JOHN CHIANG
California State Controller

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Commission on
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LATE FILING

October 3, 2014

Heather Halsey
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Re: **Notice of Revised Complete Filing**
Incorrect Reduction Claim (IRC), 12-9705-I-03
Handicapped and Disabled Students (04-RL-4282-10); *Handicapped and Disabled Student II* (02-TC-40/02-TC-49); and *Seriously Emotionally Disturbed Pupils: Out-of-State Mental Health Services* (97-TC-05)
Fiscal Years: 2006-2007, 2007-2008, and 2008-2009
County of Orange, Claimant

Dear Ms. Halsey:

The State Controller's Office is transmitting our response to the above-entitled IRC.

If you have any questions, please contact me by telephone at (916) 323-5849.

Sincerely,

JIM L. SPANO, Chief
Mandated Cost Audits Bureau
Division of Audits

MAILING ADDRESS P.O. Box 942850, Sacramento, CA 94250-5874
SACRAMENTO 3301 C Street, Suite 700, Sacramento, CA 95816 (916) 324-8907
LOS ANGELES 900 Corporate Center Drive, Suite 200, Monterey Park, CA 91754-7616 (323) 981-6802

RESPONSE BY THE STATE CONTROLLER'S OFFICE TO THE INCORRECT REDUCTION CLAIM (IRC) BY ORANGE COUNTY

Consolidated Handicapped and Disabled Students, Handicapped and Disabled Students II, and Seriously Emotionally Disturbed Pupils Program

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Note: References to Exhibits relate to the county's IRC filed on November 9, 2011, and updated by an October 21, 2013 filing as follows:

- Exhibit A – PDF page 16
- Exhibit B – PDF page 53
- Exhibit C – PDF page 101
- Exhibit D – PDF page 135

Tab 1

OFFICE OF THE STATE CONTROLLER
300 Capitol Mall, Suite 1850
Sacramento, CA 94250
Telephone No.: (916) 445-6854

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

INCORRECT REDUCTION CLAIM ON: Consolidated Handicapped and Disabled Students (HDS), HDS II, and Seriously Emotionally Disturbed Pupils Program Chapter 1747, Statutes of 1984; Chapter 1274, Statutes of 1985; Chapter 1128, Statutes of 1994; and Chapter 654, Statutes of 1996 ORANGE COUNTY, Claimant	No.: CSM 12-9705-I-03 AFFIDAVIT OF BUREAU CHIEF

I, Jim L. Spano, make the following declarations:

1) I am an employee of the State Controller's Office (SCO) and am over the age of 18 years.

2) I am currently employed as a Bureau Chief, and have been so since April 21, 2000. Before that, I was employed as an audit manager for two years and three months.

3) I am a California Certified Public Accountant (CPA).

4) I reviewed the work performed by the SCO auditor.

5) Any attached copies of records are true copies of records, as provided by Orange County or retained at our place of business.

6) The records include claims for reimbursement, along with any attached supporting documentation, explanatory letters, or other documents relating to the above-entitled Incorrect Reduction Claim.

7) A field audit of claims for fiscal year (FY) 2006-07, FY 2007-08, and FY 2008-09 was completed with the issuance of the final audit report on March 7, 2012, and the subsequent revision of the report on December 3, 2012.

I do declare that the above declarations are made under penalty of perjury and are true and correct to the best of my knowledge, and that such knowledge is based on personal observation, information, or belief.

Date: May 14, 2013

OFFICE OF THE STATE CONTROLLER

By:

Jim L. Spano, Chief
Mandated Cost Audits Bureau
Division of Audits
State Controller's Office

Tab 2

STATE CONTROLLER'S OFFICE ANALYSIS AND RESPONSE TO THE INCORRECT REDUCTION CLAIM BY ORANGE COUNTY
For Fiscal Year (FY) 2006-07, FY 2007-08, and FY 2008-09

Consolidated Handicapped and Disabled Students, Handicapped and Disabled Students II, and Seriously Emotionally Disturbed Pupils Program
Chapter 1747, Statutes of 1984; Chapter 1274, Statutes of 1985; Chapter 1128, Statutes of 1994; and Chapter 654, Statutes of 1996

SUMMARY

The following is the State Controller's Office's (SCO) response to the Incorrect Reduction Claim (IRC) that Orange County filed on November 9, 2011, and updated on October 21, 2013. The SCO audited the county's claims for costs of the legislatively mandated Consolidated Handicapped and Disabled Students, Handicapped and Disabled Students II, and Seriously Emotionally Disturbed Pupils Program for the period of July 1, 2006, through June 30, 2009. The SCO issued its final report on March 7, 2012 and revised it on December 3, 2012 (**Exhibit C**). We revised the report to reinstate costs based on the California Department of Mental Health finalized revenues for Early and Periodic Screening, Diagnosis, and Treatment occurring subsequent to the issuance of the initial final audit report.

The county submitted reimbursement claims totaling $20,228,242 ($20,248,242 less a $20,000 penalty for filing a late claims)—$5,890,670 for FY 2006-07 ($5,900,670 less a $10,000 penalty for filing a late claim); $9,404,995 for FY 2007-08; and $4,932,577 for FY 2008-09 ($4,942,577 less a $10,000 penalty for filing a late claim) (**Exhibit D**). Subsequently, the SCO audited these claims and determined that $16,451,818 is allowable and $3,776,424 is unallowable. The county claimed unallowable costs primarily because it claimed ineligible vendor payments for out-of-state residential placement of seriously emotionally disturbed (SED) pupils in facilities that are owned and operated for profit, and overstated mental health services, administrative costs, and offsetting reimbursements.

The following table summarizes the audit results:

Cost Elements	Actual Costs Claimed	Allowable Per Audit	Audit Adjustments
July 1, 2006, through June 30, 2007			
Direct costs:			
Authorize/issue payments to providers	$ 9,231,577	$ 7,685,453	$ (1,546,124)
Psychotherapy/other mental health costs	10,304,741	10,243,013	(61,728)
Participation in due process	317,554	317,554	-
Total direct costs	19,853,872	18,246,020	(1,607,852)
Indirect costs	3,317,317	3,263,174	(54,143)
Total direct and indirect costs	23,171,189	21,509,194	(1,661,995)
Offsetting revenues	(17,270,519)	(17,252,624)	17,895
Subtotal	5,900,670	4,256,570	(1,644,100)
Less late claim penalty	(10,000)	(10,000)	-
Total program cost	$ 5,890,670	4,246,570	$ (1,644,100)
Less amount paid by the State [2]		(4,246,570)	
Allowable costs claimed in excess of (less than) amount paid		$ -	

Cost Elements	Actual Costs Claimed	Allowable Per Audit	Audit Adjustments
July 1, 2007, through June 30, 2008			
Direct costs:			
Authorize/issue payments to providers	$ 10,969,480	$ 9,046,965	$ (1,922,515)
Psychotherapy/other mental health costs	10,883,016	10,837,649	(45,367)
Participation in due process	293,969	293,969	-
Total direct costs	22,146,465	20,178,583	(1,967,882)
Indirect costs	2,782,305	2,750,246	(32,059)
Total direct and indirect costs	24,928,770	22,928,829	(1,999,941)
Offsetting revenues	(15,523,775)	(15,453,091)	70,684
Subtotal	9,404,995	7,475,738	(1,929,257)
Less late claim penalty	-	-	-
Total program cost	$ 9,404,995	7,475,738	$ (1,929,257)
Less amount paid by the State		-	
Allowable costs claimed in excess of (less than) amount paid		$ 7,475,738	
July 1, 2008, through June 30, 2009			
Direct costs:			
Authorize/issue payments to providers	$ 10,540,143	$ 10,264,171	$ (275,972)
Psychotherapy/other mental health costs	10,828,666	10,880,857	52,191
Participation in due process	278,541	278,541	-
Total direct costs	21,647,350	21,423,569	(223,781)
Indirect costs	2,783,471	2,811,008	27,537
Total direct and indirect costs	24,430,821	24,234,577	(196,244)
Offsetting revenues:	(19,488,244)	(19,495,067)	(6,823)
Subtotal	4,942,577	4,739,510	(203,067)
Less late claim penalty	(10,000)	(10,000)	-
Total program cost	$ 4,932,577	4,729,510	$ (203,067)
Less amount paid by the State		-	
Allowable costs claimed in excess of (less than) amount paid		$ 4,729,510	
Summary - July 1, 2006, through June 30, 2009			
Direct costs:			
Authorize/issue payments to providers	$ 30,741,200	$ 26,996,589	$ (3,744,611)
Psychotherapy/other mental health costs	32,016,423	31,961,519	(54,904)
Participation in due process	890,064	890,064	-
Total direct costs	63,647,687	59,848,172	(3,799,515)
Indirect costs	8,883,093	8,824,428	(58,665)
Total direct and indirect costs	72,530,780	68,672,600	(3,858,180)
Offsetting revenues	(52,282,538)	(52,200,782)	81,756
Subtotal	20,248,242	16,471,818	(3,776,424)
Less late claim penalty	(20,000)	(20,000)	-
Total program cost	$ 20,228,242	16,451,818	$ (3,776,424)
Less amount paid by the State		(4,246,570)	
Allowable costs claimed in excess of (less than) amount paid		$ 12,205,248	

[1] Payment information as of April 24, 2013.

The county contests the portion of Finding 1 that relates to the out-of-state residential placement of SED pupils in facilities that are organized and operated for profit totaling $3,738,045 for the audit period—$1,539,558 for FY 2006-07, $1,922,515 for FY 2007-08, and $275,972 for FY 2008-09. The county believes that residential placement costs resulting from the placement of SED pupils in facilities owned and operated for profit are eligible and reimbursable under the state-mandated cost program.

The ineligible prior year costs relate to FY 2005-06 board and care costs claimed in FY 2006-07. We deducted the costs from the FY 2006-07 claim and allowed reimbursable costs in the FY 2005-06 claim.

The following table summarizes the IRC audit adjustment related to residential placement:

	Fiscal Year			
	2006-07	2007-08	2008-09	Total
Finding 1				
Ineligible placements:				
Treatment costs	$ (791,853)	$ (1,021,380)	$ (150,148)	$ (1,963,381)
Board and care	(747,705)	(901,135)	(125,824)	(1,774,664)
Ineligible prior year costs	(6,566)	-	-	(6,566)
Audit adjustment	$ (1,546,124)	$ (1,922,515)	$ (275,972)	$ (3,744,611)

I. SCO REBUTTAL TO STATEMENT OF DISPUTE – CLARIFICATION OF REIMBURSABLE ACTIVITIES, CLAIM CRITERIA, AND DOCUMENTATION REQUIREMENTS

Parameters and Guidelines

The parameters and guidelines consolidated the Commission on State Mandate's (CSM) statement of decisions on the (1) Reconsidered Handicapped and Disabled Students **(Tab 3)**; (2) Handicapped and Disabled Students II **(Tab 4)**; and (3) Seriously Emotionally Disturbed Pupils **(Tab 5)** Programs. The CSM adopted the consolidated program's parameters and guidelines on October 26, 2006 **(Tab 6)**, amended the consolidated program on July 29, 2010 **(Tab 7)**, and amended it again on September 28, 2012 **(Tab 8)**. Based on the adoption of consolidated parameters and guidelines, reimbursement for the program began in FY 2006-07. The amendment in 2010 related to a record-retention requirement omitted from the original parameters and guidelines regarding the number of pupils placed in out-of-state residential facilities. The amendment in 2012 related to the closing out of the program after FY 2010-11.

Following are excerpts from the consolidated program's parameters and guidelines that are applicable to the audit period **(Tab 6)**.

Section I, SUMMARY OF THE MANDATE, provides a summary of the mandate. It states:

I. <u>SUMMARY OF THE MANDATE</u>

The Handicapped and Disabled Students program was enacted in 1984 and 1985 as the state's response to federal legislation (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 legislation shifted to counties the responsibility and funding of mental health services required by a pupil's individualized education plan (IEP).

The Commission on State Mandates (Commission) adopted amended parameters and guidelines for the Handicapped and Disabled Students program (CSM 4282) on January 26, 2006, ending the period of reimbursement for costs incurred through and including June 30, 2004. Costs incurred after this date are claimed under the parameters and guidelines for the Commission's decision on reconsideration, Handicapped and Disabled Students (04-RL-4282-10).

The Commission adopted its Statement of Decision on the reconsideration of Handicapped and Disabled Students (04-RL-4282-10) on May 26, 2005. The Commission found that the 1990 Statement of Decision in Handicapped and Disabled Students correctly concluded that the test claim legislation imposes a reimbursable state-mandated program on counties pursuant to article XIII B, section 6 of the California Constitution. The Commission determined, however, that the 1990 Statement of Decision does not fully identify all of the activities mandated by the statutes and regulations pled in the test claim or the offsetting revenue applicable to the claim. Thus, the Commission, on reconsideration, identified the activities expressly required by the test claim legislation and the offsetting revenue that must be identified and deducted from the costs claimed. Parameters and guidelines were adopted on January 26, 2006, and corrected on July 21, 2006, with a period of reimbursement beginning July 1, 2004.

The Commission also adopted a Statement of Decision for the Handicapped and Disabled Students II program on May 26, 2005, addressing the statutory and regulatory amendments to the program. Parameters and guidelines were adopted on December 9, 2005, and corrected on July 21, 2006, with a period of reimbursement beginning July 1, 2001.

On May 25, 2000, the Commission adopted a Statement of Decision for the Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services (97-TC-05) program, addressing the counties' responsibilities for out-of-state placement of seriously emotionally disturbed students. Parameters and guidelines were adopted on October 26, 2000, and corrected on July 21, 2006, with a period of reimbursement beginning January 1, 1997.

These parameters and guidelines consolidate the Commission's decisions on the Reconsideration of 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) for reimbursement claims filed for costs incurred commencing with the 2006-2007 fiscal year.

Section III, PERIOD OF REIMBURSEMENT, identifies the reimbursable activities. It states:

III. <u>PERIOD OF REIMBURSEMENT</u>

The period of reimbursement for the activities in this consolidated parameters and guidelines begins on July 1, 2006.

Reimbursable actual costs for one fiscal year shall be included in each claim. Estimated costs for the subsequent year may be included on the same claim, if applicable. Pursuant to Government Code section 17561, subdivision (d)(1), all claims for reimbursement of initial years' costs shall be submitted within 120 days of the issuance of the State Controller's claiming instructions. If the total costs for a given fiscal year do not exceed $1,000, no reimbursement shall be allowed, except as otherwise allowed by Government Code section 17564.

There shall be no reimbursement for any period in which the Legislature has suspended the operation of a mandate pursuant to state law.

Section IV, REIMBURSEMENT ACTIVITIES, identifies the reimbursable activities. It states:

IV. <u>REIMBURSABLE ACTIVITES</u>

For each eligible claimant, the following activities are eligible for reimbursement:

A. The one-time activity of revising the interagency agreement with each local educational agency to include the following eight procedures (Cal. Code Regs., tit. 2, § 60030):

1. Resolving interagency disputes at the local level, including procedures for the continued provision of appropriate services during the resolution of any interagency dispute, pursuant to Government Code section 7575, subdivision (f). For purposes of this subdivision only, the term "appropriate" means any service identified in the pupil's IEP, or any service the pupil actually was receiving at the time of the interagency dispute. (Cal. Code Regs, tit. 2, § 60030, subd. (c)(2).)
2. A host county to notify the community mental health service of the county of origin within two (2) working days when a pupil with a disability is placed within the host county by courts, regional centers or other agencies for other than educational reasons. (Cal. Code Regs, tit. 2, § 60030, subd. (c)(4).)
3. Development of a mental health assessment plan and its implementation. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(5).)
4. At least ten (10) working days prior notice to the community mental health service of all IEP team meetings, including annual IEP reviews, when the participation of its staff is required. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(7).)
5. The provision of mental health services as soon as possible following the development of the IEP pursuant to section 300.342 of Title 34 of the Code of Federal Regulations. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(9).)
6. The provision of a system for monitoring contracts with nonpublic, nonsectarian schools to ensure that services on the IEP are provided. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(14).)
7. The development of a resource list composed of qualified mental health professionals who conduct mental health assessments and provide mental health services. The community mental health service shall provide the LEA with a copy of this list and monitor these contracts to assure that services as specified on the IEP are provided. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(15).)
8. Mutual staff development for education and mental health staff pursuant to Government Code section 7586.6, subdivision (a). (Cal. Code Regs., tit. 2, § 60030, subd. (c)(17).)

This activity is reimbursable only if it was not previously claimed under the parameters and guidelines for Handicapped and Disabled Students II (02-TC-40/02-TC-49).

B. Renew the interagency agreement with the local educational agency every three years and, if necessary, revise the agreement (Gov. Code, § 7571; Cal. Code Regs., tit. 2, §§ 60030, 60100)
   1. Renew the interagency agreement every three years, and revise if necessary.
   2. Define the process and procedures for coordinating local services to promote alternatives to out-of-home care of seriously emotionally disturbed pupils.

C. Referral and Mental Health Assessments (Gov. Code, §§ 7572, 7576; Cal. Code Regs., tit. 2, §§ 60040, 60045, 60200, subd. (c))
   1. Work collaboratively with the local educational agency to ensure that assessments performed prior to referral are as useful as possible to the community mental health service in determining the need for mental health services and the level of services needed. (Gov. Code, § 7576, subd. (b)(1).)
   2. A county that receives a referral for a pupil with a different county of origin shall forward the referral within one working day to the county of origin. (Gov. Code, § 7576, subd. (g); Cal. Code Regs., tit. 2, § 60040, subd. (g).)
   3. If the county determines that a mental health assessment is not necessary, the county shall document the reasons and notify the parents and the local educational agency of the county determination within one day. (Cal Code Regs., tit. 2, § 60045, subd. (a)(1).)
   4. If the county determines that the referral is incomplete, the county shall document the reasons, notify the local educational agency within one working day, and return the referral. (Cal. Code Regs., tit. 2, § 60045, subd. (a)(2).)
   5. Notify the local educational agency when an assessment is determined necessary. (Cal. Code Regs., tit. 2, § 60045, subd. (b).)

6. If mental health assessments are deemed necessary by the county, develop a mental health assessment plan and obtain the parent's written informed consent for the assessment. (Cal. Code Regs., tit. 2, § 60045, subd. (b).)

7. Provide the assessment plan to the parent. (Cal. Code Regs., tit. 2, § 60045, subd. (b).)

8. Report back to the referring local educational agency or IEP team within 30 days from the date of the receipt of the referral if no parental consent for a mental health assessment has been obtained. (Cal. Code Regs., tit. 2, § 60045, subd. (c).)

9. Notify the local educational agency within one working day after receipt of the parent's written consent for the mental health assessment to establish the date of the IEP meeting. (Cal. Code Regs., tit. 2, § 60045, subd. (d).)

10. Review the following educational information of a pupil referred to the county by a local educational agency for an assessment: a copy of the assessment reports completed in accordance with Education Code section 56327, current and relevant behavior observations of the pupil in a variety of educational and natural settings, a report prepared by personnel that provided "specialized" counseling and guidance services to the pupil and, when appropriate, an explanation why such counseling and guidance will not meet the needs of the pupil. (Cal. Code Regs., tit. 2, § 60045, subd. (a).)

11. If necessary, observe the pupil in the school environment to determine if mental health assessments are needed.

12. If necessary, interview the pupil and family, and conduct collateral interviews.

13. Assess the pupil within the time required by Education Code section 56344. (Cal. Code Regs., tit. 2, § 60045, subd. (e).)

14. Prepare and provide to the IEP team, and the parent or guardian, a written assessment report in accordance with Education Code section 56327. The report shall include the following information: whether the pupil may need special education and related services; the basis for making the determination; the relevant behavior noted during the observation of the pupil in the appropriate setting; the relationship of that behavior to the pupil's academic and social functioning; the educationally relevant health and development, and medical findings, if any; for pupils with learning disabilities, whether there is such a discrepancy between achievement and ability that it cannot be corrected without special education and related services; a determination concerning the effects of environmental, cultural, or economic disadvantage, where appropriate; and the need for specialized services, materials, equipment for pupils with low incidence disabilities. (Cal. Code Regs., tit. 2, § 60045, subds. (f) and (g).)

15. Provide the parent with written notification that the parent may require the assessor to attend the IEP meeting to discuss the recommendation when the parent disagrees with the assessor's mental health service recommendation. (Cal. Code Regs., tit. 2, § 60045, subd. (f).)

16. Review and discuss the county recommendation with the parent and the appropriate members of the IEP team before the IEP team meeting. (Gov. Code, § 7572, subd. (d)(1); Cal. Code Regs., tit. 2, § 60045, subd. (f).)

17. In cases where the local education agency refers a pupil to the county for an assessment, attend the IEP meeting if requested by the parent. (Gov. Code, § 7572, subd. (d)(1); Cal. Code Regs., tit. 2, § 60045, subd. (f).)

18. Review independent assessments of a pupil obtained by the parent. (Gov. Code, § 7572, subd. (d)(2).)

19. Following review of the independent assessment, discuss the recommendation with the parent and with the IEP team before the meeting of the IEP team. (Gov. Code, § 7572, subd. (d)(2).)

20. In cases where the parent has obtained an independent assessment, attend the IEP team meeting if requested. (Gov. Code, § 7572, subd. (d)(2).)

21. The county of origin shall prepare yearly IEP reassessments to determine the needs of a pupil. (Cal. Code Regs., tit. 2, § 60045, subd. (h).)

D. Transfers and Interim Placements (Cal. Code Regs., tit. 2, § 60055)

1. Following a pupil's transfer to a new school district, the county shall provide interim mental health services, as specified in the existing IEP, for thirty days, unless the parent agrees otherwise.

2. Participate as a member of the IEP team of a transfer pupil to review the interim services and make a determination of services.

E. Participate as a member of the IEP team whenever the assessment of a pupil determines the pupil is seriously emotionally disturbed and in-state or out-of-state residential placement may be necessary (Gov. Code, §§ 7572.5, subds. (a) and (b), 7572.55; Cal. Code Regs., tit. 2, § 60100)

1. Participate as a member of the IEP team whenever the assessment of a pupil determines the pupil is seriously emotionally disturbed and residential placement may be necessary.

2. Re-assess the pupil in accordance with section 60400 of the regulations, if necessary.

3. When a recommendation is made that a child be placed in an out-of-state residential facility, the expanded IEP team, with the county as a participant, shall develop a plan for using less restrictive alternatives and in-state alternatives as soon as they become available, unless it is in the best educational interest of the child to remain in the out-of-state school. Residential placements for a pupil who is seriously emotionally disturbed may be made out of California only when no in-state facility can meet the pupil's needs and only when the requirements of Title 2, California Code of Regulations, section 60100, subdivisions (d) and (e), have been met. (Gov. Code, § 7572.55, subd. (c); Cal. Code Regs., tit. 2, § 60100, subd. (h).)

4. The expanded IEP team, with the county as a participant, shall document the alternatives to residential placement that were considered and the reasons why they were rejected. (Cal. Code Regs., tit. 2, § 60100, subd. (c).)

5. The expanded IEP team, with the county as a participant, shall ensure that placement is in accordance with the admission criteria of the facility. (Cal. Code Regs., tit. 2, § 60100, subd. (j).)

6. When the expanded IEP team determines that it is necessary to place a pupil who is seriously emotionally disturbed in either in-state or out-of-state residential care, counties shall ensure that: (1) the mental health services are specified in the IEP in accordance with federal law, and (2) the mental health services are provided by qualified mental health professionals. (Cal. Code Regs., tit. 2, § 60100, subd. (i).)

F. Designate the lead case manager if the IEP calls for in-state or out-of-state residential placement of a seriously emotionally disturbed pupil to perform the following activities (Gov. Code, § 7572.5, subd. (c)(1); Cal. Code Regs., tit. 2, §§ 60100, 60110)

1. Convene parents and representatives of public and private agencies in order to identify the appropriate residential facility. (Cal. Code Regs., tit. 2, §§ 60110, subd. (c)(1).)

2. Identify, in consultation with the IEP team's administrative designee, a mutually satisfactory placement that is acceptable to the parent and addresses the pupil's educational and mental health needs in a manner that is cost-effective for both public agencies, subject to the requirements of state and federal special education law, including the requirement that the placement be appropriate and in the least restrictive environment. (Cal. Code Regs, tit. 2, §§ 60100, subd. (e), 60110, subd. (c)(2).)

3. Document the determination that no nearby placement alternative that is able to implement the IEP can be identified and seek an appropriate placement that is as close to the parents' home as possible. (Cal. Code Regs., tit. 2, § 60100, subd. (f).)

4. Coordinate the residential placement plan of a pupil with a disability who is seriously emotionally disturbed as soon as possible after the decision has been made to place the pupil in residential placement. The residential placement plan shall include provisions, as determined in the pupil's IEP, for the care, supervision, mental health treatment, psychotropic medication monitoring, if required, and education of the pupil. (Cal. Code Regs., tit, 2, § 60110, subd, (b)(1).)

5. When the IEP team determines that it is necessary to place a pupil with a disability who is seriously emotionally disturbed in a community treatment facility, the lead case manager shall ensure that placement is in accordance with admission, continuing stay, and discharge criteria of the community treatment facility. (Cal. Code Regs., tit. 2, § 60110, subd. (b)(3).)

6. Complete the local mental health program payment authorization in order to initiate out of home care payments. (Cal. Code Regs., tit. 2, § 60110, subd. (c)(3).)

7. Coordinate the completion of the necessary County Welfare Department, local mental health program, and responsible local education agency financial paperwork or contracts. (Cal. Code Regs., tit. 2, § 60110, subd. (c)(4).)

8. Develop the plan for and assist the family and pupil in the pupil's social and emotional transition from home to the residential facility and the subsequent return to the home. (Cal. Code Regs., tit. 2, § 60110, subd. (c)(5).)

9. Facilitate the enrollment of the pupil in the residential facility. (Cal. Code Regs., tit. 2, § 60110, subd. (c)(6).)

10. Notify the local educational agency that the placement has been arranged and coordinate the transportation of the pupil to the facility if needed. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(7).)

11. Conduct quarterly face-to-face contacts with the pupil at the residential facility to monitor the level of care and supervision and the implementation of the treatment services and the IEP. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(8).)

12. Evaluate the continuing stay criteria, as defined in Welfare and Institutions Code section 4094, of a pupil placed in a community treatment facility every 90 days. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(8).)

13. Notify the parent or legal guardian and the local education agency administrator or designee when there is a discrepancy in the level of care, supervision, provision of treatment services, and the requirements of the IEP. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(9).)

14. Schedule and attend the next expanded IEP team meeting with the expanded IEP team's administrative designee within six months of the residential placement of a pupil with a disability who is seriously emotionally disturbed and every six months thereafter as the pupil remains in residential placement. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(10).)

15. Facilitate placement authorization from the county's interagency placement committee pursuant to Welfare and Institutions Code section 4094.5, subdivision (e)(1), by presenting the case of a pupil with a disability who is seriously emotionally disturbed prior to placement in a community treatment facility. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(11).)

G. Authorize payments to in-state or out-of-state residential care providers / Issue payments to providers of in-state or out-of-state residential care for the residential and non-educational costs of seriously emotionally disturbed pupils (Gov. Code, § 7581; Cal. Code Regs., tit. 2, § 60200, subd. (e))

1. Authorize payments to residential facilities based on rates established by the Department of Social Services in accordance with Welfare and Institutions Code sections 18350 and 18356. This activity requires counties to determine that the residential placement meets all the criteria established in Welfare and Institutions Code sections 18350 through 18356 before authorizing payment.

2. Issue payments to providers of out-of-home residential facilities for the residential and non-educational costs of seriously emotionally disturbed pupils. Payments are for the costs of food, clothing, shelter, daily supervision, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation. Counties are eligible to be reimbursed for 60 percent of the total residential and non-educational costs of a seriously emotionally disturbed child placed in an out-of-home residential facility.

   Welfare and Institutions Code section 18355.5 applies to this program and prohibits a county from claiming reimbursement for its 60-percent share of the total residential and non-educational costs of a seriously emotionally disturbed child placed in an out-of-home

residential facility if the county claims reimbursement for these costs from the Local Revenue Fund identified in Welfare and Institutions Code section 17600 and receives the funds.

3. Submit reports to the State Department of Social Services for reimbursement of payments issued to seriously emotionally disturbed pupils for 24-hour out-of-home care.

H. Provide Psychotherapy or Other Mental Health Treatment Services (Cal. Code Regs., tit. 2, §§ 60020, subd. (i), 60050, subd. (b), 60200, subd. (c)1)

1. The host county shall make its provider network available and provide the county of origin a list of appropriate providers used by the host county's managed care plan who are currently available to take new referrals. (Cal. Code Regs., tit. 2, § 60200, subd. (c)(1).)

2. The county of origin shall negotiate with the host county to obtain access to limited resources, such as intensive day treatment and day rehabilitation. (Cal. Code Regs., tit. 2, § 60200, subd. (c)(1).)

3. Provide case management services to a pupil when required by the pupil's IEP. This service shall be provided directly or by contract at the discretion of the county of origin. (Cal. Code Regs., tit. 2, § 60020, subd. (i).)

4. Provide case management services and individual or group psychotherapy services, as defined in Business and Professions Code section 2903, when required by the pupil's IEP. This service shall be provided directly or by contract at the discretion of the county of origin. (Cal. Code Regs., tit. 2, § 60020, subd. (i).)

5. Provide mental health assessments, collateral services, intensive day treatment, and day rehabilitation services when required by the pupil's IEP. These services shall be provided directly or by contract at the discretion of the county of origin. (Cal. Code Regs., tit. 2, § 60020, subd. (i).)

6. Provide medication monitoring services when required by the pupil's IEP. "Medication monitoring" includes all medication support services with the exception of the medications or biologicals themselves and laboratory work. Medication support services include prescribing, administering, and monitoring of psychiatric medications or biologicals as necessary to alleviate the symptoms of mental illness. This service shall be provided directly or by contract at the discretion of the county of origin. (Cal. Code Regs., tit. 2, § 60020, subds. (f) and (i).)

7. Notify the parent and the local educational agency when the parent and the county mutually agree upon the completion or termination of a service, or when the pupil is no longer participating in treatment. ((Cal. Code Regs., tit. 2, § 60050, subd. (b).)

When providing psychotherapy or other mental health treatment services, the activities of crisis intervention, vocational services, and socialization services are not reimbursable.

I. Participate in due process hearings relating to mental health assessments or services (Gov. Code, § 7586; Cal. Code Regs., tit. 2, § 60550.) When there is a proposal or a refusal to initiate or change the identification, assessment, or educational placement of the child or the provision of a free, appropriate public education to the child relating to mental health assessments or services, the following activities are eligible for reimbursement:

1. Retaining county counsel to represent the county mental health agency in dispute resolution. The cost of retaining county counsel is reimbursable.

2. Preparation of witnesses and documentary evidence to be presented at hearings.

3. Preparation of correspondence and/or responses to motions for dismissal, continuance, and other procedural issues.

4. Attendance and participation in formal mediation conferences.

5. Attendance and participation in information resolution conferences.

6. Attendance and participation in pre-hearing status conferences convened by the Office of Administrative Hearings.

7. Attendance and participation in settlement conferences convened by the Office of Administrative Hearings.

8. Attendance and participation in Due Process hearings conducted by the Office of Administrative Hearings.

9. Paying for psychological and other mental health treatment services mandated by the test claim legislation (California Code of Regulations, title 2, sections 60020, subdivisions (f) and (i)), and the out-of-home residential care of a seriously emotionally disturbed pupil (Gov. Code, § 7581; Cal. Code Regs., tit. 2, § 60200, subd. (e)), that are required by an order of a hearing officer or a settlement agreement between the parties to be provided to a pupil following due process hearing procedures initiated by a parent or guardian.

Attorneys' fees when parents prevail in due process hearings and in negotiated settlement agreements are not reimbursable.

Section VI, RECORD RETENTION, describes the supporting data that must be maintained. It states:

VI. RECORD RETENTION

Pursuant to Government Code section 17558.5, subdivision (a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the reimbursable activities, as described in Section IV, must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

Section VII, OFFSETTING REVENUES AND OTHER REIMBURSEMENTS, identifies applicable offset requirements. It states:

VII. OFFSETTING REVENUES AND OTHER REIMBURSEMENTS

Any offsets the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate received from any of the following sources shall be identified and deducted from this claim:

1. Funds received by a county pursuant to Government Code section 7576.5.
2. Any direct payments or categorical funding received from the state that is specifically allocated to any service provided under this program.
3. Funds received and applied to this program from appropriations made by the Legislature in future Budget Acts for disbursement by the State Controller's Office.
4. Private insurance proceeds obtained with the consent of a parent for purposes of this program.
5. Medi-Cal proceeds obtained from the state or federal government, exclusive of the county match, that pay for a portion of the county services provided to a pupil under the Handicapped and Disabled Students program in accordance with federal law.
6. Any other reimbursement received from the federal or state government, or other non-local source.

Except as expressly provided in section IV(F)(2) of these parameters and guidelines, Realignment funds received from the Local Revenue Fund that are used by a county for this program are not required to be deducted from the costs claimed. (Stats. 2004, ch. 493, § 6 (Sen. Bill No. 1895).)

SCO Claiming Instructions

In compliance with Government Code section 17558, the SCO issues claiming instructions for mandated programs in order to assist local agencies and school districts in claiming reimbursable

costs. The SCO issued claiming instructions for Chapter 1747, Statutes of 1984; Chapter 1274, Statutes of 1985; Chapter 1128, Statutes of 1994; and Chapter 654, Statutes of 1996 in January 2007, and amended them October 2010 **(Exhibit B)**. In Exhibit B, the county also includes a copy of the claiming instructions for the Reconsidered Handicapped and Disabled Students program; this program was reimbursable through FY 2005-06 only. The county used the consolidated version of the claiming instructions to file its reimbursement claims **(Exhibit D)**.

II. COUNTY OVERSTATED COSTS BY CLAIMING UNALLOWABLE OUT-OF-STATE RESIDENTIAL PLACEMENT COSTS

Issue

The county IRC contests Finding 1 in the SCO's final audit report issued December 3, 2012, related to unallowable out-of-state residential placement of SED pupils in for-profit facilities, consisting of treatment costs of $1,963.381 and board and care costs of $1,774,664.

The SCO concluded that vendor payments for residential placement costs resulting from the placement of SED pupils in facilities owned and operated for profit are not reimbursable under the state-mandated program.

The county believes that residential placement costs resulting from the placement of SED pupils in facilities owned and operated for profit are eligible and reimbursable under the state-mandated cost program.

SCO Analysis

The county did not support that costs claimed for six out-of-state facilities were incurred for placement of SED pupils in non-profit residential facilities. Based on documentation the county provided and our analysis, the county placed SED pupils in out-of-state residential facilities that are organized and operated for profit.

The program's parameters and guidelines, Reimbursable Activities section IV. G., applicable to the time period specify the following services eligible for reimbursement **(Tab 6)**:

G. Authorize payments to in-state or out-of-state residential care providers / Issue payments to providers of in-state or out-of-state residential care for the residential and non-educational costs of seriously emotionally disturbed pupils (Gov. Code, § 7581; Cal. Code Regs., tit. 2, § 60200, subd. (e))

1. Authorize payments to residential facilities based on rates established by the Department of Social Services in accordance with Welfare and Institutions Code sections 18350 and 18356. This activity requires counties to determine that the residential placement meets all the criteria established in Welfare and Institutions Code sections 18350 through 18356 before authorizing payment.

2. Issue payments to providers of out-of-home residential facilities for the residential and non-educational costs of seriously emotionally disturbed pupils. Payments are for the costs of food, clothing, shelter, daily supervision, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation. Counties are eligible to be reimbursed for 60 percent of the total residential and non-educational costs of a seriously emotionally disturbed child placed in an out-of-home residential facility.

   Welfare and Institutions Code section 18355.5 applies to this program and prohibits a county from claiming reimbursement for its 60-percent share of the total residential and non-educational costs of a seriously emotionally disturbed child placed in an out-of-home residential facility if the county claims reimbursement for these costs from the Local Revenue Fund identified in Welfare and Institutions Code section 17600 and receives the funds.

3. Submit reports to the State Department of Social Services for reimbursement of payments issued to seriously emotionally disturbed pupils for 24-hour out-of-home care.

The program's parameters and guidelines, as noted in item G above, provides for reimbursement to 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 7581 and Title 2, *California Code of Regulations* (CCR), section 60200. The latter code section describes the financial responsibilities of counties and references Title 2, CCR, section 60100 relative to pupils placed in residential facilities.

The program's parameters and guidelines do not provide reimbursement for out-of-state residential placement of SED pupils in facilities that are organized and operated for profit (**Tab 6**). The underlying regulation, Title 2, CCR, section 60100, subdivision (h), specifies that out-of-state residential placements shall be made only in residential programs that meet the requirements of Welfare and Institutions Code section 11460(c)(2) through (3) (**Tab 9**). Welfare and Institutions Code section 11460, subdivision (c)(3), states that reimbursement shall be paid only to a group home organized and operated on a non-profit basis (**Tab 10**).

The parameters and guidelines do not provide reimbursement for out-of-state residential placement of SED pupils in facilities that are organized and operated for profit.

County's Response

The County disputes the State's Findings in Audit 1, Audit 2 and Audit 3 – unallowable vendor payments – because the authorities cited by the State, California Code of Regulations Title 2 section 60100(h) and Welfare and Institutions Code 11460(c)(3), are in conflict with requirements of federal law, including the Individuals with Disabilities Education Act (IDEA) and section 472, subsection (c)(2) of the Social Security Act (42 U.S.C. section 672, subsection (c)(2)). The Parameters and Guidelines which are included as an integral part of the Claiming Instructions attached hereto as Item 9, Exhibit B cite the State authorities referenced above which are in conflict with the requirements of federal law. Moreover, in its disallowance of County of Orange claims, the State ignores the administrative decisions of its own Office of Administrative Hearings (OAH) and recent affirming United States District Court decision. The following discussion demonstrates that the subject claims, for Audit Periods 1, 2, and 3, were incorrectly reduced by $3,738,045.

SCO's Comment

Our objective was to determine whether the costs of county-filed claims are reimbursable under the program's parameters and guidelines adopted by the CSM. We did not assess the appropriateness or need for services provided in light of federal regulations.

The county arguments are presented in bold below and our response follows.

A. County Contracted with Nonprofit Out-of-State Residential Program For SED Pupils.

As previously noted, the mandate reimburses counties for payments to service vendors (group homes) providing mental health services to SED pupils in out-of-state residential placements that are organized and operated on a non-profit basis. The unallowable costs relative to vendor payments involve six facilities as follows:

- For two of the six residential facilities—Youth Care of Utah and Charter Provo Canyon School (later identified as UHS of Provo Canyon)—the county claimed payments made to California non-profit entities. The California nonprofit entities—Aspen Solutions, Inc. and Mental Health Systems, Inc.—contracted with the for-profit facilities located in Utah to provide residential placement services (**Tabs 14,**

15, and 16). The Youth Care of Utah and Charter Provo Canyon School's Utah residential facilities are not organized and operated on a non-profit basis.

We allowed vendor payments for residential placements at the Provo Canyon School, Inc. from the point that it became organized and operated as a non-profit, January 6, 2009 (**Tab 17**).

- For three of the six residential facilities—Aspen Ranch, Sunhawk Academy, and Logan River, LLC—the county asserted that the for-profit residential facilities had similar arrangements with either Aspen Solutions, Inc. or Mental Health Systems, Inc. (**Tab 18**). The county did not provide any documentation to support the non-profit status of the four residential facilities. Further, the county did not provide any documentation illustrating a business relationship between the residential facilities and the California non-profits.

- For one of the six residential facilities—Kids Behavioral Health of Alaska, Inc.—the county provided a Certificate of Good Standing from the State of Alaska (**Tab 19**) and a Certificate of Registration from the State of Utah (**Tab 20**). The documentation provided does not support that the Utah residential facility is organized and operated as a non-profit for the entire audit period for which the vendor costs were claimed. Specifically, the State of Utah Certificate of Registration of a foreign non-profit was filed and approved December 7, 2007, relating to a portion of the audit period.

  The county also has not provided any information as to the existence of a business relationship between Kids Behavioral Health of Alaska, Inc. and the Utah residential facility Copper Hills Youth Center, the facility where clients were placed. Per a Utah government website, the business named Copper Hills Youth Center was registered November 5, 2003, and remained in business through November 4, 2009, operating a health services facility (**Tab 21**). Per the same website, Kids Behavioral Health of Alaska, Inc. was registered December 7, 2007 and is identified as active, managing companies and enterprises (**Tab 22**).

B. California For-Profit Placement Restriction is Incompatible With IDEA's "Most Appropriate Placement" Requirement and Placement Provisions.

The parameters and guidelines (section IV.G.) specify that the mandate is 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 of Regulations* (CCR), sections 60100 and 60110. Title 2, CCR, section 60100, subdivision (h), specifies that out-of-state residential placements shall be made only in residential programs that meet the requirements of Welfare and Institutions Code section 11460, subdivision (c)(2) through (3). Welfare and Institutions Code section 11460, subdivision (c)(3), states that reimbursement shall only be paid to a group home organized and operated on a non-profit basis. The program's parameters and guidelines do not provide reimbursement for out-of-state residential placements made outside of the regulation.

We agree that there is inconsistency between California law and federal law related to IDEA funds. Furthermore, we do not dispute the assertion that California law is more restrictive than federal law in terms of out-of-state residential placement of SED pupils; however, this is a State-mandated cost program and the county filed a claim seeking reimbursement from the State under the provisions of Title 2, CCR, section 60100.

We also agree that Education Code sections 56366.1 and 56365 do not restrict local educational agencies (LEAs) from contracting with for-profit schools for educational services. These sections specify that educational services must be provided by a school certified by the California Department of Education.

C. California Office of Administrative Hearings Special Education Division Corroborates HCA's [County's Health Care Agency's] Contention that For-Profit Placement Restriction Is Incompatible With IDEA's "Most Appropriate Placement" Requirement and Placement Provisions.

Office of Administrative Hearings (OAH) Case No. N 2007090403 **(Tab 11)** is not precedent-setting and has no legal bearing. In this case, the administrative law judge found that not placing the student in an appropriate facility was to deny the student a free and appropriate public education (FAPE) under federal regulations. The issue of funding residential placements made outside of the regulation was not specifically addressed in the case.

Alternatively, in OAH Case No. N 2005070683 **(Tab 12)**, the administrative law judge found that the county Department of Behavioral Health could not place a student in an out-of-state residential facility that is owned and operated for profit. Basically, the judge found that the county is statutorily prohibited from funding a residential placement in a for-profit facility. Further, the administrative law judge opined that the business relationship between Aspen Solutions, a non-profit entity, and Youth Care, a for-profit residential facility, did not grant the latter non-profit status.

Nevertheless, the fact remains that this is a State-mandated cost program and the county filed a claim seeking reimbursement from the State under the provisions of Title 2, CCR, section 60100, and Welfare and Institutions Code section 11460, subdivision (c)(3). Residential placements made outside of the regulation are not reimbursable under the State-mandated cost program.

D. United States District Court has Affirmed the California Office of Administrative Hearings Special Education Division of *Student v. Riverside Unified School District* and Riverside County Department of Mental Health.

United States District Court Case No. EDCV 08-0503-SGL **(Tab 13)** has no impact concerning the reimbursement of State-mandated vendor costs. In the case, the judge found that the provision of Title 2, CCR, section 60100, and Welfare and Institutions Code section 11460, subdivision (c)(3), "Does not set forth a requirement so much as a limitation upon reimbursement for costs of such placement." As such, the judge determined counties are not prohibited from placing clients in for-profit facilities. However, the issue of funding residential placements made outside of the regulation was not specifically addressed in the case.

E. Counties Face Increased Litigation if Restricted to Nonprofit Residential Facilities.

Refer to previous response.

F. Federal and State Law Do Not Impose Tax Status Requirements on Provider Treatment Services.

We do not dispute that Government Code section 7572 requires mental health services to be provided by qualified mental health professionals. As noted in our previous response, the mandate reimburses counties for payments to service vendors (group homes) that provide mental health services to SED pupils in out-of-state residential facilities that are organized and operated on a non-profit basis. The treatment and board and care vendor payments claimed result from the placement of clients in non-reimbursable out-of-state residential facilities. The program's parameters and guidelines do not include a provision for the county to be reimbursed for vendor payments made outside of the regulation.

G. The State's Interpretation of WIC Section 11460(c)(3) Would Result in Higher State Reimbursement Costs.

The focus of our audit was to assess whether county-filed claims represent eligible costs in accordance with the program's parameters and guidelines, inclusive of the underlying regulations. We did not perform any procedures to validate the county's assertion regarding the relative treatment costs of for-profit versus non-profit facilities. In reference to board and care costs, there is no difference between for-profit and non-profit facilities, as each receives a standardized rate based upon a rate classification level.

III. CONCLUSION

The SCO audited Orange County's claims for costs of the legislatively mandated Consolidated Handicapped and Disabled Students, Handicapped and Disabled Students II, and Seriously Emotionally Disturbed Pupils Program (Chapter 1747, Statutes of 1984; Chapter 1274, Statutes of 1985; Chapter 1128, Statutes of 1994; and Chapter 654, Statutes of 1996) for the period of July 1, 2006, through June 30, 2009. The county claimed $20,228,242 for the mandated program. Our audit disclosed that $16,451,818 is allowable and $3,776,424 is unallowable. The costs are unallowable primarily because the county claimed ineligible out-of-state residential placement of SED pupils in facilities that are organized and operated for profit.

The county is challenging the SCO's adjustment totaling $3,738,045 for the ineligible out-of-state residential placement of SED pupils in facilities that are organized and operated for profit.

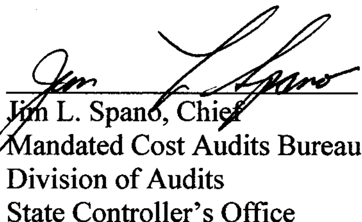
The parameters and guidelines do not provide reimbursement for out-of-state residential placement of SED pupils in facilities that are organized and operated for profit. The county is not eligible to receive reimbursement for vendor payments made to ineligible out-of-state residential facilities for the placement of SED pupils. The underlying regulations do not provide for reimbursement of out-of-state residential placements made outside of the regulation. As such, vendor payments to for-profit facilities are not eligible for reimbursement under the state-mandated cost program.

The CSM should find that: (1) the SCO correctly reduced the county's FY 2006-07 claim by $1,644,100; (2) the SCO correctly reduced the county's FY 2007-08 claim by $1,929,257; and (3) the SCO correctly reduced the county's FY 2008-09 claim by $203,067.

IV. CERTIFICATION

I hereby certify by my signature below that the statements made in this document are true and correct of my own knowledge, or, as to all other matters, I believe them to be true and correct based upon information and belief.

Executed on May 14, 2013, at Sacramento, California, by:



Jim L. Spano, Chief
Mandated Cost Audits Bureau
Division of Audits
State Controller's Office

Tab 3

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

RECONSIDERATION OF PRIOR STATEMENT OF DECISION ON: Statutes 1984, Chapter 1747; Statutes 1985, Chapter 1274; California Code of Regulations, Tit. 2, Div. 9, §§ 60000-60610 (Emergency Regulations filed December 31, 1985, Designated Effective January 1, 1986 (Register 86, No. 1) and Refiled June 30, 1986, Designated Effective July 12, 1986 (Register 86, No. 28)) CSM 4282 Directed By Statutes 2004, Chapter 493, Section 7, (Sen. Bill No. 1895) Effective September 13, 2004.	**Case No.: 04-RL-4282-10** ***Handicapped & Disabled Students*** STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 (*Adopted on May 26, 2005*)

STATEMENT OF DECISION

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

_______________________________ _______________________

PAULA HIGASHI, Executive Director Date

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

RECONSIDERATION OF PRIOR STATEMENT OF DECISION ON: Statutes 1984, Chapter 1747; Statutes 1985, Chapter 1274; California Code of Regulations, Tit. 2, Div. 9, §§ 60000-60610 (Emergency Regulations filed December 31, 1985, Designated Effective January 1, 1986 (Register 86, No. 1) and Refiled June 30, 1986, Designated Effective July 12, 1986 (Register 86, No. 28)) CSM 4282 Directed By Statutes 2004, Chapter 493, Section 7, (Sen. Bill No. 1895) Effective September 13, 2004.	**Case No.: 04-RL-4282-10** ***Handicapped & Disabled Students*** STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 (*Adopted on May 26, 2005*)

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on May 26, 2005. Leonard Kaye and Paul McIver appeared on behalf of the County of Los Angeles. Pam Stone represented and appeared on behalf of the County of Stanislaus. Linda Downs appeared on behalf of the County of Stanislaus. John Polich appeared on behalf of the County of Ventura. Patricia Ryan appeared on behalf of the California Mental Health Directors' Association. Jeannie Oropeza and Dan Troy appeared on behalf of the 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 staff analysis at the hearing by a vote of 4-0.

BACKGROUND

Statutes 2004, chapter 493 (Sen. Bill No. 1895 ("SB 1895")) directs the Commission to reconsider its prior final decision and parameters and guidelines on the *Handicapped and Disabled Students* program. Section 7 of the bill states the following:

> Notwithstanding any other law, the Commission on State Mandates shall, on or before December 31, 2005, reconsider its decision relating to included services and administrative and travel costs associated with services provided pursuant to Chapter 26.5 (commencing with

Section 7570) of Division 7 of Title 1 of the Government Code, and the parameters and guidelines for calculating the state reimbursements for these costs.

Commission Decisions

The Commission adopted the Statement of Decision on the *Handicapped and Disabled Students* program in 1990 (CSM 4282). Generally, the test claim legislation implements federal law that requires states to guarantee to disabled pupils the right to receive a free and appropriate public education that emphasizes special education and related services designed to meet the pupil's unique educational needs.[1] The mechanism for providing special education services under federal law is the individualized education program, or IEP. An IEP is a written statement developed after an evaluation of the pupil in all areas of suspected disability and may provide for related services including mental health and psychological services.[2]

Before the enactment of the test claim legislation, the state adopted a plan to comply with federal law. The responsibility for supervising special education and related services was delegated to the Superintendent of Public Instruction. Local educational agencies (LEAs) were financially responsible for the provision of mental health services required by a pupil's IEP.[3]

The test claim legislation, which became effective on July 1, 1986, shifted the responsibility and funding of mental health services required by a pupil's IEP to county mental health departments.

The Commission approved the test claim and found that the activities of providing mental health assessments, participation in the IEP process, psychotherapy, and other mental health services were reimbursable under article XIII B, section 6 of the California Constitution. Activities related to assessments and IEP responsibilities were found to be 100% reimbursable. Psychotherapy and other mental health treatment services were found to be 10% reimbursable due to the funding methodology in existence under the Short-Doyle Act for local mental health services.

The parameters and guidelines for *Handicapped and Disabled Students* (CSM 4282) were adopted in August 1991, and amended in 1996, and have a reimbursement period beginning July 1, 1986. The parameters and guidelines authorize reimbursement for the following activities:

A. One Hundred (100) percent of any costs related to IEP Participation, Assessment, and Case Management:

    1. The scope of the mandate is one hundred (100) percent reimbursement, except that for individuals billed to Medi-Cal only, the Federal Financing

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[1] See federal Rehabilitation Act of 1973 and the Individuals with Disabilities Education Act (IDEA).

[2] Title 20 United States Code sections 1400 et seq.

[3] Education Code sections 56000 et seq.

Participation portion (FFP) for these activities should be deducted from reimbursable activities not subject to the Short-Doyle Act.

2. For each eligible claimant, the following cost items are one hundred (100) percent reimbursable (Gov. Code, § 7572, subd. (d)(1)):

   a. Whenever an LEA refers an individual suspected of being an "individual with exceptional needs" to the local mental health department, mental health assessment and recommendation by qualified mental health professionals in conformance with assessment procedures set forth in Article 2 (commencing with section 56320) of Chapter 4 of part 30 of Division 4 of the Education Code, and regulations developed by the State Department of Mental Health, in consultation with the State Department of Education, including but not limited to the following mandated services:

      i. interview with the child and family,

      ii. collateral interviews, as necessary,

      iii. review of the records,

      iv. observation of the child at school, and

      v. psychological testing and/or psychiatric assessment, as necessary.

   b. Review and discussion of mental health assessment and recommendation with parent and appropriate IEP team members. (Gov. Code, § 7572, subd. (d)(1).)

   c. Attendance by the mental health professional who conducted the assessment at IEP meetings, when requested. (Gov. Code, § 7572, subd. (d)(1).)

   d. Review by claimant's mental health professional of any independent assessment(s) submitted by the IEP team. (Gov. Code, § 7572, subd. (d)(2).)

   e. When the written mental health assessment report provided by the local mental health program determines that an "individual with special needs" is "seriously emotionally disturbed," and any member of the IEP team recommends residential placement based upon relevant assessment information, inclusion of the claimant's mental health professional on that individual's expanded IEP team.

   f. When the IEP prescribes residential placement for an "individual with exceptional needs" who is "seriously emotionally disturbed," claimant's mental health personnel's identification of out-of-home placement, case management, six month review of IEP, and expanded IEP responsibilities. (Gov. Code, § 7572.5.)

   g. Required participation in due process hearings, including but not limited to due process hearings.

3. One hundred (100) percent of any administrative costs related to IEP Participation, Assessment, and Case Management, whether direct or indirect.

B. Ten (10) percent of any costs related to mental health treatment services rendered under the Short-Doyle Act:

1. The scope of the mandate is ten (10) percent reimbursement.

2. For each eligible claimant, the following cost items, for the provision of mental health services when required by a child's individualized education program, are ten (10) percent reimbursable (Gov. Code, § 7576):

   a. Individual therapy,

   b. Collateral therapy and contacts,

   c. Group therapy,

   d. Day treatment, and

   e. Mental health portion of residential treatment in excess of the State Department of Social Services payment for the residential placement.

3. Ten (10) percent of any administrative costs related to mental health treatment services rendered under the Short-Doyle Act, whether direct or indirect.

In 1993, the Sixth District Court of Appeal, in *County of Santa Clara v. Commission on State Mandates*, issued an unpublished decision that upheld the Commission's decision, including the percentage of reimbursements, on the *Handicapped and Disabled Students* program.[4]

In May 2000, the Commission approved a second test claim relating to the test claim legislation, *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (CSM 97-TC-05). The test claim on *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05) was filed on Government Code section 7576, as amended by Statutes 1996, chapter 654, the corresponding regulations, and on a Department of Mental Health Information Notice Number 86-29. The test claim in *Seriously Emotionally Disturbed Pupils* addressed only the counties' responsibilities for *out-of-state* residential placements for seriously emotionally disturbed pupils, and has a reimbursement period beginning January 1, 1997.

In addition, there are two other matters currently pending with the Commission relating to the test claim legislation. In 2001, the Counties of Los Angeles and Stanislaus filed requests to amend the parameters and guidelines on the original test claim decision, *Handicapped and Disabled Students* (CSM 4282). The counties request that the parameters and guidelines be amended to delete all references to the Short-Doyle cost-sharing mechanism for providing psychotherapy or other mental health services; to add

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[4] *County of Santa Clara v. Commission on State Mandates*, Sixth District Court of Appeal Case No. H009520, filed January 11, 1993.

an activity to provide reimbursement for room and board for in-state placement of pupils in residential facilities; and to amend the language regarding the reimbursement of indirect costs. The request to amend the parameters and guidelines was scheduled on the Commission's March 2002 hearing calendar. But at the request of the counties, the item was taken off calendar, and is still pending. If the Commission approves the Counties' requests on this matter, the reimbursement period for the new amended portions of the parameters and guidelines would begin on July 1, 2000.[5]

The second matter currently pending with the Commission is a consolidated test claim, *Handicapped and Disabled Students II* (02-TC-40 and 02-TC-49), filed by the Counties of Los Angeles and Stanislaus on all of the amendments to the original test claim legislation from 1986 to the present. The test claims in *Handicapped and Disabled Students II* were filed in June 2003 and, if approved by the Commission, will have a reimbursement period beginning July 1, 2001.

Documented Problems with the Test Claim Legislation

There have been funding and implementation problems with this program, which have been well documented. In 2002, the Legislative Analyst's Office issued a budget analysis that described "significant controversy" regarding the program. The report states in relevant part the following:

> Over the last two years, the State Controller's Office (SCO) has audited county AB 3632 mandate reimbursement claims dating back to 1997 (three years of claims for each audited county). Based on information provided by counties and professional mandate claim preparers, we understand that SCO auditors have found that many counties are claiming reimbursements for 100 percent of the cost of providing mental health treatment services to special education pupils, rather than the 10 percent specified under the terms of this mandate. In addition, some counties are not reporting revenues that auditors indicate should be included as mandate cost "offsets." The magnitude of these auditing concerns is unknown, but could total as much as $100 million statewide for the three-year period.[6]

Before the audits could be completed, Statutes 2002, chapter 1167, section 41 (Assem. Bill No. 2851) was enacted directing the State Controller's Office to not dispute the percentage of reimbursement claimed for mental health services provided by counties prior to and through fiscal years 2000-2001. According to the State Controller's Office, however, audits continue for this program to identify unallowable costs. To date,

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[5] California Code of Regulations, title 2, section 1183.2.

[6] Report by Legislative Analyst's Office, *2002 Budget Analysis: Health and Social Services, Department of Mental Health (4440)*, dated February 20, 2002. The *Handicapped and Disabled Students* program is often referred to as the "AB 3632" program.

seventeen audits have been completed, three final reports are in the process, and five audits are in the fieldwork stage.[7]

In addition, the legislative history of SB 1895 refers to a report issued by Stanford Law School in May 2004 on the program that describes the history of the test claim legislation, and addresses the policy and funding issues.[8] According to legislative history, SB 1895 was an attempt to address the issues and recommendations raised in the report.[9]

Accordingly, this reconsideration presents the following issues:

- What is the scope of the Commission's jurisdiction directed by SB 1895?
- Does the test claim legislation constitute a state-mandated new program or higher level of service?
- Does the test claim legislation impose costs mandated by the state within the meaning of article XIII B, section 6 and Government Code section 17514?

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[10] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[11] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[12] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school

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[7] E-mail from State Controller's Office dated January 19, 2005.

[8] The report is entitled "Challenge and Opportunity – An Analysis of Chapter 26.5 and the System for Delivering Mental Health Services to Special Education Students in California," Youth and Education Law Clinic, Stanford Law School, May 2004.

[9] Assembly Committee on Education, analysis of SB 1895 as introduced on March 3, 2004, dated June 23, 2004.

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

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

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

district to engage in an activity or task.[13] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[14]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[15] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[16] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[17]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[18]

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.[19] 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."[20]

I. What is the scope of the Commission's jurisdiction directed by SB 1895?

Statutes 2004, chapter 493, section 7 (Sen. Bill No. 1895, eff. Sept. 13, 2004), requires the Commission on State Mandates, on or before December 31, 2005, "notwithstanding

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

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

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

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

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

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

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

[20] *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.

any other law" to "reconsider its decision relating to included services and administrative and travel costs associated with services provided pursuant to Chapter 26.5 (commencing with Section 7570) of Division 7 of Title 1 of the Government Code, and the parameters and guidelines for calculating the state reimbursements for these costs."

As described in the Background, the Commission has issued two decisions relating to Chapter 26.5 of the Government Code. The first decision, *Handicapped and Disabled Students* (CSM 4282), was adopted on April 26, 1990. The test claim on *Handicapped and Disabled Students* (CSM 4282) was filed on Government Code section 7570 and following, as added and amended by Statutes 1984, chapter 1747, and Statutes 1985, chapter 1274, and on California Administrative Code, title 2, division 9, sections 60000-60610 (Emergency Regulations filed December 31, 1985, designated effective January 1, 1986 (Register 86, No. 1) and re-filed June 30, 1986, designated effective July 12, 1986 (Register 86, No. 28)).

The second decision, *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05), was adopted on May 25, 2000. The test claim on *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05) was filed on Government Code section 7576, as amended by Statutes 1996, chapter 654, the corresponding regulations, and on a Department of Mental Health Information Notice Number 86-29. The test claim in *Seriously Emotionally Disturbed Pupils* addressed only the counties' responsibilities for *out-of-state* residential placements for seriously emotionally disturbed pupils. This test claim did not address the mental health services provided by counties to pupils in the state of California.

A third test claim is pending with the Commission, *Handicapped and Disabled Students II* (02-TC-40 and 02-TC-49), and has been filed by the Counties of Los Angeles and Stanislaus on all of the amendments to the statutes in Chapter 26.5 of the Government Code and to their corresponding regulations from 1986 up to the current date. The test claims in *Handicapped and Disabled Students II* were filed in June 2003 and, if approved by the Commission, will have a reimbursement period beginning July 1, 2001.

For purposes of this reconsideration, the Counties of Los Angeles and Stanislaus contend that SB 1895 requires the Commission to reconsider not only the Commission's original decision in *Handicapped and Disabled Students* (CSM 4282), but also on *all* the subsequent amendments to the statutes and regulations up to the current date that were pled in *Handicapped and Disabled 11*. In this regard, the County of Stanislaus argues that "to reconsider the prior test claim only, without examining that which has amended the program since its original inception in 1984, overlooks 20 years of subsequent legislation and which has lead to the substantial filings which are before the Commission on State Mandates."[21] The Counties further contend that SB 1895 requires the Commission to reconsider the Commission's decision in *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05), adopted on May 25, 2000.

[21] Comments filed by County of Stanislaus on December 15, 2004.

Although the Counties' arguments to analyze Chapter 26.5 of the Government Code in its entirety up to the current date for purposes of reimbursement may have surface appeal, neither the law, nor the plain language of SB 1895 supports that position. For the reasons provided below, the Commission finds that SB 1895 gives the Commission the jurisdiction to reconsider only the original Commission decision, *Handicapped and Disabled Students* (CSM 4282). The Commission does not have the jurisdiction in this case to reconsider *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05), or the jurisdiction to address the statutory and regulatory amendments made to the program since 1985 that have been pled in *Handicapped and Disabled Students II* (02-TC-40 and 02-TC-49). The Commission further finds, based on the language of SB 1895, that the period of reimbursement for the Commission's decision on reconsideration begins July 1, 2004.

A. SB 1895 directs the Commission to reconsider only the original Commission decision, *Handicapped and Disabled Students* (CSM 4282)

It is a well-settled issue of law that administrative agencies, such as the Commission, are entities of limited jurisdiction. Administrative agencies have only the powers that have been conferred on them, expressly or by implication, by statute or constitution. An administrative agency may not substitute its judgment for that of the Legislature. When an administrative agency acts in excess of the powers conferred upon it by statute or constitution, its action is void.[22]

Since the Commission was created by the Legislature (Gov. Code, §§ 17500 et seq.), its powers are limited to those authorized by statute. Government Code section 17551 requires the Commission to hear and decide upon a claim by a local agency or school district that the local agency or school district is entitled to reimbursement pursuant to article XIII B, section 6 of the California Constitution. Government Code section 17521 defines the test claim as the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state.

Thus, the Government Code gives the Commission jurisdiction only over those statutes and/or executive orders pled by the claimant in the test claim. The Commission does not have the authority to consider a claim for reimbursement on statutes or executive orders that have not been pled by the claimant.

In addition, if the Commission approves the test claim, the period of reimbursement is calculated based on the date the test claim is filed by the claimant. Government Code section 17557, subdivision (e), states "[a] test claim shall be submitted on or before June 30 following a fiscal year in order to establish eligibility for reimbursement for that fiscal year." Thus, if a test claim is filed on June 30, 2004, and is approved by the Commission, the reimbursement period would begin in fiscal year 2002-2003. Reimbursement is not based on the effective and operative date of the particular statute or executive order pled in the test claim, unless the effective and operative date falls after the period of reimbursement.

[22] *Ferdig v. State Personnel Board* (1969) 71 Cal.2d 96, 103-104.

Furthermore, Government Code section 17559 grants the Commission the authority to reconsider prior final decisions only within 30 days after the Statement of Decision is issued.

In the present case, the Commission's jurisdiction is based solely on SB 1895. Absent SB 1895, the Commission would have no jurisdiction to reconsider any of its decisions relating to Chapter 26.5 of the Government Code since the two decisions on those statutes and regulations were adopted and issued well over 30 days ago.

Thus, the Commission must act within the jurisdiction granted by SB 1895, and may not substitute its judgment regarding the scope of its jurisdiction on reconsideration for that of the Legislature.[23] Since an action by the Commission is void if its action is in excess of the powers conferred by statute, the Commission must narrowly construe the provisions of SB 1895.

Under the rules of statutory construction, when the statutory language is plain the court is required to enforce the statute according to its terms. The California Supreme Court determined that:

> In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. We begin by examining the statutory language, giving the words their usual and ordinary meaning. If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. [Citations omitted.][24]

Neither the court, nor the Commission, may disregard or enlarge the plain provisions of a statute or go beyond the meaning of the words used when the words are clear and unambiguous. Thus, the Commission, like the court, is prohibited from writing into a statute, by implication, express requirements that the Legislature itself has not seen fit to place in the statute.[25] To the extent there is any ambiguity in the language used in the statute, the legislative history of the statute may be reviewed to interpret the intent of the Legislature.[26]

SB 1895 states the following:

> Notwithstanding any other law, the Commission on State Mandates shall, on or before December 31, 2005, reconsider its decision relating to included services and administrative and travel costs associated with services provided pursuant to Chapter 26.5 (commencing with Section 7570) of Division 7 of Title 1 of the Government Code, and the parameters and guidelines for calculating the state reimbursements for these costs.

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[23] *Cal. State Restaurant Assn. v. Whitlow* (1976) 58 Cal.App.3d 340, 346-347.

[24] *Estate of Griswald* (2001) 25 Cal.4th 904, 910-911.

[25] *Whitcomb v. California Employment Commission* (1944) 24 Cal.2d 753, 757.

[26] *Estate of Griswald, supra*, 25 Cal.4th at page 911.

First, the Commission does not have the jurisdiction to "reconsider" the statutory and regulatory amendments enacted after 1985 to the Handicapped and Disabled program that were pled in *Handicapped and Disabled Students II* (02-TC-40 and 02-TC-49) since the Commission has not yet adopted a decision on that claim. Pursuant to Government Code section 17557, subdivision (e), *Handicapped and Disabled Students II* will have a reimbursement period beginning July 1, 2001, if the Commission finds that the statutory and regulatory amendments pled in the claim constitute a reimbursable state-mandated program.

Second, the Commission finds that the Commission does not have the jurisdiction to reconsider the Commission's decision in *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05). The express language enacted by the Legislature in SB 1895 refers to one decision with the use of the singular word "decision." According to the analysis on the bill prepared by the Senate Rules Committee dated August 25, 2004, SB 1895 "[d]irects the Commission on State Mandates (CSM), on or before December 31, 2005, to reconsider its decision relating to administrative and travel costs for AB 3632 (Brown), Chapter 1747, Statutes of 1984 and its parameters and guidelines for calculating state reimbursement costs." The legislative history cites only to the author and one of the statutes pled in the original *Handicapped and Disabled Students* (CSM 4282) test claim. Although, as argued by the Counties, the statutes pled in *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05) are included in Chapter 26.5 of the Government Code, there is no indication in the plain language of SB 1895 or in the Senate Rules Committee analysis that the Legislature intended to give the Commission jurisdiction to reconsider *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05). The SEDs test claim was filed on a 1996 statute (Assem. Bill 2726), introduced by another author who is not identified in SB 1895 or in the legislative history.[27]

Therefore, the Commission finds that the Commission has jurisdiction to reconsider only the original Commission decision, *Handicapped and Disabled Students* (CSM 4282).

Finally, SB 1895 directs the Commission to reconsider its decision relating to "*included services* and administrative and travel costs" associated with services provided pursuant to Chapter 26.5 of the Government Code. The phrase "included services" is broad and does not limit the scope of this reconsideration to any particular service required by the statutes or regulations pled in *Handicapped and Disabled Students*. Therefore, the Commission finds that SB 1895 requires the Commission to reconsider the entire test claim in *Handicapped and Disabled Students*.

B. The period of reimbursement for the Commission's decision on reconsideration begins July 1, 2004

SB 1895, enacted as a 2004 statute, directs the Commission to reconsider its 1990 Statement of Decision on the *Handicapped and Disabled Students* program. The parameters and guidelines for this program were originally adopted in 1991, with a reimbursement period beginning July 1, 1986. Over the last 14 years, reimbursement

[27] Statutes 1996, chapter 654 was introduced by Assembly Member Woods.

claims have been filed with the State Controller's Office for payment on this program, payments have been made by the state, and audits have occurred.

SB 1895, however, does not specify the period of reimbursement for the Commission's decision on reconsideration.[28] The question is whether the Legislature intended to apply the Commission's decision on reconsideration retroactively back to the original reimbursement period of July 1, 1986 (i.e., to reimbursement claims that have already been filed and have been audited and/or paid), or to prospective claims filed in the current and future budget years. If the Commission's decision on reconsideration is applied retroactively, the decision may impose new liability on the state that did not otherwise exist or change the legal consequences of these past events.

For the reasons below, the Commission finds the Legislature intended that the Commission's decision on reconsideration apply prospectively, to current and future budget years only.

The California Supreme Court has recently upheld its conclusion that there is a strong presumption against retroactive legislation. Statutes generally operate prospectively only. A statute may be applied retroactively only if the statute contains "express language of retroactively [sic] or if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application."[29] The court explained its conclusion as follows:

> "Generally, statutes operate prospectively only." [Citation omitted.] "The presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly ... For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." [Citation omitted.] "The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact." [Citation omitted.]
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> This is not to say that a statute may never apply retroactively. "A statute's retroactivity is, *in the first instance, a policy determination for the Legislature* and one to which courts defer absent 'some constitutional objection' to retroactivity." [Citation omitted.] But it has long been established that a statute that interferes with antecedent rights will not operate retroactively unless such retroactivity be "the unequivocal and

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[28] In this respect, SB 1895 is different than another recent statute directing the Commission to reconsider a prior final decision. Statutes 2004, chapter 227, directs the Commission to reconsider Board of Control test claims relating to regional housing. Section 109 of the bill states "[a]ny changes by the commission shall be deemed effective July 1, 2004."

[29] *McClung v. Employment Development Department* (2004) 34 Cal.4th 467, 475.

inflexible import of the terms, and the manifest intention of the legislature." [Citation omitted.] "*A statute may be applied retroactively only if it contains express language of retroactively [sic] or if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application.*" [Citation omitted.] (Emphasis added.)[30]

There is nothing in the plain language of SB 1895 or its legislative history to suggest that the Legislature intended to apply the Commission's decision on reconsideration retroactively. Section 10 of SB 1895 states that the act was necessary to implement the Budget Act of 2004 and, thus, supports the conclusion that the statute was intended to apply prospectively to the current and future budget years. Similarly, the legislative history contained in the analysis of the Senate Rules Committee supports the conclusion that the statute applies to current and future budget years only. Page seven of the analysis states that "[t]his bill proposes to provide clarification and accountability *regarding the funds provided in the 2004-05 Budget Act* for mental health services for individuals with special needs." (Emphasis added.)

Moreover, had the Legislature intended to apply the Commission's decision on reconsideration retroactively, it would have included retroactive language in the bill similar to the language in other statutes relating to this program. For example, Statutes 2002, chapter 1167, addressed the funding and reimbursement for the Handicapped and Disabled program. The effective and operative date of the statute was September 30, 2002. However, the plain language in section 38 of the bill contains retroactive language that the terms of the statute applied to reimbursement claims for services delivered beginning in fiscal year 2001-2002. Section 41 of the bill also states that county reimbursement claims already submitted to the Controller for reimbursement for mental health treatment services in fiscal years up to and including fiscal year 2000-2001 were not subject to a dispute by the Controller's Office regarding the percentage of reimbursement claimed by the county.

Based on the case law cited above and the plain language of SB 1895, the Commission finds that the period of reimbursement for the Commission's decision on reconsideration begins July 1, 2004. Thus, to the extent there are new activities included in the program that are now reimbursable, reimbursement would begin July 1, 2004.

II. Does the test claim legislation constitute a state-mandated new program or higher level of service?

At the hearing, the Department of Finance argued that the state has chosen to make mental health services related to IEPs the responsibility of the counties and that current federal law allows the state to choose the agency or agencies responsible for service. Thus, the Department of Finance contends that the activities performed by counties under the Handicapped and Disabled Students program are federally mandated and not mandated by the state within the meaning of article XIII B, section 6 of the California Constitution. The Commission disagrees with the Department of Finance.

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[30] *Ibid.*

In 1993, the Sixth District Court of Appeal, in *County of Santa Clara v. State of California*, issued an unpublished decision in the present case upholding the Commission's decision that the test claim legislation constitutes a reimbursable state-mandated program pursuant to article XIII B, section 6 of the California Constitution.[31] Once a court has ruled on a question of law in its review of an agency's action, the agency cannot act inconsistently with the court's order. Instead, 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.[32]

Although there have been subsequent amendments to the original test claim legislation that have provided more specificity in the activities performed by counties and that have modified financial responsibilities for the Handicapped and Disabled program, these amendments do not create an "unusual circumstance" or constitute an "intervening change in the law" that would support a finding on reconsideration that the test claim should be denied.[33]

Although the Commission finds that the activities identified in the original Statement of Decision and the financial responsibilities for the program should be further clarified on reconsideration, the decision in *County of Santa Clara* that the test claim legislation is a reimbursable state-mandated program, is binding on the Commission and the parties for purposes of this reconsideration.

Moreover, other case law interpreting article XIII B, section 6, which is described below, further supports the conclusion that the test claim legislation mandates a new program or higher level of service on counties.

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[31] *County of Santa Clara v. Commission on State Mandates*, Sixth District Court of Appeal Case No. H009520, filed January 11, 1993. The court stated the following:

> The intent of section 6 was to preclude the state from shifting to local government the financial responsibility for providing services in light of the restrictions imposed by Proposition 13 on the taxing and spending powers of local government. (*Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835-836.) Here it is undisputed that the provision of psychotherapy and other mental health services to special education students resulted in a higher level of service within County's Short-Doyle program.

[32] *George Arakelian Farms, Inc. v. Agricultural Labor Relations Board* (1989) 49 Cal.3d 1279, 1291.

[33] The amendments addressing financial responsibilities for this program are included in this analysis. The amendments enacted after 1985 that modify the activities performed by counties, however, are addressed in the *Handicapped and Disabled Students II* test claim filed by the Counties of Los Angeles and Stanislaus (02-TC-40 and 02-TC-49).

A. Case law supports the conclusion that the test claim legislation mandates a new program or higher level of service

The test claim legislation implements federal law that requires states to guarantee to disabled pupils the right to receive a free and appropriate public education that emphasizes special education and related services designed to meet the pupil's unique educational needs.

In 1988, the California Supreme Court held that education of handicapped children is "clearly" a governmental function providing a service to the public.[34] Thus, the test claim legislation qualifies as a program that is subject to article XIII B, section 6 of the California Constitution.

In 1992, the Third District Court of Appeal, in *Hayes v. Commission on State Mandates*, determined that the federal law at issue in the present case imposes a federal mandate on the states.[35] The *Hayes* case involved test claim legislation requiring school districts to provide special education services to disabled pupils. The school districts in the *Hayes* case alleged that the activities mandated by the state that exceeded federal law were reimbursable under article XIII B, section 6 of the California Constitution.

The court in *Hayes* determined that the state's "alternatives [with respect to federal law] were to participate in the federal program and obtain federal financial assistance and the procedural protections accorded by the act, or to decline to participate and face a barrage of litigation with no real defense and ultimately be compelled to accommodate the educational needs of handicapped children in any event."[36] The court concluded that the state had no "true choice" but to participate in the federal program and, thus, there was a federal mandate on the state.[37]

Although the court concluded that the federal law was a mandate on the states, the court remanded the case to the Commission for further findings to determine if the state's response to the federal mandate constituted a state-mandated new program or higher level of service on the school districts.[38] The court held as follows:

> In our view the determination whether certain costs were imposed upon the local agency by a federal mandate must focus upon the local agency which is ultimately forced to bear the costs and how those costs came to be imposed upon that agency. If the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government.[39]

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[34] *Lucia Mar Unified School District, supra*, 44 Cal.3d at page 835.

[35] *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1592.

[36] *Hayes, supra*, 11 Cal.App.4th at page 1591.

[37] *Ibid.*

[38] *Ibid.*

[39] *Id.* at pages 1593-1594.

The court described its conclusion as follows:

> The Education of the Handicapped Act [renamed IDEA] is a comprehensive measure designed to provide all handicapped children with basic educational opportunities. While the act includes certain substantive and procedural requirements which must be included in the state's plan for implementation of the act, it leaves primary responsibility for implementation to the state. (20 U.S.C. §§ 1412, 1413.) In short, even though the state had no real choice in deciding whether to comply with the federal act, the act did not necessarily require the state to impose all of the costs of implementation upon local school districts. To the extent the state implemented the act by freely choosing to impose new programs or higher levels of service upon local school districts, the costs of such programs or higher levels of service are state mandated and subject to subvention.[40]

The federal law relevant to this case is summarized on pages 1582-1594 of the *Hayes* decision, and its requirements that existed at the time the test claim legislation was enacted are described below.

1. Pursuant to the court's ruling in *Hayes*, federal special education law imposes a federal mandate on the state

Before the mid-1970s, a series of landmark court cases established the right to an equal educational opportunity for children with disabilities. The federal courts determined that children with disabilities were entitled to a free public program of education and training appropriate to the child's capacity and that the children and their parents were entitled to a due process hearing when dissatisfied with placement decisions.[41]

In 1973, Congress responded with the Rehabilitation Act of 1973, section 504. Section 504 of the Rehabilitation Act of 1973 imposes an obligation on local school districts to accommodate the needs of children with disabilities. Section 504 provides that "[n]o otherwise qualified handicapped individual in the United States, as defined in section 706(7) [now 706(8)] of this title, shall solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." (29 U.S.C. 794.) "Since federal assistance to education is pervasive, ... section 504 was applicable to virtually all public educational programs in this and other states."[42] Section 504 gives school districts "the duty of analyzing individually the needs of each handicapped student and devising a program which will enable each individual handicapped student to receive an appropriate, free public education. The failure to perform this analysis and structure a program suited to the needs of each handicapped

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[40] *Id.* at page 1594.

[41] *Id.* at pages 1582-1584.

[42] *Id.* at page 1584.

child, constitutes discrimination against that child and a failure to provide an appropriate, free public education for the handicapped child."[43]

In 1974, Congress became dissatisfied with the progress under earlier efforts to stimulate the states to accommodate the educational needs of children with disabilities. Thus, in 1975, Congress enacted the Education for All Handicapped Children Act. In 1990, the Education for All Handicapped Act was renamed the Individuals with Disabilities Education Act (IDEA).[44]

Since 1975, the IDEA has guaranteed to disabled children the right to receive a free appropriate public education that emphasizes special education and related services designed to meet the child's individual needs. The IDEA further guarantees that the rights of disabled children and their parents are protected.[45] States are eligible for "substantial federal financial assistance" under the IDEA when the state agrees to adhere to the substantive and procedural terms of the act and submits a plan specifying how it will comply with federal requirements.[46] At the time the test claim legislation was enacted, the requirements of the IDEA applied to each state and each political subdivision of the state "involved in the education of handicapped children."[47]

Special education is defined under the IDEA as "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.[48] To be eligible for services under the IDEA, a child must be between the ages of three and twenty-one and have a qualifying disability.[49] If it is suspected that a pupil has a qualifying disability, the Individual Education Program, or IEP, process begins. The IEP is a written statement for a handicapped child that is developed and implemented in accordance with federal IEP regulations.[50] Pursuant to federal regulations on the IEP process, the child must be evaluated in all areas of suspected handicaps by a multidisciplinary team. Parents also have the right to obtain an independent assessment of the child by a qualified professional. Local educational

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[43] *Id.* at pages 1584-1585.

[44] Public Law 101-476 (Oct. 30, 1990), 104 Stat.1143.

[45] 20 United States Code section 1400(c).

[46] *Hayes, supra,* 11 Cal.App.4th at page 1588; 20 United States Code sections 1411, 1412.

[47] Title 34 Code of Federal Regulations, sections 300.2 and 300.11. These regulations defined "public agency" to mean "all political subdivisions of the State *that are involved in the education of handicapped children.*"

[48] Former Title 20 United States Code section 1401(a)(16). The definition can now be found in Title 20 United States Code section 1401(25).

[49] Title 20 United States Code section 1412.

[50] Title 20 United States Code section 1401; Title 34 Code of Federal Regulations section 300.340 et seq.

agencies are required to consider the independent assessment as part of their educational planning for the child.[51]

If it is determined that the child is handicapped within the meaning of IDEA, an IEP meeting must take place. Participants at the IEP meeting include a representative of the local educational agency, the child's teacher, one or both of the parents, the child if appropriate, other individuals at the discretion of the parent or agency, and evaluation personnel for children evaluated for the first time.[52] The local educational agency must take steps to insure that one or both of the parents are present at each meeting or are afforded the opportunity to participate, including giving the parents adequate and timely notice of the meeting, scheduling the meeting at a mutually convenient time, using other methods to insure parent participation if neither parent can attend, and taking whatever steps are necessary to insure that the parent understands the proceedings.[53] The IEP document must include the following information:

- a statement of the child's present levels of educational performance;
- a statement of annual goals, including short term instructional objectives;
- a statement of the specific special education and related services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs;
- the projected dates for initiation of services and the anticipated duration of the services; and
- appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.[54]

Each public agency must provide special education and related services to a handicapped child in accordance with the IEP.[55] In addition, each public agency must have an IEP in effect at the beginning of each school year for every handicapped child who is receiving special education from that agency. The IEP must be in effect before special education and related services are provided, and special education and related services set out in a child's IEP must be provided as soon as possible after the IEP is finalized.[56] Each public agency shall initiate and conduct IEP meetings to periodically review each child's IEP

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[51] Former Title 34 Code of Federal Regulations section 300.503. The requirement is now at Title 34 Code of Federal Regulation section 300.502.

[52] Title 34 Code of Federal Regulations section 300.344.

[53] Title 34 Code of Federal Regulations section 300.345.

[54] Former Title 34 Code of Federal Regulations section 300.346. The IEP requirements are now found in Title 34 Code of Federal Regulations section 300.347.

[55] Former Title 34 Code of Federal Regulations section 300.349. The requirement is now found in Title 34 Code of Federal Regulations section 300.343.

[56] Title 34 Code of Federal Regulations section 300.342.

and, if appropriate, revise its provisions. A meeting must be held for this purpose at least once a year.[57]

A child that is assessed during the IEP process as "seriously emotionally disturbed" has a qualifying disability under the IDEA.[58] "Seriously emotionally disturbed" children are children who have an inability to learn which cannot be explained by intellectual, sensory, or health factors; who are unable to build or maintain satisfactory interpersonal relationships with peers and teachers; who exhibit inappropriate types of behavior or feelings under normal circumstances; who have a general pervasive mood of unhappiness or depression; and/or who have a tendency to develop physical symptoms or fears associated with personal or school problems. One or more of these characteristics must be exhibited over a long period of time and to a marked degree, and must adversely affect educational performance in order for a child to be classified as "seriously emotionally disturbed." Schizophrenic children are included in the "seriously emotionally disturbed" category. Children who are socially maladjusted are not included unless they are otherwise determined to be emotionally disturbed.[59]

Related services designed to assist the handicapped child to benefit from special education are defined to include "transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children."[60] Federal regulations define "psychological services" to include the following:

- administering psychological and educational tests, and other assessment procedures;
- interpreting assessment results;
- obtaining, integrating, and interpreting information about child behavior and conditions relating to learning;

[57] Title 34 Code of Federal Regulations section 300.343.

[58] Former Title 20 United States Code section 1401(a)(1). The phrase "serious emotionally disturbed" has been changed to "serious emotional disturbance." (See, 20 U.S.C. § 1401(3)(A)(i).)

[59] Former Title 34 Code of Federal Regulations section 300.5, subdivision (b)(8). "Serious emotional disturbance" is now defined in Title 34 Code of Federal Regulations section 300.7(c)(3).

[60] Title 20 United States Code section 1401; former Title 34 Code of Federal Regulations section 300.13 (the definition of "related services" can now be found in 34 C.F.R. § 300.24.)

- consulting with other staff members in planning school programs to meet the special needs of children as indicated by psychological tests, interviews, and behavioral evaluations; and
- planning and managing a program of psychological services, including psychological counseling for children and parents.[61]

The comments to section 300.13 of the federal regulations further state that "[t]he list of related services is not exhaustive and may include other developmental, corrective, or supportive services . . . if they are required to assist a handicapped child to benefit from special education."

Furthermore, if placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents or child.[62]

The IDEA also requires states and local educational agencies to establish and maintain due process procedures to assure that handicapped children and their parents are guaranteed procedural safeguards. The procedures must include an opportunity for the parents to examine all relevant records and to obtain an independent educational evaluation; procedures to protect the rights of children who do not have parents or guardians to assert their rights, including procedures for appointment of a surrogate for the parents; prior written notice to the parents whenever the educational agency proposes to initiate, change, or refuse to initiate or change the identification, evaluation or educational placement of the child or the provision of a free appropriate public education to the child; procedures designed to assure that the required notice fully informs the parents in the parents' native language of all the procedures available; and an opportunity to present complaints. There must also be impartial due process hearing procedures that include the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children; the right to present evidence; the right to confront, cross-examine, and compel the attendance of witnesses; the right to a written or electronic verbatim record of the hearing; the right to written findings of fact and decisions; the right to appeal the determination of the due process hearing officer; and the right to bring a civil action in court. The court in its discretion may award attorney's fees and costs in certain circumstances.[63]

Finally, the state is ultimately responsible for insuring the requirements of the IDEA. For example, the state educational agency is responsible for assuring that all education and related services required for a handicapped child will be under the general supervision of persons responsible for educational programs for handicapped children in the state educational agency and shall meet the education standards of the state educational

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[61] *Ibid.*

[62] Title 20 United States Code section 1412; Title 34 Code of Federal Regulations section 300.302.

[63] Title 20 United States Code 1415.

agency.[64] The state educational agency is responsible for insuring that each public agency develops and implements an IEP for each handicapped child.[65] Furthermore, the state educational agency must provide services directly if no other agency provides them.[66] The comments to section 300.600 of the federal regulations describe the purpose of making the states ultimately responsible for providing special education and related services:

> The requirement in § 300.600(a) is taken essentially verbatim from section 612(6) of the statute and reflects the desire of the Congress for a central point of responsibility and accountability in the education of handicapped children with each State. With respect to State educational agency responsibility, the Senate Report on Pub. L. 94-142 includes the following statements:
>
> This provision is included specifically to assure a single line of responsibility with regard to the education of handicapped children, and to assure that in the implementation of all provisions of this Act and in carrying out the right to education for handicapped children, the State educational agency shall be the responsible agency . . . .
>
> Without this requirement, there is an abdication of responsibility for the education of handicapped children. Presently, in many States, responsibility is divided, depending upon the age of the handicapped child, sources of funding, and type of services delivered. While the committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency. (Sen. Rep. 94-168, p. 24 (1975)).

There have been several amendments to the IDEA since the test claim legislation was originally enacted in 1984. Congress' 1997 amendment to the IDEA is relevant for purposes of this action. In 1997, Congress amended the IDEA to "strengthen the requirements on ensuring provisions of services by non-educational agencies ..." (Sen. Rep. 105-17, dated May 9, 1997.) The amendment clarified that the state or local educational agency responsible for developing a child's IEP could look to non-educational agencies to pay for or provide those services the educational agencies are otherwise responsible for. The amendment further clarified that if a non-educational agency failed to provide or pay for the special education and related services, the state or local educational agency responsible for developing the IEP remain ultimately responsible for ensuring that children receive all the services described in their IEPs in a

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[64] Former Title 20 United States Code section 1412(6). The requirement is now in Title 20 United States Code section 1412(a)(11).

[65] Title 34 Code of Federal Regulations section 300.341.

[66] Former Title 34 Code of Federal Regulation section 300.600. The requirement is now in Title 34 Code of Federal Regulations section 300.142.

timely fashion and the state or local educational agency shall provide or pay for the services.[67] Federal law does not require states to use non-educational agencies to pay for or provide services. A states' decision regarding how to implement of the IDEA is still within the discretion of the state.

2. The state "freely chose" to mandate a new program or higher level of service on counties to implement the federal law

The court in *Hayes* held that if the state freely chose to impose the costs upon the local agency as a means of implementing a federally mandated program, regardless of whether the costs were imposed on the state by the federal government, then the costs are the result of a reimbursable state mandate pursuant to article XIII B, section 6.[68]

As more fully described below, the Commission finds that the state, with the enactment of the test claim legislation, freely chose to mandate a new program or higher level of service on counties.

The federal IDEA includes certain substantive and procedural requirements that must be included in the state's plan for implementation. But, as outlined above, federal law leaves the primary responsibility for implementation to the state.

Before the enactment of the test claim legislation, the state enacted comprehensive legislation (Ed. Code, §§ 56000 et seq.) to comply with federal law that required local educational agencies to provide special education services, including mental health and residential care services, to special education students.[69] Education Code section 56000 required that students receive public education and related services through the Master Plan for Special Education. Under the master plan, special education local plan areas (SELPAs), which consist of school districts and county offices of education, were responsible for developing and implementing a plan consistent with federal law to provide an appropriate education for individuals with special needs.[70] Each district, SELPA, or county office of education was required to establish IEP teams to develop, review, and revise education programs for each student with special needs.[71] The IEP team may determine that mental health or residential treatment services were required to support the student's special education needs.[72] The following mental health services were identified in statute: counseling and guidance; psychological services, other than assessment and development of the IEP; parent counseling and training; health and

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[67] Title 20 United States Code sections 1412 (a)(12)(A), (B), and (C), and 1401 (8); Title 34 Code of Federal Regulations section 300.142. (See also, Letters from the Department of Education dated July 28, 1998 and August 2, 2004, to all SELPAs, COEs, and LEAs on the requirements of 34 C.F.R. 300.142; and *Tri-County Special Education Local Plan Area v. County of Tuolumne* (2004) 123 Cal.App.4th 563, 578.)

[68] *Hayes, supra*, 11 Cal.App.4th at pages 1593-1594.

[69] Statutes 1980, chapter 1218.

[70] Education Code sections 56140 and 56200.

[71] Education Code sections 56340 and 56341.

[72] Education Code sections 56363 and 56365.

nursing services; and social worker services.[73] In such cases, the school districts and county offices of education were solely responsible for providing special education services, including mental health and residential care services, for special education students under the state's statutory scheme.[74] The state Superintendent of Public Instruction was, and still is, responsible for supervising education and related services for handicapped children pursuant to the IDEA.[75]

In 1984 and 1985, the Legislature enacted the test claim legislation, which added Chapter 26.5 to the Government Code to shift the responsibility and funding of mental health services required by a pupil's IEP to county mental health departments. Generally, the test claim legislation requires counties to:

- renew the interagency agreement with the local educational agency every three years and, if necessary, revise the agreement;
- perform an initial assessment of a pupil referred by the local educational agency, and discuss assessment results with the parents and IEP team;
- participate as a member of the IEP team whenever the assessment of a pupil determines the pupil is seriously emotionally disturbed and residential placement may be necessary;
- act as the lead case manager, as specified in statute and regulations, if the IEP calls for residential placement of a seriously emotionally disturbed pupil;
- issue payments to providers of out-of-home residential care for the residential and non-educational costs of seriously emotionally disturbed pupils;
- provide psychotherapy or other mental health services, as defined in regulations, when required by the IEP; and
- participate in due process hearings relating to issues involving mental health assessments or services.

The purpose of the test claim legislation was recently described in the report prepared by Stanford Law School as follows:

> With the passage of AB 3632, California's approach to mental health services was restructured with the intent to address the increasing number of emotionally disabled students who were in need of mental health services. Instead of relying on LEAs to acquire qualified staff to handle

[73] Education Code section 56363.

[74] Education Code section 56363; see also, Report by the Office of the Auditor General, dated April 1987, entitled "A Review of the Costs of Providing Noneducational Services to Special Education Students." The report states that in fiscal year 1985-86, the year immediately before the effective date of the test claim legislation, local education agencies provided psychotherapy and other mental health services to 941 students and residential services to 225 students.

[75] Education Code section 56135 and Government Code section 7570.

> the needs of these students, the state sought to have CMH [county mental health] agencies – who were already in the business of providing mental health services to emotionally disturbed youth and adults – assume the responsibility for providing needed mental health services to children who qualified for special education. Moreover, it was believed at the time that such mental health services would be most cost-efficiently provided by CMH agencies.[76]

Federal law does not require the state to impose any requirements relating to special education and related services on counties. At the time the test claim legislation was enacted, the requirements under federal law were imposed only on states and local educational agencies.[77] Today, federal law authorizes, but does not require, states to shift some of the special education requirements to non-educational agencies, such as county mental health departments.[78] But, if a county does not provide the service, federal law requires the state educational agency to be ultimately responsible for providing the services directly.[79] Thus, the decision to shift the mental health services for special education pupils from schools to counties was a policy decision of the state.

Moreover, the mental health services required by the test claim legislation for special education pupils were new to counties. At the time the test claim legislation was enacted, the counties had the existing responsibility under the Short-Doyle Act to provide mental health services to eligible children and adults. (Welf. & Inst. Code, §§ 5600 et seq.) But as outlined in a 1997 report prepared by the Department of Mental Health and the Department of Education, the requirements of the test claim legislation are different than the requirements under the Short-Doyle program. For example, mental health services under the Short-Doyle program for children are provided until the age of 18, are provided year round, and the clients must pay the costs of the services based on the ability to pay. Under the special education requirements, mental health services may be provided until the pupil is 22 years of age, are generally provided during the school year, and must be provided at no cost to the parent. Furthermore, the definition of "serious emotional disturbance" as a disability requiring special education and related services focuses on the pupil's functioning in school, a standard that is different than the standard provided under the Short-Doyle program.[80] Thus, with the enactment of the test claim legislation,

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[76] "Challenge and Opportunity – An Analysis of Chapter 26.5 and the System for Delivering Mental Health Services to Special Education Students in California," Youth and Education Law Clinic, Stanford Law School, May 2004, page 12.

[77] Title 34 Code of Federal Regulations section 300.2.

[78] Title 20 United States Code section 1412(a)(12).

[79] Title 20 United States Code sections 1412(a)(12)(A), (B), and (C), and 1401(8); Title 34 Code of Federal Regulations section 300.142.

[80] "Mental Health Services for Special Education Pupils, A Report to the State Department of Mental Health and the California Department of Education," dated March 1997. The construction of statutes by the officials charged with its administration is entitled to great weight. (*Whitcomb, supra*, 24 Cal.2d at pp. 756-757.)

counties are now required to perform mental health activities under two separate and distinct provisions of law: the Government Code (the test claim legislation) and the Welfare and Institutions Code.

Since article XIII B, section 6 "was intended to preclude the state from shifting to local agencies the financial responsibility for providing public services in view of restrictions on the taxing and spending power of the local entities,"[81] the Commission finds that the shift of mental health services for special education pupils to counties constitutes a new program or higher level of service.

Accordingly, the Commission finds that the Commission's conclusion adopted in the 1990 Statement of Decision, that the test claim legislation mandates a new program or higher level of service, was correctly decided. The new activities mandated by the state are described below.

B. Activities expressly required by the test claim legislation that constitute a state-mandated new program or higher level of service on counties

The findings and conclusion in the Commission's 1990 Statement of Decision generally identify the following state-mandated activities: assessment, participation on the expanded IEP team, case management services for seriously emotionally disturbed pupils, and providing psychotherapy and other mental health services required by the pupil's IEP. The 1990 Statement of Decision states:

> The Commission concludes that, to the extent that the provisions of Government Code section 7572 and section 60040, Title 2, Code of California Regulations, require county participation in the mental health assessment for "individuals with exceptional needs," such legislation and regulations impose a new program or higher level of service upon a county.
>
> Moreover, the Commission concludes that any related participation on the expanded IEP team and case management services for "individuals with exceptional needs" who are designated as "seriously emotionally disturbed," pursuant to subdivisions (a), (b), and (c) of Government Code section 7572.5 and their implementing regulations, impose a new program or higher level of service upon a county. ...
>
> The Commission concludes that the provisions of Welfare and Institutions Code section 5651, subdivision (g), result in a higher level of service within the county Short-Doyle program because the mental health services, pursuant to Government Code sections 7571 and 7576 and their implementing regulations, must be included in the county Short-Doyle annual plan. In addition, such services include psychotherapy and other mental health services provided to "individuals with exceptional needs," including those designated as "seriously emotionally disturbed," and required in such individual's IEP. ...

[81] *San Diego Unified School Dist., supra*, 33 Cal.4th at page 876.

As described below, the Commission finds that the 1990 Statement of Decision does not fully identify all of the activities mandated by the test claim legislation.

1. <u>Renew the interagency agreement with the local educational agency every three years and, if necessary, revise the agreement (Gov. Code, § 7571; Cal Code Regs., tit. 2, §§ 60030, 60100)</u>[82]

Government Code section 7571 requires the Secretary of Health and Welfare to designate a single agency in each county to coordinate the service responsibilities described in Government Code section 7572. To implement this requirement, section 60030 of the joint regulations adopted by the Department of Mental Health and the Department of Education (Cal. Code Regs., tit. 2, §§ 60000 et seq.) require the local mental health director to appoint a liaison person for the local mental health program to ensure that an interagency agreement is developed before July 1, 1986, with the county superintendent of schools.[83] The requirement to develop the initial interagency agreement before July 1, 1986 is not reimbursable because the original reimbursement period for this claim began on or after July 1, 1986, and the reimbursement period for purposes of this reconsideration is July 1, 2004.

But the regulations require that the interagency agreement be renewed every three years, and revised if necessary. The interagency agreement "shall include, but not be limited to, a delineation of the process and procedure for" the following:

- Interagency referrals of pupils, which minimize time line delays. This may include written parental consent on the receiving agency's forms.
- Timely exchange of pupil information in accordance with applicable procedures ensuring confidentiality.

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[82] The regulations pled in the original test claim were enacted by the Departments of Mental Health and Education as emergency regulations (Cal. Code Regs., tit. 2, §§ 60000 through 60610, filed December 31, 1985, designated effective January 1, 1986 (Register 86, No. 1) and refiled June 30, 1986, designated effective July 12, 1986 (Register 86, No. 28)). These regulations were repealed and were superceded by new regulations, effective July 1, 1998. The 1998 regulations are the subject of *Handicapped and Disabled Students II* (02-TC-40, 02-TC-49). Most of the activities required by the original regulations remain the law. However, as indicated in this decision, several activities have been deleted in the 1998 regulations. Since the reimbursement period of this reconsideration begins July 1, 2004, those activities deleted by the 1998 regulations no longer constitute a state-mandated new program or higher level of service for purposes of the original test claim. The analysis of activities that have been modified by the 1998 regulations is provided in the staff analysis for *Handicapped and Disabled Students II* (02-TC-40, 02-TC-49).

[83] The local mental health program is the county community mental health program established in accordance with the Short-Doyle Act (Welf. & Inst. Code, §§ 5600 et seq.) or the county welfare agency when designated pursuant to Government Code section 7572.5. (Cal. Code of Regs., tit. 2, § 60020, subd. (d)).

- Participation of mental health professionals, including those contracted to provide services, at IEP team meetings pursuant to Government Code sections 7572 and 7576.
- Developing or amending the mental health related service goals and objectives, and the frequency and duration of such services indicated on the pupil's IEP.
- Transportation of individuals with exceptional needs to and from the mental health service site when such service is not provided at the school.
- Provision by the school of an assigned, appropriate space for delivery of mental health services or a combination of education and mental health services to be provided at the school.
- Continuation of mental health services during periods of school vacation when required by the IEP.
- Identification of existing public and state-certified nonpublic educational programs, treatment modalities, and location of appropriate residential placements which may be used for placement by the expanded IEP program team.
- Out-of-home placement of seriously emotionally disturbed pupils in accordance with the educational and treatment goals on the IEP.[84]

In addition, section 60100, subdivision (a), of the regulations requires the local mental health program and the special education local plan area liaison person to define the process and procedures for coordinating local services to promote alternatives to out-of-home care of seriously emotionally disturbed pupils.

Accordingly, the Commission finds that Government Code section 7571, and sections 60030 and 60100 of the regulations constitute a state-mandated new program or higher level of service for the following activities:

- Renew the interagency agreement every three years, and revise if necessary.
- Define the process and procedures for coordinating local services to promote alternatives to out-of-home care of seriously emotionally disturbed pupils.

2. Perform an initial assessment of a pupil referred by the local educational agency, and discuss assessment results with the parents and IEP team (Gov. Code, § 7572, Cal. Code Regs., tit. 2, § 60040)

Government Code section 7572, subdivision (a), provides that "a child shall be assessed in all areas related to the suspected handicap by those qualified to make a determination of the child's need for the service before any action is taken with respect to the provision of related services or designated instruction and services to a child, including, but not limited to, services in the area of, ... psychotherapy, and other mental health assessments." Government Code section 7572, subdivision (c), states that psychotherapy and other mental health assessments shall be conducted by qualified mental health

[84] California Code of Regulations, title 2, section 60030, subdivision (b).

professionals as specified in regulations developed by the Department of Mental Health and the Department of Education.

Section 60040 of the regulations governs the referral to and the initial assessment by the county. Section 60040, subdivision (a), states that a local education agency may refer a pupil suspected of needing mental health services to the county mental health program when a review of the assessment data documents that the behavioral characteristics of the pupil adversely affect the pupil's educational performance. The pupil's educational performance is measured by standardized achievement tests, teacher observations, work samples, and grade reports reflecting classroom functioning, or other measures determined to be appropriate by the IEP team; the behavioral characteristics of the pupil cannot be defined solely as a behavior disorder or a temporary adjustment problem, or cannot be resolved with short-term counseling; the age of onset was from 30 months to 21 years and has been observed for at least six months; the behavioral characteristics of the pupil are present in several settings, including the school, the community, and the home; and the adverse behavioral characteristics of the pupil are severe, as indicated by their rate of occurrence and intensity.

Section 60040, subdivision (c), states that when a local education agency refers a pupil to the county, the local education agency shall obtain written parental consent to forward educational information to the county and to allow the county mental health professional to observe the pupil during school. The educational information includes a copy of the assessment reports completed in accordance with Education Code section 56327, current and relevant behavior observations of the pupil in a variety of educational and natural settings, and a report prepared by personnel that provided "specialized" counseling and guidance services to the pupil and, when appropriate, an explanation why such counseling and guidance will not meet the needs of the pupil.

Section 60040, subdivision (d), states that "[t]he local mental health program shall be responsible for reviewing the educational information [identified in the paragraph above], observing *if necessary*, the pupil in the school environment, and determining if mental health assessments are needed." (Emphasis added.) Subdivision (d)(1) provides that *"[i]f mental health assessments are deemed necessary by a mental health professional*, a mental health assessment plan shall be developed and the parent's written consent obtained ..." (Emphasis added.) This regulation includes language that implies that the observation of the pupil and the preparation of the mental health assessment plan are activities within the discretion of the county. The Commission finds, however, that these activities are mandated by the state when necessary to provide the pupil with a free and appropriate education under federal law. Under the rules of statutory construction, section 60040, subdivision (d), must be interpreted in the context of the entire statutory scheme so that the statutory scheme may be harmonized and have effect.[85] In addition, it is presumed that the administrative agency, like the Departments of Mental Health and Education, did not adopt a regulation that alters the terms of a legislative enactment.[86]

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[85] *Select Base Materials v. Board of Equalization* (1959) 51 Cal.2d 640, 645; *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 781-782.

[86] *Wallace v. State Personnel Board* (1959) 168 Cal.App.2d 543, 547.

Federal law, through the IDEA, requires the state to *identify*, locate, and evaluate *all* children with disabilities, including children attending private schools, who are in need of special education and related services.[87] The state is also required by federal law to conduct a full and individual initial evaluation to determine whether a child is a child with a qualifying disability and the educational needs of the child.[88] Government Code section 7572, subdivision (a), is consistent with federal law and requires that a child shall be assessed in all areas related to the suspected handicap by those qualified to make a determination of the child's need for the service. In cases where the pupil is suspected of needing mental health services, the state has delegated to the counties the activity of determining the need for service. Accordingly, the Commission finds that the following activities, identified in section 60040, subdivision (d) and (d)(1), are new activities mandated by the state:

- Review the following educational information of a pupil referred to the county by a local education agency for an assessment: a copy of the assessment reports completed in accordance with Education Code section 56327, current and relevant behavior observations of the pupil in a variety of educational and natural settings, a report prepared by personnel that provided "specialized" counseling and guidance services to the pupil and, when appropriate, an explanation why such counseling and guidance will not meet the needs of the pupil.
- If necessary, observe the pupil in the school environment to determine if mental health assessments are needed.
- If mental health assessments are deemed necessary by the county, develop a mental health assessment plan and obtain the parent's written informed consent for the assessment.

The county is then required by section 60040, subdivision (d)(2), to complete the assessment within the time required by Education Code section 56344 (except as expressly provided, the IEP shall be developed within a total time not to exceed 50 days from the date of receipt of the parent's written consent for assessment.) If a mental health assessment cannot be completed within the time limits, the county mental health program shall notify the IEP team administrator or designee no later than 15 days before the scheduled IEP meeting.

Section 60040, subdivision (e), requires the county to provide to the IEP team a written assessment report in accordance with Education Code section 56327. Education Code section 56327 requires that the report include the following information:

- Whether the pupil may need special education and related services.
- The basis for making the determination.
- The relevant behavior noted during the observation of the pupil in the appropriate setting.

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[87] 20 United States Code section 1412, subdivision (a)(3).

[88] 20 United States Code section 1414, subdivision (a).

- The relationship of that behavior to the pupil's academic and social functioning.
- The educationally relevant health and development, and medical findings, if any.
- For pupils with learning disabilities, whether there is such a discrepancy between achievement and ability that it cannot be corrected without special education and related services.
- A determination concerning the effects of environmental, cultural, or economic disadvantage, where appropriate.
- The need for specialized services, materials, equipment for pupils with low incidence disabilities.

After the assessment by the county is completed, Government Code section 7572, subdivision (d)(1), requires that the recommendation of the person who conducted the assessment be reviewed and discussed with the parent and the appropriate members of the IEP team before the IEP team meeting. When the proposed recommendation has been discussed with the parent and there is disagreement on the recommendation pertaining to the related service, the parent shall be notified in writing and may require the person from the county who conducted the assessment to attend the IEP team meeting. Government Code section 7572, subdivision (d)(1), states that "the person who conducted the assessment shall attend the individualized education program team meeting if requested."

Government Code section 7572, subdivision (e), requires the local education agency to invite the county to meet with the IEP team to determine the need for the related service and to participate in developing the IEP. The Commission finds, however, that the county's attendance at the IEP meeting at the request of the local education agency is not mandated by the state for the following reasons. Government Code section 7572, subdivision (e), states that *if* the county representative cannot meet with the IEP team, then the representative is required to provide the local education agency written information concerning the need for the service. The Commission finds that the assessment report required by section 60040, subdivision (e), of the regulations satisfies the written information requirement of Government Code section 7572, subdivision (e), and that Government Code section 7572, subdivision (e), does not impose any further requirement on the county to prepare additional written reports. The conclusion that the county is not required by the state to attend the IEP team meeting at the request of the local education agency is further supported by the sentence added to subdivision (e) by Statutes 1985, chapter 1274. That sentence provides the following: "If the responsible public agency representative will not be available to participate in the individualized education program meeting, the local educational agency shall ensure that a qualified substitute is available to explain and interpret the evaluation pursuant to subdivision (d) of Section 56341 of the Education Code.[89] There is no requirement in the law that the qualified substitute has to be a county representative.

[89] Education Code section 56341, subdivision (e), stated the following when the test claim legislation was enacted (as amended by Stats. 1982, ch. 1201): "If a team is developing, reviewing, or revising the individualized education program of an individual

In addition, Government Code section 7572, subdivision (e), imposes a requirement on the county to provide a copy of the written information to the parent or any adult for whom no guardian or conservator has been appointed.

Finally, Government Code section 7572, subdivision (d)(2), provides that if a parent obtains an independent assessment regarding psychotherapy or other mental health services, and the independent assessment is submitted to the IEP team, the county is required to review the independent assessment. The county's recommendation shall be reviewed and discussed with the parent and with the IEP team before the meeting of the IEP team. The county shall attend the IEP team meeting if requested.

Accordingly, the Commission finds that Government Code section 7572 and section 60040 of the regulations constitute a state-mandated new program or higher level of service for the following activities:

- Review the following educational information of a pupil referred to the county by a local education agency for an assessment: a copy of the assessment reports completed in accordance with Education Code section 56327, current and relevant behavior observations of the pupil in a variety of educational and natural settings, a report prepared by personnel that provided "specialized" counseling and guidance services to the pupil and, when appropriate, an explanation why such counseling and guidance will not meet the needs of the pupil.
- If necessary, observe the pupil in the school environment to determine if mental health assessments are needed.
- If mental health assessments are deemed necessary by the county, develop a mental health assessment plan and obtain the parent's written informed consent for the assessment.
- Assess the pupil within the time required by Education Code section 56344.[90]

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with exceptional needs who has been assessed for the purpose of that individualized education program, the district, special education local plan area, or county office, shall ensure that a person is present at the meeting who has conducted an assessment of the pupil or who is knowledgeable about the assessment procedures used to assess the pupil and is familiar with the results of the assessment. The person shall be qualified to interpret the results if the results or recommendations, based on the assessment, are significant to the development of the pupil's individualized education program and subsequent placement."

[90] The existing parameters and guidelines allow reimbursement for mental health assessments and include within that activity the interview with the child and the family, and collateral interviews, as necessary. These activities are not expressly required by the test claim legislation. However, when reconsidering the parameters and guidelines for this program, the Commission has the jurisdiction to consider "a description of the most reasonable methods of complying with the mandate." (Cal. Code Regs., tit. 2, § 1183.1, subd. (a)(1)(A)(4).)

- If a mental health assessment cannot be completed within the time limits, provide notice to the IEP team administrator or designee no later than 15 days before the scheduled IEP meeting.
- Prepare and provide to the IEP team, and the parent or guardian, a written assessment report in accordance with Education Code section 56327. The report shall include the following information: whether the pupil may need special education and related services; the basis for making the determination; the relevant behavior noted during the observation of the pupil in the appropriate setting; the relationship of that behavior to the pupil's academic and social functioning; the educationally relevant health and development, and medical findings, if any; for pupils with learning disabilities, whether there is such a discrepancy between achievement and ability that it cannot be corrected without special education and related services; a determination concerning the effects of environmental, cultural, or economic disadvantage, where appropriate; and the need for specialized services, materials, equipment for pupils with low incidence disabilities.
- Review and discuss the county recommendation with the parent and the appropriate members of the IEP team before the IEP team meeting.
- In cases where the local education agency refers a pupil to the county for an assessment, attend the IEP meeting if requested by the parent.
- Review independent assessments of a pupil obtained by the parent.
- Following review of the independent assessment, discuss the recommendation with the parent and with the IEP team before the meeting of the IEP team.
- In cases where the parent has obtained an independent assessment, attend the IEP team meeting if requested.

3. <u>Participate as a member of the IEP team whenever the assessment of a pupil determines the pupil is seriously emotionally disturbed and residential placement may be necessary (Gov. Code, § 7572.5, subds. (a) and (b); Cal. Code Regs., tit. 2, § 60100)</u>

Government Code section 7572.5, subdivision (a), and section 60100, subdivision (b), of the regulations provide that when an assessment determines that a child is seriously emotionally disturbed as defined in section 300.5 of the Code of Federal Regulations, and any member of the IEP team recommends residential placement based on relevant assessment information, the IEP team shall be expanded to include a representative of the county. Government Code section 7572.5, subdivision (b), requires the expanded IEP team to review the assessment and determine whether (1) the child's needs can reasonably be met through any combination of nonresidential services, preventing the need for out-of-home care; (2) residential care is necessary for the child to benefit from educational services; and (3) residential services are available, which address the needs identified in the assessment and which will ameliorate the conditions leading to the seriously emotionally disturbed designation. Section 60100, subdivision (d), similarly states that the expanded IEP team shall consider all possible alternatives to out-of-home placement.

Section 60100, subdivision (c), states that if the county determines that additional mental health assessments are needed, the county is required to assess or re-assess the pupil in accordance with section 60040.

Section 60100, subdivision (e), states that when residential placement is the final decision of the expanded IEP team, the team shall develop a written statement documenting the pupil's educational and mental health treatment needs that support the recommendation for the placement.

Section 60100, subdivision (f), requires the expanded IEP team to identify one or more appropriate, least restrictive and least costly residential placement alternatives, as specified in the regulation.

Finally, section 60100, subdivision (g), requires the county representative on the expanded IEP team to notify the Local Mental Health Director or designee of the team's decision within one working day of the IEP team meeting. However, effective July 1, 1998, section 60100 of the regulations was amended and this activity is no longer required. Since the reimbursement period for this reconsideration begins July 1, 2004, the Commission finds that the activity of notifying the local mental health director of the decision is not a state-mandated new program or higher level of service.

Accordingly, the Commission finds that Government Code section 7572.5, subdivisions (a) and (b), and section 60100 of the regulations constitute a state-mandated new program or higher level of service for the following activities:

- Participate as a member of the IEP team whenever the assessment of a pupil determines the pupil is seriously emotionally disturbed and residential placement may be necessary.
- Re-assess the pupil in accordance with section 60400 of the regulations, if necessary.

4. Act as the lead case manager, as specified in statute and regulations, if the IEP calls for residential placement of a seriously emotionally disturbed pupil (Gov. Code, §§ 7572.5, subd. (c)(1), 7579; Cal. Code Regs., tit. 2, § 60110)

Government Code section 7572.5, subdivision (c)(1), provides that if the review of the expanded IEP team calls for residential placement of the seriously emotionally disturbed pupil, the county shall act as the lead case manager. That statute further states that "the mental health department shall retain financial responsibility for provision of case management services."

Section 60110, subdivision (a), requires the Local Mental Health Director or the designee to designate a lead case manager to finalize the pupil placement plan with the approval of the parent and the IEP team within 15 days from the decision to place the pupil in a residential facility. Subdivision (c) defines case management duties to include the following activities:

- Convening parents and representatives of public and private agencies in accordance with section 60100, subdivision (f), in order to identify the appropriate residential facility.

- Verifying with the educational administrator or designee the approval of the local governing board of the district, special education service region, or county office pursuant to Education Code section 56342.[91]
- Completing the local mental health program payment authorization in order to initiate out of home care payments.
- Coordinating the completion of the necessary County Welfare Department, local mental health program, and responsible local education agency financial paperwork or contracts.
- Coordinating the completion of the residential placement as soon as possible.
- Developing the plan for and assisting the family and pupil in the pupil's social and emotional transition from home to the residential facility and the subsequent return to the home.
- Facilitating the enrollment of the pupil in the residential facility.
- Conducting quarterly face-to-face contacts with the pupil at the residential facility to monitor the level of care and supervision and the implementation of the treatment services and the IEP.
- Notifying the parent or legal guardian and the local education agency administrator or designee when there is a discrepancy in the level of care, supervision, provision of treatment services, and the requirements of the IEP.
- Coordinating the six-month expanded IEP team meeting with the local education agency administrator or designee.

As of July 1, 1998, however, the activity of verifying with the educational administrator or designee the approval of the local governing board pursuant to Education Code section 56342 is no longer required by section 60100 of the regulations. In addition, the activity of coordinating the six-month expanded IEP team meeting with the local education agency administrator or designee was repealed as of July 1, 1998. Since the

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[91] Education Code section 56342 states in relevant part the following:

> Prior to recommending a new placement in a nonpublic, nonsectarian school, the individualized education program team shall submit the proposed recommendation to the local governing board of the district and special education local plan area for review and recommendation regarding the cost of placement.
>
> The local governing board shall complete its review and make its recommendations, if any, at the next regular meeting of the board. A parent or representative shall have the right to appear before the board and submit written and oral evidence regarding the need for nonpublic school placement for his or her child. Any recommendations of the board shall be considered at an individualized education program team meeting, to be held within five days of the board's review.

reimbursement period for this reconsideration begins July 1, 2004, the Commission finds that these two activities are not a state-mandated new program or higher level of service.

Moreover, on April 30, 1986, the Department of Mental Health issued DMH Letter No. 86-12 to all local mental health directors, program chiefs, and administrators, and to county administrative officers regarding the implementation of the test claim legislation. (p. 1513.) On page 1521 of the record, the Department lists the case management duties for seriously emotionally disturbed pupils placed in a residential facility and includes "coordinating the pupil's transportation needs" as a case management duty of the county. This letter issued by the Department of Mental Health was not identified or pled as an executive order in the original test claim, and the activity of "coordinating the pupil's transportation needs" is not expressly required by the test claim statutes or regulations. Moreover, section 60110 was amended on July 1, 1998, to include as a case management activity "coordinating the transportation of the pupil to the facility if needed." Section 60110, as amended on July 1, 1998, is the subject of a pending test claim, *Handicapped and Disabled II* (02-TC-40 and 02-TC-49). Therefore, the Commission finds that "coordinating the pupil's transportation needs" is not mandated by the test claim legislation before the Commission in this reconsideration.

Finally, Government Code section 7579, subdivision (a), requires courts, regional centers for the developmentally disabled, or other non-educational public agencies that engage in referring children to, or placing children in, residential facilities, to notify the administrator of the special education local plan area (SELPA) in which the residential facility is located before the pupil is placed in an out-of-home residential facility. The intent of the legislation, as stated in subdivision (c), is to "encourage communication between the courts and other public agencies that engage in referring children to, or placing children in, residential facilities, and representatives of local educational agencies." Government Code section 7579, subdivision (a), however, does not apply to county mental health departments. The duty imposed by section 7579 to notify the SELPA before the pupil is placed in a residential facility is a duty imposed on a placing agency, like a court or a regional center for the developmentally disabled. This test claim was filed on behalf of county mental health departments.[92] Thus, the Commission finds that Government Code section 7579 does not impose a state-mandated new program or higher level of service on county mental health departments.

Accordingly, the Commission finds that Government Code sections 7572.5, subdivision (c)(1), and section 60110 of the regulations constitute a state-mandated new program or higher level of service for the following activities:

- Designate a lead case manager when the expanded IEP team recommends out-of-home residential placement for a seriously emotionally disturbed pupil. The lead case manager shall perform the following activities:
    1. Convene parents and representatives of public and private agencies in accordance with section 60100, subdivision (f), in order to identify the appropriate residential facility.

[92] Test claim (CSM 4282) filed by County of Santa Clara.

2. Complete the local mental health program payment authorization in order to initiate out of home care payments.
3. Coordinate the completion of the necessary County Welfare Department, local mental health program, and responsible local education agency financial paperwork or contracts.
4. Coordinate the completion of the residential placement as soon as possible.
5. Develop the plan for and assist the family and pupil in the pupil's social and emotional transition from home to the residential facility and the subsequent return to the home.
6. Facilitate the enrollment of the pupil in the residential facility.
7. Conduct quarterly face-to-face contacts with the pupil at the residential facility to monitor the level of care and supervision and the implementation of the treatment services and the IEP.
8. Notify the parent or legal guardian and the local education agency administrator or designee when there is a discrepancy in the level of care, supervision, provision of treatment services, and the requirements of the IEP.

5. Issue payments to providers of out-of-home residential care for the residential and non-educational costs of seriously emotionally disturbed pupils (Gov. Code, § 7581; Cal. Code Regs., tit. 2, § 60200, subd. (e))

Government Code section 7581 requires the county to be financially responsible for the residential and non-educational costs of a seriously emotionally disturbed child placed in an out-of-home residential facility. Section 7581 states the following:

> The residential and noneducational costs of a child placed in a medical or residential facility by a public agency, other than a local education agency, or independently placed in a facility by the parent of the child, shall not be the responsibility of the state or local education agency, but shall be the responsibility of the placing agency or parent [if the parent places the child].

Consistent with Government Code section 7581, section 60200, subdivision (e), of the regulations requires the county welfare department to issue the payments to providers of out-of-home facilities in accordance with Welfare and Institutions Code section 18351, upon receipt of authorization documents from the State Department of Mental Health or a designated county mental health agency. The authorization documents are required to include information sufficient to demonstrate that the child meets all eligibility criteria established in the regulations for this program. (Welf. & Inst. Code, § 18351.) The Department of Social Services is required to determine the rates to be paid to the residential providers in accordance with Welfare and Institutions Code section 18350. (Cal. Code Regs., tit. 2, § 60200, subd. (d).)

Thus, the test claim regulations require that payments to providers of 24-hour out-of-home care be made in accordance with Welfare and Institutions Code sections 18350 and

18351. Welfare and Institutions Code sections 18350 and following govern the payments to 24-hour out-of-home care providers for seriously emotionally disturbed pupils, and were added by the 1985 test claim statute. Welfare and Institutions Code sections 18350 and following were not pled in the original *Handicapped and Disabled Students* test claim. However, since Welfare and Institutions Code sections 18350 and 18351 were identified in the regulations that were pled in the test claim, and sections 18350 and 18351 define the scope of the activity and the costs at issue in this case, the Commission finds that the Commission may properly consider sections 18350 and 18351 on reconsideration of this claim.

Welfare and Institutions Code section 18351, subdivision (a), requires the county welfare department located in the same county as the county mental health agency designated to provide case management services to issue payments to residential care providers upon receipt of authorization documents from the State Department of Mental Health or a designated county mental health agency. Subdivision (a) further states that "[a]uthorization documents shall be submitted directly to the county welfare department clerical unit responsible for issuance of warrants and shall include information sufficient to demonstrate that the child meets all eligibility criteria established in regulations by the State Department of Mental Health, developed in consultation with the State Department of Education."

Welfare and Institutions Code section 18350, subdivision (c), states that "[p]ayments shall be based on rates established in accordance with Sections 11461, 11462, and 11463 and shall be based on providers' actual allowable costs." At the time the test claim legislation was enacted, Welfare and Institutions Code section 11462, subdivision (b), defined "allowable costs" as follows:

> As used in this section, "allowable costs" means: (A) the reasonable cost of, and the cost of providing food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation; (B) reasonable cost of administration and operation necessary to provide the items described in paragraph (A); and (C) reasonable activities performed by social workers employed by group home providers which are not otherwise allowable as daily supervision or as the costs of administration.

Welfare and Institutions Code section 11462 was repealed and replaced in 1989, before the Commission adopted the 1990 Statement of Decision in this case.[93] A similar definition of allowable costs for care and supervision of the pupil in the residential facility remains the law, however, and can now be found in Welfare and Institutions Code section 11460, subdivision (b).[94] Since Government Code section 7581 requires counties to be responsible for the residential and *non-educational* costs of the pupil only, the

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[93] Statutes 1989, chapter 1294.

[94] Welfare and Institutions Code section 11460 was added by Statutes 1989, chapter 1294.

Commission finds that the cost for school supplies are not required to be paid to residential care providers by the counties.

In addition, effective July 1, 1998, the regulations were amended to provide a definition of "care and supervision." The definition does not include issuing payments for the reasonable cost of administration and operation, and the reasonable activities performed by social workers employed by group home providers, which are not otherwise allowable as daily supervision or as the costs of administration.[95] Therefore, since the reimbursement period for this reconsideration begins July 1, 2004, the Commission finds that the activity of issuing payments for the reasonable cost of administration and operation, and the reasonable activities performed by social workers employed by group home providers which are not otherwise allowable as daily supervision or as the costs of administration, do not constitute a state-mandated new program or higher level of service.

Thus, the Commission finds that the requirement to issue payments to providers of 24-hour out-of-home facilities for the costs of food, clothing, shelter, daily supervision, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation, constitutes a state-mandated new program or higher level of service.

Welfare and Institutions Code section 18351, subdivision (b), further requires the county welfare department to submit reports to the State Department of Social Services for reimbursement of payments issued to seriously emotionally disturbed pupils for 24-hour out-of-home care.

Accordingly, the Commission finds that Government Code section 7581 and section 60200, subdivision (e), of the regulations constitute a state-mandated new program or higher level of service for the following activities:

- Issue payments to providers of out-of-home residential care for the residential and non-educational costs of seriously emotionally disturbed pupils. Payments are for the costs of food, clothing, shelter, daily supervision, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation.
- Submit reports to the State Department of Social Services for reimbursement of payments issued to seriously emotionally disturbed pupils for 24-hour out-of-home care.

6. Provide psychotherapy or other mental health services, as defined in regulations, when required by the IEP (Gov. Code, § 7576; Cal. Code Regs., tit. 2, §§ 60020, subd. (a), 60200, subds. (a) and (b))

Government Code section 7576 requires the State Department of Mental Health, or any designated community mental health service (i.e., the county), to provide psychotherapy or other mental health services when required by a pupil' s IEP. Psychotherapy or other mental health services may be provided directly or by contracting with another public

[95] See California Code of Regulations, title 2, section 60025, subdivision (a), (eff. July 1, 1998).

agency, qualified individual, or a state-certified nonpublic, nonsectarian school or agency.

Section 60020, subdivision (a), defines "psychotherapy and other mental health services" as "those services defined in Sections 542 to 543, inclusive, of Title 9 of the California Administrative Code [Department of Mental Health regulations], and provided by a local mental health program directly or by contract." Section 542 of the Department of Mental Health regulations governs the definition of "day services": services that are designed to provide alternatives to 24-hour care and supplement other modes of treatment and residential services. Day services include day care intensive services, day care habilitative services, vocational services and socialization services. These services are defined in section 542 of the regulations as follows:

- Day care intensive services are "services designed and staffed to provide a multidisciplinary treatment program of less than 24 hours per day as an alternative to hospitalization for patients who need active psychiatric treatment for acute mental, emotional, or behavioral disorders and who are expected, after receiving these services, to be referred to a lower level of treatment, or maintain the ability to live independently or in a supervised residential facility."
- Day care habilitative services are "services designed and staffed to provide counseling and rehabilitation to maintain or restore personal independence at the best possible functional level for the patient with chronic psychiatric impairments who may live independently, semi-independently, or in a supervised residential facility which does not provide this service."[96]
- Vocational services are "services designed to encourage and facilitate individual motivation and focus upon realistic and obtainable vocational goals. To the extent possible, the intent is to maximize individual client involvement in skill seeking and skill enhancement, with the ultimate goal of meaningful productive work."

[96] In comments to the draft staff analysis, the County of Los Angeles asserts that "rehabilitation" should be specifically defined to include the activities identified in section 1810.243 of the regulations adopted by the Department of Mental Health under the Medi-Cal Specialty Mental Health Services Consolidation program. (Cal. Code Regs., tit. 9, § 1810.243.) These activities include "assistance in improving, maintaining, or restoring a beneficiary's or group of beneficiaries' functional skills, daily living skills, social and leisure skills, grooming and personal hygiene skills, meal preparation skills, and support resources and/or medication education."

The Commission disagrees with the County's request. The plain language of test claim regulations (Cal. Code Regs., tit. 2, §§ 60000 et seq.) does not require or mandate counties to perform the activities defined by section 1810.243 of the Department's title 9 regulations. In addition, the test claim regulations do not reference section 1810.243 of the Department's title 9 regulations for any definition relevant to the program at issue in this case.

- Socialization services are "services designed to provide life-enrichment and social skill development for individuals who would otherwise remain withdrawn and isolated. Activities should be gauged for multiple age groups, be culturally relevant, and focus upon normalization."

Section 543 of the Department of Mental Health regulations defines "outpatient services," which are defined as "services designed to provide short-term or sustained therapeutic intervention for individuals experiencing acute or ongoing psychiatric distress." Outpatient services include the following:

- Collateral services, which are "sessions with significant persons in the life of the patient, necessary to serve the mental health needs of the patient."
- Assessment, which is defined as "services designed to provide formal documented evaluation or analysis of the cause or nature of the patient's mental, emotional, or behavioral disorder. Assessment services are limited to an intake examination, mental health evaluation, physical examination, and laboratory testing necessary for the evaluation and treatment of the patient's mental health needs."
- Individual therapy, which is defined as "services designed to provide a goal directed therapeutic intervention with the patient which focuses on the mental health needs of the patient."
- Group therapy, which are "services designed to provide a goal directed, face-to-face therapeutic intervention with the patient and one or more other patients who are treated at the same time, and which focuses on the mental health needs of the patient."
- Medication, which is defined to include "the prescribing, administration, or dispensing of medications necessary to maintain individual psychiatric stability during the treatment process. This service shall include the evaluation of side effects and results of medication."
- Crisis intervention, which means "immediate therapeutic response which must include a face-to-face contact with a patient exhibiting acute psychiatric symptoms to alleviate problems which, if untreated, present an imminent threat to the patient or others."

The County of Los Angeles, in comments to the draft staff analysis, argues that all of the activities listed above should be identified as reimbursable state-mandated activities. However, as of July 1, 1998, the activities of providing vocational services, socialization services, and crisis intervention to pupils are no longer required by section 60020 of the regulations. The final statement of reasons for the 1998 adoption of section 60020 of the regulations by the Departments of Mental Health and Education provides the following reason for the deletion of these activities:

> The provision of vocational services is assigned to the State Department of Rehabilitation by Government Code section 7577.
>
> Crisis service provision is delegated to be "from other public programs or private providers, as appropriate" by these proposed regulations in

> Section 60040(e) because crisis services are a medical as opposed to educational service. They are, therefore, excluded under both the Tatro and Clovis decisions. These precedents apply because "medical" specialists must deliver the services. A mental health crisis team involves specialized professionals. Because of the cost of these professional services, providing these services would be a financial burden that neither the schools nor the local mental health services are intended to address in this program.
>
> The hospital costs of crisis service provision are explicitly excluded from this program in the Clovis decision for the same reasons.
>
> Additionally, the IEP process is one that responds slowly due to the problems inherent in convening the team. It is, therefore, a poor avenue for the provision of crisis services. While the need for crisis services can be a predictable requirement over time, the particular medical requirements of the service are better delivered through the usual local mechanisms established specifically for this purpose.[97]

Since the reimbursement period for this reconsideration begins July 1, 2004, the Commission finds that the activities of providing vocational services, socialization services, and crisis intervention to pupils do not constitute a state-mandated new program or higher level of service.

In addition, the County of Los Angeles specifically requests reimbursement for "medication monitoring." The phrase "medication monitoring" was not included in the original test claim legislation. "Medication monitoring" was added to the regulations for this program in 1998 (Cal. Code Regs. tit. 2, § 60020.) "Medication monitoring" is part of the new, and current, definition of "mental health services" that was adopted by the Departments of Mental Health and Education in 1998. The current definition of "mental health services" and "medication monitoring" is the subject of the pending test claim, *Handicapped and Disabled Students II* (02-TC-40 and 02-TC-49), and will not be specifically analyzed here. But, as of 1998, "dispensing of medications necessary to maintain individual psychiatric stability during the treatment process" was deleted from the definition of "mental health services." Since the reimbursement period for this reconsideration begins July 1, 2004, the Commission finds that the activity of "dispensing of medications necessary to maintain individual psychiatric stability during the treatment process" does not constitute a state-mandated new program or higher level of service.

Finally, section 60200, subdivisions (a) and (b), of the regulations clarifies that counties are financially responsible for providing the mental health services identified in the IEP of a seriously emotionally disturbed pupil placed in an out-of-home residential facility located within the State of California. Mental health services provided to a seriously emotionally disturbed pupil shall be provided either directly or by contract.

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[97] Final Statement of Reasons, pages 55-56.

Accordingly, the Commission finds that Government Code section 7576, and sections 60020 and 60200 of the regulations constitute a state-mandated new program or higher level of service for the following activity:

- Providing psychotherapy or other mental health services identified in a pupil's IEP, as defined in sections 542 and 543 of the Department of Mental Health regulations. However, the activities of providing vocational services, socialization services, and crisis intervention to pupils, and dispensing medications necessary to maintain individual psychiatric stability during the treatment process, do *not* constitute a state-mandated new program or higher level of service.

7. Participate in due process hearings relating to issues involving mental health assessments or services (Gov. Code, § 7586; Cal. Code Regs., tit. 2, § 60550)

Government Code section 7586, subdivision (a), addresses the due process procedures when disputes regarding special education and related services arise. That section requires all state departments and their designated local agencies to be governed by the procedural safeguards required by federal law. The designated local agency is the county mental health program established in accordance with the Short-Doyle Act.[98]

Government Code section 7586, subdivision (a), states the following:

> All state departments, and their designated local agencies, shall be governed by the procedural safeguards required in Section 1415 of Title 20 of the United States Code. A due process hearing arising over a related service or designated instruction and service shall be filed with the Superintendent of Public Instruction. Resolution of all issues shall be through the due process hearing process established in Chapter 5 (commencing with Section 56500) of Part 30 of Division 4 of the Education Code. The decision issued in the due process hearing shall be binding on the department having responsibility for the services in issue as prescribed by this chapter.[99]

The due process hearing procedures identified in Education Code section 56501 allow the parent and the public education agency to initiate the due process hearing procedures when there is a proposal to initiate or change the identification, assessment, or educational placement of the child or the provision of a free, appropriate public education to the child; there is a refusal to initiate or change the identification, assessment, or educational placement of the child or the provision of a free, appropriate public education to the child; or when the parent refuses to consent to an assessment of the child. The due

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[98] Government Code section 7571; California Code of Regulations, title 2, section 60020, subdivision (d).

[99] Section 60550 of the regulations contains similar language and provides that "[d]ue process hearing procedures apply to the resolution of disagreements between parents and a public agency regarding the proposal or refusal of a public agency to initiate or change the identification, assessment, educational placement, or the provision of special education and related services to the pupil."

process hearing rights include the right to a mediation conference pursuant to Education Code section 56500.3 at any point during the hearing process; the right to examine pupil records; and the right to a fair and impartial administrative hearing at the state level, before a person knowledgeable in the laws governing special education and administrative hearings, under contract with the department, pursuant to Education Code section 56505.

Education Code section 56505, subdivision (e), further affords the parties the right to be accompanied and advised by counsel and by individuals with special knowledge or training relating to the problems of children and youth with disabilities; the right to present evidence, written arguments, and oral arguments; the right to confront, cross-examine, and compel the attendance of witnesses; the right to written findings of fact and decision; the right to be informed by the other parties to the hearing of the issues in dispute; and the right to receive a copy of all documents and a list of witnesses from the opposing party.

The Commission finds that the county's participation in the due process hearings relating to issues involving mental health assessments or services constitutes a state-mandated new program or higher level of service. Although federal law mandates the due process hearing procedures (20 U.S.C. § 1415), it is state law, rather than federal law, that requires counties to participate in due process hearings involving mental health assessment or service issues.

This finding is consistent with the Supreme Court's decision in the recent case of *San Diego Unified School District v. Commission on State Mandates*.[100] In the *San Diego Unified School District* case, the Supreme Court held that all due process hearing costs with respect to a mandatory expulsion of a student (those designed to satisfy the minimum requirements of federal due process, and those due process requirements enacted by the state that may have exceeded federal law) were reimbursable pursuant to article XIII B, section 6 since it was state law that required school districts to incur the hearing costs.[101]

Accordingly, the Commission finds that Government Code section 7586 and section 60550 of the regulations constitute a state-mandated new program or higher level of service for the following activity:

- Participation in due process hearings relating to issues involving mental health assessments or services.

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

In order for the activities listed above to impose a reimbursable, state-mandated program under article XIII B, section 6 of the California Constitution, two additional elements must be satisfied. First, the activities must impose costs mandated by the state pursuant

[100] *San Diego Unified School District, supra*, 33 Cal.4th 859.

[101] *Id.* at pages 881-882.

to Government Code section 17514.[102] Second, the statutory exceptions to reimbursement listed in Government Code section 17556 cannot apply.

Government Code section 17514 defines "costs mandated by the state" as any increased cost a local agency or school district is required to incur as a result of a statute that mandates a new program or higher level of service.

Government Code section 17556 states that the Commission shall not find costs mandated by the state, as defined in section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that:

> (a) The claim is submitted by a local agency or school district that requested legislative authority for that local agency or school district to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district 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 or school district that requests authorization for that local agency or school district to implement a given program shall constitute a request within the meaning of this paragraph.
>
> (b) The statute or executive order affirmed for the state a mandate that had been declared existing law or regulation by action of the courts.
>
> (c) The statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation. This subdivision applies regardless of whether the federal law or regulation was enacted or adopted prior to or after the date on which the state statute or executive order was enacted or issued.
>
> (d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.
>
> (e) The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.
>
> (f) The statute or executive order imposed duties that were expressly included in a ballot measure approved by the voters in a statewide or local election.
>
> (g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for

[102] See also, *Lucia Mar Unified School Dist.*, *supra*, 44 Cal.3d 830, 835

> that portion of the statute relating directly to the enforcement of the crime or infraction.

Except for Government Code section 17556, subdivision (e), the Commission finds that the exceptions listed in section 17556 are not relevant to this claim, and do not apply here. Since the Legislature has appropriated funds for this program in the 2004 Budget Bill, however, Government Code section 17556, subdivision (e), is relevant and is analyzed below.

A. Government Code section 17556, subdivision (e), does not apply to deny this claim

Government Code section 17556, subdivision (e), states the Commission shall not find costs mandated by the state if the Commission finds that:

> The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no net costs to the local agencies or school districts, *or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate*. (Emphasis added.)

The Budget Acts of 2003 and 2004 contain appropriations " considered offsetting revenues within the meaning of Government Code section 17556, subdivision (e)." The Budget Act of 2003 appropriated $69 million from the federal special education fund to counties to be used exclusively to support mental health services identified in a pupil's IEP and provided during the 2003-04 fiscal year by county mental health agencies pursuant to the test claim legislation. (Stats. 2003, ch. 157, item 6110-161-0890, provision 17.) The bill further states in relevant part that the funding shall be considered offsetting revenue pursuant to Government Code section 17556, subdivision (e):

> This funding shall be considered offsetting revenues within the meaning of subdivision (e) of section 17556 of the Government Code for any reimbursable mandated cost claim for provision of these mental health services provided in 2003-04.

The Budget Act of 2004 similarly appropriated $69 million to counties from the federal special education fund to be used exclusively to support mental health services provided during the 2004-05 fiscal year pursuant to the test claim legislation. (Stats. 2004, ch. 208, item 6110-161-0890, provision 10.) The appropriation was made as follows:

> Pursuant to legislation enacted in the 2003-04 Regular Session, of the funds appropriated in Schedule (4) of this item, $69,000,000 shall be used exclusively to support mental health services provided during the 2004-05 fiscal year by county mental health agencies pursuant to Chapter 26.5 (commencing with Section 7570) of Division 7 of the Government Code and that are included within an individualized education program pursuant to the Federal Individuals with Disabilities Education Act (IDEA).

The Budget Act of 2004 does not expressly identify the $69 million as "offsetting revenues within the meaning of Government Code section 17556, subdivision (e)." But

the statute does contain language that the appropriation was made "Pursuant to legislation enacted in the 2003-04 Regular Session." As indicated above, it is the 2003-04 Budget Bill that contains the language regarding the Legislature's intent that the $69 million is considered offsetting revenue within the meaning of Government Code section 17556, subdivision (e).

In order for Government Code section 17556, subdivision (e), to apply to deny this claim for fiscal year 2004-05, the plain language of the statute requires that two elements be satisfied. First, the statute must include additional revenue that was specifically intended to fund the costs of the state mandate. Second, the appropriation must be in an amount sufficient to fund the cost of the state mandate.

The Commission finds that the Legislature intended to fund the costs of this state-mandated program for fiscal year 2004-05 based on the language used by the Legislature that the funds "shall be considered offsetting revenues within the meaning of Government Code section 17556, subdivision (e)." Under the rules of statutory construction, it is presumed that the Legislature is aware of existing laws and that it enacts new laws in light of the existing law.[103] In this case, the Legislature specifically referred to Government Code section 17556, subdivision (e), when appropriating the $69 million. Thus, it must be presumed that the Legislature was aware of the plain language of Government Code section 17556, subdivision (e), and that its application results in a denial of a test claim.

But, based on public records, the second element under Government Code section 17556, subdivision (e), requiring that the appropriation must be *in an amount sufficient* to fund the cost of the state mandate, has not been satisfied. According to the State Controller's Deficiency Report issued on May 2, 2005, the amounts appropriated for this program in fiscal years 2003-04 and 2004-05 are not sufficient to pay the claims received by the State Controller's Office. Unpaid claims for fiscal year 2003-04 total $66,915,606. The unpaid claims for fiscal year 2004-05 total $68,958,263.[104]

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[103] *Williams v. Superior Court* (2001) 92 Cal.App.4th 612, 624.

[104] The State Controller's Deficiency Report is prepared pursuant to Government Code section 17567. Government Code section 17567 requires that in the event the amount appropriated for reimbursement of a state-mandated program is not sufficient to pay all of the claims approved by the Controller, the Controller shall prorate claims in proportion to the dollar amount of approved claims timely filed and on hand at the time of proration. The Controller shall then issue a report of the action to the Department of Finance, the Chairperson of the Joint Legislative Budget Committee, and the Chairperson of the respective committee in each house of the Legislature that considers appropriations. The Deficiency Report is, thus, an official record of a state agency and is properly subject to judicial notice by the court. (*Munoz v. State* (1995) 33 Cal.App.4th 1767, 1773, fn. 2; *Chas L. Harney, Inc. v. State of California* (1963) 217 Cal.App.2d 77, 85-87.)

The Deficiency Report lists the total unpaid claims for this program as follows:

1999 and prior Local Government Claims Bills	$ 8,646
2001-02	124,940,258

This finding is further supported by the 2004 report published by Stanford Law School, which indicates that "$69 million represented only approximately half of the total funding necessary to maintain AB 3632 services."[105]

Accordingly, the Commission finds that Government Code section 17556, subdivision (e), does not apply to deny this claim for fiscal year 2004-05. Eligible claimants are, however, required to identify the funds received from the $69 million appropriation as an offset to be deducted from the costs claimed.[106]

Based on the program costs identified by the State Controller's Office, the Commission further finds that counties do incur increased costs mandated by the state pursuant to Government Code section 17514 for this program. However, as more fully discussed below, the state has established cost-sharing mechanisms for some of the mandated activities that affect the total costs incurred by a county.

B. Increased costs mandated by the state for providing psychotherapy or other mental health treatment services, and for the residential and non-educational costs of a pupil placed in an out-of-home residential facility

In the Commission's 1990 Statement of Decision, the Commission concluded that the costs incurred for providing psychotherapy or other mental health treatment services were subject to the Short-Doyle Act. Under the Short-Doyle Act, the state paid 90 percent of the total costs of mental health treatment services and the counties paid the remaining 10 percent. Thus, the Commission concluded that counties incurred increased costs mandated by the state in an amount that equaled 10 percent of the total psychotherapy or other mental health treatment costs. The Commission further concluded that conducting assessments, participation on an expanded IEP team, and case management services for seriously emotionally disturbed pupils placed in residential facilities were not subject to the Short-Doyle Act and, thus, were 100 percent reimbursable. The Statement of Decision contains no findings regarding the activity of issuing and paying providers of out-of-home residential care for the residential and non-educational costs of seriously emotionally disturbed pupils.

Since the Statement of Decision was issued, the law with respect to the funding of psychotherapy or other mental health treatment services has changed. In addition, the Commission finds that the original Statement of Decision does not reflect the cost sharing ratio established by the Legislature in Welfare and Institutions Code section 18355 with respect to the residential care of seriously emotionally disturbed pupils. These issues are addressed below.

2002-03	124,871,698
2003-04	66,915,606
2004-05	68,958,263

[105] "Challenge and Opportunity – An Analysis of Chapter 26.5 and the System for Delivering Mental Health Services to Special Education Students in California," Youth and Education Law Clinic, Stanford Law School, May 2004, page 20.

[106] Government Code section 17514; California Code of Regulations, title 2, section 1183.1.

1. The costs for providing psychotherapy or other mental health treatment services

The test claim legislation (Stats. 1985, ch. 1274) amended Welfare and Institutions Code section 5651 to require that the annual Short-Doyle plan for each county include a description of the services required by Government Code sections 7571 and 7576 (psychotherapy or other mental health treatment services), including the cost of the services. Section 60200 of the regulations required the county to be financially responsible for the provision of mental health treatment services and that reimbursement to the provider of the services shall be based on a negotiated net amount or rate approved by the Director of Mental Health as provided in Welfare and Institutions Code section 5705.2, or the provider's reasonable actual cost. Welfare and Institutions Code section 5705.2 imposed a cost-sharing ratio for mental health treatment services between the state and the counties, with the state paying 90 percent and the counties paying 10 percent of the total costs.

In 1993, the Sixth District Court of Appeal in the *County of Santa Clara* case upheld the Commission's finding that psychotherapy or other mental health treatment services were to be funded as part of the Short-Doyle Act and, thus, only 10 percent of the total costs for treatment were reimbursable under article XIII B, section 6. The court interpreted the test claim legislation as follows:

> County entered into an NNA [negotiated net amount] contract with the state in lieu of the Short-Doyle plan and budget. (Welf. & Inst. Code, § 5705.2.) The NNA contract covers mental health services in the contracting county. The amount of money the state provides is the same whether the county signs a NNA contract or adopts a Short-Doyle plan.... By adding subdivision (g) to Welfare and Institutions Code section 5651, the legislature designated that the mental health services provided pursuant to Government Code section 7570 et seq. were to be funded as part of the Short-Doyle program. County's NNA contract was consistent with this intent. Accordingly, the fact that County entered into an NNA contract rather than a Short-Doyle plan and budget is not relevant.

Based on these findings, the court concluded that only 10 percent of the costs were "costs mandated by the state" and, thus, reimbursable under article XIII B, section 6. The court held as follows:

> By placing these services within Short-Doyle, however, the legislature limited the extent of its mandate for these services to the funds provided through the Short-Doyle program. A Short-Doyle agreement or NNA contract sets the maximum obligation incurred by a county for providing the services listed in the agreement or contract. "Counties may elect to appropriate more than their 10 per cent share, but in no event can they be required to do so." (*County of Sacramento v. Loeb* (1984) 160 Cal.App.3d 446, 450.) Since the services were subject to the Short-Doyle formula under which the state provided 90 per cent of the funds and the county 10 per cent, that 10 per cent was reimbursable under

section 6, article XIII B of the California Constitution. (Emphasis in original.)

There have been "intervening changes in the law" with respect to the costs for psychotherapy or other mental health treatment services, however. Thus, the decision in the *County of Santa Clara* case with respect to the inclusion of mental health treatment services for special education pupils in the Short-Doyle plan no longer applies and is not binding on the Commission for purposes of this reconsideration.[107]

In 1991, the Legislature enacted realignment legislation that repealed the Short-Doyle Act and replaced the sections with the Bronzan-McCorquodale Act. (Stats. 1991, ch. 89, §§ 63 and 173.) The realignment legislation became effective on June 30, 1991. The parties have disputed whether the Bronzan-McCorquodale Act keeps the cost-sharing ratio, with the state paying 90 percent and the counties paying 10 percent, for the cost of psychotherapy or other mental health treatment services for special education pupils.

The Commission finds, however, that the dispute does not need to be resolved for purposes of this reconsideration. Section 38 of Statutes 2002, chapter 1167 (Assem. Bill 2781) prohibits the funding provisions of the Bronzan-McCorquodale Act from affecting the responsibility of the state to fund psychotherapy and other mental health treatment services for handicapped and disabled pupils and requires the state to provide reimbursement to counties for those services for all allowable costs incurred. Section 38 also states the following:

> *For reimbursement claims for services delivered in the 2001-02 fiscal year and thereafter*, counties are *not* required to provide any share of those costs or to fund the cost of any part of these services with money received from the Local Revenue Fund [i.e. realignment funds]. (Emphasis added.)

In addition, SB 1895 (Stats. 2004, ch. 493, § 6) provides that realignment funds used by counties for this program "are eligible for reimbursement from the state *for all allowable costs* to fund assessments, psychotherapy, and other mental health services . . . ," and that the finding by the Legislature is "declaratory of existing law." (Emphasis added.)

Therefore, beginning July 1, 2001, the 90 percent-10 percent cost-sharing ratio for the costs incurred for psychotherapy and other mental health treatment services no longer applies. Since the period of reimbursement for purposes of this reconsideration begins July 1, 2004, and section 38 of Statutes 2002,chapter 1167 is still in effect, all of the county costs for psychotherapy or other mental health treatment services are reimbursable, less any applicable offsets that are identified below.

2. <u>The residential and non-educational costs of a seriously emotionally disturbed child placed in an out-of-home residential facility</u>

Government Code section 7581 requires the county to be financially responsible for the residential and non-educational costs of a seriously emotionally disturbed child placed in an out-of-home residential facility. As described above, the residential and non-

[107] *George Arakelian Farms, Inc., supra,* 49 Cal.3d 1279, 1291.

educational costs include the costs for food, clothing, shelter, daily supervision, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation.

Welfare and Institutions Code section 18355 describes a cost-sharing formula for the payment of these costs. That section states in relevant part the following:

> Notwithstanding any other provision of law, 24-hour out-of-home care for seriously emotionally disturbed children who are placed in accordance with Section 7572.5 of the Government Code shall be funded from a separate appropriation in the budget of the State Department of Social Services in order to fund both 24-hour out-of-home care payment and local administrative costs. Reimbursement for 24-hour out-of-home payment costs shall be from that appropriation, *subject to the same sharing ratio as prescribed in subdivision (c) of Section 15200*, and available funds... (Emphasis added.)

Since 1991, Welfare and Institutions Code section 15200, subdivision (c)(1), has provided that for counties that meet the performance standards or outcome measures in Welfare and Institutions Code section 11215, the state shall appropriate 40 percent of the sum necessary for the adequate care of each child. Thus, for those counties meeting the performance measures, their increased cost mandated by the state would equal 60 percent of the total cost of care for each special education child placed in an out-of-home residential facility, less any applicable offset.

When a county does not meet the performance standards or outcome measures in Welfare and Institutions Code section 11215, state funding for the program decreases and the counties are liable for the decreased cost.[108] The Commission finds that a county's cost incurred for the decrease in the state's share of the costs as a result of the county's failure to meet the performance standards, are not costs mandated by the state and are not reimbursable. Counties are mandated by the state to meet the performance standards for residential facilities.[109]

Therefore, the Commission finds that counties incur increased costs mandated by the state in an amount that equals 60 percent of the total residential and non-educational costs of a seriously emotionally disturbed child placed in an out-of-home residential facility.

C. Identification of offsets

Reimbursement under article XIII B, section 6 and Government Code section 17514 is required only for the increased costs mandated by the state. As determined by the California Supreme Court, the intent behind section 6 was to prevent the state from

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[108] Welfare and Institutions Code sections 15200, subdivision (c)(2), and 11215, subdivision (b)(5).

[109] *Ibid.*

forcing new programs on local governments that require an increased expenditure by local government of their limited tax revenues.[110]

The 1990 Statement of Decision does not identify any offsetting revenues. The parameters and guidelines for this program lists the following reimbursements that must be deducted from the costs claimed:

- Any direct payments (categorical funding) received from the State which are specifically allocated to this program; and
- Any other reimbursements for this mandate (excluding Short-Doyle funding, private insurance payments, and Medi-Cal payments), which is received from any source, e.g. federal, state, etc.

The Commission agrees with the identification of any direct payments or categorical funds appropriated by the Legislature specifically for this program as an offset to be deducted from the costs claimed. In the past, categorical funding has been provided by the state for this program in the amount of $12.3 million.[111] The categorical funding was eliminated, however, in the Budget Acts of 2002 through 2004.

If, however, funds are appropriated in the Budget Act for this program, such as the $69 million appropriation in the 2004-05 Budget Act, such funds are required to be identified as an offset.

The Commission disagrees with the language in the existing parameters and guidelines that excludes private insurance payments as offsetting revenue. Federal law authorizes public agencies to access private insurance proceeds for services provided under the IDEA if the parent consents.[112] Thus, to the extent counties obtain private insurance proceeds with the consent of a parent for purposes of this program, such proceeds must be identified as an offset and deducted from the costs claimed. This finding is consistent with the California Supreme Court's decision in *County of Fresno v. State of California.* In the *County of Fresno* case, the court clarified that article XIII B, section 6 requires reimbursement by the state only for those expenses that are recoverable from tax revenues. Reimbursable costs under article XIII B, section 6, do not include reimbursement received from other non-tax sources.[113]

The Commission further disagrees with the language in the existing parameters and guidelines that excludes Medi-Cal payments as offsetting revenue. Federal law authorizes public agencies, with certain limitations, to use public insurance benefits, such as Medi-Cal, to provide or pay for services required under the IDEA.[114] Federal law limits this authority as follows:

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[110] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of San Diego, supra,* 15 Cal.4th at page 81.

[111] Budget Acts of 1994-2001, Item 4440-131-0001.

[112] 34 Code of Federal Regulations section 300.142, subdivision (f).

[113] *County of Fresno, supra,* 53 Cal.3d at page 487.

[114] 34 Code of Federal Regulations section 300.142, subdivision (e).

(2) With regard to services required to provide FAPE [free appropriate public education] to an eligible child under this part, the public agency-

(i) May not require parents to sign up for or enroll in public insurance programs in order for their child to receive FAPE under Part B of the Act;

(ii) May not require parents to incur an out-of-pocket expense such as the payment of a deductible or co-pay amount incurred in filing a claim for services provided pursuant to this part, but pursuant to paragraph (g)(2) of this section, may pay the cost that the parent would be required to pay;

(iii) May not use a child's benefits under a public insurance program if that use would

(A) Decrease available lifetime coverage or any other insured benefit;

(B) Result in the family paying for services that would otherwise be covered by the public insurance program and that are required for the child outside of the time the child is in school;

(C) Increase premiums or lead to the discrimination of insurance; or

(D) Risk loss of eligibility for home and community-based waivers, based on aggregate health-related expenditures.[115]

According to the 2004 report published by Stanford Law School, 51.8 percent of the students receiving services under the test claim legislation are Medi-Cal eligible.[116] Thus, the Commission finds to the extent counties obtain proceeds under the Medi-Cal program from either the state or federal government for purposes of this mandated program, such proceeds must be identified as an offset and deducted from the costs claimed.

In addition, Government Code section 7576.5 describes offsetting revenue to counties transferred from local educational agencies for this program as follows:

> If funds are appropriated to local educational agencies to support the costs of providing services pursuant to this chapter, the local educational agencies shall transfer those funds to the community mental health services that provide services pursuant to this chapter in order to reduce

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[115] 34 Code of Federal Regulations section 300.142, subdivision (e)(2)

[116] "Challenge and Opportunity – An Analysis of Chapter 26.5 and the System for Delivering Mental Health Services to Special Education Students in California," Youth and Education Law Clinic, Stanford Law School, May 2004, page 20.

> the local costs of providing these services. These funds shall be used exclusively for programs operated under this chapter and are offsetting revenues in any reimbursable mandate claim relating to special education programs and services.

Government Code section 7576.5 was added by the Legislature in 2003 (Stats. 2003, ch. 227) and became operative and effective on August 11, 2003. Thus, the Commission finds money received by counties pursuant to Government Code section 7576.5 shall be identified as an offset and deducted from the costs claimed.

Finally, the existing parameters and guidelines do not require eligible claimants to offset any Short-Doyle funding, and specifically excludes such funding as an offset. As indicated above, the Short-Doyle Act was repealed and replaced with the realignment legislation of the Bronzan-McCorquodale Act. Based on the plain language of SB 1895 (Stats. 2004, ch. 493, § 6), realignment funds used by a county for this mandated program are not required to be deducted from the costs claimed. Section 6 of SB 1895 adds, as part of the Bronzan-McCorquodale Act, section 5701.6 to the Welfare and Institutions Code. Section 5701.6 states in relevant part the following:

> Counties may utilize money received from the Local Revenue Fund [realignment] ...to fund the costs of any part of those services provided pursuant to Chapter 26.5 (commencing with Section 7570) of Division 7 of Title 1 of the Government Code. *If money from the Local Revenue Fund is used by counties for those services, counties are eligible for reimbursement from the state for all allowable costs* to fund assessments, psychotherapy, and other mental health services allowable pursuant to Section 300.24 of Title 34 of the Code of Federal Regulations [IDEA] and required by Chapter 26.5 ... of the Government Code. (Emphasis added.)

Thus, the Commission finds that realignment funds used by a county for this mandated program are not required to be identified as an offset and deducted from the costs claimed.

Accordingly, the Commission finds that the following revenue and/or proceeds must be identified as offsets and be deducted from the costs claimed:

- Funds received by a county pursuant to Government Code section 7576.5.
- Any direct payments or categorical funding received from the state that is specifically allocated to any service provided under this program. This includes funds received by a county pursuant to the $69 million appropriation to counties for purposes of this mandated program in the Budget Act of 2004 ((Stats. 2004, ch. 208, item 6110-161-0890,
  provision 10).
- Private insurance proceeds obtained with the consent of a parent for purposes of this program.

- Medi-Cal proceeds obtained from the state or federal government that pay a portion of the county services provided to a pupil under this mandated program in accordance with federal law.
- Any other reimbursement received from the federal or state government, or other non-local source.[117]

CONCLUSION

The Commission concludes that the test claim legislation imposes a reimbursable state-mandated program on counties pursuant to article XIII B, section 6 of the California Constitution and Government Code section 17514 for the *increased costs* in performing the following activities:

1. Renew the interagency agreement with the local educational agency every three years and, if necessary, revise the agreement (Gov. Code, § 7571; Cal. Code Regs., tit. 2, §§ 60030, 60100)
    - Renew the interagency agreement every three years, and revise if necessary.
    - Define the process and procedures for coordinating local services to promote alternatives to out-of-home care of seriously emotionally disturbed pupils.
2. Perform an initial assessment of a pupil referred by the local educational agency, and discuss assessment results with the parents and IEP team (Gov. Code, § 7572, Cal. Code Regs., tit. 2, § 60040)
    - Review the following educational information of a pupil referred to the county by a local educational agency for an assessment: a copy of the assessment reports completed in accordance with Education Code section 56327, current and relevant behavior observations of the pupil in a variety of educational and natural settings, a report prepared by personnel that provided "specialized" counseling and guidance services to the pupil and, when appropriate, an explanation why such counseling and guidance will not meet the needs of the pupil.
    - If necessary, observe the pupil in the school environment to determine if mental health assessments are needed.
    - If mental health assessments are deemed necessary by the county, develop a mental health assessment plan and obtain the parent's written informed consent for the assessment.
    - Assess the pupil within the time required by Education Code section 56344.
    - If a mental health assessment cannot be completed within the time limits, provide notice to the IEP team administrator or designee no later than 15 days before the scheduled IEP meeting.
    - Prepare and provide to the IEP team, and the parent or guardian, a written assessment report in accordance with Education Code section 56327. The report

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[117] *County of Fresno, supra,* 53 Cal.3d at page 487; California Code of Regulations, title 2, section 1183.1, subdivision (a)(8).

shall include the following information: whether the pupil may need special education and related services; the basis for making the determination; the relevant behavior noted during the observation of the pupil in the appropriate setting; the relationship of that behavior to the pupil's academic and social functioning; the educationally relevant health and development, and medical findings, if any; for pupils with learning disabilities, whether there is such a discrepancy between achievement and ability that it cannot be corrected without special education and related services; a determination concerning the effects of environmental, cultural, or economic disadvantage, where appropriate; and the need for specialized services, materials, equipment for pupils with low incidence disabilities.

- Review and discuss the county recommendation with the parent and the appropriate members of the IEP team before the IEP team meeting.
- In cases where the local education agency refers a pupil to the county for an assessment, attend the IEP meeting if requested by the parent.
- Review independent assessments of a pupil obtained by the parent.
- Following review of the independent assessment, discuss the recommendation with the parent and with the IEP team before the meeting of the IEP team.
- In cases where the parent has obtained an independent assessment, attend the IEP team meeting if requested.

3. Participate as a member of the IEP team whenever the assessment of a pupil determines the pupil is seriously emotionally disturbed and residential placement may be necessary (Gov. Code, § 7572.5, subds. (a) and (b); Cal. Code Regs., tit. 2, § 60100)
    - Participate as a member of the IEP team whenever the assessment of a pupil determines the pupil is seriously emotionally disturbed and residential placement may be necessary.
    - Re-assess the pupil in accordance with section 60400 of the regulations, if necessary.
4. Act as the lead case manager if the IEP calls for residential placement of a seriously emotionally disturbed pupil (Gov. Code, § 7572.5, subd. (c)(1); Cal. Code Regs., tit. 2, § 60110)
    - Designate a lead case manager when the expanded IEP team recommends out-of-home residential placement for a seriously emotionally disturbed pupil. The lead case manager shall perform the following activities:
        1. Convene parents and representatives of public and private agencies in accordance with section 60100, subdivision (f), in order to identify the appropriate residential facility.
        2. Complete the local mental health program payment authorization in order to initiate out of home care payments.

3. Coordinate the completion of the necessary County Welfare Department, local mental health program, and responsible local education agency financial paperwork or contracts.
4. Coordinate the completion of the residential placement as soon as possible.
5. Develop the plan for and assist the family and pupil in the pupil's social and emotional transition from home to the residential facility and the subsequent return to the home.
6. Facilitate the enrollment of the pupil in the residential facility.
7. Conduct quarterly face-to-face contacts with the pupil at the residential facility to monitor the level of care and supervision and the implementation of the treatment services and the IEP.
8. Notify the parent or legal guardian and the local education agency administrator or designee when there is a discrepancy in the level of care, supervision, provision of treatment services, and the requirements of the IEP.

5. Issue payments to providers of out-of-home residential care for the residential and non-educational costs of seriously emotionally disturbed pupils (Gov. Code, § 7581; Cal. Code Regs., tit. 2, § 60200, subd. (e))
   - Issue payments to providers of out-of-home residential facilities for the residential and non-educational costs of seriously emotionally disturbed pupils. Payments are for the costs of food, clothing, shelter, daily supervision, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation. Counties are eligible to reimbursed for 60 percent of the total residential and non-educational costs of a seriously emotionally disturbed child placed in an out-of-home residential facility.
   - Submit reports to the State Department of Social Services for reimbursement of payments issued to seriously emotionally disturbed pupils for 24-hour out-of-home care.
6. Provide psychotherapy or other mental health services, as defined in regulations, when required by the IEP (Gov. Code, § 7576; Cal. Code Regs., tit. 2, §§ 60020, subd. (a), 60200, subds. (a) and (b))
   - Provide psychotherapy or other mental health services identified in a pupil's IEP, as defined in sections 542 and 543 of the Department of Mental Health regulations. However, the activities of providing vocational services, socialization services, and crisis intervention to pupils, and dispensing medications necessary to maintain individual psychiatric stability during the treatment process, do *not* constitute a state-mandated new program or higher level of service.
7. Participate in due process hearings relating to mental health assessments or services (Gov. Code, § 7586; Cal. Code Regs., tit. 2, § 60550)

The Commission further concludes that the following revenue and/or proceeds must be identified as offsets and be deducted from the costs claimed:

- Funds received by a county pursuant to Government Code section 7576.5
- Any direct payments or categorical funding received from the state that is specifically allocated to any service provided under this program. This includes funds received by a county pursuant to the $69 million appropriation to counties for purposes of this mandated program in the Budget Act of 2004 ((Stats. 2004, ch. 208, item 6110-161-0890, provision 10).
- Private insurance proceeds obtained with the consent of a parent for purposes of this program.
- Medi-Cal proceeds obtained from the state or federal government that pay a portion of the county services provided to a pupil under this mandated program in accordance with federal law.
- Any other reimbursement received from the federal or state government, or other non-local source

The period of reimbursement for this decision begins July 1, 2004.

Finally, any statutes and/or regulations that were pled in *Handicapped and Disabled Students* (CSM 4282) that are not identified above do not constitute a reimbursable state-mandated program.

Tab 4

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM: Government Code Sections 7570, 7571, 7572, 7572.5, 7572.55, 7573, 7576, 7579, 7582, 7584, 7585, 7586, 7586.6, 7586.7, 7587, 7588; Statutes 1984, Chapter 1747; Statutes 1985, Chapter 107; Statutes 1985, Chapter 759; Statutes 1985, Chapter 1274; Statutes 1986, Chapter 1133; Statutes 1992, Chapter 759; Statutes 1994, Chapter 1128; Statutes 1996, Chapter 654; Statutes 1998, Chapter 691; Statutes 2001, Chapter 745; Statutes 2002, Chapter 585; and Statutes 2002, Chapter 1167; and California Code of Regulations, Title 2, Sections 60000-60610; Filed on June 27, 2003 by the County of Stanislaus, Claimant; and Filed on June 30, 2003, by the County of Los Angeles, Claimant.	**Case No.: 02-TC-40/02-TC-49** ***Handicapped & Disabled Students II*** STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 (*Adopted on May 26, 2005*)

STATEMENT OF DECISION

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

______________________________ ____________________

PAULA HIGASHI, Executive Director Date

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM:

Government Code Sections 7570, 7571, 7572, 7572.5, 7572.55, 7573, 7576, 7579, 7582, 7584, 7585, 7586, 7586.6, 7586.7, 7587, 7588;

Statutes 1984, Chapter 1747; Statutes 1985, Chapter 107; Statutes 1985, Chapter 759; Statutes 1985, Chapter 1274; Statutes 1986, Chapter 1133; Statutes 1992, Chapter 759; Statutes 1994, Chapter 1128; Statutes 1996, Chapter 654; Statutes 1998, Chapter 691; Statutes 2001, Chapter 745; Statutes 2002, Chapter 585; and Statutes 2002, Chapter 1167; and

California Code of Regulations, Title 2, Sections 60000-60610;

Filed on June 27, 2003 by the County of Stanislaus, Claimant; and

Filed on June 30, 2003, by the County of Los Angeles, Claimant.

Case No.: 02-TC-40/02-TC-49

Handicapped & Disabled Students II

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

(*Adopted on May 26, 2005*)

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on May 26, 2005. Leonard Kaye and Paul McIver appeared on behalf of the County of Los Angeles. Pam Stone represented and appeared on behalf of the County of Stanislaus. Linda Downs appeared on behalf of the County of Stanislaus. Nicholas Schweizer and Jody McCoy appeared on behalf of the 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 staff analysis at the hearing by a vote of 4-0.

BACKGROUND

This test claim addresses amendments to the Handicapped and Disabled Students program (also known as, Assembly Bill 3632) administered by county mental health

departments. The Handicapped and Disabled Students program was initially enacted in 1984, as the state's response to federal legislation that guaranteed disabled pupils, including those with mental health needs, the right to receive a free and appropriate public education (Individuals with Disabilities Education Act, or IDEA). Before 1984, the state adopted a comprehensive statutory scheme in the Education Code to govern the special education and related services provided to disabled children.[1] Among the related services, called "designated instruction and services" in California, the following mental health services are identified: counseling and guidance, psychological services other than the assessment and development of the IEP, parent counseling and training, health and nursing services, and social worker services.[2] The state and the local educational agencies (school districts and county offices of education) provided all related services, including mental health services, to children with disabilities.

In 1984 and 1985, the Legislature enacted Assembly Bill 3632 (Stats. 1984, ch. 1747, and Stats. 1985, ch. 1274), to shift the responsibility and funding for providing mental health services for students with disabilities from local educational agencies to county mental health departments. AB 3632 added Chapter 26.5 to the Government Code (§§ 7570 et seq.), and the Departments of Mental Health and Education adopted emergency regulations (Cal. Code Regs., tit. 2, §§ 60000-60610) to require county mental health departments to:

- Renew the interagency agreement with the local educational agency every three years and, if necessary, revise the agreement.
- Perform an initial assessment of a pupil referred by the local educational agency, and discuss assessment results with the parents and IEP team.
- Participate as a member of the IEP team whenever the assessment of a pupil determines the pupil is seriously emotionally disturbed and residential placement may be necessary.
- Act as the lead case manager, as specified in statute and regulations, if the IEP calls for residential placement of a seriously emotionally disturbed pupil.
- Issue payments to providers of out-of-home residential care for the residential and non-educational costs of seriously emotionally disturbed pupils.
- Provide psychotherapy or other mental health services, as defined in regulations, when required by the IEP.
- Participate in due process hearings relating to issues involving mental health assessments or services.

[1] Education Code section 56000 et seq. (Stats. 1980, ch. 797.)

[2] Education Code section 56363.

Past and Pending Commission Decisions on the Handicapped and Disabled Students Program

On April 26, 1990, the Commission adopted a statement of decision in *Handicapped and Disabled Students* (CSM 4282). The test claim was filed by the County of Santa Clara on Statutes 1984, chapter 1747; Statutes 1985, chapter 1274; and on California Code of Regulations, title 2, sections 60000 through 60610 (Emergency Regulations filed December 31, 1985, designated effective January 1, 1986 (Register 86, No. 1) and refiled June 30, 1986, designated effective July 12, 1986 (Register 86, No. 28)). The Commission determined that the activities of providing mental health assessments, psychotherapy and other mental health treatment services, as well as assuming expanded IEP responsibilities, were reimbursable as a state-mandated program under article XIII B, section 6 of the California Constitution beginning July 1, 1986. Activities related to assessments and IEP responsibilities were found to be 100 per cent (100%) reimbursable. Psychotherapy and other mental health treatment services were found to be ten per cent (10%) reimbursable due to the cost sharing methodology in existence under the Short-Doyle Act for local mental health services. On January 11, 1993, the Sixth District Court of Appeal, in an unpublished decision, sustained the Commission's decision in CSM 4282.[3]

In May 2000, the Commission approved a second test claim relating to this program, *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (CSM 97-TC-05). The test claim on *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05) was filed on Government Code section 7576, as amended by Statutes 1996, chapter 654, the corresponding regulations (Cal. Code Regs, tit. 2, §§ 60100 and 60200), and on a Department of Mental Health Information Notice Number 86-29. The test claim in *Seriously Emotionally Disturbed Pupils* addressed only the counties' responsibilities for out-of-state residential placements for seriously emotionally disturbed pupils, and has a reimbursement period beginning January 1, 1997.

In addition, there are two other matters currently pending with the Commission relating to the test claim statutes and regulations. In 2001, the Counties of Los Angeles and Stanislaus filed requests to amend the parameters and guidelines on the original test claim decision, *Handicapped and Disabled Students* (CSM 4282). The counties request that the parameters and guidelines be amended to delete all references to the Short-Doyle cost-sharing mechanism for providing psychotherapy or other mental health services; to add an activity to provide reimbursement for room and board for in-state placement of pupils in residential facilities; and to amend the language regarding the reimbursement of indirect costs. The request to amend the parameters and guidelines was scheduled on the Commission's March 2002 hearing calendar. But at the request of the counties, the item was taken off calendar, and is still pending. If the Commission approves the counties'

[3] *County of Santa Clara v. Commission on State Mandates* (Jan. 11, 1993, H009520) [nonpub. Opn.]).

request to amend the parameters and guidelines, the reimbursement period for the new amended portions of the parameters and guidelines would begin on July 1, 2000.[4]

The second matter currently pending with the Commission is the reconsideration of the *Handicapped and Disabled Students* test claim (04-RL-4282-10) that was directed by Statutes 2004, chapter 493 (Sen. Bill No. 1895).

This test claim, *Handicapped and Disabled Students II*, presents the following issues:

- Does the Commission have the jurisdiction to rehear in this test claim the statutes and regulations previously determined by the Commission to constitute a reimbursable state-mandated program in *Handicapped and Disabled Students* (CSM 4282) and *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05)?
- Are the test claim statutes and regulations subject to article XIII B, section 6 of the California Constitution?
- Do the test claim statutes and regulations impose a new program or higher level of service on local agencies within the meaning of article XIII B, section 6 of the California Constitution?
- Do the test claim statutes and regulations impose "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556?

Claimants' Position

The claimants contend that the test claim statutes and regulations constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

The County of Los Angeles, according to its test claim, is seeking reimbursement for the following activities:

- Mental health assessments and related treatment services, including psychotherapy, collateral services, medication monitoring, intensive day treatment, day rehabilitation, and case management.
- Placement in a residential facility outside the child's home, including the provision of food, clothing, shelter, daily supervision, school supplies, personal incidentals, liability insurance with respect to the child, and reasonable travel to the child's home for visitation.
- Due process hearings, notifications, resolution requirements.
- Preparation of interagency agreements.

The County of Stanislaus is seeking reimbursement for the activities required by statutory and regulatory amendments to the original program. The County of Stanislaus takes no position on the issue of providing residential services to the child.

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[4] California Code of Regulations, title 2, section 1183.2.

The Counties of Los Angeles and Stanislaus filed comments on the draft staff analysis, which are addressed in the analysis of this claim.

Position of the Department of Finance

The Department of Finance filed comments on the test claims describing the Department's position on funding and the requested costs for residential treatment. With respect to funding, the Department contends the following:

- For claims for mental health treatment services provided before fiscal year 2000-01, eligible claimants are entitled to reimbursement for ten percent (10%) of their costs only. The Department argues that Bronzan-McCorquodale Act of 1991 was intended to replace the Short-Doyle Act, and provides ninety percent (90%) of the funding to counties for mental health treatment services for special education pupils.
- Eligible claimants are entitled to 100 per cent (100%) reimbursement for mental health treatment services beginning July 1, 2001. The Department states that section 38 of Statutes 2002, chapter 1167, increased the percentage of state reimbursement for treatment costs from ten percent (10%) to 100% for services delivered in fiscal year 2001-02 and subsequent years.

The Department of Finance states the following with respect to residential treatment costs:

> ....The [Department of Social Services (DSS)] sets reasonable board and care rates for in-state placement facilities based on specified criteria. To allow community mental health services to pay an unspecified and unregulated "patch" above and beyond the reasonable rate established by the DSS, could be extremely expensive and [would] provide no additional mental health services to the disabled child. The State would no longer be able to determine fair and reasonable placement costs. It is clear that Section 62000 [of the DSS regulations] intended that community mental health services defer to DSS when it came to board and care rate setting for in-state facilities. The state mandate process should not be used to undermine in-state rate setting for board and care in group homes.[5]

The Department of Finance filed comments on the draft staff analysis arguing that the Handicapped and Disabled Students program is federally mandated under the current federal law and that some of the activities recommended for approval do not increase the level of service required of counties and, thus, should be denied.

Position of the Department of Mental Health

The Department of Mental Health filed comments on the draft staff analysis that state in relevant part the following:

> After full review, [Department of Mental Health] wishes to state that it concurs with the comments made by the Department of Finance, but that [Department of Mental Health] has no objections, suggested

[5] Department of Finance comments filed October 7, 2003.

modifications, or other comments regarding the submission to the Claimants.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[6] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[7] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[8] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[9] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[10]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[11] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[12] A "higher level of service" occurs

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

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

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

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

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

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

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

when the new "requirements were intended to provide an enhanced service to the public."[13]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[14] -

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.[15] 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."[16]

Issue 1: Does the Commission have jurisdiction to rehear in this test claim the statutes and regulations previously determined by the Commission to constitute a reimbursable state-mandated program in *Handicapped and Disabled Students* (CSM 4282) and *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05)?

The claimants have included the following statutes and regulations in this test claim:

- Government Code sections 7570 et seq., as added and amended by Statutes 1984, chapter 1747, and Statutes 1985, chapter, 107.
- Government Code section 7576, as amended by Statutes 1996, chapter 654.
- Sections 60000 through 60610 of the joint regulations adopted by the Departments of Mental Health and Education to implement the program. The claimants do not, however, identify the version of the regulations for which they are claiming reimbursement.

As indicated in the Background, the statutes and some of the regulations identified in the paragraph above were included in two prior test claims that the Commission approved as reimbursable state-mandated programs. In 1990, the Commission adopted a statement of decision in *Handicapped and Disabled Students* (CSM 4282) approving Government Code sections 7570 et seq., as added and amended by Statutes 1984, chapter 1747, and Statutes 1985, chapter, 107, and sections 60000 through 60610 of the emergency regulations (filed December 31, 1985, designated effective January 1, 1986 (Register 86, No. 1) and refiled June 30, 1986, designated effective July 12, 1986 (Register 86,

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

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

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

[16] *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.

No. 28)) as a reimbursable state-mandated program. The Legislature has directed the Commission to reconsider this decision.[17]

In 2000, the Commission adopted a statement of decision in *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05) approving Government Code section 7576, as amended by Statutes 1996, chapter 654, and the corresponding regulations (Cal. Code Regs, tit. 2, §§ 60100 and 60200) as a reimbursable state-mandated program for the counties' responsibilities for out-of-state residential placements for seriously emotionally disturbed pupils.

It is a well-settled principle of law that an administrative agency, like the Commission, does not have jurisdiction to retry a question that has become final. If a prior final decision is retried by the agency, without the statutory authority to retry or reconsider the case, that decision is void.[18]

In the present case, the Commission does not have the statutory authority to rehear in this test claim the statutes and regulations previously determined by the Commission to constitute a reimbursable state-mandated program in *Handicapped and Disabled Students* (CSM 4282) and *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05).

At the time these test claims were filed, Government Code section 17521 defined a "test claim" as the first claim, including claims joined or consolidated with the first claim, filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state. The Commission's regulations allowed the filing of more than one test claim on the same statute or executive order only when (1) the subsequent test claim is filed within sixty (60) days from the date the first test claim was filed; and (2) when each test claim is filed by a different type of claimant or the issues presented in each claim require separate representation. (Cal. Code Regs., tit. 2, §§ 1183, subd. (i).) This test claim was filed more than sixty days from the date that *Handicapped and Disabled Students* (CSM 4282) and *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05) were filed. In addition, all three test claims were filed by the same type of claimant; counties. There is no evidence in the record to suggest that the same statutes already determined by the Commission to constitute a reimbursable state-mandated program in the prior test claims require separate representation here.

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[17] See reconsideration of *Handicapped and Disabled Students* (04-RL-4282-10).

[18] *Heap v. City of Los Angeles* (1936) 6 Cal.2d 405, 407, where the court held that the civil service commission had no jurisdiction to retry a question and make a different finding at a later time; *City and County of San Francisco v. Ang* (1979) 97 Cal.App.3d 673, 697, where the court held that whenever a quasi-judicial agency is vested with the authority to decide a question, such decision, when made is conclusive of the issues involved in the decision as though the adjudication had been made by the court; and *Save Oxnard Shores v. California Coastal Commission* (1986) 179 Cal.App.3d 140, 143, where the court held that in the absence of express statutory authority, an administrative agency may not change a determination made on the facts presented at a full hearing once the decision becomes final.

Finally, Government Code section 17559 grants the Commission the authority to reconsider prior final decisions only within 30 days after the Statement of Decision is issued. Since the two prior decisions in *Handicapped and Disabled Students* (CSM 4282) and *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05) were adopted and issued well over 30 days ago, the Commission does not have the jurisdiction in this test claim to reconsider the same statutes and regulations pled and determined in prior test claims.

As recognized by the California Supreme Court, the purpose behind the statutory scheme and procedures established by the Legislature in Government Code section 17500 et seq. was to "avoid[] multiple proceedings, judicial and administrative, addressing the same claim that a reimbursable state mandate has been created."[19]

Therefore, the Commission does not have the jurisdiction in this test claim over the following statutes and regulations:

- The Government Code sections in Chapter 26.5 considered in *Handicapped and Disabled Students* (CSM 4282) that were added and amended by Statutes 1984, chapter 1747, and Statutes 1985, chapter, 107, and that have not been amended by the remaining test claim legislation. These statutes are Government Code sections 7571, 7572.5, 7573, 7586, 7586.7, and 7588.
- Government Code section 7576, as amended by Statutes 1996, chapter 654, as it relates to out-of-state placement of seriously emotionally disturbed pupils.
- California Code of Regulations, title 2, sections 60000 through 60610 (filed December 31, 1985, designated effective January 1, 1986 (Register 86, No. 1) and refiled June 30, 1986, designated effective July 12, 1986 (Register 86, No. 28)). These regulations were repealed and were superceded by new regulations, effective July 1, 1998.[20]
- California Code of Regulations, title 2, sections 60100 and 60200 (filed as emergency regulations on July 1, 1998 (Register 98, No. 26) and refiled as final regulations on August 9, 1999 (Register 99, No. 33)) as they relate to the out-of-state placement of seriously emotionally disturbed pupils.

Issue 2: Are the test claim statutes and regulations subject to article XIII B, section 6 of the California Constitution?

<u>The activities performed by counties under the Handicapped and Disabled Students program are mandated by the state and not by federal law</u>

[19] *Kinlaw, supra*, 54 Cal.3d at page 333.

[20] See History of the regulations (Cal. Code Regs., tit. 2, §§ 60000 et seq.), notes 8 and 9.

The test claim statutes and regulations implement the federal special education law (IDEA) that requires states to guarantee to disabled pupils the right to receive a free and appropriate public education that emphasizes special education and related services designed to meet the pupil's unique educational needs.

The Department of Finance argues that the activities performed by counties under the Handicapped and Disabled Students program are federally mandated and, thus, reimbursement is not required under article XIII B, section 6 of the California Constitution. The Commission disagrees.

In 1992, the Third District Court of Appeal, in *Hayes v. Commission on State Mandates*, determined that the federal law at issue in the present case, IDEA, imposes a federal mandate on the states.[21] The *Hayes* case involved test claim legislation requiring school districts to provide special education services to disabled pupils. The school districts in the *Hayes* case alleged that the activities mandated by the state that exceeded federal law were reimbursable under article XIII B, section 6 of the California Constitution.

The court in *Hayes* determined that the state's "alternatives [with respect to federal law] were to participate in the federal program and obtain federal financial assistance and the procedural protections accorded by the act, or to decline to participate and face a barrage of litigation with no real defense and ultimately be compelled to accommodate the educational needs of handicapped children in any event."[22] The court concluded that the state had no "true choice" but to participate in the federal program and, thus, there was a federal mandate on the state.[23]

Although the court concluded that the federal law was a mandate on the states, the court remanded the case to the Commission for further findings to determine if the state's response to the federal mandate constituted a state-mandated new program or higher level of service on the school districts.[24] The court held that if the state "freely chose" to impose the costs upon the local agency as a means of implementing a federal program, then the costs are the result of a reimbursable state mandate. The court's holding is as follows:

> In our view the determination whether certain costs were imposed upon the local agency by a federal mandate must focus upon the local agency which is ultimately forced to bear the costs and how those costs came to be imposed upon that agency. *If the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government.*[25] (Emphasis added.)

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[21] *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1592.

[22] *Hayes, supra*, 11 Cal.App.4th at page 1591.

[23] *Ibid.*

[24] *Ibid.*

[25] *Id.* at page 1593-1594.

Here, pursuant to the court's holding in *Hayes*, the state "freely chose" to impose the costs upon the counties as a means of implementing the federal IDEA program.

Federal law does not require the state to impose any requirements relating to special education and related services on counties. At the time the test claim legislation was enacted, the requirements under federal law were imposed only on states and local educational agencies.[26] In 1997, Congress amended the IDEA to "strengthen the requirements on ensuring provisions of services by non-educational agencies ..." (Sen. Rep. 105-17, dated May 9, 1997.) The amendment clarified that the state or local educational agency responsible for developing a child's IEP could look to non-educational agencies to pay for or provide those services the educational agencies are otherwise responsible for. The amendment further clarified that if a non-educational agency failed to provide or pay for the special education and related services, the state or local educational agency responsible for developing the IEP remain ultimately responsible for ensuring that children receive all the services described in their IEPs in a timely fashion and the state or local educational agency shall provide or pay for the services.[27] Federal law, however, does not require states to use non-educational agencies to pay for or provide services. A state's decision regarding how to implement the IDEA is still within the discretion, or the "free choice," of the state. The Department of Finance agrees with this interpretation of federal law. The Department states the following:

> While subparagraph (A) of paragraph (11) of subdivision (a) of Sec. 612 states that the state educational agency is responsible for ensuring for the provision of IDEA services, subparagraph (B) states that "[s]ubparagraph (A) shall not limit the responsibility of agencies in the State other than the State educational agency to provide, or pay for some or all of the costs of, a free appropriate public education for any child with a disability in the State." This makes clear that Federal IDEA anticipates that agencies other than educational agencies *may be* responsible for providing services and absorbing costs related to the federal legislation. Indeed, subparagraph (A) of paragraph (12) lays out specific guidelines for the assigning of responsibility for services among various agencies.
>
> DOF contends that the fact that *the state has chosen through AB 3632* and related legislation to make mental health services related to individual education plans (IEPs) the responsibility of mental health agencies does not, in and of itself, trigger mandate reimbursement through Article XIII B, section 6 as the responsibilities in question are federally mandated and

[26] Title 34 Code of Federal Regulations section 300.2.

[27] Title 20 United States Code sections 1412 (a)(12)(A), (B), and (C), and 1401 (8); Title 34 Code of Federal Regulations section 300.142. (See also, Letters from the Department of Education dated July 28, 1998 and August 2, 2004, to all SELPAs, COEs, and LEAs on the requirements of 34 C.F.R. 300.142; and *Tri-County Special Education Local Plan Area v. County of Tuolumne* (2004) 123 Cal.App.4th 563, 578, where the court stated that "it is clear the Legislature could reassign administration of IDEA programs to a different entity if it chose to do so.".)

> *federal law allows the state to choose the agency or agencies responsible for service*. (Emphasis added.)[28]

Accordingly, the activities performed by counties under the Handicapped and Disabled Students program are mandated by the state and not by federal law. Thus, the actual increased costs incurred as a result of the activities in the program that constitute a mandated new program or higher level of service are reimbursable within the meaning of article XIII B, section 6.

Several test claim statutes and regulations do not mandate counties to perform an activity and, thus, are not subject to article XIII B, section 6

In order for a statute or an executive order to be subject to article XIII B, section 6 of the California Constitution, the statutory language must mandate or require local governmental agencies to perform an activity or task.[29]

Here, there are several statutes included in the test claim that are helpful in understanding the Handicapped and Disabled Students program. But they do not require counties to perform an activity or task. These statutes are Government Code sections 7570, 7584, and 7587.[30]

In addition, non-substantive changes and amendments that do not affect counties were made to Government Code sections 7572, 7582, and 7585 by the test claim statutes. These amendments do not impose any state-mandated activities on counties.[31, 32]

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[28] Department of Finance comments on the draft staff analysis.

[29] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Los Angeles, supra,* 43 Cal.3d 46, 56; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283-1284; *Department of Finance, supra,* 30 Cal.4th at page 736; Gov. Code, § 17514.

[30] Government Code section 7570 provides that ensuring a free and appropriate public education for children with disabilities under federal law and the Education Code is the joint responsibility of the Superintendent of Public Instruction and the Secretary of Health and Welfare. Government Code section 7584 defines "disabled youth," "child," and "pupil." Government Code section 7587 requires the Departments of Education and Mental Health to adopt regulations to implement the program.

[31] Government Code section 7572, as originally added in 1984 and amended in 1985, addresses the assessment of a student, including psychological and other mental health assessments performed by counties. The 1992 amendments to Government Code section 7572 substituted the word "disability" for "handicap," and made other clarifying, non-substantive amendments. Government Code section 7582 states that assessments and therapy treatment services provided under the program are exempt from financial eligibility standards and family repayment requirements. The 1992 amendment to section 7582 substituted "disabled child or youth" for "handicapped child." Government Code section 7585 addresses the notification of an agency's failure to provide a required service and reports to the Legislature. The 2001 amendments to section 7585 corrected the spelling of "administrative" and deleted the requirement for the Superintendent of

Furthermore, the Commission finds that Government Code section 7579, as amended by the test claim legislation, does not impose any state-mandated duties on county mental health departments. As originally enacted, Government Code section 7579 required courts, regional centers for the developmentally disabled, or other non-educational public agencies that engage in referring children to, or placing children in, residential facilities, to notify the administrator of the special education local plan area (SELPA) in which the residential facility is located before the pupil is placed in an out-of-home residential facility. The intent of the legislation, as stated in subdivision (c), was to "encourage communication between the courts and other public agencies that engage in referring children to, or placing children in, residential facilities, and representatives of local educational agencies."

The 2002 test claim statute (Stats. 2002, ch. 585) amended Government Code section 7579 by adding subdivision (d), to require public agencies other than educational agencies that place a child in a residential facility located out of state, without the involvement of a local educational agency, to assume responsibility for educational and non-educational costs of the child. Government Code section 7579, subdivision (d), states the following:

> Any public agency other than an educational agency that places a disabled child or child suspected of being disabled in a facility out of state without the involvement of the school district, SELPA, or COE [county office of education] in which the parent or guardian resides, shall assume financial responsibility for the child's residential placement, special education program, and related services in the other state unless the other state or its local agencies assume responsibility.

Government Code section 7579, subdivision (d), however, does not apply to county mental health departments. The duty imposed by section 7579 to pay the educational and non-educational costs of a child placed in an out-of-state residential facility is a duty imposed on a placing agency, like a court or a regional center for the developmentally

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Public Instruction and the Secretary of Health and Welfare to submit yearly reports to the Legislature on the failure of an agency to provide a required service.

[32] The County of Los Angeles, in comments to the draft staff analysis for this test claim, addresses a finding made on the reconsideration of the original *Handicapped and Disabled Students* claim (04-RL-4282-10), relating to Government Code section 7572 and the counties' attendance at IEP meetings following a mental health assessment of a pupil. The County's comments are not relevant to this test claim, however. The language in Government Code section 7572 relating to the county's attendance at an IEP meeting following an assessment was added by the Legislature in 1985. As indicated in the analysis, the Commission does not have jurisdiction in this test claim to address the statutes or activities originally added by the Legislature in 1984 and 1985. The Commission does have jurisdiction in this test claim over Government Code section 7572, as amended by Statutes 1992, chapter 759. But the 1992 amendments to section 7572 were non-substantive and do not impose any additional state-mandated activities on counties.

disabled, that fails to seek the involvement of the local educational agency. This consolidated test claim has been filed on behalf of county mental health departments.[33]

This conclusion is further supported by section 60510 of the regulations. Section 60510 of the regulations was adopted in 1998 (filed as an emergency regulation on July 1, 1998 (Register 98, No. 26) and refiled as a final regulation on August 9, 1999 (Register 99, No. 33)) to implement Government Code section 7579. The regulation requires "the court, regional center for the developmentally disabled, or public agency other than an educational agency" to notify the SELPA director before placing a child in a facility and requires the agency to provide specified information to the SELPA. Section 60510 is placed in article 7 of the regulations dealing with the exchange of information between "Education and Social Services." Article 7 is separate and apart from, and located after, the regulations addressing mental health related services. Accordingly, the Commission finds that Government Code section 7579, and section 60510 of the regulations, do not impose any state-mandated duties on county mental health departments.

Finally, the County of Stanislaus requests reimbursement for section 60400 of the regulations (filed as an emergency regulation on July 1, 1998 (Register 98, No. 26) and refiled as a final regulation on August 9, 1999 (Register 99, No. 33)). Section 60400, on its face, does not mandate any activities on counties. Rather, section 60400 of the regulations addresses the requirement imposed on the Department of Health Services to provide the services of a home health aide when the local educational agency considers a less restrictive placement from home to school for a pupil. The statutory authority and reference for this regulation is Government Code section 7575, which requires the Department of Health Services, "*or any designated local agency administering the California Children's Services*," to be responsible for occupational therapy, physical therapy, and the services of a home health aide, as required by the IEP. The claimants, however, did not plead Government Code section 7575 in their test claims. In addition, there is no evidence in the record that local agencies administering the California Children's Services program have incurred increased costs mandated by the state. Accordingly, the Commission finds that section 60400 of the regulations does not impose any state-mandated activities on county mental health departments.

Accordingly, Government Code sections 7570, 7572, 7579, 7582, 7584, 7585, and 7587, as amended by the test claim legislation, and sections 60400 and 60510 of the regulations do not impose state-mandated duties on counties and, thus, are not subject to article XIII B, section 6 of the California Constitution.

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[33] The declarations submitted by the claimants here are from the county mental health departments. (See declaration of Paul McIver, District Chief, Department of Mental Health, County of Los Angeles; and declaration of Dan Souza, Mental Health Director for the County of Stanislaus.)

The remaining test claim statutes and regulations constitute a "program" within the meaning of article XIII B, section 6

The remaining test claim statutes and regulations consist of the following:

- Government Code sections 7572.55 (as added in 1994), and 7576 and 7586.6 (as amended in 1996); and
- With the exception of sections 60400 and 60510 of the regulations, the joint regulations adopted by the Departments of Mental Health and Education (Cal. Code Regs, tit. 2, §§ 60000 et seq.), which took effect as emergency regulations on July 1, 1998 (Register 98, No. 26) and became final on August 9, 1999 (Register 99, No. 33).

In order for the test claim statutes and regulations to be subject to article XIII B, section 6 of the California Constitution, the statutes and regulations must constitute a "program." The California Supreme Court, in the case of *County of Los Angeles* v. *State of California*[34], defined the word "program" within the meaning of article XIII B, section 6 as a program that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state. Only one of these findings is necessary to trigger the applicability of article XIII B, section 6.[35]

The test claim statutes and regulations involve the special education and related services provided to pupils. In 1988, the California Supreme Court held that education of handicapped children is "clearly" a governmental function providing a service to the public.[36] Thus, the remaining test claim statutes and regulations qualify as a program that is subject to article XIII B, section 6 of the California Constitution.

Issue 3: Do the remaining test claim statutes and regulations impose a new program or higher level of service on local agencies within the meaning of article XIII B, section 6 of the California Constitution?

This test claim addresses the statutory and regulatory changes made to the existing Handicapped and Disabled Students program. The courts have defined a "higher level of service" in conjunction with the phrase "new program" to give the subvention requirement of article XIII B, section 6 meaning. "Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state-mandated increases in the services provided by local agencies in existing programs."[37] A statute or executive order imposes a reimbursable "higher level of service" when the statute or executive order, as compared to the legal requirements in effect immediately

[34] *County of Los Angeles, supra,* 43 Cal.3d 46, 56.

[35] *Carmel Valley Fire Protection Dist., supra*, 190 Cal.App.3d at 537.

[36] *Lucia Mar Unified School District, supra*, 44 Cal.3d at page 835.

[37] *County of Los Angeles, supra*, 43 Cal.3d at page 56; *San Diego Unified School District, supra*, 33 Cal.4th at page 874.

before the enactment of the test claim legislation, increases the actual level of governmental service provided in the existing program.[38]

As indicated above, the original statutes in Chapter 26.5 of the Government Code were added by the Legislature in 1984 and 1985. In addition, pursuant to the requirements of Government Code section 7587, the Departments of Mental Health and Education adopted the first set of emergency regulations for the program in 1986. Although the history of the regulations states that the first set of emergency regulations were repealed on June 30, 1997, by operation of Government Code section 7587, and that a new set of regulations were not operative until one year later (July 1, 1998), the Commission finds, as described below, that the initial set of emergency regulations remained operative after the June 30, 1997 deadline, until the new set of regulations became operative in 1998. Thus, for purposes of analyzing whether the remaining test claim legislation constitutes a new program or higher level of service, the initial emergency regulations, and the 1984 and 1985 statutes in Chapter 26.5 of the Government Code, constitute the existing law in effect immediately before the enactment of the test claim legislation.

Government Code section 7587 required the Departments of Mental Health and Education to adopt emergency regulations by January 1, 1986, to implement the Handicapped and Disabled Students program. The statute, as amended in 1996 (Stats. 1996, ch. 654), further states that the emergency regulations "shall not be subject to automatic repeal until the final regulations take effect on or before June 30, 1997." Section 7587 states, in relevant part, the following:

> ...For the purposes of the Administrative Procedure Act, *the adoption of the regulations shall be deemed to be an emergency and necessary for the immediate preservation of the public peace, health and safety, or general welfare*. These regulations shall not be subject to the review and approval of the Office of Administrative Law and *shall not be subject to automatic repeal until the final regulations take effect on or before June 30, 1997*, and the final regulations shall become effective immediately upon filing with the Secretary of State. Regulations adopted pursuant to this section shall be developed with the maximum feasible opportunity for public participation and comments. (Emphasis added.)

The final regulations were not adopted by the June 30, 1997 deadline. Nevertheless, the courts have interpreted the time limits contained in statutes similar to Government Code section 7587 as directory and not mandatory. When a deadline in a statute is deemed directory, then the action required by the statute remains valid.[39] The California Supreme Court describes the general rule of interpretation as follows:

> Time limits are usually deemed to be directory unless the Legislature clearly expresses a contrary intent. [Citation omitted.] "In ascertaining

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

[39] *California Correctional Peace Officers Association v. State Personnel Board* (1995) 10 Cal.4th 1133, 1145.

> probable intent, California courts have expressed a variety of tests. In some cases focus has been directed at the likely consequences of holding a particular time limitation mandatory, in an attempt to ascertain whether those consequences would defeat or promote the purpose of the enactment. . . .Other cases have suggested that a time limitation is deemed merely directory 'unless a consequence or penalty is provided for failure to do the act within the time commanded. [Citation omitted.] As *Morris v. County of Marin* [citation omitted] held, the consequence or penalty must have the effect of invalidating the government action in question if the limit is to be characterized as "mandatory."[40]

As determined by the California Supreme Court, time limits are usually deemed directory unless a contrary intent is expressly provided by the Legislature or there is a penalty for not complying with the deadline. In the present case, the plain language of Government Code section 7587 does *not* indicate that the Legislature intended the June 30, 1997 deadline to be mandatory, thus making the regulations invalid on that date. If that was the case, the state would be acting contrary to federal law by not having procedures in place for one year regarding the assessment, special education, and related services of a child suspected of needing mental health services necessary to preserve the child's right under federal law to receive a free and appropriate public education.[41] Instead, the plain language of the statute expresses the legislative intent that the regulations are "deemed to be an emergency and necessary for the immediate preservation of the public peace, health and safety, or general welfare." This language supports the conclusion that the Legislature intended the original regulations to remain valid until new regulations were adopted.

This conclusion is further supported by the actions of the affected parties after the June 30, 1997 deadline. In 1998, individual plaintiffs filed a lawsuit seeking a writ of mandate directing the Departments of Mental Health and Education to adopt final regulations in accordance with Government Code section 7587.[42] As indicated in the petition for writ of mandate, the plaintiffs asserted that the original emergency regulations were enforced and applied after the June 30, 1997 deadline, that the Office of

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[40] *Ibid.*

[41] The requirements of the federal special education law (the Individuals with Disabilities Education Act (IDEA)) have been determined to constitute a federal mandate on the states. (*Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1592.) Under federal law, states are required to provide specially designed instruction, at no cost to the parent, to meet the unique needs of a disabled pupil, including classroom instruction and related services, according to the pupil's IEP. (U.S.C., tit. 20 §§ 1400 et seq.; 34 C.F.R. § 300.343.) Related services include psychological services. (34 C.F.R. § 300.24.) Pursuant to federal regulations on the IEP process, the pupil must be evaluated in all areas of suspected disabilities by a multidisciplinary team. (34 C.F.R. § 300.502.)

[42] *McLeish and Ryan v. State Department of Education, et al.*, Sacramento Superior Court, Case No. 96CS01380.

Administrative Law did not provide notice of repeal of the regulations, and that the original emergency regulations were never deleted from the California Code of Regulations.[43] Ultimately, the parties stipulated to a judgment and writ that subsequent emergency regulations would be filed on or before July 1, 1998, to supercede the original emergency regulations, and that on or before September 24, 1999, the final regulations would be in full force and effect.[44] Thus, the parties affected by the original emergency regulations continued to act as if the regulations were still in effect.

Therefore, the Commission finds that the initial set of emergency regulations remained operative after the June 30, 1997 deadline, until the new set of regulations became operative in 1998. Thus, for purposes of analyzing whether the remaining test claim legislation constitutes a new program or higher level of service, there is no time gap between the original emergency regulations and the subsequent regulations adopted in July 1998. The initial emergency regulations, and the 1984 and 1985 statutes in Chapter 26.5 of the Government Code, constitute the valid, existing law in effect immediately before the enactment of the test claim legislation.

Accordingly, the issue before the Commission is whether the remaining test claim legislation [Gov. Code, § 7572.55, as added in 1994, and §§ 7576 and 7586.6, as amended in 1996, and the joint regulations adopted by the Departments of Mental Health and Education (Cal. Code Regs, tit. 2, §§ 60000 et seq.), which took effect as emergency regulations on July 1, 1998 (Register 98, No. 26) and became final on August 9, 1999 (Register 99, No. 33)] imposes a new program or higher level of service when compared to the legal requirements in effect immediately before the enactment of the test claim legislation, by increasing the actual level of governmental service provided in the existing program.

A. Interagency Agreements (Gov. Code, § 7586.6; Cal. Code Regs., tit. 2, § 60030)

Government Code section 7586.6

Government Code section 7586.6 was added by the test claim legislation in 1996 to address, in part, the interagency agreements between counties and local educational agencies. Government Code section 7586.6, subdivision (b), states the following:

> It is the intent of the Legislature that the designated local agencies of the State Department of Education and the State Department of Mental Health update their interagency agreements for services specified in this chapter at the earliest possible time. It is the intent of the Legislature that the state and local interagency agreements be updated at least every three years or earlier as necessary.

The plain language of Government Code section 7586.6, subdivision (b), states the "legislative intent" that the local interagency agreements be updated at least every three years or earlier as necessary.

[43] See Petition for Writ of Mandamus, paragraphs 42 and 43, *McLeish, supra.*

[44] See Writ of Mandamus, *McLeish, supra.*

The Commission finds that Government Code section 7586.6 does not impose a new program or higher level of service. Even if legislative intent were determined to constitute a mandated activity, updating or renewing the interagency agreements every three years is not new and the level of service required of counties is not increased. Under prior law, former section 60030, subdivision (a)(2), of the regulations adopted by the Departments of Mental Health and Education required the local mental health director[45] and the county superintendent of schools to renew, and revise if necessary, the interagency agreements every three years or at any time the parties determine a revision is necessary.

Accordingly, the Commission finds that Government Code section 7586.6 does not impose a new program or higher level of service.

California Code of Regulations, title 2, section 60030

Section 60030 of the joint regulations governs the interagency agreements between counties and local educational agencies. Under prior law, the original emergency regulations required the development of an interagency agreement that included "a delineation of the process and procedure" for the following nine (9) items:

- Interagency referrals of pupils, which minimize time line delays. This may include written parental consent on the receiving agency's forms.
- Timely exchange of pupil information in accordance with applicable procedures ensuring confidentiality.
- Participation of mental health professionals, including those contracted to provide services, at IEP team meetings pursuant to Government Code sections 7572 and 7576.
- Developing or amending the mental health related service goals and objectives, and the frequency and duration of such services indicated on the pupil's IEP.
- Transportation of individuals with exceptional needs to and from the mental health service site when such service is not provided at the school.
- Provision by the school of an assigned, appropriate space for delivery of mental health services or a combination of education and mental health services to be provided at the school.
- Continuation of mental health services during periods of school vacation when required by the IEP.
- Identification of existing public and state-certified nonpublic educational programs, treatment modalities, and location of appropriate residential placements, which may be used for placement by the expanded IEP program team.

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[45] Local mental health director is defined as "the officer appointed by the governing body of a county to manage a community mental health service." (Cal. Code Regs., tit. 2, § 60020, subd. (e).)

- Out-of-home placement of seriously emotionally disturbed pupils in accordance with the educational and treatment goals on the IEP.[46]

In addition, former section 60100, subdivision (a), of the regulations required the local mental health program and the SELPA liaison to define the process and procedures for coordinating services to promote alternatives to out-of-home care of seriously emotionally disturbed pupils. These requirements remain the law.

Section 60030 of the regulations, as replaced by the test claim legislation in 1998, now requires that the interagency agreement include a "delineation of the procedures" for seventeen (17) items. In this regard, section 60030, subdivision (c), requires that the following additional eight (8) procedures be identified in the interagency agreement:

- Resolving interagency disputes at the local level, including procedures for the continued provision of appropriate services during the resolution of any interagency dispute, pursuant to Government Code section 7575, subdivision (f). For purposes of this subdivision only, the term "appropriate" means any service identified in the pupil's IEP, or any service the pupil actually was receiving at the time of the interagency dispute. (Cal. Code Regs, tit. 2, § 60030, subd. (c)(2).)
- A host county[47] to notify the community mental health service of the county of origin within two (2) working days when a pupil with a disability is placed within the host county by courts, regional centers or other agencies for other than educational reasons. (Cal. Code Regs, tit. 2, § 60030, subd. (c)(4).)
- Development of a mental health assessment plan and its implementation. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(5).)
- At least ten (10) working days prior notice to the community mental health service of all IEP team meetings, including annual IEP reviews, when the participation of its staff is required. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(7).)
- The provision of mental health services as soon as possible following the development of the IEP pursuant to section 300.342 of Title 34 of the Code of Federal Regulations. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(9).)
- The provision of a system for monitoring contracts with nonpublic, nonsectarian schools to ensure that services on the IEP are provided. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(14).)

[46] Former California Code of Regulations, title 2, section 60030, subdivision (b).

[47] A "host county" is defined to mean the county where the pupil with a disability is living when the pupil is not living in the county of origin. (Cal. Code Regs., tit. 2, § 60020, subd. (d).) The "county of origin" is defined as the county in which the parent of the pupil with disability resides. If the pupil is a ward or dependent of the court, an adoptee receiving adoption assistance, or a conservatee, the county of origin is the county where this status currently exists. (Cal. Code Regs., tit. 2, § 60020, subd. (b).)

- The development of a resource list composed of qualified mental health professionals who conduct mental health assessments and provide mental health services. The community mental health service shall provide the LEA with a copy of this list and monitor these contracts to assure that services as specified on the IEP are provided. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(15).)
- Mutual staff development for education and mental health staff pursuant to Government Code section 7586.6, subdivision (a). (Cal. Code Regs., tit. 2, § 60030, subd. (c)(17).)

According to the final statement of reasons prepared by the Departments of Education and Mental Health for the regulations, the section on interagency agreements was "expanded because experience in the field has shown that many local interagency agreements are not effective." The final statement of reasons further states that the regulation "requires stronger interagency agreements in order to improve local agencies' ability to adhere to the timelines required by law."[48]

Since the interagency agreement must now contain additional information, the Commission finds that section 60030 of the regulations imposes a new program or higher level of service for the one-time activity of revising the interagency agreement with each local educational agency to include the following eight procedures:

- Resolving interagency disputes at the local level, including procedures for the continued provision of appropriate services during the resolution of any interagency dispute, pursuant to Government Code section 7575, subdivision (f). For purposes of this subdivision only, the term "appropriate" means any service identified in the pupil's IEP, or any service the pupil actually was receiving at the time of the interagency dispute. (Cal. Code Regs, tit. 2, § 60030, subd. (c)(2).)
- A host county to notify the community mental health service of the county of origin within two (2) working days when a pupil with a disability is placed within the host county by courts, regional centers or other agencies for other than educational reasons. (Cal. Code Regs, tit. 2, § 60030, subd. (c)(4).)
- Development of a mental health assessment plan and its implementation. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(5).)
- At least ten (10) working days prior notice to the community mental health service of all IEP team meetings, including annual IEP reviews, when the participation of its staff is required. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(7).)
- The provision of mental health services as soon as possible following the development of the IEP pursuant to section 300.342 of Title 34 of the Code of Federal Regulations. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(9).)
- The provision of a system for monitoring contracts with nonpublic, nonsectarian schools to ensure that services on the IEP are provided. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(14).)

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[48] Final Statement of Reasons, pages 10-11.

- The development of a resource list composed of qualified mental health professionals who conduct mental health assessments and provide mental health services. The community mental health service shall provide the LEA with a copy of this list and monitor these contracts to assure that services as specified on the IEP are provided. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(15).)
- Mutual staff development for education and mental health staff pursuant to Government Code section 7586.6, subdivision (a). (Cal. Code Regs., tit. 2, § 60030, subd. (c)(17).)[49]

B. Referral and Mental Health Assessment of a Pupil (Gov. Code, § 7576; Cal. Code Regs., tit. 2, §§ 60040, 60045)

Government Code section 7576, as amended by the 1996 test claim statute (Stats. 1996, ch. 654), and sections 60040 and 60045 of the regulations govern the referral of a pupil suspected of needing mental health services to the county for an assessment. Under prior law, Government Code section 7572 and former section 60040 of the regulations required counties to perform the following referral and assessment activities:

- Review the following educational information of a pupil referred to the county by a local education agency for an assessment: a copy of the assessment reports completed in accordance with Education Code section 56327, current and relevant behavior observations of the pupil in a variety of educational and natural settings, a report prepared by personnel that provided "specialized" counseling and guidance services to the pupil and, when appropriate, an explanation why such counseling and guidance will not meet the needs of the pupil.
- If necessary, observe the pupil in the school environment to determine if mental health assessments are needed.
- If mental health assessments are deemed necessary by the county, develop a mental health assessment plan and obtain the parent's written informed consent for the assessment.
- Assess the pupil within the time required by Education Code section 56344.

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[49] The Counties of Los Angeles and Stanislaus, in comments to the draft staff analysis, argue that revising the interagency agreement in accordance with section 60030 of the regulations is not a one-time activity. The County of Los Angeles argues "the negotiation, development, and periodic revision and review of Interagency Agreements require a variety of time consuming activities over an extended period of time." The County of Stanislaus contends that the interagency agreement is a living, breathing document. However, as indicated in the analysis, periodic renewal and revision of the agreements, which are ongoing activities, are not new. Counties were required to perform these activities every three years under the prior regulations. (Former Cal. Code Regs., tit. 2, § 60030.) Reimbursement for the ongoing activities of renewing the interagency agreements every three years and revising if necessary are addressed in the reconsideration of the original *Handicapped and Disabled Students* program (04-RL-4282-10).

- If a mental health assessment cannot be completed within the time limits, provide notice to the IEP team administrator or designee no later than 15 days before the scheduled IEP meeting.
- Prepare and provide to the IEP team, and the parent or guardian, a written assessment report in accordance with Education Code section 56327. The report shall include the following information: whether the pupil may need special education and related services; the basis for making the determination; the relevant behavior noted during the observation of the pupil in the appropriate setting; the relationship of that behavior to the pupil's academic and social functioning; the educationally relevant health and development, and medical findings, if any; for pupils with learning disabilities, whether there is such a discrepancy between achievement and ability that it cannot be corrected without special education and related services; a determination concerning the effects of environmental, cultural, or economic disadvantage, where appropriate; and the need for specialized services, materials, equipment for pupils with low incidence disabilities.
- Review and discuss the county recommendation with the parent and the appropriate members of the IEP team before the IEP team meeting.
- In cases where the local education agency refers a pupil to the county for an assessment, attend the IEP meeting if requested by the parent.
- Review independent assessments of a pupil obtained by the parent.
- Following review of the independent assessment, discuss the recommendation with the parent and with the IEP team before the meeting of the IEP team.
- In cases where the parent has obtained an independent assessment, attend the IEP team meeting if requested.

These activities are still required by law. However, the test claim legislation requires counties to perform additional activities. For example, Government Code section 7576, subdivision (b)(1), mandates a new program or higher level of service by requiring the county and the local educational agency to "work collaboratively to ensure that assessments performed *prior to referral* are as useful as possible to the community mental health service [i.e., the county] in determining the need for mental health services and the level of services needed." (Emphasis added.)

In addition, Government Code section 7576, subdivision (g), and section 60040, subdivision (g), mandate a new program or higher level of service by requiring a county that receives a referral for a pupil with a different county of origin, to forward the referral within one working day to the county of origin. The county of origin shall then have the programmatic and fiscal responsibility for providing or arranging for the provision of necessary services for the pupil.

Furthermore, section 60045 of the regulations addresses the assessment of a pupil and imposes new, required activities on counties. Under prior law, counties were required to determine if a mental health assessment of a pupil is necessary. (Former Cal. Code Regs., tit. 2, § 60040, subd. (d).) Section 60045 retains that requirement, and also

requires that if the county determines that a mental health assessment is not necessary, the county shall document the reasons and notify the parents and local educational agency of the county determination within one working day. (Cal. Code Regs., tit. 2, § 60045, subd. (a)(1).)

Section 60045, subdivision (a)(2), now requires that if the county determines that the referral is incomplete, the county shall document the reasons, notify the local educational agency within one working day, and return the referral.

Section 60045, subdivision (b), provides that "if a mental health assessment is determined to be necessary," the community mental health service shall notify the local educational agency, develop a mental health assessment plan, and provide the plan and a consent form to the parent." Under prior law, counties were required to develop a mental health assessment plan and provide a consent form for the assessment to the parent. (Former Cal. Code Regs., tit. 2, § 60040, subd. (d).) However, the activities to notify the local educational agency when an assessment is determined necessary, and to provide the assessment plan to the parent are new activities.

Although section 60045, subdivisions (a) and (b), includes language that implies that the activities are within the discretion of the county (e.g., the activity is required "if no mental health assessment is determined necessary"), the Commission finds that these activities are mandated by the state when necessary to provide the pupil with a free and appropriate education under federal law. Under the rules of statutory construction, section 60045, subdivisions (a) and (b), must be interpreted in the context of the entire statutory scheme so that the statutory scheme may be harmonized and have effect.[50] In addition, it is presumed that the administrative agency, like the Departments of Mental Health and Education, did not adopt a regulation that alters the terms of a legislative enactment.[51] Federal law, through the IDEA, requires the state to *identify*, locate, and evaluate *all* children with disabilities, including children attending private schools, who are in need of special education and related services.[52] The state is also required by federal law to conduct a full and individual initial evaluation to determine whether a child has a qualifying disability, and the educational needs of the child.[53] In addition, Government Code section 7572, subdivision (a), requires that a child shall be assessed in all areas related to the suspected handicap by those qualified to make a determination of the child's need for the service. In cases where the pupil is suspected of needing mental health services, the state has delegated to the counties the activity of assessing the need for service. Accordingly, the Commission finds that the section 60045, subdivisions (a) and (b), mandate the following new activities that constitute a new program or higher level of service:

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[50] *Select Base Materials v. Board of Equalization* (1959) 51 Cal.2d 640, 645; *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 781-782.

[51] *Wallace v. State Personnel Board* (1959) 168 Cal.App.2d 543, 547.

[52] 20 United States Code section 1412, subdivision (a)(3).

[53] 20 United States Code section 1414, subdivision (a).

- If the county determines that a mental health assessment is not necessary, the county shall document the reasons and notify the parents and local educational agency of the county determination within one working day.
- If the county determines that the referral is incomplete, the county shall document the reasons, notify the local educational agency within one working day, and return the referral.
- Notify the local educational agency when an assessment is determined necessary.
- Provide the assessment plan to the parent.

Furthermore, section 60045, subdivision (c), requires counties to perform a new activity to "report back to the referring [local educational agency] or IEP team within 30 days from the date of the receipt of the referral . . . if no parental consent for a mental health assessment has been obtained." The Commission finds this activity constitutes a new program or higher level of service.

The Commission further finds that section 60045, subdivision (d), mandates a new program or higher level of service on counties by requiring counties to notify the local educational agency within one working day after receipt of the parent's written consent for the mental health assessment to establish the date of the IEP meeting. This activity was not required under prior law.

The Commission also finds that section 60045, subdivision (f)(1), mandates a new program or higher level of service on counties by requiring counties to provide the parent with written notification that the parent may require the assessor to attend the IEP meeting to discuss the recommendation when the parent disagrees with the assessor's mental health service recommendation. As enacted before the test claim legislation, Government Code section 7572, subdivision (d)(1), requires that the parent be notified in writing of this parental right. But Government Code section 7572, subdivision (d)(1), does not specify the agency that is required to provide the written notice. Thus, section 60045, subdivision (f)(1), delegates the responsibility to the county.

Finally, section 60045, subdivision (h), mandates a new program or higher level of service by requiring the county of origin to prepare statutorily required IEP reassessments. Pursuant to federal law, yearly reassessments are required to determine the needs of the pupil.[54]

C. Transfers and Interim Placements (Cal. Code Regs., tit. 2, § 60055)

The Departments of Education and Mental Health adopted a new regulation in section 60055 to address the interim placement of a pupil receiving mental health services pursuant to an existing IEP following the pupil's transfer to a new school district. Section 60055 states the following:

> (a) Whenever a pupil who has been receiving mental health services, pursuant to an IEP, transfers into a school district from a school district in another county, the responsible LEA [local educational

[54] 34 Code of Federal Regulations, section 300.343.

agency] administrator or IEP team shall refer the pupil to the local community mental health service [county] to determine appropriate mental health services.

(b) The local mental health director or designee shall ensure that the pupil is provided interim mental health services, as specified in the existing IEP, pursuant to Section 56325 of the Education Code, for a period not to exceed thirty (30) days, unless the parent agrees otherwise.

(c) An IEP team, which shall include an authorized representative of the responsible community mental health service, shall be convened by the LEA to review the interim services and make a determination of services within thirty (30) days of the pupil's transfer.

According to the final statement of reasons, section 60055 "conforms with and implements Education Code section 56325 which ensures that special education pupils continue to receive services after they transfer into a new school district or SELPA. This section is intended to address implementation problems in these situations reported by the field in which eligible pupils were denied services due to an inter-county transfer."[55]

The Commission finds that section 60055 mandates a new program or higher level of service on counties, following a pupil's transfer to a new school district, by requiring them to perform the following activities:

- Provide interim mental health services, as specified in the existing IEP, for thirty days, unless the parent agrees otherwise.
- Participate as a member of the IEP team of a transfer pupil to review the interim services and make a determination of services.

D. Participate as a Member of the IEP Team When Residential Placement of a Pupil is Recommended (Gov. Code, § 7572.55; Cal. Code Regs., tit. 2, § 60100)

Under existing law, when a child is assessed as seriously emotionally disturbed and any member of the IEP team recommends residential placement, the IEP team shall be expanded to include a representative of the county. The expanded IEP team is required to review the assessment and determine whether: (1) the child's needs can reasonably be met through any combination of nonresidential services, preventing the need for out-of-home care; (2) residential care is necessary for the child to benefit from educational services; and (3) residential services are available, which address the needs identified in the assessment and which will ameliorate the conditions leading to the seriously emotionally disturbed designation. The expanded IEP team is also required to consider all possible alternatives to out-of-home placement. (Gov. Code, § 7572.5, former Cal. Code Regs, tit. 2, § 60100.) Finally, the expanded IEP team is required to document the

[55] Final Statement of Reasons, page 20.

pupil's educational and mental health treatment needs that support the recommendation for the placement. (Former Cal. Code Regs, tit. 2, § 60100, subd. (e).)

These activities remain the law and counties are currently eligible for reimbursement for their participation on the expanded IEP team.[56] However, the test claim legislation amended the law with respect to the activities performed by the expanded IEP team.

In 1994, the Legislature added section 7572.55 to the Government Code (Stats. 1994, ch. 1128). Government Code section 7572.55, subdivision (c), requires the expanded IEP team, when a recommendation is made that a child be placed in an *out-of-state* residential facility, to develop a plan for using less restrictive alternatives and in-state alternatives as soon as they become available, unless it is in the best educational interest of the child to remain in the out-of-state school.

In addition, section 60100 of the regulations, as adopted in 1998, requires the expanded IEP team to perform the following activities:

- The expanded IEP team shall document the alternatives to residential placement that were considered and the reasons why they were rejected. (Cal. Code Regs., tit. 2, § 60100, subd. (c).)
- The expanded IEP team shall ensure that placement is in accordance with admission criteria of the facility. (Cal. Code Regs., tit. 2, § 60100, subd. (j).)

The Department of Finance contends that these activities performed by the expanded IEP team do not constitute a new program or higher level of service. The Department states the following:

> It is our interpretation that there is no meaningful difference between the requirements under the prior regulations and the new regulations with respect to identifying, analyzing, and documenting all alternatives to residential placement. The existing activities of considering "all possible alternatives to out-of-home placement" and documenting "the pupil's educational and mental health treatment needs that support the recommendation for the placement" would already include the development of a plan for using less restrictive and in-state alternatives and documentation of the reasons why these alternatives were rejected. It is not clear that the new requirements cited above impose a new or higher level of service.[57]

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[56] For this reason, the Commission agrees with a comments filed by the Counties of Los Angeles and Stanislaus on the draft staff analysis that the county's participation on the expanded IEP team occurs when there is a recommendation for out-of-home placement, regardless of whether the recommendation is for a facility in the state or a facility out of the state. This test claim, however, addresses only the new activities required by the Government Code sections and regulations for which the Commission has jurisdiction (i.e., Gov. Code, § 7572.55, as added by Stats. 1994, ch. 1128, and the 1998 regulations.)

[57] Department of Finance comments to the draft staff analysis.

The Commission disagrees. First, the activity required by Government Code section 7572.55, subdivision (c), to develop a plan for using less restrictive alternatives and in-state alternatives when a recommendation is made that a child be placed in an out-of-state facility, is a new requirement. Government Code section 7572.55 was *added* by the test claim legislation. Under prior law, the expanded IEP team was only required to "consider" all possible alternatives to residential placement. The express language of prior law did not require the expanded IEP team to develop a plan for using less restrictive alternatives specifically for out-of-state placements. Thus, the Commission finds that Government Code 7572.55, subdivision (c), imposes a new program or higher level of service with regard to the counties' participation on the expanded IEP team.

The Commission further finds that the two activities mandated by section 60100 are new activities, not required under prior law. Section 60100, subdivision (c), requires the expanded IEP team to document the alternatives to residential placement that were considered and the reasons why they were rejected. Under prior law, the expanded IEP team was required to "consider" all possible alternatives to residential placement. Prior law also required the expanded IEP team to document the pupil's educational and mental health treatment needs that support the final recommendation for the placement. But prior law did not require the expanded IEP team to document the alternatives to residential placement that were considered by the team and the reasons why the alternatives were rejected. Thus, the Commission finds that section 60100, subdivision (c), imposes a new program or higher level of service.

Moreover, the Commission finds that the activity required by section 60100, subdivision (j), imposes a new program or higher level of service by requiring, for the first time, that the expanded IEP team ensure that placement is in accordance with admission criteria of the facility.

Finally, when the expanded IEP team determines that it is necessary to place a pupil who is seriously emotionally disturbed in residential care, counties are now required to ensure that: (1) the mental health services are specified in the IEP in accordance with federal law; and (2) the mental health services are provided by qualified mental health professionals.[58] (Cal. Code Regs., tit. 2, § 60100, subd. (i).) Counties were not required to perform these activities under prior law. Therefore, the Commission finds that the activities required by section 60100, subdivision (i), constitute a new program or higher level of service.

E. Case Management Duties for Pupils Placed in Residential Care (Cal. Code Regs., tit. 2, §§ 60100, 60110)

Under existing law, Government Code section 7572.5, subdivision (c)(1), requires the county to act as the lead case manager if the review of the expanded IEP team calls for residential placement of the seriously emotionally disturbed pupil. The statute further

[58] Section 60020 defines "qualified mental health professional" to include the following licensed practitioners of the healing arts: a psychiatrist; psychologist; clinical social worker; marriage, family and child counselor; registered nurse, mental health rehabilitation specialist, and others who have been waivered under Welfare and Institutions Code section 5751.2.

requires that "the mental health department shall retain financial responsibility for provision of case management services." Former section 60110, subdivision (a), required the following case management duties:

- Convene parents and representatives of public and private agencies in accordance with section 60100, subdivision (f), in order to identify the appropriate residential facility.
- Complete the local mental health program payment authorization in order to initiate out of home care payments.
- Coordinate the completion of the necessary County Welfare Department, local mental health program, and responsible local education agency financial paperwork or contracts.
- Develop the plan for and assist the family and pupil in the pupil's social and emotional transition from home to the residential facility and the subsequent return to the home.
- Facilitate the enrollment of the pupil in the residential facility.
- Conduct quarterly face-to-face contacts with the pupil at the residential facility to monitor the level of care and supervision and the implementation of the treatment services and the IEP.
- Notify the parent or legal guardian and the local education agency administrator or designee when there is a discrepancy in the level of care, supervision, provision of treatment services, and the requirements of the IEP.
- Coordinate the six-month expanded IEP team meeting with the local education agency administrator or designee.

Sections 60100 and 60110 of the regulations, as adopted in 1998, require county case managers to perform the following new activities not required under prior law:

- Coordinate the residential placement plan of a pupil with a disability who is seriously emotionally disturbed as soon as possible after the decision has been made to place the pupil in residential placement. The residential placement plan shall include provisions, as determined in the pupil's IEP, for the care, supervision, mental health treatment, psychotropic medication monitoring, if required, and education of the pupil. (Cal. Code Regs., tit, 2, § 60110, subd, (b)(1).)[59]
- When the IEP team determines that it is necessary to place a pupil with a disability who is seriously emotionally disturbed in a community treatment facility, the lead case manager shall ensure that placement is in accordance with

[59] Although the regulation requires the county case manager to plan for the educational needs of a pupil placed in a residential facility, the local educational agency is ultimately responsible for "providing or arranging for the special education and non-mental health related services needed by the pupil. (Cal. Code Regs., tit. 2, § 60110, subd. (b)(2); Final Statement of Reasons, p. 24.)

admission, continuing stay, and discharge criteria of the community treatment facility. (Cal. Code Regs., tit. 2, § 60110, subd. (b)(3).)[60]

- Identify, in consultation with the IEP team's administrative designee, a mutually satisfactory placement that is acceptable to the parent and addresses the pupil's educational and mental health needs in a manner that is cost-effective for both public agencies, subject to the requirements of state and federal special education law, including the requirement that the placement be appropriate and in the least restrictive environment. (Cal. Code Regs, tit. 2, §§ 60100, subd. (e), 60110, subd. (c)(2).) Under prior law, the expanded IEP team identified the placement. (Former Cal. Code Regs., tit. 2, § 60100, subd. (f).)
- Document the determination that no nearby placement alternative that is able to implement the IEP can be identified and seek an appropriate placement that is as close to the parents' home as possible. (Cal. Code Regs., tit. 2, § 60100, subd. (f).)
- Notify the local educational agency that the placement has been arranged and coordinate the transportation of the pupil to the facility if needed. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(7).)
- Facilitate placement authorization from the county's interagency placement committee pursuant to Welfare and Institutions Code section 4094.5, subdivision (e)(1), by presenting the case of a pupil with a disability who is seriously emotionally disturbed prior to placement in a community treatment facility. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(11).)[61]

The Commission finds that the new activities bulleted above constitute a new program or higher level of service.

In addition, the language for some of the case management activities required under existing law was amended by section 60110 of the test claim legislation. Thus, the issue is whether the amended language mandates an increase in the level of service provided by the county case manager.

For example, existing law required counties to "conven[e] parents and representatives of public and private agencies in accordance with subsection (f) of Section 60100 in order to identify the appropriate residential placement." (Former Cal. Code Regs., tit. 2, § 60110,

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[60] A "community treatment facility" is defined in section 60025 of the regulations to mean "any residential facility that provides mental health treatment services to children in a group setting which has the capacity to provide secure confinement. The facility's program components shall be subject to program standards developed and enforced by the State Department of Mental Health pursuant to Section 4094 of the Welfare and Institutions Code."

[61] Welfare and Institutions Code section 4094.5, subdivision (e)(1), states in relevant part that "[t]he child shall, prior to admission, have been determined to be in need of the level of care provided by a community treatment facility, by a county interagency placement committee ..."

subd. (c)(1).) Section 60110, subdivision (c)(1), as replaced by the test claim legislation, amended the regulation, in relevant part, by requiring the county case manager to include "educational staff" in the meeting. The Commission finds that the requirement to include "educational staff" in the meeting does not increase the level of service required by county case managers. The old regulation required county case managers to convene the meeting with "representatives of public agencies." For purposes of this program, "representatives of public agencies" includes educational staff.[62] Thus, section 60110, subdivision (c)(1), does not impose a new program or higher level of service.

Furthermore, former section 60110, subdivision (c)(8), required case managers to conduct quarterly face-to-face contacts with the pupil at the residential facility to monitor the level of care and supervision and the implementation of the treatment services as required by the IEP. That requirement remains the law. However, section 60110, subdivision (c)(8), as replaced by the test claim legislation, requires the case manager to also evaluate "the continuing stay criteria" of a pupil placed in a community treatment facility on a quarterly basis:

> In addition, for children placed in a community treatment facility, an evaluation shall be made within every 90 days of the residential placement of the pupil to determine if the pupil meets the continuing stay criteria as defined in Welfare and Institutions Code section 4094 and implementing mental health regulations.

Pursuant to Department of Mental Health regulations, the continuing stay criteria require the case manager and the community treatment facility psychiatrist to evaluate and document the continued placement of the pupil in the community treatment facility.[63]

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[62] See section 60000 of the regulations, which provides that "this chapter applies to the State Departments of Mental Health, Social Services, and their designated local agencies, and the California Department of Education, school districts, county offices, and special education local plan areas."

[63] California Code of Regulations, title 9, section 1924, defines the "continuing stay criteria" for this program as follows:

> (b) Individuals who are special education pupils identified in paragraph (4) of subdivision (c) of Section 56026 of the Education Code and who are placed in a CTF [community treatment facility] prior to age eighteen (18) pursuant to Chapter 26.5 of the Government Code may continue to receive services through age 21 provided the following conditions are met:
>
> (1) They continue to satisfy the requirements of subsection (a) [documentation by the CTF psychiatrist and the case manager supporting the continued placement of the pupil in the community treatment facility];
>
> (2) They have not graduated from high school;
>
> (3) They sign a consent for treatment and a release of information for CTF staff to communicate with education and county mental health

The Commission finds that the evaluation every 90 days of the continuing stay criteria of a pupil placed in a community treatment facility, as required by section 60110, subdivision (c)(8), constitutes a new program or higher level of service.

Finally, under prior law, the expanded IEP team was required to review the case progress, the continuing need for out-of-home placement, the extent of compliance with the IEP, and progress toward alleviating the need for out-of-home care "at least every six months." (Gov. Code, § 7572.5, subd. (c)(2).) In addition, former section 60110, subdivision (c)(10), required case managers to "coordinate the six-month expanded IEP team meeting with the local educational agency administrator or designee."

Section 60110, subdivision (c)(10), as adopted by the test claim legislation in 1998, replaced the requirement imposed on the case manager to "coordinate" the expanded six-month IEP team meeting, with the requirement to "schedule and attend" the six-month expanded IEP team meeting. Section 60110, subdivision (c)(10), states the following:

> Schedule and attend the next expanded IEP team meeting with the expanded IEP team's administrative designee within six months of the residential placement of a pupil with a disability who is seriously emotionally disturbed and every six months thereafter as the pupil remains in residential placement.

The Commission finds that section 60110, subdivision (c)(10), increases the level of service required of counties. Under the prior requirement, case managers were required to coordinate the expanded IEP team meeting every six months. Case managers are now required to schedule the meeting. The activities of "coordinating" and "scheduling" are different. To "coordinate" means to "to place in the same order, class, or rank; to harmonize in a common effort; to work together harmoniously." To "schedule" means "to plan or appoint for a certain date or time." [64] In addition, although a representative from the county is a member of the IEP team, there was no requirement that the case manager, who may be a different person than the IEP team member, attend the IEP team meeting.[65] Therefore, the Commission finds that section 60110, subdivision (c)(10), of the regulations constitutes a new program or higher level of service for the activity of scheduling and attending the six-month expanded IEP team meetings.

> professionals after staff have informed them of their rights as an adult;
>
> (4) A CTF obtains an exception from the California Department of Social Services to allow for the continued treatment of the young adult in a CTF… .

[64] Webster's II New College Dictionary (1999) pages 248, 987.

[65] Existing law authorizes the county to delegate the case management responsibilities to the county welfare department. (Gov. Code, § 7572.5, subd. (c)(1).)

F. Authorize Payments to Out-Of-Home Residential Care Providers (Cal. Code Regs., tit. 2, § 60200, subd. (e))

Pursuant to existing law, counties are financially responsible for 60 percent of the total residential and non-educational costs of a seriously emotionally disturbed pupil placed in an out-of-home residential facility. The residential and non-educational costs include the costs for food, clothing, shelter, daily supervision, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation. (Gov. Code, § 7581, former Cal. Code Regs., tit. 2, § 60200, subd. (e), Welf. & Inst. Code, § 15200, subd. (c)(1).) The counties' financial responsibility for the residential and non-educational costs of pupils placed out of the home remain the law today.

In addition, former section 60200 of the regulations required the county welfare department to issue the payments to providers of out-of-home facilities in accordance with Welfare and Institutions Code section 18351, upon receipt of authorization documents from the State Department of Mental Health *or* a designated county mental health agency. The authorization documents are required to include information sufficient to demonstrate that the child meets all eligibility criteria established in the regulations for this program. (Welf. & Inst. Code, § 18351.)

The county welfare department is still required to issue payments to the residential facilities under section 60200, subdivision (e), of the regulations, as replaced in 1998. However, the regulation now requires the county community mental health service to authorize the payment to the residential facility before the county welfare agency can issue the payment. Subdivision (e) states, "[t]he community mental health service shall be responsible for authorizing payment to the facilities listed in Section 60025 based upon rates established by the Department of Social Services in accordance with Sections 18350 through 18356 of the Welfare and Institutions Code."

The Department of Finance contends that "[a]ccording to the Department of Social Services, there is no meaningful difference between the requirements under the prior regulations and the new regulations with respect to authorizing payments to the out-of-home residential facilities." The Department further states that "the child's mental health caseworker is already required to participate in the development of the IEP, and this IEP could constitute the authorizing paperwork that is presented to the county child welfare department to initiate payment for residential treatment." Thus, the Department argues that "[i]t is not clear that the new requirement . . . would impose a new or higher level of service."[66]

The Commission disagrees with the Department's interpretation of section 60200 of the regulations. The same rules of construction applicable to statutes govern the interpretation of administrative regulations. Thus, the Commission, like a court, should attempt to ascertain the intent of the regulating agency.[67]

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[66] Department of Finance comments to the draft staff analysis.

[67] *Goleta Valley Community Hospital v. Department of Health Services* (1984) 149 Cal.App.3d 1124, 1129.

As indicated above, prior law specified that either the Department of Mental Health or a designated county mental health agency provided the authorization documents before payment to the residential facility could be issued. According to the final statement of reasons prepared by the Departments of Mental Health and Education for the 1998 regulations, section 60200, subdivision (e), now assigns the responsibility of authorizing payments to the residential facilities solely to the county community mental health service. The final statement of reasons also states that it is the responsibility of the county to determine that the residential placement meets all of the criteria established in Welfare and Institutions Code sections 18350 through 18356. The final statement of reasons for this regulation expressly provides the following:

> Subsection (e) assigns the responsibility for authorizing payment for board and care to the community mental health service. It is the responsibility of the community mental health service to determine that the residential placement meets all of the criteria established in Sections 18350 through 18356 of the Welfare and Institutions Code. These sections of code also refer to Section 11460 of the Welfare and Institutions Code which state that rates will be established by CDSS, and outline certain requirements in order for facilities to be eligible for payment."[68]

Thus, compliance with section 60200, subdivision (e), of the regulations requires the counties to determine that the residential placement meets all of the criteria established in the Welfare and Institutions Code before authorizing payment. The final statement of reasons suggests that the requirement to authorize payment to residential facilities may not be satisfied by simply providing the IEP to the county welfare department.

The Department of Social Services has not provided the Commission with any comments on this test claim. In addition, the argument asserted by the Department of Finance is not supported with documentary evidence or declarations signed under the penalty of perjury, as required by the Commission's regulations. (Cal. Code Regs., tit. 2, § 1183.02, subd. (c).)

Accordingly, the Commission finds that authorizing payments to the residential facilities in accordance with section 60200, subdivision (e), constitutes a new program or higher level of service.

G. Provide Psychotherapy or Other Mental Health Treatment Services (Cal. Code Regs, tit. 2, §§ 60020, subd. (i), 60050, subd. (b), 60200, subd. (c))

Pursuant to existing law, counties are required to provide psychotherapy or other mental health treatment services to a pupil, either directly or by contract, when required by the pupil's IEP. (Gov. Code, § 7576; former Cal. Code Regs., tit. 2, § 60200, subd. (b).) Under the former regulations, "psychotherapy and other mental health services" were defined to include the day services and outpatient services identified in sections 542 and 543 of the Department of Mental Health regulations. (Former Cal. Code Regs., tit. 2, § 60020, subd. (a).)

[68] Final Statement of Reasons, page 26.

The regulations adopted by the Departments of Education and Mental Health in 1998 modified these activities. For example, section 60200, subdivision (c)(1), adds new requirements when a pupil receives mental health services in a host county. Under such circumstances, the county of origin (the county where the parent resides, the pupil receives adoption assistance, or where the pupil is a ward of the court, for example) is financially responsible for the mental health services, even though the services are provided in a host county. (Cal. Code Regs., tit. 2, § 60200, subd. (c).) Section 60200, subdivision (c)(1), states the following:

> The host county shall be responsible for making its provider network available and shall provide the county of origin a list of appropriate providers used by the host county's managed care plan who are currently available to take new referrals. Counties of origin shall negotiate with host counties to obtain access to limited resources, such as intensive day treatment and day rehabilitation.

Thus, the Commission finds that section 60200, subdivision (c)(1), of the regulations mandates a new program or higher level of service for the following new activities:

- The host county shall make its provider network available and provide the county of origin a list of appropriate providers used by the host county's managed care plan who are currently available to take new referrals.
- The county of origin shall negotiate with the host county to obtain access to limited resources, such as intensive day treatment and day rehabilitation.

In addition, section 60020, subdivision (i), changed the definition of mental health services. As indicated above, the former regulations defined "psychotherapy and other mental health services" to include the day services and outpatient services identified in sections 542 and 543 of the Department of Mental Health regulations. (Former Cal. Code Regs., tit. 2, § 60020, subd. (a).) Under the prior regulations, these services included the following: day care intensive services, day care habilitative (counseling and rehabilitative) services, vocational services, socialization services, collateral services, assessment, individual therapy, group therapy, medication (including the prescribing, administration, or dispensing of medications, and the evaluation of side effects and results of the medication), and crisis intervention.

Section 60020, subdivision (i), of the regulations, now defines "mental health services" as follows:

> "Mental health services" means mental health assessment and the following services when delineated on an IEP in accordance with Section 7572(d) of the Government Code: psychotherapy as defined in Section 2903 of the Business and Professions Code provided to the pupil individually or in a group, collateral services, medication monitoring, intensive day treatment, day rehabilitation, and case management. These services shall be provided directly or by contract at the discretion of the community mental health service of the county of origin.

Section 60020 of the test claim regulations continues to include mental health assessments, collateral services, intensive day treatment, and day rehabilitation within the definition of "mental health services." These services are not new.[69]

However, the activities of crisis intervention, vocational services, and socialization services were deleted by the test claim regulations. The final statement of reasons, in responding to a comment that these activities remain in the definition of "mental health services," states the following:

> The provision of vocational services is assigned to the State Department of Rehabilitation by Government Code section 7577.
>
> Crisis service provision is delegated to be "from other public programs or private providers, as appropriate" by these proposed regulations in Section 60040(e) because crisis services are a medical as opposed to educational service. They are, therefore, excluded under both the Tatro and Clovis decisions. These precedents apply because "medical" specialists must deliver the services. A mental health crisis team involves specialized professionals. Because of the cost of these professional services, providing these services would be a financial burden that neither the schools nor the local mental health services are intended to address in this program.
>
> The hospital costs of crisis service provision are explicitly excluded from this program in the Clovis decision for the same reasons.
>
> Additionally, the IEP process is one that responds slowly due to the problems inherent in convening the team. It is, therefore, a poor avenue for the provision of crisis services. While the need for crisis services can be a predictable requirement over time, the particular medical requirements of the service are better delivered through the usual local mechanisms established specifically for this purpose.[70]

Thus, counties are not eligible for reimbursement for providing crisis intervention, vocational services, and socialization services since these activities were repealed as of July 1, 1998.

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[69] The County of Los Angeles, in comments to the draft staff analysis, argues that all activities specified in section 60020, subdivision (i), should be reimbursable under this test claim. The County of Stanislaus filed similar comments. As indicated in the analysis, however, the activities of mental health assessments, collateral services, intensive day treatment, and case management, are not new activities. Counties were required to perform these activities under the prior regulations. (Former Cal. Code Regs., tit. 2, § 60020, subd. (a).) Reimbursement for the activities of mental health assessments, collateral services, intensive day treatment, and case management, are addressed in the reconsideration of the original *Handicapped and Disabled Students* program (04-RL-4282-10).

[70] Final Statement of Reasons, pages 55-56.

Nevertheless, section 60020 of the regulations increases the level of service of counties providing mental health services by including case management services and "psychotherapy" within the meaning of "mental health services." The regulation defines psychotherapy to include both individual and group therapy, based on the definition in Business and Professions Code section 2903. Business and Professions Code section 2903 states in relevant part the following:

> No person may engage in the practice of psychology, or represent himself or herself to be a psychologist, without a license granted under this chapter, except as otherwise provided in this chapter. The practice of psychology is defined as rendering or offering to render for a fee to individuals, groups, organizations or the public any psychological service involving the application of psychological principles, methods, and procedures of understanding, predicting, and influencing behavior, such as the principles pertaining to learning, perception, motivation, emotions, and interpersonal relationships; and the methods and procedures of interviewing, counseling, psychotherapy, behavior modification, and hypnosis; and of constructing, administering, and interpreting tests of mental abilities, aptitudes, interests, attitudes, personality characteristics, emotions, and motivations.
>
> The application of these principles and methods includes, but is not restricted to: diagnosis, prevention, treatment, and amelioration of psychological problems and emotional and mental disorders of individuals and groups.
>
> Psychotherapy within the meaning of this chapter means the use of psychological methods in a professional relationship to assist a person or persons to acquire greater human effectiveness or to modify feelings, conditions, attitudes and behavior which are emotionally, intellectually, or socially ineffectual or maladjustive.

The Commission finds that providing the services of case management and psychotherapy, as defined in Business and Professions Code section 2903, to a pupil when required by the pupil's IEP constitutes a new program or higher level of service.

Furthermore, under prior law, mental health services included prescribing, administering, and dispensing medications, and evaluating the side effects and results of the medication. Section 60020, subdivision (i), now includes "medication monitoring" within the provision of mental health services. "Medication monitoring" is defined in section 60020, subdivision (f), as follows:

> "Medication monitoring" includes all medication support services with the exception of the medications or biologicals themselves and laboratory work. Medication support services include prescribing, administering, and monitoring of psychiatric medications or biologicals as necessary to alleviate the symptoms of mental illness.

The Department of Finance argues that "medication monitoring" does not increase the level of service provided by counties. The Department states the following:

> It is our interpretation that there is no meaningful difference between the medication requirements under the prior regulations and the new regulations of the test claim. The existing activities of "dispensing of medications, and the evaluation of side effects and results of medication" are in fact activities of medication monitoring and seem representative of all aspects of medication monitoring. To the extent that counties are already required to evaluate the "side effects and results of medication," it is not clear that the new requirement of "medication monitoring" imposes a new or higher level of service.[71]

The Commission disagrees with the Department's interpretation of section 60020, subdivisions (i) and (f), of the regulations, and finds that "medication monitoring" as defined in the regulation increases the level of service required of counties.

The same rules of construction applicable to statutes govern the interpretation of administrative regulations.[72] Under the rules of statutory construction, it is presumed that the Legislature or the administrative agency intends to change the meaning of a law or regulation when it materially alters the language used.[73] The courts will not infer that the intent was only to clarify the law when a statute or regulation is amended unless the nature of the amendment clearly demonstrates the case.[74]

In the present case, the test claim regulations, as replaced in 1998, materially altered the language regarding the provision of medication. The activity of "dispensing" medications was deleted from the definition of mental health services. In addition, the test claim regulations deleted the phrase "evaluating the side effects and results of the medication," and replaced the phrase with "monitoring of psychiatric medications or biologicals as necessary to alleviate the symptoms of mental illness." The definitions of "evaluating" and "monitoring" are different. To "evaluate" means to "to examine carefully; appraise."[75] To "monitor" means to "to keep watch over; supervise."[76] The definition of "monitor" and the regulatory language to monitor the "psychiatric medications or biologicals as necessary to alleviate the symptoms of mental illness" indicate that the activity of "monitoring" is an ongoing activity necessary to ensure that the pupil receives a free and appropriate education under federal law. This interpretation is supported by the final statement of reasons for the adoption of the language in section 60020, subdivision (f), which state that the regulation was intended to make it

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[71] Department of Finance comments to draft staff analysis.

[72] *Goleta Valley Community Hospital v. Department of Health Services* (1984) 149 Cal.App.3d 1124, 1129.

[73] *Garrett v. Young* (2003) 109 Cal.App.4th 1393, 1404-1405.

[74] *Medina v. Board of Retirement, Los Angeles County Employees Retirement Assn.* (2003) 112 Cal.App.4th 864, 869-870.

[75] Webster's II New College Dictionary (1999) page 388.

[76] *Id.* at page 708.

clear that "medication monitoring" is an educational service that is provided pursuant to an IEP, rather than a medical service that is not allowable under the program.[77]

Neither the Department of Mental Health nor the Department of Education, agencies that adopted the regulations, filed substantive comments on this test claim. Thus, there is no evidence in the record to contradict the finding, based on the rules of statutory construction, that "medication monitoring" increases the level of service on counties.

Therefore, the Commission finds that the activity of "medication monitoring," as defined in section 60020, subdivisions (f) and (i), constitutes a new program or higher level of service.

Finally, section 60050 was added by the test claim legislation to address the completion or termination of IEP health services. In relevant part, section 60050, subdivision (b), states the following:

> When completion or termination of IEP specified health services is mutually agreed upon by the parent and the community mental health service, or when the pupil is no longer participating in treatment, the community mental health service shall notify the parent and the LEA which shall schedule an IEP meeting to discuss and document this proposed change it if is acceptable to the IEP team.

The Commission finds that section 60050, subdivision (b), mandates a new program or higher level of service by requiring counties to notify the parent and the local educational agency when the parent and the county mutually agree upon the completion or termination of the service, or when the pupil is no longer participating in treatment.

H. Participation in Due Process Hearings (Cal. Code Regs., tit. 2, § 60550)

The County of Los Angeles argues that a county's participation in a due process hearing, which resolves disputes between a parent and a public agency regarding special education and related services, is reimbursable. The County further argues that reimbursement should cover the costs for "participation in mediation conferences, travel costs associated with dispute resolution, preparation of witnesses and documentary evidence, as well as participation in administrative hearings ..."[78] The Commission disagrees.

Under existing law, due process procedures are in place to resolve disputes between a parent and a public agency regarding the special education and related services, including mental health services provided to a pupil by a county under the Handicapped and Disabled Students program. Government Code section 7586, as originally enacted in 1984, requires all state departments and their designated local agencies, including counties, to be governed by the procedural due process protections required by federal law. Government Code section 7586, subdivision (a), states the following:

> All state departments, and their designated local agencies, shall be governed by the procedural safeguards required in Section 1415 of

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[77] Final Statement of Reasons, page 7.

[78] County of Los Angeles' comments to the draft staff analysis.

> Title 20 of the United States Code. A due process hearing arising over a related service or designated instruction and service shall be filed with the Superintendent of Public Instruction. Resolution of all issues shall be through the due process hearing process established in Chapter 5 (commencing with Section 56500) of Part 30 of Division 4 of the Education Code. The decision issued in the due process hearing shall be binding on the department having responsibility for the services in issue as prescribed by this chapter.

Pursuant to the former regulations, counties were required to participate in the due process hearings relating to issues involving mental health assessments or services and were required to prepare documentation and provide testimony supporting the county's position. (Former Cal. Code Regs., tit. 2, § 60550.) Counties are currently eligible for reimbursement for their participation in the due process hearings.

The test claim legislation, section 60550 of the regulations, as enacted in 1998, does not increase the level of service provided by counties with respect to the due process hearings. Counties are still subject to the due process hearing procedures as they were under prior law, and are still required to prepare documentation and provide testimony to support its position. According to the final statement of reasons, the amendments in the regulation, with respect to the county, simply reflect the deletion of the Office of Administrative Hearings from the hearing process.

Therefore, the Commission finds that section 60550 does not mandate that counties perform new activities or increase their level of service. Therefore, section 60550 of the regulations does not impose a new program or higher level of service on counties.

I. Compliance Complaints (Cal. Code Regs., tit. 2, § 60560)

The County of Stanislaus requests reimbursement for defending against an allegation that the county has not complied with the regulations for this program, in accordance with section 60560 of the regulations. Section 60560 states that "[a]llegations of failure by an LEA, Community Mental Health Services or CCS to comply with these regulations, shall be resolved pursuant to [sections 4600 et seq. of the Department of Education regulations]."

The Commission finds that the compliance complaint procedure established by section 60560 does not constitute a new program or higher level of service. The compliance complaint procedures, as they relate to the counties' participation in the Handicapped and Disabled Students program, have been in the law since 1991. Section 4650 of the Department of Education regulations (the regulation cited as the authority for section 60560 of the joint regulations in this case) addresses compliance complaints and was adopted in 1991.[79] Section 4650, subdivision (a)(viii), states in relevant part the following:

> For complaints relating to special education the following shall also be conditions for direct state intervention:

[79] California Code of Regulations, title 5, section 4650.

> (A) The complainant alleges that a public agency, other than a local educational agency, as specified in Government Code section 7570 et seq., fails or refuses to comply with an applicable law or regulation relating to the provision of free appropriate public education to handicapped individuals ...

Therefore, the Commission finds that section 60560 does not constitute a new program or higher level of service.

J. Interagency Dispute Resolution (Cal. Code Regs., tit. 2, §§ 60600, 60610)

The County of Stanislaus requests reimbursement for the counties' participation in interagency dispute resolution procedures, in accordance with sections 60600 and 60610 of the regulations. These regulations implement Government Code section 7585, which was enacted in 1984. Government Code section 7585 provides that whenever any department or local agency designated by that department fails to provide a related service specified in a pupil's IEP, the parent, adult pupil, or any local educational agency shall submit a written notification of the failure to provide the service to the Superintendent of Public Instruction or the Secretary of Health and Welfare. The superintendent and the secretary, or their designees, shall meet to resolve the issue within 15 days. If the issue cannot be resolved, the matter is referred to the Office of Administrative Hearings, whose decision is binding on the parties. Under prior regulations (former section 60610), once the dispute resolution procedures have been completed, the agency determined responsible for the service shall pay for, or provide the service, and shall reimburse the other agency that provided the service, if applicable.

Sections 60600 and 60610, as adopted in 1998, do not change the prior dispute resolution procedures. The level of participation by the county under the interagency dispute resolution procedures remains the same.

Therefore, the Commission finds that sections 60600 and 60610 of the regulations do not mandate a new program or higher level of service on counties.

Issue 4: Do the test claim statutes and regulations impose costs mandated by the state within the meaning of article XIII B, section 6 and Government Code section 17514?

As indicated above, the Commission finds that the following activities mandate a new program or higher level of service on counties:

1. Interagency Agreements (Cal. Code Regs., tit. 2, § 60030)
    - The one-time activity of revising the interagency agreement with each local educational agency to include the following eight procedures:
        - Resolving interagency disputes at the local level, including procedures for the continued provision of appropriate services during the resolution of any interagency dispute, pursuant to Government Code section 7575, subdivision (f). For purposes of this subdivision only, the term "appropriate" means any service identified in the pupil's IEP, or any service the pupil actually was receiving at the time of the interagency dispute. (Cal. Code Regs, tit. 2, § 60030, subd. (c)(2).)

- A host county to notify the community mental health service of the county of origin within two (2) working days when a pupil with a disability is placed within the host county by courts, regional centers or other agencies for other than educational reasons. (Cal. Code Regs, tit. 2, § 60030, subd. (c)(4).)
- Development of a mental health assessment plan and its implementation. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(5).)
- At least ten (10) working days prior notice to the community mental health service of all IEP team meetings, including annual IEP reviews, when the participation of its staff is required. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(7).)
- The provision of mental health services as soon as possible following the development of the IEP pursuant to section 300.342 of Title 34 of the Code of Federal Regulations. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(9).)
- The provision of a system for monitoring contracts with nonpublic, nonsectarian schools to ensure that services on the IEP are provided. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(14).)
- The development of a resource list composed of qualified mental health professionals who conduct mental health assessments and provide mental health services. The community mental health service shall provide the LEA with a copy of this list and monitor these contracts to assure that services as specified on the IEP are provided. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(15).)
- Mutual staff development for education and mental health staff pursuant to Government Code section 7586.6, subdivision (a). (Cal. Code Regs., tit. 2, § 60030, subd. (c)(17).)

2. Referral and Mental Health Assessments (Gov. Code, § 7576; Cal. Code Regs., tit. 2, §§ 60040, 60045)

   - Work collaboratively with the local educational agency to ensure that assessments performed prior to referral are as useful as possible to the community mental health service in determining the need for mental health services and the level of services needed. (Gov. Code, § 7576, subd. (b)(1).)
   - A county that receives a referral for a pupil with a different county of origin shall forward the referral within one working day to the county of origin. (Gov. Code, § 7576, subd. (g); Cal. Code Regs., tit. 2, § 60040, subd. (g).)
   - If the county determines that a mental health assessment is not necessary, the county shall document the reasons and notify the parents and the local educational agency of the county determination within one day. (Cal Code Regs., tit. 2, § 60045, subd. (a)(1).)

- If the county determines that the referral is incomplete, the county shall document the reasons, notify the local educational agency within one working day, and return the referral. (Cal. Code Regs., tit. 2, § 60045, subd. (a)(2).)
- Notify the local educational agency when an assessment is determined necessary. (Cal. Code Regs., tit. 2, § 60045, subd. (b).)
- Provide the assessment plan to the parent. (Cal. Code Regs., tit. 2, § 60045, subd. (b).)
- Report back to the referring local educational agency or IEP team within 30 days from the date of the receipt of the referral if no parental consent for a mental health assessment has been obtained. (Cal. Code Regs., tit. 2, § 60045, subd. (c).)
- Notify the local educational agency within one working day after receipt of the parent's written consent for the mental health assessment to establish the date of the IEP meeting. (Cal. Code Regs., tit. 2, § 60045, subd. (d).)
- Provide the parent with written notification that the parent may require the assessor to attend the IEP meeting to discuss the recommendation when the parent disagrees with the assessor's mental health service recommendation. (Cal. Code Regs., tit. 2, § 60045, subd. (f).)
- The county of origin shall prepare yearly IEP reassessments to determine the needs of a pupil. (Cal. Code Regs., tit. 2, § 60045, subd. (h).)

3. Transfers and Interim Placements (Cal. Code Regs., tit. 2, § 60055)

    - Following a pupil's transfer to a new school district, the county shall provide interim mental health services, as specified in the existing IEP, for thirty days, unless the parent agrees otherwise.
    - Participate as a member of the IEP team of a transfer pupil to review the interim services and make a determination of services.

4. Participate as a Member of the Expanded IEP Team When Residential Placement of a Pupil is Recommended (Gov. Code, § 7572.55; Cal Code Regs., tit. 2, § 60100)

    - When a recommendation is made that a child be placed in an out-of-state residential facility, the expanded IEP team, with the county as a participant, shall develop a plan for using less restrictive alternatives and in-state alternatives as soon as they become available, unless it is in the best educational interest of the child to remain in the out-of-state school. (Gov. Code, § 7572.55, subd. (c).)
    - The expanded IEP team, with the county as a participant, shall document the alternatives to residential placement that were considered and the reasons why they were rejected. (Cal. Code Regs., tit. 2, § 60100, subd. (c).)

- The expanded IEP team, with the county as a participant, shall ensure that placement is in accordance with the admission criteria of the facility. (Cal. Code Regs., tit. 2, § 60100, subd. (j).)
- When the expanded IEP team determines that it is necessary to place a pupil who is seriously emotionally disturbed in residential care, counties shall ensure that: (1) the mental health services are specified in the IEP in accordance with federal law, and (2) the mental health services are provided by qualified mental health professionals. (Cal. Code Regs., tit. 2, § 60100, subd. (i).)

5. Case Management Duties for Pupils Placed in Residential Care (Cal. Code Regs., tit. 2, §§ 60100, 60110)

- Coordinate the residential placement plan of a pupil with a disability who is seriously emotionally disturbed as soon as possible after the decision has been made to place the pupil in residential placement. The residential placement plan shall include provisions, as determined in the pupil's IEP, for the care, supervision, mental health treatment, psychotropic medication monitoring, if required, and education of the pupil. (Cal. Code Regs., tit, 2, § 60110, subd, (b)(1).)
- When the IEP team determines that it is necessary to place a pupil with a disability who is seriously emotionally disturbed in a community treatment facility, the lead case manager shall ensure that placement is in accordance with admission, continuing stay, and discharge criteria of the community treatment facility. (Cal. Code Regs., tit. 2, § 60110, subd. (b)(3).)
- Identify, in consultation with the IEP team's administrative designee, a mutually satisfactory placement that is acceptable to the parent and addresses the pupil's educational and mental health needs in a manner that is cost-effective for both public agencies, subject to the requirements of state and federal special education law, including the requirement that the placement be appropriate and in the least restrictive environment. (Cal. Code Regs, tit. 2, §§ 60100, subd. (e), 60110, subd. (c)(2).)
- Document the determination that no nearby placement alternative that is able to implement the IEP can be identified and seek an appropriate placement that is as close to the parents' home as possible. (Cal. Code Regs., tit. 2, § 60100, subd. (f).)
- Notify the local educational agency that the placement has been arranged and coordinate the transportation of the pupil to the facility if needed. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(7).)
- Facilitate placement authorization from the county's interagency placement committee pursuant to Welfare and Institutions Code section 4094.5, subdivision (e)(1), by presenting the case of a pupil with a disability who is seriously emotionally disturbed prior to placement in a community treatment facility. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(11).)

- Evaluate every 90 days the continuing stay criteria, as defined in Welfare and Institutions Code section 4094, of a pupil placed in a community treatment facility. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(8).)
- Schedule and attend the next expanded IEP team meeting with the expanded IEP team's administrative designee within six months of the residential placement of a pupil with a disability who is seriously emotionally disturbed and every six months thereafter as the pupil remains in residential placement. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(10).)

6. Authorize Payments to Out-Of-Home Residential Care Providers (Cal. Code Regs., tit. 2, § 60200, subd. (e))
   - Authorize payments to residential facilities based on rates established by the Department of Social Services in accordance with Welfare and Institutions Code sections 18350 and 18356.
7. Provide Psychotherapy or Other Mental Health Treatment Services (Cal. Code Regs., tit. 2, §§ 60020, subd. (i), 60050, subd. (b), 60200, subd. (c))
   - The host county shall make its provider network available and provide the county of origin a list of appropriate providers used by the host county's managed care plan who are currently available to take new referrals. (Cal. Code Regs., tit. 2, § 60200, subd. (c)(1).)
   - The county of origin shall negotiate with the host county to obtain access to limited resources, such as intensive day treatment and day rehabilitation. (Cal. Code Regs., tit. 2, § 60200, subd. (c)(1).)
   - Provide case management services to a pupil when required by the pupil's IEP. This service shall be provided directly or by contract at the discretion of the county of origin. (Cal. Code Regs., tit. 2, § 60020, subd. (i).)
   - Provide individual or group psychotherapy services, as defined in Business and Professions Code section 2903, when required by the pupil's IEP. This service shall be provided directly or by contract at the discretion of the county of origin. (Cal. Code Regs., tit. 2, § 60020, subd. (i).)
   - Provide medication monitoring services when required by the pupil's IEP. "Medication monitoring" includes all medication support services with the exception of the medications or biologicals themselves and laboratory work. Medication support services include prescribing, administering, and monitoring of psychiatric medications or biologicals as necessary to alleviate the symptoms of mental illness. This service shall be provided directly or by contract at the discretion of the county of origin. (Cal. Code Regs., tit. 2, § 60020, subds. (f) and (i).)
   - Notify the parent and the local educational agency when the parent and the county mutually agree upon the completion or termination of a service, or when the pupil is no longer participating in treatment. ((Cal. Code Regs., tit. 2, § 60050, subd. (b).)

In order for the activities listed above to impose a reimbursable, state-mandated program under article XIII B, section 6 of the California Constitution, two additional elements must be satisfied. First, the activities must impose costs mandated by the state pursuant to Government Code section 17514.[80] Second, the statutory exceptions to reimbursement listed in Government Code section 17556 cannot apply.

Government Code section 17514 defines "costs mandated by the state" as any increased cost a local agency or school district is required to incur as a result of a statute that mandates a new program or higher level of service.

Government Code section 17556 states that the Commission shall not find costs mandated by the state, as defined in section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that:

> (a) The claim is submitted by a local agency or school district that requested legislative authority for that local agency or school district to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district 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 or school district that requests authorization for that local agency or school district to implement a given program shall constitute a request within the meaning of this paragraph.
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> (b) The statute or executive order affirmed for the state a mandate that had been declared existing law or regulation by action of the courts.
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> (c) The statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation. This subdivision applies regardless of whether the federal law or regulation was enacted or adopted prior to or after the date on which the state statute or executive order was enacted or issued.
>
> (d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.
>
> (e) The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.
>
> (f) The statute or executive order imposed duties that were expressly included in a ballot measure approved by the voters in a statewide or local election.

[80] See also, *Lucia Mar Unified School Dist.*, *supra*, 44 Cal.3d 830, 835.

> (g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction.

Except for Government Code section 17556, subdivision (e), the Commission finds that the exceptions listed in section 17556 are not relevant to this claim, and do not apply here. Since the Legislature has appropriated funds for this program, however, Government Code section 17556, subdivision (e), is relevant and is analyzed below.

A. Government Code section 17556, subdivision (e), does not apply to deny this claim

Government Code section 17556, subdivision (e), states the Commission shall not find costs mandated by the state if the Commission finds that:

> The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no net costs to the local agencies or school districts, *or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate*. (Emphasis added.)

Thus, in order for Government Code section 17556, subdivision (e), to apply to deny this claim, the plain language of the statute requires that two elements be satisfied. First, the statute must include additional revenue that was specifically intended to fund the costs of the state mandate. Second, the appropriation must be in an amount sufficient to fund the cost of the state mandate.

For the reasons provided below, the Commission finds that Government Code section 17556, subdivision (e), does not apply to deny this claim.

The reimbursement period of this test claim, if approved by the Commission, would begin July 1, 2001. The Budget Act of 2001 appropriated funds to counties specifically for this program in the amounts of $12,334,000 and $46,944,000.[81] The Budget Act of 2002 appropriated $1000 to counties.[82]

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[81] Statutes 2001, chapter 106, items 4440-131-0001 and 4440-295-0001. Item 4440-295-0001, however, is an appropriation, pursuant to article XIII B, section 6, for the original program approved by the Commission in CSM 4282, *Handicapped and Disabled Students* (Stats. 1984, ch. 1747; Stats. 1985, ch. 1274; and on Cal. Code Regs., tit.2, §§ 60000 through 60610 (Emergency Regulations filed December 31, 1985, designated effective January 1, 1986 (Register 86, No. 1) and refiled June 30, 1986, designated effective July 12, 1986 (Register 86, No. 28)).

[82] Statutes 2002, chapter 379, item 4440-295-0001. Item 4440-295-0001 is an appropriation, pursuant to article XIII B, section 6, for the original program added approved by the Commission in CSM 4282, *Handicapped and Disabled Students* (Stats. 1984, ch. 1747; Stats. 1985, ch. 1274; and on Cal. Code Regs., tit.2, §§ 60000 through 60610 (Emergency Regulations filed December 31, 1985, designated effective January 1,

The Commission finds that the amount appropriated in 2001 and 2002 are not sufficient to fund the cost of the state mandate and, thus, the second element under Government Code section 17556, subdivision (e), has not been satisfied. According to the State Controller's Deficiency Report issued on May 2, 2005, the unpaid claims for fiscal year 2001-02 total $124,940,258. The unpaid claims for fiscal year 2002-03 total $124,871,698.[83]

In addition, the Budget Acts of 2003 and 2004 contain appropriations "considered offsetting revenues within the meaning of Government Code section 17556, subdivision (e)." However, for the reasons provided below, the Commission finds that Government Code section 17556, subdivision (e), has not been satisfied with these appropriations.

The Budget Act of 2003 appropriated $69 million to counties from the federal special education fund to be used exclusively to support mental health services identified in a pupil's IEP and provided during the 2003-04 fiscal year by county mental health agencies pursuant to the test claim legislation. (Stats. 2003, ch. 157, item 6110-161-0890, provision 17.) The bill further states in relevant part that the funding shall be considered offsetting revenue pursuant to Government Code section 17556, subdivision (e):

> This funding shall be considered offsetting revenues within the meaning of subdivision (e) of section 17556 of the Government Code for any reimbursable mandated cost claim for provision of these mental health services provided in 2003-04.

The Budget Act of 2004 similarly appropriated $69 million to counties from the federal special education fund to be used exclusively to support mental health services provided during the 2004-05 fiscal year pursuant to the test claim legislation. (Stats. 2004, ch. 208, item 6110-161-0890, provision 10.) The appropriation in 2004 was made as follows:

> Pursuant to legislation enacted in the 2003-04 Regular Session, of the funds appropriated in Schedule (4) of this item, $69,000,000 shall be used exclusively to support mental health services provided during the

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1986 (Register 86, No. 1) and refiled June 30, 1986, designated effective July 12, 1986 (Register 86, No. 28)).

[83] The Deficiency Report is prepared pursuant to Government Code section 17567. Government Code section 17567 requires that in the event the amount appropriated for reimbursement of a state-mandated program is not sufficient to pay all of the claims approved by the Controller, the Controller shall prorate claims in proportion to the dollar amount of approved claims timely filed and on hand at the time of proration. The Controller shall then issue a report of the action to the Department of Finance, the Chairperson of the Joint Legislative Budget Committee, and the Chairperson of the respective committee in each house of the Legislature that considers appropriations. The Deficiency Report is, thus, an official record of a state agency and is properly subject to judicial notice by the court. (*Munoz v. State* (1995) 33 Cal.App.4th 1767, 1773, fn. 2; *Chas L. Harney, Inc. v. State of California* (1963) 217 Cal.App.2d 77, 85-87.)

> 2004-05 fiscal year by county mental health agencies pursuant to Chapter 26.5 (commencing with Section 7570) of Division 7 of the Government Code and that are included within an individualized education program pursuant to the Federal Individuals with Disabilities Education Act (IDEA).

The Budget Act of 2004 does not expressly identify the $69 million as "offsetting revenues within the meaning of Government Code section 17556, subdivision (e)." But the statute does contain language that the appropriation was made "[p]ursuant to legislation enacted in the 2003-04 Regular Session." As indicated above, it is the 2003-04 Budget Bill that contains the language regarding the Legislature's intent that the $69 million is considered offsetting revenue within the meaning of Government Code section 17556, subdivision (e).

The Commission finds that the Legislature intended to fund the costs of this state-mandated program for fiscal year 2004-05 based on the language used by the Legislature that the funds "shall be considered offsetting revenues within the meaning of Government Code section 17556, subdivision (e)." Under the rules of statutory construction, it is presumed that the Legislature is aware of existing laws and that it enacts new laws in light of the existing law.[84] In this case, the Legislature specifically referred to Government Code section 17556, subdivision (e), when appropriating the $69 million. Thus, it must be presumed that the Legislature was aware of the plain language of Government Code section 17556, subdivision (e), and that its application results in a denial of a test claim.

But, based on public records, the second element under Government Code section 17556, subdivision (e), requiring that the appropriation must be *in an amount sufficient* to fund the cost of the state mandate, has not been satisfied. According to the State Controller's Deficiency Report issued on May 2, 2005, the amounts appropriated for this program in fiscal years 2003-04 and 2004-05 are not sufficient to pay the claims approved by the State Controller's Office. Unpaid claims for fiscal year 2003-04 total $66,915,606. The unpaid claims for fiscal year 2004-05 total $68,958,263.[85]

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[84] *Williams v. Superior Court* (2001) 92 Cal.App.4th 612, 624.

[85] The State Controller's Deficiency Report lists the total unpaid claims for the following fiscal years as follows:

1999 and prior Local Government Claims Bills	$ 8,646
2001-02	124,940,258
2002-03	124,871,698
2003-04	66,915,606
2004-05	68,958,263

This finding is further supported by the 2004 report published by Stanford Law School, which states "$69 million represented only approximately half of the total funding necessary to maintain AB 3632 services."[86]

Accordingly, the Commission finds that Government Code section 17556, subdivision (e), does not apply to deny this claim. Eligible claimants are, however, required to identify the funds received during fiscal years 2001-02 through 2004-05 as an offset to be deducted from the costs claimed.[87]

Based on the program costs identified by the State Controller's Office, the Commission further finds that counties do incur increased costs mandated by the state pursuant to Government Code section 17514 for this program. However, as more fully discussed below, the state has amended cost-sharing mechanisms for some of the mandated activities that affect the total costs incurred by a county.

B. Increased costs mandated by the state for providing psychotherapy and other mental health services.

In *Handicapped and Disabled Students* (CSM 4282), the Commission determined that the costs incurred for providing psychotherapy or other mental health treatment services were subject to the Short-Doyle Act. Under the Short-Doyle Act, the state paid 90 percent of the total costs of mental health treatment services and the counties paid the remaining 10 percent. Thus, the Commission concluded that counties incurred increased costs mandated by the state in an amount that equaled 10 percent of the total psychotherapy or other mental health treatment costs. In 1993, the Sixth District Court of Appeal agreed with the Commission's conclusion.[88]

In 1991, the Legislature enacted realignment legislation that repealed the Short-Doyle Act and replaced the sections with the Bronzan-McCorquodale Act. (Stats. 1991, ch. 89, §§ 63 and 173.) The realignment legislation became effective on June 30, 1991. The parties have disputed whether the Bronzan-McCorquodale Act keeps the cost-sharing ratio, with the state paying 90 percent and the counties paying 10 percent, for the cost of psychotherapy or other mental health treatment services for special education pupils.

The Commission finds, however, that the Commission does not need to resolve that dispute for purposes of this test claim. Section 38 of Statutes 2002, chapter 1167 (Assem. Bill 2781) prohibits the funding provisions of the Bronzan-McCorquodale Act from affecting the responsibility of the state to fund psychotherapy and other mental health treatment services for handicapped and disabled pupils and requires the state to provide reimbursement to counties for those services for all allowable costs incurred. Section 38 also states the following:

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[86] "Challenge and Opportunity – An Analysis of Chapter 26.5 and the System for Delivering Mental Health Services to Special Education Students in California," Youth and Education Law Clinic, Stanford Law School, May 2004, page 20.

[87] Government Code section 17514; California Code of Regulations, title 2, section 1183.1.

[88] *County of Santa Clara v. Commission on State Mandates*, Sixth District Court of Appeal Case No. H009520, filed January 11, 1993 (unpubl.)

> *For reimbursement claims for services delivered in the 2001-02 fiscal year and thereafter*, counties are *not* required to provide any share of those costs or to fund the cost of any part of these services with money received from the Local Revenue Fund [i.e. realignment funds]. (Emphasis added.)

In addition, Senate Bill 1895 (Stats. 2004, ch. 493, § 6) states that realignment funds used by counties for this program "are eligible for reimbursement from the state *for all allowable costs* to fund assessments, psychotherapy, and other mental health services . . . .," and that the finding by the Legislature is "declaratory of existing law." (Emphasis added.)

Therefore, beginning July 1, 2001, the 90 percent-10 percent cost-sharing ratio for the costs incurred for psychotherapy and other mental health treatment services no longer applies. Since the period of reimbursement for purposes of this reconsideration begins July 1, 2001, and section 38 of Statutes 2002, chapter 1167 is still in effect, all of the county costs for psychotherapy or other mental health treatment services are reimbursable, less any applicable offsets that are identified below.

C. Identification of offsets

Reimbursement under article XIII B, section 6 and Government Code section 17514 is required only for the increased costs mandated by the state. As determined by the California Supreme Court, the intent behind section 6 was to prevent the state from forcing new programs on local governments that require an increased expenditure by local government of their limited tax revenues.[89]

Government Code section 7576.5 states the following:

> If funds are appropriated to local educational agencies to support the costs of providing services pursuant to this chapter, the local educational agencies shall transfer those funds to the community mental health services that provide services pursuant to this chapter in order to reduce the local costs of providing these services. These funds shall be used exclusively for programs operated under this chapter and are offsetting revenues in any reimbursable mandate claim relating to special education programs and services.

Government Code section 7576.5 was added by the Legislature in 2003 (Stats. 2003, ch. 227) and became operative and effective on August 11, 2003. Thus, the Commission finds money received by counties pursuant to Government Code section 7576.5 shall be identified as an offset and deducted from the costs claimed.

In addition, any direct payments or categorical funds appropriated by the Legislature to the counties specifically for this program shall be identified as an offset and deducted from the costs claimed. This includes the appropriations made by the Legislature in the Budget Act of 2001, which appropriated funds to counties in the amount of $12,334,000

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[89] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of San Diego, supra*, 15 Cal.4th at page 81.

and the $69 million appropriations in 2003 and 2004.[90] The appropriations made by the Legislature in 2001 and 2002, under Item 4440-295-0001 (appropriations of $46,944,000 and $1000, respectively), however, were expressly made pursuant to article XIII B, section 6 for purposes of reimbursing the original program approved by the Commission in CSM 4282, *Handicapped and Disabled Students*.[91] Since the Commission does not have jurisdiction in this test claim over the reimbursement of the statutes and regulations pled in the original test claim (CSM 4282), the Commission finds that the 2001 appropriation of $46,944,000 and the 2002 appropriation of $1000 are not required to be identified as an offset and deducted from the costs claimed here.

Furthermore, to the extent counties obtain private insurance proceeds with the consent of a parent for purposes of this program, such proceeds must be identified as an offset and deducted from the costs claimed. Federal law authorizes public agencies to access private insurance proceeds for services provided under the IDEA if the parent consents.[92] Thus, this finding is consistent with the California Supreme Court's decision in *County of Fresno v. State of California*. In the *County of Fresno* case, the court clarified that article XIII B, section 6 requires reimbursement by the state only for those expenses that are recoverable from tax revenues. Reimbursable costs under article XIII B, section 6, do not include reimbursement received from other non-tax sources.[93]

The Commission further finds that, to the extent counties obtain proceeds under the Medi-Cal program from either the state or federal government for purposes of this mandated program, such proceeds must be identified as an offset and deducted from the costs claimed. Federal law authorizes public agencies, with certain limitations, to use public insurance benefits, such as Medi-Cal, to provide or pay for services required under the IDEA.[94] Federal law limits this authority as follows:

> (2) With regard to services required to provide FAPE [free appropriate public education] to an eligible child under this part, the public agency-
>
> (i) May not require parents to sign up for or enroll in public insurance programs in order for their child to receive FAPE under Part B of the Act;
>
> (ii) May not require parents to incur an out-of-pocket expense such as the payment of a deductible or co-pay amount incurred in filing a claim for services provided pursuant to this part, but pursuant to paragraph (g)(2)

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[90] Statutes 2001, chapter 106, items 4440-131-0001; Statutes 2003, chapter 157, item 6110-161-0890, provision 17; Statutes 2004, chapter 208, item 6110-161-0890, provision 10.

[91] Statutes 2001, chapter 106, item 4440-295-0001; Statutes 2002, chapter 379, item 4440-295-0001.

[92] 34 Code of Federal Regulations section 300.142, subdivision (f).

[93] *County of Fresno, supra,* 53 Cal.3d at page 487.

[94] 34 Code of Federal Regulations section 300.142, subdivision (e).

of this section, may pay the cost that the parent would be required to pay;

(iii) May not use a child's benefits under a public insurance program if that use would

(A) Decrease available lifetime coverage or any other insured benefit;

(B) Result in the family paying for services that would otherwise be covered by the public insurance program and that are required for the child outside of the time the child is in school;

(C) Increase premiums or lead to the discrimination of insurance; or

(D) Risk loss of eligibility for home and community-based waivers, based on aggregate health-related expenditures.[95]

According to the 2004 report published by Stanford Law School, 51.8 percent of the students receiving services under the test claim legislation are Medi-Cal eligible.[96] Thus, the finds to the extent counties obtain proceeds under the Medi-Cal program from the state or federal government for purposes of this mandated program, such proceeds must be identified as an offset and deducted from the costs claimed.[97]

Finally, Senate Bill 1895 (Stats. 2004, ch. 493, § 6), states that realignment funds under the Bronzan-McCorquodale Act that are used by a county for the Handicapped and Disabled Students program are not required to be deducted from the costs claimed. Section 6 of Senate Bill 1895 adds, as part of the Bronzan-McCorquodale Act, section 5701.6 to the Welfare and Institutions Code, which states in relevant part the following:

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[95] 34 Code of Federal Regulations section 300.142, subdivision (e)(2).

[96] "Challenge and Opportunity – An Analysis of Chapter 26.5 and the System for Delivering Mental Health Services to Special Education Students in California," Youth and Education Law Clinic, Stanford Law School, May 2004, page 20.

[97] In comments to the draft staff analysis, the County of Stanislaus states that counties share in the cost of Medi-Cal and, thus, the local Medi-Cal match should not be offset from the costs claimed under this program. The Commission agrees. Under the Medi-Cal program, "the state's share of costs of medical care and services, county administration, and fiscal intermediary services shall be determined pursuant to a plan approved by the Director of Finance and certified to by the director." (Welf. & Inst. Code, § 14158.5.) Thus, this analysis recommends that *to the extent* a county obtains proceeds under the Medi-Cal program from the state or federal government and that such proceeds pay for a portion of the county services provided to a pupil under the Handicapped and Disabled Students program, such funds are required to be identified as an offset and deducted from the costs claimed.

> Counties may utilize money received from the Local Revenue Fund [realignment] ... to fund the costs of any part of those services provided pursuant to Chapter 26.5 (commencing with Section 7570) of Division 7 of Title 1 of the Government Code. *If money from the Local Revenue Fund is used by counties for those services, counties are eligible for reimbursement from the state for all allowable costs* to fund assessments, psychotherapy, and other mental health services allowable pursuant to Section 300.24 of Title 34 of the Code of Federal Regulations [IDEA] and required by Chapter 26.5 ... of the Government Code. (Emphasis added.)

Senate Bill 1895 was a budget trailer bill to the 2004 budget. However, for reasons provided below, the language in Welfare and Institutions Code section 5701.6, that realignment funds are not required to be identified as an offset and deducted from the costs claimed, is retroactive and applies to the reimbursement period for this test claim, beginning July 1, 2001.

Welfare and Institutions Code section 5701.6, subdivision (b), states that "[t]his section is declaratory of existing law." Although a legislative statement that an act is declaratory of existing law is not binding on the courts, the courts have interpreted such language as legislative intent that the amendment applies to all existing causes of action. The courts have given retroactive effect to such a statute when there is no constitutional objection to its retroactive application. In this regard, the California Supreme Court has stated the following:

> A subsequent expression of the Legislature as the intent of the prior statute, although not binding on the court, may properly be used in determining the effect of a prior act. [Citation omitted.] Moreover, even if the court does not accept the Legislature's assurance that an unmistakable change in the law is merely a "clarification," the declaration of intent may still effectively reflect the Legislature's purpose to achieve a retrospective change. [Citation omitted.] Whether a statute should apply retrospectively or only prospectively is, in the first instance, a policy question of the legislative body enacting the statute. [Citation omitted.] Thus, where a statute provides that it clarifies or declares existing law, "[i]t is obvious that such a provision is indicative of a legislative intent that the amendment apply to all existing causes of action from the date of its enactment. In accordance with the general rules of construction, we must give effect to this intention unless there is some constitutional objection thereto." [Citations omitted.][98]

Thus, the Commission finds that realignment funds used by a county for this mandated program are not required to be identified as an offset and deducted from the costs claimed.

Accordingly, the Commission finds that the following revenue and/or proceeds must be identified as offsets and be deducted from the costs claimed:

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[98] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 244.

- Funds received by a county pursuant to Government Code section 7576.5.
- Any direct payments or categorical funding received from the state that is specifically allocated to any service provided under this program. This includes the appropriation made by the Legislature in the Budget Act of 2001, which appropriated funds to counties in the amounts of $12,334,000 (Stats. 2001, ch. 106, item 4440-131-0001), and the $69 million appropriations in 2003 and 2004 (Stats. 2003, ch. 157, item 6110-161-0890, provision 17; Stats. 2004, ch. 208, item 6110-161-0890, provision 10).
- Private insurance proceeds obtained with the consent of a parent for purposes of this program.
- Medi-Cal proceeds obtained from the state or federal government that pay for a portion of the county services provided to a pupil under the Handicapped and Disabled Students program in accordance with federal law.
- Any other reimbursement received from the federal or state government, or other non-local source.[99]

CONCLUSION

The Commission concludes that the test claim legislation imposes a reimbursable state-mandated program on counties pursuant to article XIII B, section 6 of the California Constitution and Government Code section 17514 for the increased costs in performing the following activities:

1. Interagency Agreements (Cal. Code Regs., tit. 2, § 60030)
   - The one-time activity of revising the interagency agreement with each local educational agency to include the following eight procedures:
     - Resolving interagency disputes at the local level, including procedures for the continued provision of appropriate services during the resolution of any interagency dispute, pursuant to Government Code section 7575, subdivision (f). For purposes of this subdivision only, the term "appropriate" means any service identified in the pupil's IEP, or any service the pupil actually was receiving at the time of the interagency dispute. (Cal. Code Regs, tit. 2, § 60030, subd. (c)(2).)
     - A host county to notify the community mental health service of the county of origin within two (2) working days when a pupil with a disability is placed within the host county by courts, regional centers or other agencies for other than educational reasons. (Cal. Code Regs, tit. 2, § 60030, subd. (c)(4).)
     - Development of a mental health assessment plan and its implementation. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(5).)

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[99] *County of Fresno, supra,* 53 Cal.3d at page 487; California Code of Regulations, title 2, section 1183.1, subdivision (a)(8).

- o At least ten (10) working days prior notice to the community mental health service of all IEP team meetings, including annual IEP reviews, when the participation of its staff is required. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(7).)
- o The provision of mental health services as soon as possible following the development of the IEP pursuant to section 300.342 of Title 34 of the Code of Federal Regulations. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(9).)
- o The provision of a system for monitoring contracts with nonpublic, nonsectarian schools to ensure that services on the IEP are provided. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(14).)
- o The development of a resource list composed of qualified mental health professionals who conduct mental health assessments and provide mental health services. The community mental health service shall provide the LEA with a copy of this list and monitor these contracts to assure that services as specified on the IEP are provided. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(15).)
- o Mutual staff development for education and mental health staff pursuant to Government Code section 7586.6, subdivision (a). (Cal. Code Regs., tit. 2, § 60030, subd. (c)(17).)

2. Referral and Mental Health Assessments (Gov. Code, § 7576; Cal. Code Regs., tit. 2, §§ 60040, 60045)

   - Work collaboratively with the local educational agency to ensure that assessments performed prior to referral are as useful as possible to the community mental health service in determining the need for mental health services and the level of services needed. (Gov. Code, § 7576, subd. (b)(1).)
   - A county that receives a referral for a pupil with a different county of origin shall forward the referral within one working day to the county of origin. (Gov. Code, § 7576, subd. (g); Cal. Code Regs., tit. 2, § 60040, subd. (g).)
   - If the county determines that a mental health assessment is not necessary, the county shall document the reasons and notify the parents and the local educational agency of the county determination within one day. (Cal Code Regs., tit. 2, § 60045, subd. (a)(1).)
   - If the county determines that the referral is incomplete, the county shall document the reasons, notify the local educational agency within one working day, and return the referral. (Cal. Code Regs., tit. 2, § 60045, subd. (a)(2).)
   - Notify the local educational agency when an assessment is determined necessary. (Cal. Code Regs., tit. 2, § 60045, subd. (b).)
   - Provide the assessment plan to the parent. (Cal. Code Regs., tit. 2, § 60045, subd. (b).)

- Report back to the referring local educational agency or IEP team within 30 days from the date of the receipt of the referral if no parental consent for a mental health assessment has been obtained. (Cal. Code Regs., tit. 2, § 60045, subd. (c).)
- Notify the local educational agency within one working day after receipt of the parent's written consent for the mental health assessment to establish the date of the IEP meeting. (Cal. Code Regs., tit. 2, § 60045, subd. (d).)
- Provide the parent with written notification that the parent may require the assessor to attend the IEP meeting to discuss the recommendation when the parent disagrees with the assessor's mental health service recommendation. (Cal. Code Regs., tit. 2, § 60045, subd. (f).)
- The county of origin shall prepare yearly IEP reassessments to determine the needs of a pupil. (Cal. Code Regs., tit. 2, § 60045, subd. (h).)

3. Transfers and Interim Placements (Cal. Code Regs., tit. 2, § 60055)
   - Following a pupil's transfer to a new school district, the county shall provide interim mental health services, as specified in the existing IEP, for thirty days, unless the parent agrees otherwise.
   - Participate as a member of the IEP team of a transfer pupil to review the interim services and make a determination of services.
4. Participate as a Member of the Expanded IEP Team When Residential Placement of a Pupil is Recommended (Gov. Code, § 7572.55; Cal Code Regs., tit. 2, § 60100)
   - When a recommendation is made that a child be placed in an out-of-state residential facility, the expanded IEP team, with the county as a participant, shall develop a plan for using less restrictive alternatives and in-state alternatives as soon as they become available, unless it is in the best educational interest of the child to remain in the out-of-state school. (Gov. Code, § 7572.55, subd. (c).)
   - The expanded IEP team, with the county as a participant, shall document the alternatives to residential placement that were considered and the reasons why they were rejected. (Cal. Code Regs., tit. 2, § 60100, subd. (c).)
   - The expanded IEP team, with the county as a participant, shall ensure that placement is in accordance with the admission criteria of the facility. (Cal. Code Regs., tit. 2, § 60100, subd. (j).)
   - When the expanded IEP team determines that it is necessary to place a pupil who is seriously emotionally disturbed in residential care, counties shall ensure that: (1) the mental health services are specified in the IEP in accordance with federal law, and (2) the mental health services are provided by qualified mental health professionals. (Cal. Code Regs., tit. 2, § 60100, subd. (i).)

5. Case Management Duties for Pupils Placed in Residential Care (Cal. Code Regs., tit. 2, §§ 60100, 60110)

   - Coordinate the residential placement plan of a pupil with a disability who is seriously emotionally disturbed as soon as possible after the decision has been made to place the pupil in residential placement. The residential placement plan shall include provisions, as determined in the pupil's IEP, for the care, supervision, mental health treatment, psychotropic medication monitoring, if required, and education of the pupil. (Cal. Code Regs., tit, 2, § 60110, subd, (b)(1).)

   - When the IEP team determines that it is necessary to place a pupil with a disability who is seriously emotionally disturbed in a community treatment facility, the lead case manager shall ensure that placement is in accordance with admission, continuing stay, and discharge criteria of the community treatment facility. (Cal. Code Regs., tit. 2, § 60110, subd. (b)(3).)

   - Identify, in consultation with the IEP team's administrative designee, a mutually satisfactory placement that is acceptable to the parent and addresses the pupil's educational and mental health needs in a manner that is cost-effective for both public agencies, subject to the requirements of state and federal special education law, including the requirement that the placement be appropriate and in the least restrictive environment. (Cal. Code Regs, tit. 2, §§ 60100, subd. (e), 60110, subd. (c)(2).)

   - Document the determination that no nearby placement alternative that is able to implement the IEP can be identified and seek an appropriate placement that is as close to the parents' home as possible. (Cal. Code Regs., tit. 2, § 60100, subd. (f).)

   - Notify the local educational agency that the placement has been arranged and coordinate the transportation of the pupil to the facility if needed. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(7).)

   - Facilitate placement authorization from the county's interagency placement committee pursuant to Welfare and Institutions Code section 4094.5, subdivision (e)(1), by presenting the case of a pupil with a disability who is seriously emotionally disturbed prior to placement in a community treatment facility. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(11).)

   - Evaluate every 90 days the continuing stay criteria, as defined in Welfare and Institutions Code section 4094, of a pupil placed in a community treatment facility every 90 days. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(8).)

   - Schedule and attend the next expanded IEP team meeting with the expanded IEP team's administrative designee within six months of the residential placement of a pupil with a disability who is seriously emotionally disturbed and every six months thereafter as the pupil remains in residential placement. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(10).)

6. Authorize Payments to Out-Of-Home Residential Care Providers (Cal. Code Regs., tit. 2, § 60200, subd. (e))

   - Authorize payments to residential facilities based on rates established by the Department of Social Services in accordance with Welfare and Institutions Code sections 18350 and 18356.

7. Provide Psychotherapy or Other Mental Health Treatment Services (Cal. Code Regs., tit. 2, §§ 60020, subd. (i), 60050, subd. (b), 60200, subd. (c))

   - The host county shall make its provider network available and provide the county of origin a list of appropriate providers used by the host county's managed care plan who are currently available to take new referrals. (Cal. Code Regs., tit. 2, § 60200, subd. (c)(1).)
   - The county of origin shall negotiate with the host county to obtain access to limited resources, such as intensive day treatment and day rehabilitation. (Cal. Code Regs., tit. 2, § 60200, subd. (c)(1).)
   - Provide case management services to a pupil when required by the pupil's IEP. This service shall be provided directly or by contract at the discretion of the county of origin. (Cal. Code Regs., tit. 2, § 60020, subd. (i).)
   - Provide individual or group psychotherapy services, as defined in Business and Professions Code section 2903, when required by the pupil's IEP. This service shall be provided directly or by contract at the discretion of the county of origin. (Cal. Code Regs., tit. 2, § 60020, subd. (i).)
   - Provide medication monitoring services when required by the pupil's IEP. "Medication monitoring" includes all medication support services with the exception of the medications or biologicals themselves and laboratory work. Medication support services include prescribing, administering, and monitoring of psychiatric medications or biologicals as necessary to alleviate the symptoms of mental illness. This service shall be provided directly or by contract at the discretion of the county of origin. (Cal. Code Regs., tit. 2, § 60020, subds. (f) and (i).)
   - Notify the parent and the local educational agency when the parent and the county mutually agree upon the completion or termination of a service, or when the pupil is no longer participating in treatment. ((Cal. Code Regs., tit. 2, § 60050, subd. (b).)

The Commission further concludes that the following revenue and/or proceeds must be identified as offsets and deducted from the costs claimed:

- Funds received by a county pursuant to Government Code section 7576.5.
- Any direct payments or categorical funding received from the state that is specifically allocated to any service provided under this program. This includes the appropriation made by the Legislature in the Budget Act of 2001, which appropriated funds to counties in the amounts of $12,334,000 (Stats. 2001, ch. 106, items 4440-131-0001), and the $69 million appropriations in 2003 and

2004 (Stats. 2003, ch. 157, item 6110-161-0890, provision 17; Stats. 2004, ch. 208, item 6110-161-0890, provision 10).

- Private insurance proceeds obtained with the consent of a parent for purposes of this program.
- Medi-Cal proceeds obtained from the state or federal government that pay for a portion of the county services provided to a pupil under the Handicapped and Disabled Students program in accordance with federal law.
- Any other reimbursement received from the federal or state government, or other non-local source.

The reimbursement period for this test claim begins July 1, 2001.[100]

Finally, any statutes and or regulations that were pled in this test claim that are not identified above do not constitute a reimbursable state-mandated program.

[100] Government Code section 17557, subdivision (e).

Tab 5

BEFORE THE

COMMISSION ON STATE MANDATES

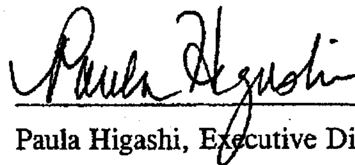
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:	No. 97-TC-05
Government Code Section 7576, as amended by Statutes of 1996, Chapter 654;	*Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services*
California Code of Regulations, Title 2, Division 9, Chapter 1 , Sections 60000-60610; and	STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ. ; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7
California Department of Mental Health Information Notice Number 86-29	
Filed on December 22, 1997	
By the County of Los Angeles, Claimant.	*(Adopted on May 25, 2000)*

STATEMENT OF DECISION

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

This Decision shall become effective on May 26, 2000.



Paula Higashi, Executive Director

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON:	No. 97-TC-05
Government Code Section 7576, as amended by Statutes of 1996, Chapter 654;	*Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services*
California Code of Regulations, Title 2, Division 9, Chapter 1, Sections 60000-60610; and	STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7
California Department of Mental Health Information Notice Number 86-29	
Filed on December 22, 1997;	
By the County of Los Angeles, Claimant.	*(Adopted on May 25, 2000)*

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim on April 27, 2000 during a regularly scheduled hearing. Leonard Kaye, Paul McIver, Gurubanda Khalsa, and Robert Ulrich appeared for the County of Los Angeles and Daniel Stone appeared for the Department of Finance.

The law applicable to the Commission's determination of a reimbursable state mandated program is Government Code section 17500 et seq., article XIII B, section 6 of the California Constitution and related case law.

The Commission, by a vote of 7-0, approved this test claim.

BACKGROUND AND FINDINGS

This test claim alleges reimbursable costs mandated by the state regarding the monitoring and paying for out-of-state residential placements for seriously emotionally disturbed (SED) pupils as detailed in Government Code section 7576, California Code of Regulations sections 60000-60610, and the California Department of Mental Health Information Notice Number 86-29.

Prior law provided that any community mental health agency shall be responsible for the provision of psychotherapy or other mental health services, as defined by regulation, when required in an individual's IEP. Specifically, Government Code section 7576 as amended by Statutes of 1985, Chapter 1247 provided:

"Notwithstanding any other provision of law, the State Department of Mental Health, or any community mental health service designated by the State Department of Mental Health, shall be responsible for the provision of psychotherapy or other mental health services, as defined by regulation by the State Department of Mental Health, developed in consultation with the State Department of Education, when required in the child's [IEP]. This service shall be provided directly or by contracting with another public agency, qualified individual, or a state-certified nonpublic, nonsectarian school or agency."

Regulations in effect immediately before the enactment of the test claim legislation prohibited county mental health agencies from providing psychotherapy and other mental health services in those cases where out-of-state residential placement was required. Section 60200 provided:

"(b) The local [county] mental health program shall be responsible for:

"(1) Provision of mental health services as recommended by a local mental health program representative and included in an [IEP]. Services shall be provided directly or by contract. . . . *The services must be provided within the State of California.*" (Emphasis added.)

In contrast, LEAs were required to provide mental health services for students placed outside of California under subdivision (c) of section 60200, which provided:

"(c) [LEAs] shall be responsible for:

"(3) Mental health services when an individual with exceptional needs is placed in a nonpublic school outside of the State of California." (Emphasis added.)

Thus, the law in effect immediately before the enactment of the test claim legislation did not require county mental health agencies to pay or monitor the mental health component of out-of-state residential placements for SED pupils.[1]

The Test Claim Legislation

The Legislature, in section 1 of Statutes of 1996, Chapter 654, expresses its intent that:

"The *fiscal and program* responsibilities of community mental health services shall be the same *regardless of the location of placement.* . . . [LEAs] and community mental health services *shall make out-of-state placements* . . . *only* if other options have been considered and are determined inappropriate. . . ."[2] (Emphasis added .)

Before the enactment of Chapter 654, counties were only required to provide mental health services to SED pupils placed in out-of-home (in-state) residential facilities. However, section 1 now requires counties to have fiscal and programmatic responsibility for SED pupils

[1] Title 2, California Code of Regulations, section 60200, subdivision (c)(3).

[2] Statutes of 1996, Chapter 654.

regardless of placement - i.e., regardless of whether SED pupils are placed out-of-home (in-state) or out-of-state.

Chapter 654 also added subdivision (g) to Government Code section 7576, which provides:

> "Referrals shall be made to the community mental health service in the county in which the pupil lives. If the pupil has been placed into residential care from another county, the community mental health service receiving the referral shall forward the referral immediately to the community mental health service of the county of origin which *shall have fiscal and programmatic responsibility for providing or arranging for provision of necessary services. . . .* " (Emphasis added.)

California Code of Regulations, sections 60100 and 60200, amended in response to section 7576, further define counties' "fiscal and programmatic responsibilities" for SED pupils placed in out-of-state residential care. Specifically, section 60 100 entitled "LEA Identification and Placement of a Seriously Emotionally Disturbed Pupil" reflects the Legislature's intent behind the test claim statute by providing that residential placements for a SED pupil may be made out-of-state only when no in-state facility can meet the pupil's needs. Section 60200 entitled "Financial Responsibilities" details county mental health and LEA financial responsibilities regarding the residential placements of SED pupils.

In particular, amended section 60200 removes the requirement that LEAs be responsible for the out-of-state residential placement of SED pupils. Subdivision (c) of section 60200 *now* provides that the county mental health agency of origin shall be "responsible for the provision of assessments and mental health services included in an IEP in accordance with [section 601001." Thus, as amended, section 60200 replaces the LEA with the *county of origin* as the entity responsible for paying the mental health component of *out-of-state* residential placement for SED pupils.

Therefore, the Commission found that under the test claim legislation and implementing regulations, county mental health agencies now have the fiscal and programmatic responsibility for the mental health component of a SED pupil's IEP whenever such pupils are referred to a community mental health agency by an IEP team.

Issue 1: Does the Test Claim Legislation Impose a New Program or Higher Level of Service Within an Existing Program Upon County Offices of Education Within the Meaning of Section 6, Article XIII B of the California Constitution by Requiring County Mental Health Agencies to Pay for Out-of-State Residential Placement for Seriously Emotionally Disturbed Pupils?

In order for a statute or executive order, which is the subject of a test claim, to impose a reimbursable state mandated program, the language: (1) must direct or obligate an activity or task upon local governmental entities; and (2) the required activity or task must be new, thus constituting a "new program, " or it must create an increased or "higher level of service" over the former required level of service. The court has defined a "new program" or "higher level of service" as a program that carries out the governmental function of providing services to the public, or a law, which to implement a state policy, imposes unique requirements on local

agencies or school districts that do not apply generally to all residents and entities in the state. To determine if a required activity is new or imposes a higher level of service, a comparison must be undertaken between the test claim legislation and the legal requirements in effect immediately before the enactment of the test claim legislation. Finally, the newly required activity or increased level of service must be state mandated.[3]

The test claim legislation involves the paying and monitoring of the mental health component of out-of-state residential placement for SED pupils. These placements are deemed necessary by an IEP team to ensure that the pupil receives a free appropriate public education. Public education in California is a peculiarly governmental function administered by local agencies as a service to the public. Moreover, the test claim legislation imposes unique requirements upon county mental health agencies that do not apply generally to all residents and entities of the state. Therefore, the Commission found that paying and monitoring of the mental health component of out-of-state residential placements for SED pupils constitutes a "program" within the meaning of section 6, article XIII B of the California Constitution.[4]

Does A Shift of Costs and Activities Between Local Governmental Entities Create a New Program or Higher Level of Service?

The Commission found that immediately before the enactment of the test claim legislation, LEAs were responsible for paying and monitoring the mental health component of out-of-state residential placements for SED pupils. The test claim legislation shifted these responsibilities to county mental health agencies. The Government Code considers both LEAs and county mental health agencies local agencies for purposes of mandates law. Thus, the question arises whether a shift of program responsibilities from one local agency to another constitutes a state mandate. This question was recently addressed in *City of San Jose v. State of California?*

In *City of San Jose,* the issue was whether Government Code section 29550, which gave counties the discretion to charge cities and other local agencies for the costs of booking persons arrested by a city or other local agency into county jails, constituted a state mandate. The City of San Jose (City) contended that because the statute allowed counties to charge cities and other local agencies for booking fees, the statute imposed a new program under article XIII B, section 6. Thus, the City maintained that the *Lucia Mar*[7] decision governed the claim.

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[3] *County of Los Angeles* v. *State of California (1987)* 43 Cal.3d 46, 56; *Carmel Valley Fire Protection Dist. v. State of California (1987)* 190 Cal.App.3d *521, 537; Lucia Mar Unified School Dist. v. Honig (1988) 44* Cal.3d 830, 835.

[4] *Long Beach Unified School Dist. v. State of California (1990) 225* Cal.App.3d 155, 172.

[5] *City of San Jose, supra* (1996) 45 Cal.App.4th 1802.

[6] The Commission noted that the *Handicapped and Disabled Students* Test Claim, which also involved a shift of funding and activities from one local agency to another, was decided six years before the *City of San Jose* decision. Therefore, the analysis the Commission relied on in deciding the *Handicapped and Disabled Students* Test Claim is inapplicable to the present test claim.

[7] *Lucia Mar, supra* (1988) 44 Cal.3d 830, involved Education Code section 59300, enacted in 1981. That section required local school districts to contribute part of the cost of educating district students at state schools for the severely handicapped *while the state continued to administer the program.* Prior to 1979, the school districts had been required by statute to contribute to the education of students in their districts who attended state schools.

The *City of San Jose* court disagreed with the City's contention. The court held that the shift in funding was not from the state to the local agency, but from the county to the city and, thus, *Lucia Mar* was inapposite. The court stated:

> "The flaw in the City's reliance on Lucia Mar is that in our case the shift in funding is not from the state to the local entity but from the county to the city. *In Lucia Mar,* prior to the enactment of the statute in question, the *program was funded and operated entirely by the state. Here, however, at the time section 29550 was enacted, and indeed long before that statute, the financial and administrative responsibility associated with the operation of county jails and detention of prisoners was borne entirely by the county.* "[8] (Emphasis added.)

The *City of San Jose* court concluded that:

> *"Nothing in article XIII B prohibits the shifting of costs between local governmental entities.* "[9] (Emphasis added.)

The requirement to provide for and monitor the mental health component of a SED pupil in an out-of-state residential placement was not shifted to county mental health agencies by LEAs - LEAs have no such power. Rather, the shift in activities was performed by the state. *City of San Jose* applies if it can be shown that *LEAs* initiated the shift *of costs* to counties. However, this is not the case. Although a shift between local agencies occurred, the state required the shift. Moreover, the shift entailed both *costs and activities.*

As explained above, the legislation at issue in *City of San Jose* permitted counties to charge cities and other local agencies for the costs of booking persons arrested by a city or other local agency into county jails. The counties, in turn, enacted ordinances that required cities and other local agencies to pay booking fees. Under these facts, the county not the state, imposed costs upon cities and other local agencies. While the state enabled counties with the authority to charge booking fees to cities or other local agencies, the state did not require the imposition of such fees.

The same cannot be said for the test claim legislation. Before the enactment of the test claim legislation, LEAş were required to provide for the mental health component of a SED pupil in an out-of-state residential placement. Under the test claim legislation, the state shifted those responsibilities from LEAs to county mental health agencies. This scenario is different from

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However, those statutes were repealed following the passage of Proposition 13 in 1978. In 1979, the state assumed full responsibility for funding the schools. At the time section 59300 was enacted in 1981, the state had full financial responsibility for operating state schools.

The California Supreme Court found that the primary financial and administrative responsibility for state handicapped schools rested with the state at the time the test claim statute was enacted. The court stated that "[t]he intent of [section 6] would plainly be violated if the state could, while retaining administrative control of programs it has supported with state tax money, simply shift the cost of the programs to local government. . . . " (Emphasis added.) Thus, the court found that, under the circumstances of the case, the transfer of financial responsibility from the state to local school districts imposed a new program under section 6.

[8] City of *San* Jose, *supra* (1996) 45 Cal.App.4th 1802, 1812.

[9] *Id.* at 1815.

the one in *City of San Jose,* in which the court recounted: "in our case the shift in *funding* is not from the State to the local entity but from county to city. "[10] (Emphasis added.)

Based on the foregoing, the Commission found that *City of San Jose* does not apply to the present test claim. The shift in responsibilities regarding the mental health component of SED pupils in out-of-state residential placements represents a shift performed by the state. In addition, there is a shift of *costs and activities.*

Issue 2: Does the Requirement That Counties Pay and Monitor the Mental Health Component of Out-of-State Residential Placements for SED Pupils Represent Costs Mandated by the State?

The Commission noted that the issue of whether federal special education law requires counties to pay and monitor the mental health component of out-of-state residential placements for SED pupils must be addressed to determine whether there are costs mandated by the state.

Overview of Federal Special Education Law - The Individuals with Disabilities Education Act (IDEA)

The Commission noted that the Education for All Handicapped Children Act (Act) of 1975 is the backbone of the federal statutory provisions governing special education. [11] The express purpose of the Act is to assist state and local educational efforts to assure equal protection of the law and that children with disabilities have available special education and related services designed to meet their unique needs.

The Act requires : "that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living. "[12] The Act defines FAPE as "special education" and "related services" that: (1) are provided at public expense,* under public supervision and direction, and without charge; (2) meet the standards of the state educational agency; (3) include an appropriate preschool, elementary, or secondary school education in the state involved; and (4) are provided in conformity with the individualized education program (IEP) required under federal law.

The Commission further noted that every disabled child must have an IEP. The IEP is a written statement developed in a meeting between the school, the teacher, and the parents. It includes the child's current performance, the annual goals and short-term instructional objectives, specific educational services that must be provided, and the objective criteria and evaluation procedures to determine whether the objectives are being achieved. Special education services include both *special education,* defined as specially designed instruction to meet the unique needs of a child with disabilities, and *related services,* defined as such developmental, corrective, and other supportive services as may be require;! to assist a child

[10] City of *San Jose, supra* (1996) 45 Cal.App.4th 1802, 1812.

[11] In 1990, Congress changed the title of the Act to the "Individuals with Disabilities Education Act."

[12] ***Ibid.***

with disabilities to benefit from special education. The federal definition of a "child with a disability" includes children with serious emotional disturbances.

Are Counties Responsible for Paying and Monitoring the Mental Health Component of Out-of-State Residential Placements for SED Pupils Under Federal Law?

As discussed in the previous section, federal law requires that every child receive a FAPE. The Commission found that SED pupils are no exception to this requirement. [13] The test claim legislation requires counties to be responsible for the mental health component of out-of-state residential placements for SED pupils. A SED pupil's IEP team, which includes a county mental health representative, directs such placements. [14] The purpose of a SED pupil's IEP is to ensure they receive a FAPE in the least restrictive environment. In those cases where out-of-state residential placements are required, it is because an IEP team has determined that no school site, school district, or out-of-home (in-state) residential placement is adequate to provide the necessary special education services to meet the federal FAPE requirement. [15]

The Commission found that when an IEP team recommends an out-of-state residential placement for a SED pupil, the requirement to provide such placement is a federal, not state requirement. Such placements are made to ensure pupils receive a FAPE, not in response to any state program. However, the fact that federal law requires the state to provide a FAPE to all disabled children begs the question: Does federal law require county mental health agencies to pay and monitor the mental health component of out-of-state residential placements for SED pupils?

The Commission found that federal law does not require counties to provide out-of-state placements. The Commission recognized that federal law defines "local educational agency" as:

> "A public board of education or other public authority legally constituted within a State for either *administrative control or direction of,* or *to perform a service function for*, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. . . . The term includes -

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[13] The claimant agrees: "As previously noted, of the 1,000 pupils who receive residential care, only a few, about 100, are placed out-of-state. But the rights of the few are no less that the rights of the many. [SED] pupils placed in out-of-state residential program [sic] are also entitled to a [FAPE]." See claimant's Test Claim filing dated December 22, 1997 at page 3.

[14] Education Code section 56345 requires school districts or county offices of education to provide the services that are recommended in the student's IEP.

[15] The Commission noted that title 2, California Code of Regulations, section 60100 provides that when an IEP team member recommends residential placement, the IEP team is expanded to include a county mental health representative. Before determining that residential placement is required, the expanded IEP team must consider other, less restrictive alternatives - such as a full-time behavioral aide in the classroom and/or parent training. The IEP team must document the alternatives considered and why they were rejected. Section 60100 goes on to provide that: "Residential placements for a [SED pupil] may be made out of California only when no-instate facility can meet the pupil's needs. "

"(i) an educational service agency . . . ; and

"(ii) any other public institution or agency having administrative control and direction of a public elementary or secondary school. "[16]

The Commission found that, as the above definition demonstrates, federal law does not consider counties to be "local educational agencies. "[17] Counties are not legally constituted in the state for "'either *administrative control or direction of,* or *to perform a service function for,* public elementary or secondary schools. " Under the test claim legislation counties are only providing services *on an individual basis.*

Furthermore, the Commission found that counties are not recognized by the state as an administrative agency having control and direction of a public elementary or secondary school It is LEAs that continue to control a SED pupil's IEP. LEAs determine when a county mental health agency representative must join a pupil's IEP team. The county acts in a responsive manner to the determinations of the LEA, not in a proactive manner. Therefore, the Commission concluded that counties do not have administrative control and direction of public elementary or secondary schools, let alone SED pupils.

Moreover, the Commission recognized that federal law defines public agency to include:

> " [State Educational Agencies-J, LEAs, [educational service agencies (ESA)] , public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA, and *any other political subdivisions of the State that are responsible for providing education to children with disabilities.* "[18] (Emphasis added.)

The Commission found that the federal definition of "public agency" does not include counties for purposes of this test claim. Since counties are not included in the federal definition of LEAs, the question remains whether counties are "responsible for providing education to children with disabilities. " To answer this question it is necessary to review the state's requirements under the test claim legislation. Here, under the test claim legislation, counties are not responsible for providing education to children with disabilities. Rather, the test claim legislation limits counties' responsibilities to paying for and monitoring the mental health component of out-of-state residential placements of SED pupils. Under the test claim legislation, LEAs continue to be responsible for the educational aspects of a SED pupil's IEP. This is evidenced by regulation section 60110, subdivision (b)(2), which provides that: "The LEA shall be responsible for providing or arranging for the special education and non-mental health related services needed by the pupil." Moreover, there is no reference to counties in federal special education law that would support a finding that counties, under the program outlined in the test claim legislation, are required to pay for and monitor out-of-state residential placements of SED pupils. Therefore, the Commission concluded that federal law does not

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[16] Title 20, United States Code, section 1401, subdivision (15).

[17] The definition of "local educational agency" is identical in the federal regulations. See 34 Code of Federal Regulations, section 300.18.

[18] 34 Code of Federal Regulations, section 300.22.

require counties to pay for and monitor the mental health component of out-of-state residential placements for SED pupils.

CONCLUSION

Based on the foregoing, the Commission concluded that the test claim legislation, regulations, and information notice impose new programs or higher levels of service within an existing program upon counties within the meaning of section 6, article XIII B of the California Constitution and Government Code section 17514 for the following activities:

- Payment of out-of-state residential placements for SED pupils. (Gov. Code, § 7576; Cal. Code Regs., tit. 2, §§ 60100, 60110.)
- Case management of out-of-state residential placements for SED pupils. Case management includes supervision of mental health treatment and monitoring of psychotropic medications. (Gov. Code, § 7576; Cal. Code Regs., tit. 2, § 60110.)
- Travel to conduct quarterly face-to-face contacts at the residential facility to monitor level of care, supervision, and the provision of mental health services as required in the pupil's IEP. (Cal. Code Regs., tit. 2, § 60110.)
- Program management, which includes parent notifications as required, payment facilitation, and all other activities necessary to ensure a county's out-of-state residential placement program meets the requirements of Government Code section 7576 and Title 2, California Code of Regulations, sections 60000-60610. (Gov. Code, § 7576; Cal. Code of Regs., tit. 2, §§ 60100, 60110.)

Tab 6

Adopted: October 26, 2006

CONSOLIDATED PARAMETERS AND GUIDELINES

Government Code Sections 7570-7588
Statutes 1984, Chapter 1747 (Assem. Bill No. 3632)
Statutes 1985, Chapter 1274 (Assem. Bill No. 882)
Statutes 1994, Chapter 1128 (Assem. Bill No. 1892)
Statutes 1996, Chapter 654 (Assem. Bill No. 2726)

California Code of Regulations, Title 2, Sections 60000-60610
(Emergency regulations effective January 1, 1986 [Register 86, No. 1], and re-filed
June 30, 1986, designated effective July 12, 1986 [Register 86, No. 28]; and
Emergency regulations effective July 1, 1998 [Register 98, No. 26],
final regulations effective August 9, 1999 [Register 99, No. 33])

Handicapped and Disabled Students (04-RL-4282-10);
Handicapped and Disabled Students II (02-TC-40/02-TC-49); and
Seriously Emotionally Disturbed (SED) Pupils:
Out-of-State Mental Health Services (97-TC-05)

Commencing with Fiscal Year 2006-2007

I. SUMMARY OF THE MANDATE

The *Handicapped and Disabled Students* program was enacted in 1984 and 1985 as the state's response to federal legislation (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 legislation shifted to counties the responsibility and funding of mental health services required by a pupil's individualized education plan (IEP).

The Commission on State Mandates (Commission) adopted amended parameters and guidelines for the *Handicapped and Disabled Students* program (CSM 4282) on January 26, 2006, ending the period of reimbursement for costs incurred through and including June 30, 2004. Costs incurred after this date are claimed under the parameters and guidelines for the Commission's decision on reconsideration, *Handicapped and Disabled Students* (04-RL-4282-10).

The Commission adopted its Statement of Decision on the reconsideration of *Handicapped and Disabled Students* (04-RL-4282-10) on May 26, 2005. The Commission found that the 1990 Statement of Decision in *Handicapped and Disabled Students* correctly concluded that the test claim legislation imposes a reimbursable state-mandated program on counties pursuant to article XIII B, section 6 of the California Constitution. The Commission determined, however, that the 1990 Statement of Decision does not fully identify all of the activities mandated by the statutes and regulations pled in the test claim or the offsetting revenue applicable to the claim. Thus, the Commission, on reconsideration, identified the activities expressly required by the test claim legislation and the offsetting revenue that must be identified and deducted from the costs

claimed. Parameters and guidelines were adopted on January 26, 2006, and corrected on July 21, 2006, with a period of reimbursement beginning July 1, 2004.

The Commission also adopted a Statement of Decision for the *Handicapped and Disabled Students II* program on May 26, 2005, addressing the statutory and regulatory amendments to the program. Parameters and guidelines were adopted on December 9, 2005, and corrected on July 21, 2006, with a period of reimbursement beginning July 1, 2001.

On May 25, 2000, the Commission adopted a Statement of Decision for the *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05) program, addressing the counties' responsibilities for out-of-state placement of seriously emotionally disturbed students. Parameters and guidelines were adopted on October 26, 2000, and corrected on July 21, 2006, with a period of reimbursement beginning January 1, 1997.

These parameters and guidelines consolidate the Commission's decisions on the Reconsideration of *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) for reimbursement claims filed for costs incurred commencing with the 2006-2007 fiscal year.

II. ELIGIBLE CLAIMANTS

Any county, or city and county, that incurs increased costs as a result of this reimbursable state-mandated program is eligible to claim reimbursement of those costs.

III. PERIOD OF REIMBURSEMENT

The period of reimbursement for the activities in this consolidated parameters and guidelines begins on July 1, 2006.

Reimbursable actual costs for one fiscal year shall be included in each claim. Estimated costs for the subsequent year may be included on the same claim, if applicable. Pursuant to Government Code section 17561, subdivision (d)(1), all claims for reimbursement of initial years' costs shall be submitted within 120 days of the issuance of the State Controller's claiming instructions. If the total costs for a given fiscal year do not exceed $1,000, no reimbursement shall be allowed, except as otherwise allowed by Government Code section 17564.

There shall be no reimbursement for any period in which the Legislature has suspended the operation of a mandate pursuant to state law.

IV. REIMBURSABLE ACTIVITIES

To be eligible for mandated cost reimbursement for any given fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, calendars, and declarations. Declarations must include a certification or declaration stating, "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of Code of Civil Procedure

section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise reported in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

For each eligible claimant, the following activities are eligible for reimbursement:

A. The one-time activity of revising the interagency agreement with each local educational agency to include the following eight procedures (Cal. Code Regs., tit. 2, § 60030):

   1. Resolving interagency disputes at the local level, including procedures for the continued provision of appropriate services during the resolution of any interagency dispute, pursuant to Government Code section 7575, subdivision (f). For purposes of this subdivision only, the term "appropriate" means any service identified in the pupil's IEP, or any service the pupil actually was receiving at the time of the interagency dispute. (Cal. Code Regs, tit. 2, § 60030, subd. (c)(2).)

   2. A host county to notify the community mental health service of the county of origin within two (2) working days when a pupil with a disability is placed within the host county by courts, regional centers or other agencies for other than educational reasons. (Cal. Code Regs, tit. 2, § 60030, subd. (c)(4).)

   3. Development of a mental health assessment plan and its implementation. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(5).)

   4. At least ten (10) working days prior notice to the community mental health service of all IEP team meetings, including annual IEP reviews, when the participation of its staff is required. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(7).)

   5. The provision of mental health services as soon as possible following the development of the IEP pursuant to section 300.342 of Title 34 of the Code of Federal Regulations. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(9).)

   6. The provision of a system for monitoring contracts with nonpublic, nonsectarian schools to ensure that services on the IEP are provided. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(14).)

   7. The development of a resource list composed of qualified mental health professionals who conduct mental health assessments and provide mental health services. The community mental health service shall provide the LEA with a copy of this list and monitor these contracts to assure that services as specified on the IEP are provided. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(15).)

   8. Mutual staff development for education and mental health staff pursuant to Government Code section 7586.6, subdivision (a). (Cal. Code Regs., tit. 2, § 60030, subd. (c)(17).)

This activity is reimbursable only if it was not previously claimed under the parameters and guidelines for *Handicapped and Disabled Students II* (02-TC-40/02-TC-49).

B. Renew the interagency agreement with the local educational agency every three years and, if necessary, revise the agreement (Gov. Code, § 7571; Cal. Code Regs., tit. 2, §§ 60030, 60100)

1. Renew the interagency agreement every three years, and revise if necessary.
2. Define the process and procedures for coordinating local services to promote alternatives to out-of-home care of seriously emotionally disturbed pupils.

C. Referral and Mental Health Assessments (Gov. Code, §§ 7572, 7576; Cal. Code Regs., tit. 2, §§ 60040, 60045, 60200, subd. (c))

1. Work collaboratively with the local educational agency to ensure that assessments performed prior to referral are as useful as possible to the community mental health service in determining the need for mental health services and the level of services needed. (Gov. Code, § 7576, subd. (b)(1).)
2. A county that receives a referral for a pupil with a different county of origin shall forward the referral within one working day to the county of origin. (Gov. Code, § 7576, subd. (g); Cal. Code Regs., tit. 2, § 60040, subd. (g).)
3. If the county determines that a mental health assessment is not necessary, the county shall document the reasons and notify the parents and the local educational agency of the county determination within one day. (Cal Code Regs., tit. 2, § 60045, subd. (a)(1).)
4. If the county determines that the referral is incomplete, the county shall document the reasons, notify the local educational agency within one working day, and return the referral. (Cal. Code Regs., tit. 2, § 60045, subd. (a)(2).)
5. Notify the local educational agency when an assessment is determined necessary. (Cal. Code Regs., tit. 2, § 60045, subd. (b).)
6. If mental health assessments are deemed necessary by the county, develop a mental health assessment plan and obtain the parent's written informed consent for the assessment. (Cal. Code Regs., tit. 2, § 60045, subd. (b).)
7. Provide the assessment plan to the parent. (Cal. Code Regs., tit. 2, § 60045, subd. (b).)
8. Report back to the referring local educational agency or IEP team within 30 days from the date of the receipt of the referral if no parental consent for a mental health assessment has been obtained. (Cal. Code Regs., tit. 2, § 60045, subd. (c).)
9. Notify the local educational agency within one working day after receipt of the parent's written consent for the mental health assessment to establish the date of the IEP meeting. (Cal. Code Regs., tit. 2, § 60045, subd. (d).)
10. Review the following educational information of a pupil referred to the county by a local educational agency for an assessment: a copy of the assessment reports completed in accordance with Education Code section 56327, current and relevant behavior observations of the pupil in a variety of educational and natural settings, a report prepared by personnel that provided "specialized" counseling and guidance services to the pupil and, when appropriate, an explanation why such counseling and guidance will not meet the needs of the pupil. (Cal. Code Regs., tit. 2, § 60045, subd. (a).)

11. If necessary, observe the pupil in the school environment to determine if mental health assessments are needed.

12. If necessary, interview the pupil and family, and conduct collateral interviews.

13. Assess the pupil within the time required by Education Code section 56344. (Cal. Code Regs., tit. 2, § 60045, subd. (e).)

14. Prepare and provide to the IEP team, and the parent or guardian, a written assessment report in accordance with Education Code section 56327. The report shall include the following information: whether the pupil may need special education and related services; the basis for making the determination; the relevant behavior noted during the observation of the pupil in the appropriate setting; the relationship of that behavior to the pupil's academic and social functioning; the educationally relevant health and development, and medical findings, if any; for pupils with learning disabilities, whether there is such a discrepancy between achievement and ability that it cannot be corrected without special education and related services; a determination concerning the effects of environmental, cultural, or economic disadvantage, where appropriate; and the need for specialized services, materials, equipment for pupils with low incidence disabilities. (Cal. Code Regs., tit. 2, § 60045, subds. (f) and (g).)

15. Provide the parent with written notification that the parent may require the assessor to attend the IEP meeting to discuss the recommendation when the parent disagrees with the assessor's mental health service recommendation. (Cal. Code Regs., tit. 2, § 60045, subd. (f).)

16. Review and discuss the county recommendation with the parent and the appropriate members of the IEP team before the IEP team meeting. (Gov. Code, § 7572, subd. (d)(1); Cal. Code Regs., tit. 2, § 60045, subd. (f).)

17. In cases where the local education agency refers a pupil to the county for an assessment, attend the IEP meeting if requested by the parent. (Gov. Code, § 7572, subd. (d)(1); Cal. Code Regs., tit. 2, § 60045, subd. (f).)

18. Review independent assessments of a pupil obtained by the parent. (Gov. Code, § 7572, subd. (d)(2).)

19. Following review of the independent assessment, discuss the recommendation with the parent and with the IEP team before the meeting of the IEP team. (Gov. Code, § 7572, subd. (d)(2).)

20. In cases where the parent has obtained an independent assessment, attend the IEP team meeting if requested. (Gov. Code, § 7572, subd. (d)(2).)

21. The county of origin shall prepare yearly IEP reassessments to determine the needs of a pupil. (Cal. Code Regs., tit. 2, § 60045, subd. (h).)

D. Transfers and Interim Placements (Cal. Code Regs., tit. 2, § 60055)

1. Following a pupil's transfer to a new school district, the county shall provide interim mental health services, as specified in the existing IEP, for thirty days, unless the parent agrees otherwise.

2. Participate as a member of the IEP team of a transfer pupil to review the interim services and make a determination of services.

E. Participate as a member of the IEP team whenever the assessment of a pupil determines the pupil is seriously emotionally disturbed and in-state or out-of-state residential placement may be necessary (Gov. Code, §§ 7572.5, subds. (a) and (b), 7572.55; Cal. Code Regs., tit. 2, § 60100)

1. Participate as a member of the IEP team whenever the assessment of a pupil determines the pupil is seriously emotionally disturbed and residential placement may be necessary.

2. Re-assess the pupil in accordance with section 60400 of the regulations, if necessary.

3. When a recommendation is made that a child be placed in an out-of-state residential facility, the expanded IEP team, with the county as a participant, shall develop a plan for using less restrictive alternatives and in-state alternatives as soon as they become available, unless it is in the best educational interest of the child to remain in the out-of-state school. Residential placements for a pupil who is seriously emotionally disturbed may be made out of California only when no in-state facility can meet the pupil's needs and only when the requirements of Title 2, California Code of Regulations, section 60100, subdivisions (d) and (e), have been met. (Gov. Code, § 7572.55, subd. (c); Cal. Code Regs., tit. 2, § 60100, subd. (h).)

4. The expanded IEP team, with the county as a participant, shall document the alternatives to residential placement that were considered and the reasons why they were rejected. (Cal. Code Regs., tit. 2, § 60100, subd. (c).)

5. The expanded IEP team, with the county as a participant, shall ensure that placement is in accordance with the admission criteria of the facility. (Cal. Code Regs., tit. 2, § 60100, subd. (j).)

6. When the expanded IEP team determines that it is necessary to place a pupil who is seriously emotionally disturbed in either in-state or out-of-state residential care, counties shall ensure that: (1) the mental health services are specified in the IEP in accordance with federal law, and (2) the mental health services are provided by qualified mental health professionals. (Cal. Code Regs., tit. 2, § 60100, subd. (i).)

F. Designate the lead case manager if the IEP calls for in-state or out-of-state residential placement of a seriously emotionally disturbed pupil to perform the following activities (Gov. Code, § 7572.5, subd. (c)(1); Cal. Code Regs., tit. 2, §§ 60100, 60110)

1. Convene parents and representatives of public and private agencies in order to identify the appropriate residential facility. (Cal. Code Regs., tit. 2, §§ 60110, subd. (c)(1).)

2. Identify, in consultation with the IEP team's administrative designee, a mutually satisfactory placement that is acceptable to the parent and addresses the pupil's educational and mental health needs in a manner that is cost-effective for both public agencies, subject to the requirements of state and federal special education law, including the requirement that the placement be appropriate and in the least restrictive environment. (Cal. Code Regs, tit. 2, §§ 60100, subd. (e), 60110, subd. (c)(2).)

3. Document the determination that no nearby placement alternative that is able to implement the IEP can be identified and seek an appropriate placement that is as close to the parents' home as possible. (Cal. Code Regs., tit. 2, § 60100, subd. (f).)
4. Coordinate the residential placement plan of a pupil with a disability who is seriously emotionally disturbed as soon as possible after the decision has been made to place the pupil in residential placement. The residential placement plan shall include provisions, as determined in the pupil's IEP, for the care, supervision, mental health treatment, psychotropic medication monitoring, if required, and education of the pupil. (Cal. Code Regs., tit, 2, § 60110, subd, (b)(1).)
5. When the IEP team determines that it is necessary to place a pupil with a disability who is seriously emotionally disturbed in a community treatment facility, the lead case manager shall ensure that placement is in accordance with admission, continuing stay, and discharge criteria of the community treatment facility. (Cal. Code Regs., tit. 2, § 60110, subd. (b)(3).)
6. Complete the local mental health program payment authorization in order to initiate out of home care payments. (Cal. Code Regs., tit. 2, § 60110, subd. (c)(3).)
7. Coordinate the completion of the necessary County Welfare Department, local mental health program, and responsible local education agency financial paperwork or contracts. (Cal. Code Regs., tit. 2, § 60110, subd. (c)(4).)
8. Develop the plan for and assist the family and pupil in the pupil's social and emotional transition from home to the residential facility and the subsequent return to the home. (Cal. Code Regs., tit. 2, § 60110, subd. (c)(5).)
9. Facilitate the enrollment of the pupil in the residential facility. (Cal. Code Regs., tit. 2, § 60110, subd. (c)(6).)
10. Notify the local educational agency that the placement has been arranged and coordinate the transportation of the pupil to the facility if needed. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(7).)
11. Conduct quarterly face-to-face contacts with the pupil at the residential facility to monitor the level of care and supervision and the implementation of the treatment services and the IEP. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(8).)
12. Evaluate the continuing stay criteria, as defined in Welfare and Institutions Code section 4094, of a pupil placed in a community treatment facility every 90 days. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(8).)
13. Notify the parent or legal guardian and the local education agency administrator or designee when there is a discrepancy in the level of care, supervision, provision of treatment services, and the requirements of the IEP. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(9).)
14. Schedule and attend the next expanded IEP team meeting with the expanded IEP team's administrative designee within six months of the residential placement of a pupil with a disability who is seriously emotionally disturbed and every six months thereafter as the pupil remains in residential placement. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(10).)

15. Facilitate placement authorization from the county's interagency placement committee pursuant to Welfare and Institutions Code section 4094.5, subdivision (e)(1), by presenting the case of a pupil with a disability who is seriously emotionally disturbed prior to placement in a community treatment facility. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(11).)

G. Authorize payments to in-state or out-of-state residential care providers / Issue payments to providers of in-state or out-of-state residential care for the residential and non-educational costs of seriously emotionally disturbed pupils (Gov. Code, § 7581; Cal. Code Regs., tit. 2, § 60200, subd. (e))

1. Authorize payments to residential facilities based on rates established by the Department of Social Services in accordance with Welfare and Institutions Code sections 18350 and 18356. This activity requires counties to determine that the residential placement meets all the criteria established in Welfare and Institutions Code sections 18350 through 18356 before authorizing payment.

2. Issue payments to providers of out-of-home residential facilities for the residential and non-educational costs of seriously emotionally disturbed pupils. Payments are for the costs of food, clothing, shelter, daily supervision, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation. Counties are eligible to be reimbursed for 60 percent of the total residential and non-educational costs of a seriously emotionally disturbed child placed in an out-of-home residential facility.

   Welfare and Institutions Code section 18355.5 applies to this program and prohibits a county from claiming reimbursement for its 60-percent share of the total residential and non-educational costs of a seriously emotionally disturbed child placed in an out-of-home residential facility if the county claims reimbursement for these costs from the Local Revenue Fund identified in Welfare and Institutions Code section 17600 and receives the funds.

3. Submit reports to the State Department of Social Services for reimbursement of payments issued to seriously emotionally disturbed pupils for 24-hour out-of-home care.

H. Provide Psychotherapy or Other Mental Health Treatment Services (Cal. Code Regs., tit. 2, §§ 60020, subd. (i), 60050, subd. (b), 60200, subd. (c)[1])

1. The host county shall make its provider network available and provide the county of origin a list of appropriate providers used by the host county's managed care plan who are currently available to take new referrals. (Cal. Code Regs., tit. 2, § 60200, subd. (c)(1).)

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[1] Section 60200, subdivision (c), of the regulations defines the financial responsibilities of the counties and states that "the county of origin shall be responsible for the provision of assessments and mental health services included in an IEP in accordance with Sections 60045, 60050, and 60100 [pupils placed in residential facilities]. Mental health services shall be provided directly by the community mental health service [the county] or by contractors."

2. The county of origin shall negotiate with the host county to obtain access to limited resources, such as intensive day treatment and day rehabilitation. (Cal. Code Regs., tit. 2, § 60200, subd. (c)(1).)

3. Provide case management services to a pupil when required by the pupil's IEP. This service shall be provided directly or by contract at the discretion of the county of origin. (Cal. Code Regs., tit. 2, § 60020, subd. (i).)

4. Provide case management services and individual or group psychotherapy services, as defined in Business and Professions Code section 2903, when required by the pupil's IEP. This service shall be provided directly or by contract at the discretion of the county of origin. (Cal. Code Regs., tit. 2, § 60020, subd. (i).)

5. Provide mental health assessments, collateral services, intensive day treatment, and day rehabilitation services when required by the pupil's IEP. These services shall be provided directly or by contract at the discretion of the county of origin. (Cal. Code Regs., tit. 2, § 60020, subd. (i).)

6. Provide medication monitoring services when required by the pupil's IEP. "Medication monitoring" includes all medication support services with the exception of the medications or biologicals themselves and laboratory work. Medication support services include prescribing, administering, and monitoring of psychiatric medications or biologicals as necessary to alleviate the symptoms of mental illness. This service shall be provided directly or by contract at the discretion of the county of origin. (Cal. Code Regs., tit. 2, § 60020, subds. (f) and (i).)

7. Notify the parent and the local educational agency when the parent and the county mutually agree upon the completion or termination of a service, or when the pupil is no longer participating in treatment. ((Cal. Code Regs., tit. 2, § 60050, subd. (b).)

When providing psychotherapy or other mental health treatment services, the activities of crisis intervention, vocational services, and socialization services are not reimbursable.

I. Participate in due process hearings relating to mental health assessments or services (Gov. Code, § 7586; Cal. Code Regs., tit. 2, § 60550.) When there is a proposal or a refusal to initiate or change the identification, assessment, or educational placement of the child or the provision of a free, appropriate public education to the child relating to mental health assessments or services, the following activities are eligible for reimbursement:

1. Retaining county counsel to represent the county mental health agency in dispute resolution. The cost of retaining county counsel is reimbursable.

2. Preparation of witnesses and documentary evidence to be presented at hearings.

3. Preparation of correspondence and/or responses to motions for dismissal, continuance, and other procedural issues.

4. Attendance and participation in formal mediation conferences.

5. Attendance and participation in information resolution conferences.

6. Attendance and participation in pre-hearing status conferences convened by the Office of Administrative Hearings.

7. Attendance and participation in settlement conferences convened by the Office of Administrative Hearings.
8. Attendance and participation in Due Process hearings conducted by the Office of Administrative Hearings.
9. Paying for psychological and other mental health treatment services mandated by the test claim legislation (California Code of Regulations, title 2, sections 60020, subdivisions (f) and (i)), and the out-of-home residential care of a seriously emotionally disturbed pupil (Gov. Code, § 7581; Cal. Code Regs., tit. 2, § 60200, subd. (e)), that are required by an order of a hearing officer or a settlement agreement between the parties to be provided to a pupil following due process hearing procedures initiated by a parent or guardian.

Attorneys' fees when parents prevail in due process hearings and in negotiated settlement agreements are not reimbursable.

V. CLAIM PREPARATION AND SUBMISSION

Each of the following cost elements must be identified for each reimbursable activity identified in Section IV, Reimbursable Activities, of this document. Each claimed reimbursable cost must be supported by source documentation as described in Section IV. Additionally, each reimbursement claim must be filed in a timely manner.

There are two satisfactory methods of submitting claims for reimbursement of increased costs incurred to comply with the mandate: the direct cost reporting method and the cost report method.

Direct Cost Reporting Method

A. Direct Cost Reporting

Direct costs are those costs incurred specifically for the reimbursable activities. The following direct costs are eligible for reimbursement.

1. Salaries and Benefits

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

3. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the services that were performed during the period covered by the reimbursement claim. If the

contract services are also used for purposes other than the reimbursable activities, only the pro-rata portion of the services used to implement the reimbursable activities can be claimed. Submit contract consultant and attorney invoices with the claim and a description of the contract scope of services.

4. Fixed Assets and Equipment

Report the purchase price paid for fixed assets and equipment (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset or equipment is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination point, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1, Salaries and Benefits, for each applicable reimbursable activity.

B. Indirect Cost Rates

Indirect costs are costs that are incurred for a common or joint purpose, benefiting more than one program, and are not directly assignable to a particular department or program without efforts disproportionate to the result achieved. Indirect costs may include both (1) overhead costs of the unit performing the mandate; and (2) the costs of the central government services distributed to the other departments based on a systematic and rational basis through a cost allocation plan.

Compensation for indirect costs is eligible for reimbursement utilizing the procedure provided in the Office of Management and Budget (OMB) Circular A-87. Claimants have the option of using 10% of direct labor, excluding fringe benefits, or preparing an Indirect Cost Rate Proposal (ICRP) if the indirect cost rate claimed exceeds 10%.

If the claimant chooses to prepare an ICRP, both the direct costs (as defined and described in OMB Circular A-87 Attachments A and B) and the indirect costs shall exclude capital expenditures and unallowable costs (as defined and described in OMB Circular A-87 Attachments A and B). However, unallowable costs must be included in the direct costs if they represent activities to which indirect costs are properly allocable.

The distribution base may be (1) total direct costs (excluding capital expenditures and other distorting items, such as pass-through funds, major subcontracts, etc.), (2) direct salaries and wages, or (3) another base which results in an equitable distribution.

In calculating an ICRP, the claimant shall have the choice of one of the following methodologies:

1. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) classifying a department's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect

costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected; or

2. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) separating a department into groups, such as divisions or sections, and then classifying the division's or section's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate that is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected.

Cost Report Method

A. Cost Report Method

Under this claiming method, the mandate reimbursement claim is still submitted on the State Controller's claiming forms in accordance with claiming instructions. A complete copy of the annual cost report, including all supporting schedules attached to the cost report as filed with the Department of Mental Health, must also be filed with the claim forms submitted to the State Controller.

B. Indirect Cost Rates

To the extent that reimbursable indirect costs have not already been reimbursed, they may be claimed under this method.

Indirect costs are costs that are incurred for a common or joint purpose, benefiting more than one program, and are not directly assignable to a particular department or program without efforts disproportionate to the result achieved. Indirect costs may include (1) the overhead costs of the unit performing the mandate; and (2) the costs of the central government services distributed to the other departments based on a systematic and rational basis through a cost allocation plan.

Compensation for indirect costs is eligible for reimbursement utilizing the procedure provided in the Office of Management and Budget (OMB) Circular A-87. Claimants have the option of using 10% of labor, excluding fringe benefits, or preparing an Indirect Cost Rate Proposal (ICRP) if the indirect cost rate claimed exceeds 10%.

If the claimant chooses to prepare an ICRP, both the direct costs (as defined and described in OMB Circular A-87 Attachments A and B) and the indirect costs shall exclude capital expenditures and unallowable costs (as defined and described in OMB A-87 Attachments A and B). However, unallowable costs must be included in the direct costs if they represent activities to which indirect costs are properly allocable.

The distribution base may be (1) total direct costs (excluding capital expenditures and other distorting items, such as pass-through funds, major subcontracts, etc.), (2) direct salaries and wages, or (3) another base which results in an equitable distribution.

In calculating an ICRP, the claimant shall have the choice of one of the following methodologies:

1. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) classifying a department's total costs for the base period as either direct or indirect, and

(2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected; or

2. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) separating a department into groups, such as divisions or sections, and then classifying the division's or section's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate that is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected.

VI. RECORD RETENTION

Pursuant to Government Code section 17558.5, subdivision (a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter[2] is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the reimbursable activities, as described in Section IV, must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

VII. OFFSETTING REVENUE AND REIMBURSEMENTS

Any offsets the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate received from any of the following sources shall be identified and deducted from this claim:

1. Funds received by a county pursuant to Government Code section 7576.5.
2. Any direct payments or categorical funding received from the state that is specifically allocated to any service provided under this program.
3. Funds received and applied to this program from appropriations made by the Legislature in future Budget Acts for disbursement by the State Controller's Office.
4. Private insurance proceeds obtained with the consent of a parent for purposes of this program.
5. Medi-Cal proceeds obtained from the state or federal government, exclusive of the county match, that pay for a portion of the county services provided to a pupil under the Handicapped and Disabled Students program in accordance with federal law.

[2] This refers to Title 2, division 4, part 7, chapter 4 of the Government Code.

6. Any other reimbursement received from the federal or state government, or other non-local source.

Except as expressly provided in section IV(F)(2) of these parameters and guidelines, Realignment funds received from the Local Revenue Fund that are used by a county for this program are not required to be deducted from the costs claimed. (Stats. 2004, ch. 493, § 6 (Sen. Bill No. 1895).)

VIII. STATE CONTROLLER'S CLAIMING INSTRUCTIONS

Pursuant to Government Code section 17558, subdivision (b), the Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 60 days after receiving the adopted parameters and guidelines from the Commission, to assist local agencies and school districts in claiming costs to be reimbursed. The claiming instructions shall be derived from the test claim decision and the parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561, subdivision (d)(1), issuance of the claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

IX. REMEDIES BEFORE THE COMMISSION

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the State Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines, the Commission shall direct the Controller to modify the claiming instructions and the Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557, subdivision (d), and California Code of Regulations, title 2, section 1183.2.

X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES

The Statements of Decision are legally binding on all parties and provide the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record for these test claims. The administrative records, including the Statements of Decision, are on file with the Commission.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *Governor*

COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
FAX: (916) 445-0278
E-mail: csminfo@csm.ca.gov

July 30, 2010

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

And Interested Parties and Affected State Agencies (See Enclosed Mailing List)

RE: **Adopted Amendments to Parameters and Guidelines,** 09-PGA-03
Handicapped and Disabled Students (04-RL-4282-10);
Handicapped and Disabled Students II (02-TC-40/02-TC-49); and
Seriously Emotionally Disturbed (SED) Pupils:
Out-of-State Mental Health Services (97-TC-05)
State Controller's Office, Requestor

Dear Ms. Kanemasu:

On July 29, 2010, the Commission on State Mandates adopted the enclosed amendment to the parameters and guidelines for the above-entitled program.

Please contact Nancy Patton at (916) 323-8217 if you have questions.

Sincerely,

PAULA HIGASHI
Executive Director

Enclosure

J:mandates/2009/09pga03/pgaadopttrans

Tab 7

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE AMENDMENT TO PARAMETERS AND GUIDELINES ON:

Government Code Sections 7570-7588; Statutes 1984, Chapter 1747 (AB 3632); Statutes 1985, Chapter 1274 (AB 882); Statutes 1994, Chapter 1128 (AB 1892); Statutes 1996, Chapter 654 (AB 2726);

California Code of Regulations, Title 2, Sections 60000-60610 (Emergency Regulations effective January 1, 1986 [Register 86, No. 1], and re-filed June 30, 1986, designated effective July 12, 1986 [Register 86, No. 28]; and Emergency Regulations effective July 1, 1998 [Register 98, No. 26], Final Regulations effective August 9, 1999 [Register 99, No. 33]);

Filed on February 4, 2010;

By State Controller's Office, Requestor.

No. 09-PGA-03 (04-RL-4282-10; 02-TC-40/ 02-TC-49; 97-TC-05)

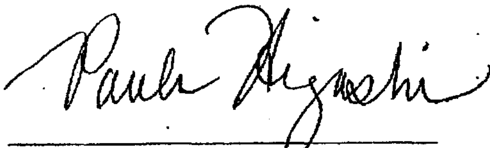
Consolidated Handicapped and Disabled Students, Handicapped and Disabled Students II, and Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental health Services

ADOPTION OF AMENDMENT TO PARAMETERS AND GUIDELINES PURSUANT TO GOVERNMENT CODE SECTION 17557 AND TITLE 2, CALIFORNIA CODE OF REGULATIONS, SECTION 1183.2

(Adopted on July 29, 2010)

AMENDMENT TO PARAMETERS AND GUIDELINES

On July 29, 2010, the Commission on State Mandates adopted the attached amendment to parameters and guidelines.



Paula Higashi, Executive Director

Dated: July 30, 2010

Amended: July 29, 2010
Adopted: October 26, 2006

AMENDMENT TO CONSOLIDATED PARAMETERS AND GUIDELINES

Government Code Sections 7570-7588
Statutes 1984, Chapter 1747 (Assem. Bill No. 3632)
Statutes 1985, Chapter 1274 (Assem. Bill No. 882)
Statutes 1994, Chapter 1128 (Assem. Bill No. 1892)
Statutes 1996, Chapter 654 (Assem. Bill No. 2726)

California Code of Regulations, Title 2, Sections 60000-60610
(Emergency regulations effective January 1, 1986 [Register 86, No. 1], and re-filed June 30, 1986, designated effective July 12, 1986 [Register 86, No. 28]; and Emergency regulations effective July 1, 1998 [Register 98, No. 26], final regulations effective August 9, 1999 [Register 99, No. 33])

Handicapped and Disabled Students 09-PGA-03 (04-RL-4282-10);
Handicapped and Disabled Students II (02-TC-40/02-TC-49); and
Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services (97-TC-05)

Commencing with Fiscal Year 2008-2009

I. SUMMARY OF THE MANDATE

The *Handicapped and Disabled Students* program was enacted in 1984 and 1985 as the state's response to federal legislation (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 legislation shifted to counties the responsibility and funding of mental health services required by a pupil's individualized education plan (IEP).

The Commission on State Mandates (Commission) adopted amended parameters and guidelines for the *Handicapped and Disabled Students* program (CSM 4282) on January 26, 2006, ending the period of reimbursement for costs incurred through and including June 30, 2004. Costs incurred after this date are claimed under the parameters and guidelines for the Commission's decision on reconsideration, *Handicapped and Disabled Students* (04-RL-4282-10).

The Commission adopted its Statement of Decision on the reconsideration of *Handicapped and Disabled Students* (04-RL-4282-10) on May 26, 2005. The Commission found that the 1990 Statement of Decision in *Handicapped and Disabled Students* correctly concluded that the test claim legislation imposes a reimbursable state-mandated program on counties pursuant to article XIII B, section 6 of the California Constitution. The Commission determined, however, that the 1990 Statement of Decision does not fully identify all of the activities mandated by the statutes and regulations pled in the test claim or the offsetting revenue applicable to the claim. Thus, the Commission, on reconsideration, identified the activities expressly required by the test claim legislation and the offsetting revenue that must be identified and deducted from the costs

claimed. Parameters and guidelines were adopted on January 26, 2006, and corrected on July 21, 2006, with a period of reimbursement beginning July 1, 2004.

The Commission also adopted a Statement of Decision for the *Handicapped and Disabled Students II* program on May 26, 2005, addressing the statutory and regulatory amendments to the program. Parameters and guidelines were adopted on December 9, 2005, and corrected on July 21, 2006, with a period of reimbursement beginning July 1, 2001.

On May 25, 2000, the Commission adopted a Statement of Decision for the *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05) program, addressing the counties' responsibilities for out-of-state placement of seriously emotionally disturbed students. Parameters and guidelines were adopted on October 26, 2000, and corrected on July 21, 2006, with a period of reimbursement beginning January 1, 1997.

These parameters and guidelines consolidate the Commission's decisions on the Reconsideration of *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) for reimbursement claims filed for costs incurred commencing with the 2006-2007 fiscal year.

II. ELIGIBLE CLAIMANTS

Any county, or city and county, that incurs increased costs as a result of this reimbursable state-mandated program is eligible to claim reimbursement of those costs.

III. PERIOD OF REIMBURSEMENT

The period of reimbursement for the activities in this consolidated parameters and guidelines begins on July 1, 2006.

Reimbursable actual costs for one fiscal year shall be included in each claim. Estimated costs for the subsequent year may be included on the same claim, if applicable. Pursuant to Government Code section 17561, subdivision (d)(1), all claims for reimbursement of initial years' costs shall be submitted within 120 days of the issuance of the State Controller's claiming instructions. If the total costs for a given fiscal year do not exceed $1,000, no reimbursement shall be allowed, except as otherwise allowed by Government Code section 17564.

There shall be no reimbursement for any period in which the Legislature has suspended the operation of a mandate pursuant to state law.

IV. REIMBURSABLE ACTIVITIES

To be eligible for mandated cost reimbursement for any given fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, calendars, and declarations. Declarations must include a certification or declaration stating, "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of Code of Civil Procedure

section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise reported in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

For each eligible claimant, the following activities are eligible for reimbursement:

A. The one-time activity of revising the interagency agreement with each local educational agency to include the following eight procedures (Cal. Code Regs., tit. 2, § 60030):

1. Resolving interagency disputes at the local level, including procedures for the continued provision of appropriate services during the resolution of any interagency dispute, pursuant to Government Code section 7575, subdivision (f). For purposes of this subdivision only, the term "appropriate" means any service identified in the pupil's IEP, or any service the pupil actually was receiving at the time of the interagency dispute. (Cal. Code Regs, tit. 2, § 60030, subd. (c)(2).)

2. A host county to notify the community mental health service of the county of origin within two (2) working days when a pupil with a disability is placed within the host county by courts, regional centers or other agencies for other than educational reasons. (Cal. Code Regs, tit. 2, § 60030, subd. (c)(4).)

3. Development of a mental health assessment plan and its implementation. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(5).)

4. At least ten (10) working days prior notice to the community mental health service of all IEP team meetings, including annual IEP reviews, when the participation of its staff is required. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(7).)

5. The provision of mental health services as soon as possible following the development of the IEP pursuant to section 300.342 of Title 34 of the Code of Federal Regulations. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(9).)

6. The provision of a system for monitoring contracts with nonpublic, nonsectarian schools to ensure that services on the IEP are provided. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(14).)

7. The development of a resource list composed of qualified mental health professionals who conduct mental health assessments and provide mental health services. The community mental health service shall provide the LEA with a copy of this list and monitor these contracts to assure that services as specified on the IEP are provided. (Cal. Code Regs., tit. 2, § 60030, subd. (c)(15).)

8. Mutual staff development for education and mental health staff pursuant to Government Code section 7586.6, subdivision (a). (Cal. Code Regs., tit. 2, § 60030, subd. (c)(17).)

This activity is reimbursable only if it was not previously claimed under the parameters and guidelines for *Handicapped and Disabled Students II* (02-TC-40/02-TC-49).

B. Renew the interagency agreement with the local educational agency every three years and, if necessary, revise the agreement (Gov. Code, § 7571; Cal. Code Regs., tit. 2, §§ 60030, 60100)

1. Renew the interagency agreement every three years, and revise if necessary.
2. Define the process and procedures for coordinating local services to promote alternatives to out-of-home care of seriously emotionally disturbed pupils.

C. Referral and Mental Health Assessments (Gov. Code, §§ 7572, 7576; Cal. Code Regs., tit. 2, §§ 60040, 60045, 60200, subd. (c))

1. Work collaboratively with the local educational agency to ensure that assessments performed prior to referral are as useful as possible to the community mental health service in determining the need for mental health services and the level of services needed. (Gov. Code, § 7576, subd. (b)(1).)
2. A county that receives a referral for a pupil with a different county of origin shall forward the referral within one working day to the county of origin. (Gov. Code, § 7576, subd. (g); Cal. Code Regs., tit. 2, § 60040, subd. (g).)
3. If the county determines that a mental health assessment is not necessary, the county shall document the reasons and notify the parents and the local educational agency of the county determination within one day. (Cal Code Regs., tit. 2, § 60045, subd. (a)(1).)
4. If the county determines that the referral is incomplete, the county shall document the reasons, notify the local educational agency within one working day, and return the referral. (Cal. Code Regs., tit. 2, § 60045, subd. (a)(2).)
5. Notify the local educational agency when an assessment is determined necessary. (Cal. Code Regs., tit. 2, § 60045, subd. (b).)
6. If mental health assessments are deemed necessary by the county, develop a mental health assessment plan and obtain the parent's written informed consent for the assessment. (Cal. Code Regs., tit. 2, § 60045, subd. (b).)
7. Provide the assessment plan to the parent. (Cal. Code Regs., tit. 2, § 60045, subd. (b).)
8. Report back to the referring local educational agency or IEP team within 30 days from the date of the receipt of the referral if no parental consent for a mental health assessment has been obtained. (Cal. Code Regs., tit. 2, § 60045, subd. (c).)
9. Notify the local educational agency within one working day after receipt of the parent's written consent for the mental health assessment to establish the date of the IEP meeting. (Cal. Code Regs., tit. 2, § 60045, subd. (d).)
10. Review the following educational information of a pupil referred to the county by a local educational agency for an assessment: a copy of the assessment reports completed in accordance with Education Code section 56327, current and relevant behavior observations of the pupil in a variety of educational and natural settings, a report prepared by personnel that provided "specialized" counseling and guidance services to the pupil and, when appropriate, an explanation why such counseling and guidance will not meet the needs of the pupil. (Cal. Code Regs., tit. 2, § 60045, subd. (a).)

11. If necessary, observe the pupil in the school environment to determine if mental health assessments are needed.

12. If necessary, interview the pupil and family, and conduct collateral interviews.

13. Assess the pupil within the time required by Education Code section 56344. (Cal. Code Regs., tit. 2, § 60045, subd. (e).)

14. Prepare and provide to the IEP team, and the parent or guardian, a written assessment report in accordance with Education Code section 56327. The report shall include the following information: whether the pupil may need special education and related services; the basis for making the determination; the relevant behavior noted during the observation of the pupil in the appropriate setting; the relationship of that behavior to the pupil's academic and social functioning; the educationally relevant health and development, and medical findings, if any; for pupils with learning disabilities, whether there is such a discrepancy between achievement and ability that it cannot be corrected without special education and related services; a determination concerning the effects of environmental, cultural, or economic disadvantage, where appropriate; and the need for specialized services, materials, equipment for pupils with low incidence disabilities. (Cal. Code Regs., tit. 2, § 60045, subds. (f) and (g).)

15. Provide the parent with written notification that the parent may require the assessor to attend the IEP meeting to discuss the recommendation when the parent disagrees with the assessor's mental health service recommendation. (Cal. Code Regs., tit. 2, § 60045, subd. (f).)

16. Review and discuss the county recommendation with the parent and the appropriate members of the IEP team before the IEP team meeting. (Gov. Code, § 7572, subd. (d)(1); Cal. Code Regs., tit. 2, § 60045, subd. (f).)

17. In cases where the local education agency refers a pupil to the county for an assessment, attend the IEP meeting if requested by the parent. (Gov. Code, § 7572, subd. (d)(1); Cal. Code Regs., tit. 2, § 60045, subd. (f).)

18. Review independent assessments of a pupil obtained by the parent. (Gov. Code, § 7572, subd. (d)(2).)

19. Following review of the independent assessment, discuss the recommendation with the parent and with the IEP team before the meeting of the IEP team. (Gov. Code, § 7572, subd. (d)(2).)

20. In cases where the parent has obtained an independent assessment, attend the IEP team meeting if requested. (Gov. Code, § 7572, subd. (d)(2).)

21. The county of origin shall prepare yearly IEP reassessments to determine the needs of a pupil. (Cal. Code Regs., tit. 2, § 60045, subd. (h).)

D. Transfers and Interim Placements (Cal. Code Regs., tit. 2, § 60055)

1. Following a pupil's transfer to a new school district, the county shall provide interim mental health services, as specified in the existing IEP, for thirty days, unless the parent agrees otherwise.

2. Participate as a member of the IEP team of a transfer pupil to review the interim services and make a determination of services.

E. Participate as a member of the IEP team whenever the assessment of a pupil determines the pupil is seriously emotionally disturbed and in-state or out-of-state residential placement may be necessary (Gov. Code, §§ 7572.5, subds. (a) and (b), 7572.55; Cal. Code Regs., tit. 2, § 60100)

1. Participate as a member of the IEP team whenever the assessment of a pupil determines the pupil is seriously emotionally disturbed and residential placement may be necessary.

2. Re-assess the pupil in accordance with section 60400 of the regulations, if necessary.

3. When a recommendation is made that a child be placed in an out-of-state residential facility, the expanded IEP team, with the county as a participant, shall develop a plan for using less restrictive alternatives and in-state alternatives as soon as they become available, unless it is in the best educational interest of the child to remain in the out-of-state school. Residential placements for a pupil who is seriously emotionally disturbed may be made out of California only when no in-state facility can meet the pupil's needs and only when the requirements of Title 2, California Code of Regulations, section 60100, subdivisions (d) and (e), have been met. (Gov. Code, § 7572.55, subd. (c); Cal. Code Regs., tit. 2, § 60100, subd. (h).)

4. The expanded IEP team, with the county as a participant, shall document the alternatives to residential placement that were considered and the reasons why they were rejected. (Cal. Code Regs., tit. 2, § 60100, subd. (c).)

5. The expanded IEP team, with the county as a participant, shall ensure that placement is in accordance with the admission criteria of the facility. (Cal. Code Regs., tit. 2, § 60100, subd. (j).)

6. When the expanded IEP team determines that it is necessary to place a pupil who is seriously emotionally disturbed in either in-state or out-of-state residential care, counties shall ensure that: (1) the mental health services are specified in the IEP in accordance with federal law, and (2) the mental health services are provided by qualified mental health professionals. (Cal. Code Regs., tit. 2, § 60100, subd. (i).)

F. Designate the lead case manager if the IEP calls for in-state or out-of-state residential placement of a seriously emotionally disturbed pupil to perform the following activities (Gov. Code, § 7572.5, subd. (c)(1); Cal. Code Regs., tit. 2, §§ 60100, 60110)

1. Convene parents and representatives of public and private agencies in order to identify the appropriate residential facility. (Cal. Code Regs., tit. 2, §§ 60110, subd. (c)(1).)

2. Identify, in consultation with the IEP team's administrative designee, a mutually satisfactory placement that is acceptable to the parent and addresses the pupil's educational and mental health needs in a manner that is cost-effective for both public agencies, subject to the requirements of state and federal special education law, including the requirement that the placement be appropriate and in the least restrictive environment. (Cal. Code Regs, tit. 2, §§ 60100, subd. (e), 60110, subd. (c)(2).)

3. Document the determination that no nearby placement alternative that is able to implement the IEP can be identified and seek an appropriate placement that is as close to the parents' home as possible. (Cal. Code Regs., tit. 2, § 60100, subd. (f).)
4. Coordinate the residential placement plan of a pupil with a disability who is seriously emotionally disturbed as soon as possible after the decision has been made to place the pupil in residential placement. The residential placement plan shall include provisions, as determined in the pupil's IEP, for the care, supervision, mental health treatment, psychotropic medication monitoring, if required, and education of the pupil. (Cal. Code Regs., tit, 2, § 60110, subd, (b)(1).)
5. When the IEP team determines that it is necessary to place a pupil with a disability who is seriously emotionally disturbed in a community treatment facility, the lead case manager shall ensure that placement is in accordance with admission, continuing stay, and discharge criteria of the community treatment facility. (Cal. Code Regs., tit. 2, § 60110, subd. (b)(3).)
6. Complete the local mental health program payment authorization in order to initiate out of home care payments. (Cal. Code Regs., tit. 2, § 60110, subd. (c)(3).)
7. Coordinate the completion of the necessary County Welfare Department, local mental health program, and responsible local education agency financial paperwork or contracts. (Cal. Code Regs., tit. 2, § 60110, subd. (c)(4).)
8. Develop the plan for and assist the family and pupil in the pupil's social and emotional transition from home to the residential facility and the subsequent return to the home. (Cal. Code Regs., tit. 2, § 60110, subd. (c)(5).)
9. Facilitate the enrollment of the pupil in the residential facility. (Cal. Code Regs., tit. 2, § 60110, subd. (c)(6).)
10. Notify the local educational agency that the placement has been arranged and coordinate the transportation of the pupil to the facility if needed. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(7).)
11. Conduct quarterly face-to-face contacts with the pupil at the residential facility to monitor the level of care and supervision and the implementation of the treatment services and the IEP. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(8).)
12. Evaluate the continuing stay criteria, as defined in Welfare and Institutions Code section 4094, of a pupil placed in a community treatment facility every 90 days. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(8).)
13. Notify the parent or legal guardian and the local education agency administrator or designee when there is a discrepancy in the level of care, supervision, provision of treatment services, and the requirements of the IEP. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(9).)
14. Schedule and attend the next expanded IEP team meeting with the expanded IEP team's administrative designee within six months of the residential placement of a pupil with a disability who is seriously emotionally disturbed and every six months thereafter as the pupil remains in residential placement. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(10).)

15. Facilitate placement authorization from the county's interagency placement committee pursuant to Welfare and Institutions Code section 4094.5, subdivision (e)(1), by presenting the case of a pupil with a disability who is seriously emotionally disturbed prior to placement in a community treatment facility. (Cal. Code Regs, tit. 2, § 60110, subd. (c)(11).)

G. Authorize payments to in-state or out-of-state residential care providers / Issue payments to providers of in-state or out-of-state residential care for the residential and non-educational costs of seriously emotionally disturbed pupils (Gov. Code, § 7581; Cal. Code Regs., tit. 2, § 60200, subd. (e))

1. Authorize payments to residential facilities based on rates established by the Department of Social Services in accordance with Welfare and Institutions Code sections 18350 and 18356. This activity requires counties to determine that the residential placement meets all the criteria established in Welfare and Institutions Code sections 18350 through 18356 before authorizing payment.

2. Issue payments to providers of out-of-home residential facilities for the residential and non-educational costs of seriously emotionally disturbed pupils. Payments are for the costs of food, clothing, shelter, daily supervision, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation. Counties are eligible to be reimbursed for 60 percent of the total residential and non-educational costs of a seriously emotionally disturbed child placed in an out-of-home residential facility.

   Welfare and Institutions Code section 18355.5 applies to this program and prohibits a county from claiming reimbursement for its 60-percent share of the total residential and non-educational costs of a seriously emotionally disturbed child placed in an out-of-home residential facility if the county claims reimbursement for these costs from the Local Revenue Fund identified in Welfare and Institutions Code section 17600 and receives the funds.

3. Submit reports to the State Department of Social Services for reimbursement of payments issued to seriously emotionally disturbed pupils for 24-hour out-of-home care.

H. Provide Psychotherapy or Other Mental Health Treatment Services (Cal. Code Regs., tit. 2, §§ 60020, subd. (i), 60050, subd. (b), 60200, subd. (c)[1])

1. The host county shall make its provider network available and provide the county of origin a list of appropriate providers used by the host county's managed care plan who are currently available to take new referrals. (Cal. Code Regs., tit. 2, § 60200, subd. (c)(1).)

[1] Section 60200, subdivision (c), of the regulations defines the financial responsibilities of the counties and states that "the county of origin shall be responsible for the provision of assessments and mental health services included in an IEP in accordance with Sections 60045, 60050, and 60100 [pupils placed in residential facilities]. Mental health services shall be provided directly by the community mental health service [the county] or by contractors."

2. The county of origin shall negotiate with the host county to obtain access to limited resources, such as intensive day treatment and day rehabilitation. (Cal. Code Regs., tit. 2, § 60200, subd. (c)(1).)

3. Provide case management services to a pupil when required by the pupil's IEP. This service shall be provided directly or by contract at the discretion of the county of origin. (Cal. Code Regs., tit. 2, § 60020, subd. (i).)

4. Provide case management services and individual or group psychotherapy services, as defined in Business and Professions Code section 2903, when required by the pupil's IEP. This service shall be provided directly or by contract at the discretion of the county of origin. (Cal. Code Regs., tit. 2, § 60020, subd. (i).)

5. Provide mental health assessments, collateral services, intensive day treatment, and day rehabilitation services when required by the pupil's IEP. These services shall be provided directly or by contract at the discretion of the county of origin. (Cal. Code Regs., tit. 2, § 60020, subd. (i).)

6. Provide medication monitoring services when required by the pupil's IEP. "Medication monitoring" includes all medication support services with the exception of the medications or biologicals themselves and laboratory work. Medication support services include prescribing, administering, and monitoring of psychiatric medications or biologicals as necessary to alleviate the symptoms of mental illness. This service shall be provided directly or by contract at the discretion of the county of origin. (Cal. Code Regs., tit. 2, § 60020, subds. (f) and (i).)

7. Notify the parent and the local educational agency when the parent and the county mutually agree upon the completion or termination of a service, or when the pupil is no longer participating in treatment. ((Cal. Code Regs., tit. 2, § 60050, subd. (b).)

When providing psychotherapy or other mental health treatment services, the activities of crisis intervention, vocational services, and socialization services are not reimbursable.

I. Participate in due process hearings relating to mental health assessments or services (Gov. Code, § 7586; Cal. Code Regs., tit. 2, § 60550.) When there is a proposal or a refusal to initiate or change the identification, assessment, or educational placement of the child or the provision of a free, appropriate public education to the child relating to mental health assessments or services, the following activities are eligible for reimbursement:

1. Retaining county counsel to represent the county mental health agency in dispute resolution. The cost of retaining county counsel is reimbursable.

2. Preparation of witnesses and documentary evidence to be presented at hearings.

3. Preparation of correspondence and/or responses to motions for dismissal, continuance, and other procedural issues.

4. Attendance and participation in formal mediation conferences.

5. Attendance and participation in information resolution conferences.

6. Attendance and participation in pre-hearing status conferences convened by the Office of Administrative Hearings.

7. Attendance and participation in settlement conferences convened by the Office of Administrative Hearings.
8. Attendance and participation in Due Process hearings conducted by the Office of Administrative Hearings.
9. Paying for psychological and other mental health treatment services mandated by the test claim legislation (California Code of Regulations, title 2, sections 60020, subdivisions (f) and (i)), and the out-of-home residential care of a seriously emotionally disturbed pupil (Gov. Code, § 7581; Cal. Code Regs., tit. 2, § 60200, subd. (e)), that are required by an order of a hearing officer or a settlement agreement between the parties to be provided to a pupil following due process hearing procedures initiated by a parent or guardian.

Attorneys' fees when parents prevail in due process hearings and in negotiated settlement agreements are not reimbursable.

V. CLAIM PREPARATION AND SUBMISSION

Each of the following cost elements must be identified for each reimbursable activity identified in Section IV, Reimbursable Activities, of this document. Each claimed reimbursable cost must be supported by source documentation as described in Section IV. Additionally, each reimbursement claim must be filed in a timely manner.

There are two satisfactory methods of submitting claims for reimbursement of increased costs incurred to comply with the mandate: the direct cost reporting method and the cost report method.

Direct Cost Reporting Method

A. Direct Cost Reporting

Direct costs are those costs incurred specifically for the reimbursable activities. The following direct costs are eligible for reimbursement.

1. Salaries and Benefits

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

3. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the services that were performed during the period covered by the reimbursement claim. If the

contract services are also used for purposes other than the reimbursable activities, only the pro-rata portion of the services used to implement the reimbursable activities can be claimed. Submit contract consultant and attorney invoices with the claim and a description of the contract scope of services.

4. Fixed Assets and Equipment

Report the purchase price paid for fixed assets and equipment (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset or equipment is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination point, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1, Salaries and Benefits, for each applicable reimbursable activity.

B. Indirect Cost Rates

Indirect costs are costs that are incurred for a common or joint purpose, benefiting more than one program, and are not directly assignable to a particular department or program without efforts disproportionate to the result achieved. Indirect costs may include both (1) overhead costs of the unit performing the mandate; and (2) the costs of the central government services distributed to the other departments based on a systematic and rational basis through a cost allocation plan.

Compensation for indirect costs is eligible for reimbursement utilizing the procedure provided in the Office of Management and Budget (OMB) Circular A-87. Claimants have the option of using 10% of direct labor, excluding fringe benefits, or preparing an Indirect Cost Rate Proposal (ICRP) if the indirect cost rate claimed exceeds 10%.

If the claimant chooses to prepare an ICRP, both the direct costs (as defined and described in OMB Circular A-87 Attachments A and B) and the indirect costs shall exclude capital expenditures and unallowable costs (as defined and described in OMB Circular A-87 Attachments A and B). However, unallowable costs must be included in the direct costs if they represent activities to which indirect costs are properly allocable.

The distribution base may be (1) total direct costs (excluding capital expenditures and other distorting items, such as pass-through funds, major subcontracts, etc.), (2) direct salaries and wages, or (3) another base which results in an equitable distribution.

In calculating an ICRP, the claimant shall have the choice of one of the following methodologies:

1. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) classifying a department's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect

costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected; or

2. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) separating a department into groups, such as divisions or sections, and then classifying the division's or section's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate that is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected.

Cost Report Method

A. Cost Report Method

Under this claiming method, the mandate reimbursement claim is still submitted on the State Controller's claiming forms in accordance with claiming instructions. A complete copy of the annual cost report, including all supporting schedules attached to the cost report as filed with the Department of Mental Health, must also be filed with the claim forms submitted to the State Controller.

B. Indirect Cost Rates

To the extent that reimbursable indirect costs have not already been reimbursed, they may be claimed under this method.

Indirect costs are costs that are incurred for a common or joint purpose, benefiting more than one program, and are not directly assignable to a particular department or program without efforts disproportionate to the result achieved. Indirect costs may include (1) the overhead costs of the unit performing the mandate; and (2) the costs of the central government services distributed to the other departments based on a systematic and rational basis through a cost allocation plan.

Compensation for indirect costs is eligible for reimbursement utilizing the procedure provided in the Office of Management and Budget (OMB) Circular A-87. Claimants have the option of using 10% of labor, excluding fringe benefits, or preparing an Indirect Cost Rate Proposal (ICRP) if the indirect cost rate claimed exceeds 10%.

If the claimant chooses to prepare an ICRP, both the direct costs (as defined and described in OMB Circular A-87 Attachments A and B) and the indirect costs shall exclude capital expenditures and unallowable costs (as defined and described in OMB A-87 Attachments A and B). However, unallowable costs must be included in the direct costs if they represent activities to which indirect costs are properly allocable.

The distribution base may be (1) total direct costs (excluding capital expenditures and other distorting items, such as pass-through funds, major subcontracts, etc.), (2) direct salaries and wages, or (3) another base which results in an equitable distribution.

In calculating an ICRP, the claimant shall have the choice of one of the following methodologies:

1. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) classifying a department's total costs for the base period as either direct or indirect, and

(2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected; or

2. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) separating a department into groups, such as divisions or sections, and then classifying the division's or section's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate that is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected.

VI. RECORD RETENTION

Pursuant to Government Code section 17558.5, subdivision (a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter[2] is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the reimbursable activities, as described in Section IV, must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings. All claims shall identify the number of pupils in out-of-state residential programs for the costs being claimed.

VII. OFFSETTING REVENUE AND REIMBURSEMENTS

Any offsets the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate received from any of the following sources shall be identified and deducted from this claim:

1. Funds received by a county pursuant to Government Code section 7576.5.
2. Any direct payments or categorical funding received from the state that is specifically allocated to any service provided under this program.
3. Funds received and applied to this program from appropriations made by the Legislature in future Budget Acts for disbursement by the State Controller's Office.
4. Private insurance proceeds obtained with the consent of a parent for purposes of this program.

[2] This refers to Title 2, division 4, part 7, chapter 4 of the Government Code.

5. Medi-Cal proceeds obtained from the state or federal government, exclusive of the county match, that pay for a portion of the county services provided to a pupil under the Handicapped and Disabled Students program in accordance with federal law.
6. Any other reimbursement received from the federal or state government, or other non-local source.

Except as expressly provided in section IV(G)(2) of these parameters and guidelines, Realignment funds received from the Local Revenue Fund that are used by a county for this program are not required to be deducted from the costs claimed. (Stats. 2004, ch. 493, § 6 (Sen. Bill No. 1895).)

VIII. STATE CONTROLLER'S CLAIMING INSTRUCTIONS

Pursuant to Government Code section 17558, subdivision (b), the Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 60 days after receiving the adopted parameters and guidelines from the Commission, to assist local agencies and school districts in claiming costs to be reimbursed. The claiming instructions shall be derived from the test claim decision and the parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561, subdivision (d)(1), issuance of the claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

IX. REMEDIES BEFORE THE COMMISSION

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the State Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines, the Commission shall direct the Controller to modify the claiming instructions and the Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557, subdivision (d), and California Code of Regulations, title 2, section 1183.2.

X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES

The Statements of Decision are legally binding on all parties and provide the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record for these test claims. The administrative records, including the Statements of Decision, are on file with the Commission.

Original List Date: 5/10/2010
Last Updated: 7/30/2010
List Print Date: 07/30/2010
Claim Number: 09-PGA-03
Issue: Handicapped and Disabled Student (04-RL-4282-10); Handicapped and Disabled Students II (02-TC-40/02-TC-49); and Seriously Emotionally Disturbed (SED) Pupils; Out-ofState Mental Health Services (97-TC-05)

Mailing Information: Notice of adopted Ps & Gs

Mailing List

Related Matter(s)

02-TC-40	Handicapped and Disabled Students II
02-TC-49	County Mental Health Services For Pupils With Disabilities
04-RL-4282-10	Handicapped and Disabled Students
97-TC-05	Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

Mr. Zoey Todd
Department of Mental Health (A-31)
1600 9th Street, Room 130
Sacramento, CA 95814
Tel: (916) 651-1446
Fax: (916) 654-3198

Mr. David E. Scribner
Max8550
2200 Sunrise Boulevard, Suite 240
Gold River, California 95670
Tel: (916) 852-8970
Fax: (916) 852-8978

Mr. Michael Wilkening
Department of Finance (A-15)
915 L Street, 9th Floor
Sacramento, CA 95814
Tel: (916) 445-6423
Fax:

Ms. Bonnie Ter Keurst
County of San Bernardino
Office of the Auditor/Controller-Recorder
222 West Hospitality Lane
San Bernardino, CA 92415-0018
Tel: (909) 386-8850
Fax: (909) 386-8830

Ms. Robin Ulesich-Roemmel
Department of Mental Health (A-31)
1600 9th Street, Room 150
Sacramento, CA 95814
Tel: (916) 651-0491
Fax: (916) 653-6486

Ms. Annette Chinn
Cost Recovery Systems, Inc.
705-2 East Bidwell Street, #294
Folsom, CA 95630
Tel: (916) 939-7901
Fax: (916) 939-7801

Contact		
Ms. Stacey R. Wofford Department of Mental Health (A-31) 1600 9th Street, Room 130 Sacramento, CA 95814	Tel: Fax:	(916) 651-0995 (916) 651-1496
Director California Department of Developmental Services P.O. Box 944202 Sacramento, CA 94244-2020	Tel: Fax:	(916)654-1690
Mr. Edward Jewik Los Angeles County Auditor-Controller's Office 500 W. Temple Street, Room 603 Los Angeles, CA 90012	Tel: Fax:	(213) 974-8564 (213) 617-8106
Ms. Christine L. Cohen County of Ventura County Auditor's Office 800 S. Victoria Avenue Ventura, CA 93009-1540	Tel: Fax:	(805) 654-3151 (805) 654-5081
Mr. Steve Shields Shields Consulting Group, Inc. 1536 36th Street Sacramento, CA 95816	Tel: Fax:	(916) 454-7310 (916) 454-7312
Mr. Jeff Carosone Department of Finance (A-15) 915 L Street, 8th Floor Sacramento, CA 95814	Tel: Fax:	(916) 445-8913
Ms. Bonnie Burns Children & Family Services County of Fresno 2011 Fresno Street, Suite 301 Fresno, CA 93721	Tel: Fax:	(916) 000-0000 (916) 000-0000
Mr. Jim Spano State Controller's Office (B-08) Division of Audits 300 Capitol Mall, Suite 518 Sacramento, CA 95814	Tel: Fax:	(916) 323-5849 (916) 327-0832
Ms. Juliana F. Gmur MAXIMUS 2380 Houston Ave Clovis, CA 93611	**Claimant Representative** Tel: Fax:	 (916) 485-8102 (916) 485-0111
Ms. Carol Bingham California Department of Education (E-08) Fiscal Policy Division 1430 N Street, Suite 5602 Sacramento, CA 95814	Tel: Fax:	(916) 324-4728 (916) 319-0116
Mr. Allan Burdick MAXIMUS 3130 Kilgore Road, Suite 400 Rancho Cordova, CA 95670	**Claimant Representative** Tel: Fax:	 (916) 471-5538 (916) 366-4838

Ms. Linda Downs
Administrative Services Stanislaus County
Behavioral Health & Recovery Services
800 Scenic Drive
Modesto, CA 95350
Tel: (209) 525-6225
Fax: (209) 525-6291

Mr. Robert Miyashiro
Education Mandated Cost Network
1121 L Street, Suite 1060
Sacramento, CA 95814
Tel: (916) 446-7517
Fax: (916) 446-2011

Mr. David Wellhouse
David Wellhouse & Associates, Inc.
9175 Kiefer Blvd, Suite 121
Sacramento, CA 95826
Tel: (916) 368-9244
Fax: (916) 368-5723

Mr. Leonard Kaye
Los Angeles County Auditor-Controller's Office
500 W. Temple Street, Room 603
Los Angeles, CA 90012
Tel: (213) 974-9791
Fax: (213) 617-8106

County of Sacramento
Mental Health Administration
7001-A East Parkway, Suite 400
Sacramento, CA 95823
Tel: (916) 875-7070
Fax: (916) 875-6970

Ms. Jeannie Oropeza
Department of Finance (A-15)
Education Systems Unit
915 L Street, 7th Floor
Sacramento, CA 95814
Tel: (916) 445-0328
Fax: (916) 323-9530

Ms. Donna Ferebee
Department of Finance (A-15)
915 L Street, 11th Floor
Sacramento, CA 95814
Tel: (916) 445-3274
Fax: (916) 323-9584

Mr. Mark Refowitz
County of Orange Health Care Agency
Orange County Department of Mental Health
405 W. 5th St., Suite 721
Santa Ana, CA 92701
Tel: (714) 834-6254
Fax: (714) 834-3660

Ms. Patricia Ryan
California Mental Health Directors Association
2125 19 Street, 2nd Floor
Sacramento, CA 95818-1602
Tel: (916) 556-3477
Fax: (916) 446-4519

Ms. Sandy Reynolds
Reynolds Consulting Group, Inc.
P.O. Box 894059
Temecula, CA 92589
Tel: (951) 303-3034
Fax: (951) 303-6607

Ms. Diane Van Maren
Senate Budget & Fiscal Review Committee (E-22)
California State Senate
State Capitol, Room 5066
Sacramento, CA 95814
Tel: (916) 445-5202
Fax: (916) 323-8386

Mr. Jay Lal
State Controller's Office (B-08)
Division of Accounting & Reporting
3301 C Street, Suite 700
Sacramento, CA 95816
Tel: (916) 324-0256
Fax: (916) 323-6527

Ms. Sandra Shewry, Director
Department of Health Services (A-22)
1501 Capital Avenue
MS 0000
Sacramento, CA 95899-7413
Tel: (916) 440-7400
Fax: (916) 440-7404

Ms. Jill Kanemasu
State Controller's Office (B-08)
Division of Accounting and Reporting
3301 C Street, Suite 700
Sacramento, CA 95816
Tel: (916) 322-9891
Fax:

Ms. Jolene Tollenaar
MGT of America
2001 P Street, Suite 200
Sacramento, CA 95811
Tel: (916) 443-9136
Fax: (916) 443-1766

Ms. Susan Geanacou
Department of Finance (A-15)
915 L Street, Suite 1280
Sacramento, CA 95814
Tel: (916) 445-3274
Fax: (916) 449-5252

Mr. Dale Mangram
Riverside County Auditor Controller's Office
4080 Lemon Street, 11th Floor
Riverside, CA 92502
Tel: (951) 955-3883
Fax: (951) 955-8133

Mr. Edward Jewik
Los Angeles County Auditor-Controller's Office
500 W. Temple Street, Room 603
Los Angeles, CA 90012
Tel: (213) 974-8564
Fax: (213) 617-8106

Mr. Mark Hagiya
Department of Health Services
P.O. Box 997413, MS0010
Sacramento, CA 95899-7413
Tel: (916) 440-7400
Fax: (916) 440-7408

Ms. Denise C. Hunt, R.N., M.F.T.
County of Stanislaus
Behavioral Health and Recovery Systems
800 Scenic Drive
Modesto, CA 95350
Tel: (209) 525-6205
Fax: (209) 525-6291

Mr. Mark Ginsberg
Department of Social Services (A-24)
Staff Attorney
744 P Street, MS 17-27
Sacramento, CA 95814
Tel: (916) 657-2353
Fax: (916) 657-2281

Tab 8

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE PARAMETERS AND GUIDELINES AMENDMENT FOR: Government Code Sections 7570-7588 Statutes 1984, Chapter 1747 (AB 3632) Statutes 1985, Chapter 1274 (AB 882) Statutes 1994, Chapter 1128 (AB 1892) Statutes 1996, Chapter 654 (AB 2726) Statutes 2011, Chapter 43 (AB 114) California Code of Regulations, Title 2, Sections 60000-60610 (Emergency regulations effective January 1, 1986 [Register 86, No. 1], and re-filed June 30, 1986, designated effective July 12, 1986 [Register 86, No. 28]; and Emergency regulations effective July 1, 1998 [Register 98, No. 26], final regulations effective August 9, 1999 [Register 99, No. 33]) Requestor: Department of Finance Reimbursement Ends: Effective July 1, 2011.	Case Nos.: 11-PGA-06 (4282, 04-RL-4282-10, 02-TC-40/02-TC-49, 97-TC-05) *Handicapped and Disabled Students; Handicapped and Disabled Students II, and Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted September 28, 2012*) (*Served October 5, 2012*)

STATEMENT OF DECISION

The Commission on State Mandates (Commission) adopted this statement of decision and parameters and guidelines amendment on consent during a regularly scheduled hearing on September 28, 2012.

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.

COMMISSION FINDINGS

Chronology

12/21/2011	Department of Finance filed a request to amend parameters and guidelines
01/18/2012	Commission staff issued a notice of complete filing and schedule for comments issued
06/14/2012	Draft staff analysis and proposed parameters and guidelines amendment issued
09/11/2012	Proposed statement of decision and parameters and guidelines amendment issued

I. Summary of the Mandate

The consolidated programs were enacted in 1984 and 1985 as the state's response to federal legislation (Individuals with Disabilities Education Act, or IDEA) that guarantees 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. Under federal law, a state's educational agency is responsible for meeting the IDEA requirements. However, states have the option under federal law to assign responsibility for the provision of mental health or other related services to other local agencies.[1] Thus, the test claim statutes (codified in chapter 26.5 of the Government Code by AB 3632, beginning with section 7560) shifted to counties the responsibility and funding of the mental health services required by the IDEA and identified in a pupil's individualized education plan (IEP).

On October 26, 2006, the Commission consolidated the parameters and guidelines for the *Handicapped and Disabled Students, Handicapped and Disabled Students II, and Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* programs for claiming costs beginning in fiscal year 2006-2007. The consolidated parameters and guidelines were last amended in July 2010 to correct language in Section VI of the parameters and guidelines, dealing with the record retention requirements unique to the *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* program.[2]

On December 21, 2011, the Department of Finance requested that these parameters and guidelines be amended to reflect AB 114, a budget trailer bill enacted on June 30, 2011, to end reimbursement for the consolidated program on June 30, 2011.[3]

<u>AB 114 (Stats. 2011, ch. 43)</u>

AB 114 eliminates the test claim statutory requirements for counties, shifts the responsibilities of providing mental health services required by a pupil's IEP to school districts, and continues the funding for educationally related mental health services to pupils.[4] AB 114 amended the test claim statutes as follows:

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[1] 20 U.S.C. section 1412(a)(11) and (a)(12).

[2] Exhibit B.

[3] Exhibit A.

[4] The floor analysis on AB 114, prepared by the Assembly on June 28, 2011, states the following:

- Section 32 amended Government Code section 7572, by eliminating former subdivision (c), which stated the following: "Psychotherapy and other mental health assessments shall be conducted by qualified mental health professionals as specified in regulations developed by the State Department of Mental Health, in consultation with the State Department of Education, pursuant to this chapter." Section 32 also amended former subdivision (e) by eliminating the requirement for the local education agency to invite the county mental health professional to meet with the IEP team whenever mental health services are considered for inclusion in the IEP team.
- Sections 33-38, 41, 42, 43, 48, 49, and 51 added a subdivision to Government Code sections 7572.5, 7572.55, 7576, 7576.2, 7576.3, 7576.5, 7586.5, 7586.6, and 7586.7, and Welfare and Institutions Code sections 5701.3, 5701.6, and 18356.1 to state the following: "This section shall become inoperative on July 1, 2011, and, as of January 1, 2012, is repealed, unless a later enacted statute, that becomes operative on or before January 1, 2012, deletes or extends the dates on which it becomes inoperative and is repealed."
- Section 40 amended Government Code section 7585, which addresses an agency's failure to provide services required under an IEP. The bill eliminated references to mental health services provided by counties under Government Code section 7576.
- Section 44 repealed Government Code section 7588, which provided that "This chapter shall become operative on July 1, 1986, except Section 7583, which shall become operative on January 1, 1985."
- Section 47 amended Welfare and Institutions Code section 5651 to eliminate former subdivision (a)(2), which provided that the annual county mental health services performance contract shall include assurances "that the county shall provide the mental health services required by Chapter 26.5 (commencing with Section 7570) of Division 7 of Title 1 of the Government Code and will comply with all requirements of that chapter."

Section 55 of the bill also directs the Departments of Education and Mental Health to modify or repeal the joint regulations adopted to implement the program that are no longer supported by statute.[5] These regulations are located in Title 2, sections 60000 et seq., and are considered the

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> Amend and repeals various sections of the Education, Government, and Welfare and Institutions code to repeal the state AB 3632 mandate program, which mandated counties to provide mental health services to students with disabilities. This mandate was suspended due to the veto of funding for the AB 3632 mandate in the 2010-2011 budget by Governor Schwarzenegger. As a result of this elimination, responsibility for educationally related mental health services, as required by federal law for student[s] with disabilities, is permanently shifted to schools. Pursuant to federal law, local educational agencies are required to update the Individualized Education Plan of each child that will experience a change in services as a result of this shift of responsibility.

[5] AB 114, section 55 states the following:

"meat" of the program. The regulations are included in the consolidated parameters and guidelines for reimbursement. Section 60000 introduces the regulatory requirements by stating the following:

> The provisions of this chapter shall implement Chapter 26.5, commencing with Section 7570, of Division 7 of Title 1 of the Government Code relating to interagency responsibilities for providing services to pupils with disabilities. This chapter applies to the State Departments of Mental Health, Health Services, Social Services, and their designated local agencies, and the California Department of Education, school districts, county offices, and special education local plan areas.

Following the enactment of AB 114, working group meetings and webinars with school districts were conducted by the Department of Education to help transition the provision of psychological and other mental health services to school districts. The webinar documents state that the Title 2 regulations related to the test claim statutes are no longer supported by statute and will need to be readopted, amended and adopted, or repealed.[6] As of this date, however, the regulations still exist in the California Code of Regulations.

II. Commission Findings

The request to amend the parameters and guidelines for this consolidated program raises a couple of legal issues. Although the enabling statutes for the program have been amended by the

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> (a) It is the intent of the Legislature that the State Department of Education and the appropriate departments within the California Health and Human Services Agency modify or repeal regulations that are not longer supported by statute due to the amendments in Sections . . . 32 to 44, inclusive, Sections 47 to 49, inclusive, and Section 51 of this act.
>
> (b) The State Department of Education and the appropriate departments within the California Health and Human Services Agency shall review regulations to ensure the appropriate implementation of educationally related mental health services required by the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.) and Sections . . . 32 to 44, inclusive, Sections 47 to 49, inclusive, and Section 51 of this act.
>
> (c) The State Department of Education and the appropriate departments within the California Health and Human Services Agency may adopt regulations to implement Sections . . . 32 to 44, inclusive, Sections 47 to 49, inclusive, and Section 51 of this act. The adoption, amendment, repeal, or readoption of a regulation authorized by this section is deemed to address an emergency, for purposes of Sections 11346.1 and 11349.6 of the Government Code, and the State Department of Education and the appropriate departments within the California Health and Human Services Agency are hereby exempted, for this purpose, from the requirements of subdivision (b) of Section 11346.1 of the Government Code, the 180-day period, as applicable to the effective period of an emergency regulatory action and submission of specified materials to the Office of Administrative Law, is hereby extended to one year.

[6] Exhibit D.

Legislature to become inoperative and, thus, no longer imposing a state-mandated program beginning July 1, 2011, the regulations that implement the program have not yet been amended or repealed and still exist in the California Code of Regulations. Thus, the issue is whether counties continue to be mandated by the state to comply with the regulations in Title 2, sections 60000 et seq. For the reasons below, the Commission finds that the activities required by sections 60000, et seq., and included in the consolidated parameters and guidelines, no longer impose a reimbursable state-mandated program pursuant to article XIII B, section 6.

Government Code sections 11340, et seq., governs the rulemaking process. Government Code section 11342.2 states that "no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." Thus, state agencies do not have the discretion to promulgate a regulation that is inconsistent with the governing statute. Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and not effective.[7]

AB 114 repealed and made inoperative the statutes that originally shifted the provision of psychotherapy and other mental health treatment services for pupils based on their IEPs to counties. Although the regulations in Title 2, sections 60000, et seq., were valid when promulgated by the Departments of Education and Mental Health, the regulatory requirements imposed on counties now conflict with the enabling statutes. Therefore, the requirements imposed on counties are not in effect pursuant to Government Code section 11342.2, and the test claim regulations no longer constitute a state-mandated program on counties.

Furthermore, AB 114 was intended to implement changes made in the Budget Act for fiscal year 2011-2012 and its plain language makes inoperative the test claim statutes beginning July 1, 2011. Therefore, the Commission finds that the consolidated mandated program ends on June 30, 2011, and that counties are no longer eligible to claim reimbursement for these programs beginning July 1, 2011.

The proposed parameters and guidelines amendment adds language to the title, Section I Summary, and Section III Period of Reimbursement to clarify that effective July 1, 2011, the consolidated mandated program is no longer reimbursable.

III. Conclusion

The Commission hereby adopts this statement of decision and the parameters and guidelines amendment to end reimbursement, for the *Handicapped and Disabled Students, Handicapped and Disabled Students II, and Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* programs effective July 1, 2011.

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[7] *Ontario Community Foundation, Inc. v. State Bd. of Equalization* (1984) 35 Cal.3d 811, 816-817; *Woods v. Superior Court* (1981) 28 Cal.3d 668, 678.

Tab 9

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2 CA ADC § 60100

§ 60100. LEA Identification and Placement of a Seriously Emotionally Disturbed Pupil.

Term

2 CCR § 60100

Cal. Admin. Code tit. 2, § 60100

Barclays Official California Code of Regulations Currentness
Title 2. Administration
Division 9. Joint Regulations for Pupils with Disabilities
Chapter 1. Interagency Responsibilities for Providing Services to Pupils with Disabilities
Article 3. Residential Placement
§ 60100. LEA Identification and Placement of a Seriously Emotionally Disturbed Pupil.

(a) This article shall apply only to a pupil with a disability who is seriously emotionally disturbed pursuant to paragraph (i) of Section 3030 of Title 5 of the California Code of Regulations.

(b) When an IEP team member recommends a residential placement for a pupil who meets the educational eligibility criteria specified in paragraph (4) of subsection (c) of Section 300.7 of Title 34 of the Code of Federal Regulations, the IEP shall proceed in the following manner:

(1) An expanded IEP team shall be convened within thirty (30) days with an authorized representative of the community mental health service.

(2) If any authorized representative is not present, the IEP team meeting shall be adjourned and be reconvened within fifteen (15) calendar days as an expanded IEP team with an authorized representative from the community mental health service participating as a member of the IEP team pursuant to Section 7572.5 of the Government Code.

(3) If the community mental health service or the LEA determines that additional mental health assessments are needed, the LEA and the community mental health service shall proceed in accordance with Sections 60040 and 60045.

(c) Prior to the determination that a residential placement is necessary for the pupil to receive special education and mental health services, the expanded IEP team shall consider less restrictive alternatives, such as providing a behavioral specialist and full-time behavioral aide in the classroom, home and other community environments, and/or parent training in the home and community environments. The IEP team shall document the alternatives to residential placement that were considered and the reasons why they were rejected. Such alternatives may include any combination of cooperatively developed educational and mental health services.

(d) When the expanded IEP team recommends a residential placement, it shall document the pupil's educational and mental health treatment needs that support the recommendation for residential placement. This documentation shall identify the special education and related mental health services to be provided by a residential facility listed in Section 60025 that cannot be provided in a less restrictive environment pursuant to Title 20, United States Code Section 1412(a)(5).

(e) The community mental health service case manager, in consultation with the IEP team's administrative designee, shall identify a mutually satisfactory placement that is acceptable to the parent and addresses the pupil's educational and mental health needs in a manner that is cost-effective for both public agencies, subject to the requirements of state and federal special education law, including the requirement that the placement be appropriate and in the least restrictive environment.

(f) The residential placement shall be in a facility listed in Section 60025 that is located within, or in the county adjacent to, the county of residence of the parents of the pupil with a disability, pursuant to paragraph (3) of subsection (a) of Section 300.552 of Title 34 of the Code of Federal Regulations. When no nearby placement alternative which is able to implement the IEP can be identified, this determination shall be documented, and the community mental health service case manager shall seek an appropriate placement which is as close to the parents' home as possible.

(g) Rates for care and supervision shall be established for a facility listed in Section 60025 in accordance with Section 18350 of the Welfare and Institutions Code.

(h) Residential placements for a pupil with a disability who is seriously emotionally disturbed may be made out of California only when no in-state facility can meet the pupil's needs and only when the requirements of subsections (d) and (e) have been met. Out-of-state placements shall be made only in residential programs that meet the requirements of Welfare and Institutions Code Sections 11460(c)(2) through (c)(3). For educational purposes, the pupil shall receive services from a privately operated non-medical, non-detention school certified by the California Department of Education.

(i) When the expanded IEP team determines that it is necessary to place a pupil with a disability who is seriously emotionally disturbed in residential care, the community mental health service shall ensure that:

(1) The mental health services are specified in the IEP in accordance with Title 20, United States Code Section 1414(d)(1)(A)(vi).

(2) Mental health services are provided by qualified mental health professionals.

(j) When the expanded IEP team determines that it is necessary to place a pupil with a disability who is seriously emotionally disturbed in a facility listed in Section 60025, the expanded IEP team shall ensure that placement is in accordance with admission criteria of the facility.

Note: Authority cited: Section 7587, Government Code. Sections 10553, 10554, 11462(i) and (j) and 11466.1, Welfare and Institutions Code. Reference: Sections 7576(a) and 7579, Government Code; Sections 11460(c)(2)-(c)(3), 18350 and 18356, Welfare and Institutions Code; Sections 1412 and 1414, Title 20, United States Code; and Sections 300.7 and 300.552, Title 34, Code of Federal Regulations.

HISTORY

1. New section refiled 5-1-87 as an emergency; designated effective 5-1-87 (Register 87, No. 30). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 8-31-87.

2. Division 9 (Chapter 1, Articles 1-9, Sections 60000-60610, not consecutive) shall not be subject to automatic repeal until the final regulations take effect on or before June 30, 1988 pursuant to Item 4440-131-001(b)(2), Chapter 135, Statutes of 1987 (Register 87, No. 46).

3. Division 9 (Chapter 1, Articles 1-9, Sections 60000-60610, not consecutive) shall not be subject to automatic repeal until the final regulations take effect on or before June 30, 1997, pursuant to Government Code section 7587, as amended by Stats. 1996, c. 654 (A.B. 2726, s4.) (Register 98, No. 26).

4. Division 9 (Chapter 1, Articles 1-9, Sections 60000-60610, not consecutive) repealed June 30, 1997, by operation of Government Code section 7587, as amended by Stats. 1996, c. 654 (A.B. 2726, s4.) (Register 98, No. 26).

5. New article 3 (sections 60100-60110) and section filed 6-26-98 as an emergency; operative 7-1-98 (Register 98, No. 26). A Certificate of Compliance must be transmitted to OAL by 10-29-98 or emergency language will be repealed by operation of law on the following day.

6. Editorial correction restoring prior Histories 1-2, adding new Histories 3-4, and renumbering and amending existing History 1 to new History 5 (Register 98, No. 44).

7. New article 3 (sections 60100-60110) and section refiled 10-26-98 as an emergency; operative 10-29-98 (Register 98, No. 44). A Certificate of Compliance must be transmitted to OAL by 2-26-99 or emergency language will be repealed by operation of law on the following day.

8. New article 3 (sections 60100-60110) and section refiled 2-25-99 as an emergency; operative 2-26-99 (Register 99, No. 9). A Certificate of Compliance must be transmitted to OAL by 6-28-99 or emergency language will be repealed by operation of law on the following day.

9. Certificate of Compliance as to 2-25-99 order, including amendment of section heading, amendment of subsections (b)-(b)(2), (d) and (i)(1) and amendment of Note, transmitted to OAL 6-25-99 and filed 8-9-99 (Register 99, No. 33).

2 CCR § 60100, **2 CA ADC § 60100**

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Tab 10

(c) If an amount collected as child or spousal support represents payment on the required support obligation for future months, the amount shall be applied to such future months. However, no such amounts shall be applied to future months unless amounts have been collected which fully satisfy the support obligation assigned under subdivision (a) of Section 11477 for the current months and all past months.

11458. The county may cancel, suspend or revoke aid under this chapter for cause. Upon instructions from the department, the county shall cancel, suspend or revoke aid under this chapter.

Upon request of the department, an immediate report of every suspension of aid shall be made to the department stating the reason for the suspension and showing the action of the county in approving the suspension.

11460. (a) Foster care providers shall be paid a per child per month rate in return for the care and supervision of the AFDC-FC child placed with them. The department is designated the single organizational unit whose duty it shall be to administer a state system for establishing rates in the AFDC-FC program. State functions shall be performed by the department or by delegation of the department to county welfare departments or Indian tribes, consortia of tribes, or tribal organizations that have entered into an agreement pursuant to Section 10553.1.

(b) "Care and supervision" includes food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, reasonable travel to the child's home for visitation, and reasonable travel for the child to remain in the school in which he or she is enrolled at the time of placement. Reimbursement for the costs of educational travel, as provided for in this subdivision, shall be made pursuant to procedures determined by the department, in consultation with representatives of county welfare and probation directors, and additional stakeholders, as appropriate.

(1) For a child placed in a group home, care and supervision shall also include reasonable administration and operational activities necessary to provide the items listed in this subdivision.

(2) For a child placed in a group home, care and supervision may also include reasonable activities performed by social workers employed by the group home provider which are not otherwise considered daily supervision or administration activities.

(c) It is the intent of the Legislature to establish the maximum level of state participation in out-of-state foster care group home program rates effective January 1, 1992.

(1) The department shall develop regulations that establish the method for determining the level of state participation for each out-of-state group home program. The department shall consider all of the following methods:

(A) A standardized system based on the level of care and services per child per month as detailed in Section 11462.

(B) A system which considers the actual allowable and reasonable costs of care and supervision incurred by the program.

(C) A system which considers the rate established by the host state.

(D) Any other appropriate methods as determined by the department.

(2) State reimbursement for the AFDC-FC group home rate to be paid to an out-of-state program on or after January 1, 1992, shall only be paid to programs which have done both of the following:

(A) Submitted a rate application to the department and received a determination of the level of state participation.

(i) The level of state participation shall not exceed the current fiscal year's standard rate for rate classification level 14.

(ii) The level of state participation shall not exceed the rate determined by the ratesetting authority of the state in which the facility is located.

(iii) The level of state participation shall not decrease for any child placed prior to January 1, 1992, who continues to be placed in the same out-of-state group home program.

(B) Agreed to comply with information requests, and program and fiscal audits as determined necessary by the department.

(3) 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.

(d) A foster care provider that accepts payments, following the effective date of this section, based on a rate established under this section, shall not receive rate increases or retroactive payments as the result of litigation challenging rates established prior to the effective date of this section. This shall apply regardless of whether a provider is a party to the litigation or a member of a class covered by the litigation.

(e) Nothing shall preclude a county from using a portion of its county funds to increase rates paid to family homes and foster family agencies within that county, and to make payments for specialized care increments, clothing allowances, or infant supplements to homes within that county, solely at that county's expense.

11461. (a) For children or, on and after January 1, 2012, nonminor dependents placed in a licensed or approved family home with a capacity of six or less, or in an approved home of a relative or nonrelated legal guardian, or the approved home of a nonrelative extended family member as described in Section 362.7, or, on and after January 1, 2012, a supervised independent living setting, as defined in subdivision (w) of Section 11400, the per child per month rates in the following schedule shall be in effect for the period July 1, 1989, through December 31, 1989:

Age	Basic rate
0-4	$294
5-8	319
9-11	340
12-14	378
15-20	412

(b) (1) Any county that, as of October 1, 1989, has in effect a basic rate that is at the levels set forth in the schedule in subdivision (a), shall continue to receive state participation, as specified in subdivision (c) of Section 15200, at these levels.

(2) Any county that, as of October 1, 1989, has in effect a basic rate that exceeds a level set forth in the schedule in subdivision (a), shall continue to receive the same level of state participation as it received on October 1, 1989.

(c) The amounts in the schedule of basic rates in subdivision (a)

Tab 11

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVSION
STATE OF CALIFORNIA

In the Matter of: STUDENT, Petitioner, v. RIVERSIDE UNIFIED SCHOOL DISTRICT and RIVERSIDE COUNTY DEPARTMENT of MENTAL HEALTH, Respondents.	OAH CASE NO. N 2007090403

DECISION

Administrative Law Judge Judith L. Pasewark, Office of Administrative Hearings, Special Education Division, State of California (OAH), heard this matter by written stipulation and joint statement of facts presented by the parties, along with written argument and closing briefs submitted by each party.

Heather D. McGunigle, Esq., of Disability Rights Legal Center, and Kristelia Garcia, Esq., of Quinn Emanuel Urquhart Oliver & Hedges, represented Student (Student).

Ricardo Soto, Esq., of Best Best & Krieger, represented Riverside Unified School District (District).

Sharon Watt, Esq., of Filarsky & Watt, represented Riverside County Department of Mental Health (CMH).

Student filed his first amended Request for Due Process Hearing on September 25, 2007. At the pre-hearing conference on December 7, 2007, the parties agreed to submit the matter on a written Joint Stipulation of Facts, and individual written closing arguments. The documents were received, the record closed, and matter was submitted for decision on December 31, 2007.

ISSUE

May the educational and mental health agencies place Student in an out-of-state for-profit residential center under California Code of Regulations section 60100, subdivision (h), and California Welfare and Institutions Code section 11460, subdivision (c)(2) and (3), when no other appropriate residential placement is available to provide Student a FAPE?

CONTENTIONS

All parties agree that Student requires a therapeutic residential placement which will meet his mental health and communication needs pursuant to his October 9, 2007 Individual Educational Plan (IEP). The District and CMH have conducted a nation-wide search and have been unable to locate an appropriate non-profit residential placement for Student.

Student contends that, as the District and CMH's searches for an appropriate non-profit residential placement have been exhausted, the District and CMH are obligated to place Student in an appropriate out-of-state for-profit residential program in order to provide Student with a free and appropriate public education (FAPE).

Both the District and CMH contend that they do not have the authority to place Student at an out-of-state for-profit residential program.

JOINT STIPULATION OF FACTS[1]

1. Student is 17 years old and resides with his Mother (Mother) within the District in Riverside County, California. Student's family is low-income and meets Medi-Cal eligibility requirements.

2. Student is deaf, has impaired vision and an orthopedic condition known as legg-perthes. Student has been assessed as having borderline cognitive ability. His only effective mode of communication is American Sign Language (ASL). Student also has a long history of social and behavioral difficulties. As a result, Student is eligible for special education and related services and mental health services through AB2726/3632 under the category of emotional disturbance (ED), with a secondary disability of deafness.

3. Student requires an educational environment in which he has the opportunity to interact with peers and adults who are fluent in ASL. Student attended the California

[1] The parties submitted a Stipulated Statement of Undisputed Facts and Evidence which is admitted into evidence as Exhibit 67, and incorporated herein. The stipulated facts have been consolidated and renumbered for clarity in this decision. As part of the same document, the parties stipulated to the entry of the joint Exhibits 1 through 66, which are admitted into evidence.

School for the Deaf, Riverside (CSDR) between January 2005 and September 2006, while a resident of the Monrovia Unified School District.

4. CSDR does not specialize in therapeutic behavior interventions. In January 2005, CSDR terminated Student's initial review period due to his behaviors. CSDR removed Student from school as suicide prevention because Student physically harmed himself. At that time, both CSDR and Monrovia USD believed Student to be a danger to himself and others. They, therefore, placed him in home-hospital instruction.

5. Between June 2005 and October 2005, Student's behaviors continued to escalate. Student was placed on several 72-hour psychiatric holds for which he missed numerous days of school. On one occasion, Student was hospitalized for approximately two weeks. On another occasion, he was hospitalized at least a week.

6. Pursuant to a mental health referral, on September 14, 2006, Monrovia USD and Los Angeles County Department of Mental Health (LACDMH) met, and determined that Student had a mental disturbance for which they recommended residential placement.[2] At that time, Amy Kay, Student's ASL-fluent therapist through LACDMH's AB2726 program, recommended a residential placement at the National Deaf Academy (NDA). Ms. Kay specifically recommended that Student be placed in a residential placement at NDA due to his need for a higher level of care to address his continuing aggressive and self-injurious behaviors. Additionally, the rehabilitation of these behaviors would be unsuccessful without the ability for Student to interact with deaf peers and adults. Ms. Kay further indicated that the use of an interpreter did not provide an effective method for Student to learn due to his special needs.

7. On August 5, 2006, NDA sent Student a letter of acceptance into its program. Monrovia USD and LACDMH, however, placed Student at Willow Creek/North Valley Non-public School. This placement failed as of March 2007, at which time both Monrovia USD and LACDMH indicated they were unable to find a residential placement for Student that could meet his mental health and communication needs. They did not pursue the residential treatment center at NDA because of its for-profit status.

8. Student and his mother moved to the District and Riverside County in April 2007.

9. On April 20, 2007, the District convened an IEP meeting to develop Student's educational program. The District staff, CMH staff, staff from CSDR, Student, his mother and attorney attended and participated in the IEP meeting. The IEP team changed Student's primary disability classification from emotional disturbance to deafness with social-emotional overlay. The parties agreed to this change in eligibility as CSDR required that

[2] As noted in Student's prior IEP, Student also required an educational environment which provided instruction in his natural language and which facilitated language development in ASL.

deafness be listed as a student's primary disability in order to be admitted and no other appropriate placements were offered. The IEP team offered placement at CSDR for a 60-day assessment period, individual counseling, speech and language services through CSDR, and individual counseling through CMH. The IEP team also proposed to conduct an assessment to determine Student's current functioning and to make recommendations concerning his academic programming based upon his educational needs.

10. CSDR suspended Student within its 60-day assessment period. CSDR subsequently terminated Student when, during his suspension, Student was found in the girl's dormitory following an altercation with the staff.

11. On May 23, 2007, the District convened another IEP meeting to discuss Student's removal from CSDR. The IEP team recommended Student's placement at Oak Grove Institute/Jack Weaver School (Oak Grove) in Murrieta, California, with support from a deaf interpreter pending the assessment agreed to at the April 2007 IEP meeting. CMH also proposed conducting an assessment for treatment and residential placement for Student.

12. On August 3, 2007, the District convened an IEP meeting to develop Student's annual IEP, and to review the assessments from CSDR and CMH. District staff, Oak Grove staff, CMH staff, Student's mother and attorney attended the IEP meeting. Based upon the information reviewed at the meeting, the IEP team proposed placement at Oak Grove with a signing interpreter, deaf and hard of hearing consultation and support services from the District, and individual counseling with a signing therapist through CMH. Mother and her attorney agreed to implementation of the proposed IEP, but disagreed that the offer constituted an offer of FAPE due to its lack of staff, teachers and peers who used ASL.

13. On October 9, 2007, the District convened another IEP meeting to review Student's primary disability. District staff, Oak Grove staff, CMH staff, Student's mother and attorney attended the IEP meeting. At this meeting, the IEP team once again determined Student's primary special education eligibility category as emotional disturbance with deafness as a secondary condition. The IEP team recommended placement in a residential treatment program, as recommended by CMH. Placement would remain at Oak Grove with a signing interpreter pending a residential placement search by CMH. Mother consented to the change in eligibility and the search for a residential placement. Mother also requested that Student be placed at NDA.

14. CMH made inquiries and pursued several leads to obtain a therapeutic residential placement for Student. CMH sought placements in California, Florida, Wyoming, Ohio and Illinois. All inquiries have been unsuccessful, and Student has not been accepted in any non-profit residential treatment center. At present CMH has exhausted all leads for placement of Student in a non-profit, in-state or out-of-state residential treatment center.

15. Student, his mother and attorney have identified NDA as an appropriate placement for Student. NDA, located in Mount Dora, Florida, is a residential treatment center for the treatment of deaf and hard-of-hearing children with the staff and facilities to

accommodate Student's emotional and physical disability needs. NDA also accepts students with borderline cognitive abilities. In addition, nearly all of the service providers, including teachers, therapists and psychiatrists are fluent in ASL. The residential treatment center at NDA is a privately owned limited liability corporation, and is operated on a for-profit basis. The Charter School at NDA is a California certified non-public school. All parties agree that NDA is an appropriate placement which would provide Student a FAPE.

16. Student currently exhibits behaviors that continue to demonstrate a need for a residential treatment center. Student has missed numerous school days due to behaviors at home. As recently as December 11, 2007, Student was placed in an emergency psychiatric hold because of uncontrollable emotions and violence to himself and others.

LEGAL CONCLUSIONS

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528], the party who files the request for due process has the burden of persuasion at the due process hearing. Student filed this due process request and bears the burden of persuasion.

2. A child with a disability has the right to a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA or the Act) and California law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.) The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), effective July 1, 2005, amended and reauthorized the IDEA. The California Education Code was amended, effective October 7, 2005, in response to the IDEIA. Special education is defined as specially designed instruction provided at no cost to parents and calculated to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); Ed. Code, § 56031.)

3. In *Board of Education of the Hendrick Hudson Central School District, et. al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L. Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the IDEA consists of access to specialized instruction and related services which are individually designed to provide educational benefit to a child with special needs." *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is "sufficient to confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Court concluded that the standard for determining whether a local educational agency's provision of services substantively provided a FAPE involves a determination of three factors: (1) were the services designed to address the student's unique needs, (2) were the services calculated to provide educational benefit to the student, and (3) did the services conform to the IEP. (*Id.* at p.176; *Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F. 2d 1307, 1314.) Although the IDEA does not require that a student be provided with the best available education or services or that the services maximize each child's potential, the "basic floor of opportunity"

of specialized instruction and related services must be individually designed to provide some educational benefit to the child. De minimus benefit or trivial advancement is insufficient to satisfy the *Rowley* standard of "some" benefit. (*Walczak v. Florida Union Free School District* (2d Cir. 1998) 142 F.3d at 130.)

4. Under California law, "special education" is defined as specially designed instruction, provided at no cost to parents, that meets the unique needs of the child. (Ed. Code, § 56031.) "Related services" include transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from special education. State law refers to related services as "designated instruction and services" (DIS) and, like federal law, provides that DIS services shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program." (Ed. Code, § 56363, subd. (a).) Included in the list of possible related services are psychological services other than for assessment and development of the IEP, parent counseling and training, health and nursing services, and counseling and guidance. (Ed. Code, § 56363, subd. (b).) Further, if placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parent of the child. (34 C.F.R § 300.104.) Thus, the therapeutic residential placement and services that Student requests are related services/DIS that must be provided if they are necessary for Student to benefit from special education. (20 U.S.C. § 1401(22); Ed. Code, § 56363, subd. (a).) Failure to provide such services may result in a denial of a FAPE.

5. A "local educational agency" is generally responsible for providing a FAPE to those students with disabilities residing within its jurisdictional boundaries. (Ed. Code, § 48200.)

6. Federal law provides that a local educational agency is not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility. (20 U.S.C. § 1412(a)(10)(C)(i).)

7. Under California law, a residential placement for a student with a disability who is seriously emotionally disturbed may be made outside of California only when no in-state facility can meet the student's needs and only when the requirements of subsections (d) and (e) have been met. (Cal. Code Regs., tit. 2, § 60100, subd. (h).) An out-of-state placement shall be made only in residential programs that meet the requirements of Welfare and Institutions Code sections 11460, subdivisions (c)(2) through (c)(3).

8. When a school district denies a child with a disability a FAPE, the child is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*School Comm. of the Town of Burlington v. Dept. of Educ.* (1985) 471 U.S. 359, 374 [105 S.Ct. 1996].) Based on the principle set forth in *Burlington,* federal courts have held that compensatory education is a form of equitable relief which may be granted for the denial of appropriate

special education services to help overcome lost educational opportunity. (*See e.g. Parents of Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) The purpose of compensatory education is to "ensure that the student is appropriately educated within the meaning of the IDEA." (*Id.* at p. 1497.) The ruling in *Burlington* is not so narrow as to permit reimbursement only when the placement or services chosen by the parent are found to be the exact proper placement or services required under the IDEA. (*Alamo Heights Independent Sch. Dist. v. State Bd. of Educ.*(6th Cir. 1986) 790 F.2d 1153, 1161.) However, the parents' placement still must meet certain basic requirement of the IDEA, such as the requirement that the placement address the child's needs and provide him educational benefit. (*Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 13-14 [114 S.Ct. 361].)

Determination of Issues

9. In summary, based upon Factual Findings 2, 3, and 6 through 16, all parties agree that the placement in the day program at Oak Grove NPS with an interpreter cannot meet Student's unique educational needs because it does not sufficiently address his mental health and communication needs and does not comport with his current IEP. All parties agree that Student requires a therapeutic residential placement in order to benefit from his education program. Further, all parties agree that the nationwide search by the District and CMH for an appropriate non-profit residential placement with a capacity to serve deaf students has been exhausted, and Student remains without a residential placement. Lastly, all parties agree that the National Deaf Academy can meet both Student's mental health and communication needs. Further, the charter school at NDA is a California certified NPS.

10. The District and CMH rely upon Legal Conclusion 7 to support their contentions that they are prohibited from placing Student in an out-of-state for-profit residential placement, even if it represents the only means of providing Student with a FAPE.

11. As administrative law precedent, CMH cites *Yucaipa-Calimesa Joint Unified School District and San Bernardino County Department of Behavioral Health (Yucaipa),* OAH Case No. N2005070683 (2005), which determined that the District and County Mental Health were statutorily prohibited from funding an out-of-state for-profit placement. The *Yucaipa* case can be distinguished from the one at hand. Clearly, the ruling in *Yucaipa,* emphasized that the regulation language used the mandatory term "shall," and consequently there was an absolute prohibition from funding a for-profit placement. The ALJ, however, did not face a resulting denial of FAPE for Student. In *Yucaipa*, several non-profit placement options were suggested, including residential placement in California, however, the parent would not consider any placement other than the out-of-state for-profit placement. In denying Student's requested for-profit placement, the ALJ ordered that the parties continue to engage in the IEP process and diligently pursue alternate placements. In the current matter, however, pursuant to Factual Findings 12 through 14, CMH has conducted an extensive multi-state search, and all other placement possibilities for Student have been exhausted. Pursuant to Factual Finding 15, NDA is the only therapeutic residential placement remaining, capable of providing a FAPE for Student.

12. "When Congress passed in 1975 the statute now known as the Individuals with Disabilities Act (IDEA or Act), it sought primarily to make public education available to handicapped children. Indeed, Congress specifically declared that the Act was intended to assure that all children with disabilities have available to them... appropriate public education and related services designed to meet their unique needs, to assure the rights of children with disabilities and their parents or guardians are protected... and to assess and assure the effectiveness of efforts to educate children with disabilities." (*Hacienda La Puente Unified School District v. Honig* (1992) 976 F.2d 487, 490.) The Court further noted that the United States Supreme Court has observed that "in responding to these programs, Congress did not content itself with passage of a simple funding statute...Instead, the IDEA confers upon disabled students an enforceable substantive right to public education in participating States, and conditions federal financial assistance upon a State's compliance with the substantive and procedural goals of the Act." (*Id.* at p. 491.)

13. California maintains a policy of complying with IDEA requirements in the Education Codes, sections 56000, et seq. With regard to the special education portion of the Education Code, the Legislature intended, in relevant part, that every disabled child receive a FAPE. Specifically, "It is the further intent of the Legislature to ensure that all individuals with exceptional needs are provided their rights to appropriate programs and services which are designed to meet their unique needs under the Individuals with Disabilities Education Act." (Ed. Code, § 56000.)

14. California case law explains further, "although the Education Code does not explicitly set forth its overall purpose, the code's primary aim is to benefit students, and in interpreting legislation dealing with our educational systems, it must be remembered that the fundamental purpose of such legislation is the welfare of the children." (*Katz v. Los Gatos-Saratoga Joint Union High School Dist.* (2004) 117 Cal.App. 4th 47, 63.)

15. Pursuant to Legal Conclusion 6, a district is not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if the district made a free appropriate public education available to the child. All parties concur, in Factual Findings 12 through 15, that the District has been unable to provide a FAPE to Student because no appropriate placement exists except in an out-of-state for-profit residential program.

16. Assuming the District's interpretation of section 60100, subdivision (h) of Title 2 of the California Code of Regulations is correct, it is inconsistent with the federal statutory and regulatory law by which California has chosen to abide. California education law itself mandates a contrary response to Welfare and Institutions Code section 11460, subdivision (c)(3), where no other placement exists for a child. Specifically, "It is the further intent of the Legislature that this part does not abrogate any rights provided to individuals with exceptional needs and their parents or guardians under the federal Individuals with Disabilities Education Act." (Ed. Code, § 56000, subd. (e) (Feb. 2007).) A contrary result

would frustrate the core purpose of the IDEA and the companion state law, and would prevent Student from accessing educational opportunities.[3]

17. Regardless of whether the District and CMH properly interpreted Legal Conclusion 7, Student has ultimately been denied a FAPE since May 23, 2007, when he was terminated from attending CSDR, as indicated in Factual Findings 10 through 16. Pursuant to Factual Findings 6 and 16, Student's need for therapeutic residential placement with ASL services continues. As a result of this denial of FAPE, Student is entitled to compensatory education consisting of immediate placement at the National Deaf Academy through the 2008-2009 school years. The obligation for this compensatory education shall terminate forthwith in the event Student voluntarily terminates his attendance at NDA after his 18th birthday, or Student's placement is terminated by NDA.

ORDER

The District has denied Student a free appropriate public education as of May 23, 2007. The District and CMH are to provide Student with compensatory education consisting of immediate placement at the National Deaf Academy and through the 2008-2009 school year. The obligation for this compensatory education shall terminate forthwith in the event Student voluntarily terminates his attendance at NDA after his 18th birthday, or Student's placement is terminated by NDA.

PREVAILING PARTY

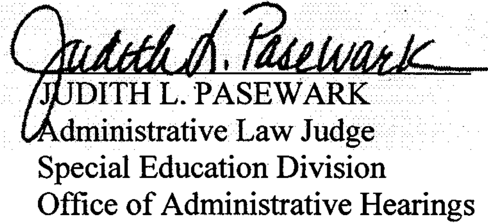
Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Student has prevailed on the single issue presented in this case.

[3] Further, there appears to be no argument that had Mother completely rejected the District's IEP offer, and privately placed Student at NDA, she would be entitled to reimbursement of her costs from the District, if determined that the District's offer of placement did not constitute a FAPE. By all accounts, Student's low income status prevented placement at NDA, and therefore precluded Student from receiving a FAPE via reimbursement by the District.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision. (Ed. Code, § 56505, subd. (k).)

Dated: January 15, 2008



JUDITH L. PASEWARK
Administrative Law Judge
Special Education Division
Office of Administrative Hearings

Tab 12

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of: STUDENT, Petitioner, vs. YUCAIPA-CALIMESA JOINT UNIFIED SCHOOL DISTRICT and SAN BERNARDINO COUNTY DEPARTMENT OF BEHAVIORAL HEALTH, Respondents.	OAH NO. N2005070683

DECISION

This matter came on regularly for hearing, before Administrative Law Judge Roy W. Hewitt, Office of Administrative Hearings, at Yucaipa, California on September 2 and 6, 2005.

Student (student) was represented by advocate Jillian Bonnington.

Ms. Gail Lindberg, program manager for the East Valley Special Education Local Plan Area, represented the Yucaipa-Calimesa Joint Unified School District (district).

Scott M. Runyan, Esq. represented the San Bernardino County Department of Behavioral Health (DBH).

Oral and documentary evidence was received, the record was left open, and the matter was continued for good cause to allow the parties to submit written closing arguments/briefs. The parties' written arguments/briefs were received, read, and considered, and the matter was deemed submitted on September 27, 2005.

During the continuance period, from the date the parties rested their cases, September 7, 2005 until the matter was deemed submitted on September 27, 2005, petitioner filed the

following motions: a motion for reconsideration of the denial of petitioner's motion for a "stay put" order; and a motion for sanctions against the district. Those motions and the briefs filed by respondents in opposition were read and considered. The rulings on the motions follow:

1. Petitioner's motion for reconsideration of her "stay put" request is denied. Petitioner's original motion for a "stay put" order was heard, and denied, by ALJ William O. Hoover on July 29, 2005. Petitioner then filed a motion for reconsideration of ALJ Hoover's order. That motion for reconsideration was heard on the record, and denied, by ALJ Hewitt on the first day of the hearing, September 2, 2005. Petitioner's current motion for reconsideration of ALJ Hoover's and ALJ Hewitt's rulings was filed on September 14, 2005. This, petitioner's third attempt to obtain a "stay put" order, also fails. The basis for denial of petitioner's current motion for reconsideration will become evident from the facts, conclusions, and order resulting from the instant due process hearing.

2. Petitioner's motion for sanctions against the district is also denied based on petitioner's failure to present competent evidence that district representatives engaged in any bad faith actions during the instant litigation.

PROPOSED ISSUES

1. Was petitioner provided with a Free and Appropriate Public Education (FAPE) from June 6, 2005 through the present?

2. Did respondents properly implement and fund student's Individualized Education Plan (IEP) as described in the June 6, 2005 and June 27, 2005 IEP documents?

3. Did respondents offer services and instruction designed to meet student's unique needs?

4. Is the district obligated to fund student's current placement if DBH is statutorily prohibited from funding the placement?

INTRODUCTION

The reason the previous section is titled "proposed issues" is because all of the issues delineated by petitioner really hinge on one, key issue. All parties agree on the relevant underlying facts. The key issue is whether, given the facts of the instant case, respondents are statutorily prohibited from funding student's current placement. If so, then respondents have not "denied" student a FAPE because, they have no discretion to "deny" funding the placement. If, however, respondents are not statutorily prohibited from funding petitioner's current placement then DBH is ready and willing to fund petitioner's placement, retroactive to June 6, 2005.

ISSUE

1. Are respondents statutorily prohibited from funding student's current placement?

FACTUAL FINDINGS

1. Student, whose date of birth is May 4, 1989, is a 16-year-old female.

2. Student attended school in the district during the 2002-2003 and 2003-2004 school years. During these periods student was not identified as a special education student.

3. Student's parents are currently separated and student's mother has sole legal and physical custody of student.

4. In 2004, student's mother relocated student to Arizona. Student's parents remained in California. On December 19, 2004, student's mother placed student at Youth Care, Inc. (Youth Care) due to student's emotional instability. Youth Care is a Delaware corporation located in, and doing business in, Draper, Utah. Youth Care is a group home/residential care facility that provides in-house care for mentally disturbed youths.

5. Student's mother contacted the district to inquire about special education services that may be available to student since student's parents live within district boundaries. On February 17, 2005, the district sent its school psychologist to Utah to conduct a psycho educational assessment of student. Upon completion of the assessment the district concluded that student was eligible for special education under the category of emotional disturbance (ED), but did not qualify as a student with a specific learning disability (SLD).

6. On March 18, 2005 an Individualized Education Program (IEP) team was convened to discuss student's needs. As a result of the meeting, the district offered to place student at the district's Yucaipa High School in a Special Class for ED students. Student's mother disagreed with the placement and requested an AB2726 residential placement[1]. The district informed mother that DBH needed to conduct an assessment before an AB2726 placement could be offered. Student's mother signed an authorization form allowing release of information to DBH and the district referred the matter to DBH.

7. DBH conducted an assessment of student, as requested.

8. On June 6, 2005, the IEP team again met to discuss student's situation. The IEP team agreed that "residential care under AB2726 is appropriate at this time." (Petitioner's Exhibit 2.) Student's mother was adamant in her assertion that student's current placement at Youth Care is an appropriate placement for student. DBH was receptive to mother's request; however, DBH needed proof that Youth Care is a nonprofit entity. This request was based on

[1] This refers to a mental health services placement.

DBH's belief, as will be discussed in the Legal Conclusions section of this decision, that DBH was statutorily prohibited from funding placements in out-of-state "for profit" entities. As stated in student's June 6, 2005 IEP, "[DBH] has made [student] eligible for AB2726 as of this date 6/6/05. Once Youth Care provides information to DBH regarding funding for placement and their non-profit status, DBH will make it effective today." (Petitioner's Exhibit 2.) The IEP also states: "The District offer of FAPE for educational placement for the 30 days interim until the next IEP meeting is the NPS placement." (Petitioner's Exhibit 2.) Due to the uncertainty of Youth Care's profit/non-profit status, other placement options were discussed at the IEP meeting. The following alternative placements were suggested: Provo Canyon, a Utah placement; Cinnamon Hills, a Utah placement; and an in-state, California placement. Student's mother refused to consider any of the suggestions. Instead, student's mother insisted that student remain in her current placement at Youth Care.

9. On June 27, 2005, a "follow-up" IEP team meeting was held. Again, Youth Care's profit/non-profit status was discussed. In fact, Youth Care's profit/non-profit status was the key discussion. All parties agreed that Youth Care was an appropriate placement for student unless its profit/non-profit status precluded funding. Consequently, DBH again requested documentation of Youth Care's profit/non-profit status.

10. Ultimately, it was established that Youth Care is a "for-profit" entity that provides direct services to student. Youth Care has a business relationship with Aspen Solutions, Inc. (Aspen Solutions), a non-profit, California corporation. Youth Care and Aspen Solutions are associated through a "Management Agreement," dated January 1, 2003. That agreement reflects that Aspen Solutions "is engaged in the business of providing certain management and administrative services to providers of health care services." (Petitioner's Exhibit 3.). Youth Care is such a "provider of health care services" and Aspen Solutions has contracted with Youth Care to: provide administrative coordination and support to Youth Care; establish bookkeeping and accounting systems for Youth Care, including preparation, distribution and recordation of all bills and statements for services rendered by Youth Care; and prepare cost reports. Aspen Solutions is responsible for recruiting, hiring, and compensating its employees, employees who are responsible for performing Aspen Solutions' previously listed responsibilities. Aspen Solutions has no role in hiring Youth Care employees and Youth Care, not Aspen Solutions, is responsible for the "supervision of all Youth [Care] staff with regards to therapeutic activities..." (Petitioner's Exhibit 3). Aspen Solutions plays no part in the daily activities at Youth Care. Aspen Education Group Vice President Ruth Moore's testimony established that: "the finance department of Youth Care sets rates for services. The management fee charged by Aspen Solutions is a percentage for each facility. The amounts collected can vary although the percentage is standardized across the facilities." Aspen Solutions plays no role in Youth Care's rate setting and does not mandate that services billed through Aspen Solutions be provided by Youth Care on a non-profit basis.

11. By letter, dated July 7, 2005, DBH notified mother that DBH can not fund student's placement at Youth Care because Youth Care is a "for-profit" entity and DBH is prohibited by California Code of Regulations, title 2 (Regulations), section 60100, subdivision

(h) and California Welfare and Institutions Code (Code) section 11460, subdivision (c), subsections (2) and (3), from funding a "for-profit" placement.

12. Other county agencies in California have made AB2726 placements at Youth Care. In fact, there are several agencies that currently have such placements at Youth Care. There was no evidence that Youth Care's "profit/non-profit" status was ever considered by the California county agencies that currently fund AB2726 placements at Youth Care. In the present instance, when DBH originally requested information concerning Youth Care's profit/non-profit status, it received documents concerning Aspen Solutions. Those documents reveal that Aspen Solutions is a non-profit corporation.

LEGAL CONCLUSIONS

1. California Government Code sections 7570 through 7588 shifts responsibility for certain services from local education agencies to other state agencies, such as DBH in the present instance, to provide services, such as occupational therapy, physical therapy, nursing services, mental health services, and residential placements. In pertinent part, Regulations section 60100 provides:

> (h) Residential placements for a pupil with a disability who is seriously emotionally disturbed may be made out of California only when no in-state facility can meet the pupil's needs and only when the requirements of subsections (d) and (e) have been met. <u>Out-of-state placements shall be made only in residential programs that meet the requirements of Welfare and Institutions Code Sections 11460(c)(2) through (c)(3).</u> For educational purposes, the pupil shall receive services from a privately operated non-medical, non-detention school certified by the California Department of Education. (Emphasis added.)

Code section 11460, subdivision (c), subsection (3), provides:

> State reimbursement for an AFDC-FC rate paid on or after January 1, 1993, <u>shall only be made to a group home organized and operated on a nonprofit basis.</u> (Emphasis added.)

As set forth in Findings 4 and 10, Youth Care is an out-of-state group home/residential care facility that operates on a profit basis. It is not operated on a nonprofit basis. Accordingly, DBH and district are prohibited from funding student's Youth Care placement. Code section 11460(c)(3) states that reimbursements for placements "shall only be made to a group home organized and operated on a nonprofit basis." The statute uses the mandatory term "shall;" consequently, there is an absolute prohibition against funding Youth Care, a group home organized and operated on a profit basis.

2. Petitioner asserts that based on the business relationship between Youth Care and Aspen Solutions, Youth Care falls within Aspen Solutions' non-profit status; thereby avoiding the Code's funding prohibition. Petitioner highlights the fact that similar placements at Youth Care have been, and currently are, funded by other California county agencies; therefore, such placements must be permissible. Petitioner's assertion lacks merit. As set forth in Finding 5, while it is true that other California county agencies have placed individuals at Youth Care, it seems that the placements were made without a full understanding of Youth Care's status and its true relationship with Aspen Solutions. DBH discovered, as set forth in Finding 10, that Aspen Solutions and Youth Care are distinct legal entities; Aspen Solutions merely acts as Youth Care's bookkeeper. Code section 11460(c)(3) states in pertinent part that agencies, such as DBH and the district, may only make payments to "a group home organized and operated on a nonprofit basis." Youth Care is the group home/residential facility, not Aspen Solutions. Youth care is the entity providing services to student, not Aspen Solutions. Youth Care's profit/nonprofit status is what is important, not Aspen Solutions'. Youth Care is "for profit" and cannot magically become "nonprofit" by virtue of its management agreement with Aspen Solutions. Consequently, the determinations that DBH and district are absolutely prohibited from funding student's current placement, and that petitioner's "stay put" requests were properly denied are, and were, appropriate.

3. As indicated by Finding 4, mother unilaterally elected to place student in the current Youth Care placement. Mother and her advocate knew, as early as June 6, 2005, that DBH was concerned about Youth Care's profit/nonprofit status and its effect on respondents' abilities to fund the placement (Finding 8). Nonetheless, mother elected to continue with the placement. By doing so, she assumed the risk that she would not be reimbursed for costs of the placement. Additionally, because DBH and district are statutorily prohibited from funding the Youth Care placement, they are equally prohibited from making any retroactive reimbursements to mother for the placement.

4. Under both state law and the federal Individuals with Disabilities Education Act (IDEA), students with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. § 1400; Educ. Code § 56000.) The term "free appropriate public education" means special education and related services that are available to the student at no cost to the parents, that meet state educational standards, and that conform to the student's individualized education program (IEP). (20 U.S.C. § 1401(9).) In the present instance, DBH and the district have worked in good faith to develop an appropriate program for student. DBH is ready and willing to fund an appropriate placement. In fact, DBH is ready and willing, but unable, to fund student's current placement at Youth Care. Consequently, respondents have not denied student a FAPE because there is no current IEP in effect with which to conform, and respondents are diligently pursuing other reasonable alternatives to student's Youth Care Placement. Student's mother is encouraged to work with respondents to find an appropriate placement by considering other, viable alternatives.

5. Petitioner asserts that if DBH fails to fund student's current placement, then the district should fund the placement under the "single line of authority" doctrine. It is unnecessary to discuss the "single line" doctrine because, district, like DBH falls within the

purview of Regulations section 60100 and Code section 11460. Accordingly, both DBH and district are statutorily barred from funding student's placement at any out-of-state "for-profit" residential facility.

6. California Education Code section 56507, subdivision (d) requires that the extent to which each party prevailed on each issue heard and decided must be indicated in the hearing decision. In the present case, respondents prevailed on the controlling issue and all sub-issues.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

1. Student's petition is denied.

2. The parties shall continue to engage in the IEP process and diligently pursue placement alternatives to Youth Care.

Dated: November 2, 2005

ROY W. HEWITT
Administrative Law Judge
Special Education Division
Office of Administrative Hearings

Note: Pursuant to California Education Code section 56505, subdivision (k), the parties have a right to appeal this Decision to a court of competent jurisdiction within 90 days of receipt of this Decision.

Tab 13

JS - 6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - EASTERN DIVISION

RIVERSIDE COUNTY DEPARTMENT OF MENTAL HEALTH, Plaintiff, v. ANTHONY SULLIVAN et al, Defendants.	CASE NO. EDCV 08-0503-SGL (RCx) ORDER AFFIRMING ADMINISTRATIVE LAW JUDGE'S DECISION
CONSOLIDATED CASES: MONICA VALENTINE, Plaintiff, v. RIVERSIDE UNIFIED SCHOOL DISTRICT et al, Defendants.	
RIVERSIDE UNIFIED SCHOOL DISTRICT, Plaintiff, v. ANTHONY SULLIVAN et al, Defendants.	

1 At its core, the case before the Court presents a simple question: Is a school
2 district excused from its duty under the federal Individuals with Disabilities Education Act
3 ("IDEA") to provide a free, appropriate public education ("FAPE") where certain state
4 administrative code provisions prohibit the reimbursement of expenses associated with
5 placement at an out-of-state for-profit facility but where that facility is the only one
6 identified as an appropriate placement? As set forth below, the Court rejects arguments
7 that the ALJ exceeded the scope of her authority, that California law prohibits the
8 recommended placement, and that a limited waiver made by the student does not
9 preclude the remedy imposed and, in the end, the Court concludes that such a funding
10 structure does not excuse the school district from its duty.

11 **I. INTRODUCTION**

12 This case arises from a dispute regarding the provision of educational services to
13 a disabled individual, defendant Anthony Sullivan ("Sullivan"). Plaintiffs Riverside
14 County Department of Mental Health ("DMH") and Riverside Unified School District
15 ("RUSD") seek the reversal of the January 15, 2008, decision of Administrative Law
16 Judge Judith L. Pasewark ("ALJ"), Office of Administrative Hearings, Special Education
17 Division, State of California ("OAH"), in *Anthony Sullivan v. Riverside Unified School*
18 *District and Riverside County Department of Mental Health*, and ask the Court to find
19 that Sullivan was not entitled to an order directing placement at the National Deaf
20 Academy ("NDA") under the Individuals with Disabilities Education Act ("IDEA"), 20
21 U.S.C. § 1400 *et seq.*, or California special education law, California Education Code
22 section 56000 *et seq. See* Administrative Record ("A.R.") 780-89.

23 Sullivan filed his First Amended Request for Due Process Hearing on September
24 25, 2007. A.R. 780. At the pre-hearing conference on December 7, 2007, the parties
25 agreed to have the matter decided by the ALJ without oral argument based stipulation
26 facts, stipulated evidence, and written closing arguments. *Id.* Ultimately, in the decision
27 that is the subject of the current appeal, the ALJ decided that defendant had been
28 denied a free, appropriate public education ("FAPE"), and ordered immediate placement

of defendant at an out-of-state residential facility. In a separate decision (which is also the subject of the present appeal), the ALJ denied a motion for reconsideration based on an issue of waiver.

Upon review of the ALJ's decision, the ALJ's Order Denying Motion for Reconsideration, the pleadings, and the administrative record, the Court **AFFIRMS** the ALJ's decisions.

II. FACTUAL BACKGROUND

At the time of the administrative hearing, Sullivan was seventeen years old and resided with his mother, Monica Valentine ("Valentine"), within the RSUD in Riverside County, California.[1] His family was considered low-income. Sullivan is deaf, has impaired vision, and an orthopedic condition affecting the hip known as legg-perthes. His only effective mode of communication is American Sign Language ("ASL"). He has also been assessed as having borderline cognitive ability and a long history of social and behavioral difficulties. As a result, Sullivan was eligible for special education and related services and mental health services under the category of emotional disturbance ("ED"), with a secondary disability of deafness.

Sullivan requires an education environment in which he has an opportunity to interact with peers and adults who are fluent in ASL. Between January, 2005, and September, 2006, he was a resident of the Monrovia Unified School District ("MUSD") and attended the California School for the Deaf, Riverside ("CSDR"). CSDR did not specialize in therapeutic behavior interventions. Sullivan was removed from CSDR for suicide prevention because he physically harmed himself and was placed in home-hospital instruction. Between June, 2005, and October, 2005, Sullivan was placed on several 72-hour psychiatric holds.

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[1] As part of the Request for Due Process Hearing, the Parties filed a joint Stipulated Statement of Undisputed Facts and Evidence to the ALJ. A.R. 731 - 738. The facts presented here are contained in the Parties' joint stipulation, which was relied upon by the ALJ. *See* A.R. 781 - 784.

1 On September 14, 2006, MUSD and the Los Angeles County Department of
2 Mental Health ("LACDMH") held a meeting and recommended residential placement for
3 Sullivan. It was recommended that Sullivan be placed at National Deaf Academy
4 ("NDA") because of his need for a higher level of care to address his continuing
5 aggressive and self-injurious behaviors and to interact with deaf peers and adults
6 without the use of an interpreter. On August 5, 2006, Sullivan was accepted by NDA,
7 but was instead placed at Willow Creek/North Valley Non-public School. The placement
8 failed in March, 2007; MUSD and LACDMH indicated they were unable to find a
9 residential placement for Sullivan that could meet his mental health and communication
10 needs. As explained more fully below, NDA was not considered an option for MUSD
11 and LACDMH because of NDA's for-profit status.

12 In Apri,l 2007, defendants moved into Riverside County and RUSD. On April 20,
13 2007, RUSD convened an Individual Education Plan ("IEP") meeting. The IEP team
14 changed Sullivan's primary disability classification from ED to deafness with social-
15 emotional overlay to enroll him in CSDR for a 60-day assessment period, which was the
16 only appropriate placement. CSDR terminated Sullivan's placement for poor behavior
17 within the 60-day assessment period.

18 On May 23, 2007, RUSD convened another IEP meeting to discuss Sullivan's
19 termination from CSDR. It was recommended that Sullivan be placed at Oak Grove
20 Institute/Jack Weaver School ("Oak Grove") and have support from a deaf interpreter.
21 On August 3, 2007, RUSD convened another IEP meeting to develop an annual IEP.
22 The IEP team proposed placement at Oak Grove with a signing interpreter, deaf and
23 hard-of-hearing consultation, and support services provided by RUSD and DMH.
24 Sullivan, his mother, and his attorney agreed to the proposed IEP, but disagreed that
25 the offer constituted a FAPE due to Oak Grove's lack of staff, teachers, and peers who
26 used ASL.

27 On October 9, 2007, RUSD convened another IEP and it was determined that
28 Sullivan's primary special education eligibility category should be changed back to ED

with deafness as a secondary condition. It was recommended by the IEP team that Sullivan be placed in a residential treatment program and, until a proper residential placement was found, he would remain at Oak Grove. DMH made inquiries to find a proper non-profit residential placement for Sullivan, including schools in California, Florida, Wyoming, Ohio, and Illinois, but was unsuccessful.

Sullivan, his mother, and his attorney all identified NDA as an appropriate placement for Sullivan. NDA is a residential treatment center for the treatment of deaf and hard-of-hearing children with the staff and facilities to accommodate Sullivan's emotional and physical disability needs. NDA also accepts students with borderline cognitive abilities. Also, nearly all of the service providers, including teachers, therapists and psychiatrists are fluent in ASL. The Charter School at NDA is a California certified non-public school and is operated on a for-profit basis. All parties agree that NDA is an appropriate placement and would provide Sullivan with a FAPE.

Notwithstanding this agreement, the RSUD and DMH took the position that they could not place Sullivan at NDA because it is operated by a for-profit entity. Sullivan filed for a due process hearing to resolve the issue.

III. THE ALJ'S DECISION

As noted previously, the matter was submitted to the ALJ by stipulation. The parties stipulated to a single issue, which was articulated as:

> Must RUSD and RCDMH place Anthony at the National Deaf Academy or other appropriate therapeutic residential placement that can meet both his mental health and communication needs, regardless of whether the facility is run on a for-profit basis, in the absence of existing alternatives?

A.R. 724. In articulating this issue, the parties noted their agreement on a number of key points: (1) Sullivan's current placement at Oak Grove did not constitute a FAPE; (2) Sullivan required therapeutic residential placement; (3) despite a nationwide search,

1 no appropriate non-for-profit residential placement could be found; and (4) placement at
2 NDA, would constitute a FAPE.
3 On January 15, 2008, the ALJ issued her decision in favor of Sullivan. A.R. 788.
4 She found that Sullivan had been denied a FAPE since May 23, 2007, when he was
5 removed from CSDR, that his need for therapeutic residential placement with ASL
6 service continued, and that he was "entitled to compensatory education consisting of
7 immediate placement at the National Deaf Academy." A.R. 788.
8 On January 28, 2008, RUSD submitted a Motion for Reconsideration of Decision
9 and Order. A.R. 791-97. The motion challenged the propriety of the remedy ordered by
10 the ALJ – immediate placement at NDA, in light of the fact that such a remedy was not
11 sought by the parties' stipulation, and in light of the fact that Sullivan had agreed to
12 waive all claims for a compensatory education for the period April, 2007, through
13 October 9, 2007. The existence of a waiver was not disputed by Sullivan. The ALJ, on
14 February 20, 2008, denied the Motion for Reconsideration. A.R. 818-20.
15 In response, Plaintiffs filed the instant action.
16 **IV. THE IDEA**
17 THE IDEA guarantees all disabled children a FAPE "that emphasizes special
18 education and related services designed to meet their unique needs and prepare them
19 for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A).
20 A FAPE is defined as special education and related services that: (1) are available to
21 the student at public expense, under public supervision and direction, and without
22 charge; (2) meet the state education standards; (3) include an appropriate education in
23 the state involved; and (4) conform with the student's IEP. 20 U.S.C. § 1401(9).
24 "Special education" is defined as instruction specially designed to meet a
25 disabled student's unique needs, at no cost to parents, whether it occurs in the
26 classroom, at home, or in other settings. 20 U.S.C. § 1401(29); Cal. Educ. Code
27 § 56031. "Related services" include developmental, corrective, and supportive services,
28 such as speech-language services, needed to assist a disabled child in benefitting from

1 education, and to help identify disabling conditions. 20 U.S.C. § 1401(26); Cal. Educ.
2 Code § 56363.
3 The primary tool for achieving the goal of providing a FAPE to a disabled student
4 is the IEP. *Van Duyn ex rel. Van Duyn v. Baker School Dist. 5J*, 502 F.3d 811, 818 (9th
5 Cir. 2007). An IEP is a written statement containing the details of the individualized
6 education program for a specific child, which is crafted by a team that includes the
7 child's parents and teacher, a representative of the local education agency, and,
8 whenever appropriate, the child. 20 U.S.C. § 1401(14), § 1414(d)(1)(B). An IEP must
9 contain: (1) Information regarding the child's present levels of performance; (2) a
10 statement of measurable annual goals; (3) a statement of the special educational and
11 related services to be provided to the child; (4) an explanation of the extent to which the
12 child will not participate with non-disabled children in the regular class; and (5) objective
13 criteria for measuring the child's progress. 20 U.S.C. § 1414(d)(1)(A).
14 The IDEA contains numerous procedural safeguards to ensure that the parents
15 or guardians of a disabled student be kept informed and involved in decisions regarding
16 the child's education. 20 U.S.C. § 1415. As part of this procedural scheme, the local
17 educational agency must give parents an opportunity to present complaints regarding
18 the provision of a FAPE to the child. 20 U.S.C. § 1415(b)(6). Upon the presentation of
19 such a complaint, the parent or guardian is entitled to an impartial due process
20 administrative hearing conducted by the state or local educational agency. 20 U.S.C.
21 § 1415(f).

22 **V. JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS**

23 The IDEA provides that a party aggrieved by the findings and decisions made in
24 a state administrative due process hearing has the right to bring an original civil action
25 in federal district court. 20 U.S.C. § 1415(i)(2). The party bringing the administrative
26 challenge bears the burden of proof in the administrative proceeding. *Schaffer ex rel.
27 Schaffer v. Weast*, 546 U.S. 49, 62 (2005). Similarly, the party challenging the
28 administrative decision bears the burden of proof in the district court. *Hood v. Encinitas*

1 *Union Sch. Dist.*, 486 F.3d 1099, 1103 (9th Cir. 2007).

2 The standard for district court review of an administrative decision under the
3 IDEA is set forth in 20 U.S.C. § 1415(i)(2), which provides as follows:

> 4 In any action brought under this paragraph the court --
> 5 (i) shall receive the records of the administrative
> 6 proceedings; (ii) shall hear additional evidence at the request
> 7 of a party; and (iii) basing its decision on the preponderance
> 8 of the evidence, shall grant such relief as the court
> 9 determines is appropriate.

10 20 U.S.C. § 1415(i)(2)(C). Thus, judicial review of IDEA cases is quite different from
11 review of most other agency actions, in which the record is limited and review is highly
12 deferential. *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1471 (9th Cir. 1993).
13 Courts give "due weight" to administrative proceedings, *Board of Educ. of the Hendrick*
14 *Hudson Central Sch. Dist. Westchester County v. Rowley*, 458 U.S. 176, 206 (1982),
15 but how much weight is "due" is a question left to the court's discretion, *Gregory K. v.*
16 *Longview Sch. Dist.*, 811 F.2d 1307, 1311 (9th Cir. 1987). In exercising this discretion,
17 the Court considers the thoroughness of the hearing officer's findings and award more
18 deference where the hearing officer's findings are "thorough and careful." *Capistrano*
19 *Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 891 (9th Cir. 1995).

20 A hearing officer's findings are treated as "thorough and careful when the officer
21 participates in the questioning of witnesses and writes a decision contain[ing] a
22 complete factual background as well as a discrete analysis supporting the ultimate
23 conclusions." *R.B., ex rel. F.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 942 (9th
24 Cir. 2007) (internal quotation marks and citations omitted).[2]

25

26 [2] Plaintiffs contend that the Court, when reviewing purely legal questions such as
27 those at issue here, must subject the ALJ's decision to *de novo* review. Plaintiffs'
contention is not without support. *See Paul K. ex rel. Joshua K. v. Hawaii*, 567
28 F.Supp.2d 1231, 1234 (D. Hawai'i 2008) (setting forth standard of review in IDEA case
by stating, *inter alia*, "[s]tatutory interpretation is reviewed de novo," and collecting

VI. CHALLENGES TO THE ALJ DECISIONS

Plaintiffs oppose the decisions of the ALJ on three grounds: (1) First, they argue that the remedy the ALJ ordered was beyond the scope of the order to which the parties stipulated, and thus, should not have been decided by the ALJ; (2) next, California law is an absolute bar to a placement at NDA; and (3) finally, that Sullivan waived his rights to a compensatory education for the time period April, 2007, through October 9, 2007.

In the end, the Court rejects each of these challenges.

A. The Remedy Ordered by the ALJ was Proper

Plaintiffs assert that the ALJ overstepped her authority by awarding compensatory education to Sullivan. Essentially, plaintiffs contend that the ALJ was limited by the stipulation before her to the issue of the duty of plaintiffs regarding placement of Sullivan in light of certain California Administrative Code provisions.

The ALJ rejected plaintiffs' argument in her February 20, 2008, Order Denying Motion for Reconsideration. The ALJ found that "[n]one of the documents filed in this matter indicate that Student's Request for Due Process Hearing had been restructured as a request of Declaratory Relief only." A.R. 820. The Court agrees with the ALJ's assessment.

When the ALJ ordered that Sullivan be placed at NDA, she ordered the natural remedy that flowed from her determination that Sullivan was denied a FAPE and that the California Administrative Code provisions relied upon by plaintiffs did not excuse them from providing one. All the parties agreed that Sullivan was not receiving a FAPE, and they agreed that NDA was the only facility, despite a nationwide search that could provide him with a FAPE. Upon the presentation of the issue to the ALJ, the parties should have understood that any affirmative response by the ALJ would result in an order setting forth an appropriate remedy.

The suggestion that the ALJ was limited to sending the issue back to the parties

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cases). Nevertheless, because the Court's own analysis would lead it to the same conclusion as that reached by the ALJ, the Court need not resolve this issue.

1 for another IEP process is absurd in light of the agreement as to the only appropriate
2 placement. Sullivan would be forced to litigate an issue that he was entitled to a
3 particular placement when an ALJ had already effectively determined the issue. Such
4 an outcome is horribly inefficient; it would be a waste of administrative and judicial
5 resources, and would result in a wholly avoidable delay in the only appropriate
6 placement identified for Sullivan.

7 Accordingly, this Court finds that the issue of a compensatory education was
8 presented to the ALJ and she did not overstep her authority by granting Sullivan a
9 remedy after finding that he had been denied a FAPE.

10 **B. California Law Does Not Prohibit Placement at NDA and Does Not Excuse**
11 **Compliance with the IDEA**

12 The heart of the present appeal is represented by plaintiffs' argument regarding
13 funding for Sullivan's placement at NDA. As alluded to earlier, the difficulty in placing
14 Sullivan at that facility is in its for-profit status.

15 The Court begins with Cal. Adm. Code tit. 2, § 60100(h), relating to "Interagency
16 Responsibility for Providing Services to Pupils with Disabilities" in the area of
17 "Residential Placement" such as that considered for Sullivan:

18 > (h) Residential placements for a pupil with a disability who is
19 > seriously emotionally disturbed may be made out of
20 > California only when no in-state facility can meet the pupil's
21 > needs and only when the requirements of subsections (d)
22 > and (e) have been met. Out-of-state placements shall be
23 > made only in residential programs that meet the
24 > requirements of Welfare and Institutions Code Sections
25 > 11460(c)(2) through (c)(3). For educational purposes, the
26 > pupil shall receive services from a privately operated
27 > non-medical, non-detention school certified by the California
28 > Department of Education.

Id. This provision has many requirements, but no party contends that the student is not "seriously emotionally disturbed," that there is an "instate-facility [that] can meet [his] needs," that the requirements of subsection (d) (relating to documentation for residential placement) have not been met, or that the requirements of subsection (e) (relating to a mental health service case manager assessment) have not been met. Rather, plaintiffs focus on the requirement that out-of-state placements meet the requirements of Cal. Welfare & Inst. Code § 11460(c)(2)-(3) have not been met.

In relevant part, § 11460(c)(2)-(3) provides that "(3) 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."[3]

Reading these statutes together, the Court, like the ALJ, can discern no outright prohibition under California law on Sullivan's placement at NDA. To be sure, § 60100(h) speaks in terms of conditions precedent to out-of-state placements when it provides as follows: "Out-of-state placements ***shall be made only*** in residential programs that meet the requirements of Welfare and Institutions Code Sections 11460(c)(2) through (c)(3)," but the subsection upon which plaintiffs focus, subsection (c)(3) does not set forth a requirement so much as a limitation upon reimbursement for the costs of such placement.[4] This is especially so when viewed in light of § 60000, which provides that the intent of the chapter of the Administrative Code in which § 60100 appears "is to assure conformity with the federal Individuals with Disabilities Education Act or IDEA." That section provides guidance on interpretation of the Code provisions that follow it:

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[3] The parties cite to subsection (c)(2) and (c)(3), but the "for-profit" non-placement provision is found only in subsection (c)(3).

[4] This incorporation of the requirements makes much more sense as to subsection (c)(2), which sets forth certain conditions relating to the operations of the facility. Plaintiffs do not argue that these requirements have not been met; their argument is that they are prohibited from placing Sullivan at NDA because of its for-profit status.

> Thus, provisions of this chapter shall be construed as supplemental to, and in the context of, federal and state laws and regulations relating to interagency responsibilities for providing services to pupils with disabilities.

Id.

Plaintiffs reliance on *Yucaipa-Calimesa Joint Unified School District and San Bernardino County Department of Behavioral Health,* OAH Case No. N2005070683 (2005), does not compel a contrary result. The ALJ properly distinguished that case on the grounds that other acceptable placements were identified for the student. No such alternative placements have been identified for Sullivan, and therefore the cited case is unpersuasive.

What was apparent to the ALJ, and what is apparent to this Court, is that whatever funding limitations plaintiffs may face, the duty under the IDEA to provide to Sullivan a FAPE is clear and cannot be diminished. Equally clear from the record before the ALJ, and before this Court, is that Sullivan can receive a FAPE through placement at NDA, and that no other alternative placement has been identified.

C. Sullivan's Waiver Was Limited and Does not Affect the ALJ-Ordered Remedy

The waiver was limited to the time period of April, 2007, through October 9, 2007. Rights for the time period thereafter are expressly reserved. DMH Compl., Exh. D. ("Parent does not waive any claims of any kind from October 9, 2007 forward.").

The compensatory education ordered by the ALJ only applied to the period from the date of her decision, January 15, 2008, through the 2008- 2009 school year, several months after the Defendants' waiver expired. A.R. 788. The ALJ's order of compensatory education was a prospective equitable remedy that did not require RUSD and DMH to provide any compensation for the time period before January 15, 2008.

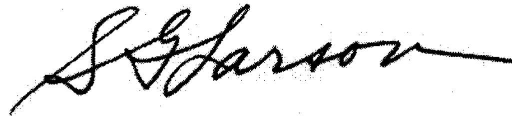
VI. CONCLUSION

Accordingly, and for the foregoing reasons, the Court **AFFIRMS** the ALJ's January 15, 2008, decision requiring RUSD and DMH provide Sullivan with a compensatory education consisting of immediate placement at the National Deaf Academy. The Court also **AFFIRMS** ALJ's February 20, 2008 Order Denying Motion for Reconsideration.

Counsel for defendants shall lodge a proposed judgment that complies with Fed. R. Civ. P. 54(a) within five days of the entry of this Order. A motion for attorney fees may be filed in accordance with the schedule previously set by the Court.

IT IS SO ORDERED.

DATE: July 20, 2009



STEPHEN G. LARSON
UNITED STATES DISTRICT JUDGE

Tab 14

MANAGEMENT AGREEMENT

This MANAGEMENT AGREEMENT (the "Agreement") is made and entered into as of the 1st day of January, 2003, by and between Aspen Solutions Inc., a California nonprofit mutual benefit company ("ASI"), and Youth Care of Utah, Inc., a Delaware corporation ("Youth"). ASI and Youth are sometimes referred to herein collectively as the "Parties" and individually as a "Party."

RECITALS

WHEREAS, ASI is engaged in the business of providing certain management and administrative services to providers of health care services;

WHEREAS, Youth is a Delaware corporation whose employees provide therapeutic services in the state of Utah;

WHEREAS, Youth desires to retain ASI to manage and administer certain aspects of Youth's business relating to the therapuetic services provided by Youth; and

WHEREAS, Youth and ASI recognize that Youth has sole and complete responsibility for the provision of professional services.

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein, the parties hereto agree as follows:

ARTICLE 1

DUTIES OF ASI

Notwithstanding anything to the contrary in this Agreement, the parties hereto understand and agree that Youth has the sole responsibility for provision of therapeutic services. ASI does not itself provide therapeutic services to the clients of Youth and shall not exercise control over or interfere in any way with the exercise of professional judgment by Youth or Youth's employees in connection with Youth's therapeutic services. The parties agree that the benefits hereunder to Youth do not require, are not payment for, and are not in any way contingent upon the referral or any other arrangement for the provision of any item or service offered by ASI or any of its affiliates or any other providers which may be managed by ASI. The following non-therapeutic services shall be performed by ASI on behalf of Youth:

1.1 General Management and Administration.

1.1.1 ASI shall be responsible for performing, supervising or paying for all business services, resources and other aspects of Youth's business as addressed in greater detail in the remainder of this Article 1.

1.1.2 Providing administrative coordination and support to Youth.

1.2 Financial Services. ASI's responsibilities under this Agreement shall include the following:

1.2.1 Establishing bookkeeping and accounting systems, including the maintenance and supervision of all of Youth's business records and the preparation, distribution and recordation of all bills and statements for services rendered by Youth, and the billing and completion of reports and forms required by insurance companies, governmental agencies and other third party payors, as applicable.

1.2.2 Providing Youth access to any and all books and records maintained by ASI on behalf of Youth upon five (5) business days notice in writing by Youth to ASI.

1.2.3 Preparing and furnishing cost reports as necessary.

1.3 Personnel Services: Payroll and Other Services. ASI's responsibilities under this Agreement shall include:

1.3.1 Recruiting, hiring, compensating, training and discharging all personnel necessary for the performance of the terms of this Agreement who shall be employees of ASI. Supervision of all Youth staff with regards to therapeutic activities shall be the right and responsibility of Youth's director.

ARTICLE 2

COMPENSATION

Youth shall pay to ASI those amounts set forth on Exhibit A hereto for services rendered by ASI hereunder. Said compensation shall be paid monthly and shall be due and payable on the fifteenth (15th) day of the month following the month in which service is provided.

ARTICLE 3

TERM AND TERMINATION

3.1 Term. The initial term of this Agreement shall commence on the date first written above and shall continue in effect until December 31, 2023 unless sooner terminated pursuant to the provisions of this Agreement. Thereafter, this Agreement shall automatically renew for successive periods of one (1) year each, unless terminated as provided herein.

3.2 Termination With Cause by Either Party. In the event of a material breach of this Agreement by either party, the other party shall provide written notice to the defaulting party (the "Default Notice") specifying the nature of the breach. In the event such breach is not cured to the reasonable satisfaction of the non-defaulting party within thirty (30) days after service of the Default Notice, this Agreement shall automatically terminate at the election of the non-defaulting party upon the giving of a written notice of termination to the defaulting party not later than sixty (60) days after service of the Default Notice; provided, however, that if the nature of the breach is such that it cannot be reasonably cured within thirty (30) days, this Agreement cannot be terminated by the non-defaulting party so long as the defaulting party is taking or has taken

reasonable steps within said thirty (30) day period to cure the breach and such steps are being diligently pursued.

3.3 Termination for Insolvency. Either party may terminate this Agreement immediately and without notice in the event that an application is made by the other party for the appointment of a receiver, trustee or custodian for any of the other party's assets; a petition under any section or chapter of the federal Bankruptcy Code or any similar law or regulation is filed by or against the other party and is not dismissed within sixty (60) days; the other party makes an assignment for the benefit of his creditors; or the other party becomes insolvent or fails generally to pay his debts as they become due.

3.4 Termination for Jeopardizing Client Care. Either party may terminate this Agreement immediately if: (a) the action or inaction of the other party constitutes an immediate and serious threat to the therapeutic services being provided; (b) the non-breaching party has given the other party prior written notice specifying such action or inaction; and (c) the breaching party has not within twenty-four (24) hours after being given such notice corrected the action or inaction. Notwithstanding anything herein to the contrary, during the 24-hour period described in the preceding sentence, Youth shall be entitled to take such other actions as are reasonably necessary to ensure the safety of the clients it provides therapeutic services for.

3.5 Termination for Change in Law. Subject to Section 3.6, either party may terminate this Agreement immediately if any change in the law or regulations governing the parties renders performance of this Agreement unenforceable or illegal by its terms.

3.6 Reformation of Agreement. If any provision in the Agreement is in violation of any law or regulation, the parties will amend, to the extent possible, the Agreement as necessary to correct such offending term or terms, while preserving the underlying economic and financial arrangements between the parties and without substantial economic detriment to either party.

3.7 Books and Records. Within fifteen (15) days of termination under this Article 3, ASI shall return to Youth all books, records and intangible property it has in its possession relating to Youth and its operations.

ARTICLE 4

COVENANTS OF ASI

4.1 Corporate Status. ASI covenants and agrees that it is presently, and shall remain throughout the initial term of this agreement and each renewal term thereof, a California nonprofit mutual benefit corporation in good standing with the California Secretary of State.

4.2 Insurance. ASI covenants and agrees that it shall maintain in effect during the initial term and each renewal term thereof, adequate comprehensive general liability and other insurance coverage to cover any loss, liability or damage which may result out of the activities of ASI or its officers, agents or employees. Youth shall be entitled to receive not less than thirty (30) calendar days' prior written notice of any reduction or cancellation in such insurance coverage by ASI. Evidence of the policies described above shall be provided to Youth upon request.

ARTICLE 5

COVENANTS OF YOUTH

5.1 Corporate Status. Youth covenants and agrees that:

5.1.1 it is presently and shall remain throughout the initial term of this Agreement and each renewal term thereof, a corporation or limited liability company in good standing in the state of its incorporation or organization, as the case may be; and

5.1.2 it shall retain reasonable control over the manner in which it furnishes services.

5.2 Insurance.

5.2.1 Youth covenants and agrees that it shall obtain and maintain in effect throughout the initial term of this Agreement and each renewal term thereof and pay the cost, of such policies of comprehensive general liability insurance and professional liability insurance with coverage in the minimum amount of Three Million Dollars ($3,000,000) per occurrence and Three Million Dollars ($3,000,000) in the annual aggregate to insure it and its employees against liability for damages directly or indirectly related to the performance of any services provided, the use of any property and facilities provided by Youth and activities performed by Youth. ASI shall be entitled to receive not less than thirty (30) days written notice of any reduction or cancellation of such insurance coverage by Youth. Evidence of the insurance policies described above shall be provided to ASI upon request.

5.2.2 ASI covenants and agrees that it shall obtain and maintain in effect policies of workers' compensation and other insurance to the extent required by applicable law.

5.3 Cooperation. Youth covenants and agrees that it shall provide ASI access to all records and information and the use of such facilities as is required by ASI to perform its services hereunder subject to all applicable confidentiality laws. Youth further covenants that it shall grant ASI such authority as may be necessary or desirable to ensure ASI's ability to perform its duties hereunder.

5.4 Compliance With Law. Youth represents and warrants that it has not within the past three (3) years been cited for a material violation of any federal, state, local or other statute, law or regulation, and that Youth employees are duly licensed to provide therapeutic services to the extent required by applicable law.

ARTICLE 6

RECORDS

6.1 Business Records. All business records, papers and documents of Youth are the property of Youth.

ARTICLE 7

ARBITRATION

In the event of any dispute arising out of or relating to this Agreement, any Party will have the right to demand that such dispute be resolved by binding arbitration, pursuant to California Code of Civil Procedure Section 1280 et seq. (the "Arbitration Statute"), including Section 1283.05 regarding discovery. Such Party will serve a written notice to arbitrate pursuant to this Article 7 on the other Party to the dispute. An arbitration hearing will be held before a single arbitrator jointly selected by the Parties. The arbitrator will be selected from a list of retired superior court judges from the Counties of Los Angeles or Orange. If the parties fail within ten (10) calendar days to agree on the appointment of a single arbitrator, then each party will appoint one arbitrator (who need not be a retired superior court judge) within three (3) days thereafter and the two arbitrators will select a third arbitrator (who must be a retired superior court judge) who will serve as the sole arbitrator of the dispute. The arbitrator will decide the dispute in accordance with the procedure set forth in the Arbitration Statute within fifteen (15) days following the conclusion of the hearing. The prevailing party in such action will be entitled to recover all reasonable incurred costs and expenses accorded by the arbitrator, including reasonable attorneys fees and legal costs, incurred by such party in connection with such action. The decision of the arbitrator will be final and binding on both parties for any and all purposes. Judgment upon any award rendered by the arbitrator may be entered in any court of competent jurisdiction. Notwithstanding any other provision of this Agreement, in the case of a dispute involving a claim for equitable relief, a court with equitable jurisdiction may grant temporary restraining orders and preliminary injunctions to preserve the status quo existing before the events that are the subject of the dispute. Any final equitable or other relief will be ordered in the arbitration proceeding.

ARTICLE 8

INDEMNIFICATION

8.1 By ASI. ASI shall indemnify, defend, protect and hold Youth and its officers, directors, employees, agents and representatives ("Youth Released Parties") harmless from and against any and all liabilities, losses, damages, claims, causes of action, costs and expenses, including reasonable attorney's fees, (hereinafter each referred to as a "Claim") caused by reason of any injury to person or property resulting from the acts or omissions of ASI or ASI's employees or agents which occur in the course of performance of its duties under this Agreement or by reason of ASI's breach hereof, provided, however, that ASI shall have no responsibility to indemnify, protect and hold any Youth Released Parties harmless from and against any Claim occurring through the negligence of Youth or any of Youth's employees or agents and provided further that such indemnification obligation shall not apply with respect to any Claim covered by either Party's existing insurance policies.

8.2 By Youth. Youth shall indemnify, defend, protect and hold ASI and its officers, directors, employees, agents and representatives ("ASI Released Parties") harmless from and against any and all liabilities, losses, damages, claims, causes of action, costs and expenses, including reasonable attorney's fees, (hereinafter each referred to as a "Claim") caused by reason

of any injury to person or property resulting from the acts or omissions of Youth or Youth's employees or agents which occur in the course of performance of its duties under this Agreement or by reason of Youth's breach hereof, provided, however, that Youth shall have no responsibility to indemnify, protect and hold any ASI Released Parties harmless from and against any Claim occurring through the negligence of ASI or any of ASI's employees or agents.

ARTICLE 9

INDEPENDENT CONTRACTOR

In the performance of the work, duties and obligations described hereunder, it is mutually understood and agreed that each party is at all times acting and performing as an independent contractor with respect to the other and that -no relationship of partnership, joint venture or employment is created by this Agreement. Neither party, nor any other person performing services on behalf of either party pursuant to this Agreement, shall have any right or claim against the other party under this Agreement for social security benefits, workers' compensation benefits, disability benefits, unemployment insurance benefits, health benefits, vacation pay, sick leave or any other employee benefits of any kind. Each party agrees to be responsible for, to pay, and to hold the other party harmless from and indemnify the other party against, all such compensation, social security, workers, compensation, disability, unemployment and other benefits, and tax withholding and similar obligations related to those persons employed or engaged by such party.

ARTICLE 10

NOTICES

All notices required to be given hereunder shall be in writing and shall be deemed delivered if personally delivered or dispatched by certified or registered mail, return receipt requested, postage prepaid, addressed to the parties as follows:

Youth: Youth Care of Utah, Inc.
17777 Center Court Drive, Suite 300
Cerritos, California 90703
Attn: Susan Burden
Facsimile No. 562-467-5511

ASI: Aspen Solutions, Inc.
17777 Center Court Drive, Suite 300
Cerritos, California 90703
Attn: Ginny Romig
Facsimile No. 562-467-5574

with a copy to:

Nathaniel Weiner, Esq.

Aspen Education Group, Inc.
17777 Center Court Drive, Suite 300
Cerritos, California 90703
Facsimile No. 562-402-7036

Notice shall be deemed given on the date it is deposited in the mail in accordance with the foregoing. Any party may change the address to which to send notices by notifying the other party of such change of address in writing in accordance with the foregoing.

ARTICLE 11

MISCELLANEOUS

11.1 Severability. Any terms or provisions of this Agreement which shall prove to be invalid, void or illegal shall in no way affect, impair or invalidate any other term or provisions herein and such remaining terms and provisions shall remain in full force and effect.

11.2 Attorneys' Fees. In the event that either party to this Agreement shall bring any action at law or in equity to enforce any term, covenant or condition of this Agreement, the prevailing party in such action shall be entitled to recover all costs and expenses, including reasonable attorney's fees, incurred by such party in connection with such action.

11.3 Governing Law. The existence, validity and construction of this Agreement shall be governed by laws of the State of California.

11.4 Assignment. Neither party shall have the right to assign this Agreement without the prior written consent of the other party, provided that any assignment to an entity under common control shall not require such consent. Any attempted assignment of this Agreement in contravention of this Section 11.4 shall be null and void and without any effect whatsoever.

11.5 Successors and Assigns. Subject to the provisions of this Agreement regarding assignment, the terms, covenants and conditions contained herein shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto.

11.6 Waiver. The waiver by either party to this Agreement of any one or more defaults, if any, on the part of the other, shall not be construed to operate as a waiver of any other or future defaults, under the same or different terms, conditions or covenants contained in this Agreement.

11.7 Caption and Headings. The captions and headings throughout this Agreement are for convenience of reference only and shall in no way be held or deemed to be a part of or affect the interpretation of this Agreement.

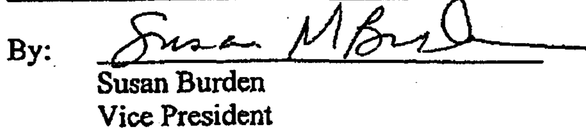
11.8 No Third Party Beneficiaries. Nothing in this Agreement, express or implied, is intended or shall be construed to confer upon any person, firm or corporation other than the parties hereto and their respective successors or assigns, any remedy or claim under or by reason of this Agreement or any term, covenant or condition hereof, as third party beneficiaries or

otherwise, and all of the terms, covenants and conditions hereof shall be for the sole and exclusive benefit of the parties hereto and their successors and assigns.

11.9 Entire Agreement; Amendments. This Agreement states the entire contract between the parties in respect to the subject matter of this Agreement and supersedes any oral or written proposals, statements, discussions, negotiations or other agreements before or contemporaneous to this Agreement. The parties acknowledge that they have not been induced to enter into this Agreement by any oral or written representations or statements not expressly contained in this Agreement. This Agreement may be modified only by mutual agreement of the parties provided that, before any modification shall be operative or valid, it be reduced to writing and signed by both parties.

IN WITNESS WHEREOF, the parties hereto have executed this Management Agreement on that day and year set forth hereinabove.

YOUTH CARE OF UTAH, INC.

By: 
Susan Burden
Vice President

ASPEN SOLUTIONS, INC.

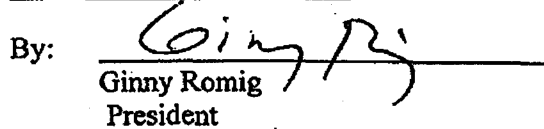
By: 
Ginny Romig
President

EXHIBIT A

MANAGEMENT FEE PROVISIONS

In return for services as provided for hereunder by Aspen Solutions, Inc., Youth Care of Utah, Inc. shall compensate Aspen Solutions, Inc. an amount equal to 2% of the monthly gross revenue billed by ASI on behalf of Youth, payable in arrears on a monthly basis.

Tab 15

AGREEMENT TO PROVIDE
MENTAL HEALTH SERVICES

This Agreement is executed this 1st day of July, 1998, by and between Mental Health Systems Inc. ("MHS"), a California non-profit corporation and Charter Provo Canyon School, LLC ("Provo Canyon") a Delaware for-profit limited liability company.

RECITALS

A. MHS is certified as a Short-Doyle/Medi-Cal Mental Health Rehabilitation Services Provider, which desires to contract with Provo Canyon to provide care to children and adolescents who have been authorized by certain County Mental Health Departments of California as listed on Exhibit C to receive mental health services;

B. Provo Canyon has been approved by the certain County Mental Health Departments for the State of California (as listed on Exhibit C) as a provider of services to children and adolescents residing in California and desires to contract with MHS for the purpose of obtaining certain funds distributed by California State Social Services and California County Mental Health Departments;

C. MHS seeks to contract with qualified professionals to assure that appropriate care is provided to those persons authorized to receive mental health services;

D. Provo Canyon has agreed to provide the services of qualified professionals to provide care to those persons authorized to receive mental health services.

IT IS THEREFORE AGREED by the parties as follows:

1. Definitions.

A. Beneficiary shall mean any person authorized by any of the certain County Mental Health Departments of California (as listed on Exhibit C which may be amended from time to time as appropriate and upon mutual agreement of the parties) to receive Mental Health Services and who has been properly placed at Provo Canyon for the provision of services pursuant to Chapter 26.5 of Division 7 of Title 1 of the Government Code.

B. Mental Health Services shall mean all inpatient mental health services.

C. Covered Services are those services covered by California State Social Service funding or by California County Mental Health Departments, as identified on Exhibit A.

D. Professional shall mean an employee, or independent contractor of Provo Canyon qualified to provide services as required pursuant to this Agreement.

2. Provision of Covered Services. Provo Canyon will employ Professionals who shall provide Covered Services to Beneficiaries in accordance to this Agreement. Provo Canyon shall insure that Covered Services are rendered in a manner which assures availability, adequacy, and continuity of care to Beneficiaries.

Provo Canyon shall operate continuously throughout the term of this Agreement with at least the minimum number and type of staff which meet applicable State and Federal requirements, and which are necessary fro the provision of the services hereunder.

All Covered Services rendered hereunder shall be provided by Provo Canyon under the general supervision of MHS. MHS shall have the right to monitor the kind, quality, appropriateness, timeliness and the amount of Covered Services to be provided, however all decisions pertaining to the Mental Health Services to be rendered to any Beneficiary shall be based on the individual Beneficiary's medical needs as initially determined by Provo Canyon. Provo Canyon shall remain solely responsible for the quality of all Mental Health Services and Covered Services provided.

3. Compliance with Laws.

A. Nondiscrimination. Provo Canyon shall not discriminate in providing any services based on the sex, race, national origin, religion, or disability of any Beneficiary.

B. Child Abuse Reporting and Related Personnel Requirements. Provo Canyon, and all persons employed by Provo Canyon, shall comply with all child abuse and neglect laws of the State of Utah and shall report all known or suspected instances of child abuse to an appropriate child protective agency, as mandated by the laws of Utah. Provo Canyon shall assure that any person who enters into employment as a care custodian of minor children, or who enters into employment as a health or other practitioner, prior to commencing employment, and as a prerequisite to that employment, shall sign a statement on a form provided by MHS in accordance with the above laws to the effect that such person has knowledge of, and will comply with, these laws. For the safety and welfare of minor children, Provo Canyon shall, to the maximum extent permitted by law, ascertain arrest and conviction records for all current and prospective employees and shall not employ or continue to employ any person convicted of any crime involving any harm to minor children. Provo Canyon shall not employ or continue to employ, or shall take other appropriate action to fully protect all persons receiving services under this Agreement concerning, any person whom Provo Canyon knows, or reasonably suspects, has committed any acts which are inimical to the health, morals, welfare, or safety of minor children, or which otherwise make it inappropriate for such person to be employed by Provo Canyon.

C. Fair Labor Standards. Provo Canyon shall comply with all applicable provisions of the Federal Fair Labor Standards Act, and shall indemnify, defend and hold harmless MHS, its officers, employees and agents, from any and all liability, including, but not limited to, wages, overtime pay, liquidated damages, penalties, court costs, and attorney's fees arising under any wage and hour law, including, but not limited to the Federal Fair Labor Standards Act, for services performed by Provo Canyon's employees for which MHS may be found jointly or solely liable.

D. Licensure. Provo Canyon certifies that it is licensed as a Residential Treatment Center and that each of its Professionals is licensed and/or certified in good standing to practice his or her profession in the State of Utah. Provo Canyon, its Professionals, officers, agents, employees and subcontractors shall, throughout the term of this Agreement, maintain all necessary licenses, permits, approvals, certificates, waivers and exemptions necessary for the provision of the services hereunder and required by the laws or regulations of the United States, Utah and all other applicable government jurisdictions or agencies. Provo Canyon agrees to immediately notify MHS in the event that Provo Canyon or any Professional has his/her license placed on probation, suspended, or terminated.

4. Insurance. Without limiting Provo Canyon's indemnification as provided herein, at all times during the course of this Agreement, Provo Canyon shall maintain professional liability insurance at least in the amount of [$2,000,000 per occurrence and $6,000,000 annual aggregate]. Provo Canyon shall also maintain customary and reasonable workers compensation insurance and general liability insurance. The costs for said policies, deductible amounts, uncovered liabilities, defense costs, loss adjustment expenses, and settlements arising out of or from any services provided by Provo Canyon (including those services rendered by Provo Canyon Professionals or personnel who are acting under the direction or supervision of Provo Canyon) shall be payable by Provo Canyon, to the extent not covered by insurance proceeds. The costs for said policies, deductible amounts, uncovered liabilities, defense costs, loss adjustment expenses, and settlements arising out of services provided by MHS shall be payable by MHS, to the extent not covered by insurance proceeds.

Provo Canyon shall provide evidence of such coverage prior to the effective date of this Agreement and thereafter as requested by MHS. Provo Canyon's insurance shall include MHS as an additional insured with respect to the operations which Provo Canyon performs under contract with MHS. It is agreed that any insurance maintained by MHS shall apply in excess of and not contribute with, insurance provided by this policy. Provo Canyon's insurance shall not be canceled, limited or non-renewed until after thirty (30) days written notice has been given to MHS at the address first noted in this Agreement.

In the event that any Professional or Provo Canyon is sued as a result of any services provided to a Beneficiary pursuant to this Agreement, Provo Canyon shall immediately notify MHS. Provo Canyon shall notify MHS, in writing, within sixteen (16) hours of becoming aware of any occurrence of a serious nature which may expose MHS to liability. Such occurrences shall include, but not be limited to deaths, accidents or injuries to any Beneficiary, or acts of negligence of Provo Canyon or one of its Professionals.

5. Prohibition on Billing Beneficiaries. MHS shall be the sole source of payment to Provo Canyon for those Covered Services rendered to the Beneficiaries for which MHS obtains funding from California State Social Services and/or California County Mental Health Departments. Provo Canyon agrees that in no event shall it seek payment from the Beneficiaries for any Covered Service except in those instances where there is a co-payment amount or for incremental costs, as outlined in the financial policies of Provo Canyon, including medical and ancillary expenses not covered under routine room and board. If Provo Canyon desires to seek such payment from the Beneficiaries for either a co-payment or for incremental costs, Provo Canyon shall seek such payment directly without any involvement from MHS. Provo Canyon agrees that it and not MHS will have full responsibility for Provo Canyon's collection of money for such co-payments or incremental costs.

6. Total Quality Management/Utilization Review. Provo Canyon agrees to cooperate fully with MHS in assuring total quality management and utilization review in accordance with MHS's policies. This includes, but is not limited to, permitting MHS to observe the operation of Provo Canyon and to review the records of individual Beneficiaries, in accordance with all applicable laws, to assure that the care which is provided is appropriate.

7. Release of Medical Information. MHS, as applicable and appropriate, shall obtain from Beneficiaries appropriate authorization for release of medical information by MHS. Provo Canyon, as applicable and appropriate, shall obtain from Beneficiaries appropriate authorization for release of medical information by Provo Canyon.

8. Indemnification. Except as provided herein, MHS agrees to indemnify and hold Provo Canyon, its officers, directors, employees, agents, successors and assigns harmless from and against any claim, damage, loss, expense, liability, obligation, action or cause of action, including reasonable attorney's fees and reasonable costs of investigation, which Provo Canyon may sustain, pay, suffer or incur by reason of any act, omission, or negligence of MHS in performing its obligations under this Agreement.

Except as provided herein, Provo Canyon agrees to indemnify and hold MHS, its officers, directors, employees, agents, successors and assigns harmless from and against any claim, damage, loss, expense, liability, obligation, action or cause of action, including reasonable attorney's fees and reasonable costs of investigation, which MHS may sustain, pay, suffer or incur by reason of any act, omission, or negligence of Provo Canyon in performing its obligations under this Agreement.

Immediately after either Party has notice of a claim or potential claim relating either directly or indirectly to any Beneficiary as defined by this Agreement, that party shall give notice to the other of any claim or other matter with respect to which indemnity may be sought pursuant to this provision, and of the commencement of any legal proceedings or action with respect to such claim, and shall permit the other party at its own expense to assume the handling and defense of any such claim, proceeding or action. Neither party shall pay or settle any claim or action subject to the indemnity hereunder without the prior written consent of the other party.

Failure to give such notice, or the payment or settlement without written consent, shall vitiate the indemnity provided herein.

9. Maintenance of Records. Provo Canyon agrees to maintain standard financial and medical records for Beneficiaries for at least a five-year period (or longer if required by law or by any funding source) and to comply with all applicable provisions of federal and state law concerning confidentiality of such records. In the event a Beneficiary chooses another mental health services provider, Provo Canyon shall forward such records to the new mental health services provider upon Provo Canyon's receipt of the Beneficiary's signed consent and authorization in a timely manner at no cost to the Beneficiary or MHS.

10. Access to Records. This Section is included herein because of the possible application of Section 1861(v)(1)(I) of the Social Security Act to this Agreement. If such Section 1861(v)(1)(I) should not be found applicable to this Agreement under the terms of such Section and the regulations promulgated thereunder, then this Section of the Agreement will be deemed not to be a part of this Agreement and will be null and void. Until the expiration of four years after the furnishing of services under this Agreement, Provo Canyon will make available to MHS, the California County Mental Health Departments listed on Exhibit C, U.S. Department of Health and Human Services, and the Comptroller General this Agreement and all related books, documents and records. Unless required by law, Provo Canyon shall not otherwise disclose the terms and conditions of this Agreement to any third parties, except to its attorneys or accountants who shall be similarly bound.

11. Audits. Provo Canyon will permit MHS and those California County Mental Health Departments listed on Exhibit C, upon written request and during reasonable business hours, to have access to its business, financial and client records related to services provided to Beneficiaries related to this Agreement for the purpose of auditing Provo Canyon's bills and for conducting quality and utilization review.

12. Required Notification. Provo Canyon shall notify MHS within five days of any of the following occurrences:

A. Provo Canyon or a Professional's license is suspended, revoked, voluntarily relinquished, or subject to terms of probation or other restrictions;

B. Provo Canyon or a Professional is suspended from participation in the Medicare or Medicaid programs;

C. Provo Canyon's insurance as set forth in Section 5 is terminated or the limits of coverage are decreased for any reason;

D. When a Professional who is a member of the medical staff has his/her privileges limited or terminated in any manner;

E. Provo Canyon or a Professional is named in a professional liability action or any other action involving a Beneficiary or related to the services provided by Provo Canyon or its Professionals to any Beneficiary.

13. Compliance with Medicare and Medicaid/No Referrals. The parties to this Agreement expressly acknowledge that it has been and continues to be their intent to comply fully with all federal, state, and local laws, rules and regulations. It is not a purpose, nor is it a requirement, of this Agreement or of any other agreement between the parties, to offer or receive any remuneration of any patient, payment of which may be made in whole or in part by Medicare or Medicaid. Neither party shall make or receive any payment that would be prohibited under state or federal law.

14. Compensation. MHS will pay Provo Canyon in accordance with the procedures and terms set forth in Exhibit B ("Fee Schedule and Compensation Procedure").

Provo Canyon shall only be entitled to compensation from MHS for those services for which MHS has received remuneration from the California State Social Services or from a California County Mental Health Department. Provo Canyon shall not be entitled to any compensation from MHS for any services for which MHS does not receive remuneration from the California State Social Services or California County Mental Health Department. By way of illustration and not limitation, MHS may not receive remuneration, and therefore Provo Canyon shall not be entitled to any compensation for the following:

A. services rendered prior to receipt of any required advance approval to provide services;

B. services which are not Covered Services as set forth on Exhibit A;

C. unnecessary services as determined by MHS in accordance with its utilization policies and procedures.

In consideration of the compensation which Provo Canyon receives under this Agreement, Provo Canyon agrees to cooperate with MHS and to amend this Agreement from time to time as MHS may reasonably request in order to comply with various contractual obligations which MHS may need to satisfy in order to receive California State Social Services or California County Mental Health Department funding.

15. Costs. All costs incurred in the provision of Provo Canyon's services, including but not limited to the Covered Services, shall be born by Provo Canyon and not by MHS. Any costs incurred by MHS for the purpose of providing Total Quality Management/Utilization Review as set forth in Section 6, hereto or conducting Audits as set forth in Section 11 hereto shall be born by MHS, provided however, that any additional costs incurred by MHS which result from any delay or complication for which Provo Canyon is responsible shall be born by Provo Canyon. Provo Canyon shall reimburse MHS for all such costs within thirty (30) days of receiving from MHS a written account of all such additional costs.

16. Patient Disputes. If there are any disputes between MHS and Provo Canyon for itself or its Professionals, the dispute must be discussed directly between Provo Canyon and MHS and at no point shall the Beneficiary become aware of or participate in these discussions.

17. Termination. The term of this Agreement is one (1) year and shall renew automatically unless terminated in accordance with the provisions of this Section.

A. Either party may terminate this Agreement without cause upon thirty days written notice. In the event that this Agreement is terminated, the parties will work together to bring forth the smooth transition of Beneficiaries' care which, by way of demonstration but not exclusion, may include providing interim services not to exceed sixty (60) days in accordance with all terms of this Agreement.

B. The Agreement shall be terminated automatically upon Provo Canyon having its license suspended or revoked or its ability to participate in the Medicare/Medicaid program suspended or terminated.

C. Either party may immediately terminate this Agreement with cause if the other party materially breaches this Agreement. Under such circumstances, the nonbreaching party may give notice of the breach and the Agreement shall terminate within fifteen (15) days unless the breach is corrected within such time.

18. Effect of Termination. Upon termination, the provisions of Section 4 ("Insurance"), Section 8 ("Indemnification"), Section 10 ("Access to Records"), Section 11 ("Audits"), Section 14 ("Compensation"), Section 15 ("Costs") and Section 16 ("Patient Disputes") shall remain in effect.

19. Non-Exclusivity. Nothing contained herein shall restrict the right of Provo Canyon or Professional to participate in providing services to other patients, regardless of the payor for such services.

20. Jeopardy. In the event the performance by either party hereto of any term, covenant, condition or provision of this Agreement should (i) jeopardize (A) the licensure of either party, any employee or any individual providing services hereunder or any provider owned and/or operated by either party or any corporate affiliate of such party (a "Covered Party"); (B) any Covered Party's participation in or reimbursement from Medicare, Medicaid or other reimbursement of payment programs; or (C) any Covered Party's full accreditation by JCAHO or any successor accrediting agency, or (ii) if the continuance of this Agreement should be in violation of any statute, ordinance, or otherwise deemed illegal or be deemed unethical by any recognized body, agency or association in the medical or behavioral health care fields (collectively, "Jeopardy Event"), then the parties shall use their best efforts to meet forthwith in an attempt to negotiate an amendment to this Agreement to remove or negate the effects of the Jeopardy Event. In the event the parties are unable to negotiate such an amendment within fifteen (15) days following written notice by either party of the Jeopardy Event, then either party may terminate this Agreement immediately upon written notice to the other party, notwithstanding any severability provisions hereto to the contrary.

21. Notices. All notices required under this Agreement shall be provided in writing as follows:

MHS:

Mental Health Systems, Inc.
9845 Erma Road, Suite 300
San Diego, CA 92131
Attn: Bill Eastwood

With a copy to:

Gray Cary Ware & Freidenrich
4365 Executive Drive, Suite 1600
San Diego, CA 92121-2189
Attention: T. Knox Bell, Esq.

Provo Canyon:

Charter Provo Canyon School, LLC
1350 East 750 North
Orem, UT 84097
Attn: Administration

With a copy to:

Charter Provo Canyon School, LLC
c/o Charter Behavioral Health Systems, LLC
1105 Sanctuary Parkway, Suite 400
Alpharetta, Georgia 30004
Attn: General Counsel

22. Independent Status. Provo Canyon is, and shall at all times be deemed to be, an independent contractor and shall be wholly responsible for the manner in which it performs the services or Covered Services required of it by the terms of this Agreement. Provo Canyon is entirely responsible for compensating its Professionals and other staff, subcontractors and consultants employed by Provo Canyon. The parties are independent of each other and this Agreement shall not be construed as creating the relationship of employer and employee, or principal and agent, between MHS and Provo Canyon or any of Provo Canyon's Professionals, other employees, agents, consultants or subcontractors. Provo Canyon assumes exclusively the responsibility for the acts of its Professionals, employees, agents, consultants and/or subcontractors as they relate to the services and Covered Services to be provided during the course and scope of their employment. Provo Canyon will remain an independent contractor responsible for all taxes and/or payments made by MHS. Nothing contained in this Agreement shall constitute or be construed to be or to create a partnership, joint venture or lease between Provo Canyon and MHS with respect to Charter Provo Canyon School or any equity interest in Charter Provo Canyon School on the part of MHS.

23. Assignment. This Agreement shall not be subcontracted or assigned except to an affiliate or purchaser of Provo Canyon. If MHS wishes to assign this Agreement, it must notify Provo Canyon in writing and obtain its written consent.

24. Organization, Power and Authority. MHS hereby represents, warrants and covenants that it is a non-profit corporation duly organized, validly existing and in good standing under the laws of the State of California, is qualified or otherwise has met all lawful requirements to transact business in the State of Utah, and has all requisite corporate power and authority to execute and deliver this Agreement, to perform its obligations under this Agreement, and this Agreement is valid, binding and enforceable in accordance with its terms.

Provo Canyon hereby represents, warrants and covenants that it is a for-profit limited liability company duly organized, validly existing and in good standing under the laws of the State of Delaware, is qualified or otherwise has met all lawful requirements to transact business in the State of Utah, and has all requisite power and authority to execute and deliver this Agreement, to perform its obligations under this Agreement, and this Agreement is valid, binding and enforceable in accordance with its terms.

25. <u>Nonassumption of Liabilities</u>. By entering into and performing this Agreement, neither party shall become liable for any of the existing or future obligations, liabilities or debts of the other party.

26. <u>Rights Cumulative, No Waiver</u>. No right or remedy herein conferred upon or reserved to either of the parties hereto is intended to be exclusive of any right or remedy, and each and every right and remedy shall be cumulative and in addition to any other right or remedy given hereunder, or now or hereafter legally existing upon the occurrence of an event of default thereunder. The failure of either party hereto to insist at any time upon the strict observance or performance of any of the provisions of this Agreement or to exercise any right or remedy as provided in this Agreement shall not impair any such right or remedy or be construed as a waiver or relinquishment thereof. Every right and remedy given by this Agreement to the parties hereto may be exercised from time to time and as often as may be deemed expedient by the parties hereto, as the case may be.

27. <u>Captions and Headings</u>. The captions and headings throughout this Agreement are for convenience and reference only, and the words contained therein shall in no way be held or deemed to define, limit, describe, explain, modify, amplify or add to the interpretation, construction or meaning of any provision of or the scope or intent of this Agreement nor in any way affect the Agreement.

[Remainder of Page intentionally left blank]

28. **Counterparts**. This Agreement may be executed in counterparts, each of which will be treated as an original, but all of which together will constitute one and the same instrument.

29. **Entire Agreement**. This Agreement contains the entire agreement of the parties and can only be modified by documents signed by both the parties.

Entered into this on the date first noted above.

"MHS"
Mental Health Services, Inc.:

Bill Eastwood

Title: Executive Director

"Provo Canyon"
Charter Provo Canyon School, LLC:

____

Title: ________________

Tab 16

AGREEMENT TO PROVIDE MENTAL HEALTH SERVICES

This agreement is executed this 5th day of December, 2006, by and between MHS, Inc. ("MHS"), a California non-profit corporation and UHS of Provo Canyon, Inc. ("Provo Canyon") a Delaware for-profit limited liability company.

RECITALS

A. MHS is certified as a Short-Doyle/Medi-Cal Mental Health Rehabilitation Services Provider, which desires to contract with Provo Canyon to provide care to children and adolescents who have been authorized by certain County Mental Health Departments of California as listed on Exhibit C to receive mental health services;

B. Provo Canyon has been approved by the certain County Mental Health Departments for the State of California (as listed on Exhibit C) as a provider of services to children and adolescents residing in California and desires to contract with MHS for the purpose of obtaining certain funds distributed by California State Social Services and California County Mental Health Departments;

C. MHS seeks to contract with qualified professionals to assure that appropriate care is provided to those persons authorized to receive mental health services;

D. Provo Canyon has agreed to provide the services of qualified professionals to provide care to those persons authorized to receive mental health services.

IT IS THEREFORE AGREED by the parties as follows:

1. **Definitions.**

A. **Beneficiary** shall mean any person authorized by any of the certain County Mental Health Departments of California (as listed on Exhibit C which may be amended from time to time as appropriate and upon mutual agreement of the parties) to receive Mental Health Services and who has been properly placed at Provo Canyon for the provision of services pursuant to Chapter 26.5 of Division 7 of title 1 of the Government Code.

B. **Mental Health Services** shall mean all inpatient mental health services.

C. **Covered Services** are those services covered by California State Social Service funding or by California County Mental Health Departments, as identified on Exhibit A.

D. **Professional** shall mean an employee, or independent contractor of Provo Canyon qualified to provide services as required pursuant to this Agreement.

2. **<u>Provision of Covered Services.</u>**

Provo Canyon will employ Professionals who shall provide Covered Services to Beneficiaries in accordance to this Agreement. Provo Canyon shall insure that Covered Services are rendered in a manner which assures availability, adequacy, and continuity if care to Beneficiaries.

Provo Canyon shall operate continuously throughout the term of this Agreement with at least the minimum number and type of staff which meet applicable State and Federal requirements, and which are necessary for the provision of the services hereunder.

All Covered Services rendered hereunder shall be provided by Provo Canyon under the general supervision of MHS. MHS shall have the right to monitor the kind, quality, appropriateness, timeliness and the amount of Covered Services to be provided, however all decisions pertaining to the Mental Health Services to be rendered to any Beneficiary shall be based on the individual Beneficiary's medical needs as initially determined by Provo Canyon. Provo Canyon shall remain solely responsible for the quality of all Mental Health Services and Covered Services provided.

3. **<u>Compliance with Laws</u>**.

A. **<u>Nondiscrimination.</u>** Provo Canyon shall not discriminate in providing any services based on sex, race, national origin, religion, or disability of any Beneficiary.

B. **<u>Child Abuse Reporting and Related Personnel Requirements.</u>** Provo Canyon, and all persons employed by Provo Canyon, shall comply with all child abuse and neglect laws of the State of Utah and shall report all known or suspected instances of child abuse to an appropriate child protective agency, as mandated by the laws of Utah. Provo Canyon shall assure that any person who enters into the employment as a care custodian of minor children, or who enters into employment as a health practitioner, prior to commencing employment, and as a prerequisite to that employment, shall sign a statement on a form provided by MHS in accordance with the above laws to the effect that such person has knowledge of, and will comply with, these laws. For the safety and welfare of minor children, Provo Canyon shall, to the maximum extent permitted by law, ascertain arrest and conviction records for all current and prospective employees and shall not employ or continue to employ any person convicted of any crime involving any harm to minor children. Provo Canyon shall not employ or continue to employ, or shall take other appropriate action to fully protect all persons receiving services under this Agreement concerning, any person whom Provo Canyon knows, or reasonably suspects, has committed any acts which are inimical to the health, morals, welfare, or safety of minor children, or which otherwise make it inappropriate for such person to be employed by Provo Canyon.

C. **Fair Labor Standards.** Provo Canyon shall comply with all applicable provisions of the Federal Fair Labor Standards Act, and shall indemnify, defend and hold harmless MHS, its officers, employees and agents, from any and all liability, including, but not limited to, wages, overtime pay, liquidated damages, penalties, court costs, and attorney" fees arising under any wage and hour law, including, but not limited to the Federal Fair Labor Standards Act, for services performed by Provo Canyon's employees for which MHS may be found jointly or solely liable.

D. **Licensure.** Provo Canyon certifies that it is licensed as a Residential Treatment Center and that each of its Professionals is licensed and/or certified in good standing to practice his or her profession in the State of Utah. Provo Canyon, its Professionals, officers, agents, employees and subcontractors shall, throughout the term of this Agreement, maintain all necessary licenses, permits, approvals, certificates, waivers and exemptions necessary for the provision of the services hereunder and required by the laws or regulations of the United States, Utah and all other applicable government jurisdictions or agencies. Provo Canyon agrees to immediately notify MHS in the event that Provo Canyon or any Professional has his/her license placed on probation, suspended, or terminated.

4. **Insurance.**

Without limiting Provo Canyon's indemnification as provided herein, at all times during the course of this Agreement, Provo Canyon shall maintain professional liability insurance at least in the amount of $2,000,000 per occurrence and $6,000,000 annual aggregate. Provo Canyon shall also maintain customary and reasonable workers compensation insurance and general liability insurance. The costs for said policies, deductible amounts, uncovered liabilities, defense costs, loss adjustment expenses and settlements arising out of or from any services provided by Provo Canyon (including those services rendered by Provo Canyon Professionals or personnel who are acting under the direction or supervision of Provo Canyon) shall be payable by Provo Canyon, to the extent not covered by insurance proceeds. The costs for said policies, deductible amounts, uncovered liabilities, defense costs, loss adjustment expenses, and settlements arising out of services provided by MHS shall be payable by MHS, to the extent not covered by insurance proceeds.

Provo Canyon shall provide evidence of such coverage prior to the effective date of this Agreement and thereafter as requested by MHS. Provo Canyon's insurance shall include MHS as an additional insured with respect to the operations which Provo Canyon performs under contract with MHS. It is agreed that any insurance maintained by MHS shall apply in excess of and not contribute with, insurance provided by this policy. Provo Canyon's insurance shall not be canceled, limited or non-renewed until thirty (30) days written notice has been given to MHS at the address first noted in this Agreement.

In the event that any Professional or Provo Canyon is sued as a result of any services provided to a Beneficiary pursuant to this Agreement, Provo Canyon shall immediately notify MHS. Provo Canyon shall notify MHS, in writing, within sixteen

(16) hours of becoming aware of any occurrence of a serious nature which may expose MHS to liability. Such occurrences shall include, but not be limited to deaths, accidents or injuries to any Beneficiary, or acts of negligence of Provo Canyon or one of its Professionals.

5. Prohibition on Billing Beneficiaries.

MHS shall be the sole source of payment to Provo Canyon for those Covered Services rendered to the Beneficiaries for which MHS obtains funding from California State Social Services and/or California County Mental Health Departments. Provo Canyon agrees that in no event shall it seek payment from the Beneficiaries for any Covered Service except in those instances where there is a co-payment amount or for incremental costs, as outlined in the financial policies of Provo Canyon, including medical and ancillary expenses not covered under routine room and board. If Provo Canyon desires to seek such payment from the Beneficiaries for either a co-payment or for incremental costs, Provo Canyon shall seek such payment directly without any involvement from MHS. Provo Canyon agrees that it and not MHS will have full responsibility for Provo Canyon's collection of money for such co-payments or incremental costs.

6. Total Quality Management/Utilization Review.

Provo Canyon agrees to cooperate fully with MHS in assuring total quality management and utilization review in accordance with MHS's policies. This includes, but is not limited to, permitting MHS to observe the operation of Provo Canyon and to review the records of individual Beneficiaries, in accordance with all applicable laws, to assure that the care which is provided is appropriate.

7. Release of Medical Information.

MHS, as applicable and appropriate, shall obtain from Beneficiaries appropriate authorization for release of medical information by MHS. Provo Canyon, as applicable and appropriate, shall obtain from Beneficiaries appropriate authorization for release of medical information by Provo Canyon.

8. Indemnification.

Except as provided herein, MHS agrees to indemnify and hold Provo Canyon, its offices, directors, employees, agents, successors and assigns harmless from and against any claim, damage, loss, expense, liability, obligation, action or cause of action, including reasonable attorney's fees and reasonable costs of investigation, which Provo Canyon may sustain, pay, suffer or incur by reason of any act, omission, or negligence of MHS in performing its obligations under this Agreement.

Immediately after either Party has notice of a claim or potential claim relating either directly or indirectly to any Beneficiary as defined by this Agreement, that party

shall give notice to the other of any claim or other matter with respect to which indemnity may be sought pursuant to this provision, and of the commencement of any legal proceedings or action with respect to such claim, and shall permit the other party at its own expense to assume the handling and defense of any such claim, proceeding or action. Neither party shall pay or settle any claim or action subject to the indemnity hereunder without the prior written consent of the other party. Failure to give such notice, or the payment or settlement without written consent, shall vitiate the indemnity provided herein.

9. **Maintenance of Records.**

Provo Canyon agrees to maintain standard financial and medical records for Beneficiaries for at least a five-year period (or longer if required by law or by any funding source) and to comply with all applicable provisions of federal and state law concerning confidentiality of such records. In the event a Beneficiary chooses another mental health services provider, Provo Canyon shall forward such records to the new mental health services provider upon Provo Canyon's receipt of the Beneficiary's signed consent and authorization in a timely manner at no cost to the Beneficiary or MHS.

10. **Access to Records.**

This Section is included herein because of the possible application of Section 1861(v) (1) (1) of the Social Security Act to this Agreement. If such Section and the regulations promulgated thereunder, then this Section of the Agreement will be deemed not to be a part of this Agreement and will be null and void. Until the expiration of four years after the furnishing of services under this Agreement, Provo Canyon will make available to MHS, the California County Mental Health Departments listed on Exhibit C, U.S. Department of Health and Human Services, and the Controller General this Agreement and all related books, documents, and records. Unless required by law, Provo Canyon shall not otherwise disclose the terms and conditions of this Agreement to any third parties, except to its attorneys or accountants who shall be similarly bound.

11. **Audits.**

Provo Canyon will permit MHS and those California County Mental Health Departments listed on Exhibit C, upon written request and during reasonable business hours, to have access to its business, financial and client records related to services provided to Beneficiaries related to this Agreement for the purpose of auditing Provo Canyon's bills and for conducting quality and utilization review.

12. **Required Notification.**

Provo Canyon shall notify MHS within five days of any of the following occurrences:

A. Provo Canyon or a Professional's license is suspended, revoked, voluntarily relinquished, or subject to terms of or other restrictions;

B. Provo Canyon or a Professional is suspended from participation in the Medicare or Medicaid programs;

C. Provo Canyon's insurance as set forth in Section 5 is terminated or the limits of coverage are decreased for any reason;

D. When a Professional who is a member of the medical staff has his/her privileges limited or terminated in any manner;

E. Provo Canyon or a Professional is named in a professional liability action or any other action involving a Beneficiary or related to the services provided by Provo Canyon or its Professionals to any Beneficiary.

13. Compliance with Medicare and Medicaid/No Referrals.

The parties to this Agreement expressly acknowledge that it has been and continues to be their intent to comply fully with all federal, state, and local laws, rules and regulations. It is not a purpose, nor is it a requirement, of this Agreement or of any other agreement between the parties, to offer or receive any remuneration of any patient, payment of which may be made in whole or in part by Medicare or Medicaid. Neither party shall make or receive any payment that would be prohibited under state or federal law.

14. Compensation.

MHS will pay Provo Canyon in accordance with the procedures and terms set forth in Exhibit B ("Fee Schedule and Compensation Procedure").

Provo Canyon shall only be entitled to compensation from MHS for those services for which MHS has received remuneration from the California State and Social Services or from a California County Mental Health Department. Provo Canyon shall not be entitled to any compensation from MHS for any services for which MHS does not receive remuneration from the California State Social Services or California County Mental Health Department. By the way of illustration and not limitation, MHS may not receive remuneration, and therefore Provo Canyon shall not be entitled to any compensation for the following:

A. Services rendered prior to receipt of any required advance approval to provide services;

B. Services which are not Covered Services as set forth on Exhibit A;

C. Unnecessary services as determined by MHS in accordance with its utilization policies and procedures.

In consideration of the compensation which Provo Canyon receives under this Agreement, Provo Canyon agrees to cooperate with MHS and to amend this Agreement from time to time as MHS may reasonably request in order to comply with various contractual obligations which MHS may need to satisfy in order to receive California State Social Services or California County Mental Health Department funding.

15. Costs.

All costs incurred in the provision of Provo Canyon's services, including but not limited to the Covered Services, shall be born by Provo Canyon and not MHS. Any costs incurred by MHS for the purpose of providing Total Quality Management/Utilization Review as set forth in Section 6, hereto or conducting Audits as set forth in Section 11 hereto shall be born by MHS, provided however, that any additional costs incurred by MHS which result from any delay or complication for which Provo Canyon is responsible shall be born by Provo Canyon. Provo Canyon shall reimburse MHS for all such costs within thirty (30) days of receiving from MHS a written account of all such additional costs.

16. Patient Disputes.

If there are any disputes between MHS and Provo Canyon for itself or its Professionals, the dispute must be discussed directly between Provo Canyon and MHS and at no point shall the Beneficiary become aware of or participate in these discussions.

17. Termination.

The term of this Agreement is one (1) year and shall renew automatically unless terminated in accordance with the provisions of this Section.

A. Either party may terminate this Agreement without cause upon thirty days written notice. In the event that this Agreement is terminated, the parties will work together to bring forth the smooth transition of Beneficiaries' care which, by way of demonstration but not exclusion, may include providing interim services not to exceed sixty (60) days in accordance with all terms of this Agreement.

B. The Agreement shall be terminated automatically upon Provo Canyon having its license suspended or revoked or its ability to participate in the Medicare/Medicaid program, suspended or terminated.

C. Either party may immediately terminate this Agreement with cause if the other party materially breaches this Agreement. Under such circumstances, the non-breaching party may give notice of the breach and the Agreement shall terminate within fifteen (15) days unless the breach is corrected within such time.

18. Effect of Termination.

Upon termination, the provisions of Section 4 ("Insurance"), Section 8 ("Indemnification"), Section 10 ("Access to Records"), Section 11 ("Audits"), Section 14 ("Compensation"), Section 15 ("Costs") and Section 16 ("Patient Dispute") shall remain in effect.

19. Non-Exclusivity.

Nothing contained herein shall restrict the right of Provo Canyon or Professional to participate in providing services to other patients, regardless of the payor for such services.

20. Jeopardy.

In the event the performance by either party hereto of any term, covenant, condition or provision of this Agreement should (I) jeopardize (A) the licensure of either party, any employee or any individual providing services hereunder or any provider owned and/or operated by either party or any corporate affiliate of such party (a "Covered Party"); (B) any Covered Party' participation in or reimbursement from Medicare, Medicaid or other reimbursement of payment programs; or (c) any Covered Party's full accreditation by JCAHO or any successor accrediting agency, or (ii) if the continuance of this Agreement should be in violation of any statute, ordinance, or otherwise deemed illegal or be deemed unethical by any recognized body, agency, or association in the medical or behavioral health care fields (collectively, "Jeopardy Event"), then the parties shall use their best efforts to meet forthwith in an attempt to negotiate an amendment to this Agreement to remove or negate the effects of the Jeopardy Event. In the event the parties are unable to negotiate such an amendment within fifteen (15) days following written notice by either party of the Jeopardy Event, then either party may terminate this Agreement immediately upon written notice to the other party, notwithstanding any severability provisions hereto to the contrary.

21. Notices.

All notices required under this Agreement shall be provided in writing as follows:

MHS:

Mental Health Systems, Inc.
9465 Farnham Street
San Diego, CA 92123
Attn: Kimberly Bond

With a copy to:

DLA Piper
4365 Executive Drive, Suite 1600
San Diego, CA92121-2189
Attention: T. Knox Bell, Esp.

Provo Canyon:

UHS of Provo Canyon, Inc.
1350 East 750 North
Orem, UT 84097
Attn: Administration

22. **Independent Status.**

Provo Canyon is, and shall at all times be deemed to be, an independent contractor and shall be wholly responsible for the manner in which it performs the services or Covered Services required of it by the terms of this Agreement. Provo Canyon is entirely responsible for compensating its Professional and other staff, subcontractors and consultants employed by Provo Canyon. The parties are independent of each other and this Agreement shall not be construed as creating the relationship of employer and employee, or principal and agent, between MHS and Provo Canyon or any of Provo Canyon's Professionals, other employees, agents, consultants or subcontractors. Provo Canyon assumes exclusively the responsibility for the acts of its Professional, employees, agents, consultants and/or subcontractors as they relate to the services and Covered Services to be provided during the course and scope of their employment. Provo Canyon will remain an independent contractor responsible for all taxes and/or payments made by MHS. Nothing contained in this Agreement shall constitute or be construed to be or to create a partnership, joint venture or lease between Provo Canyon and MHS with respect to UHS of Provo Canyon, Inc. or any equity interest in UHS of Provo Canyon, Inc. on the part of MHS.

23. **Assignment.**

This Agreement shall not be subcontracted or assigned except to an affiliate or purchaser of Provo Canyon. If MHS wishes to assign this Agreement, it must notify Provo Canyon in writing and obtain its written consent.

24. **Organization, Power and Authority.**

MHS hereby represents, warrants and covenants that it is a non-profit corporation duly organized, validly existing and in good standing under the laws of the State of California, is qualified or otherwise has met all lawful requirements to transact business in the State of Utah, and has all requisite corporate power and authority to execute and

deliver this Agreement, to perform its obligations under this Agreement, and this Agreement is valid, binding and enforceable in accordance with its terms.

Provo Canyon hereby represents, warrants and covenants that it is a for-profit limited liability company duly organized, validly existing and I good standing under the laws of the State of Delaware, is qualified or otherwise has met all lawful requirements to transact business in the State of Utah, and has all requisite power and authority to execute and deliver this Agreement, to perform its obligations under this Agreement, and this Agreement is valid, binding and enforceable in accordance with its terms

25. Non-assumption of Liabilities.

By entering into and performing this Agreement, neither party shall become liable for any of the existing or future obligations, liabilities or debts of the other party.

26. Rights Cumulative, No Waiver.

No right or remedy herein conferred upon or reserved to either of the parties hereto is intended to be exclusive of any right or remedy, and each and every right and remedy shall be cumulative and in addition to any other right or remedy given hereunder, or now or hereafter legally existing upon the occurrence of an event of default thereunder. The failure of either party hereto to insist at any time upon the strict observance or performance of any of the provisions of this Agreement or to exercise any right or remedy as provided in this Agreement shall not impair any such right or remedy or be construed by as a waiver or relinquishment thereof. Every right and remedy given by this Agreement to the parties hereto may be exercised from time to time and as often as may be deemed expedient by the parties hereto, as the case may be.

27. Captions and Headings.

The captions and headings throughout this Agreement are for convenience and reference only, and the words contained therein shall in no way be held or deemed to define, limit, describe, explain, modify, amplify, or add to the interpretation, construction or meaning of any provision of or the scope or intent of this Agreement nor in any way affect the Agreement.

28. Counterparts.

This Agreement may be executed in counterparts, each of which will be treated as an original, but all of which together will constitute one and the same instrument.

29. Entire Agreement.

This Agreement contains the entire agreement of the parties and can only be modified by documents signed by both the parties.

Entered into this on the date first noted above.

"MHS"
Mental Health Systems, Inc.

____

Title: ______________________________

"Provo Canyon"
UHS of Provo Canyon, Inc.

____

Title: ______________________________

EXHIBIT A: COVERED SERVICES

Provo Canyon will provide the following services and facilities: Room and board; first aid supplies and nursing services' laundry services; supervised use of recreational equipment and facilities; supervised work projects; and, all routine therapeutic and behavioral modification services and testing.

Tab 17

Francine Giani
Executive Director
Department of Commerce

Jon M. Huntsman, Jr.
Governor
State of Utah

Kathy Berg
Director
Division of Corporations & Commercial Code

STATE OF UTAH
DEPARTMENT OF COMMERCE
DIVISION OF CORPORATIONS & COMMERCIAL CODE
CERTIFICATE OF REGISTRATION

C T CORPORATION SYSTEM
PROVO CANYON SCHOOL, INC.
136 EAST SOUTH TEMPLE, SUITE 2100
SALT LAKE CITY UT 84111

Access Code
Code: 4511097

State of Utah
Department of Commerce
Division of Corporations & Commercial Code

CERTIFICATE OF REGISTRATION

Corporation - Domestic - Non-Profit

This certifies that **PROVO CANYON SCHOOL, INC.** has been filed and approved on **January 06, 2009** and has been issued the registration number **7231976-0140** in the office of the Division and hereby issues this Certification thereof.

Kathy Berg

KATHY BERG
Division Director

*The Access Code is used for Online Applications used by this Division only.

State of Utah
Department of Commerce
Division of Corporations and Commercial Code
I hereby certified that the foregoing has been filed and approved on this 26 day of Jan 2009 in this office of this Division and hereby issued This Certificate thereof.
Examiner BKP Date 1/7/09

Kathy Berg
Division Director

RECEIVED
JAN 06 2009
Utah Div. Of Corp. & Comm. Code

EXPEDITE
#9700

ARTICLES OF INCORPORATION

OF

PROVO CANYON SCHOOL, INC.

A Nonprofit Corporation

01-06-09P01:49 RCVD

We, the undersigned natural persons all being of the age of eighteen years or more, acting as incorporators under the Utah Revised Nonprofit Corporation Act (the "Act"), adopt the following Articles of Incorporation for such Corporation:

ARTICLE I

Name: The name of the corporation is PROVO CANYON SCHOOL, INC.

ARTICLE II

Duration: The period of duration of this corporation is perpetual.

ARTICLE III

Purposes: The specific purposes for which the corporation has been formed are to engage in any lawful act for which a nonprofit corporation may be organized under the Act.

ARTICLE IV

Members: The corporation shall have a single voting member.

ARTICLE V

Incorporator: The name and address of the incorporator is:

NAME	ADDRESS
Matthew D. Klein	367 South Gulph Road King Of Prussia, PA 19406-0958

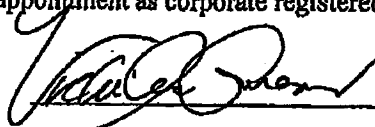
Date: 01/06/2009
Receipt Number: 2715124
Amount Paid: $1,157.00

7231976

ARTICLE VI

Registered Office and Agent: The address of the corporation's initial registered office shall be 136 East South Temple, suite 2100, Salt Lake City, Utah 84111. Such office may be changed at any time by the Board of Trustees without amendment of these Articles of Incorporation. The corporation's initial registered agent at such address shall be CT Corporation System.

I hereby acknowledge and accept appointment as corporate registered agent:



VickiAnn Owens
Special Assistant Secretary

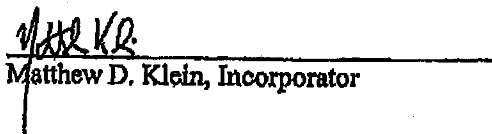
ARTICLE VII

Distributions: No part of the net earnings of the corporation shall inure to the benefit of, or be distributable to its trustees, officers, or other private persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in Article III hereof.

ARTICLE VII

Distribution on Dissolution: Upon the dissolution of the Corporation, the Board of Directors shall make provision for the payment, satisfaction, and discharge of all of the liabilities and obligations of the Corporation, and shall return, transfer, or convey any assets held by the Corporation upon a condition requiring return, transfer, or conveyance by reason of the dissolution. Thereafter, the Board of Directors shall transfer or convey the remaining assets of the Corporation to such organizations or domestic or foreign corporations, as shall be determined pursuant to a plan of distribution adopted by the Corporation in accordance with the Act.

IN WITNESS WHEREOF, Matthew D. Klein has executed these Articles of Incorporation in duplicate this 6th day of January, 2009. He is the incorporator herein; has read the above and foregoing Articles of Incorporation; know the contents thereof and that the same is true to the best of his knowledge and belief, excepting as to matters herein alleged upon information and belief and as to those matters he believes to be true.



Matthew D. Klein, Incorporator

ASSIGNMENT AND CONSENT TO USE OF NAME

UHS of Provo Canyon, Inc. a Utah corporation, filed a DBA application for the name "Provo Canyon School" shown as entity number 6364497-0151, registered October 20, 2006. UHS of Provo Canyon, Inc. hereby assigns and consents to the use of the name "Provo Canyon School, Inc." in forming a new Utah nonprofit corporation, and authorizes Matthew D. Klein as incorporator to utilize the name for the new corporation.

UHS of Provo Canyon, Inc.

By: ______________________________
Alan B. Miller, President

Tab 18

Exhibit A

List of Providers for the Provision of Mental Health Outpatient Services for Fiscal Years 2002-03, 2003-04, and 2004-05:

- Alpine Academy
- Aspen Solutions Inc.
  - Aspen Ranch – (For Profit – under Aspen Solutions corporate umbrella)
  - Island View – (under Aspen Solutions corporate umbrella)
  - SunHawk Academy – (under Aspen Solutions corporate umbrella)
  - Youth Care – (under Aspen Solutions corporate umbrella)
- Buckeye Ranch – (Letter of Agreement – non-profit from IRS.gov website)
- Cathedral Home for Children
- Chileda Institute, Inc.
- Colorado Boys' Ranch
- Daystar Residential, Inc.
- Devereux Foundation Arizona
- Devereux Cleo Wallace
- Devereux Texas Treatment Network
- Excelsior Youth Center
- Forest Heights Lodge
- Griffith Centers for Children, Inc.
- Heritage Schools, Inc.
- Intermountain – (Letter of Agreement)
- Mental Health Systems Inc. (Logan River)
- Mental Health Systems Inc. (Provo Canyon)
- National Deaf Academy – (Letter of Agreement – For Profit – Mediation Settlement)
- The Pathway School
- Yellowstone Boys and Girls Ranch

Tab 19

Alaska Entity # **78003D**

State of Alaska
Department of Commerce, Community, and Economic Development

CERTIFICATE OF GOOD STANDING

THE UNDERSIGNED, as Commissioner of Commerce, Community, and Economic Development of the State of Alaska, and custodian of corporation records for said state, hereby certifies that

KIDS BEHAVIORAL HEALTH OF ALASKA, INC.

on the 12th day of November, 2002 filed in this office its Articles of Incorporation, as a Nonprofit Corporation organized under the laws of this state.

I FURTHER CERTIFY that said Nonprofit Corporation is in good standing, having fully complied with all the requirements of this office.

No information is available in this office on the financial condition, business activity or practices of this corporation.

IN TESTIMONY WHEREOF, I execute this certificate and affix the Great Seal of the State of Alaska on the 7th day of December, 2007.

Emil Notti
Commissioner

Certification Number: 236711-1
Verify this certificate online at https://myalaska.state.ak.us/business/soskb/verify.asp

Tab 20

Francine Giani
Executive Director
Department of Commerce

Jon M. Huntsman, Jr.
Governor
State of Utah

Kathy Berg
Director
Division of Corporations
& Commercial Code

STATE OF UTAH
DEPARTMENT OF COMMERCE
DIVISION OF CORPORATIONS & COMMERCIAL CODE
CERTIFICATE OF REGISTRATION

CT CORPORATION SYSTEM
KIDS BEHAVIORAL HEALTH OF ALASKA, INC.
136 E SOUTH TEMPLE STE 2100
SALT LAKE CITY UT 84111

Access Code
Code: 4361694

State of Utah
Department of Commerce
Division of Corporations & Commercial Code

CERTIFICATE OF REGISTRATION

Corporation - Foreign - Non-Profit

This certifies that **KIDS BEHAVIORAL HEALTH OF ALASKA, INC.** has been filed and approved on **December 07, 2007** and has been issued the registration number **6840462-0141** in the office of the Division and hereby issues this Certification thereof.

Kathy Berg

KATHY BERG
Division Director

*The Access Code is used for Online Applications used by this Division only.

Tab 21

Utah Business Search - Details

COPPER HILLS YOUTH CENTER

Entity Number: 5401811-0151
Company Type: DBA
Address: 5899 W RIVERDELL DR West Jordan, UT 84088
State of Origin:
Registered Agent: C T CORPORATION SYSTEM
Registered Agent Address:
1108 E SOUTH UNION AVE
Midvale, UT 84047

Status: Expired

Status: Expired ● *as of 12/04/2012*
Status Description: Failure to File Renewal
Employment Verification: Not Registered with Verify Utah

History

Registration Date: 11/05/2003
Last Renewed: 11/04/2009

Additional Information

NAICS Code: 6219 **NAICS Title:** 6219-Other Ambulatory Health Care Servic

Refine your search by:

- Search by:
- Business Name
- Number
- Executive Name
- Search Hints

Name:

Tab 22

Utah Business Search - Details

KIDS BEHAVIORAL HEALTH OF ALASKA, INC.

Entity Number: 6840462-0141
Company Type: Corporation - Foreign - Non-Profit
Address: 367 S GULPH RD KING OF PRUSSIA, PA 19406
State of Origin: AK
Registered Agent: C T CORPORATION SYSTEM
Registered Agent Address:
1108 E SOUTH UNION AVE
Midvale, UT 84047

Status: Active

Status: Active *as of 03/07/2011*
Renew By: 12/31/2013
Status Description: Good Standing
The "Good Standing" status represents that a renewal has been filed, within the most recent renewal period, with the Division of Corporations and Commercial Code.
Employment Verification: Not Registered with Verify Utah

History

Registration Date: 12/07/2007
Last Renewed: 10/16/2012

Additional Information

NAICS Code: 5511 **NAICS Title:** 5511-Management of Companies and Enterpr

Refine your search by:

- Search by:
- Business Name
- Number
- Executive Name
- Search Hints

Name:

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

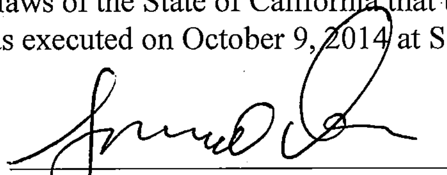
I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On October 9, 2014, I served the:

SCO Comments
Incorrect Reduction Claim, 12-9705-I-03
Handicapped and Disabled Students (04-RL-4282-10); *Handicapped and Disabled Students II* (02-TC-40/02-TC-49); and *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05)
Government Code Sections 7570 et seq. (AB 3632)
Fiscal Years: 2006-2007, 2007-2008, and 2008-2009
County of Orange, 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 October 9, 2014 at Sacramento, California.



Lorenzo Duran
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 7/1/14

Claim Number: 12-9705-I-03

Matter: Handicapped and Disabled Students; Handicapped and Disabled Students

Claimant: County of Orange

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

Socorro Aquino, *State Controller's Office*
Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-7522
SAquino@sco.ca.gov

Lacey Baysinger, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-0254
lbaysinger@sco.ca.gov

Allan Burdick,
7525 Myrtle Vista Avenue, Sacramento, CA 95831
Phone: (916) 203-3608
allanburdick@gmail.com

Michael Byrne, *Department of Finance*
915 L Street, 8th Floor, Sacramento, CA 95814
Phone: (916) 445-3274
michael.byrne@dof.ca.gov

Gwendolyn Carlos, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 323-0706
gcarlos@sco.ca.gov

Annette Chinn, *Cost Recovery Systems,Inc.*
705-2 East Bidwell Street, #294, Folsom, CA 95630
Phone: (916) 939-7901

achinncrs@aol.com

Marieta Delfin, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-4320
mdelfin@sco.ca.gov

Tom Dyer, *Department of Finance (A-15)*
915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
tom.dyer@dof.ca.gov

Kimberly Engelby, *Orange County Health Care Agency*
Claimant Representative
Auditor-Controller, 405 W. 5th Street, 7th Floor, Santa Ana, CA 92701
Phone: (714) 834-5264
kengelby@ochca.com

Donna Ferebee, *Department of Finance*
915 L Street, Suite 1280, Sacramento, CA 95814
Phone: (916) 445-3274
donna.ferebee@dof.ca.gov

Susan Geanacou, *Department of Finance*
915 L Street, Suite 1280, Sacramento, CA 95814
Phone: (916) 445-3274
susan.geanacou@dof.ca.gov

Dorothy Holzem, *California Special Districts Association*
1112 I Street, Suite 200, Sacramento, CA 95814
Phone: (916) 442-7887
dorothyh@csda.net

Edward Jewik, *County of Los Angeles*
Auditor-Controller's Office, 500 W. Temple Street, Room 603, Los Angeles, CA 90012
Phone: (213) 974-8564
ejewik@auditor.lacounty.gov

Jill Kanemasu, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-9891
jkanemasu@sco.ca.gov

Jean Kinney Hurst, Senior Legislative Representative, Revenue & Taxation, *California State Association of Counties (CSAC)*
1100 K Street, Suite 101, Sacramento, CA 95814-3941
Phone: (916) 327-7500
jhurst@counties.org

Jay Lal, *State Controller's Office (B-08)*
Division of Accounting & Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-0256
JLal@sco.ca.gov

Kathleen Lynch, *Department of Finance (A-15)*

915 L Street, Suite 1280, 17th Floor, Sacramento, CA 95814
Phone: (916) 445-3274
kathleen.lynch@dof.ca.gov

Andy Nichols, *Nichols Consulting*
1857 44th Street, Sacramento, CA 95819
Phone: (916) 455-3939
andy@nichols-consulting.com

Christian Osmena, *Department of Finance*
915 L Street, Sacramento, CA 95814
Phone: (916) 445-0328
christian.osmena@dof.ca.gov

Keith Petersen, *SixTen & Associates*
P.O. Box 340430, Sacramento, CA 95834-0430
Phone: (916) 419-7093
kbpsixten@aol.com

Jai Prasad, *County of San Bernardino*
Office of Auditor-Controller, 222 West Hospitality Lane, 4th Floor, San Bernardino, CA 92415-0018
Phone: (909) 386-8854
jai.prasad@atc.sbcounty.gov

Kathy Rios, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-5919
krios@sco.ca.gov

Lee Scott, *Department of Finance*
15 L Street, 8th Floor, Sacramento, CA 95814
Phone: (916) 445-3274
lee.scott@dof.ca.gov

David Scribner, *Max8550*
2200 Sunrise Boulevard, Suite 240, Gold River, CA 95670
Phone: (916) 852-8970
dscribner@max8550.com

Jim Spano, Chief, Mandated Cost Audits Bureau, *State Controller's Office*
Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 323-5849
jspano@sco.ca.gov

Dennis Speciale, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-0254
DSpeciale@sco.ca.gov