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DMH**  
LOS ANGELES COUNTY  
DEPARTMENT OF  
MENTAL HEALTH

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**RECEIVED**  
February 09, 2015  
*Commission on  
State Mandates*

February 6, 2015

**LATE FILING**

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

Dear Ms. Halsey:

**LOS ANGELES COUNTY REBUTTAL TO  
STATE CONTROLLER'S OFFICE COMMENTS  
TO IRC NO. 12-9705-I-04**

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

On behalf of the County of Los Angeles, I am submitting the attached rebuttal to the State Controller's comments on the County's Incorrect Reduction Claim (IRC) No. 12-9705-I-04 related to the disallowance of costs associated with the placement of pupils in certain out-of-state residential facilities.

We appreciate your consideration of this information.

Sincerely,

Robin Kay, Ph.D.  
Chief Deputy Director

RK:lw

c: Lyn Wallensak

**Los Angeles County IRC No. 12-9705-I-04**  
**Seriously Emotionally Disturbed Pupils: Out of State Mental Health Services Program**  
**Fiscal Years 2003-04, 2004-05 and 2005-06**  
**Rebuttal to State Controller's Office Comments**

**Introduction**

The following is the County of Los Angeles' rebuttal to the State Controller's Office (SCO) comments on the County's Incorrect Reduction Claim (IRC) contesting the SCO's disallowance of costs associated with the placement of pupils in certain out-of-state residential facilities.

In its comments, the SCO argues the costs are disallowed because the Program's Parameters and Guidelines' reference California Code of Regulation Section 60100, Subsection (h), which states residential placements in out-of-state facilities shall be made only in residential programs meeting the requirements of Welfare and Institutions Code Section 11460, Subsection (c)(2) and (c)(3). In doing so, the SCO assumes the "mandate" depends entirely on the Parameters and Guidelines and not on the underlying legislation. Such an assumption would be incorrect.

The placement of a pupil in an out-of-state residential facility is not a decision that is made lightly. In fact, such placements may only be made when there is no in-state facility that can provide the services and supports necessary to allow a pupil to access and benefit from his or her public education as required by federal law, specifically the Individuals with Disabilities Education Act (IDEA). Pupils placed in such out-of-state facilities need highly specialized services and supports to address mental and emotional, and sometimes physical, challenges. The availability of these specialized services is extremely limited nationwide.

Payment of out-of-state residential placement consists of two components: A "care and supervision" component and a "treatment" component. The County of Los Angeles agrees with the Counties of San Diego and Orange, who have independently filed Incorrect Reduction Claims contesting the disallowance of costs associated with similar out-of-state residential placements, that all costs associated with the placement of pupils in these out-of-state facilities are mandated costs and thus should be reimbursed to counties under this State Mandated Program. However, the County has focused its IRC on the mental health treatment component so as to ensure each component is specifically addressed.

**SCO Comments & County Response**

In its comments, the SCO admits there is "inconsistency" between the California Code of Regulations and the federal law. The SCO also admits the Education Code does not have the same restriction on for-profit facilities.

As discussed in the IRC, a regulation cannot override the statutes it was supposed to implement and cannot operate to prohibit a county from complying with State law. The regulation is not only inconsistent with IDEA, the Government Code, and the Education Code, but it unlawfully restricts the rights of pupils with serious emotional or mental illness to receive a free and appropriate public education (FAPE).

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IDEA requires a pupil be given the "most appropriate placement." The federal law does not place any restrictions on such placements. Further, as discussed in the IRC, the Legislature in passing Assembly Bill 2726 specifically stated:

*"The people of the State of California do enact as follows: Section 1. (a) The fiscal and program responsibilities of community mental health agencies shall be the same regardless of the location of placement. Local education agencies and community mental health services shall make out-of-state placements under Chapter 26.5 (commencing with Section 7570) of Division 7 of Title 1 of the Government Code only if other options have been considered and are determined to be inappropriate. In making these placements, local education agencies and community mental health services shall comply with relevant sections of the Education Code including Section 56365."*

The Legislature did not reference the Welfare & Institutions Code, only the Education Code. The Education Code does not prohibit placements in for-profit facilities and, in fact, Section 56365 of the Education Code **requires** local education agencies to make available services provided by nonpublic, nonsectarian schools, as defined pursuant to Section 56034<sup>1</sup>, and nonpublic, nonsectarian agencies, as defined pursuant to Section 56035.<sup>2</sup>

The SCO's response states: "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 county is prohibited from placing a client in a for-profit facility and the residential vendor payments shall be made only to a group home organized and operated on a nonprofit basis."<sup>3</sup> SCO cites no authority for its assertion that the County is *prohibited* from placing a client in a for-profit facility. Welfare and Institutions Code Section 11460, subdivision (3), upon which the SCO relies, says: "State reimbursement for the AFDC-FC group home rate paid on or after January 1, 1993, shall only be paid to a group home organized and operated on a nonprofit basis. While it addresses a requirement for the AFDC-FC group home rate to be paid, it places no prohibition on the placement of a child in a for-profit facility.

More importantly, this provision is limited in its applicability. "Aid to Families with Dependent Children-Foster Care" means "the aid provided on behalf of needy children in foster care under

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<sup>1</sup> Section 56034 defines a "non public, nonsectarian school" as "a private, nonsectarian school that enrolls individuals with exceptional needs pursuant to an individualized education program and is certified by the department. It does not include an organization or agency that operates as a public agency or offers public service, including, but not limited to, a state or local agency, an affiliate of a state or local agency, including a private, nonprofit corporation established or operated by a state or local agency, or a public university or college. A nonpublic, nonsectarian school also shall meet standards as prescribed by the Superintendent and board.

<sup>2</sup> Section 56035 defines a "non public, nonsectarian agency" as "a private, nonsectarian establishment or individual that provides related services necessary for an individual with exceptional needs to benefit educationally from the pupils' educational program pursuant to an individualized education program and that is certified by the department. It does not include an organization or agency that operates as a public agency or offers public service, including, but not limited to, a state or local agency, an affiliate of a state or local agency, including a private, nonprofit corporation established or operated by a state or local agency, a public university or college, or a public hospital. The nonpublic, nonsectarian agency shall also meet standards as prescribed by the superintendent and board.

<sup>3</sup> See Page 9, section A. of SCO's response filed October 3, 2014.

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the terms of this division," referring to Division 9, Public Social Services. (Welf. & Inst. Code section 11400(a)). The children placed in out-state-placements under Government Code section 7572.55 were not "needy children" but children entitled to State-mandated mental health services to assure that they received a FAPE.

Consequently, the courts and administrative bodies in applying these various provisions have consistently required public agencies, including the County of Los Angeles, in conjunction with the local education agency to allow the placement of pupils in the exact facilities for which the SCO is disallowing the costs and these courts and administrative bodies have consistently sided with the parents after the parents made unilateral placements of a pupil in a for-profit facility.

The County is a party to these actions only because of the State mandate. This fact was recognized by the Commission as County litigation costs for treatment-related issues such as placement is expressly identified as a reimbursable cost under the "case management" portion of the parameters and guidelines. If the costs of litigation are covered, how can the costs resulting from the litigation – namely payment of the costs associated with the pupil's placement in a for-profit facility – not be?

The SCO interpretation of the regulation -- namely 2 CCR 60100 (h) — which it contents prohibits placement of a seriously emotionally disturbed child in a for-profit facility — contradicts both the Federal IDEA law and the Education Code cited in Government Code Section 7576, which is the basis of the mandate. The SCO relies solely on an argument that because the Parameters and Guidelines reference the regulation (which cites an inapplicable statutory provision), all payments to for-profit facilities are not subject to the mandate. To permit the SCO to disallow mandated costs on the basis of the profit status of the service provider would permit a regulation, namely 2 CCR 60100 (h), to contravene clear and express statutory requirements, namely those of Government Code section 7576. This is clearly not allowed; regulations cannot impose requirements that are contrary to statute and should not be construed to allow the SCO to circumvent the requirement to reimburse the County for legislatively mandated costs.

Further, the SCO does not address the fact that Welfare & Institutions Code Section 11460 (c)(3) is applicable only to the AF-DC rate for care and supervision, not mental health treatment services. The SCO wrongly makes an assumption that even if the regulation, as the SCO construes it, could somehow override both state and federal law regarding the most appropriate placement, such placement in a residential facility would automatically result in the disallowance of **all** costs, including treatment costs. Such a conclusion is clearly contradictory to the Legislature's intent. As discussed in the IRC, in passing Assembly Bill 2726, the Legislature specifically stated that the intent of the legislation was to ensure that community mental health agencies would be responsible for the mental health services required under individualized education plans *no matter where the pupil was placed*.

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“This bill would specify that, commencing on July 1, 1997, the fiscal and program responsibilities of community mental health services shall be the same regardless of the location of the placement.”

This intent was recognized by the Commission in its Test Claim decision, adopted on May 25, 2000.

That the AF-DC rate does not include payment of mental health treatment services is explicitly identified in the Agency Plan for Title IV-E of the Social Security Act Foster Care and Adoption Assistance for the State of California, as identified below.

<p>1355.20(a) 475(4)(A)</p>	<p>C. PAYMENTS</p> <p>1. Foster care maintenance payments for a child in foster care may cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to the child, and reasonable travel to the child's home for visitation with family, or other caretakers and reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement. Local travel associated with providing the items listed above is also an allowable expense. In the case of child care institutions, such term must include the reasonable costs of administration and operation of such institutions as are necessarily required to provide the items described in the preceding sentences.</p>	<p>WIC 4684, 11460, 11461, 11462, 11464  MPP 11-401.11, 11-401.12  MPP 11-401.312  MPP 11-402 et. Seq.  MPP 11-402.5, 11-403  MPP 45-200.2, 45-302.21  ACL 97-55 (BASS)  WIC 11460(b)(1)  WIC 11460(b)(2), 11463</p> <div style="border: 1px solid red; padding: 5px;"> <p>* California does not claim Title IV-E funds for administrative reimbursement for mental health or social work costs in the basic rate for FFAs or Group Homes.  ACL 10-12</p> </div>
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Therefore, as the rate referenced in Welfare and Institutions Code Section 11460 (c)(3) clearly does not include the cost of mental health services, the SCO’s rationale is not consistent with the regulation or the law it references.

**CONCLUSION**

In placing these pupils in for-profit facilities, the IEP team – in accordance with the State Education Code and the federal IDEA – determined that these facilities represented the “most appropriate placements” that would allow the pupils to access and benefit from their public education. As required by law and as the recipient of the federal funds, the State assumed responsibility for not only the educational components, but the provision of the required services and supports and board and care so that these “most appropriate” placements would be provided to the pupils at no cost to the parents.

As described above, and in the IRC, the SCO’s argument is clearly not defensible. Outside of the mandate, the County has no financial responsibility for services to pupils under IDEA or the State Education Code. Therefore, the Commission should find that the SCO’s reductions were incorrect and rule in favor of the County.

**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 February 10, 2015, I served the:

**Claimant Rebuttal Comments**

Incorrect Reduction Claim, 12-9705-I-04

*Seriously Emotionally Disturbed (SED) Pupils:*

*Out-of-State Mental Health Services (97-TC-05)*

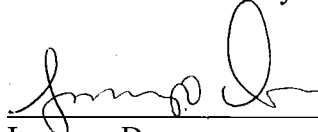
Government Code Section 7576; Statutes 1996, Chapter 654

Fiscal Years: 2003-2004, 2004-2005, and 2005-2006

County of Los Angeles, 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 February 10, 2015 at Sacramento, California.



\_\_\_\_\_  
Lorenzo Duran

Commission on State Mandates  
980 Ninth Street, Suite 300  
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# COMMISSION ON STATE MANDATES

## Mailing List

**Last Updated:** 2/10/15

**Claim Number:** 12-9705-I-04

**Matter:** Seriously Emotionally Disturbed (SED) Pupils: Out of State Mental Health Services

**Claimant:** County of Los Angeles

### 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.)

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