006-2007 fiscal year.<sup>18</sup> Reimbursement for the cost of out-of-state residential placement of seriously emotionally disturbed pupils remained the same when the program was consolidated with the *Handicapped and Disabled Students* program.<sup>19</sup>

Statutes 2011, chapter 43 (AB 114) eliminated the mandated programs for *Handicapped and Disabled Students*, 04-RL-4282-10; *Handicapped and Disabled Students II*, 02-TC-40/02-TC-49; and *SED Pupils: Out-of-State Mental Health Services*, 97-TC-05; by transferring responsibility for seriously emotionally disturbed pupils to school districts, effective July 1, 2011.<sup>20</sup> Thus on September 28, 2012, the Commission adopted an amendment to the consolidated parameters and guidelines ending reimbursement effective July 1, 2011.

#### B. The Audit Findings of the Controller

The claimant submitted reimbursement claims for the SEDS program totaling \$12,396,610 for fiscal years 2001-2002, 2002-2003, 2003-2004, 2004-2005 (\$9,933,677) and 2005-2006 (\$2,462,933). The Controller audited the claims and reduced them by a total of \$2,953,833 for various reasons. The claimant only disputes the reduction in Finding 1 for \$1,979,388 for fiscal years 2001-2002 through 2004-2005, and \$647,309 for fiscal year 2005-2006, relating to ineligible vendor payments for board and care and treatment services for out-of-state residential placement of SED pupils in facilities that are “owned and operated *for-profit*.”<sup>21</sup> The Controller concluded that the vendor payments made by the claimant to Mental Health Systems, Inc., a California nonprofit corporation are not allowable because Mental Health Systems, Inc., contracted with Charter Provo Canyon School, a Delaware for-profit limited liability company, to provide the out-of-state residential placement services. Since the facility providing the treatment and board and care is a for-profit facility, the Controller found that the costs were not eligible for reimbursement under the parameters and guidelines.<sup>22</sup>

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<sup>18</sup> Exhibit C, Controller’s Comments on IRC 10-9705-I-01, page 63; Exhibit I, Consolidated Parameters and Guidelines, adopted October 26, 2006.

<sup>19</sup> Exhibit I, Consolidated Parameters and Guidelines, adopted October 26, 2006, page 8.

<sup>20</sup> Exhibit I, Assembly Bill No. 114 (2011-2012 Reg. Sess.), approved by Governor, June 30, 2011.

<sup>21</sup> Exhibit A, Incorrect Reduction Claim 10-9705-I-01, page 9; Exhibit B, Incorrect Reduction Claim 13-9705-I-05, page 10. (Emphasis added.) Both the audit reports and IRCs use the terms “owned and operated for-profit.” However the statute states “organized and operated for-profit;” our analysis tracks the statutory language.

<sup>22</sup> Exhibit C, Controller’s Late Comments on IRC 10-9705-I-01, pages 12, 15-16 (see also the contract between Mental Health Systems, Inc. and Charter Provo Canyon School, provided in

### III. Positions of the Parties

#### A. County of San Diego

The claimant contends that the Controller's reductions for vendor payments for out-of-state residential placement of SED pupils in facilities that are owned and operated for-profit are incorrect and should be reinstated. For all fiscal years at issue, the claimant asserts that the requirements in the parameters and guidelines, based on California Code of Regulations, title 2, section 60100(h) and Welfare and Institutions Code section 11460(c)(3), are in conflict with the requirements of federal law, including the Individuals with Disabilities Education Act (IDEA) and section 472(c)(2) of the Social Security Act (42 U.S.C. 672(c)(2)).<sup>23</sup> In support of this position, the claimant argues the following:

- California law prohibiting placement in for-profit facilities is inconsistent with federal law, which no longer has such limitation, and with the IDEA's requirement that children with disabilities be placed in the most appropriate educational environment out-of-state and not be constrained by nonprofit status.<sup>24</sup>
- Counties will be subject to increased litigation without the same ability as parents to place seriously emotionally disturbed students in appropriate for-profit out-of-state facilities because the U.S. Supreme Court and the Office of Administrative Hearings (OAH) have found that parents were entitled to reimbursement for placing their child in appropriate for-profit out-of-state facilities when the IEP prepared by the school district was found to be inadequate and the placement was otherwise proper under IDEA.<sup>25</sup>
- The County contracted with a nonprofit entity, Mental Health Services, Inc. to provide the out-of-state residential services subject to the disputed disallowances.<sup>26</sup>
- State and Federal law do not contain requirements regarding the tax identification status of mental health treatment service providers and the county has complied with the legal requirements regarding treatment services, so there is no basis to disallow treatment costs.<sup>27</sup> California Code of Regulations, title 2, section 60020(i) and (j) describes the type of mental health services to be provided to SED pupils, as well as who shall provide

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Tab 12, pages 94-104 of Exhibit C); Exhibit D, Controller's Late Comments on IRC 13-9705-I-05, pages 11, 13 (see also the contract between Mental Health Systems, Inc. and Charter Provo Canyon School, provided in Tab 11, pages 82-91 of Exhibit D).

<sup>23</sup> Exhibit A, Incorrect Reduction Claim 10-9705-I-01, page 10; Exhibit B, Incorrect Reduction Claim 13-9705-I-05, page 10.

<sup>24</sup> Exhibit A, Incorrect Reduction Claim 10-9705-I-01, pages 11-14; Exhibit B, Incorrect Reduction Claim 13-9705-I-05, pages 11-15.

<sup>25</sup> Exhibit A, Incorrect Reduction Claim 10-9705-I-01, pages 14-16; Exhibit B, Incorrect Reduction Claim 13-9705-I-05, pages 15-17.

<sup>26</sup> Exhibit A, Incorrect Reduction Claim 10-9705-I-01, pages 16-17; Exhibit B, Incorrect Reduction Claim 13-9705-I-05, page 17.

<sup>27</sup> Exhibit A, Incorrect Reduction Claim 10-9705-I-01, pages 17-18; Exhibit B, Incorrect Reduction Claim 13-9705-I-05, page 18.

these services to special education students, with no mention of the tax identification status of the services provider.<sup>28</sup>

Claimant disagrees with the conclusions and recommendations in the Draft Proposed Decision and reasserts it is “entitled to the full amount of costs claimed for the placement of pupils in certain out-of-state residential facilities that are organized and operated on a non-profit basis for the reasons cited in the County’s incorrect reduction claim filing.”<sup>29</sup> The claimant also asserts that the Commission used the incorrect standard of review in making its decision on the incorrect reduction claim, and argues that the Commission must conduct an independent review of the matter and hear the claim de novo.<sup>30</sup>

#### B. State Controller’s Office

It is the Controller’s position that the audit adjustments are correct and that these IRCs should be denied. The Controller found that the unallowable costs resulting from the out-of-state residential placement of SED pupils in for-profit facilities are correct because the parameters and guidelines only allow vendor payments for SED pupils placed in a group home organized and operated on a nonprofit basis.<sup>31</sup> The Controller asserts that the unallowable treatment and board-and-care vendor payments claimed result from the claimant’s placement of SED pupils in prohibited for-profit out-of-state residential facilities.<sup>32</sup>

The Controller does not dispute the assertion that California law is more restrictive than federal law in terms of out-of-state residential placement of SED pupils. The Controller also does not dispute that local educational agencies, unlike counties, are not restricted under the Education Code from contracting with for-profit schools for educational services. However the Controller maintains that under the mandated program, costs incurred at out-of-state for-profit residential programs are not reimbursable.<sup>33</sup>

The Controller also distinguishes the OAH case cited by the claimant, in which the administrative law judge found that not placing the student in an appropriate facility denied the student a free and appropriate public education under federal regulations, because the decision does not address the issue of state mandated reimbursement for residential placements made outside of the regulations. The Controller also cites an OAH case where the administrative law

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<sup>28</sup> Exhibit A, Incorrect Reduction Claim 10-9705-I-01, page 17; Exhibit B, Incorrect Reduction Claim 13-9705-I-05, page 18.

<sup>29</sup> Exhibit H, Claimant’s Comments on the Draft Proposed Decision, filed April 15, 2016, page 1.

<sup>30</sup> Exhibit H, Claimant’s Comments on the Draft Proposed Decision, filed April 15, 2016, page 1. The Commission need not make a determination with regard to Claimant’s assertion of the legal standard to apply to the Controller’s auditing decisions generally, since this issue in this claim is a pure issue of law and therefore the de novo standard applies in this case.

<sup>31</sup> Exhibit C, Controller’s Late Comments on IRC 10-9705-I-01, page 12; Exhibit D, Controller’s Late Comments on IRC 13-9705-I-05, page 11.

<sup>32</sup> Exhibit C, Controller’s Late Comments on IRC 10-9705-I-01, page 16; Exhibit D, Controller’s Late Comments on IRC 13-9705-I-05, page 13.

<sup>33</sup> Exhibit C, Controller’s Late Comments on IRC 10-9705-I-01, page 15; Exhibit D, Controller’s Late Comments on IRC 13-9705-I-05, page 12.

judge found, consistent with the parameters and guidelines, that the county Department of Health could *not* place a student in an out-of-state residential facility that is organized and operated for-profit because the county is statutorily prohibited from funding a residential placement in a for-profit facility. There, the administrative law judge also determined that the business relationship between the nonprofit entity, Aspen Solutions, and a for-profit residential facility, Youth Care, did not grant the latter nonprofit status.<sup>34</sup>

The Controller filed comments in response to the Draft Proposed Decision, supporting the staff analysis and conclusion.<sup>35</sup>

#### **IV. Discussion**

Government Code section 17561(d) authorizes the Controller to audit the claims filed by local agencies and school districts and to reduce any claim for reimbursement of state mandated costs that the Controller determines is excessive or unreasonable.

Government Code Section 17551(d) requires the Commission to hear and decide a claim that the Controller has incorrectly reduced payments to a local agency or school district. If the Commission determines that a reimbursement claim has been incorrectly reduced, section 1185.9 of the Commission's regulations requires the Commission to send the decision to the Controller and request that the costs in the claim be reinstated.

The Commission must review questions of law, including interpretation of the parameters and guidelines, *de novo*, without consideration of legal conclusions made by the Controller in the context of an audit. 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.<sup>36</sup> The Commission must also interpret the Government Code and implementing regulations in accordance with the broader constitutional and statutory scheme. 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."<sup>37</sup>

With regard to the Controller's audit decisions, the Commission must determine whether they were arbitrary, capricious, or entirely lacking in evidentiary support. This standard is similar to

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<sup>34</sup> Exhibit C, Controller's Late Comments on IRC 10-9705-I-01, page 15 (citing OAH case Nos. N 2007090403 and 2005070683, available at Exhibit C, tabs 10 and 11, pages 75-92); Exhibit D, Controller's Late Comments on IRC 13-9705-I-05, pages 12-13 citing OAH case Nos. 2007090403 and 2005070683, available at Exhibit D, tabs 9 and 10, pages 62-79).

<sup>35</sup> Exhibit G, Controller's Comments on the Draft Proposed Decision, filed April 1, 2016.

<sup>36</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

<sup>37</sup> *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

the standard used by the courts when reviewing an alleged abuse of discretion of a state agency.<sup>38</sup> Under this standard, the courts have found that:

When reviewing the exercise of discretion, “[t]he scope of review is limited, out of deference to the agency’s authority and presumed expertise: ‘The court may not reweigh the evidence or substitute its judgment for that of the agency. [Citation.]’”...“In general...the inquiry is limited to whether the decision was arbitrary, capricious, or entirely lacking in evidentiary support...” [Citations.] When making that inquiry, the “ ‘ ‘court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute.’ ”<sup>39</sup>

The Commission must review the Controller’s audit in light of the fact that the initial burden of providing evidence for a claim of reimbursement lies with claimant.<sup>40</sup> In addition, section 1185.1(f)(3) and 1185.2(c) of the Commission’s regulations requires that any assertions of fact by the parties to an IRC must be supported by documentary evidence. The Commission’s ultimate findings of fact must be supported by substantial evidence in the record.<sup>41</sup>

### **The Controller’s Reduction of Costs Is Correct as a Matter of Law.**

As described below, the Commission finds that the Controller’s reduction for vendor service costs claimed for treatment and board and care of SED pupils placed in facilities that are organized and operated for-profit is correct as a matter of law.

- A. During all of the fiscal years at issue in this claim, the parameters and guidelines and state law required that SED pupils be placed in out-of-state nonprofit facilities and thus, costs claimed for vendor services provided by out-of-state service vendors that are organized and operated on a for-profit basis are beyond the scope of the mandate and not reimbursable as a matter of law.

Reimbursement claims filed with the Controller are required as a matter of law to be filed in accordance with the parameters and guidelines adopted by the Commission.<sup>42</sup> Parameters and

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<sup>38</sup> *Johnston v. Sonoma County Agricultural Preservation and Open Space District* (2002) 100 Cal.App.4th 973, 983-984. See also *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547.

<sup>39</sup> *American Bd. of Cosmetic Surgery, Inc., v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

<sup>40</sup> *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

<sup>41</sup> Government Code section 17559(b), which provides that a claimant or the state may commence a proceeding in accordance with the provisions of section 1094.5 of the Code of Civil Procedure to set aside a decision of the Commission on the ground that the Commission’s decision is not supported by substantial evidence in the record.

<sup>42</sup> Government Code sections 17561(d)(1); 17564(b); and 17571; *Clovis Unified School District v. Chiang* (2010) 188 Cal.App.4th 794, 801, where the court ruled that parameters and guidelines adopted by the Commission are regulatory in nature and are “APA valid”; *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1201, where the court

guidelines provide instructions for eligible claimants to prepare reimbursement claims for direct and indirect costs of a state-mandated program.<sup>43</sup>

As indicated above, the parameters and guidelines track the regulatory language and state that reimbursement is authorized for payments to service vendors providing mental health services to SED pupils placed in out-of-state residential facilities, as specified in California Code of Regulations, title 2, section 60100. Section 60100 states that out-of-state residential programs shall meet the requirements in Welfare and Institutions Code section 11460(c)(2) through (3) and 11460(c)(3) specifies that “State reimbursement for an AFDC-FC rate paid on or after January 1, 1993, shall only be paid to a group home *organized and operated on a nonprofit basis.*” The July 21, 2006 correction to the parameters and guidelines clarifies that “mental health services” includes residential board and care. Thus, reimbursement for the mandated activity of “providing mental health services” in out-of-state facilities includes both treatment and board and care, is conditioned on the providers meeting the requirements of Welfare and Institutions Code section 11460(c)(3), to be organized and operated on a nonprofit basis as explained above.

Claimant argues, however, that there is no requirement in state or federal law regarding the tax identification status of mental health treatment service providers and that the California Code of Regulations, at section 60020(i) and (j), describe the type of mental health services to be provided in the SEDs program, as well as who shall provide it, with no requirement regarding the provider’s tax identification status.<sup>44</sup> However, section 60020 of the regulations defines “psychotherapy and other mental health services” for SED pupils and is part of the same article containing the provisions in section 60100, which further specifies the requirements for out-of-state residential programs. The definition of “psychotherapy and other mental health services” in section 60020 does not change the requirement that an out-of-state residential facility providing treatment services and board and care for SED pupils is required to be organized and operated on a nonprofit basis under this program.

This is further evidenced by the regulatory history of section 60100. Section 60100 of the regulations implements the requirements of former Welfare and Institutions Code section 18350, which was enacted to govern the payments for 24 hour out-of-home care provided on behalf of SED pupils who are placed out-of-home pursuant to an IEP developed pursuant to Government Code section 7572.5. Former Welfare and Institutions Code section 18350(c) requires that the payment “for care and supervision shall be based on rates established in accordance with Sections 11460 to 11467” of the Welfare and Institutions Code. During the regulatory process for the adoption of section California Code of Regulations section 60100, comments were filed by interested persons with concerns that referencing Welfare and Institutions Code section 11460 in section 60100 of the regulations to provide that “[o]ut-of-state placements shall only be made in residential programs that meet the requirements of Welfare and Institutions Code sections 11460(c)(2) through (c)(3)” was not clear since state reimbursement for special education

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found that the Commission’s quasi-judicial decisions are final and binding, just as judicial decisions.

<sup>43</sup> Government Code section 17557; California Code of Regulations, title 2, section 1183.7.

<sup>44</sup> Exhibit A, Incorrect Reduction Claim IRC 10-9705-I-01, page 17; Exhibit B, Incorrect Reduction Claim 13-9705-I-05, page 18.

residential placements is not an AFDC-Foster Care program.<sup>45</sup> The Departments of Education and Mental Health responded as follows:

Board and care rates for children placed pursuant to Chapter 26.5 of the Government Code are linked in statute to the statutes governing foster care board and care rates. The foster care program and the special education pupils program are quite different in several respects. This creates some difficulties which must be corrected through statutory changes, and cannot be corrected through regulations. Rates are currently set for foster care payments to out-of-state facilities through the process described in WIC Sections 11460(c)(2) through (c)(3). *The rates cannot exceed the current level 14 rate and the program must be non-profit, and because of the requirements contained in Section WIC 18350, placements for special education pupils must also meet these requirements.* The Departments believe these requirements are clearly stated by reference to statute, but we will handbook WIC Sections 11460(c)(2) through (c)(3) for clarity.<sup>46</sup>

In addition, the Departments specifically addressed the issue of “out-of-state group homes which are organized as for-profit entities, but have beds which are leased by a nonprofit shell corporation.” The Departments stated that the issue may need further legal review of documentation of group homes that claim to be nonprofit, but nevertheless “[t]he statute in WIC section 11460 states that state reimbursement shall only be paid to a group home organized and operated on a non-profit basis.”<sup>47</sup>

Subsequent to the adoption of the test claim decision and parameters and guidelines for this program, legislation was introduced to allow for state reimbursement for placement of SED pupils in out-of-state for-profit facilities. However, as described below, the legislation did not pass and the law applicable to these claims remained unchanged during the reimbursement period of the program.

In the 2007-2008 legislative session, Senator Wiggins introduced SB 292, which would have authorized payments to out-of-state, for-profit residential facilities that meet applicable licensing requirements in the state in which they operate, for placement of SED pupils placed pursuant to an IEP. The committee analysis for the bill explained that since 1985, California law has tied the requirement for placement of a SED pupil placed out-of-home pursuant to an IEP, to state foster care licensing and rate provisions. However, the analysis notes that the funds for placement of SED pupils are not AFDC-FC funds. California first defined the private group homes that could receive AFDC-FC funding as nonprofits to parallel the federal funding requirement. Because of the connection between foster care and SED placement requirements, this prohibition applies to placements of SED pupils as well. The committee analysis further recognized, as a reason the bill is necessary, that the federal government eliminated the requirement that a facility be

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<sup>45</sup> Exhibit I, Final Statement of Reasons for Joint Regulations for Pupils with Disabilities, pages 127-128.

<sup>46</sup> Exhibit I, Final Statement of Reasons for Joint Regulations for Pupils with Disabilities, page 127 (emphasis added).

<sup>47</sup> Exhibit I, Final Statement of Reasons for Joint Regulations for Pupils with Disabilities, page 128.

operated as a nonprofit in order to receive federal funding in 1996.<sup>48</sup> However, SB 292 did not pass the assembly.<sup>49</sup>

In 2008, AB 1805, a budget trailer bill, containing identical language to SB 292 was vetoed by the governor.<sup>50</sup> In his veto message he wrote, "I cannot sign [AB 1805] in its current form because it will allow the open-ended reimbursement of claims, including claims submitted and denied prior to 2006-07. Given our state's ongoing fiscal challenges, I cannot support any bill that exposes the state General Fund to such a liability."<sup>51</sup>

Subsequently, during the 2009-2010 legislative session, Assembly Member Beall introduced AB 421 which authorized payment for 24-hour care of SED pupils placed in out-of-state, for-profit residential facilities. The bill analysis for AB 421 cites the Controller's disallowance of \$1.8 million in mandate claims from San Diego County based on the claims for payments for out-of-state, for-profit residential placement of SED pupils. The analysis states that the purpose of the proposed legislation was to incorporate the allowance made in federal law for reimbursement of costs of placement in for-profit group homes for SED pupils.<sup>52</sup> Under federal law, for-profit companies were originally excluded from receiving federal funds for placement of foster care children because Congress feared repetition of nursing home scandals in the 1970s, when public funding of these homes triggered growth of a badly monitored industry.<sup>53</sup> The bill analysis suggests that the reasoning for the current policy in California, limiting payments to nonprofit group homes, ensures that the goal of serving children's interests is not mixed with the goal of private profit. For these reasons, California has continually rejected allowing placements in for-profit group home facilities for both foster care and SED pupils.<sup>54</sup> The authors and supporters of the legislation contended that out-of-state, for-profit facilities are sometimes the only available placement to meet the needs of the child, as required by federal law.<sup>55</sup> The author notes the discrepancy between California law and federal law, which allows federal funding of

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<sup>48</sup> Exhibit I, Assembly Committee on Human Services, analysis of Senate Bill No. 292 (2007-2008 Reg. Sess.), June 17, 2009, page 2.

<sup>49</sup> Exhibit I, Complete Bill History, Senate Bill No. 292 (2007-2008 Reg. Sess.).

<sup>50</sup> Exhibit I, Assembly Committee on Appropriations, analysis of Assembly Bill No. 421 (Reg. Sess. 2009-2010), May 20, 2009, page 3.

<sup>51</sup> Exhibit I, Governor's Veto Message, Assembly Bill No. 1885 (Reg. Sess. 2007-2008), September 30, 2008.

<sup>52</sup> Exhibit I, Assembly Committee on Appropriations, analysis of Assembly Bill No. 421 (Reg. Sess. 2009-2010), May 20, 2009, page 2.

<sup>53</sup> Exhibit I, Assembly Committee on Appropriations, analysis of Assembly Bill No. 421 (Reg. Sess. 2009-2010), May 20, 2009, page 1.

<sup>54</sup> Exhibit I, Assembly Committee on Appropriations, analysis of Assembly Bill No. 421 (Reg. Sess. 2009-2010), May 20, 2009, page 2.

<sup>55</sup> Exhibit I, Assembly Committee on Appropriations, analysis of Assembly Bill No. 421 (Reg. Sess. 2009-2010), May 20, 2009, page 2.

for-profit group home placements.<sup>56</sup> However the bill did not pass the Assembly and therefore did not move forward.<sup>57</sup>

Thus, during the entire reimbursement period for this program, state law required that out-of-state residential programs shall meet the requirements of Welfare and Institutions Code section 11460(c)(2) through (3), which specified that reimbursement shall only be provided to facilities organized and operated on a nonprofit basis. Although the claimant contends that state law conflicted with federal law during this time period, absent a decision from the courts on this issue, the Commission is required by law to presume that the state statutes and regulations for this program, which were adopted in accordance with the Administrative Procedures Act, are valid.<sup>58</sup>

Accordingly, pursuant to the law and the Commission's parameters and guidelines, reimbursement is required only if the out-of-state service vendor is organized and operated on a nonprofit basis. Costs claimed for out-of-state service vendors that are organized and operated on a for-profit basis are beyond the scope of the mandate and are not eligible for reimbursement as a matter of law.<sup>59</sup>

B. The Controller's reduction of costs claimed for vendor service payments is consistent with the Commission's parameters and guidelines and is correct as a matter of law.

As indicated above, reimbursement is required only if the out-of-state service vendor that provides board and care and treatment services to SED pupils is organized and operated on a nonprofit basis. Costs claimed for out-of-state service vendors that are organized and operated on a for-profit basis are beyond the scope of the mandate and are not eligible for reimbursement as a matter of law.

In this case, the Controller concluded that the vendor payments made by the claimant to Mental Health Systems, Inc., a California nonprofit corporation are not reimbursable because Mental Health Systems, Inc., contracted with Charter Provo Canyon School, a Delaware for-profit limited liability company, to provide the board and care and treatment services for SED pupils. Since the facility providing the treatment and board and care is a for-profit facility, the Controller found that the costs were not eligible for reimbursement under the parameters and guidelines.<sup>60</sup>

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<sup>56</sup> Exhibit I, Assembly Committee on Appropriations, analysis of Assembly Bill No. 421 (Reg. Sess. 2009-2010), May 20, 2009.

<sup>57</sup> Exhibit I, Complete Bill History, Assembly Bill No. 421 (Reg. Sess. 2009-2010).

<sup>58</sup> California Constitution, article III, section 3.5; *Robin J. v. Superior Court* (2004) 124 Cal.App.4th 414, 425.

<sup>59</sup> In this respect, the Commission agrees with the claimant's comments on the Draft Proposed Decision that the issue presented in this IRC is a question of law and, thus, the Commission reviews this matter de novo and determines whether the Controller's reduction of costs is correct as a matter of law.

<sup>60</sup> Exhibit C, Controller's Late Comments on IRC 10-9705-I-01, pages 12, 15-16 (see also the contract between Mental Health Systems, Inc. and Charter Provo Canyon School, provided in Tab 12, pages 94-104 of Exhibit C); Exhibit D, Controller's Late Comments on IRC 13-9705-I-

1. The documentation in the record supports the Controller's findings.

The claimant makes no argument disputing the Controller's findings that Provo Canyon School is a for-profit facility that provided the treatment and board and care services for its SED pupils. Claimant contends, however, that reimbursement is required because it contracted with Mental Health Systems, Inc., a nonprofit corporation, in accordance with the parameters and guidelines, and provides a copy of a letter from the IRS verifying that Mental Health Systems, Inc. is a nonprofit entity.<sup>61</sup> Claimant further argues that

The State never provided any guidance to counties as to how to access or contract with appropriate out-of-state facilities that meet State criteria or qualifications.

The State never provided counties a list of appropriate out-of-state facilities that meet State requirements. County should not be penalized now for fulfilling the requirements of the law with little or no guidance from the State.<sup>62</sup>

The Commission finds that the evidence in the record supports the Controller's reduction of costs for vendor service payments and that, therefore, the reduction is correct as a matter of law.

As indicated above, reimbursement is required only if the out-of-state service vendor that provides board and care and treatment services to SED pupils is organized and operated on a nonprofit basis. Costs claimed for out-of-state service vendors that are organized and operated on a for-profit basis are beyond the scope of the mandate and are not eligible for reimbursement as a matter of law. In response to the draft audit report, claimant provided a copy of the contract between Mental Health Systems, Inc. and Charter Provo Canyon School, LLC "for the provision of services pursuant to Chapter 26.5 of Division 7 of Title 1 of the Government Code" (the chapter Government Code that includes the test claim statute). The agreement demonstrates that Charter Provo Canyon School provided the services for the claimant, and confirms that Charter Provo Canyon School, LLC is a for-profit limited liability company. The contract title itself expresses that it is an "Agreement to Provide Mental Health Services" and the recitals state "Provo Canyon has agreed to provide the services of qualified professionals to provide care to those persons authorized to receive mental health services."<sup>63</sup> In addition, the reimbursement claims filed for 2004-2005 and 2005-2006 identify the vendor as "Mental Health Systems-Provo Canyon."<sup>64</sup>

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05, pages 11, 13 (see also the contract between Mental Health Systems, Inc. and Charter Provo Canyon School, provided in Tab 11, pages 82-91 of Exhibit D).

<sup>61</sup> Exhibit A, Incorrect Reduction Claim 10-9705-I-01, page 23; Exhibit B, Incorrect Reduction Claim 13-9705-I-05, page 24.

<sup>62</sup> Exhibit A, Incorrect Reduction Claim 10-9705-I-01, page 17.

<sup>63</sup> Exhibit C, Controller's Late Comments on IRC 10-9705-I-01, page 94 (Contract between Mental Health Services and Charter Provo Canyon School, LLC); Exhibit D, Controller's Late Comments on IRC 13-9705-I-05, page 81 (Contract between Mental Health Services and Charter Provo Canyon School, LLC).

<sup>64</sup> Exhibit A, Incorrect Reduction Claim 10-9705-I-01, page 98 (fiscal year 2004-2005); Exhibit B, Incorrect Reduction Claim 13-9705-I-05, page 81 (fiscal year 2005-2006).

Therefore, the evidence in the record supports the Controller's finding that the services were provided by a for-profit entity and are outside the scope of the mandate.

2. Claimant's reliance on decisions issued by OAH and the United States Supreme Court is misplaced.

The claimant further argues that a decision issued by OAH supports the position that reimbursement is required if a SED pupil is placed in a for-profit facility that complies with federal IDEA law.<sup>65</sup> The OAH decision relied upon by claimant involves a SED pupil who was deaf, had impaired vision and an orthopedic condition, was assessed as having borderline cognitive ability, and had a long history of social and behavioral difficulties. His only mode of communication was American Sign Language. The parties agreed that the National Deaf Academy would provide the student with a free and appropriate public education, as required by federal law. The facility accepted students with borderline cognitive abilities and nearly all service providers are fluent in American Sign Language. However, the school district and county mental health department took the position that they could not place the student at the National Deaf Academy because it is operated by a for-profit entity. OAH found that the state was not prohibited from placing the student at this out-of-state for-profit facility because the facility was the only one identified as an appropriate placement.<sup>66</sup> Upon appeal, the District Court affirmed the OAH order directing the school district and the county mental health department to provide the student with compensatory education consisting of immediate placement at the National Deaf Academy and through the 2008-2009 school year.<sup>67</sup>

Although the District Court's decision in *Riverside County* is binding with respect to the placement of that student,<sup>68</sup> the court did not address state-mandated reimbursement under article XIII B, section 6. Moreover, the claimant has provided no documentation or evidence that the costs claimed in these claims were incurred as a result of a court order finding that no other alternative placement was identified for a SED pupil during the audit years in question. Thus, the Commission does not need to reach the issue whether reimbursement under article XIII B, section 6 would be required in such a case.

The claimant also relies on the U.S. Supreme Court decision in *Florence County School District Four v. Carter*,<sup>69</sup> for the proposition that local government will be subject to increased litigation

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<sup>65</sup> Exhibit A, Incorrect Reduction Claim 10-9705-I-01, pages 15-16; Exhibit B, Incorrect Reduction Claim 13-9705-I-05, pages 15-16.

<sup>66</sup> Exhibit B, Incorrect Reduction Claim 13-9705-I-05, pages 67-76.

<sup>67</sup> Exhibit I, *Riverside County Department of Mental Health v. Sullivan* (E.D.Cal. 2009) EDCV 08-0503-SGL.

<sup>68</sup> Absent "unusual circumstances," or an intervening change in the law, the decision of the reviewing court establishes the law of the case and binds the agency and the parties to the action in all further proceedings addressing the particular claim. (*George Arakelian Farms, Inc. v. Agricultural Labor Relations Board* (1989) 49 Cal.3d 1279, 1291.)

<sup>69</sup> *Florence County School District v. Carter* (1993) 510 U.S. 7.

with the Controller's interpretation.<sup>70</sup> In the *Florence* case, the court held that parents can be reimbursed under the IDEA when they unilaterally withdraw their child from an inappropriate placement in a public school and place their child in a private school, even if the placement in the private school does not meet all state standards or is not state-approved. Although the court found that parents are entitled to reimbursement under such circumstances only if a federal court concludes both that the public placement violated IDEA and the private school placement was proper under IDEA, the court's decision in such cases is *equitable*. "IDEA's grant of equitable authority empowers a court 'to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act.'"<sup>71</sup> Unlike the court's equitable powers under IDEA, the reimbursement requirements of article XIII B, section 6, must be strictly construed and not applied as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."<sup>72</sup>

Therefore, these decisions do not support the claimant's right to reimbursement.

Accordingly, the Commission finds that the Controller's reduction of costs for vendor service payments for treatment and board and care for SED pupils placed in out-of-state residential facilities organized and operated for-profit, is consistent with the Commission's parameters and guidelines and is correct as a matter of law.

## **V. Conclusion**

Based on the foregoing, the Commission finds that the Controller's reductions are correct as a matter of law.

Based on the foregoing, the Commission denies these IRCs.

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<sup>70</sup> Exhibit A, Incorrect Reduction Claim 10-9705-I-01, pages 14-15; Exhibit B, Incorrect Reduction Claim 13-9705-I-05, page 15.

<sup>71</sup> *Florence County School District, supra*, 510 U.S. 5, 12 (citing its prior decision in *School Comm. of Burlington v. Department of Ed. of Mass.* (1985) 471 U.S. 359, 369.)

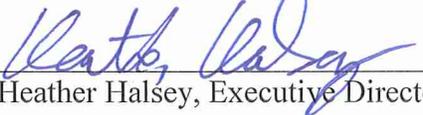
<sup>72</sup> *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1281 (citing *City of San Jose v. State* (1996) 45 Cal.App.4th 1802, 1817).



RE: **Decision**

*Seriously Emotionally Disturbed Pupils: Out-of-State Mental Health Services,*  
10-9705-I-01 and 13-9705-I-05  
Government Code Section 7576, as amended by Statutes 1996, Chapter 654;  
California Code of Regulations, Title 2, Division 9, Chapter 1, Sections 60100 and 60110  
Fiscal Years: 2001-2002, 2002-2003, 2003-2004, 2004-2005, and 2005-2006  
County of San Diego, Claimant

On May 26, 2016, the foregoing decision of the Commission on State Mandates was adopted on the above-entitled matter.

  
\_\_\_\_\_  
Heather Halsey, Executive Director

Dated: June 1, 2016

**DECLARATION OF SERVICE BY EMAIL**

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On June 1, 2016, I served the:

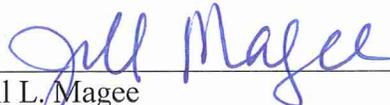
**Decision**

*Seriously Emotionally Disturbed Pupils: Out-of-State Mental Health Services,*  
10-9705-I-01 and 13-9705-I-05

Government Code Section 7576, as amended by Statutes 1996, Chapter 654;  
California Code of Regulations, Title 2, Division 9, Chapter 1, Sections 60100 and 60110  
Fiscal Years: 2001-2002, 2002-2003, 2003-2004, 2004-2005, and 2005-2006  
County of San Diego, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on June 1, 2016 at Sacramento, California.

  
\_\_\_\_\_  
Jill L. Magee  
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# COMMISSION ON STATE MANDATES

## Mailing List

**Last Updated:** 3/24/16

**Claim Number:** 10-9705-I-01 Consolidated with 13-9705-I-05

**Matter:** Seriously Emotionally Disturbed Pupils (SEDS): Out of State Mental Health Services (97-TC-05)

**Claimant:** County of San Diego

### TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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