

ITEM 10
INCORRECT REDUCTION CLAIM
FINAL STAFF ANALYSIS

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

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

09-4282-I-05

County of Santa Clara, Claimant

EXECUTIVE SUMMARY

Overview

This is an incorrect reduction claim filed by the County of Santa Clara regarding reductions made by the State Controller's Office to reimbursement claims for costs incurred in fiscal years 2003-2004 through 2005-2006, in the approximate amount of \$8.6 million to provide outpatient mental health rehabilitation services to seriously emotionally disturbed pupils under the *Handicapped and Disabled Students* program.

The *Handicapped and Disabled Students* program was enacted by the Legislature to implement federal special education law (Individuals with Disabilities Education Act, or 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, including psychological and other mental health services, designed to meet the pupil's unique educational needs. The program shifted to counties the responsibility and funding to provide mental health services required by a pupil's individualized education plan (IEP).

The State Controller's Office contends that outpatient rehabilitation services are not required by the underlying regulations as a service to be provided to seriously emotionally disturbed pupils, and that providing outpatient rehabilitation services is not identified as a reimbursable activity in the parameters and guidelines. Thus, the State Controller's Office argues that outpatient rehabilitation costs are not reimbursable and that its reduction to the County's reimbursement claims is correct. The Controller's Office also contends that the County provided socialization

and vocational services to pupils as part of the rehabilitation services, which are not reimbursable under the parameters and guidelines.

The County disagrees with the State Controller's Office. The County seeks a determination from the Commission pursuant to Government Code section 17551, subdivision (d), that the State Controller's Office incorrectly reduced the claim, and requests that the Controller reinstate the \$8.6 million reduced for fiscal years 2003-2004 through 2005-2006.

For the reasons provided in the analysis, staff finds that the State Controller's Office incorrectly reduced the County's reimbursement claims for the costs incurred to provide outpatient rehabilitation services, except those costs provided for "social skills training." "Social skills training" is one of eight types of outpatient rehabilitation interventions provided by the County. The Commission's statement of decision and parameters and guidelines include an express finding that socialization services are not reimbursable. The Commission's decisions are final and binding on the parties. Therefore, the County's costs incurred for social skills training are not reimbursable and are properly reduced.

Staff recommends that the County's reimbursement claims be remanded back to the State Controller's Office to determine the portion of the costs claimed related to "social skills training," which can be properly reduced. All other costs incurred by the County for outpatient rehabilitation services are incorrectly reduced and should be reinstated.

Procedural History

The County filed reimbursement claims for fiscal years 2003-2004 through 2005-2006 with the State Controller's Office. On June 30, 2009, the State Controller's Office issued a final audit report on these reimbursement claims, reducing all costs claimed under the billing code "Mode 15" for rehabilitation services. The billing code used by the County is included in the cost report method of claiming reimbursement for this program and is authorized to be used by the Commission's parameters and guidelines.

On January 15, 2010, the County filed a request for reconsideration of the final audit report. On March 10, 2010, the Controller's Office denied the request for reconsideration.

On April 12, 2010, the County filed this incorrect reduction claim, and requested that the Commission expedite this matter. The claim was amended on May 20, 2010. The County's claim was deemed complete and issued to the State Controller's Office for comment on June 8, 2010. The incorrect reduction claim was not expedited for hearing as requested by the County, but kept in line behind the incorrect reduction claims previously filed.

When the County's incorrect reduction claim was not expedited by the Commission, the County, on July 7, 2010, filed a petition for writ of mandate pursuant to Code of Civil Procedure section 1094.5 in Sacramento County Superior Court to challenge reductions made by the State Controller's Office in the amount of \$8,658,336. On November 18, 2010, the court sustained demurrers filed by the Commission and the State Controller's Office on the ground that the County did not exhaust its administrative remedies by resolving the incorrect reduction claim with the Commission. Following the court's ruling, the County requested that the Commission expedite its claim. When the request was denied by the Commission, the County filed an amended petition for writ of mandate and complaint for declaratory relief in December 2010.

In February 2011, the parties came to an agreement and, as relevant to the Commission, the County's incorrect reduction claim was set for hearing with the Commission in May 2011 and the County dismissed the amended complaint without prejudice.

Position of the Parties

Claimant's Position

The County contends that the State Controller's Office incorrectly reduced the costs for providing outpatient rehabilitation services to seriously emotionally disturbed pupils. The County asserts that the outpatient rehabilitation services were required to be provided by the pupils' IEPs.

The County further contends that the parameters and guidelines specifically identify "day rehabilitation" as a reimbursable mental health service and that the services provided by the County fit within that definition. Contrary to the Controller's assertion, the County maintains that the parameters and guidelines do not exclude outpatient rehabilitation services. The Department of Mental Health, in a letter dated February 19, 2009, to the Commission's Chief Legal Counsel, confirmed that mental health rehabilitation services fall within section 60200 of its Title 2 regulations. The County argues that if section 60020 of the Title 2 regulations excluded mental health rehabilitation services, it would be inconsistent with federal law and the Government Code, and would therefore be invalid.

The County further asserts that the Department of Mental Health's exclusion of vocational and socialization services from the definition of "mental health services" under the program is not material. The County acknowledges that some of the specific interventions described in the pupils' files may develop a child's socialization or vocational skills. But the County asserts that the primary goal of the interventions was not to develop social or vocational skills, but to equip the children in the least restrictive environment with the skills necessary to function independently in an educational environment.

The County supports its case with a declaration and letters from the mental health service providers that contract with the County for this program. The County has also filed an expert report from Dr. Margaret Rea, an independent psychologist and researcher at the University of California, Davis. Dr. Rea reviewed the patient files and the descriptions of care provided by the County under the label "rehabilitation services" indicated in the progress notes for each session with the child, and states that the services provided by the County include the following treatment interventions, which the County claims are reimbursable:

- Cognitive Restructuring: helping children to think in more constructive ways, these interventions focus on decreasing the number of negative thoughts, increasing the number of positive thoughts, learning to challenge unhelpful thoughts, and questioning unrealistic thoughts.
- Communication Training: helping children to improve the manner in which they express themselves; improving eye contact; using active listening; learning to give both positive and negative feedback; making requests of others in a more productive and appropriate manner.
- Behavioral Activation: activity scheduling, which involves helping children engage in both pleasing and success-oriented activities.

- Emotional Regulation: helping children to identify the triggers that can lead them to emotional dysregulation (anger outbursts, self-harm, violent acts, anxiety) and to develop alternative healthier responses.
- Problem-Solving: children are taught strategies that can empower them to approach problems with adaptive skills, to brainstorm and fully consider their options, and to implement and evaluate solutions.
- Relaxation Training: these techniques are offered to children to help them manage emotional lability and anxiety as an alternative to maladaptive behaviors.
- Safety Planning: developing structured cognitive and behavioral plans to insure safety for the child.
- Social Skills Training: using cognitive behavioral techniques to expand and improve interpersonal interactions and to broaden the child's social support circle.

State Controller's Office

The State Controller's Office issued its final audit report on June 30, 2009, reducing the County's reimbursement claims for costs incurred to provide outpatient rehabilitation services to seriously emotionally disturbed pupils.

On April 22, 2011, the Controller's Office filed a response disagreeing with the draft staff analysis and over 900 pages of supporting documentation, including the Controller's record on this claim and response to the incorrect reduction claim. The Controller's Office also filed additional comments and documentation on May 9, 2011. The Controller's Office argues that:

- The County claimed rehabilitation costs under two categories in the cost report: outpatient rehabilitation services (Mode 15, Service Function Code 35) and day rehabilitation services (Mode 10, Service Function Codes 91-99). These modes of service are different in terms of definition, tracking, reporting, and service delivery. The Controller allowed reimbursement for costs claimed under Mode 10, day rehabilitation services, because those services are identified in the parameters and guidelines. However, costs claimed under Mode 15, Service Function Code 35 (outpatient mode of service), are not reimbursable.
- The services under Mode 15 are identified in section 1810.243 of the Title 9 regulations and include the "fringe services" of providing assistance with daily living skills, social and leisure skills, grooming and personal hygiene, and meal preparation skills. These services were expressly "excluded" by the Commission. The documentation provided by the County in support of its costs includes progress notes for students noting assistance with grooming and personal hygiene. The documentation also shows that vocational and socialization services were provided. Socialization and vocational services were denied by the Commission.
- The reports prepared by the County's witnesses do not address the differences between the two rehabilitation services in the context of the cost report. If outpatient rehabilitation services are actually day rehabilitation services, the County has reported erroneous information to both federal and state agencies.

- The County’s Manual for Outpatient Mental Health Services is relevant to this claim. The County’s manual identifies and defines services that are provided, tracked, and reported on its cost reports submitted to the Department of Mental Health (DMH), and the service definitions in the County’s manual are consistent with Medi-Cal requirements and DMH guidelines.
- The rehabilitation services provided by the County are also provided under the Wraparound program, which uses non-federal Aid of Families with Dependent Children-Foster Care (AFDC-FC). In claiming rehabilitation services provided by the Wraparound program, the County did not identify any associated AFDC-FC revenues to offset the costs claimed. The Controller did not pursue this issue further since outpatient rehabilitation services are excluded from reimbursement under the mandated cost program. However, the Commission should fully consider the issue since it was raised in the audit and is an appropriate subject for the Commission to consider.

The Controller’s Office summarizes its position as follows:

The [outpatient] rehabilitation services are not identified in the Handicapped and Disabled Students and Handicapped and Disabled Students II program’s parameters and guidelines. We maintain that day rehabilitation services are separate and distinct from outpatient rehabilitation services in terms of definition, tracking, reporting and service delivery. The review performed by Dr. Rea and the declaration of Ms. Champion do not address these distinctions. Further, they do not address potential ramifications arising from the possible misreporting of services to federal and state agencies. The lack of reference in the program’s parameters and guidelines concerning outpatient rehabilitation services is the basis by which Los Angeles County attempted to incorporate these services in the reconsidered parameters and guidelines. Further, the CSM considered outpatient rehabilitation services in the reconsideration of the Handicapped and Disabled Students program’s parameters and guidelines, stating that the services are not required by the test claim legislation. The county accumulates and reports outpatient rehabilitation costs in accordance with the same Medi-Cal specialty definition that CSM considered in the reconsideration. Day rehabilitation services are separate and distinct from rehabilitation services in terms of definition, tracking, reporting and service delivery. As such, [outpatient] rehabilitation services are not eligible for reimbursement under the state-mandated costs program.

Position of the Department of Mental Health

The Department of Mental Health filed comments on April 22, 2011, agreeing with the Controller’s reduction of costs “because outpatient rehabilitation services are not reimbursable under the legislatively mandated Handicapped and Disabled Students Program.”¹

¹ This position conflicts with the Department’s earlier documents filed with the Commission. The Department’s County Notice issued on June 23, 2008, states “Mental health services may include mental health rehabilitation services when such services are determined to be the most appropriate in meeting a student’s specialized needs.” The Department’s letter of February 19, 2009, to the Commission’s Chief Legal Counsel further states that:

The Department of Mental Health states the following:

The California Code of Regulations delineates the difference between outpatient rehabilitation services and day rehabilitation services. The term “rehabilitation,” which definition has been adopted by the County of Santa Clara in its Clinical Record Documentation Manual for Outpatient Mental Health Services, means “a service activity which includes, but is not limited to, 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.” Title 9 C.C.R., § 1810.243. Title 9 limits the definition of “day rehabilitation services” to a structured program of rehabilitation and therapy to improve, maintain or restore personal independence and functioning, consistent with requirements for learning and development, which provides services to a distinct group of individuals. Services are available at least three hours and less than 24 hours each day the program is open.” Title 9 C.C.R. § 1810.212. The definition of day rehabilitation services, as acknowledged by the Commission on State Mandates (CSM) in its Draft Staff Analysis, does not include socialization and vocational services. [Footnote 1 states the following: “Socialization and vocational services are also shown as separate services from day rehabilitation through different service codes in the cost report.”] However, outpatient rehabilitation services include socialization and vocational services such as “daily living skills, social and leisure skills, grooming and personal hygiene, and meal preparation skills,” which are outside the definition of day rehabilitation services. The definitions under Title 9 illustrate the differences between outpatient rehabilitation services and day rehabilitation services.

Recognizing the differences between outpatient rehabilitation services and day rehabilitation services, outpatient rehabilitation services were excluded from Title 2 C.C.R. § 60020 (i), which governs reimbursable services under the program. Title 2 C.C.R. § 60020 (i) defines “mental health services” as “mental health assessments and the following services when delineated on an Individualized Education Program in accordance with Section 7572(d) of the Government Code: psychology 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.”

Rehabilitation services are also not mentioned in the list of mental health services eligible for reimbursement. However, DMH questions the need to specifically identify rehabilitation as a particular type of mental health service allowable under this program. Pursuant to the Final Statement of Reasons for Section 1810.242 of Title 9 of the California Code of Regulations, rehabilitation is an essential component of many mental health services.

The HDS and HDS II Parameters and Guidelines also do not identify outpatient rehabilitation services as a reimbursable activity. The Parameters and Guidelines further state “when providing psychotherapy or other mental health treatment services, the activities of crisis intervention, vocational services, and socialization services are not reimbursable.”

Consistent with Title 2 and the HDS and HDS II Parameters and Guidelines, CSM declared in its Statement of Decision issued on May 26, 2005 and by letter to DMH dated February 27, 2009, that rehabilitation services, as defined under Title 9 C.C.R. § 1810.243, are not reimbursable services. CSM stated that the test claim regulations do not require or mandate counties to perform activities defined by section 1810.243. As can be seen, outpatient rehabilitation services have been consistently excluded from reimbursable activities under HDS.

Commission Responsibilities

Government Code section 17561, subdivision (b), authorizes the State Controller’s Office to audit the claims filed by local agencies and school districts and to reduce any claim for reimbursement of state-mandated costs that the State Controller’s Office determines is excessive or unreasonable.

Government Code Section 17551, subdivision (d), requires the Commission to hear and decide a claim that the State Controller’s Office has incorrectly reduced payments to the local agency or school district.

If the Commission determines that a reimbursement claim has been incorrectly reduced, section 1185.7 of the Commission’s regulations requires the Commission to send the statement of decision to the State Controller’s Office and request that the costs in the claim be reinstated.

Analysis

The *Handicapped and Disabled Students* program has a long and complicated history with several sets of parameters and guidelines that apply to different fiscal years. A summary of the program is provided in the analysis.

The County’s claim was reduced on the ground that the costs incurred for the activities performed by the County (providing outpatient rehabilitation services to seriously emotionally disturbed pupils) are not reimbursable.

In its audit of the County’s claim, the State Controller’s Office relies on Medi-Cal definitions of mental health services for other programs that are included in Title 9 of the California Code of Regulations and on the billing codes identified in the County’s reimbursement claims. The County claimed the costs for outpatient rehabilitation services using the cost report method and identified a Department of Mental Health billing code for rehabilitation services under Mode 15. According to the Department of Mental Health and the State Controller’s Office, Mode 15 is a billing code used for Medi-Cal reimbursement for outpatient rehabilitation services provided in accordance with section 1810.243 of the Title 9 Medi-Cal regulations. The State Controller’s Office contends that the Commission denied reimbursement for the services identified in section 1810.243.

Although the County’s reimbursement claim identifies the outpatient rehabilitation costs under Mode 15, the County now argues that the outpatient rehabilitation services it provided fall within

the category of “day rehabilitation” under the Title 2 *Handicapped and Disabled Students* regulations. The State Controller’s Office and the Department of Mental Health argue, however, that under the *Title 9 Medi-Cal regulations*, “day rehabilitation” is a different category of service defined in section 1810.212 and is billed separately under Mode 10. The Controller’s Office provided reimbursement for all costs claimed under Mode 10, but reduced all costs claimed under Mode 15.

The Controller’s Office further believes the County is now taking a position contrary to the reimbursement claims and cost reports it certified and filed under penalty of perjury. The Controller’s Office questions the “potential ramifications arising from the [County’s] possible misreporting of services to federal and state agencies” for Medi-Cal reimbursement.

The County does not explain why it filed the reimbursement claims using the Mode 15 billing code for outpatient services, but argues that it is not material to the issue presented in this case:

As the Controller admits, the mode and service function codes are derived from the Medi-Cal reimbursement system. The Medi-Cal codes differentiate services based on billable units, not on service type, and therefore cannot be used to assess whether a particular service fits within a programmatic or clinical definition. It is therefore immaterial whether the County codes its mental health rehabilitation services as Outpatient Services or Day Services for Medi-Cal billing purposes; the only question is whether the actual services the County provides fit within the set of mental health services that are reimbursable under the AB 3632 Parameters and Guidelines.

The Commission does not have jurisdiction to determine whether the County filed a false report and those issues are not presented here.

For the reasons provided in the following analysis, staff finds that the Controller’s Office is mistakenly relying on Medi-Cal regulations and billing codes to determine this case. The reimbursable activities in this case are mandated by Government Code section 7576 and Title 2 regulations and not by the Medi-Cal regulations. Thus, the proper analysis of this claim depends on the interpretation of the “mental health treatment services” required to be provided pursuant to Government Code section 7576 and sections 60020 and 60200 of the Title 2 regulations, and the findings of the Commission in the statements of decision and parameters and guidelines for this program, and not on the assumption that the definitions in Title 9 Medi-Cal regulations apply.

- A. The footnote in the statement of decision on reconsideration denying reimbursement for providing mental health services based on section 1810.243 of the Department of Mental Health’s Title 9 regulations has no bearing on the issue of whether outpatient rehabilitation services are reimbursable under section 60020 of the Title 2 regulations that implements the *Handicapped and Disabled Students* program.**

The State Controller’s Office contends that the Commission specifically denied reimbursement for the outpatient rehabilitation services in a footnote in the statement of decision on reconsideration of the *Handicapped and Disabled Students* program (04-RL-4282-04). The footnote addresses a request by another interested county to define “rehabilitation” by using the

definition in section 1810.243 of the Title 9 regulations. The Commission denied the request. The footnote states the following:

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 [the] 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.

The Controller’s interpretation that the Commission denied reimbursement for outpatient rehabilitation costs under the *Handicapped and Disabled Students* program in this footnote is wrong.

Section 1810.243 is a regulation adopted by the Department of Mental Health to implement the Medi-Cal Specialty Mental Health Services program, which provides managed mental health care for Medi-Cal beneficiaries. It defines rehabilitation services under *that* program as “a service activity, which includes, but is not limited to 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.”

Section 1810.243 was not adopted to implement the *Handicapped and Disabled Students* program or the special education provisions of federal law and was not referenced in the plain language of the regulations adopted to implement the *Handicapped and Disabled Students* program. Nor was section 1810.243 pled in the *Handicapped and Disabled Students* program. Thus, the Commission did not have jurisdiction to make any mandate findings relating to section 1810.243.

In addition, the plain language contained in the regulations that implement the *Handicapped and Disabled Students* program is not the same as the language in section 1810.243. Thus, on its face, section 1810.243 has nothing to do with the test claim regulations at issue here and is not relevant to the *Handicapped and Disabled Students* program.

Therefore, the Commission’s footnote in the statement of decision on reconsideration simply finds that section 1810.243 of the regulations adopted under a completely different program is not relevant to the *Handicapped and Disabled Students* program.

In addition, the parameters and guidelines do not include any language excluding outpatient rehabilitation services. Thus, outpatient rehabilitation services cannot be presumed excluded from the parameters and guidelines as a reimbursable cost.

B. Providing outpatient rehabilitation services required by a pupil's IEP is a reimbursable activity and, thus, the State Controller's Office incorrectly reduced the costs incurred by the claimant for the provision of these services in fiscal years 2003-2004 through 2005-2006.

Government Code section 7576 requires the county to provide psychotherapy or other mental health services when required by a pupil's IEP. Section 60200 of the regulations adopted to implement the *Handicapped and Disabled Students* program requires the County to pay for the mental health services included in an IEP. Section 60020 of the Title 2 regulations defines "mental health services."

The Commission's statement of decision and parameters and guidelines approved reimbursement for providing and paying for the mental health services identified in section 60020 when required by a pupil's IEP, but did not interpret the meaning of the words used in section 60020 that define the services.

The Commission also found that socialization services, vocational services, and crisis intervention services, as those terms were defined in section 60020 of the Title 2 regulations before the regulation was amended in 1998, were no longer mandated as a "mental health service" to be provided under the program after the 1998 amendment.

Thus, the analysis of this case requires the interpretation of the words identified in 60020 and included the Commission's parameters and guidelines, and the meaning of services excluded by the Commission after the regulations were amended in 1998 to determine what is reimbursable. The interpretation must be done in context with state and federal special education law. The regulations are intended to "assure conformity" with the federal IDEA and "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."

- 1) State and federal special education law require the provision of mental health treatment services when required by the IEP to assist the pupil to benefit from special education.

Under federal law, the IDEA guarantees to disabled pupils, including those with mental health needs, the right to receive a free and appropriate public education that includes psychological and other mental health treatment services specially designed to meet the pupil's unique educational needs in the least restrictive environment. The mental health services required to be provided are those that assist the pupil in obtaining an educational benefit. The list of services in federal regulations is not exhaustive and is provided as an example of the types of services that can be tailored to fit the unique needs of the child.

It is a violation of federal law if a public agency fails to implement the services identified in the IEP as necessary to assist the pupil in obtaining an educational benefit from the service.

In this case, the Controller does not dispute that the services provided by the County fall within the requirements of the federal IDEA. The final audit report states that "we do not dispute the need for nor the basis to provide rehabilitation services prescribed within a pupil's IEP in accordance with federal IDEA regulations."

Similarly, the state's *Handicapped and Disabled Student's* program requires that mental health treatment services be included in the pupil's IEP based on a finding by the IEP team that the service is necessary for the pupil to benefit from special education. The IEP team is made up of the parents, regular education teacher, special education teacher, a representative of the local

educational agency, a person who can interpret instructional implications of assessment results, and the pupil. The county is not a member of the IEP team unless residential treatment is recommended.

Pursuant to Government Code section 7576, subdivision (a), and section 60200 of the Title 2 regulations, the county is then responsible for providing and paying for the mental health services “required in the IEP of a pupil.” Any changes to the mental health services must be proposed to the IEP team. The County has no authority to unilaterally change the mental health services identified in the pupil’s IEP.

If the County fails to provide or pay for the treatment services identified in the IEP, an administrative complaint may be filed by the parent or local education agency with the Office of Administrative Hearings to enforce the provisions of the IEP pursuant to Government Code section 7585. The administrative procedures before the Office of Administrative Hearings must be exhausted before the parties resort to relief from the courts.

Accordingly, once the service is identified in the IEP, the County is required by the *Handicapped and Disabled Students* program to provide and pay for the service.

The County maintains in this case that all outpatient rehabilitation services were required by the pupils’ IEPs and determined by the IEP team to provide an educational benefit to the pupil, and thus it was required to provide and pay for these services. The record supports this contention.

The Controller’s Office does not dispute that the County was required by federal law to provide outpatient services, or that the outpatient rehabilitation services were approved by the IEP team. However, the Controller’s Office argues that neither the definition of “mental health services” in section 60020 of the Title 2 regulations, nor the parameters and guidelines include outpatient rehabilitation services. Thus, the Controller’s Office asserts that the costs incurred by the County are not reimbursable.

The Controller’s interpretation of the regulation is wrong.

- 2) The State Controller’s Office incorrectly reduced some of the costs incurred by the County for providing services that fall within the definitions in section 60020.

All of the statements of decision adopted by the Commission for this program conclude that providing mental health treatment services required by a pupil’s IEP pursuant to Government Code section 7576 and sections 60200 and 60020 of the Title 2 regulations are reimbursable.

The statement of decision and parameters and guidelines for the original test claim, *Handicapped and Disabled Students* (CSM 4282), address costs incurred through June 30, 2004, for psychotherapy and other mental health treatment services using the definitions of “mental health services” in section 60020 of the Title 2 regulations as originally adopted in 1986.

The statement of decision and parameters and guidelines for *Handicapped and Disabled Students II* (02-TC-04/49) address the costs incurred beginning July 1, 2001, for psychotherapy and other mental health treatment services required by a pupil’s IEP using the definitions of “mental health services” in the 1998 amendment to section 60020 of the regulations.

Both the County’s reimbursement claims and the Controller’s audit report generally identify the *Handicapped and Disabled Students* program without specifying the set of parameters and guidelines used. Since both sets of parameters and guidelines cover costs for all fiscal years at

issue here based on section 60020 as originally adopted and as amended in 1998, both versions are analyzed below.

The original parameters and guidelines adopted in *Handicapped and Disabled Students* (CSM 4282) apply to the fiscal year 2003-2004 costs incurred by the County and authorize reimbursement for psychotherapy and other mental health treatment services as follows:

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.

The original parameters and guidelines do not identify the definitions in section 60020 of the Title 2 regulations, but the language is consistent with that section. Section 60020 as originally adopted in 1986 defined "mental health services" by borrowing the definitions from the Short-Doyle Act in sections 542 to 543 of the Title 9 regulations.

Thus, with the definitions borrowed from section 542 of the title 9 regulations, section 60020 defined "day services" as those "services that are designed to provide alternatives to 24-hour care and supplement other modes of treatment and residential services" 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."
- "Socialization skills" 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."
- "Vocational skills" 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."

Section 60020 borrowed the definitions of “outpatient services” (“services designed to provide short-term or sustained therapeutic intervention for individuals experiencing acute or ongoing psychiatric distress”) from section 543 of the Title 9 regulations as follows:

- 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 is defined as “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 definitions in section 60020 are broad and contain no limitations with respect to specific behavioral interventions within each category. For example, “day care habilitative services” include any service designed and staffed to provide counseling and rehabilitation to maintain or restore personal independence at the best possible functional level. “Individual therapy” is defined as any service designed to provide a goal directed therapeutic intervention that focuses on the mental health needs of the pupil. These services may not fit nicely into a box on a reimbursement claim or cost report. Nor do the needs of seriously emotionally disturbed pupils fit into a one-size-fits-all box. Each child is different and federal and state law demand that professionals draw on a wide array of services tailored to meet the special needs of each unique child. The services are required as long as they benefit the pupil’s education.

The evidence in this case shows that the outpatient rehabilitation services required by the IEPs and provided by the County consisted of a series of behavioral interventions (including cognitive restructuring, communication training, behavioral activation, emotional regulation, problem solving, relaxation training, and safety planning) provided while the pupil was in school or at home. The treatment also included collateral sessions with the parent and teacher. It is undisputed that these services were determined by the IEP team to assist the child to better manage the skills necessary to function in school.

Therefore, except as explained below for socialization services provided by the County, staff finds that the services provided fall within the definitions of day care intensive services, day care

habilitative services, individual therapy, and collateral services in section 60020 as originally adopted and included in the parameters and guidelines for *Handicapped and Disabled Services* (CSM 4282). Although day care intensive and habilitative services are listed as “day services” and not as “outpatient services,” these day services are designed to provide an alternative to 24-hour residential counseling and include rehabilitation. The word, “day” in the phrase indicates that the services do not consist of 24-hour residential treatment. In addition, the services provided by the County fit within the definitions of collateral services since sessions were conducted with the pupils’ parents and teachers. The category of “individual therapy” also applies because it broadly defines the treatment as services designed to provide goal-directed therapeutic interventions.

Staff also finds that the County’s provision of services, except as explained in the next section below, fall within the statement of decision and parameters and guidelines for *Handicapped and Disabled Students II* (02-TC-40/02-TC-49). *Handicapped and Disabled Students II* authorizes reimbursement for providing mental health treatment services defined in section 60020 of the regulations as amended in 1998. As amended, section 60020 states the following:

“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.

The Commission found that providing 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 were new services mandated by the state. Psychotherapy services under the Business and Professions Code are broadly defined to include any of the following:

Psychotherapy within the meaning of this chapter means 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 amendment to section 60020 also created a slight wording change to some of the other services. The former language requiring “day care intensive services” and “day care habilitative services” was changed to “intensive day treatment” and “day rehabilitation services.” The term “collateral services” stayed the same. In addition, the amendment to section 60020 deleted the definitions provided by sections 542 and 543 of the Department of Mental Health’s Title 9 regulations, including the specific definitions of these services.

Although the amendment created a slight wording change with these services, the Commission found that intensive day treatment, day rehabilitation services, and collateral services were not new activities required by the 1998 amendments, but continued to be mandated by section 60020 when required by a pupil’s IEP.

Thus, the Commission treated “intensive day treatment” the same as “day care intensive services” and treated “day rehabilitation services” the same as “day care habilitative services.” “Habilitative” services under former section 60020 were expressly defined to include

“rehabilitation,” the same term used in the 1998 regulations. Both the original and amended versions of section 60020 specify that the intensive treatment and rehabilitative services are designed to be provided during the “day” as opposed to 24-hour residential care. Moreover, there is no indication in the final statement of reasons supporting the 1998 regulatory amendment to suggest that the purpose of the amendment was to change the requirement imposed on counties to provide rehabilitation services. The Commission also treated “collateral services” the same as prior law.

The Commission’s parameters and guidelines for *Handicapped and Disabled Students II* (02-TC-40/02-TC-49) authorize reimbursement for the following activities:

- 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).) [beginning July 1, 2001]
- *Beginning July 1, 2004*, 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).)

Thus, the outpatient rehabilitation services provided by the County also fall within the definitions contained in section 60020 as amended in 1998.

A look at all of the relevant terms in section 60020 produces a dizzying list of mental health services that are difficult to understand: related services, rehabilitation services, outpatient services, day care habilitative services, day rehabilitation services, day care intensive services, intensive day treatment, collateral services, individual therapy. However, the Commission’s charge is to determine what is reimbursable by interpreting the meaning of these terms.

For the reasons identified above, the services identified in section 60020 must be interpreted broadly in light of state and federal law. The outpatient rehabilitation services provided by the County were designed to assist the child to better manage the skills necessary to function in school, and are considered related services required to be provided by state and federal law. Pursuant to the Commission’s decision that reimbursement is required for the provision and payment of the services as contained in the broad definitions of section 60020 and required by the pupils’ IEPs, the outpatient rehabilitation services (except for socialization services) provided and paid for by the County are eligible for reimbursement.

- 3) Socialization services are not reimbursable under the Commission’s statement of decision and parameters and guidelines and, thus, the reduction of those costs is correct.

The Controller’s Office asserts that the County’s reimbursement claims were properly reduced because the rehabilitation services provided by the County include socialization and vocational services, services which the Commission expressly found not to be reimbursable. The Controller’s audit report contends the following:

Day care habilitative (rehabilitation) services do not include vocational services or socialization services. But the County’s Clinical Record Documentation Manual for Outpatient Mental Health Services defines rehabilitation services to include

medication education and compliance, grooming and personal hygiene skills, meal preparation skills, money management, leisure skills, social skills, developing and maintaining a support system, maintaining current housing situation.

To support its contention, the Controller's Office submitted several progress reports showing the County's treatment provided to pupils that addressed issues related to grooming and social skills.

The County acknowledges that that some of the specific interventions described in the pupils' files may develop a child's socialization or vocational skills. But the County asserts that the primary goal of the interventions was not to develop social or vocational skills, but to equip the children in the least restrictive environment with the skills necessary to function independently in an educational environment.

The Controller's Office is correct that section 60020 was amended in 1998 and as part of the amendment, the definitions borrowed from sections 542 and 543 were deleted from section 60020. In addition, the service categories of "socialization services, vocational services, and crisis intervention" were deleted from the plain language of section 60020.

In the statement of decision for *Handicapped and Disabled Students II*, the Commission found that the service categories of socialization, vocational skills, and crisis intervention in former section 60020 were no longer mandated by the state based on the deletion of these words from section 60020 and the final statement of reasons issued by the Departments of Mental Health and Education that explained the amendment to section 60020. The statement of decision in *Handicapped and Disabled Students II* (which has a reimbursement period beginning July 1, 2001) states the following:

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.

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.

The Departments' response to the comments in the final statement of reasons explains why vocational services and crisis intervention services were deleted. Vocational services were assigned to the State Department of Rehabilitation by statute. And crisis intervention services were considered "medical" services rather than "educational" services and, thus, under the courts' interpretation of the IDEA, medical services are not required to be provided. The response, however, does not explain why socialization services were deleted. Nor does the summary of the regulatory amendments on section 60020 that is contained in the final statement of reasons explain the deletion of socialization services. The summary simply says that:

"Subsection (i) [of section 60020], which defines the term 'mental health services,' clarifies the nature and scope of such services, including assessments. Section 7576 of Chapter 26.5 of the Government Code requires such clarification.

Nevertheless, the Commission is bound by its decision. The decision, adopted in 2005, is a final binding decision and was never challenged by the parties. The parameters and guidelines clearly state that "when providing psychotherapy and other mental health treatment services, the activities of crisis intervention, vocational services, and socialization services are not reimbursable." Once "the Commission's decisions are final, whether after judicial review or without judicial review, they are binding, just as judicial decisions."²

In this case, the record submitted to the Commission does not contain evidence that the County provided "vocational skills." That makes sense. Vocational skills are provided under the *Handicapped and Disabled Students* program by the Department of Rehabilitation pursuant to Government Code section 7577. Government Code section 7577 requires the Department of Rehabilitation and the Department of Education to jointly develop assessment procedures for determining client eligibility for Department of Rehabilitation services for disabled pupils in secondary schools to help them make the transition from high school to work.

However, there is evidence that the County provided "social skills" interventions. The County identifies eight categories of interventions it provided. These intervention categories include cognitive restructuring, communications training, behavioral activation, emotional regulation, problem solving, relaxation training, safety planning, and social skills training. The State Controller's Office has not disputed that the County provided these services. Of the eight categories, one category is labeled "social skills."

In the draft staff analysis, staff disagreed with the Controller's assertion and reduction of costs for social skills training since all of the services provided by the County were *designed* for the purpose of providing an educational benefit to the students, and were not designed to develop social skills.

² *California School Boards Assoc. v. State of California* (2009) 171 Cal.App.4th 1183, 1200.

After further review, however, that conclusion is not correct as a matter of law. Section 60010, subdivision (s), of the Title 2 regulations defines “related services” as “those services that are necessary for a pupil with a disability to benefit from the special education program in accordance with the federal IDEA. “Related services” under the IDEA includes mental health treatment services. And, under former section 60020, “mental health treatment services” was defined to include “socialization services.” When read in the context of the federal IDEA and section 60010, the definition in section 60020 of “socialization services” is one service among the listed services that are necessary for a pupil with a disability to benefit from the special education program in accordance with the federal IDEA. Moreover, all services provided by the County here, including “social skills” services, were determined by the IEP team to benefit the child’s education and were identified in the pupils’ IEPs as a required service. Therefore, even though the plain language in the section 60020 definition of “socialization skills” states that the service is designed to provide social skills, the ultimate and overall purpose of the socialization treatment and all the other treatment categories in section 60020, must be, by law, designed for the purpose of providing an educational benefit. The development of social skills may, given the needs and assessment of the child, be considered necessary for educational purposes and under such circumstances, is a required service under the program.

The Commission nevertheless expressly determined that socialization skills, as defined in former section 60020, are not reimbursable because the service category was deleted from regulation. “Socialization skills” were defined as “services designed to provide life-enrichment and social skill development for individuals who would otherwise remain withdrawn and isolated.” This definition, like the other definitions in section 60020, is broad. While the list of services in section 60020 can all be categorized similarly as day or outpatient services, the services were listed in different categories. This suggests that the Departments of Mental Health and Education intended the categories in section 60020 to provide different services. Thus, “socialization skills” (designed to provide life-enrichment and social skill development) must be different than day care intensive services (a multidisciplinary treatment program of less than 24 hours per day), day care habilitative services (services designed to provide counseling and rehabilitation to maintain or restore personal independence), and individual therapy (services designed to provide a goal directed therapeutic intervention with the patient which focuses on the mental health needs of the patient).

The only category of intervention and service provided by the County which clearly falls within the definition of “socialization services” is the “social skills training.” As stated by the County, social skills training uses cognitive behavioral techniques to expand and improve interpersonal interactions and helps to broaden the child’s social support circle; i.e., the service provides life-enrichment and social skill development as defined in former section 60020 under “socialization skills.”

Accordingly, of the eight categories of treatment provided by the County, one category (social skills training) is not eligible for reimbursement under the Commission’s statement of decision and parameters and guidelines.

Therefore, staff recommends that the Commission remand the claims back to the State Controller’s Office to determine the portion of the costs claimed related to “social skills training,” which can be properly reduced. Based on this analysis, all other costs incurred for outpatient rehabilitation services are incorrectly reduced and should be reinstated.

C. The Commission does not have jurisdiction to determine whether the County received offsetting revenue from the Wraparound program because the reduction of costs was not made on this ground and the time for completing the audit has expired.

The Controller's Final Audit report states the following:

The rehabilitation services provided by the County are also provided under the Wraparound program, which use non-federal Aid of Families with Dependent Children-Foster Care (AFDC-FC). In claiming rehabilitation services provided by the Wraparound program, the County did not identify any associated AFDC-FC revenues to offset the costs claimed. The Controller did not pursue this issue further since outpatient rehabilitation services are excluded from reimbursement under the mandated cost program.

Although the Controller "did not pursue" the issue of potential offsetting revenue received by the County under the Wraparound program, the Controller's Office now urges the Commission to address the issue. In comments filed on April 22, 2011, the Controller states that "[a]lthough [the issue] may not have been fully developed in the audit, the problem was raised in the audit and is an appropriate subject for the commission to consider." In the Controller's comments filed May 9, 2011, it asserts that the revenues received from the Wraparound program apply to some of the services provided by pupils under the *Handicapped and Disabled Students* program and are relevant as potential offsetting revenue. The Controller's Office further asserts that the County did not respond to audit inquiries or address the issue in its response to the draft audit report. The Controller's Office states that "[d]espite the lack of response from the county, we continue to believe that Wraparound revenues deserve consideration in the determination of the eligibility of outpatient rehabilitation services."

The Commission, however, does not have jurisdiction to consider this issue. Pursuant to Government Code section 17558.5, "an audit shall be completed [by the Controller's Office] not later than two years after the date that the audit is commenced."

In this case, the evidence shows that the audit was underway in December 2008, when the Controller's Office conducted an exit conference with the County before issuing the draft audit report. Thus, pursuant to Government Code section 17558.5, more than two years have passed since the audit was commenced. Although the Controller's Office may have inquired about the Wraparound funds during the audit, there is no evidence that the reductions were made because the County failed to identify offsetting revenue. Rather, the reductions were based on the Controller's contention that the costs incurred for outpatient rehabilitation services were not reimbursable. The Controller's final audit report states that the Wraparound issue was not pursued "since outpatient rehabilitation services are excluded from reimbursement under the mandated cost program." Based on this language in the final audit report, the County has not been put on notice that its claim was reduced on the ground that it did not properly identify offsetting revenue. Since more than two years have lapsed since the audit of the County's reimbursement claims were commenced, the Commission has no authority to re-open the audit period to address potential new grounds for reducing the County's claims.

Thus, the Commission does not have jurisdiction to determine whether the County received offsetting revenue from the Wraparound program.

Conclusion

For the foregoing reasons, staff concludes that the State Controller's Office correctly reduced the costs incurred for providing "social skills training." Staff further concludes that the State Controller's Office incorrectly reduced all other costs claimed by the County for providing outpatient rehabilitation services as required by the pupils' IEPs.

Staff Recommendation

Staff recommends that the Commission adopt this analysis to approve the incorrect reduction claim filed by the County of Santa Clara in accordance with this analysis.

Staff further recommends that the County's reimbursement claims be remanded back to the State Controller's Office to determine the portion of the costs claimed related to "social skills training," which can be properly reduced. All other costs incurred by the County for outpatient rehabilitation services are incorrectly reduced and should be reinstated.

STAFF ANALYSIS

Claimant

County of Santa Clara

Chronology

- 03/07/05 County files amended reimbursement claim for fiscal year 2003-2004³
- 01/12/06 County files reimbursement claim for fiscal year 2004-2005⁴
- 01/10/07 County files reimbursement claim for fiscal year 2005-2006⁵
- 03/13/09 State Controller's Office issues initial draft audit report on County's reimbursement claims for fiscal years 2003-2004 through 2005-2006⁶
- 05/22/09 State Controller's Office issues revised draft audit report stating that the County claimed "ineligible" rehabilitation services for fiscal years 2003-2004 through 2005-2006⁷
- 06/19/09 County sends letter to State Controller's Office disagreeing with proposed reduction of rehabilitation services⁸
- 06/30/09 State Controller's Office issues final audit report, reducing all costs claimed for rehabilitation services⁹
- 01/15/10 County requests reconsideration of final audit report¹⁰
- 03/10/10 State Controller's Office responds to County's request for reconsideration¹¹
- 04/12/10 County files incorrect reduction claim¹²
- 05/20/10 County amends incorrect reduction claim¹³

³ Exhibit A, page 484. (Page number citations in this analysis reference the Commission's record on this incorrect reduction claim as identified in the Table of Contents for this item. The numbers are located in bold on the bottom center of each page.)

⁴ Exhibit A, page 584.

⁵ Exhibit A, page 648.

⁶ Exhibit A, page 49.

⁷ Exhibit A, page 73.

⁸ Exhibit A, page 86.

⁹ Exhibit A, page 95

¹⁰ Exhibit A, page 168.

¹¹ Exhibit A, page 227.

¹² Exhibit A.

¹³ Exhibit A.

- 06/08/10 Incorrect reduction claim deemed complete and issued for comment¹⁴; no comments filed
- 03/25/11 Draft staff analysis issued for comment; comments due April 15, 2011, hearing set for May 26, 2011¹⁵
- 04/15/11 County files comments on draft staff analysis¹⁶
- 04/15/11 State Controller's Office requests extension of time to file comments until April 22, 2011
- 04/18/11 Request by the State Controller's Office for extension of time to file comments is granted
- 04/22/11 Department of Mental Health files comments on draft staff analysis¹⁷
- 04/22/11 State Controller's Office files response to the draft staff analysis and over 900 pages of supporting documentation¹⁸
- 05/04/11 County files rebuttal comments¹⁹
- 05/09/11 State Controller's Office files comments responding to County rebuttal comments²⁰

I. Background

This is an incorrect reduction claim filed by the County of Santa Clara regarding reductions made by the State Controller's Office to reimbursement claims for costs incurred in fiscal years 2003-2004 through 2005-2006 in the approximate amount of \$8.6 million to provide outpatient mental health rehabilitation services to seriously emotionally disturbed pupils under the *Handicapped and Disabled Students* program.

The *Handicapped and Disabled Students* program was enacted by the Legislature to implement 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, including psychological and other mental health services, designed to meet the pupil's unique educational needs. The program shifted to counties the responsibility and funding to provide mental health services required by a pupil's individualized education plan (IEP).

The State Controller's Office contends that outpatient rehabilitation services are not required by the underlying regulations as a service to be provided to seriously emotionally disturbed pupils and that providing outpatient rehabilitation services is not identified as a reimbursable activity in

¹⁴ Exhibit A.

¹⁵ Exhibit C.

¹⁶ Exhibit D.

¹⁷ Exhibit E.

¹⁸ Exhibit F.

¹⁹ Exhibit G.

²⁰ Exhibit H.

the parameters and guidelines. Thus, the State Controller's Office argues that outpatient rehabilitation costs are not reimbursable and that its reduction to the County's reimbursement claims is correct. The Controller's Office also contends that the County provided socialization and vocational services to pupils, which are not reimbursable under the parameters and guidelines.

The County disagrees with the State Controller's Office. The County seeks a determination from the Commission pursuant to Government Code section 17551, subdivision (d), that the State Controller's Office incorrectly reduced the claim, and requests that the Controller reinstate the \$8.6 million reduced for fiscal years 2003-2004 through 2005-2006.

The *Handicapped and Disabled Students* program has a long and complicated history, a summary of which is provided below.

Federal Special Education Law

The *Handicapped and Disabled Students* program (also known as the "AB 3632" program) was initially 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.

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."²¹ 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.²² 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 disabled child that is developed and implemented in accordance with federal IEP regulations.²³ 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 agencies are required to consider the independent assessment as part of their educational planning for the child.

A child that is assessed during the IEP process as "seriously emotionally disturbed" has a qualifying disability under the IDEA.²⁴ "Seriously emotionally disturbed" children are children who have an inability to learn that cannot be explained by intellectual, sensory, or health factors; who are unable to build or maintain satisfactory interpersonal relationships with peers and

²¹ 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).

²² Title 20 United States Code section 1412.

²³ Title 20 United States Code section 1401; Title 34 Code of Federal Regulations section 300.320 et seq.

²⁴ The phrase "serious emotionally disturbed" has been changed to "serious emotional disturbance." (See, 20 U.S.C. § 1401(3)(A)(i).)

teachers; who exhibit inappropriate types of behavior or feelings under normal circumstances; who have a general pervasive mood of unhappiness or depression; 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.²⁵

Related services designed to assist the handicapped child to benefit from special education include psychological services counseling, and such developmental, corrective, and other supportive services) as may be required to assist a handicapped child to benefit from special education.²⁶

Each public agency must provide special education and related services to a disabled child in accordance with the IEP.²⁷ In addition, each public agency must have an IEP in effect at the beginning of each school year for every disabled 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. Each public agency shall initiate and conduct IEP meetings to periodically review each child’s IEP and, if appropriate, revise its provisions. A meeting must be held for this purpose at least once a year.

Commission’s Decision on *Handicapped and Disabled Students* (CSM 4282)

Before the enactment of the *Handicapped and Disabled Students* program, the state adopted a plan to comply with federal law. Under prior law, 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. 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.²⁸

The *Handicapped and Disabled Students* program became effective on July 1, 1986 and shifted the responsibility and funding of mental health services required by a pupil’s IEP to county mental health departments. A test claim on *Handicapped and Disabled Students* (CSM 4282) was filed on Government Code section 7570 et seq., as added and amended by Statutes 1984 and

²⁵ Title 34 Code of Federal Regulations section 300.7.

²⁶ Title 20 United States Code section 1401; Title 34 Code of Federal Regulations section 300.34.

²⁷ Title 34 Code of Federal Regulations section 300.323.

²⁸ Education Code sections 56000 et seq.

1985, and on the initial emergency regulations adopted by the Departments of Mental Health and Education to implement this program.²⁹

In 1990, the Commission adopted a statement of decision approving the *Handicapped and Disabled Students* test claim (CSM 4282) as a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for the reimbursement period beginning July 1, 1986. The Commission found that the activities of providing mental health assessments; participation in the IEP process; and providing psychotherapy and other mental health treatment services were reimbursable and that providing mental health treatment services was funded as part of the Short-Doyle Act,³⁰ based on a cost sharing formula with the state. Beginning July 1, 2001, however, the 90 percent-10 percent cost sharing ratio for providing psychotherapy and other mental health treatment services no longer applies and counties are entitled to receive reimbursement for 100 percent of the costs to perform these services.³¹

In 1991, the Commission adopted parameters and guidelines for CSM 4282 for the reimbursement period beginning July 1, 1986, and authorized reimbursement for mental health treatment services as follows:

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.

Commission's Decision on *Reconsideration of Handicapped and Disabled Students* (04-RL-4282-10)

In 2004, the Legislature directed the Commission to reconsider *Handicapped and Disabled Students* (CSM 4282). (Stats. 2004, ch. 493 (SB 1895).) In May 2005, the Commission adopted a statement of decision on reconsideration (04-RL-4282-10), and determined that the original

²⁹ California Code of Regulations, 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).

³⁰ Former Welfare and Institutions Code sections 5600 et seq.

³¹ Statutes 2002, chapter 1167 (AB 2781, §§ 38, 41).

statement of decision correctly concluded that the 1984 and 1985 test claim statutes and the original regulations adopted by the Departments of Mental Health and Education impose a reimbursable state-mandated program on counties pursuant to article XIII B, section 6. The Commission concluded, however, that the 1990 statement of decision did not fully identify all of the activities mandated by the state or the offsetting revenue applicable to the program. Thus, for costs incurred beginning July 1, 2004, the Commission identified the activities expressly required by the test claim statutes and regulations that were reimbursable, identified the offsetting revenue applicable to the program, and updated the new funding provisions enacted in 2002 that required 100 percent reimbursement for mental health treatment services. The Commission further concluded that, based on the plain language of the statute directing reconsideration, the period of reimbursement for its decision on reconsideration would begin July 1, 2004.

On reconsideration, the Commission agreed with its earlier decision that Government Code section 7576 and the initial regulations adopted by the Departments of Mental Health and Education required counties to provide psychotherapy or other mental health treatment services to a pupil, either directly or by contract, when required by the pupil's IEP. The Commission further found that the 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 title 9 regulations.³² These services included 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.

The Commission also found that the activities of providing vocational services, socialization services, and crisis intervention services to pupils, and dispensing medications necessary to maintain individual psychiatric stability during the treatment process were deleted from the regulations in 1998 and were not reimbursable. The Commission continued to approve reimbursement for providing mental health treatment services, but incorporated the plain language of the regulations governing the provision of these services beginning July 1, 2004, as follows:

Provide psychotherapy or other mental health treatment 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).)

- 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.

³² Former California Code of Regulations, title 2, section 60020, subdivision (a).

Commission's Decision on *Handicapped and Disabled Students II* (02-TC-40/02-TC-49)

In May 2005, the Commission also adopted a statement of decision on *Handicapped and Disabled Students II* (02-TC-40/02-TC-49), a test claim addressing statutory amendments enacted between the years 1986 and 2002 to Government Code sections 7570 et seq., and 1998 amendments to the joint regulations adopted by the Departments of Education and Mental Health. The period of reimbursement for *Handicapped and Disabled Students II* (02-TC-40/02-TC-49) began July 1, 2001.

In *Handicapped and Disabled Students II* (02-TC-40/02-TC-49), the Commission found that the regulatory definition of “mental health services” changed 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.

The Commission found that the following activities imposed a new program or higher level of service: 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.

The Commission further found that section 60020 of the test claim regulations continued to include mental health assessments, collateral services, intensive day treatment, and day rehabilitation within the definition of “mental health services.”³³

The Commission placed all activities for providing psychotherapy and other mental health treatment services identified in the statement of decision on reconsideration (04-RL-4282-10) and in the statement of decision for *Handicapped and Disabled Students II* (02-TC-40/02-TC-49) in the parameters and guidelines for *Handicapped and Disabled Students II* as follows:

1. 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).)
2. *Beginning July 1, 2004*, 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. (j).)

All parameters and guidelines authorize reimbursement for providing psychotherapy and other mental health treatment services by using either the standard direct cost reporting method or the

³³ Exhibit A, statement of decision, *Handicapped and Disabled Students II* (02-TC-40/49), page 387, 422-423.

cost report method. The cost report method was included in the parameters and guidelines at the request of the State Controller's Office for the following reasons:

The majority of claimants use this method to claim costs for the mental health portion of their claims. The resulting costs represent actual costs consistent with the cost accounting methodology used to report overall mental health costs to the State Department of Mental Health. The method is also consistent with how counties contract with mental health service vendors to provide services.³⁴

The cost report method was included in the original parameters and guidelines adopted in 1986 for the *Handicapped and Disabled Students* program (CSM 4282).

Thus, the language for the cost report method in section V of all the parameters and guidelines for this program states in relevant part the following:

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.

According to the State Controller's Office and Department of Mental Health, the cost report method identifies various services by mode and service function, and accumulates associated units of service relative to each service type. The costs are reported in accordance with Medi-Cal definitions because a portion of the units of service provided relative to each cost category are for Medi-Cal eligible clients. For each mental health service claimed, the county computes its direct costs by multiplying the corresponding units of service by the applicable unit rate.³⁵

Subsequent Actions and Inquiries of the Department of Mental Health Regarding Mental Health Rehabilitation Services

After the parameters and guidelines were adopted, the Department of Mental Health issued several documents regarding mental health rehabilitation services with respect to the *Handicapped and Disabled Students* program.

On June 23, 2008, the Department issued an all county letter (DMH Information Notice No. 08-15) to clarify the funding of mental health rehabilitation services for children in the "AB 3632" program. The letter states that "Mental health services may include mental health rehabilitation services when such services are determined to be the most appropriate in meeting a student's specialized needs." The letter further identifies funding sources for the provision of mental health rehabilitation services, including Medi-Cal, IDEA funds, and state general funds distributed by the Department of Mental Health.³⁶

³⁴ Exhibit I, Corrected parameters and guidelines, Reconsideration of *Handicapped and Disabled Students* (04-RL-4282-10), corrected July 21, 2006).

³⁵ Staff notes that the Commission has not approved any unit costs or reasonable reimbursement methodologies with respect to the *Handicapped and Disabled Students* program.

³⁶ Exhibit A, page 220.

On February 19, 2009, the Department of Mental Health sent a letter to the Commission's Chief Legal Counsel seeking clarification on the Commission's "basis for excluding rehabilitation as a mental health service eligible for reimbursement. . . ." The letter states in relevant part the following:

In February 2005, Los Angeles County Department of Mental Health (County) submitted a declaration to the Commission after reviewing a January 20, 2005 Commission Staff Analysis regarding a Reconsideration of the HDS Program (04-RL-4282-10). [Footnote omitted.] In that declaration, the County asserted that "Rehabilitation," as defined in Section 1810.243 of the Title 9 of the California Code of Regulations [footnote omitted], should be included in the array of mental health services available to children served through the HDS program. [Footnote omitted.]

On May 26, 2005, the Commission on State Mandates issued a Final Staff Analysis that addressed the County's assertion. In footnote #103, beginning on page SA-39 of the Final Staff Analysis, Commission Staff disagreed with the County's request. In part, footnote #103 reads:

... 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.

On October 26, 2006, the Commission on State Mandates adopted consolidated Parameters and Guidelines for the HDS, HDS II, and SED Pupils: Out-of-State Mental Health Services consolidated program, which identifies reimbursable activities under this program. However, the Parameters and Guidelines do not specifically exclude rehabilitation, as a mental health service, from the list of reimbursable activities. Page 9 of the Parameters and Guidelines states "*When providing psychotherapy or other mental health services, the activities of crisis intervention, vocational services, and socialization services are not reimbursable*" but makes no mention of rehabilitation. Rehabilitation services are also not mentioned in the list of mental health services eligible for reimbursement. However, DMH questions the need to specifically identify rehabilitation as a particular type of mental health service allowable under this program. Pursuant to the Final Statement of Reasons for Section 1810.242 of Title 9 of the California Code of Regulations, rehabilitation is an essential component of many mental health services.³⁷

The Commission's Chief Legal Counsel responded to the Department's letter on February 27, 2009, informing the Department that the Commission no longer had jurisdiction over the test claims for *Handicapped and Disabled Students*, and that the statement of decision on reconsideration was adopted and was not challenged by the parties. Thus, the statement of

³⁷ Exhibit I.

decision on reconsideration was a final decision of the Commission and the Commission no longer had authority to consider it. The letter informed the Department that a local agency or the State could file a written request with the Commission to amend the parameters and guidelines as a way to get clarification of the issue presented.³⁸ To date, there has not been a request filed with the Commission to amend the parameters and guidelines.

On April 15, 2009, the Department of Mental Health issued Information Notice No. 09-04, stating that effective April 6, 2009, the Department rescinds its earlier Notice No. 08-15 (dated June 23, 2008). The notice states the following:

Certain rehabilitation service activities allowable for reimbursement under the AB 3632 program continue to be under dispute based on rulings by the Commission on State Mandates. DMH is working to resolve these issues with county mental health departments, the California Department of Education, the Commission on State Mandates, and the Office of the State Controller to ensure consistency in the provision of mental health services required by a pupil's Individualized Education Plan (IEP) and the identification of appropriate funding sources.

This rescission notices does not change existing Federal and State requirements governing the AB 3632 program nor does it change existing funding sources. All existing laws and regulations are still applicable when administering the AB 3632 program. The county mental health departments' obligations and responsibilities under Sections 7570 et seq. of Chapter 26.5 of the California Government Code and Sections 60000 et seq. of Division 9 of Title 2 of the California Code of Regulations have not changed. For further guidance on allowable service activities under the AB 3632 program, please see the Consolidated Parameters and Guidelines adopted by the Commission on State Mandates on October 26, 2006 ...

Pursuant to Section 300.101 of the Code of Federal Regulations (CFR), a Free Appropriate Public Education (FAPE) must be available to all children residing in the State between the ages of 3 and 21. The mental health services of an IEP must constitute an offer of FAPE. Pursuant to Section 300.103(c) of the CFR, there should be no delay in implementing the child's IEP, including any case in which the payment source for providing or paying for special education and related services to the child is being determined.³⁹

On August 28, 2009, the Department of Mental Health issued a written summary of options for possible amendments to the Title 2 regulations that implement the *Handicapped and Disabled Students* program. The summary states that the Commission adopted parameters and guidelines that do not include rehabilitation services as a type of mental health service eligible for reimbursement. The summary further states that "the decision to exclude rehabilitation services from reimbursement was based on the exclusion of reference to 'rehabilitation' in the definition of 'mental health services' in

³⁸ Exhibit A, pages 231-232.

³⁹ Exhibit A, 233-234.

CCR Title 2, Section 60020(i).” The summary identifies four options for defining “rehabilitation services” within the scope of the *Handicapped and Disabled Students* program.⁴⁰

II. Position of the Parties

Claimant’s Position

For fiscal years 2003-2004 through 2005-2006, the County of Santa Clara claimed reimbursement for costs to provide outpatient mental health rehabilitation services to children with disabilities pursuant to the pupils’ IEPs through the following contractors: Gardner Family Care Corporations; AchieveKids; EMQ FamiliesFirst; Rebekah Childrens’ Services; and Asian Americans for Community Involvement. The costs were claimed under the “treatment services” category of the claim and, according to the County, total approximately \$8.6 million for the three fiscal years in question.⁴¹

The County contends that the State Controller’s Office incorrectly reduced the costs for providing outpatient rehabilitation services to seriously emotionally disturbed pupils. The County asserts that:

- The parameters and guidelines specifically identify “day rehabilitation” as a reimbursable mental health service.
- The Department of Mental Health’s exclusion of vocational and socialization services from the definition of “mental health services” under the program is not material, since the County’s rehabilitation services do not consist of vocational and socialization services.
- Contrary to the Controller’s assertions, the 2005 statement of decision does not define mental health rehabilitation services as non-reimbursable.
- Whether the County’s rehabilitation services fall within the broad Medi-Cal definition of “rehabilitation” has no bearing on whether they are covered by section 60020 of the test claim regulations.
- The Department of Mental Health, in a letter dated February 19, 2009, to the Commission’s Chief Legal Counsel, has confirmed that mental health rehabilitation services fall within section 60200 of its Title 2 regulations.

⁴⁰ Exhibit F.

⁴¹ Exhibit A, incorrect reduction claim, pages 220-221, letter dated March 11, 2010, from the County to the State Controller’s Office. The County’s letter states the following:

... I write to confirm the amount of the disallowance attributable to the mental health rehabilitation services for which reimbursement was denied in the June 2009 audit decision, as those costs were not separately identified in the audit decision or in other communications received from the State Controller’s Office. The County has calculated those amounts as follows: \$3,145,054 for fiscal year 2004, \$2,776,529 for fiscal year 2005, and \$2,684,779 for fiscal year 2006.

- Mental health rehabilitative services are addressed, and found reimbursable, in the Commission’s Statements of Decision.
- If section 60020 of the Title 2 regulations excluded mental health rehabilitation services, it would be inconsistent with federal law and the Government Code, and would therefore be invalid.

In support of its position, the County has submitted a declaration from Laura Champion, Executive Director of EMQ Families First.⁴² EMQ Families First has contracted with the County since 1995 to provide mental health services pursuant to the pupil’s IEP under the *Handicapped and Disabled Students* program. Her declaration states the following:

Since 1995, EMQFF has been under contract with the Santa Clara County Mental Health Department to provide mental health services to children eligible for such services pursuant to their IEPs. One type of mental health services [sic] EMQFF provides is “mental health rehabilitation services.”

Mental health rehabilitation services are targeted, one-on-one mental health interventions incorporating evidence-based practices such as Cognitive Behavioral Treatment and Positive Behavioral Intervention and Support. Mental health rehabilitation services are provided in the child’s usual environments – typically at home, in school, and in the child’s community – consistent with the therapeutic needs of the child. Because mental health rehabilitation services are provided on an individual basis in a variety of settings, they can be tailored to meet the child’s unique needs.

Contemporary, peer reviewed research shows that the mental health rehabilitation services treatment model – in which the service provider works with the child in the settings in which his or her mental health symptoms actually arise and coaches the child on how to deal with those symptoms safely and appropriately – tends to be more effective for many children than traditional therapy provided by a licensed therapist in his or her office. My clinical experience and my experience managing clinical care bear this out. Through mental health rehabilitation services, children learn to cope with their environments and to modify their behavior experientially, and they generally learn these new skills more quickly and in a more lasting way than they would through a therapy-only treatment plan. In addition, the provision of services in the child’s usual environments enables the counselor providing these services to model, for the child’s parents, caregivers, and/or teachers, how to respond when the child is demonstrating the symptoms associated with his or her mental health diagnosis, which helps to effect a transfer of skills to the child’s parents, caregivers, or teachers. When a child receives only therapy or out-of-home care, this comprehensive, coordinated service delivery does not typically occur, and there is a lower likelihood that the therapeutic gains made in treatment will be sustained.

[¶]

⁴² Exhibit A, incorrect reduction claim, page 222.

All of the children receiving mental health rehabilitation services from EMQFF have a demonstrable need for these services documented in their IEPs. Each child's IEP team has determined that the child is at imminent risk of residential placement or other institutional placement. . . . For each of these children, EMQFF was selected to provide mental health rehabilitation services as a cost-effective alternative to the more expensive and restrictive option of out-of-home residential placement.

In addition, the County has submitted letters from the following contract service providers describing similar "rehabilitation services" they provided pursuant to a pupil's IEP: Miguel Valencia, Ph.D., Mental Health Director of Gardner Family Care Organization; AchieveKids; Jerry Doyle, Chief Executive Officer of EMQ FamiliesFirst; Mary Kaye Gerski, Executive Director of Rebekah Children's Services; and Sarita Kohli, Director of Mental Health Programs of Asian Americans for Community Involvement.⁴³ These services are described as flexible, tailored to the needs of each child, and provided in the child's natural environment of home and school during the day and night. The rehabilitation helps to identify the events that trigger the acting out behaviors and to learn appropriate coping skills. Services also include collateral sessions with parents, caregivers, and teachers to coach them with discipline techniques and to create a healthy and safe environment for children to grow.

The County has also retained an expert witness, Dr. Margaret Rea, an independent psychologist and researcher at the University of California at Davis who specializes in child and adolescent psychology, to review a representative sample of 53 patient files for children who received mental health rehabilitation services from the County under the *Handicapped and Disabled Students* program during the fiscal years in question and to prepare a report.⁴⁴ The 53 patient files were chosen at random from the files of children not enrolled in Medi-Cal. Each file contained the child's "Chapter 26.5 Mental Health Assessment," the mental health goals and objectives, the intake and update assessments, the child's treatment plan, and progress notes. The County asked Dr. Rea to determine, based on her professional experience and expertise, whether the services provided by the County aligned with the mental health services identified in section 60020 of the Title 2 test claim regulations. Dr. Rea reviewed the patient files and the description of the care being provided under the label "rehabilitation services" indicated in the progress notes for each session with the child, the language of section 60020 of the Title 2 regulations and the amendments to that regulation.⁴⁵

Dr. Rea's report, dated January 14, 2009, describes the range of diagnoses identified in the files that interfered with the ability to function in school and at home, and the mental health rehabilitation services provided by the County as follows:

⁴³ Exhibit A, incorrect reduction claim, supporting documentation, pages 61-72.

⁴⁴ Exhibit A, incorrect reduction claim, pages 201-219.

⁴⁵ As the Controller's Office correctly points out, the Commission may not consider Dr. Rea's expert testimony for purposes of determining what the statutes and regulations in the *Handicapped and Disabled Students* program mean. (*People v. Torres* (1995) 33 Cal.App.4th 37, 45-46.) That is a question of law to be determined here by the Commission. The Commission may, however, admit Dr. Rea's report as evidence of the treatment services provided by the County to the pupils in this case.

10. The mental health rehabilitation services being provided to these patients can be described, at a general level, as behavioral interventions designed to maximize the children's ability to function in the classroom as well as at home. The focus of the interventions was to assist the children in developing more adaptive coping skills that would help them in better managing their clinical symptoms with the ultimate goal of reaching their educational goals and developing an age-appropriate level of independent functioning. The interventions I reviewed were necessary because the children's mental health impairments precluded them from functioning independently without behavioral intervention. They were receiving interventions addressing such issues as anger management, communication skills, impulse control, and emotional regulation. The children's mental health issues required that they receive a behaviorally focused intervention that would help them function safely and adaptively within their school and home environments. All of the patients whose files I reviewed would be unable to function in any educational environment without this level of behavioral intervention.

11. The interventions described in the progress notes were consistent with what is known in clinical and research arenas as behavioral evidence-based practices. The interventions described were generally consistent with cognitive behavioral interventions for depression, anxiety, PTSD, and impulse control, the typical mental health issues that were barriers to the children functioning in school. . . . For example, the files described interventions such as:

- Cognitive Restructuring: helping children to think in more constructive ways, these interventions focus on decreasing the number of negative thoughts, increasing the number of positive thoughts, learning to challenge unhelpful thoughts, and questioning unrealistic thoughts.
- Communication Training: helping children to improve the manner in which they express themselves; improving eye contact; using active listening; learning to give both positive and negative feedback; making requests of others in a more productive and appropriate manner.
- Behavioral Activation: activity scheduling which involves helping children engage in both pleasing and success-oriented activities.
- Emotional Regulation: helping children to identify the triggers that can lead them to emotional dysregulation (anger outbursts, self-harm, violent acts, anxiety) and to develop alternative healthier responses.
- Problem-Solving: children are taught strategies that can empower them to approach problems with adaptive skills, to brainstorm and fully consider their options, and to implement and evaluate solutions.
- Relaxation Training: these techniques are offered to children to help them manage emotional lability and anxiety as an alternative to maladaptive behaviors.
- Safety Planning: developing structured cognitive and behavioral plans to insure safety for the child.
- Social Skills Training: using cognitive behavioral techniques to expand and improve interpersonal interactions and to broaden the child's social support circle.

12. All of the patients whose files I reviewed would be unable to function in any educational environment without this level of behavioral intervention. For many of the children whose files I reviewed, this level of intervention was necessary in order for these children to avoid a more restrictive level of placement – such as an inpatient hospital, residential treatment facility or group home – as well as to maintain school attendance.

Dr. Rea acknowledges that some of the specific interventions described in the files may develop a child’s socialization or vocational skills. But the primary goal of the interventions was to equip the children with the skills necessary to function in an educational environment. She states in paragraph 20 the following:

20. Although some of the specific interventions described in the progress notes may develop children’s “socialization” or “vocational” skills, it was clear that the primary goal of these interventions was to equip these children with the skills necessary to enable them to behave appropriately in the least restrictive manner in an educational setting by enabling them to behave appropriately in interactions with teachers and peers – e.g. teaching them anger management, management of emotional impulses, etc. Indeed, it was clear that the ultimate goal of the treatment in such cases was to assist the child in managing their symptoms in order to enable the child to meaningfully participate in an educational setting; it was not to develop social or vocational skills for their own sake. . . .

The costs were claimed under the “treatment services” category of the reimbursement claims and, according to the County, total approximately \$8.6 million for the three fiscal years in question. The County used the cost report method for claiming treatment costs by using cost reports submitted under Medi-Cal guidelines to the Department of Mental Health as a basis for its claim. The County and its vendors identified and reported rehabilitation costs for “day rehabilitation services” under Mode 10-Day Mode of Service and “rehabilitation services” under Mode 15-Outpatient Mode of Service.

The Controller states it provided reimbursement for the costs claimed under Mode 10, day rehabilitation. The Controller denied reimbursement for the costs claimed under Mode 15, outpatient services.

Position of the State Controller’s Office

The State Controller’s Office did not file a response to the incorrect reduction claim when it was initially issued for comment in June 2010. The State Controller’s Office issued its final audit report on June 30, 2009, reducing the County’s reimbursement claims for costs incurred to provide outpatient rehabilitation services to seriously emotionally disturbed pupils. (Audit Finding 1.)⁴⁶

In the final audit report, the State Controller’s Office states that it does not dispute the following issues raised by the County:

We do not dispute the following assertions in the county’s response:

- The Individuals with Disabilities Education Act (IDEA) entitles qualifying students to a free appropriate public education (FAPE) in the least restrictive environment.

⁴⁶ Exhibit A, pages 95-166, Final Audit Report.

FAPE includes special education and related services to meet the needs of a child with a disability.

- California Education Code section 56363 defines “related services” and includes “psychological services, physical and occupational therapy, recreation ... and counseling services, including rehabilitation counseling.”
- Under federal regulations (... , section 300.34), rehabilitation counseling services “means services provided by qualified personnel in individual or group sessions that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community of a student with a disability. The term also includes vocational rehabilitation services provided to a student with a disability by vocational rehabilitation programs funded under the Rehabilitation Act.”
- Regarding the discussion of the shift in responsibilities from local educational agencies (LEAs) to county mental health departments, we agree that Chapter 26 of the Government Code, commencing with section 7570, and Welfare and Institutions Code section 5651 (added and amended by Chapter 1747, Statutes of 1984, and Chapter 1274, Statutes of 1985) requiring counties to participate in the mental health assessment for “individuals with exceptional needs,” participate in the expanded “Individualized Educational Program “ (IEP) team, and provide case management services for “individuals with exceptional needs” who are designated as “seriously emotionally disturbed.” The Commission on State Mandates (CSM) determined that these requirements impose a new program or higher level of service on counties.
- Title 2, section 60020, subdivision (i), provides the basis for the services in the state mandated cost program. This section includes “mental health assessments and the following services when delineated on an IEP in accordance with Section 7572(d) of the Government Code: psychology as defined in Section 2903 of the Business and Profession 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.”
- Title 9, CCR, section 542, defines day services. These services are designed to provide alternatives to 24-hour care and supplement other modes of treatment and residential services, and include day care intensive services, day care habilitative services, vocational services and socialization services. The CSM determined that the state-mandated cost program includes only day care intensive services and day care habilitative (rehabilitation) services as eligible services.
- Title 9, CCR, section 543, defines outpatient services. These services are designed to provide short-term or sustained therapeutic intervention for individuals experiencing acute or ongoing psychiatric distress, and include collateral services, assessment, individual therapy, group therapy, medication and crisis intervention. The CSM determined that the state-mandated cost program includes all services with the exception of crisis intervention. Outpatient services do not include rehabilitation services.

- On May 26, 2005, CSM adopted the statement of decision on the reconsideration of Handicapped and Disabled Students program, refusing to include a definition of rehabilitation services consistent with Title 9, CCR, section 1810.243.

However, the State Controller's Office believes that it properly reduced the claims for outpatient rehabilitation services for the reasons stated in the next section of this analysis:

- The program's parameters and guidelines do not identify outpatient rehabilitation services as an eligible service.
- Outpatient rehabilitation services are not included in the underlying regulations (Title 2, section 60020, subd. (i)). As noted in the Commission's decision on reconsideration, a county argued that outpatient rehabilitation services, medication monitoring, and crisis intervention services should be included in the parameters and guidelines. The Commission "refused" to include outpatient rehabilitation services and crisis intervention services, including only medication monitoring in the parameters and guidelines. If the rehabilitation definition was adopted by the Commission, outpatient rehabilitation services would be eligible for reimbursement.
- The outpatient rehabilitation services put forth by the County are not consistent with the day care habilitative (rehabilitation) services. Day care habilitative (rehabilitation) services do not include vocational services or socialization services, as these are separate and distinct services. In contrast, outpatient rehabilitation services is defined by federal and state regulations to include elements of vocational services and socialization services. Furthermore, the County's Clinical Record Documentation Manual for Outpatient Mental Health Services defines rehabilitation services to include medication education and compliance, grooming and personal hygiene skills, meal preparation skills, money management, leisure skills, social skills, developing and maintaining a support system, maintaining current housing situation. Vocational and socialization services are not reimbursable.
- The rehabilitation services provided by the County are also provided under the Wraparound program, which use non-federal Aid of Families with Dependent Children-Foster Care (AFDC-FC). In claiming rehabilitation services provided by the Wraparound program, the County did not identify any associated AFDC-FC revenues to offset the costs claimed. The Controller did not pursue this issue further since outpatient rehabilitation services are excluded from reimbursement under the mandated cost program.

On March 10, 2010, the State Controller's Office denied a request by the County to reconsider its audit position, and many of the same points identified in the audit report are raised in the Controller's letter. The State Controller's Office further explained the following:

On May 26, 2005, the CSM issued a statement of decision on the reconsideration of the HDS program finding that rehabilitation services, as defined by Title 9, CCR, section 1810.243, are not reimbursable. More recently, the CSM responded to the Department of Mental Health's (DMH's) request for clarification on February 27, 2009, stating that rehabilitation services, as defined by Title 9, CCR, section 1810.243, are not reimbursable. The CSM stated that the test claim

regulations do not require or mandate counties to perform activities defined by section 1810.243.

Contrary to the county's position, we believe that rehabilitation services claimed by the county are separate and distinct from day rehabilitation services by definition and in terms of service delivery. The definition of each rehabilitation service in the county's Clinical Record Documentation Manual for Outpatient Mental Health Services is consistent with the service definitions in Title 9, CCR. The way in which these services were reported on the county's cost report submitted to DMH and for Medi-Cal Federal Financing Participation funds reimbursement is also consistent with the definition in Title 9, CCR. The county's rehabilitation services definition is consistent with section 1810.243, while the day rehabilitation service definition is consistent with section 1810.212.

...

The State Controller's Office further states that the Department of Mental Health participated in a conference call in August 2009 to discuss the issue of "adding" rehabilitation services to the regulations that form the basis of the state-mandated program.

On April 22, 2011, the Controller's Office filed a response disagreeing with the draft staff analysis and over 900 pages of supporting documentation, including the Controller's record on this claim and response to the incorrect reduction claim.⁴⁷ The Controller also filed additional comments on May 9, 2011.⁴⁸

The Controller's Office argues that:

- The draft staff analysis finds that providing outpatient rehabilitation services required by a pupil's IEP is reimbursable since these services fall within "day services" including "day care rehabilitative services" and "day rehabilitation" categories.

However, the County claimed rehabilitation costs under two categories in the cost report; outpatient rehabilitation services (Mode 15, Service Function Code 35) and day rehabilitation services (Mode 10, Service Function Codes 91-99). These modes of service are different in terms of definition, tracking, reporting, and service delivery. The Controller allowed reimbursement for costs claimed under Mode 10, day rehabilitation services, because those services are identified in the parameters and guidelines. However, costs claimed under Mode 15, Service Function Code 35 (outpatient mode of service), are not reimbursable.

- The services under Mode 15 are identified in section 1810.243 of the Title 9 regulations and include the "fringe services" of providing assistance with daily living skills, social and leisure skills, grooming and personal hygiene, and meal preparation skills. These services were expressly "excluded" by the Commission. The documentation provided by the County in support of its costs includes progress notes for students noting assistance with grooming and personal hygiene. The documentation also shows that vocational and

⁴⁷ Exhibit F.

⁴⁸ Exhibit G.

socialization services were provided. Socialization and vocational services were denied by the Commission.

- The rehabilitation services under Mode 10 and Mode 15 also differ in terms of service delivery. Under Mode 15, outpatient rehabilitation services are delivered in minutes, while day rehabilitation services under Mode 10 are delivered in half-day or full-day increments of at least three hours. A portion of the rehabilitation services provided by the County do not meet the required service available of at least three hours and, thus, are consistent with the outpatient services provided under Mode 15.
- The reports prepared by the County's witnesses do not address the differences between the two rehabilitation services in the context of the cost report. If outpatient rehabilitation services are actually day rehabilitation services, the County has reported erroneous information to both federal and state agencies.
- The County's Manual for Outpatient Mental Health Services is relevant to this claim. The County's manual identifies and defines services that are provided, tracked, and reported on its cost reports submitted to the Department of Mental Health, and the service definitions in the County's manual are consistent with Medi-Cal requirements and DMH guidelines.
- The Commission should fully consider the issue of potential offsetting revenues received by the County from the Wraparound program - non-federal Aid to Families with Dependent Children Foster Care (AFDC-FC). "Although [the issue] may not have been fully developed in the audit, the problem was raised in the audit and is an appropriate subject for the commission to consider."

The Controller's Office summarizes its position as follows:

The [outpatient] rehabilitation services are not identified in the Handicapped and Disabled Students and Handicapped and Disabled Students II program's parameters and guidelines. We maintain that day rehabilitation services are separate and distinct from outpatient rehabilitation services in terms of definition, tracking, reporting and service delivery. The review performed by Dr. Rea and the declaration of Ms. Champion do not address these distinctions. Further, they do not address potential ramifications arising from the possible misreporting of services to federal and state agencies. The lack of reference in the program's parameters and guidelines concerning outpatient rehabilitation services is the basis by which Los Angeles County attempted to incorporate these services in the reconsidered parameters and guidelines. Further, the CSM considered outpatient rehabilitation services in the reconsideration of the Handicapped and Disabled Students program's parameters and guidelines, stating that the services are not required by the test claim legislation. The county accumulates and reports outpatient rehabilitation costs in accordance with the same Medi-Cal specialty definition that CSM considered in the reconsideration. Day rehabilitation services are separate and distinct from rehabilitation services in terms of definition, tracking, reporting and service delivery. As such, [outpatient] rehabilitation services are not eligible for reimbursement under the state-mandated costs program.

Position of the Department of Mental Health

The Department of Mental Health filed comments on April 22, 2011, agreeing with the Controller's reduction of costs "because outpatient rehabilitation services are not reimbursable under the legislatively mandated Handicapped and Disabled Students Program."⁴⁹ The Department of Mental Health states the following:

The California Code of Regulations delineates the difference between outpatient rehabilitation services and day rehabilitation services. The term "rehabilitation," which definition has been adopted by the County of Santa Clara in its Clinical Record Documentation Manual for Outpatient Mental Health Services, means "a service activity which includes, but is not limited to, 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." Title 9 C.C.R., § 1810.243. Title 9 limits the definition of "day rehabilitation services" to a structured program of rehabilitation and therapy to improve, maintain or restore personal independence and functioning, consistent with requirements for learning and development, which provides services to a distinct group of individuals. Services are available at least three hours and less than 24 hours each day the program is open." Title 9 C.C.R. § 1810.212. The definition of day rehabilitation services, as acknowledged by the Commission on State Mandates (CSM) in its Draft Staff Analysis, does not include socialization and vocational services. [Footnote 1 state the following: "Socialization and vocational services are also shown as separate services from day rehabilitation through different service codes in the cost report."] However, outpatient rehabilitation services include socialization and vocational services such as "daily living skills, social and leisure skills, grooming and personal hygiene, and meal preparation skills," which are outside the definition of day rehabilitation services.

⁴⁹ Exhibit E. This position conflicts with the Department's earlier documents. The Department's County Notice issued on June 23, 2008, states "Mental health services may include mental health rehabilitation services when such services are determined to be the most appropriate in meeting a student's specialized needs." The Department's February 19, 2009 letter further states the following:

However, the Parameters and Guidelines do not specifically exclude rehabilitation, as a mental health service, from the list of reimbursable activities. Page 9 of the Parameters and Guidelines states "*When providing psychotherapy or other mental health services, the activities of crisis intervention, vocational services, and socialization services are not reimbursable*" but makes no mention of rehabilitation. Rehabilitation services are also not mentioned in the list of mental health services eligible for reimbursement. However, DMH questions the need to specifically identify rehabilitation as a particular type of mental health service allowable under this program. Pursuant to the Final Statement of Reasons for Section 1810.242 of Title 9 of the California Code of Regulations, rehabilitation is an essential component of many mental health services.

The definitions under Title 9 illustrate the differences between outpatient rehabilitation services and day rehabilitation services.

Recognizing the differences between outpatient rehabilitation services and day rehabilitation services, outpatient rehabilitation services were excluded from Title 2 C.C.R. § 60020 (i), which governs reimbursable services under the program. Title 2 C.C.R. § 60020 (i) defines “mental health services” as “mental health assessments and the following services when delineated on an Individualized Education Program in accordance with Section 7572(d) of the Government Code: psychology 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.”

The HDS and HDS II Parameters and Guidelines also do not identify outpatient rehabilitation services as a reimbursable activity. The Parameters and Guidelines further state “when providing psychotherapy or other mental health treatment services, the activities of crisis intervention, vocational services, and socialization services are not reimbursable.”

Consistent with Title 2 and the HDS and HDS II Parameters and Guidelines, CSM declared in its Statement of Decision issued on May 26, 2005 and by letter to DMH dated February 27, 2009, that rehabilitation services, as defined under Title 9 C.C.R. § 1810.243, are not reimbursable services. CSM stated that the test claim regulations do not require or mandate counties to perform activities defined by section 1810.243. As can be seen, outpatient rehabilitation services have been consistently excluded from reimbursable activities under HDS.

III. Discussion

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

Government Code Section 17551, subdivision (d), requires the Commission to hear and decide a claim that the State Controller’s Office has incorrectly reduced payments to the local agency or school district. That section states the following:

The commission, pursuant to the provisions of this chapter, shall hear and decide upon a claim by a local agency or school district filed on or after January 1, 1985, that the Controller has incorrectly reduced payments to the local agency or school district pursuant to paragraph (2) of subdivision (b) of Section 17561.

If the Commission determines that a reimbursement claim has been incorrectly reduced, section 1185.7 of the Commission’s regulations requires the Commission to send the statement of decision to the State Controller’s Office and request that the costs in the claim be reinstated.

The County’s claim was reduced on the ground that the costs incurred for the activities performed by the County (providing outpatient rehabilitation services to seriously emotionally disturbed pupils) are not reimbursable. The analysis requires the Commission to interpret the activities identified in the parameters and guidelines to provide “psychotherapy and other mental health treatment services” to pupils based on approved IEPs pursuant to Government Code

section 7576 and sections 60020 and 60200 of the Title 2 regulations – regulations adopted to implement the *Handicapped and Disabled Students* program.

The County claimed the costs for outpatient rehabilitation services using the cost report method and identified a Department of Mental Health billing code for rehabilitation services under Mode 15. According to the Department of Mental Health and the State Controller’s Office, Mode 15 is a billing code used for Medi-Cal reimbursement for outpatient rehabilitation services provided in accordance with section 1810.243 of the Title 9 Medi-Cal regulations. Although section 1810.243 of the Title 9 regulations is not part of the *Handicapped and Disabled Students* program, section 1810.243 was addressed by the Commission on reconsideration of the *Handicapped and Disabled Students* program. There, the Commission disagreed with a request by an interested party to specifically define the “rehabilitation” required by section 60020 of the Title 2 regulations based on section 1810.243 of the Title 9 Medi-Cal regulations. Based on this action, the Controller’s Office contends that the Commission denied reimbursement for outpatient rehabilitation altogether and, thus, the costs claimed are not reimbursable.

Although the County’s reimbursement claim identifies the outpatient rehabilitation costs under Mode 15, the County argues that the outpatient rehabilitation services it provided fall within the category of “day rehabilitation” under the Title 2 *Handicapped and Disabled Students* regulations. The State Controller’s Office and the Department of Mental Health argue, however, that under the *Title 9 Medi-Cal regulations*, “day rehabilitation” is a different category of service defined in section 1810.212 and is billed separately under Mode 10.⁵⁰ The Controller’s Office believes the County is now taking a position contrary to the reimbursement claims and cost reports it certified and filed under penalty of perjury. The Controller’s Office questions the “potential ramifications arising from the [County’s] possible misreporting of services to federal and state agencies” for Medi-Cal reimbursement.

The County does not explain why it filed the reimbursement claims using the Mode 15 billing code for outpatient services, but argues that it is not material to the issue presented in this case:

As the Controller admits, the mode and service function codes are derived from the Medi-Cal reimbursement system. The Medi-Cal codes differentiate services based on billable units, not on service type, and therefore cannot be used to assess whether a particular service fits within a programmatic or clinical definition. It is therefore immaterial whether the County codes its mental health rehabilitation services as Outpatient Services or Day Services for Medi-Cal billing purposes; the only question is whether the actual services the County

⁵⁰ Section 1810.212 of the Title 9 Medi-Cal regulations defines “day rehabilitation” as “a structured program of rehabilitation and therapy to improve, maintain or restore personal independence and functioning, consistent with requirements for learning and development, which provides services to a distinct group of individuals. Services are available at least three hours and less than 24 hours each day the program is open. Service activities may include, but are not limited to, assessment, plan development, therapy, rehabilitation and collateral.”

Section 1810.243 of the Title 9 Medi-Cal regulations defines “rehabilitation” as “a service activity which includes, but is not limited to assistance in improving, maintaining, or restoring a beneficiary’s or group of beneficiaries’ functional skills, daily living skills, social and leisure skills, and support resources; and/or medication education.”

provides fit within the set of mental health services that are reimbursable under the AB 3632 Parameters and Guidelines.⁵¹

The Commission does not have jurisdiction to determine whether the County filed a false report and those issues are not presented here.

For the reasons provided in the following analysis, staff finds that the Controller's Office is mistakenly relying on Medi-Cal regulations and billing codes. The reimbursable activities in this case are mandated by Government Code section 7576 and Title 2 regulations and not by the Medi-Cal regulations. Thus, the proper analysis of this claim depends on the interpretation of the "mental health treatment services" required to be provided pursuant to Government Code section 7576 and sections 60020 and 60200 of the Title 2 regulations, and the findings of the Commission in the statements of decision and parameters and guidelines for this program, and not on the assumption that the definitions in Title 9 Medi-Cal regulations apply.

A. The footnote in the statement of decision on reconsideration denying reimbursement for providing mental health services based on section 1810.243 of the Department of Mental Health's Title 9 regulations has no bearing on the issue of whether outpatient rehabilitation services are reimbursable under section 60020 of the Title 2 regulations that implements the *Handicapped and Disabled Students* program.

The State Controller's Office contends that the County claimed outpatient rehabilitation costs using the cost report method by identifying Mode 15, Service Function Code 35 (outpatient mode of service). The State Controller's Office and the Department of Mental Health state the services under Mode 15 are identified in section 1810.243 of the Title 9 regulations, regulations that implement the Medi-Cal program. The State Controller's Office further contends that the Commission specifically denied reimbursement for the outpatient rehabilitation services in section 1810.243 of the Title 9 regulations in a footnote in the statement of decision on reconsideration of the *Handicapped and Disabled Students* program (04-RL-4282-04). That footnote states the following:

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 [the] 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

⁵¹ Exhibit G.

not reference section 1810.243 of the Department's title 9 regulations for any definition relevant to the program at issue in this case.

The Controller's interpretation of the footnote in the Commission's statement of decision is wrong.

Section 1810.243 is a regulation adopted by the Department of Mental Health to implement the Medi-Cal Specialty Mental Health Services program, which provides managed mental health care for Medi-Cal beneficiaries. It defines rehabilitation services under *that* program as "a service activity, which includes, but is not limited to 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."

Section 1810.243 was not adopted to implement the *Handicapped and Disabled Students* program or the special education provisions of federal law and was not referenced in the plain language of the regulations adopted to implement the *Handicapped and Disabled Students* program. Nor was section 1810.243 cited in the *Handicapped and Disabled Students* program. Thus, the Commission did not have jurisdiction to make any mandate findings relating to section 1810.243.

In addition, the plain language contained in the regulations that implement the *Handicapped and Disabled Students* program do not contain the words requiring the provision of assistance in functional skills, daily living skills, social and leisure skills, grooming and personal hygiene skills, meal preparation skills, and support resources and/or medication education. Thus, on its face, section 1810.243 has nothing to do with the test claim regulations at issue here and is not relevant to the *Handicapped and Disabled Students* program.

Therefore, the Commission's footnote in the statement of decision on reconsideration simply finds that section 1810.243 of the regulations adopted under a completely different program is not relevant to the *Handicapped and Disabled Students* program.

In addition, the parameters and guidelines do not include any language excluding outpatient rehabilitation services. Thus, outpatient rehabilitation services cannot be presumed excluded from the parameters and guidelines as a reimbursable cost.

B. Providing outpatient rehabilitation services required by a pupil's IEP is a reimbursable activity and, thus, the State Controller's Office incorrectly reduced the costs incurred by the claimant for the provision of these services in fiscal years 2003-2004 through 2005-2006.

The Controller's Office further argues that the outpatient rehabilitation services provided by the County are not reimbursable based on the following arguments:

- The words "outpatient rehabilitation," do not appear in section 60020 of the Title 2 regulations, which defines "mental health services" under the program, or in the parameters and guidelines.
- The activities claimed by the County fall within the definition of "rehabilitation" provided in section 1810.243 of the Title 9 regulations, which the Commission denied.

- The services provided by the County include socialization and vocational services; services which the Commission denied. Socialization and vocational services are also defined in categories separate and apart from the Title 9 regulations that define day care habilitative or rehabilitation services.

The Controller's interpretation of the law relies primarily on the definitions in the Title 9 regulations issued by the Department of Mental Health. These definitions of mental health services were adopted to implement other programs. The Controller's focus on the Title 9 definitions is not correct.

As determined by the Commission, Government Code section 7576 requires the county to provide psychotherapy or other mental health services when required by a pupil's IEP. Section 60200 of the regulations adopted to implement the *Handicapped and Disabled Students* program requires the County to pay for the mental health services included in an IEP.⁵² Section 60020 of the Title 2 regulations defines "mental health services."

When adopting the statements of decision and parameters and guidelines for this program, the Commission found that socialization services, vocational services, and crisis intervention services, as those terms were defined in former section 60020 of the Title 2 regulations before they were amended in 1998, were no longer mandated as a "mental health service" to be provided under the program. The Commission's statement of decision and parameters and guidelines are final decisions, and must be followed here.⁵³

The Commission's statement of decision and parameters and guidelines also approved reimbursement for providing and paying for the remaining mental health services identified in section 60020, but did not interpret the meaning of those words. The analysis of this case requires the interpretation of the words identified in 60020 and included the Commission's parameters and guidelines, and the meaning of services excluded by the Commission to determine what is reimbursable.

Pursuant to the rules of statutory interpretation, the plain language of the regulations adopted to implement the *Handicapped and Disabled Students* program must be construed in the context of the entire statutory and regulatory scheme of the *Handicapped and Disabled Students* program, and not in the context of other mental health programs, so that every provision of the law may be harmonized and have effect.⁵⁴ Regulations that alter, amend, enlarge, or impair the scope of the governing statutes are void and the courts will strike down such regulations.⁵⁵

These rules have been codified in the *Handicapped and Disabled Students* program. The statutes and regulations of the program make it clear that interpretation of the program must be construed in light of state and federal special education law as follows:

⁵² Exhibit A, statement of decision, reconsideration of *Handicapped and Disabled Students* 4-RL-4282-10), pages 329, 354-357, 377; statement of decision in *Handicapped and Disabled Students II* (02-TC-40/02-TC-49), page 367, 424.

⁵³ *California School Boards Assoc. v. State of California* (1009) 171 Cal.App.4th 1183, 1200.

⁵⁴ *People v. Simon* (1995) 9 Cal.4th 493, 514.

⁵⁵ *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1388-1389.

- Government Code sections 7570 states that the *Handicapped and Disabled Students* program was enacted to ensure the maximum utilization of state and federal resources available to provide a child with a disability with a free appropriate public education in accordance with the federal IDEA.
- Government Code section 7576, which requires counties to provide and pay for mental health services identified in a pupil’s IEP, includes legislative intent that the referral of the student to the county for an assessment and possible treatment under the *Handicapped and Disabled Students* program is “subject to the requirements of state and federal special education law.”
- In 2005, the Legislature amended Education Code section 56363, the statute that defines “designated instruction and services” for purposes of the special education services provided under the federal IDEA, to clarify that “designated instruction and services” means “related services” as that term is defined in the [IDEA] and section 300.34 of the Code of Federal Regulations.⁵⁶ Pursuant to Government Code section 7572, all assessments of pupils that are placed in the *Handicapped and Disabled Students* program under sections 7570 et seq. of the Government Code are made in accordance with “Article 2 (commencing with Section 56320) of Chapter 4 of Part 30 of the Education Code,” which includes section 56363.
- The Title 2 regulations implementing the *Handicapped and Disabled Students* program, beginning with section 60000, expressly state that the regulations are intended to “assure conformity” with the federal IDEA. Section 60000 further requires that the regulations “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.”
- Section 60010, subdivision (s), of the Title 2 regulations defines “related services” as those services that are necessary for a pupil with a disability to benefit from his or her special education program in accordance with the federal IDEA. “Related services” under federal law includes mental health services.
- Government Code section 7587 requires that the regulations adopted to implement the *Handicapped and Disabled Students* program be reviewed by the Superintendent of Public Instruction, prior to filing with the Office of Administrative Law, “in order to ensure consistency with federal and state laws and regulations governing the education of disabled children.”

With respect to the last bulleted point, it is presumed that the official duty of the Superintendent of Public Instruction under Government Code section 7587 was performed and that the Title 2 regulations for this program are consistent with state and federal special education law.⁵⁷

⁵⁶ Statutes 2005, chapter 653 (AB 1662).

⁵⁷ Evidence Code section 664 provides that the court may presume that that official duty has been regularly performed. There is no evidence in this case to the contrary.

Thus, before turning to the language contained in the title 2 regulations and in the parameters and guidelines, it is necessary to lay out the state and federal law governing the *Handicapped and Disabled Students* program with respect to mental health treatment services.

1) “Related services” under federal law

The IDEA 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, specially designed to meet the pupil’s unique educational needs in the least restrictive environment. Each public agency is required by the IDEA to ensure that the special education and related services are made available to a child in accordance with the IEP developed for that child.⁵⁸ A material failure to implement an IEP violates the IDEA.⁵⁹

Section 300.34 of the Code of Federal Regulations defines “related services” to specifically include “psychological services” and “counseling services.”⁶⁰ “Psychological services” includes “planning and managing a program of psychological services, including psychological counseling for children and parents, and assisting in developing positive behavioral intervention strategies.” “Counseling services” means “services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.”

The comments to 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.”

Since the list of related services is not exhaustive, the list can be viewed as providing examples of the types of services designed to meet a pupil’s unique educational needs. Related services may include other developmental, corrective, or supportive services as long as the service is required to assist a disabled child to benefit from special education.⁶¹

The student’s IEP, which identifies the related services to be provided, defines the relevant goals to measure whether a student is getting an educational benefit in the placement of the related

⁵⁸ Title 34 Code of Federal Regulations section 300.323.

⁵⁹ *Van Duyn ex rel. Van Duyn v. Baker School Dist.* 5J (2007) 502 F.3d 811, 822.

⁶⁰ “Related services” is also defined to include “rehabilitation counseling services,” defined as “services provided by qualified personnel in individual or group sessions that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community of a student with a disability. The term also includes vocational rehabilitation programs funded under the Rehabilitation Act of 1973” (34 C.F.R. § 300.34 (c)(12).) The Controller’s audit finding recognizes this definition and suggests that “rehabilitation counseling” is limited to vocational rehabilitation. For the reasons in the analysis, staff disagrees with the Controller’s Office.

⁶¹ Federal Department of Education comments to former Code of Federal Regulations, section 300.13 that defined “related services;” *Cedar Rapids Cmty. Sch. Dist. v. Garrett F.* (1999) 526 U.S. 66, 73; *Clovis Unified School Dist. v. California Office of Administrative Hearings* (1990) 903 F.2d 635, 638, fn. 1.

service.⁶² The correct standard for measuring whether a related service provides an educational benefit under the IDEA and is therefore required to be provided, has been identified by the courts as “whether the child makes progress toward the goals set forth in the pupil’s IEP” and not whether the placement is “reasonably calculated to provide the child with educational benefits.”⁶³ Thus, under the IDEA, educational benefit is not limited to academic needs, but includes the social and emotional needs that affect academic progress, school behavior, and socialization.⁶⁴

An example of the application of this standard is explained in *County of San Diego v. California Special Education Hearing Office*. In that case, the pupil in question was designated by the school district as seriously emotionally disturbed whose IEP goals were not being met with “outpatient therapy” and “day treatment.”⁶⁵ The school district and special education hearing officer determined that placing the pupil in a residential treatment program at the expense of the County would achieve the pupil’s IEP goals and the County challenged those decisions. The court noted that the pupil’s IEP goals were not limited to academic benefits, but also included behavioral and emotional growth. The court upheld the residential placement and found it proper under the IDEA. The court held as follows:

In *Clovis Unified School District v. California Office of Administrative Hearings*, 903 F.2d 635 (9th Cir. 1990), this circuit identified three possible tests for determining when to impose responsibility for residential placements on the special education system: (1) where the placement is “supportive” of the pupil’s education; (2) where medical, social or emotional problems that require residential placement are intertwined with educational problems; and (3) when the placement is primarily to aid the student to benefit from special education. *Id.* at 643. The hearing officer applied all three tests to the present case and found that Rosalind’s placement at a residential facility satisfied all three.

First, the placement is “supportive” of her education in that it provides structure, discipline, and support she needs to achieve her IEP and mental health goals. Second, Rosalind’s difficulties clearly include substantial educational problems that are related to noneducational problems. Finally, Rosalind’s primary therapeutic need is educational and the primary purpose of her residential placement is educational. Thus, Rosalind satisfies all three tests entitling her to residential treatment provided by the County.⁶⁶

Many other courts have recognized that services provided under the IDEA to improve behavioral and emotional skills can be considered necessary for educational purposes and may be required

⁶² *County of San Diego v. California Special Education Hearing Office* (1996) 93 F.3d 1458, 1467.

⁶³ *County of San Diego, supra*, 93 F.3d 1458, 1467-1468.

⁶⁴ *Id.* at page 1467.

⁶⁵ *Id.* at pages 1463.

⁶⁶ *Id.* at page 1468.

by a pupil's IEP under federal law.⁶⁷ In 1997, Congress amended the IDEA to clarify that one of its purposes is to ensure that special education and related services disabled children receive are designed to "prepare them for employment and independent living."⁶⁸

Thus, outpatient rehabilitation services are required to be provided under federal law if the service is determined necessary to assist the pupil in obtaining an educational benefit.

As stated above, it is a violation of federal law if a public agency fails to implement the services identified in the IEP. In this case, the Controller does not dispute that the services provided by the County fall within the requirements of the federal IDEA. The final audit report states that "we do not dispute the need for nor the basis to provide rehabilitation services prescribed within a pupil's IEP in accordance with federal IDEA regulations."⁶⁹

- 2) The State's *Handicapped and Disabled Student's* program requires that mental health treatment services be included in the pupil's IEP based on a finding by the IEP team that the service is necessary for the pupil to benefit from special education. Once approved by the IEP team, the County is required to provide and pay for the services.

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 7576 and section 60040, subdivision (a), of the Title 2 regulations provide that a local education agency, the IEP team, or the parent may initiate a referral to the county for an assessment of a pupil's social and emotional status pursuant to Education Code section 56320. The IEP team (made up of the parents, regular education teacher, special education teacher, a representative of the local educational agency, a person who can interpret instructional implications of assessment results, and the pupil)⁷⁰ may refer a pupil suspected of needing mental health services to the county when the pupil has been assessed by qualified school personnel as having emotional or behavioral characteristics that impede the pupil from benefitting from educational services and when the pupil's functioning in school would benefit from mental health services. The pupil can be referred when he or she has emotional or behavioral characteristics that are: (1) observed by qualified educational staff; (2) impede the pupil from benefitting from educational services; (3) are significant as indicated by their rate of occurrence and intensity; and (4) are associated with a condition that cannot be described solely

⁶⁷ See, e.g., *Abrahamson v. Hershman* (1983) 701 F.2d 223, 228. There, the court stated the following: "Where what is being taught is how to pay attention, talk, respond to words of warning, and dress and feed oneself, it is reasonable to find that a suitably staffed and structured residential environment providing continual training and reinforcement in those skills serves an educational service for someone like Daniel."

⁶⁸ 20 U.S.C. section 1400(d)(1)(A), amended June 4, 1997.

⁶⁹ Exhibit A, Final Audit Report, Finding 1, page 110.

⁷⁰ Education Code section 56341. The County does not become a member of the IEP team unless residential placement is recommended. (Gov. Code, § 7572.5; Cal. Code Regs, tit. 2, § 60100.)

as a temporary adjustment problem that can be resolved with less than three months of counseling. Furthermore, the local educational agency has already provided counseling, psychological, or guidance services to the pupil pursuant to Education Code section 56363 and the IEP team has determined that the services do not meet the pupil's educational needs.⁷¹

When the pupil is referred to the county, the county develops a mental health assessment pursuant to section 60045 of the Title 2 regulations. An assessment is required to include the review of the pupil's school records, assessment reports, and observation of the pupil in the educational setting when appropriate. The county then provides a report, for purposes of discussion, to the IEP team and parent with recommendations for treatment.

If it is determined by the IEP team (which does not include the county unless residential placement is recommended)⁷² that a mental health service is necessary for the pupil to benefit from special education, the following documents are placed in the pupil's IEP pursuant to section 60050 of the Title 2 regulations: a description of the present levels of social and emotional performance; the goals and objectives of the mental health services with objective criteria and evaluation procedures to determine whether they are being achieved; a description of the types of mental health services to be provided; the initiation, duration and frequency of the mental health services; and parental approval for the provisions of mental health services.

Pursuant to Government Code section 7576, subdivision (a), and section 60200 of the Title 2 regulations, the county is then responsible for providing and paying for the mental health services "required in the IEP of a pupil." Any changes to the mental health services must be proposed to the IEP team. The County has no authority to unilaterally change the mental health services identified in the pupil's IEP.⁷³

If the County fails to provide or pay for the treatment services identified in the IEP, an administrative complaint may be filed by the parent or local education agency with the Office of Administrative Hearings to enforce the provisions of the IEP pursuant to Government Code section 7585. The administrative procedures before the Office of Administrative Hearings must be exhausted before the parties resort to relief from the courts.⁷⁴

Accordingly, once the service is identified in the IEP, the County is required by the *Handicapped and Disabled Students* program to provide and pay for the service. The Commission found this to be reimbursable.⁷⁵

⁷¹ California Code of Regulations, Title 2, section 60040, subdivision (a)(1-5).

⁷² Government Code section 7572.5; California Code of Regulations, title 2, section 60100.

⁷³ Education Code section 56343; see also the discussion of the County's involvement in the statement of decision on reconsideration of the program (04-RL-4282-10), pages 27-32.

⁷⁴ *Tri-County Special Ed. Local Plan Area v. County of Tuolumne* (2004) 123 Cal.App.4th 563, 574-575.

⁷⁵ Exhibit A, statement of decision, reconsideration of *Handicapped and Disabled Students*. (04-RL-4282-10), pages 354 (summarizing the 1990 statement of decision for the program), 367, and 385.

The County maintains in this case that all outpatient rehabilitation services were required by the pupils' IEPs and determined by the IEP team to provide an educational benefit to the pupil, and thus it was required to provide and pay for these services. The record supports this contention.⁷⁶

The Controller's Office does not dispute that the County was required by federal law to provide outpatient services, or that the outpatient rehabilitation services were approved by the IEP team. However, the Controller's Office argues that neither the definition of "mental health services" in section 60020 of the Title 2 regulations, nor the parameters and guidelines include outpatient rehabilitation services. Thus, the Controller's Office asserts that the costs incurred by the County are not reimbursable.

As described below, Government Code section 7576, subdivision (a), states that:

The State Department of Mental Health, or any community mental health service, a defined in Section 5602 of the Welfare and Institutions Code, designated by the State Department of Mental Health [i.e., the county] is responsible for the provision of mental health services, *as defined in regulations* by the State Department of Mental Health, developed in consultation with the State Department of Education, if required in the individualized education program [IEP] of a pupil. [Emphasis added.]

Section 60200 of the Title 2 regulations is similar to Government Code section 7576, but it does not qualify the requirement to provide and pay for the mental health services included in an IEP with the words "as defined in regulations." Nevertheless, section 60020 of the Title 2 regulations does define "mental health services" and the dispute here revolves around the meaning of the words used in the definitions.

As indicated in this analysis, section 60020 must be interpreted in light of state and federal special education law; laws that require related services, including mental health services that are identified in an IEP, to be uniquely tailored to the individual student assessed as seriously emotionally disturbed and provided in the least restrictive environment. The interpretation of the words in section 60020 cannot be limited by regulations that may implement other mental health programs, such as the programs included in Medi-Cal or the billing codes identified in the cost report, as suggested by the State Controller's Office.

- 3) The State Controller's Office incorrectly reduced some of the costs incurred by the County for providing services that fall within the definitions in section 60020.

All of the statements of decision adopted by the Commission for this program conclude that providing mental health treatment services required by a pupil's IEP pursuant to Government Code section 7576 and sections 60200 and 60020 of the Title 2 regulations are reimbursable.

The statement of decision and parameters and guidelines for the original test claim, *Handicapped and Disabled Students* (CSM 4282), address costs incurred through June 30, 2004, for psychotherapy and other mental health treatment services using the definitions of "mental health services" in section 60020 of the Title 2 regulations as originally adopted in 1986.

The statement of decision and parameters and guidelines for *Handicapped and Disabled Students II* (02-TC-04/49) address the costs incurred beginning July 1, 2001, for psychotherapy and other

⁷⁶ Exhibit A, pages 61-72; Dr. Rea's report, page 208, paragraph 20.

mental health treatment services required by a pupil's IEP using the definitions of "mental health services" in the 1998 amendment to section 60020 of the regulations.

Both the County's reimbursement claims and the Controller's audit report generally identify the *Handicapped and Disabled Students* program without specifying the set of parameters and guidelines used. Since both sets of parameters and guidelines cover costs for all fiscal years at issue here based on section 60020 as originally adopted and as amended in 1998, both versions are analyzed below. However, the 90/10 cost sharing formula identified in the original parameters and guidelines for CSM 4282 no longer applies to the costs for the mental health services provided under Government Code section 7576, and sections 60020 and 60200 of the regulations. Any reimbursement approved for costs incurred for providing mental health treatment services under the original parameters and guidelines are 100 percent reimbursable.⁷⁷

The original parameters and guidelines adopted in *Handicapped and Disabled Students* (CSM 4282) apply to the fiscal year 2003-2004 costs incurred by the County and authorize reimbursement for psychotherapy and other mental health treatment services as follows:

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.

The original parameters and guidelines do not identify the definitions in section 60020 of the Title 2 regulations, but the language is consistent with that section. Section 60020 as originally adopted in 1986 defined "mental health services" by borrowing the definitions from the Short-Doyle Act in sections 542 to 543 of the Title 9 regulations.

The Short-Doyle Act was enacted in 1957 (before the enactment of the IDEA) to provide counties with state funds for local mental health programs. The purpose of the Short-Doyle Act was to encourage community and state participation in mental health care by providing a means to share funding of community programs.⁷⁸ As indicated in the background, the provision of mental health services under the *Handicapped and Disabled Students* program was initially funded through the Short-Doyle Act, with the state paying 90 percent and the counties paying 10 percent of the treatment services.

However, in 1991, after the initial parameters and guidelines on the *Handicapped and Disabled Students* program were adopted, 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.) In 2002, the Legislature enacted Statutes 2002, chapter 1167 (Assem.

⁷⁷ Statutes 2002, chapter 1167 (AB 2781).

⁷⁸ *County of San Diego v. Brown* (1993) 19 Cal.App.4th 1054, 1060-1062.

Bill 2781), which prohibited 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 required the state to provide reimbursement to counties for those services for “all allowable costs incurred.”⁷⁹

Thus, although sections 542 and 543 provide mental health definitions for services under the Short-Doyle and Bronzan-McCorquodale Acts, and are incorporated by reference in section 60020 to implement the *Handicapped and Disabled Students* program – the definitions must not be construed in the context of these other Acts.⁸⁰ Rather, the mental health definitions must be interpreted to “assure conformity” with the federal IDEA and “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.”⁸¹

⁷⁹ Statutes 2002, chapter 1167, section 38 stated 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].

⁸⁰ The Commission recognized the differences in the programs. On page 24 of the statement of decision on reconsideration (04-RL-4282-10), the Commission made the following findings:

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.[Footnote omitted.] Thus, with the enactment of the test claim legislation, 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.

⁸¹ California Code of Regulations, title 2, section 60000. Further, section 60010, subdivision (s), of the Title 2 regulations defines “related service” under the *Handicapped and Disabled Students* program as “those services that are necessary for a pupil with a disability to benefit from his or her special education program in accordance with paragraph [sic] Title 20, United States Code Section 1401(22).”

Thus, with the definitions borrowed from section 542 of the title 9 regulations, section 60020 defined “day services” as those “services that are designed to provide alternatives to 24-hour care and supplement other modes of treatment and residential services” 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.”
- “Socialization skills” 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.”
- “Vocational skills” 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.”

Section 60020 borrowed the definitions of “outpatient services” (“services designed to provide short-term or sustained therapeutic intervention for individuals experiencing acute or ongoing psychiatric distress”) from section 543 of the Title 9 regulations as follows:

- 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 is defined as “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 definitions in section 60020 are broad and contain no limitations with respect to specific behavioral interventions within each category. For example, “day care habilitative services” include any service designed and staffed to provide counseling and rehabilitation to maintain or restore personal independence at the best possible functional level. “Individual therapy” is defined as any service designed to provide a goal directed therapeutic intervention that focuses on the mental health needs of the pupil. These services may not fit nicely into a box on a reimbursement claim or cost report. Nor do the needs of seriously emotionally disturbed pupils fit into a one-size fits all box. Each child is different and federal and state law demand that professionals draw on a wide array of services tailored to meet the special needs of each unique child. The services are required as long as they provide an educational benefit.

The evidence in this case shows that the outpatient rehabilitation services required by the IEPs and provided by the County consisted of a series of behavioral interventions (including cognitive restructuring, communication training, behavioral activation, emotional regulation, problem solving, relaxation training, and safety planning)⁸² provided while the pupil was in school or at home. The treatment also included collateral sessions with the parent and teacher. It is undisputed that these services were determined by the IEP team to assist the child to better manage the skills necessary to function in school.

Therefore, except as explained below for socialization services provided by the County, staff finds that the services provided fall within the definitions of day care intensive services, day care habilitative services, individual therapy, and collateral services in section 60020 as originally adopted and included in the parameters and guidelines for *Handicapped and Disabled Services* (CSM 4282). Although day care intensive and habilitative services are listed as “day services” and not as “outpatient services,” these day services are designed to provide an alternative to 24-hour residential counseling and include rehabilitation. The word “day” in the phrase indicates that the services do not consist of 24-hour residential treatment. In addition, the services provided by the County fit within the definitions of collateral services since sessions were conducted with the pupils’ parents and teachers. The category of “individual therapy” also applies because it broadly defines the treatment as services designed to provide goal-directed therapeutic interventions.

Staff also finds that the County’s provision of services, except as explained in the next section below, fall within the statement of decision and parameters and guidelines for *Handicapped and Disabled Students II* (02-TC-40/02-TC-49). *Handicapped and Disabled Students II* authorizes reimbursement for providing mental health treatment services defined in section 60020 of the regulations as amended in 1998. As amended, section 60020 states the following:

“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

⁸² The intervention labeled “social skills” is discussed in the next section of this analysis.

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.

The Commission found that providing 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 were new services mandated by the state. Psychotherapy services under the Business and Professions Code are broadly defined to include any of the following:

Psychotherapy within the meaning of this chapter means 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 amendment to section 60020 also created a slight wording change to some of the other services. The former language requiring "day care intensive services" and "day care habilitative services" was changed to "intensive day treatment" and "day rehabilitation services." The term "collateral services" stayed the same. In addition, the amendment to section 60020 deleted the definitions provided by sections 542 and 543 of the Department of Mental Health's Title 9 regulations, including the specific definitions of these services.

Although the amendment created a slight wording change with these services, the Commission found that intensive day treatment, day rehabilitation services, and collateral services were not new activities required by the 1998 amendments, but continued to be mandated by section 60020 when required by a pupil's IEP.⁸³

Thus, the Commission treated "intensive day treatment" the same as "day care intensive services" and treated day rehabilitation services" the same as "day care habilitative services." "Habilitative" services under former section 60020 were expressly defined to include "rehabilitation," the same term used in the 1998 regulations. Both the original and amended versions of section 60020 specify that the intensive treatment and rehabilitative services are designed to be provided during the "day" as opposed to 24-hour residential care. Moreover, there is no indication in the final statement of reasons supporting the 1998 regulatory amendment to suggest that the purpose of the amendment was to change the requirement imposed on counties to provide rehabilitation services.⁸⁴ The Commission also treated "collateral services" the same as prior law.

The Commission's parameters and guidelines for *Handicapped and Disabled Students II* (02-TC-40/02-TC-49)-authorize reimbursement for the following activities:

- 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

⁸³ Exhibit A, statement of decision, *Handicapped and Disabled Students II* (02-TC-40/02-TC-49), page 423.

⁸⁴ See Exhibit A, statement of decision in *Handicapped and Disabled Students II*, pages 421-426; Final Statement of Reasons for the 1998 regulation package that amended section 60020 and the other regulations under the program, pages 240-241.

the county of origin. (Cal. Code Regs., tit. 2, § 60020, subd. (i).) [beginning July 1, 2001]

- *Beginning July 1, 2004*, 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).)

Thus, the outpatient rehabilitation services provided by the County also fall within the definitions contained in section 60020 as amended in 1998.

A look at all of the relevant terms in section 60020 produces a dizzying list of mental health services that are difficult to understand: related services, rehabilitation services, outpatient services, day care habilitative services, day rehabilitation services, day care intensive services, intensive day treatment, collateral services, individual therapy. However, the Commission's charge is to determine what is reimbursable by interpreting the meaning of these terms.

For the reasons identified above, the services identified in section 60020 must be interpreted broadly in light of state and federal law. The outpatient rehabilitation services provided by the County were designed to assist the child to better manage the skills necessary to function in school, and are considered related services required to be provided by state and federal law. Pursuant to the Commission's decision that reimbursement is required for the provision and payment of the services as contained in the broad definitions of section 60020 and required by the pupils' IEPs, the outpatient rehabilitation services (except for socialization services) provided and paid for by the County are eligible for reimbursement.

- 4) Socialization services are not reimbursable under the Commission's statement of decision and parameters and guidelines and, thus, the reduction of those costs is correct.

The Controller's Office asserts that the County's reimbursement claims were properly reduced because the rehabilitation services provided by the County include socialization and vocational services, services which the Commission expressly found not to be reimbursable. The Controller's audit report contends the following:

Day care habilitative (rehabilitation) services do not include vocational services or socialization services. But the County's Clinical Record Documentation Manual for Outpatient Mental Health Services defines rehabilitation services to include medication education and compliance, grooming and personal hygiene skills, meal preparation skills, money management, leisure skills, social skills, developing and maintaining a support system, maintaining current housing situation.

To support its contention, the Controller's Office submitted several progress reports showing the County's treatment provided to pupils that addressed issues related to grooming and social skills.⁸⁵

The County acknowledges that that some of the specific interventions described in the pupils' files may develop a child's socialization or vocational skills. But the County asserts that the primary goal of the interventions was not to develop social or vocational skills, but to equip the

⁸⁵ Exhibit F.

children in the least restrictive environment with the skills necessary to function independently in an educational environment.⁸⁶

The Controller's Office is correct that section 60020 was amended in 1998 and as part of the amendment, the definitions borrowed from sections 542 and 543 were deleted from section 60020. In addition, the service categories of "socialization services, vocational services, and crisis intervention" were deleted from the plain language of section 60020.

In the statement of decision for *Handicapped and Disabled Students II*, the Commission found that the service categories of socialization, vocational skills, and crisis intervention in former section 60020 were no longer mandated by the state based on the deletion of these words from section 60020 and the final statement of reasons issued by the Departments of Mental Health and Education that explained the amendment to section 60020. The statement of decision in *Handicapped and Disabled Students II* (which has a reimbursement period beginning July 1, 2001) states the following:

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.

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, 1998.⁸⁷

⁸⁶ Exhibit A (incorrect reduction claim narrative, page 29-31; Dr. Rea's report, page 208, paragraph 20).

The Departments' response to the comments in the final statement of reasons explains why vocational services and crisis intervention services were deleted. Vocational services were assigned to the State Department of Rehabilitation by statute. And crisis intervention services were considered "medical" services rather than "educational" services and, thus, under the courts' interpretation of the IDEA, medical services are not required to be provided. The response, however, does not explain why socialization services were deleted. Nor does the summary of the regulatory amendments on section 60020 that is contained in the final statement of reasons explain the deletion of socialization services. The summary simply says that:

"Subsection (i) [of section 60020], which defines the term 'mental health services,' clarifies the nature and scope of such services, including assessments. Section 7576 of Chapter 26.5 of the Government Code requires such clarification."⁸⁸

Nevertheless, the Commission is bound by its decision. The decision, adopted in 2005, is a final binding decision and was never challenged by the parties. The parameters and guidelines clearly state that "when providing psychotherapy and other mental health treatment services, the activities of crisis intervention, vocational services, and socialization services are not reimbursable." Once "the Commission's decisions are final, whether after judicial review or without judicial review, they are binding, just as judicial decisions."⁸⁹

In this case, the record submitted to the Commission does not contain evidence that the County provided "vocational skills." That makes sense. Vocational skills are provided under the *Handicapped and Disabled Students* program by the Department of Rehabilitation pursuant to Government Code section 7577. Government Code section 7577 requires the Department of Rehabilitation and the Department of Education to jointly develop assessment procedures for determining client eligibility for Department of Rehabilitation services for disabled pupils in secondary schools to help them make the transition from high school to work.

However, there is evidence that the County provided "social skills" interventions. The County identifies eight categories of interventions it provided. These categories are listed below. The State Controller's Office has not disputed that the County provided these services. Of the eight categories, one category is labeled "social skills:"

- Cognitive Restructuring: helping children to think in more constructive ways, these interventions focus on decreasing the number of negative thoughts, increasing the number of positive thoughts, learning to challenge unhelpful thoughts, and questioning unrealistic thoughts.
- Communication Training: helping children to improve the manner in which they express themselves; improving eye contact; using active listening; learning to give both positive and negative feedback; making requests of others in a more productive and appropriate manner.

⁸⁷ Exhibit A, statement of decision, *Handicapped and Disabled Students II*, page 423; Final Statement of Reasons, pages 240-241.

⁸⁸ Exhibit A, Final Statement of Reasons, page 239.

⁸⁹ *California School Boards Assoc. v. State of California* (2009) 171 Cal.App.4th 1183, 1200.

- Behavioral Activation: activity scheduling, which involves helping children engage in both pleasing and success-oriented activities.
- Emotional Regulation: helping children to identify the triggers that can lead them to emotional dysregulation (anger outbursts, self-harm, violent acts, anxiety) and to develop alternative healthier responses.
- Problem-Solving: children are taught strategies that can empower them to approach problems with adaptive skills, to brainstorm and fully consider their options, and to implement and evaluate solutions.
- Relaxation Training: these techniques are offered to children to help them manage emotional lability and anxiety as an alternative to maladaptive behaviors.
- Safety Planning: developing structured cognitive and behavioral plans to insure safety for the child.
- Social Skills Training: using cognitive behavioral techniques to expand and improve interpersonal interactions and to broaden the child's social support circle.

In the draft staff analysis, staff disagreed with the Controller's assertion and reduction of costs since all of the services provided by the County were *designed* for the purpose of providing an educational benefit to the students, and were not designed to develop social skills.

After further review, however, that conclusion is not correct as a matter of law. Section 60010, subdivision (s), of the Title 2 regulations defines "related services" as "those services that are necessary for a pupil with a disability to benefit from the special education program in accordance with the federal IDEA. "Related services" under the IDEA includes mental health treatment services. And, under former section 60020, "mental health treatment services" was defined to include "socialization services." When read in the context of the federal IDEA and section 60010, the definition in section 60020 of "socialization services" is one service among the listed services that are necessary for a pupil with a disability to benefit from the special education program in accordance with the federal IDEA. Moreover, all services provided by the County here, including "social skills" services, were determined by the IEP team to benefit the child's education and were identified in the pupils' IEPs as a required service. Therefore, even though the plain language in the section 60020 definition of "socialization skills" states that the service is designed to provide social skills, the ultimate and overall purpose of the socialization treatment and all the other treatment categories in section 60020, must be, by law, designed for the purpose of providing an educational benefit. The development of social skills may, given the needs and assessment of the child, be considered necessary for educational purposes and under such circumstances, is a required service under the program.

The Commission nevertheless expressly determined that socialization skills, as defined in former section 60020, are not reimbursable. "Socialization skills" were defined as "services designed to provide life-enrichment and social skill development for individuals who would otherwise remain withdrawn and isolated." This definition, like the other definitions in section 60020, is broad. While the list of services in section 60020 can all be categorized similarly as day or outpatient services, the services were listed in different categories. This suggests that the Departments of Mental Health and Education intended the categories in section 60020 to provide different services. Thus, "socialization skills" (designed to provide life-enrichment and social skill development) must be different than day care intensive services (a multidisciplinary

treatment program of less than 24 hours per day), day care habilitative services (services designed to provide counseling and rehabilitation to maintain or restore personal independence), and individual therapy (services designed to provide a goal directed therapeutic intervention with the patient which focuses on the mental health needs of the patient).

The only category of intervention and service provided by the County which clearly falls within the definition of “socialization services” is the “social skills training.” As stated by the County, social skills training uses cognitive behavioral techniques to expand and improve interpersonal interactions and helps to broaden the child’s social support circle; i.e., the service provides life-enrichment and social skill development as defined in former section 60020 under “socialization skills.”

Accordingly, of the eight categories of treatment provided by the County, one category (social skills training) is not eligible for reimbursement under the Commission’s statement of decision and parameters and guidelines.

Therefore, staff recommends that the Commission remand the claims back to the State Controller’s Office to determine the portion of the costs claimed related to “social skills training,” which can be properly reduced. Based on this analysis, all other costs incurred for outpatient rehabilitation services are incorrectly reduced and should be reinstated.

- f) The Commission does not have jurisdiction to determine whether the County received offsetting revenue from the Wraparound program because the reduction of costs was not made on this ground and the time for completing the audit has expired.**

The Controller’s Final Audit report states the following:

The rehabilitation services provided by the County are also provided under the Wraparound program, which use non-federal Aid of Families with Dependent Children-Foster Care (AFDC-FC). In claiming rehabilitation services provided by the Wraparound program, the County did not identify any associated AFDC-FC revenues to offset the costs claimed. The Controller did not pursue this issue further since outpatient rehabilitation services are excluded from reimbursement under the mandated cost program.

Although the Controller “did not pursue” the issue of potential offsetting revenue received by the County under the Wraparound program, the Controller’s Office now urges the Commission to address the issue. In comments filed on April 22, 2011, the Controller states that “[a]lthough [the issue] may not have been fully developed in the audit, the problem was raised in the audit and is an appropriate subject for the commission to consider.”⁹⁰ In the Controller’s comments filed May 9, 2011, it asserts that the revenues received from the Wraparound program apply to some of the services provided by pupils under the *Handicapped and Disabled Students* program and are relevant as potential offsetting revenue. The Controller’s Office further asserts that the County did not respond to audit inquiries or address the issue in its response to the draft audit report. The Controller’s Office states that “[d]espite the lack of response from the county, we

⁹⁰ Exhibit F.

continue to believe that Wraparound revenues deserve consideration in the determination of the eligibility of outpatient rehabilitation services.”⁹¹

The Commission, however, does not have jurisdiction to consider this issue. Pursuant to Government Code section 17558.5, “an audit shall be completed [by the Controller’s Office] not later than two years after the date that the audit is commenced.”

In this case, the evidence shows that the audit was underway in December 2008, when the Controller’s Office conducted an exit conference with the County before issuing the draft audit report.⁹² Thus, pursuant to Government Code section 17558.5, more than two years have passed since the audit was commenced. Although the Controller’s Office may have inquired about the Wraparound funds during the audit, there is no evidence that the reductions were made because the County failed to identify offsetting revenue. Rather, the reductions were based on the Controller’s contention that the costs incurred for outpatient rehabilitation services were not reimbursable. The Controller’s final audit report states that the Wraparound issue was not pursued “since outpatient rehabilitation services are excluded from reimbursement under the mandated cost program.” Based on this language in the final audit report, the County has not been put on notice that its claim was reduced on the ground that it did not properly identify offsetting revenue. Since more than two years have lapsed since the audit of the County’s reimbursement claims were commenced, the Commission has no authority to re-open the audit period to address potential new grounds for reducing the County’s claims.

Thus, the Commission does not have jurisdiction to determine whether the County received offsetting revenue from the Wraparound program.

IV. Conclusion

For the foregoing reasons, staff concludes that the State Controller’s Office correctly reduced the costs incurred for providing “social skills training.” Staff further concludes that the State Controller’s Office incorrectly reduced all other costs claimed by the County for providing outpatient rehabilitation services as required by the pupils’ IEPs.

V. Staff Recommendation

Staff recommends that the Commission adopt this analysis to approve the incorrect reduction claim filed by the County of Santa Clara in accordance with this analysis.

Staff further recommends that the County’s reimbursement claims be remanded back to the State Controller’s Office to determine the portion of the costs claimed related to “social skills training,” which can be properly reduced. All other costs incurred by the County for outpatient rehabilitation services are incorrectly reduced and should be reinstated.

⁹¹ Exhibit H.

⁹² Exhibit A, Draft Audit Report, page 55.