



May 31, 2017

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

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

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

Re: **Decision**

Handicapped and Disabled Students (04-RL-4282-10); Handicapped and Disabled Students II (02-TC-40/02-TC-49); and Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services (97-TC-05), 15-9705-I-06
Government Code Sections 7571, 7572, 7572.5, 7572.55, 7576, 7581, and 7586 as added by Statutes 1984, Chapter 1747 (AB 3632); and as amended by Statutes 1985, Chapter 1274 (AB 882); Statutes 1994, Chapter 1128 (AB 1892); Statutes 1996, Chapter 654 (AB 2726); California Code of Regulations, Title 2, Division 9, Chapter 1, Sections 60020, 60030, 60040, 60045, 60050, 60055, 60100, 60110, 60200, and 60550 (Emergency regulations effective January 1, 1986 [Register 86, No. 1], and refiled 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])
Fiscal Years: 2006-2007, 2007-2008, and 2008-2009
County of San Diego, Claimant

Dear Ms. Macchione and Ms. Kanemasu:

On May 26, 2017, the Commission on State Mandates adopted the Decision on the above-entitled matter.

Sincerely,

Heather Halsey
Executive Director

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

**IN RE INCORRECT REDUCTION CLAIM
ON:**

Government Code Sections 7571, 7572, 7572.5, 7572.55, 7576, 7581, and 7586 as added by Statutes 1984, Chapter 1747 (AB 3632); and as amended by Statutes 1985, Chapter 1274 (AB 882); Statutes 1994, Chapter 1128 (AB 1892); Statutes 1996, Chapter 654 (AB 2726);

California Code of Regulations, Title 2, Division 9, Chapter 1, Sections 60020, 60030, 60040, 60045, 60050, 60055, 60100, 60110, 60200 and 60550

(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])¹

Fiscal Years 2006-2007, 2007-2008, and 2008-2009

County of San Diego, Claimant

Case No.: 15-9705-I-06

Handicapped and Disabled Students (04-RL-4282-10); Handicapped and Disabled Students II (02-TC-40/02-TC-49); and Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services (97-TC-05)

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

(Adopted May 26, 2017)

DECISION

The Commission on State Mandates (Commission) heard and decided this Incorrect Reduction Claim (IRC) during regularly scheduled hearings on March 25, 2016, October 28, 2016, and May 26, 2017.

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

The law applicable to the Commission’s determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission heard the County of San Diego's (claimant’s) appeal of the Executive Director’s decision to dismiss the Incorrect Reduction Claim (IRC) as untimely filed on March 25, 2016, and October 28, 2016. Ms. Lisa Macchione and Mr. Kyle Sand appeared for the claimant. Mr. Jim Spano appeared for the State Controller’s Office (Controller). During the March 25, 2016 hearing, a motion to grant the appeal resulted in a tie vote of the Commission and, thus, no action was taken. On October 28, 2016, the Commission granted the claimant’s appeal, finding that the IRC was timely filed by a vote of 5-2 as follows:

Member	Vote
Ken Alex, Director of the Office of Planning and Research	Yes
Richard Chivaro, Representative of the State Controller	No
Mark Hariri, Representative of the State Treasurer, Vice Chairperson	Yes
Sarah Olsen, Public Member	Yes
Eraina Ortega, Representative of the Director of the Department of Finance, Chairperson	No
Carmen Ramirez, City Council Member	Yes
Don Saylor, County Supervisor	Yes

The Commission heard and decided this IRC on May 26, 2017. Mr. Kyle Sand appeared for the claimant. Mr. Jim Spano and Mr. Chris Ryan appeared for the State Controller’s Office. The Commission adopted the Proposed Decision to deny this IRC by a vote of 5 -1 as follows:

Member	Vote
Lee Adams, County Supervisor	Yes
Ken Alex, Director of the Office of Planning and Research	Yes
Richard Chivaro, Representative of the State Controller	Yes
Mark Hariri, Representative of the State Treasurer, Vice Chairperson	Yes
Sarah Olsen, Public Member	Absent
Eraina Ortega, Representative of the Director of the Department of Finance, Chairperson	Yes
Carmen Ramirez, City Council Member	No

Summary of the Findings

This IRC challenges the Controller’s findings and reductions in Finding 2 of \$1,387,095, claimed for board and care and treatment services costs of seriously emotionally disturbed (SED) pupils provided by out-of-state, for-profit, residential facilities claimed for fiscal years 2006-2007

through 2008-2009 by the claimant under the *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services*² program.

The Commission's findings are as follows:

A. The Claimant Timely Filed the IRC.

On March 7, 2012, the Controller issued the Final Audit Report.³ On December 18, 2012, the Controller issued the Revised Final Audit Report which "supersedes" the March 7, 2012 Final Audit Report.⁴ The claimant filed this IRC on December 10, 2015, more than three years after the Final Audit Report was issued, but within three years after the Revised Final Audit Report was issued.⁵ Based on this record, the Commission finds that a new statute of limitations began to accrue with the issuance of the Revised Final Audit Report. The conclusion on the statute of limitations is based on the plain language of the Revised Final Audit Report that it superseded the earlier March 7, 2012 report, the ambiguity in the Commission's regulations at the time the IRC was filed, and on the policy of reaching the merits of the claim as requested by the claimant. Although the claimant could have filed an IRC on the March 7, 2012 Final Audit Report as early as March 7, 2012 (and before the December 18, 2012 Revised Final Audit Report was issued), the claimant's IRC filing on December 10, 2015, following the superseding Revised Final Audit Report issued December 18, 2012, is timely.

B. The Controller Timely Initiated the Audit.

Government Code section 17558.5 requires the Controller to initiate an audit no later than three years after the reimbursement claim is filed or last amended. However, if no funds are appropriated or no payment is made to the claimant for the program for the fiscal year at issue, the time for the Controller to initiate the audit is tolled to three years after the date of the initial payment of the claim. The fiscal year 2006-2007 reimbursement claim was filed on April 9, 2008, but the claim was not paid until fiscal year 2009-2010. Thus the time for the Controller to initiate the claim was tolled, and the audit initiation date of either March 29, 2010, or April 14, 2010, as the parties assert, was within three years of the date of payment on the fiscal year 2006-2007 claim. As to the other two fiscal years, the audit was initiated within three years of the date the reimbursement claims were submitted.

C. The Controller Timely Completed the March 7, 2012 Final Audit Report, But Did Not Timely Complete the December 18, 2012 Revised Final Audit Report and, Thus, the December 18, 2012 Revised Final Audit Report Is Void.

² Though the consolidated *Handicapped and Disabled Students; Handicapped and Disabled Students II*; and *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* parameters and guidelines apply to the fiscal years at issue, this IRC solely involves the *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* program.

³ Exhibit B, Controller's Comments on the IRC, page 6.

⁴ Exhibit A, IRC, page 76.

⁵ Exhibit A, IRC, page 1.

Government Code section 17558.5 requires that an audit be completed no later than two years after the date that the audit was commenced. Here, the Controller's audit was commenced on either March 29, 2010, or April 14, 2010. Therefore, a timely audit must be completed as early as March 29, 2012.

An audit is complete under Government Code section 17558.5(c) when the Controller notifies the claimant of any adjustment to a claim for reimbursement that results from an audit or review. The "notification shall specify the claim components adjusted, the amounts adjusted, interest charges on claims adjusted to reduce the overall reimbursement to the local agency . . . , and the reason for the adjustment." Absent evidence to the contrary, the Commission finds that the date of the Final Audit Report provides evidence of when an audit is complete.

In this case, the Controller issued the Final Audit Report on March 7, 2012, notifying the claimant of the reduction in Finding 2, before the completion deadline of March 29, 2012. The claimant does not dispute that the reduction in Finding 2 was included in the March 7, 2012 Final Audit Report and that Finding 2 did not change in the later-dated revised report.⁶ Thus, the March 7, 2012 Final Audit Report was timely completed.

The Controller issued the Revised Final Audit Report on December 18, 2012, after the two year deadline imposed by Government Code section 17558.5 to complete the audit. Therefore, the Commission finds that the Revised Final Audit Report, dated December 18, 2012, is not timely. Although Government Code section 17558.5 does not specify the consequences for failing to meet the deadlines imposed by the statute, the courts have ruled that when a deadline is for the protection of a person or class of persons, and the language of the statute as a whole indicates the Legislature's intent to enforce the deadline, the deadline is mandatory. Therefore, the Commission finds that the failure to meet the deadline makes the Revised Final Audit Report void.

D. The Controller's Audit Conclusions and Reduction of Costs in Finding 2 for Board and Care and Treatment Services Costs for SED Pupils Provided by Out-of-State, For-Profit, Residential Programs Remains Valid When the Final Audit Report Is Timely, But the Superseding Revised Final Audit Report Is Void.

Since the Revised Final Audit Report is void because it was not timely completed, the Commission must determine the effect on the March 7, 2012 Final Audit Report.

⁶ Exhibit F, pages 4-5 (March 25, 2016 Commission Hearing Transcript Excerpt).

1. Although Claimant Now Requests Reinstatement of All Costs Reduced by the Controller, the Commission's Jurisdiction Is Limited to the Reductions for Board and Care and Treatment Services Under Finding 2 Because the Claimant Only Timely Filed an IRC to Challenge Reductions for Board and Care and Treatment Services Under Finding 2, and Did Not Plead the Remaining Audit Reductions in Its IRC.

The claimant now requests that the Commission determine the effect of the void and superseding Revised Final Audit Report on *all* of the Controller's cost reductions in Findings 1, 2, 3, and 4, most of which the claimant did not challenge in the IRC.⁷ The Commission finds that it does not have jurisdiction over costs reduced in the audit which were not alleged to be incorrect by the claimant in the IRC. The claimant's IRC challenged only the reductions in Finding 2 of \$1,387,095: board and care and treatment services for seriously emotionally disturbed pupils provided by out-of-state, for-profit, residential programs. To be timely, an additional IRC or an amendment to the existing IRC to challenge the Findings not challenged in this IRC, had to be filed in accordance with the Commission's regulations by December 18, 2015. No additional IRC or amendment to this IRC was filed.

Accordingly, the Commission's jurisdiction is limited to the reduction of costs in Finding 2 for board and care and treatment services for seriously emotionally disturbed pupils provided by out-of-state, for-profit, residential programs.

2. The Commission Finds that the Timely Completion of the Audit Was Made with the Controller's March 7, 2012 Final Audit Report. Since the Revised Final Audit Report Was Not Timely Completed and Is Void, It Has No Effect on the March 7, 2012 Reductions Under Finding 2. Therefore, the Commission Must Reach the Merits of Finding 2, As Requested by Claimant in its Appeal of the Executive Director's Decision, 15-AEDD-01. On the Merits, the Commission Finds the Controller's Reduction of Costs Claimed for Board and Care and Treatment Services for Seriously Emotionally Disturbed Pupils Provided by Out-of-State Residential Programs that Are Organized and Operated on a For-Profit Basis, Is Correct as a Matter Of Law.

- a) The Timely Completion of the Audit Was Made with the Controller's March 7, 2012 Final Audit Report and the Revised Final Audit Report Is Void and Can Have No Effect on the March 7, 2012 Reductions Under Finding 2.

On October 28, 2016, the Commission heard and decided the issue of whether the claimant timely filed this IRC in accordance with the Commission's regulations and found that the statute of limitations for filing the IRC began to accrue with the later December 18, 2012 Revised Final Audit Report. The conclusion on the statute of limitations was based on the policy of reaching the merits of the claim as requested by the claimant, the plain language of the Revised Final Audit Report that it superseded the earlier March 7, 2012 report (and hence provided notice to the claimant that it could commence an IRC proceeding), and the ambiguity in the Commission's regulations at the time the IRC was filed. However, the issue of whether the Controller timely

⁷ Exhibit E, Claimant's Late Comments on Draft Proposed Decision.

completed the audit in accordance with Government Code section 17558.5 was not before the Commission at the October 28, 2016 hearing. Thus, the Commission was not made aware of, and did not address, the timeliness of the Revised Final Audit Report and the effect of that untimely and void report with respect to the validity of the March 7, 2012 Final Audit Report and the reductions made therein. Thus, the Commission did *not* make a finding at that hearing that the March 7, 2012 Final Audit Report was void, as asserted by the claimant. The Commission, instead, agreed to reach the merits of the IRC.

Based on the evidence in the record, the Commission finds that the March 7, 2012 Final Audit Report provided notice to the claimant of the reasons for the reduction and the amount reduced in Finding 2 in accordance with Government Code section 17558.5. No changes were made in the Revised Final Audit Report to Finding 2 and the claimant does not dispute that the reduction amount and reasoning for the reduction in Finding 2 remained the same in the Revised Final Audit Report as it was in the March 7, 2012 Final Audit Report.⁸

Accordingly, the Commission finds that completion of the audit was made with the Controller's March 7, 2012 Final Audit Report and claimant could have filed an IRC at any time beginning on March 7, 2012 to contest the Finding 2 reductions at issue in this claim. Since the March 7, 2012 Final Audit Report was timely completed, and the Revised Final Audit Report is void and can have no effect on Finding 2 since it was completed past the statutory deadline, the Commission must now reach the merits of Finding 2.

- b) The Controller's Reduction of Costs Claimed for Board and Care and Treatment Services for Seriously Emotionally Disturbed Pupils Provided by Out-Of-State Residential Programs That Are Organized and Operated on a For-Profit Basis, Is Correct as a Matter of Law.

During the entire reimbursement period for this program, state law and the Parameters and Guidelines required that out-of-state residential programs that provide board and care and treatment services to SED pupils shall be organized and operated on a nonprofit basis. The Parameters and Guidelines also require the claimant to provide supporting documentation for the costs claimed. In this case, the Controller concluded, based on a service agreement provided by the claimant, that the vendor payments made by the claimant to Mental Health Systems, Inc., a California nonprofit corporation, are not reimbursable because Mental Health Systems, Inc., contracted with Charter Provo Canyon School, a Delaware for-profit limited liability company, to provide board and care and treatment services for SED pupils. Since the facility providing the board and care and treatment services is a for-profit facility, the Controller correctly found that the costs were not eligible for reimbursement under the Parameters and Guidelines and state law.

The decisions issued by the Office of Administrative Hearings (OAH) and the United States Supreme Court that claimant relies upon to argue for subvention are not applicable in this case because those cases do not address the subvention requirement of article XIII B section 6 of the California Constitution. Moreover, the claimant has provided no documentation or evidence that the costs claimed in the subject reimbursement claims were incurred as a result of a court order finding that no other alternative placement was identified for

⁸ Exhibit F, pages 4-5 (March 25, 2016 Commission Hearing Transcript Excerpt).

a SED pupil during the audit years in question. Further, unlike the court’s equitable powers under the federal Individuals with Disabilities Education Act (IDEA), the reimbursement requirements of article XIII B, section 6, of the California Constitution must be strictly construed and not applied as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”⁹

Accordingly, the Commission finds that the Controller’s reduction of costs in Finding 2 for board and care and treatment services costs for SED pupils provided by out-of-state, for-profit, residential programs is correct as a matter of law.

The Commission therefore denies this IRC.

I. Chronology

- 04/09/2008 Claimant filed its fiscal year 2006-2007 annual reimbursement claim.¹⁰
- 02/10/2009 Claimant filed its fiscal year 2007-2008 annual reimbursement claim.¹¹
- 02/08/2010 Claimant filed its fiscal year 2008-2009 annual reimbursement claim.¹²
- 03/29/2010 Date that claimant asserts the Controller initiated the audit of the fiscal year 2006-2007 through 2008-2009 reimbursement claims.¹³
- 04/14/2010 Date that Controller asserts that it initiated the audit of the fiscal years 2006-2007 through 2008-2009 reimbursement claims.¹⁴
- 03/07/2012 Controller issued the Final Audit Report.¹⁵
- 12/18/2012 Controller issued the Revised Final Audit Report, which “superseded” the Final Audit Report.¹⁶
- 12/10/2015 Claimant filed this IRC.¹⁷
- 12/18/2015 Commission issued a notice that the IRC was deemed untimely filed.

⁹ *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1281, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

¹⁰ Exhibit A, IRC, page 123. In its audit report, the Controller noted the County received payment for their 2006-2007 claim from the 2009-10 budget (see also, Exhibit A, page 84).

¹¹ Exhibit A, IRC, page 133.

¹² Exhibit A, IRC, page 145.

¹³ Exhibit E, Claimant’s Late Comments on the Draft Proposed Decision, page 3.

¹⁴ Exhibit B, Controller’s Comments on the IRC, page 6.

¹⁵ Exhibit A, IRC, page 8.

¹⁶ Exhibit A, IRC, pages 8 and 76.

¹⁷ Exhibit A, IRC, page 1.

12/28/2015 Claimant filed the *Appeal of Executive Director Decision*, 15-AEDD-01.

03/25/2016 Commission heard 15-AEDD-01, but took no action.

09/23/2016 Commission heard 15-AEDD-01, but took no action.¹⁸

10/28/2016 Commission heard 15-AEDD-01, and granted claimant’s Appeal, finding that the IRC was timely filed.¹⁹

12/05/2016 Controller filed comments on the IRC.²⁰

01/20/2017 Commission staff issued the Draft Proposed Decision.²¹

02/01/2017 Controller filed comments on the Draft Proposed Decision.²²

02/08/2017 Claimant requested an extension of time to file comments on the Draft Proposed Decision and postponement of hearing.

02/23/2017 Commission granted a limited approval of request for extension of time and postponement of hearing.

03/13/2017 Claimant filed late comments on the Draft Proposed Decision.²³

II. Background

A. Out-of-State Residential Treatment for Seriously Emotionally Disturbed (SED) Pupils

This IRC addresses reimbursement claims for costs incurred by the County of San Diego for vendor services provided to SED pupils in out-of-state residential facilities from fiscal years 2006-2007, 2007-2008, and 2008-2009. During the audit period, the consolidated Parameters and Guidelines for *Handicapped and Disabled Students* (04-RL-4282-10); *Handicapped and Disabled Students II* (02-TC-40/02-TC-49); and *Seriously Emotionally Disturbed (SED) Pupils: Out of State Mental Health Services* (97-TC-05) governed the program.²⁴ The history of this program with respect to out-of-state residential treatment for SED pupils is described below.

Government Code sections (Gov. Code, §§ 7570, et seq.) and implementing regulations (Cal. Code Regs., tit. 2, §§ 60000, et seq.) were part of the state’s response to the federal Individuals with Disabilities Education Act (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

¹⁸ 15-AEDD-01 was also set for hearing on May 26, 2016 but was continued, and again on July 22, 2016 but was postponed.

¹⁹ Exhibit F, page 33 (October 28, 2016 Commission Hearing Transcript Excerpt).

²⁰ Exhibit B, Controller’s Comments on the IRC, page 1.

²¹ Exhibit C, Draft Proposed Decision, issued January 20, 2017.

²² Exhibit D, Controller’s Comments on the Draft Proposed Decision.

²³ Exhibit E, Claimant’s Late Comments on the Draft Proposed Decision.

²⁴ Exhibit A, IRC, page 30 (consolidated Parameters and Guidelines, adopted October 26, 2006).

needs.²⁵ As originally enacted, Government Code sections 7570, et seq. shifted to counties the responsibility and funding of mental health services required by a pupil’s individualized education plan (IEP), but the implementing regulations required that all services provided by the counties be provided *within* the State of California.²⁶ In 1996, the Legislature amended Government Code section 7576 to provide that the fiscal and program responsibilities of counties for SED pupils shall be the same regardless of the location of placement, and that the counties shall have fiscal and programmatic responsibility for providing or arranging the provision of necessary services for SED pupils placed in out-of-state residential facilities.²⁷

On May 25, 2000, the Commission approved the *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services*, 97-TC-05 Test Claim, in which the claimant pled the 1996 amendment to Government Code section 7576 and the regulations that implemented the amendment, as a reimbursable state-mandated program (hereafter referred to as “SED”).²⁸ In the Test Claim Statement of Decision the Commission found that:

Before the enactment of Chapter 654, counties were only required to provide mental health services to SED pupils placed in out-of-home (in-state) residential facilities. However, section 1 now requires counties to have fiscal and programmatic responsibility for SED pupils regardless of placement – i.e., regardless of whether SED pupils are placed out-of-home (in-state) or out-of-state.

Chapter 654 also added subdivision (g) to Government Code section 7576, which provides:

“Referrals shall be made to the community mental health service in the county in which the pupil lives. If the pupil has been placed into residential care from another county, the community mental health service receiving the referral shall forward the referral immediately to the community mental health service of the county of origin, which shall have fiscal and programmatic responsibility for providing or arranging for provision of necessary services. . . .” (Emphasis added.)

California Code of Regulations, sections 60100 and 60200, amended in response to section 7576, further define counties’ “fiscal and programmatic responsibilities” for SED pupils placed in out-of-state residential care.

²⁵ Former Government Code sections 7570, et seq., as enacted and amended by Statutes 1984, Chapter 1747; Statutes 1985, Chapter 1274; California Code of Regulations, title 2, sections 60000-60610 (emergency regulations filed December 31, 1985, designated effective January 1, 1986 (Register 86, No. 1) and refiled June 30, 1986, designated effective July 12, 1986 (Register 86, No. 28).

²⁶ Former California Code of Regulations, title 2, section 60200.

²⁷ Statutes 1996, chapter 654.

²⁸ Exhibit B, Controller’s Comments on the IRC, pages 22-30.

Specifically, section 60100 entitled “LEA Identification and Placement of a Seriously Emotionally Disturbed Pupil” reflects the Legislature’s intent behind the Test Claim statute by providing that residential placements for a SED pupil may be made out-of-state only when no in-state facility can meet the pupil’s needs. Section 60200 entitled “Financial Responsibilities” details county mental health and LEA financial responsibilities regarding the residential placements of SED pupils.

In particular, amended section 60200 removes the requirement that LEAs be responsible for the out-of-state residential placement of SED pupils. Subdivision (c) of section 60200 now provides that the county mental health agency of origin shall be “responsible for the provision of assessments and mental health services included in an IEP in accordance with [section 60100].” Thus, as amended, section 60200 replaces the LEA with the county of origin as the entity responsible for paying the mental health component of out-of-state residential placement for SED pupils.²⁹

As relevant here, the Commission concluded that the following new costs were mandated by the state:

- Payment of out-of-state residential placements for SED pupils. (Gov. Code, § 7576; Cal. Code Regs., tit. 2, §§ 60100, 60110.)
- Program management, which includes parent notifications as required, payment facilitation, and all other activities necessary to ensure a county’s out-of-state residential placement program meets the requirements of Government Code section 7576 and Title 2, California Code of Regulations, sections 60000-60610. (Gov. Code, § 7576; Cal. Code of Regs., tit. 2, §§ 60100, 60110.)³⁰

Parameters and Guidelines for the *SED* program were adopted on October 26, 2000,³¹ and corrected on July 21, 2006,³² with a period of reimbursement beginning January 1, 1997. The Parameters and Guidelines, as originally adopted, authorize reimbursement for the following costs:

To reimburse counties for payments to service vendors providing mental health services to SED pupils in out-of-state residential placements as specified in

²⁹ Exhibit B, Controller’s Comments on the IRC, pages 141-142 (Statement of Decision, *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services*, 97-TC-05).

³⁰ Exhibit B, Controller’s Comments on the IRC, page 148.

³¹ Exhibit F, Parameters and Guidelines, adopted October 26, 2000.

³² Exhibit F, Corrected Parameters and Guidelines, dated July 21, 2006.

Government Code section 7576 and Title 2, California Code Regulations, [sections] 60100 and 60110.³³

The correction adopted on July 21, 2006 added the following sentence: “Included in this activity is the cost for out-of-state residential board and care of SED pupils.” The correction was necessary to clarify the Commission’s finding when it adopted the Parameters and Guidelines, that the term “payments to service vendors providing mental health services to SED pupils in out-of-state residential placements” includes reimbursement for “residential costs” of out-of-state placements.³⁴

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

On October 26, 2006, the Commission consolidated the Parameters and Guidelines for *Handicapped and Disabled Students (04-RL-4282-10)*; *Handicapped and Disabled Students II (02-TC-40/02-TC-49)*; and *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services (97-TC-05)* for costs incurred commencing with the 2006-2007 fiscal year.³⁵ The reimbursable activities in the consolidated Parameters and Guidelines require counties to determine that the residential placement of SED pupils meets all the criteria established in Welfare and Institutions Code sections 18350 through 18356 before authorizing payment as follows:

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

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

³³ Exhibit F, Parameters and Guidelines, adopted October 26, 2000.

³⁴ Exhibit F, Corrected Parameters and Guidelines, dated July 21, 2006.

³⁵ Exhibit A, IRC, page 30 (consolidated Parameters and Guidelines, adopted October 26, 2006).

*Institutions Code sections 18350 through 18356 before authorizing payment.*³⁶

At that time Welfare and Institutions Code section 18350(c) required that “[p]ayments for care and supervision shall be based on rates established in accordance with Sections 11460 to 11467, inclusive.”³⁷ And, as discussed above, section 11460(c) requires that out-of-state facilities where SED pupils are placed, shall be organized and operated on a nonprofit basis. Thus, under the Parameters and Guidelines, reimbursement for the cost of out-of-state residential placement of seriously emotionally disturbed pupils is contingent upon the placement being at a nonprofit facility.

Section V. of the consolidated Parameters and Guidelines instructs claimants to claim for contract services as follows:

Report the name of the contractor and services performed to implement the reimbursable activities. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the services that were performed during the period covered by the reimbursement claim. If the contract services are also used for purposes other than the reimbursable activities, only the pro-rata portion of the services used to implement the reimbursable activities can be claimed. Submit contract consultant and attorney invoices with the claim and a description of the contract scope of services.³⁸

Section IV. of the Parameters and Guidelines then requires that the costs claimed be supported with contemporaneous source documents. Pursuant to Section VI., the supporting documents shall be retained “during the period subject to audit.”³⁹

Statutes 2011, chapter 43 (AB 114) eliminated the mandated programs for *Handicapped and Disabled Students (04-RL-4282-10)*; *Handicapped and Disabled Students II (02-TC-40/02-TC-49)*; and *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services (97-TC-05)*, by transferring responsibility for SED pupils to school districts, effective July 1, 2011.⁴⁰ Thus on September 28, 2012, the Commission adopted an amendment to the Parameters and Guidelines ending reimbursement for these programs effective July 1, 2011.

³⁶ Exhibit A, IRC, page 37 (emphasis added) (consolidated Parameters and Guidelines, adopted October 26, 2006).

³⁷ Exhibit F, Welfare and Institutions Code section 18350, as amended by Statutes 1990, chapter 46, section 12, effective April 10, 1990.

³⁸ Exhibit A, IRC, pages 39-40 (consolidated Parameters and Guidelines, adopted October 26, 2006).

³⁹ Exhibit A, IRC, page 42 (consolidated Parameters and Guidelines, adopted October 26, 2006).

⁴⁰ Exhibit F, Assembly Bill No. 114 (2011-2012 Reg. Sess.), approved by the Governor, June 30, 2011.

B. The Audit Findings of the Controller

The claimant submitted reimbursement claims totaling \$14,484,766 for fiscal years 2006-2007 through 2008-2009. The Controller audited the claims and reduced them by \$2,832,875 based on four findings.⁴¹ The claimant only disputes the reductions in Finding 2 totaling \$1,387,095 (of the \$1,653,904 reduced in Finding 2) relating to ineligible vendor payments for board and care and treatment services for out-of-state residential placement of SED pupils in facilities that are “owned and operated *for-profit*.”⁴² The Controller concluded that the vendor payments made by the claimant to Mental Health Systems, Inc., a California nonprofit corporation, are not allowable because Mental Health Systems, Inc., contracted with Charter Provo Canyon School, a Delaware for-profit limited liability company, to provide the out-of-state residential placement services. Since the facility providing the board and care treatment services is a for-profit facility, the Controller found that the costs are not eligible for reimbursement under the Parameters and Guidelines.⁴³

III. **Positions of the Parties**

A. County of San Diego

The claimant contends that it timely filed its IRC on December 10, 2015, based on the Revised Final Audit Report dated December 18, 2012, which “superseded” the Final Audit Report dated March 7, 2012.

The claimant further contends that the Controller’s reductions for vendor payments for out-of-state residential placement of SED pupils in facilities that are owned and operated for-profit are incorrect and should be reinstated. For all fiscal years at issue, the claimant asserts that the requirements in the Parameters and Guidelines, based on California Code of Regulations, title 2, section 60100(h) and Welfare and Institutions Code section 11460(c)(3), are in conflict with the requirements of federal law, including the Individuals with Disabilities Education Act (IDEA) and section 472(c)(2) of the Social Security Act (42 U.S.C. 672(c)(2)).⁴⁴ In support of this position, the claimant argues the following:

⁴¹ The four findings are as follows: (1) overstated mental health services unit costs and indirect (administrative) costs of \$1,261,745; (2) overstated residential placement costs of \$1,653,904 (\$1,387,095 of which is disputed and is for ineligible board and care and treatment costs; the remaining reduction is based on adjustments for Local Revenue Funds applied to eligible board and care costs and for costs incurred outside of the clients’ authorization period); (3) duplicate due process hearing costs claimed of \$15,401; and (4) understated offsetting reimbursements of \$156,960. (Exhibit A, IRC, pages 85-97.)

⁴² Exhibit A, IRC, page 9.

⁴³ Exhibit A, IRC, page 94; Exhibit B, Controller’s Comments on the IRC, pages 192-202 and 206-216 (see also the contract between Mental Health Systems, Inc., and Charter Provo Canyon School, LLC (later identified as UHS of Provo Canyon, Inc.)).

⁴⁴ Exhibit A, IRC, page 9.

- California law prohibiting placement in for-profit facilities is inconsistent with federal law, which no longer has such limitation, and with IDEA’s requirement that children with disabilities be placed in the most appropriate educational environment out-of-state and not be constrained by nonprofit status.⁴⁵
- Counties will be subject to increased litigation without the same ability as parents to place seriously emotionally disturbed students in appropriate for-profit out-of-state facilities because the U.S. Supreme Court and the Office of Administrative Hearings (OAH) have found that parents were entitled to reimbursement for placing students in appropriate for-profit out-of-state facilities when the IEP prepared by the school district was found to be inadequate and the placement was otherwise proper under IDEA.⁴⁶
- The County contracted with a nonprofit entity, Mental Health Services, Inc., to provide the out-of-state residential services subject to the disputed disallowances.⁴⁷
- State and Federal law do not contain requirements regarding the tax identification status of mental health treatment service providers and the county has complied with the legal requirements regarding treatment services, so there is no basis to disallow treatment costs.⁴⁸ California Code of Regulations, title 2, section 60020(i) and (j) describes the type of mental health services to be provided to SED pupils, as well as who shall provide these services to special education students, with no mention of the tax identification status of the services provider.⁴⁹

The claimant filed late comments on the Draft Proposed Decision asserting that the Controller’s audit of the County’s claims is invalid because it was not completed within the required two year statutory timeframe and therefore the Controller does not have the authority to impose the findings or to disallow the costs claimed by the County. Specifically, the claimant argues that because the Controller issued the Revised Final Audit Report on December 18, 2012, after the March 29, 2012 deadline to complete a timely audit, and the Commission determined that this report “superseded” the report dated March 7, 2012, the Controller failed to complete a timely audit pursuant to Government Code section 17558.5(a).⁵⁰

B. State Controller’s Office

It is the Controller’s position that the audit adjustments are correct and that this IRC should be denied. The Controller asserts that the unallowable costs resulting from the out-of-state residential placement of SED pupils in for-profit facilities are correct because the Parameters and Guidelines only allow vendor payments for SED pupils placed in a group home organized and

⁴⁵ Exhibit A, IRC, pages 12-13.

⁴⁶ Exhibit A, IRC, pages 14-16.

⁴⁷ Exhibit A, IRC, pages 16-17.

⁴⁸ Exhibit A, IRC, pages 17-18.

⁴⁹ Exhibit A, IRC, page 17.

⁵⁰ Exhibit E, Claimant’s Late Comments on the Draft Proposed Decision, pages 1-3.

operated on a nonprofit basis.⁵¹ The Controller states that the unallowable treatment and board-and-care vendor payments claimed result from the claimant's placement of SED pupils in a prohibited for-profit out-of-state residential facility.⁵²

The Controller does not dispute the assertion that California law is more restrictive than federal law in terms of out-of-state residential placement of SED pupils. The Controller also does not dispute that local educational agencies, unlike counties, are not restricted under the Education Code from contracting with for-profit schools for educational services. However the Controller maintains that under the mandated program, costs incurred at out-of-state for-profit residential programs are not reimbursable.⁵³

The Controller also distinguishes the OAH case cited by the claimant, in which the administrative law judge found that not placing the student in an appropriate facility denied the student a free and appropriate public education under federal regulations, which the Controller argues has no bearing or precedent here because the decision does not address the issue of state mandated reimbursement for residential placements made outside of the regulations.⁵⁴ The Controller also cites an OAH case where the administrative law judge found, consistent with the Parameters and Guidelines, that the county Department of Health could *not* place a student in an out-of-state residential facility that is organized and operated for-profit because the county is statutorily prohibited from funding a residential placement in a for-profit facility. There, the administrative law judge also determined that the business relationship between the nonprofit entity, Aspen Solutions, and a for-profit residential facility, Youth Care, did not grant the latter nonprofit status.⁵⁵

The Controller filed comments on the Draft Proposed Decision, agreeing with the staff recommendations and conclusion.⁵⁶

IV. Discussion

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

Government Code Section 17551(d) requires the Commission to hear and decide a claim that the Controller has incorrectly reduced payments to a local agency or school district. If the Commission determines that a reimbursement claim has been incorrectly reduced, section 1185.9

⁵¹ Exhibit B, Controller's Comments on the IRC, page 11.

⁵² Exhibit B, Controller's Comments on the IRC, page 11.

⁵³ Exhibit B, Controller's Comments on the IRC, page 14.

⁵⁴ Exhibit B, Controller's Comments on the IRC, page 14.

⁵⁵ Exhibit B, Controller's Comments on the IRC, page 14 (citing OAH case Nos. N 2007090403 (Exhibit B of the IRC, pages 112-121) and 2005070683 (Tab 14 of the Controller's Comments on the IRC, pages 231-237)).

⁵⁶ Exhibit D, Controller's Comments on the Draft Proposed Decision.

of the Commission's regulations requires the Commission to send the decision to the Controller and request that the costs in the claim be reinstated.

The Commission must review questions of law, including interpretation of the parameters and guidelines, de novo, without consideration of legal conclusions made by the Controller in the context of an audit. The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.⁵⁷ The Commission must also interpret the Government Code and implementing regulations in accordance with the broader constitutional and statutory scheme. In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."⁵⁸

With regard to the Controller's audit decisions, the Commission must determine whether they were arbitrary, capricious, or entirely lacking in evidentiary support. This standard is similar to the standard used by the courts when reviewing an alleged abuse of discretion of a state agency.⁵⁹ Under this standard, the courts have found that:

When reviewing the exercise of discretion, "[t]he scope of review is limited, out of deference to the agency's authority and presumed expertise: 'The court may not reweigh the evidence or substitute its judgment for that of the agency. [Citation.]'"... "In general...the inquiry is limited to whether the decision was arbitrary, capricious, or entirely lacking in evidentiary support..." [Citations.] When making that inquiry, the " "court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute." [Citation.]' "⁶⁰

The Commission must review the Controller's audit in light of the fact that the initial burden of providing evidence for a claim of reimbursement lies with claimant.⁶¹ In addition, section 1185.1(f)(3) and 1185.2(c) of the Commission's regulations require that any assertions of fact by

⁵⁷ *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

⁵⁸ *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1281, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

⁵⁹ *Johnston v. Sonoma County Agricultural Preservation and Open Space District* (2002) 100 Cal.App.4th 973, 983-984. See also *American Bd. of Cosmetic Surgery, Inc., v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547.

⁶⁰ *American Bd. of Cosmetic Surgery, Inc., v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

⁶¹ *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

the parties to an IRC must be supported by documentary evidence. The Commission's ultimate findings of fact must be supported by substantial evidence in the record.⁶²

A. The Claimant Timely Filed the IRC.

On March 7, 2012, the Controller issued the Final Audit Report for all fiscal years at issue in this claim.⁶³ On December 18, 2012, the Controller issued the Revised Final Audit Report, which by its plain language "supersedes" the Final Audit Report because the Controller "recalculated EPSDT revenues for FY 2008-09 and revised Finding 4 to reflect the actual funding percentages based on the final settlement."⁶⁴ The revision had no fiscal effect on allowable total program costs, or on the adjustments in Finding 2, which is the subject of this IRC.⁶⁵ The claimant filed this IRC on December 10, 2015, challenging the Controller's reductions in Finding 2 for out-of-state, for-profit, vendor costs for room and board and treatment services incurred for SED pupils for fiscal years 2006-2007, 2007-2008, and 2008-2009.

In 2012, when the Final Audit Report and the Revised Final Audit Report were issued, section 1185.1(c) of the Commission's regulations required IRCs to be filed "no later than three (3) years following the date of the Office of State Controller's final state audit report, letter, remittance advice, or other written notice of adjustment notifying the claimant of a reduction."⁶⁶

In this case, the IRC was filed more than three years after the Final Audit Report was issued, but within three years after the Revised Final Audit Report was issued. The claimant contends that the statute of limitations did not begin to accrue until after the Revised Final Audit Report was issued for the following reasons: the Commission's regulations did not clearly state that the statute of limitations began to accrue when the claimant *first* receives notice of a reduction; the December 18, 2012 Revised Final Audit Report "supersedes" the March 7, 2012 Final Audit Report; and therefore the Commission should reach the merits of the IRC.⁶⁷ As described below, the Commission finds that the claimant's IRC was timely filed.

A reimbursement claim for actual costs filed by a local agency is subject to the initiation of an audit by the Controller within the time periods specified in Government Code section 17558.5. Government Code section 17558.5(c) requires the Controller to notify the claimant of any adjustment to a claim for reimbursement that results from an audit or review. The "notification shall specify the claim components adjusted, the amounts adjusted, interest charges on claims

⁶² Government Code section 17559(b), which provides that a claimant or the state may commence a proceeding in accordance with the provisions of section 1094.5 of the Code of Civil Procedure to set aside a decision of the Commission on the ground that the Commission's decision is not supported by substantial evidence in the record.

⁶³ Exhibit B, Controller's Comments on the IRC, page 6.

⁶⁴ Exhibit A, IRC, page 76.

⁶⁵ Exhibit A, IRC, page 76.

⁶⁶ California Code of Regulations, title 2, section 1185.1(c) (Register 2010, No. 44).

⁶⁷ Exhibit F, pages 126-128 (Exhibits to Item 2 of the October 28 Commission hearing); Exhibit F, page 5 (March 25, 2016 Commission Hearing Transcript Excerpt).

adjusted to reduce the overall reimbursement to the local agency . . . , and the reason for the adjustment.”⁶⁸ Government Code sections 17551 and 17558.7 then allow a claimant to file an IRC with the Commission if the Controller reduces a claim for reimbursement. Here, claimant received such a notification on two occasions: On March 7, 2012, with the issuance of the Final Audit Report, and again on December 18, 2012 with the issuance of the Revised Final Audit Report. Unlike under the current regulations, section 1185.1(c) of the Commission’s regulations, as it existed when the Final Audit Report and Revised Final Audit Report were issued in 2012 and when this IRC was filed on December 10, 2015, did not expressly state that the time for filing an IRC begins to accrue when the claimant *first* receives a notice of adjustment.⁶⁹

In addition, the Controller’s Revised Final Audit Report issued December 18, 2012, states that the Revised Final Audit Report “supersedes” the March 7, 2012 Final Audit Report. The dictionary definition of supersede is: “1. To replace: supplant. 2. To cause to be set aside or replaced by another.”⁷⁰ Relying on the “supersedes” language, the claimant testified that it believed that the March 7, 2012 Final Audit Report was replaced by the December 18, 2012 Revised Final Audit Report and that it had three years from the date of the Revised Audit Report to file the IRC.⁷¹

Based on the circumstances of this case, including the language in the Revised Final Audit Report that it “supersedes” the earlier Final Audit Report, the ambiguity of the Commission’s regulations at the time the IRC was filed, and the policy expressed by the courts favoring disposition of cases based on the merits,⁷² the Commission finds that the IRC was timely filed. Although the claimant could have filed an IRC on the March 7, 2012 Final Audit Report as early as March 7, 2012 (and before the December 18, 2012 Revised Final Audit Report was issued),

⁶⁸ Government Code section 17558.5(c).

⁶⁹ California Code of Regulations, title 2, section 1185.1(c) (Register 2016, No. 48), which now states the following:

All incorrect reduction claims shall be filed with the Commission no later than three years following the date a claimant *first* receives from the Office of State Controller a final state audit report, letter, or other written notice of adjustment to a reimbursement claim, which complies with Government Code section 17558.5(c) by specifying the claim components adjusted, the amounts adjusted, interest charges on claims adjusted to reduce the overall reimbursement to the claimant, and the reason for the adjustment. The filing shall be returned to the claimant for lack of jurisdiction if this requirement is not met. (Emphasis added.)

⁷⁰ Webster’s II New College Dictionary (1995) page 1107.

⁷¹ Exhibit F, page 4 (March 25, 2016 Commission Hearing Transcript Excerpt).

⁷² *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806 (“A countervailing factor, of course, is the policy favoring disposition of cases on the merits rather than on procedural grounds.”); *Norgart v. Upjohn Company* (1999) 21 Cal.4th 383, 396; *Department of Corrections and Rehabilitations v. State Personnel Board* (2007) 147 Cal.App.4th 797, 805.

the claimant's IRC filing on December 10, 2015, which is based on the date of the superseding Revised Final Audit Report issued December 18, 2012, is timely.⁷³

B. The Controller Timely Initiated the Audit.

The claimant filed the 2006-2007 reimbursement claim on April 9, 2008,⁷⁴ the 2007-2008 reimbursement claim on February 10, 2009,⁷⁵ and the 2008-2009 reimbursement claim on February 8, 2010.⁷⁶ The claimant asserts that the audit was initiated on March 29, 2010, based on an entrance conference conducted by phone between the Controller's Office and the claimant, which is supported by an "entrance conference agenda," presumably prepared by the Controller's Office and submitted by the claimant.⁷⁷ The Controller asserts that it initiated the audit on April 14, 2010.⁷⁸ At the time the audit was initiated, either on March 29, 2010, or April 14, 2010, no payment had been made on the claims for fiscal years 2007-2008 and 2008-2009, and \$4,106,959 (appropriated from the fiscal year 2009-2010 budget) was paid on the 2006-2007 claim.⁷⁹

When the reimbursement claims at issue in this IRC were submitted, Government Code section 17558.5 required the Controller to initiate an audit no later than three years after the claim is filed or last amended. However, if no funds are appropriated or no payment is made to the claimant for the program for the fiscal year at issue, the time for the Controller to initiate the audit is tolled to three years after the date of the initial payment of the claim. The statute reads as follows:

A reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. *However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim.*⁸⁰

The Commission finds that the Controller timely initiated the audit for all three fiscal years. The fiscal year 2006-2007 reimbursement claim was filed on April 9, 2008, but the claim was not paid until fiscal year 2009-2010. Thus, the time for the Controller to initiate the claim was

⁷³ Exhibit F, page 33 (October 28, 2016 Commission Hearing Transcript Excerpt).

⁷⁴ Exhibit A, IRC, page 123.

⁷⁵ Exhibit A, IRC, page 133.

⁷⁶ Exhibit A, IRC, page 145.

⁷⁷ Exhibit E, Claimant's Late Comments on the Draft Proposed Decision, pages 3, 4-7.

⁷⁸ Exhibit B, Controller's Comments on the IRC, page 6.

⁷⁹ Exhibit A, IRC, pages 20, 84.

⁸⁰ Government Code section 17558.5 (as amended by Stats. 2004, ch. 890, eff. January 1, 2005, emphasis added).

toll, and the audit initiation date of either March 29, 2010, or April 14, 2010, was within three years of the date of payment on the fiscal year 2006-2007 claim. As to the other two fiscal years, the audit was initiated within three years of the date the reimbursement claims were submitted.

Therefore, the Controller's audit was timely initiated pursuant to Government Code section 17558.5(a).

C. The Controller Timely Completed the March 7, 2012 Final Audit Report, But Did Not Timely Complete the December 18, 2012 Revised Final Audit Report and Thus, the December 18, 2012 Revised Final Audit Report Is Void.

Government Code section 17558.5 requires that an audit be completed no later than two years after the date that the audit was commenced.⁸¹ Here, the Controller's audit was commenced on either March 29, 2010, or April 14, 2010. Therefore, to be timely the audit must be completed as early as March 29, 2012 and no later than April 14, 2012.

The Controller asserts that the audit was timely completed on March 7, 2012, the date of the Final Audit Report.⁸² The claimant argues that the Controller's Revised Final Audit Report, which supersedes the Final Audit Report and is dated December 18, 2012, completes the audit. The Revised Final Audit Report, however, was not completed within the required two year statutory deadline and the claimant asserts "therefore [the Controller] has no authority to impose the findings or disallow costs claimed and the County should be reimbursed for all disallowances."⁸³

An audit is complete under Government Code section 17558.5(c) when the Controller notifies the claimant of any adjustment to a claim for reimbursement that results from an audit or review. The "notification shall specify the claim components adjusted, the amounts adjusted, interest charges on claims adjusted to reduce the overall reimbursement to the local agency . . . , and the reason for the adjustment." Absent evidence to the contrary, the Commission has found that the date of the final audit report provides evidence of when an audit is complete.⁸⁴

In this case, the Controller issued the Final Audit Report on March 7, 2012, notifying the claimant of the reduction in Finding 2, before the earliest completion deadline of March 29, 2012.⁸⁵ The claimant does not dispute that the reduction in Finding 2 was included in the March 7, 2012 Final Audit Report and that Finding 2 did not change in the later-dated revised report.⁸⁶ Thus, the March 7, 2012 Final Audit Report was timely completed.

⁸¹ Government Code section 17558.5 (as amended by Stats. 2004, ch. 890, eff. January 1, 2005).

⁸² Exhibit B, Controller's Comments on the IRC, page 6.

⁸³ Exhibit E, Claimant's Late Comments on the Draft Proposed Decision, page 1.

⁸⁴ *Collective Bargaining and Collective Bargaining Agreement Disclosure*, 08-4425-I-15, adopted December 5, 2014 (<http://www.csm.ca.gov/matters/08-4425-I-15/doc8.pdf>).

⁸⁵ Exhibit A, IRC, page 82.

⁸⁶ Exhibit F, pages 4-5 (March 25, 2016 Commission Hearing Transcript Excerpt).

The Controller issued the Revised Final Audit Report on December 18, 2012, after the two year deadline imposed by Government Code section 17558.5 to complete the audit. Therefore, the Commission finds that the Revised Final Audit Report, dated December 18, 2012, is not timely. Although Government Code section 17558.5 does not specify the consequences for failing to meet the deadlines imposed by the statute, the Commission finds that the failure to meet the deadline makes the Revised Final Audit Report void. Courts have ruled that when a deadline is for the protection of a person or class of persons, and the language of the statute as a whole indicates the Legislature’s intent to enforce the deadline, the deadline is mandatory.

[T]he intent must be gathered from the terms of the statute construed as a whole, from the nature and character of the act to be done, and from the consequences which would follow the doing or the failure to the particular act at the required time. (Citation.) When the provision is to serve some public purpose, the provision may be held directory or mandatory as will best accomplish that purpose (citation)....⁸⁷

The California Supreme Court specifically rejected the notion that a statute could only be mandatory if it included a means of enforcement. Rather, the Court ruled that the important analysis is whether the purpose of the statute is to require an act.⁸⁸

Here, the Legislature specifically amended section 17558.5 to require an audit be completed within two years, stating “[i]n any case, an audit shall be completed not later than two years after the date that the audit is commenced.” Because the structure and purpose of the statute suggests that it is mandatory, an audit report not completed by the deadline must be held void.

Accordingly, the Commission finds that the March 7, 2012 Final Audit Report was timely completed and that the December 18, 2012 Revised Final Audit Report, which was not completed by the deadline, is void.

D. The Controller’s Audit Conclusions and Reduction of Costs in Finding 2 for Board and Care and Treatment Services Costs for SED Pupils Provided by Out-of-State, For-Profit, Residential Programs Remains Valid When the Final Audit Report Is Timely, But the Superseding Revised Final Audit Report Is Void.

The claimant contends that the Commission has already decided, when it determined that this IRC was timely filed, that the Revised Final Audit Report superseded the March 7, 2012 Final Audit Report, and constitutes the last essential element and completion of the audit. Thus, the claimant asserts that since the March 7, 2012 Final Audit Report has been superseded it is void and cannot be used against the claimant. The claimant contends that since the Revised Final Audit Report is also void because it was not timely completed, claimant is “entitled to the full amount of costs claimed for reimbursement for the placement of pupils in certain out-of-state residential facilities that are organized and operated on a for-profit basis,” that were reduced in Finding 2. The claimant, for the first time, also requests in its comments on the Draft Proposed Decision the additional remedy of directing the Controller to reinstate all costs reduced in

⁸⁷ *People v. McGee* (1977) 19 Cal.3d 948, 962, citing *Morris v. County of Marin* (1977) 18 Cal.3d 901, 909-910.

⁸⁸ *Id.*

Findings 1, 2, 3, and 4, most of which the claimant did not challenge in the IRC filing.⁸⁹ These issues are analyzed below.

1. Although the Claimant Now Requests Reinstatement of All Costs Reduced by the Controller, the Commission's Jurisdiction Is Limited to the Reductions for Board and Care and Treatment Services Under Finding 2 Because the Claimant Only Timely Filed an IRC to Challenge Reductions for Board and Care and Treatment Services Under Finding 2, and Did Not Plead the Remaining Audit Reductions in its IRC.

The claimant now requests that the Commission determine the effect of the void and superseding Revised Final Audit Report on *all* of the Controller's reduction of costs in Findings 1, 2, 3, and 4, most of which the claimant did not challenge in the IRC.⁹⁰ The Commission finds that it does not have jurisdiction over costs reduced in the audit which were not alleged to be incorrect in the IRC.

Government Code sections 17551(d) and 17558.7(a) allow a claimant to file an IRC if the Controller reduces a reimbursement claim, but requires the IRC to be filed in accordance with Commission regulations. Section 1185.1 of the Commission's regulations requires a claimant to specifically identify the alleged incorrect reduction. And, in this case, the claimant's IRC specifically challenges only \$1,387,095 of the \$1,653,904 reduced in Finding 2.⁹¹ Section 1185.1 of the regulations allows a claimant to amend an IRC, but the amendment has to be filed within the three year statute of limitations. Section 1185.1(a) provides that "*all* incorrect reduction claims" shall be filed within the three year statute of limitations. Here, the Commission found that the statute of limitations began to accrue on December 18, 2012, with regard to the Revised Final Audit Report. Thus, any new IRC or amendment to the existing IRC to challenge all of Findings 1, 2, 3, and 4, had to be filed by December 18, 2015. No additional IRC or amendment to this IRC was filed.

Moreover, the record supports a finding that the claimant waived its right to challenge the remaining issues in Finding 2 and the reductions in Findings 1, 3, and 4. Waiver is the intentional relinquishment of a known right after knowledge of the facts.⁹² The claimant's February 29, 2012 response to the Draft Audit Report, states the following:

There are four Findings in the above-referenced Draft Report and the County disputes Finding 2 – Overstated Residential Placement Costs. The County claims \$14,484,766 for the mandated programs for the audit period and \$4,106,959 has already been paid by the State. The State Controller's Office's audit found that \$11,651,891 is allowable and \$2,832,875 is unallowable. The unallowable costs as determined by State Controller's Office occurred primarily because the State

⁸⁹ Exhibit E, Claimant's Late Comments on the Draft Proposed Decision.

⁹⁰ Exhibit E, Claimant's Late Comments on the Draft Proposed Decision.

⁹¹ Exhibit A, IRC, page 1.

⁹² *City of Ukiah v. Fones* (1966) 64 Cal.2d 104, 107.

alleges the County overstated residential placement costs by \$1,653,904 (the County disputes \$1,387,095) for the audit period. As stated above, the County disputes Finding 2 and asserts that \$1,387,095 are allowable costs that are due the County for the audit period.⁹³

The claimant's IRC also states the following:

- “The County of San Diego (County) hereby submits an Incorrect Reduction Claim (IRC) challenging the State Controller’s disallowance of \$1,387,095.00 in costs claimed by the County for providing legislatively mandated Consolidated Handicapped and Disabled Students (HDS), HDS II, and Seriously Emotionally Disturbed Pupils Program for the period of July 1, 2006-June 30, 2009.”⁹⁴
- “There were four Findings in the Audit Report and the County disputes only the second Finding which alleges the County overstated residential placement costs by \$1,653,904 for the audit period.”⁹⁵
- The County disputes Finding 2 – Overstated residential placement costs – because the California Code of Regulations Title 2 section 60100(h) which was in effect during the audit period and Welfare and Institutions Code section 11460(c)(3) cited by the State is in conflict with requirements of federal law”⁹⁶
- “The County specifically disputes the finding that it claimed ineligible vendor payments of \$1,387,095 (board and care costs of \$753,624 and treatment costs of \$633,471) for out-of-state residential placement of SED pupils owned and operated for profit.”⁹⁷
- “The County asserts that it is entitled to the entire amount claimed less the sum already paid by the State and that its claim was incorrectly reduced by board and care costs of \$753,624 and treatment costs of \$633,471.”⁹⁸
- “In conclusion, the County asserts that the costs claimed for the period of July 1, 2006 through June 30, 2009 was incorrectly reduced by \$1,387,095 as set forth in Exhibits A-1 through A-4 and the County should be reimbursed the full amount of these disputed costs.”⁹⁹

Accordingly, the sole issue is whether the Controller’s audit conclusions and reduction of costs in Finding 2 for board and care and treatment services costs for SED pupils provided by out-of-

⁹³ Exhibit A, IRC, pages 99-100.

⁹⁴ Exhibit A, IRC, page 1.

⁹⁵ Exhibit A, IRC, page 9.

⁹⁶ Exhibit A, IRC, page 9.

⁹⁷ Exhibit A, IRC, page 10.

⁹⁸ Exhibit A, IRC, page 10.

⁹⁹ Exhibit A, IRC, page 18.

state, for profit, residential programs remain valid when the Final Audit Report is timely, but the superseding Revised Final Audit Report is void.

2. The Commission Finds That the Timely Completion of the Audit was Made with the Controller's March 7, 2012 Final Audit Report. Since the Revised Final Audit Report Was Not Timely Completed and Is Void, It Has No Effect on the March 7, 2012 Reductions Under Finding 2. Therefore, the Commission Must Reach the Merits of Finding 2, As Requested by Claimant in its Appeal of Executive Director Decision, 15-AEDD-01. On the Merits, the Commission Finds the Controller's Reduction of Costs Claimed for Board and Care and Treatment Services for Seriously Emotionally Disturbed Pupils Provided by Out-Of-State Residential Programs That Are Organized and Operated on a For-Profit Basis, Is Correct as a Matter of Law.

- a) The Timely Completion of the Audit Was Made with the Controller's March 7, 2012 Final Audit Report and the Revised Final Audit Report Is Void and Can Have No Effect on the March 7, 2012 Reductions Under Finding 2.

The claimant contends that the Commission already determined that the Revised Final Audit Report superseded the March 7, 2012 Final Audit Report when it found that the IRC was timely filed, and further asserts that the Revised Final Audit Report constitutes the last essential element and completion of the audit. Thus, the claimant asserts that the March 7, 2012 Final Audit Report is void and cannot be used against the claimant. Since the December 18, 2012 Revised Final Audit Report is also void because it was not timely completed, the claimant contends that the IRC should be approved.¹⁰⁰ The claimant is wrong.

As described below, the audit was timely completed with the March 7, 2012 Final Audit Report. Since the Revised Final Audit Report is void, it has no effect on the March 7, 2012 reductions under Finding 2. On October 28, 2016, the Commission heard and decided the issue of whether the claimant timely filed this IRC in accordance with the Commission's regulations and found that the statute of limitations for filing the IRC began to accrue with the later December 18, 2012 Revised Final Audit Report. The conclusion on the statute of limitations was based on the policy of reaching the merits of the claim as requested by the claimant, the plain language of the Revised Final Audit Report that it superseded the earlier March 7, 2012 report (and hence provided notice to the claimant that it could commence an IRC proceeding), and the ambiguity in the Commission's regulations at the time the IRC was filed. However, the issue of whether the Controller timely completed the audit in accordance with Government Code section 17558.5 was not before the Commission at the October 28, 2016 hearing. Thus, the Commission was not made aware of, and did not address, the timeliness of the Revised Final Audit Report and the effect of that untimely and void report with respect to validity of the March 7, 2012 Final Audit Report and the reductions made therein. Thus, the Commission did *not* find at that hearing that the March 7, 2012 Final Audit Report was void, as asserted by the claimant. The Commission, instead, agreed to reach the merits of the IRC.

¹⁰⁰ Exhibit E, Claimant's Late Comments on the Draft Proposed Decision, page 3.

As indicated above, an audit is complete under Government Code section 17558.5(c) when the Controller notifies the claimant of any adjustment to a claim for reimbursement that results from an audit or review. The “notification shall specify the claim components adjusted, the amounts adjusted, interest charges on claims adjusted to reduce the overall reimbursement to the local agency . . . , and the reason for the adjustment.” Based on the evidence in the record, the Commission finds that the March 7, 2012 Final Audit Report provided notice to the claimant of the reasons for the reduction and the amount reduced in Finding 2 in accordance with Government Code section 17558.5. No changes were made in the Revised Final Audit Report to Finding 2 and the claimant does not dispute that the reduction amount and reasoning for the reduction in Finding 2 remained the same in the Revised Final Audit Report as it was in the March 7, 2012 Final Audit Report.¹⁰¹ Moreover, claimant is not prejudiced by the intervening Revised Audit Report as that simply extended the time for claimant to file this IRC.

Accordingly, the Commission finds that completion of the audit was made with the Controller’s March 7, 2012 Final Audit Report and claimant could have filed an IRC at any time beginning on March 7, 2012 to contest the Finding 2 reductions at issue in this claim. Since the March 7, 2012 Final Audit Report was timely completed, and the Revised Final Audit Report is void and can have no effect on Finding 2 since it was completed past the statutory deadline, the Commission must now reach the merits of Finding 2.

b) The Controller’s Reduction of Costs Claimed for Board and Care and Treatment Services for Seriously Emotionally Disturbed Pupils Provided by Out-Of-State Residential Programs That Are Organized and Operated on a For-Profit Basis, Is Correct as a Matter of Law.

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

1) During all of the fiscal years at issue in these claims, the Parameters and Guidelines and state law required that SED pupils placed in out-of-state residential facilities be placed in nonprofit facilities and thus, costs claimed for vendor services provided by out-of-state service programs that are organized and operated on a for-profit basis are beyond the scope of the mandate.

Reimbursement claims filed with the Controller are required by law to be filed in accordance with the parameters and guidelines adopted by the Commission.¹⁰² Parameters and guidelines

¹⁰¹ Exhibit F, pages 4-5 (March 25, 2016 Commission Hearing Transcript Excerpt).

¹⁰² Government Code sections 17561(d)(1); 17564(b); and 17571; *Clovis Unified School District v. Chiang* (2010) 188 Cal.App.4th 794, 801, where the court ruled that parameters and guidelines adopted by the Commission are regulatory in nature and are “APA valid”; *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1201, where the court found that the Commission’s quasi-judicial decisions are final and binding, just as judicial decisions.

provide instructions for eligible claimants to prepare reimbursement claims for direct and indirect costs of a state-mandated program.¹⁰³ Parameters and guidelines are regulatory in nature and “APA valid, and absent a court ruling setting them aside, are binding on the parties.”¹⁰⁴

As indicated above, the consolidated Parameters and Guidelines authorize reimbursement for the payments made by counties to out-of-state care providers of a SED pupil for residential board and care treatment services costs based on rates established by the Department of Social Services in accordance with Welfare and Institutions Code sections 18350 and 18356. Counties are further required to determine that the residential placement “meets all the criteria established in Welfare and Institutions Code sections 18350 through 18356 before authorizing payment.”

As described in the Background, Welfare and Institutions Code section 18350(c) required that the payment “for care and supervision shall be based on rates established in accordance with Sections 11460 to 11467” of the Welfare and Institutions Code. Welfare and Institutions Code section 11460 governed the foster care program and subdivision (c)(3) provided that “State reimbursement for an AFDC-FC rate paid on or after January 1, 1993, shall only be paid to a group home *organized and operated on a nonprofit basis.*” (Emphasis added.) Thus, the nonprofit rule applicable to out-of-state foster care group homes was made expressly applicable to out-of-state residential placements of SED pupils. Consistent with these statutes, section 60100(h) of the regulations for this program states that out-of-state residential programs shall meet the requirements in Welfare and Institutions Code section 11640(c)(2) through (3) and, thus, be organized and operated on a nonprofit basis.

The claimant argues, however, that there is no requirement in state or federal law regarding the tax identification status of mental health treatment service providers and that the California Code of Regulations, at section 60020(i) and (j), describe the type of mental health services to be provided in the *SED* program, as well as who shall provide it, with no requirement regarding the providers’ tax identification status.¹⁰⁵ However, section 60020 of the regulations defines “psychotherapy and other mental health services” for SED pupils and is part of the same article containing the provisions in section 60100, which further specifies the requirements for out-of-state residential programs. The definition of “psychotherapy and other mental health services” in section 60020 does not change the requirement that an out-of-state residential facility providing board and care and treatment services for SED pupils is required to be organized and operated on a nonprofit basis under this program.

This is further evidenced by the regulatory history of section 60100. During the regulatory process for the adoption of California Code of Regulation section 60100, comments were filed by interested persons with concerns that referencing Welfare and Institutions Code section 11460 in section 60100 of the regulations to provide that “[o]ut-of-state placements shall only be made in residential programs that meet the requirements of Welfare and Institutions Code sections 11460(c)(2) through (c)(3)” was not clear since state reimbursement for special education

¹⁰³ Government Code section 17557; California Code of Regulations, title 2, section 1183.7(e).

¹⁰⁴ *Clovis Unified School District v. Chiang* (2010) 188 Cal.App.4th 794, 801; *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1201.

¹⁰⁵ Exhibit A, IRC, page 17-18.

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

Board and care rates for children placed pursuant to Chapter 26.5 of the Government Code are linked in statute to the statutes governing foster care board and care rates. The foster care program and the special education pupils program are quite different in several respects. This creates some difficulties which must be corrected through statutory changes, and cannot be corrected through regulations. Rates are currently set for foster care payments to out-of-state facilities through the process described in WIC Sections 11460(c)(2) through (c)(3). The rates cannot exceed the current level 14 rate *and the program must be non-profit*, and because of the requirements contained in Section WIC 18350, placements for special education pupils must also meet these requirements. The Departments believe these requirements are clearly stated by reference to statute, but we will handbook WIC Sections 11460(c)(2) through (c)(3) for clarity.¹⁰⁶

In addition, the departments specifically addressed the issue of “out-of-state group homes which are organized as for profit entities, but have beds which are leased by a non-profit shell corporation.”¹⁰⁷ The departments stated that the issue may need further legal review of documentation of group homes that claim to be nonprofit, but nevertheless “[t]he statute in WIC section 11460 states that state reimbursement shall only be paid to a group home organized and operated on a non-profit basis.”¹⁰⁸

Subsequent to the adoption of the Test Claim Decision and Parameters and Guidelines for this program, legislation was introduced to address the issue of payment for placement of SED pupils in out-of-state for-profit facilities in light of the fact that the federal government eliminated the requirement that a facility be operated as nonprofit in order to receive federal funding. However, as described below, the legislation was not enacted and the law applicable to these claims remained unchanged during the reimbursement period of the program.

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

¹⁰⁶ Exhibit F, Final Statement of Reasons for Joint Regulations for Pupils with Disabilities, page 127 (emphasis added).

¹⁰⁷ Exhibit F, Final Statement of Reasons for Joint Regulations for Pupils with Disabilities, page 128.

¹⁰⁸ Exhibit F, Final Statement of Reasons for Joint Regulations for Pupils with Disabilities, page 128.

the connection between foster care and SED placement requirements, this prohibition applies to placements of SED pupils as well. The committee analysis further recognized that the federal government eliminated the requirement that a facility be operated as a nonprofit in order to receive federal funding in 1996.¹⁰⁹ However, the bill did not pass the assembly.¹¹⁰

In 2008, AB 1805, a budget trailer bill, containing identical language to SB 292 was vetoed by the governor.¹¹¹ In his veto message he wrote, "I cannot sign [AB 1805] in its current form because it will allow the open-ended reimbursement of claims, including claims submitted and denied prior to 2006-07. Given our state's ongoing fiscal challenges, I cannot support any bill that exposes the state General Fund to such a liability."¹¹²

Subsequently, during the 2009-2010 legislative session, Assembly Member Beall introduced AB 421, which authorized payment for 24-hour care of SED pupils placed in out-of-state, for-profit residential facilities. The bill analysis for AB 421 cites the Controller's disallowance of \$1.8 million in mandate claims from San Diego County based on the claims for payments for out-of-state, for-profit residential placement of SED pupils. The analysis states that the purpose of the proposed legislation was to incorporate the allowance made in federal law for reimbursement of costs of placement in for-profit group homes for SED pupils.¹¹³ Under federal law, for-profit companies were originally excluded from receiving federal funds for placement of foster care children because Congress feared repetition of nursing home scandals in the 1970s, when public funding of these homes triggered growth of a badly monitored industry.¹¹⁴ The bill analysis suggests that the reasoning for the current policy in California, limiting payments to nonprofit group homes, ensures that the goal of serving children's interests is not mixed with the goal of private profit. For these reasons, California has continually rejected allowing placements in for-profit group home facilities for both foster care and SED pupils.¹¹⁵ The authors and supporters of the legislation contended that out-of-state, for-profit facilities are sometimes the only available placement to meet the needs of the child, as required by federal law.¹¹⁶ The

¹⁰⁹ Exhibit F, Assembly Committee on Human Services, analysis of SB 292 (2007-2008 Reg. Sess.), June 17, 2009, page 2.

¹¹⁰ Exhibit F, Complete Bill History, SB 292 (2007-2008 Reg. Sess.).

¹¹¹ Exhibit F, Assembly Committee on Appropriations, analysis of AB 421 (2009-2010 Reg. Sess.), May 20, 2009, page 3.

¹¹² Exhibit F, Governor's Veto Message, AB 1885 (2007-2008), September 30, 2008.

¹¹³ Exhibit F, Assembly Committee on Appropriations, analysis of AB 421 (2009-2010), May 20, 2009, page 2.

¹¹⁴ Exhibit F, Assembly Committee on Appropriations, analysis of AB 421 (2009-2010), May 20, 2009, page 1.

¹¹⁵ Exhibit F, Assembly Committee on Appropriations, analysis of AB 421 (2009-2010), May 20, 2009, page 2.

¹¹⁶ Exhibit F, Assembly Committee on Appropriations, analysis of AB 421 (2009-2010), May 20, 2009, page 2.

author notes the discrepancy between California law and federal law, which allows federal funding of for-profit group home placements.¹¹⁷ However, the bill did not pass the Assembly and therefore did not move forward.¹¹⁸

Thus, during the entire reimbursement period for this program, reimbursement was authorized only for out-of-state residential facilities organized and operated on a nonprofit basis. Although the claimant contends that state law conflicted with federal law during this time period, there is no law or evidence in the record that the nonprofit requirement for out-of-state residential programs conflicts with federal law or results in a failure for a pupil to receive a free and appropriate education. Absent a decision from the courts on this issue, the Commission is required by law to presume that the statutes and regulations for this program, which were adopted in accordance with the Administrative Procedures Act, are valid.¹¹⁹

Accordingly, pursuant to the law and the Parameters and Guidelines, reimbursement is required only if the out-of-state service vendor operates on a nonprofit basis. As indicated above, the Parameters and Guidelines are binding.¹²⁰ Therefore, costs claimed for out-of-state service vendors that are organized and operated on a for-profit basis are beyond the scope of the mandate.

- 2) *The claimant's reference to decisions issued by the Supreme Court and administrative bodies allowing placement in for-profit residential programs is misplaced.*

The claimant argues that:

In California, during the audit period, if counties were unable to access for-profit out-of-state programs, they may not be able to offer an appropriate placement for a pupil that had a high level of unique mental health needs that may only be treated in a specialized program. If that program was for-profit, that county would have been subject to litigation from parents, who through litigation, may access the appropriate program for their child regardless of the program's tax identification status.

...

Consistent with IDEA, during the audit period, counties should have been able to place special education students in the most appropriate program that met their unique needs without consideration for the programs for-profit or nonprofit status

¹¹⁷ Exhibit F, Assembly Committee on Appropriations, analysis of AB 421 (2009-2010), May 20, 2009.

¹¹⁸ Exhibit F, Complete Bill History, AB 421 (2009-2010).

¹¹⁹ California Constitution, article III, section 3.5; *Robin J. v. Superior Court* (2004) 124 Cal.App.4th 414, 425.

¹²⁰ *Clovis Unified School District v. Chiang* (2010) 188 Cal.App.4th 794, 801; *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1201.

so that students would be placed appropriately and counties would not be subject to needless litigation as evidenced in the Riverside case above.¹²¹

The Riverside OAH decision relied upon by claimants, involved a SED pupil who was deaf, had impaired vision, and an orthopedic condition, was assessed as having borderline cognitive ability, and had a long history of social and behavioral difficulties. His only mode of communication was American Sign Language. The parties agreed that the National Deaf Academy would provide the student with a free and appropriate public education, as required by federal law. The facility accepted students with borderline cognitive abilities and nearly all service providers are fluent in American Sign Language. However, the school district and county mental health department took the position that they could not place the student at the National Deaf Academy because it is operated by a for-profit entity. OAH found that the state was not prohibited from placing the student at this out-of-state for-profit facility because the facility was the only one identified as an appropriate placement.¹²² Upon appeal, the District Court affirmed the OAH order directing the school district and the county mental health department to provide the student with compensatory education consisting of immediate placement at the National Deaf Academy and through the 2008-2009 school year.¹²³

The claimant also relies on the U.S. Supreme Court decision in *Florence County School District Four v. Carter*,¹²⁴ for the proposition that local government will be subject to increased litigation with the Controller's interpretation. In the *Florence* case, the court held that parents can be reimbursed under IDEA when they unilaterally withdraw their child from an inappropriate placement in a public school and place their child in a private school, even if the placement in the private school does not meet all state standards or is not state approved. Although the court found that parents are entitled to reimbursement under such circumstances only if a federal court concludes both that the public placement violated IDEA and the private school placement was proper under IDEA, the court's decision in such cases is *equitable*. "IDEA's grant of equitable authority empowers a court 'to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act.'"¹²⁵ Unlike the court's equitable powers under IDEA, the reimbursement requirements of article XIII B, section 6, of the

¹²¹ Exhibit A, IRC, pages 14-15.

¹²² Exhibit A, IRC, pages 112-121 (*Student v. Riverside Unified School District and Riverside County Department of Mental Health*, OAH Case No. 2007090403, dated January 15, 2008).

¹²³ Exhibit F, *Riverside County Department of Mental Health v. Sullivan* (E.D.Cal. 2009) EDCV 08-0503-SGL.

¹²⁴ *Florence County School District v. Carter* (1993) 510 U.S. 7.

¹²⁵ *Florence County School District v. Carter* (1993) 510 U.S. 7, 12 (citing its prior decision in *School Comm. of Burlington v. Department of Ed. of Mass.* (1985) 471 U.S. 359, 369).

California Constitution must be strictly construed and not applied as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”¹²⁶

In this case, the claimant has provided no documentation or evidence that the costs claimed were incurred as a result of a court order finding that no other alternative placement was identified for a SED pupil during the audit years in question. Thus, the Commission does not need to reach the issue of whether reimbursement under article XIII B, section 6 of the California Constitution would be required in such cases. Therefore, these decisions do not support the claimant’s right to reimbursement.

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

3) *The documentation in the record supports the Controller’s findings that services were provided by for-profit residential programs.*

The claimant makes no argument disputing the Controller’s findings that Charter Provo Canyon School is a for-profit facility that provided the board and care and treatment services for its SED pupils. Claimant contends, however, that reimbursement is required because it contracted with Mental Health Systems, Inc., a nonprofit corporation, in accordance with the Parameters and Guidelines, and provides a copy of a letter from the IRS verifying that Mental Health Systems, Inc., is a nonprofit entity.¹²⁷ Claimant further argues that

The State never provided any guidance to counties as to how to access or contract with appropriate out-of-state facilities that meet State criteria or qualifications. The State never provided counties a list of appropriate out-of-state facilities that meet State requirements. County should not be penalized now for fulfilling the requirements of the law with little or no guidance from the State.¹²⁸

In this case, the Controller concluded that the vendor payments made by the claimant to Mental Health Systems, Inc., a California nonprofit corporation are not reimbursable because Mental Health Systems, Inc., contracted with Charter Provo Canyon School, a Delaware for-profit limited liability company, to provide the board and care and treatment services for SED pupils. Since the facility providing the board and care and treatment services is a for-profit facility, the Controller found that the costs were not eligible for reimbursement under the Parameters and Guidelines.¹²⁹

As indicated above, reimbursement is required only if the out-of-state service vendor that provides board and care and treatment services to SED pupils is organized and operated on a

¹²⁶ *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1281 (citing *City of San Jose v. State* (1996) 45 Cal.App.4th 1802, 1817).

¹²⁷ Exhibit A, IRC, page 24.

¹²⁸ Exhibit A, IRC, pages 16-17.

¹²⁹ Exhibit A, IRC, page 94.

nonprofit basis. Costs claimed for out-of-state service vendors that are organized and operated on a for-profit basis are beyond the scope of the mandate and are not eligible for reimbursement as a matter of law.

During the course of the audit, claimant provided a copy of the contracts between Mental Health Systems, Inc., and Charter Provo Canyon School, LLC (later identified as UHS of Provo Canyon) “for the provision of services pursuant to Chapter 26.5 of Division 7 of Title 1 of the Government Code” (the chapter Government Code that includes the test claim statute). The agreement demonstrates that Charter Provo Canyon School provided the services for the claimant, and confirms that Charter Provo Canyon School, LLC is a for-profit limited liability company. The contract title itself expresses that it is an “Agreement to Provide Mental Health Services” and the recitals state “Provo Canyon has agreed to provide the services of qualified professionals to provide care to those persons authorized to receive mental health services.”¹³⁰ In addition, the reimbursement claims filed for 2006-2007 and 2007-2008 identify the vendor as “Mental Health Systems-Provo Canyon” and for 2008-2009 as “MHS-Provo Canyon.”¹³¹

Accordingly, the evidence in the record supports the Controller’s finding that the services were provided by for-profit entities and are outside the scope of the mandate.

Therefore, the Commission finds that the Controller’s reduction for vendor service costs claimed for board and care and treatment services of SED pupils placed in facilities that are organized and operated for-profit is correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support.

V. Conclusion

Based on the foregoing, the Commission denies this IRC on the ground that the Controller’s audit was timely initiated on either March 29, 2010 or April 14, 2010, and timely completed with the March 7, 2012 Final Audit Report. Since the Revised Final Audit Report was not timely completed and is void, it has no effect on the March 7 2012 reductions under Audit Finding 2. Therefore, the Commission must reach the merits of Audit Finding 2, as requested by claimant in its *Appeal of Executive Director Decision*, 15-AEDD-01. On the merits, the Commission concludes that the Controller’s reduction of costs in Audit Finding 2 for board and care and treatment services costs for SED pupils provided by out-of-state, for-profit, residential programs is correct as a matter of law.

¹³⁰ Exhibit B, Controller’s Comments on the IRC, pages 192-204 and 206-216.

¹³¹ Exhibit A, IRC, pages 127, 138, and 150.



RE: **Decision**

Handicapped and Disabled Students (04-RL-4282-10); Handicapped and Disabled Students II (02-TC-40/02-TC-49); and Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services (97-TC-05), 15-9705-I-06

Government Code Sections 7571, 7572, 7572.5, 7572.55, 7576, 7581, and 7586 as added by Statutes 1984, Chapter 1747 (AB 3632); and as amended by Statutes 1985, Chapter 1274 (AB 882); Statutes 1994, Chapter 1128 (AB 1892); Statutes 1996, Chapter 654 (AB 2726);

California Code of Regulations, Title 2, Division 9, Chapter 1, Sections 60020, 60030, 60040, 60045, 60050, 60055, 60100, 60110, 60200, and 60550

(Emergency regulations effective January 1, 1986 [Register 86, No. 1], and refiled 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])

Fiscal Years: 2006-2007, 2007-2008, and 2008-2009

County of San Diego, Claimant

On May 26, 2017, the foregoing Decision of the Commission on State Mandates was adopted on the above-entitled matter.

Heather Halsey, Executive Director

Dated: May 31, 2017

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

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

On May 31, 2017, I served the:

- **Decision adopted May 26, 2017**

Handicapped and Disabled Students (04-RL-4282-10); Handicapped and Disabled Students II, (02-TC-40/02-TC-49); and Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services (97-TC-05), 15-9705-I-06

Government Code Sections 7571, 7572, 7572.5, 7572.55, 7576, 7581, and 7586 as added by Statutes 1984, Chapter 1747 (AB 3632); and as amended by Statutes 1985, Chapter 1274 (AB 882); Statutes 1994, Chapter 1128 (AB 1892); Statutes 1996, Chapter 654 (AB 2726);

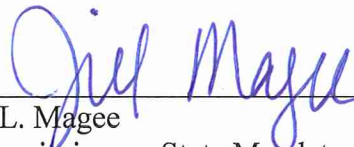
California Code of Regulations, Title 2, Division 9, Chapter 1, Sections 60020, 60030, 60040, 60045, 60050, 60055, 60100, 60110, 60200, and 60550 (Emergency regulations effective January 1, 1986 [Register 86, No. 1], and refiled June 30, 1986, designated effective July 12, 1986 [Register 86, No. 28]; and Emergency regulations effective July 1, 1998 [Register 98, No. 26]; final regulations effective August 9, 1999 [Register 99, No. 33])

Fiscal Years: 2006-2007, 2007-2008, and 2008-2009

County of San Diego, Claimant

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on May 31, 2017 at Sacramento, California.



Jill L. Magee
Commission on State Mandates
980 Ninth Street, Suite 300
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(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 3/22/17

Claim Number: 15-9705-I-06

Matter: Handicapped and Disabled Students (04-RL-4282-10); Handicapped and Disabled Students II (02-TC-40/02-TC-49); Seriously Emotionally Disturbed Pupils (SED); Out-of-State Mental Health Services (97-TC-05)

Claimant: County of San Diego

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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