



September 28, 2016

Mr. Salvador Lopez
Orange County Health Care Agency
AC/HCA Accounting Administrative Services
405 West 5th Street
Santa Ana, CA 92701

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

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

Re: **Decision**

Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services, 11-9705-I-02

Government Code Section 7576, as amended by Statutes 1996, Chapter 654 (AB 2726); California Code of Regulations, Title 2, Division 9, Chapter 1, Sections 60100 and 60110
Fiscal Years: 2001-2002, 2002-2003, 2003-2004, 2004-2005, and 2005-2006

And

Handicapped and Disabled Students; Handicapped and Disabled Students II; and Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services, 12-9705-I-03

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 Orange, Claimant

Dear Mr. Lopez and Ms. Kanemasu:

On September 23, 2016, the Commission on State Mandates adopted the Decision on the above-entitled matters.

Sincerely,

Heather Halsey
Executive Director

J:\MANDATES\IRC\2011\9705 (SED Handicapped)\11-9705-I-02 (Consolidated with 12-9705-I-03)\Correspondence\Decisiontrans.docx

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE INCORRECT REDUCTION CLAIMS
ON:

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

California Code of Regulations, Title 2, Division
9, Chapter 1, Sections 60100 and 60110

Fiscal Years 2000-2001, 2001-2002, 2002-2003,
2003-2004, 2004-2005, and 2005-2006

AND

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])¹

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

County of Orange, Claimant

Case Nos.: 11-9705-I-02 and 12-9705-I-03

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

*Handicapped and Disabled Students;
Handicapped and Disabled Students II; and
Seriously Emotionally Disturbed (SED) Pupils:
Out-of-State Mental Health Services*

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

(Adopted September 23, 2016)

(Served September 28, 2016)

¹ Note that this caption differs from the Test Claim and Parameters and Guidelines captions in that it includes only those sections that were approved for reimbursement in the Test Claim 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.

DECISION

The Commission on State Mandates (Commission) heard and decided these consolidated Incorrect Reduction Claims (IRCs) during a regularly scheduled hearing on September 23, 2016. James Harman appeared on behalf of the County of Orange. Jim Spano and Chris Ryan appeared on behalf of the State Controller's Office (Controller).

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

The Commission adopted the Proposed Decision to deny these IRCs by a vote of 6-0 as follows:

Member	Vote
Richard Chivaro, Representative of the State Controller	Yes
Mark Hariri, Representative of the State Treasurer, Vice Chairperson	Yes
Scott Morgan, Deputy Director of Administration and State Clearinghouse Director, Governor's Office of Planning and Research	Yes
Sarah Olsen, Public Member	Yes
Eraina Ortega, Representative of the Director of the Department of Finance, Chairperson	Yes
Carmen Ramirez, City Council Member	Absent
Don Saylor, County Supervisor	Yes

Summary of the Findings

The Commission finds that the Office of the State Controller's (Controller's) reduction of costs claimed by the County of Orange (claimant) for board and care and treatment services for out-of-state residential placement of SED pupils in facilities organized and operated for-profit 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 further require the claimant to provide supporting documentation for the costs claimed. Based on the documentation provided by the claimant in this case, the Controller found that the vendor costs claimed for eight out-of-state residential facilities were beyond the scope of the mandate and not allowable. Some of the residential facilities were not organized and operated on a nonprofit basis.² Other vendor payments made by the claimant were made to nonprofit corporations, but those corporations contracted with for-profit facilities

² Exhibit D, Controller's Late Comments on IRC 11-9705-I-02, page 14 (claimant did not support that costs claimed for eight out-of-state facilities were incurred for placement of SED pupils in nonprofit residential placement facilities); Exhibit E, Controller's Late Comments on IRC 12-9705-I-03, page 18 (claimant did not support that costs claimed for six out-of-state facilities were incurred for placement of SED pupils in nonprofit residential facilities).

to provide the services. And the claimant did not provide any documentation to support the nonprofit status of some of the facilities, and admitted the for-profit status of the other facilities. The Office of Administrative Hearings (OAH) and the federal court decisions relied upon by claimant are not applicable because they do not address whether the subvention requirement under article XIII B, section 6 applies. Moreover, claimant has provided no documentation or evidence, nor has claimant alleged, 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. 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, must be strictly construed and not applied as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”³

Accordingly, the Commission finds that the Controller’s reduction of costs claimed for vendor service payments is consistent with the Commission’s Parameters and Guidelines and is correct as a matter of law. Therefore, the Commission denies these IRCs.

I. Chronology

- 11/12/2008 Controller issued the final audit report for fiscal years 2000-2001 through 2001-2002.⁴
- 11/12/2008 Controller issued the final audit report for fiscal years 2002-2003 through 2004-2005.⁵
- 09/17/2010 Controller issued the final audit report for fiscal year 2005-2006.⁶
- 11/09/2011 Claimant filed IRC 11-9705-I-02.⁷
- 03/07/2012 Controller issued a final audit report for fiscal years 2006-2007 through 2008-2009.⁸
- 12/03/2012 Controller issued a revised final audit report for fiscal years 2006-2007 through 2008-2009.⁹

³ *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).

⁴ Exhibit A, Incorrect Reduction Claim 11-9705-I-02, page 73.

⁵ Exhibit A, Incorrect Reduction Claim 11-9705-I-02, page 114

⁶ Exhibit A, Incorrect Reduction Claim 11-9705-I-02, page 155.

⁷ Exhibit A, Incorrect Reduction Claim 11-9705-I-02, page 1. On October 21, 2013, in response to a Commission notice of incomplete filing, claimant resubmitted the claim form, specifying county as the claimant and providing an authorized signature of the county’s Manager of Financial Reporting on the claim certification. Exhibit A reflects the completed test claim filing.

⁸ Exhibit B, Incorrect Reduction Claim 12-9705-I-03, page 109.

⁹ Exhibit B, Incorrect Reduction Claim 12-9705-I-03, page 103.

03/08/2013 Claimant filed IRC 12-9705-I-03.¹⁰

03/21/2013 Claimant filed supplemental materials for IRC 12-9705-I-03.¹¹

10/03/2014 Controller filed late comments on IRC 11-9705-I-02.¹²

10/03/2014 Controller filed late comments on IRC 12-9705-I-03.¹³

10/31/2014 Claimant filed a request for an extension of time to file rebuttal comments on both IRCs.¹⁴

03/04/2015 Claimant filed late rebuttal comments to Controller's Late Comments on IRC 11-9705-I-02 and Controller's Late Comments on IRC 12-9705-I-03.¹⁵

02/04/2016 Commission staff issued the Notice of Proposed Consolidation of IRCs 11-9705-I-02 and 12-9705-I-03.

05/13/2016 Commission staff issued the Draft Proposed Decision, and scheduled the hearing for July 22, 2016.¹⁶

05/17/2016 Controller filed comments on the Draft Proposed Decision.¹⁷

06/03/2016 Claimant filed comments on the Draft Proposed Decision.¹⁸

07/06/2016 Commission staff issued the Proposed Decision for hearing.

07/11/2016 Claimant filed a request for postponement of hearing.

07/13/2016 The executive director granted claimant's request for good cause and scheduled the hearing for September 23, 2016.

¹⁰ Exhibit B, Incorrect Reduction Claim 12-9705-I-03, page 1. On October 21, 2013, in response to a Commission notice of incomplete filing, claimant resubmitted the claim form, specifying county as the claimant and providing an authorized signature of the county's Manager of Financial Reporting on the claim certification. Exhibit B reflects the completed test claim filing.

¹¹ Exhibit C, Claimant's Supplement to IRC 12-9705-I-03, page 1.

¹² Exhibit D, Controller's Late Comments on IRC 11-9705-I-02, page 1.

¹³ Exhibit E, Controller's Late Comments on IRC 12-9705-I-03, page 1.

¹⁴ Exhibit F, Claimant's Request for Extension to file Rebuttal to Controller's Comments on the IRCs, filed October 31, 2014.

¹⁵ Exhibit G, Claimant's Late Rebuttal Comments to Controller's Comments on the IRCs, filed March 4, 2015.

¹⁶ Exhibit H, Draft Proposed Decision.

¹⁷ Exhibit I, Controller's Comments on the Draft Proposed Decision, filed May 17, 2016.

¹⁸ Exhibit J, Claimant's Comments on the Draft Proposed Decision, filed June 3, 2016.

II. Background

A. Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services Program

These consolidated IRCs address reimbursement claims for costs incurred by the County of Orange for vendor services provided to SED pupils in out-of-state residential facilities from fiscal years 2000-2001 through 2008-2009. During this audit period, two sets of Parameters and Guidelines governed the program.¹⁹

Generally, the statutes (Gov. Code, §§ 7570, *et seq.*) and implementing regulations at issue (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 needs.²⁰ As originally enacted, the statutes shifted to counties the responsibility and funding of mental health services required by a pupil's individualized education plan (IEP), but required that all services provided by the counties be provided *within* the State of California.²¹ 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.²²

On May 25, 2000, the Commission approved the Test Claim *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services*, 97-TC-05, which 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").²³ 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

¹⁹ Exhibit D, Controller's Late Comments on IRC 11-9705-I-02, pages 48-52 (corrected Parameters and Guidelines, adopted July 21, 2006); Exhibit E, Controller's Late Comments on IRC 12-9705-I-03, pages 156-169 (consolidated Parameters and Guidelines, adopted October 26, 2006.)

²⁰ 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).

²¹ Former California Code of Regulations, title 2, section 60200.

²² Statutes 1996, chapter 654.

²³ Exhibit D, Controller's Late Comments on IRC 11-9705-I-02, pages 22-30.

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. 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.²⁴

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

²⁴ Exhibit D, Controller’s Late Comments on IRC 11-9705-I-02, pages 23-24 (Statement of Decision, *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services*, 97-TC-05); Exhibit E, Controller’s Late Comments on IRC 12-9705-I-03, pages 147-148 (Statement of Decision, *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services*, 97-TC-05).

- 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.)²⁵

Parameters and Guidelines for the *SED* program were adopted on October 26, 2000,²⁶ and corrected on July 21, 2006,²⁷ 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 Government Code section 7576 and Title 2, California Code Regulations, [sections] 60100 and 60110.²⁸

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.²⁹

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

²⁵ Exhibit D, Controller’s Late Comments on IRC 11-9705-I-02, page 30; Exhibit E, Controller’s Late Comments on IRC 12-9705-I-03, page 154.

²⁶ Exhibit A, Incorrect Reduction Claim 11-9705-I-02, pages 60-64; Exhibit D, Controller’s Late Comments on IRC 11-9705-I-01, pages 33-48.

²⁷ Exhibit D, Controller’s Late Comments on IRC 11-9705-I-02, pages 46-52.

²⁸ Exhibit A, Incorrect Reduction Claim 11-9705-I-02, page 61.

²⁹ Corrected Parameters and Guidelines, dated July 21, 2006; Exhibit D, Controller’s Late Comments on IRC 11-9705-I-02, pages 46-49.

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 *SED, Handicapped and Disabled Students*, CSM 4282 and 04-RL-4282-10, and *Handicapped and Disabled Students II*, 02-TC-40/02-TC-49, for costs incurred commencing with the 2006-2007 fiscal year.³⁰ 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 non-educational costs of seriously emotionally disturbed pupils (Gov. Code, § 7581; Cal. Code Regs., tit. 2, § 60200, subd. (e))
 1. Authorize payments to residential facilities based on rates established by the Department of Social Services in accordance with Welfare and Institutions Code sections 18350 and 18356. *This activity requires counties to determine that the residential placement meets all the criteria established in Welfare and Institutions Code sections 18350 through 18356 before authorizing payment.*³¹

Former 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.”³² 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, reimbursement for the cost of board, care, and treatment services in out-of-state residential facilities remained the same when the program was consolidated with the *Handicapped and Disabled Students* program and during all audit years in question.³³

Both sets of Parameters and Guidelines also contain instructions for claiming costs. Section V. of the original Parameters and Guidelines require that claimed costs for fiscal years 2000-2001 through 2005-2006 “shall be supported by” cost element information, as specified. With respect to claims for contract services, claimants are required to:

³⁰ Exhibit E, Controller’s Late Comments on IRC 12-9705-I-03, page 156 (consolidated Parameters and Guidelines, adopted October 26, 2006).

³¹ Exhibit E, Controller’s Late Comments on IRC 12-9705-I-02, page 163 (emphasis added) (consolidated Parameters and Guidelines, adopted October 26, 2006).

³² Exhibit K, Welfare and Institutions Code section 18350, as amended by Statutes 1990, chapter 46, section 12, effective April 10, 1990.

³³ Exhibit E, Controller’s Late Comments on IRC 12-9705-I-02, page 163 (consolidated Parameters and Guidelines, adopted October 26, 2006).

Provide the name(s) of the contractor(s) who performed the services, including any fixed contract for services. Describe the reimbursable activity(ies) performed by each named contractor and give the number of actual hours spent on the activities, if applicable. Show the inclusive dates when services were performed and itemize all costs for those services.³⁴

Section VI. of the original Parameters and Guidelines requires documentation to support the costs claimed as follows:

For auditing purposes, all costs claimed be traceable to source documents (e.g., invoices, receipts, purchase orders, contracts, worksheets, calendars, declarations, etc.) that show the evidence and validity of such costs and their relationship to the state mandated program. All documentation in support of the claimed costs shall be made available to the State Controller's Office, as may be requested...[T]hese documents must be kept on file by the agency submitting the claim for a period of no less than two years after the later of (1) the end of the calendar year in which the reimbursement claim is filed or last amended, or (2) if no funds are appropriated for the fiscal year for which the claim is made, the date of initial payment of the claim.

Beginning with fiscal year 2006-2007, 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.³⁵

Section IV. of the consolidated 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."³⁶

³⁴ Exhibit A, Incorrect Reduction Claim 11-9705-I-02, page 63 (Parameters and Guidelines, adopted October 26, 2000); Exhibit D, Controller's Late Comments on IRC 11-9705-I-02, pages 50-51 (corrected Parameters and Guidelines, adopted July 21, 2006).

³⁵ Exhibit E, Controller's Late Comments on IRC 12-9705-I-03, pages 165-166 (consolidated Parameters and Guidelines, adopted October 26, 2006).

³⁶ Exhibit E, Controller's Late Comments on IRC 12-9705-I-03, pages 165-168 (consolidated Parameters and Guidelines, adopted October 26, 2006).

Statutes 2011, chapter 43 (AB 114) eliminated the mandated programs for *Handicapped and Disabled Students*, CSM 4282 and 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, 2011.³⁷ Thus on September 28, 2012, the Commission adopted an amendment to the Parameters and Guidelines ending reimbursement for these programs effective July 1, 2011.

B. The Audit Findings of the Controller

The Controller audited and reduced the reimbursement claims for various reasons. The claimant only disputes the reduction totaling \$6,711,871 for all fiscal years at issue in Finding 1 of both audit reports 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*.”³⁸ In this respect, the Controller found unallowable costs for all fiscal years based on the following costs claimed for eight residential facilities:

- For two of the facilities (Youth Care of Utah and Charter Provo Canyon School), the county claimed payments made to Mental Health Systems, Inc., and Aspen Solutions Inc., both California nonprofit corporations. However, the Controller found the costs not allowable because these nonprofit corporations contracted with Youth Care of Utah and Charter Provo Canyon, both of which are organized and operated as for-profit facilities, to provide the out-of-state residential placement services.³⁹
- For four of the facilities (Aspen Ranch, Island View, SunHawk Academy and Logan River, LLC), the county asserted that the for-profit facilities had similar contractual arrangements with either Aspen Solutions, Inc. or Mental Health Systems, Inc. (nonprofit businesses incorporated in California). The county, however, did not provide any documentation to support the nonprofit status of the residential facilities providing the services, or provide documentation illustrating a business relationship between the residential facilities and the California nonprofit entities.⁴⁰

³⁷ Exhibit K, Assembly Bill No. 114 (2011-2012 Reg. Sess.), approved by the Governor, June 30, 2011.

³⁸ Exhibit A, Incorrect Reduction Claim 11-9705-I-02, page 8; Exhibit B, Incorrect Reduction Claim 12-9705-I-03, page 9. (Emphasis added.) Both the audit reports and IRC’s use the terms “owned and operated for-profit.” However the statute states “organized and operated for-profit”; our analysis tracks the statutory language.

³⁹ Exhibit D, Controller’s Late Comments on IRC 11-9705-I-02, page 17; Exhibit E, Controller’s Late Comments on IRC 12-9705-I-03, pages 19-20.

⁴⁰ Exhibit D, Controller’s Late Comments on IRC 11-9705-I-02, page 17; Exhibit E, Controller’s Late Comments on IRC 12-9705-I-03, page 20.

- For National Deaf Academy, the county acknowledged it is a for-profit entity, and did not provide any documentation in support of its nonprofit status.⁴¹
- The claimant also contracted with For Kids Behavioral Health of Alaska, Inc., who then contracted with Copper Hills Youth Center to provide the services. Claimant argued that For Kids Behavioral Health of Alaska, Inc. was a nonprofit facility and provided a Certificate of Good Standing from the State of Alaska and a Certificate of Registration from the State of Utah seeking nonprofit status, which was filed and approved December 7, 2007, relating to only a portion of the audit period. In addition, the claimant did not provide any documentation regarding the business relationship between Kids Behavioral Health of Alaska and Copper Hills Youth Center, the residential facility where the pupils were placed. According to a Utah government website, the business named Copper Hills Youth Center was registered November 5, 2004 and remained in business through November 4, 2009, operating as a health services facility.⁴² However, claimant provided no documentation to support a finding that Copper Hills was a nonprofit entity.

III. Positions of the Parties

A. County of Orange

The claimant contends that the Controller's reductions for vendor payments for out-of-state residential placement of SED pupils in facilities that are owned and operated for-profit are incorrect and should be reinstated. For all fiscal years at issue, the claimant asserts that the requirements in the Parameters and Guidelines, based on California Code of Regulations, title 2, section 60100(h) and Welfare and Institutions Code section 11460(c)(3), are in conflict with the requirements of federal law, including the Individuals with Disabilities Education Act (IDEA) and section 472(c)(2) of the Social Security Act (42 U.S.C. 672(c)(2)).⁴³ In support of this position, the claimant argues the following:

- California law prohibiting placement in for-profit facilities is inconsistent with federal law, which no longer has such limitation, and with the IDEA's requirement that children with disabilities be placed in the most appropriate educational environment out-of-state and not be constrained by non-profit status.⁴⁴
- During the periods at issue, the County contracted with nonprofit entities: Mental Health Services, Inc. (facilities include: Provo Canyon School and Logan River Academy),

⁴¹ Exhibit D, Controller's Late Comments on IRC 11-9704-I-02, page 17.

⁴² Exhibit D, Controller's Late Comments on IRC 11-9705-I-02, page 17; Exhibit E, Controller's Late Comments on IRC 12-9705-I-03, page 20.

⁴³ Exhibit A, Incorrect Reduction Claim 11-9705-I-02, page 9; Exhibit B, Incorrect Reduction Claim 12-9705-I-03, page 9.

⁴⁴ Exhibit A, Incorrect Reduction Claim 11-9705-I-02, pages 9-10; Exhibit B, Incorrect Reduction Claim 12-9705-I-03, pages 10-11.

Aspen Solutions, Inc. (facilities include: Island View, Aspen Ranch, Youth Care of Utah, and SunHawk Academy), and Kids Behavior Health of Alaska, Inc. (facility: Copper Hills Youth Center) to provide the out-of-state residential services subject to the disputed disallowances.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, the U.S. District Court, Central District of California, 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.⁴⁶
- 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. 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.⁴⁷
- The Controller's interpretation of Welfare and Institutions Code section 11460(c)(3) would result in higher state reimbursement costs, based on a comparison between the cost of mental health services provided at residential facilities that are organized and operated for-profit versus those that are organized as nonprofit.⁴⁸

Claimant disagrees with the conclusions and recommendations in the Draft Proposed Decision and reasserts it is entitled to the full amount of costs claimed for the placement of pupils in out-of-state residential facilities that are organized and operated on a non-profit basis.⁴⁹ The claimant argues the following:

[T]he Proposed Decision disallows the costs associated with these vendors because of the corporate status of the companies they deal with, such as Charter Provo Canyon. Nothing in the Parameters and Guidelines references subcontractors, affiliates, or partners. Rather, it references "vendors" which the

⁴⁵ Exhibit A, Incorrect Reduction Claim 11-9705-I-02, pages 12-13; Exhibit B, Incorrect Reduction Claim 12-9705-I-03, pages 9-10.

⁴⁶ Exhibit A, Incorrect Reduction Claim 11-9705-I-02, pages 10-12, 14-16; Exhibit B, Incorrect Reduction Claim 12-9705-I-03, pages 12-13, 15-17.

⁴⁷ Exhibit A, Incorrect Reduction Claim 11-9705-I-02, page 13; Exhibit B, Incorrect Reduction Claim 12-9705-I-03, page 14.

⁴⁸ Exhibit A, Incorrect Reduction Claim 11-9705-I-02, page 14; Exhibit B, Incorrect Reduction Claim 12-9705-I-03, pages 14-15.

⁴⁹ Exhibit J, Claimant's Comments on the Draft Proposed Decision.

Proposed Decision concedes in two instances the County's vendors were non-profit entities.⁵⁰

The claimant also asserts that the Proposed Decision adopts an inappropriate abuse of discretion standard of review of the Controller's audit decisions, and argues that the Commission must conduct an independent review of the matter and "make a determination that the Controller incorrectly reduced the County's claims for the reasons stated in the claims in this letter."⁵¹

B. State Controller's Office

It is the Controller's position that the audit adjustments are correct and that these IRCs should be denied. The Controller found that the unallowable costs resulting from the out-of-state residential placement of SED pupils in for-profit facilities are correct because the Parameters and Guidelines only allow vendor payments for SED pupils placed in a group home organized and operated on a nonprofit basis.⁵² The Controller asserts that the unallowable treatment and board-and-care vendor payments claimed result from the claimant's placement of SED pupils in prohibited for-profit out-of-state residential facilities.⁵³ The Controller argues that the county did not support that costs claimed for eight out-of-state facilities were for placement in nonprofit residential facilities, and concludes that the county made placements in out-of-state facilities that are organized and operated for profit.⁵⁴

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

⁵⁰ Exhibit J, Claimant's Comments on the Draft Proposed Decision, pages 1 and 2.

⁵¹ Exhibit J, Claimant's Comments on the Draft Proposed Decision, page 2. The Commission need not make a determination with regard to claimant's assertion of the legal standard to apply to the Controller's auditing decisions generally, since the issue in this case is a pure issue of law and therefore the de novo standard of review applies.

⁵² Exhibit D, Controller's Late Comments on IRC 11-9705-I-02, page 15; Exhibit E, Controller's Late Comments on IRC 12-9705-I-03, page 19.

⁵³ Exhibit D, Controller's Late Comments on IRC 11-9705-I-02, page 14; Exhibit E, Controller's Late Comments on IRC 12-9705-I-03, page 18.

⁵⁴ Exhibit D, Controller's Late Comments on IRC 11-9705-I-02, page 14 (county did not support that costs claimed for eight out-of-state facilities were incurred for placement in non-profit residential facilities); Exhibit E, Controller's Late Comments on IRC 12-9705-I-03, page 18 (county did not support that costs claimed for six out-of-state facilities were incurred for placement in non-profit residential facilities).

maintains that under the mandated program, costs incurred at out-of-state for-profit residential programs are not reimbursable.⁵⁵

The Controller also distinguishes the OAH, U.S. District Court, Central District of California Court, and U.S. Supreme Court cases cited by the claimant. In the OAH case and related appeal to the U.S. District Court, 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.⁵⁶ In the U.S. Supreme Court case, *Florence County Sch. Dist. Four v. Carter by & Through Carter* (1993) 510 U.S. 7, the court ruled that parents who unilaterally withdrew their child from an inappropriate placement must be reimbursed even if the parents' school placement does not meet state educational standards and is not state approved, which the Controller distinguishes for the same reason as the OAH and U.S. District Court cases. 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.⁵⁷

The Controller filed comments in support of the Draft Proposed Decision.⁵⁸

IV. Discussion

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

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

⁵⁵ Exhibit D, Controller's Late Comments on IRC 11-9705-I-02, pages 15-16; Exhibit E, Controller's Late Comments on IRC 12-9705-I-03, page 20.

⁵⁶ Exhibit D, Controller's Late Comments on IRC 11-9705-I-02, pages 16-17; Exhibit E, Controller's Late Comments on IRC 12-9705-I-03, page 21.

⁵⁷ Exhibit D, Controller's Late Comments on IRC 11-9705-I-02, page 16 (citing OAH case Nos. N 2007090403 and 2005070683, available at Exhibit D, Tabs 9 and 10, pages 67-84); Exhibit E, Controller's Late Comments on IRC 12-9705-I-03, page 21 (citing OAH case Nos. 2007090403 and 2005070683, available at Exhibit E, Tabs 11 and 12, pages 205-222).

⁵⁸ Exhibit I, Controller's Comments on the Draft Proposed Decision, filed May 17, 2016.

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 6.⁵⁹ 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.”⁶⁰

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.⁶¹ 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.’ ”⁶²

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.⁶³ In addition, section 1185.1(f)(3) and 1185.2(c) of the Commission’s regulations require that any assertions of fact by the parties to an IRC must be supported by documentary evidence. The Commission’s ultimate findings of fact must be supported by substantial evidence in the record.⁶⁴

⁵⁹ *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

⁶⁰ *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

⁶¹ *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.

⁶² *American Bd. of Cosmetic Surgery, Inc., v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-548.

⁶³ *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

⁶⁴ 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

The Controller's Reduction of Costs Is Correct as a Matter of Law.

Reimbursement claims filed with the Controller are required as a matter of law to be filed in accordance with the parameters and guidelines adopted by the Commission.⁶⁵ Parameters and guidelines provide instructions for eligible claimants to prepare reimbursement claims for direct and indirect costs of a state-mandated program.⁶⁶

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

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

As indicated above, the original Parameters and Guidelines for the *SED* program governs the 2000-2001 through 2005-2006 reimbursement claims and authorizes reimbursement for payments to service vendors providing mental health services to SED pupils placed in out-of-state residential facilities, as specified in California Code of Regulations, title 2, section 60100. Section 60100 of the regulations implements the requirements of former Welfare and Institutions Code section 18350, which was enacted to govern the payments for 24 hour out-of-home care provided on behalf of SED pupils who are placed out-of-home pursuant to an IEP. Former 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. Section 11640(c)(3) specifies that SED pupils shall only be placed in out-of-state facilities organized and operated on a nonprofit basis. Consistent with these statutes, section 60100(h) of the regulations states that out-of-state residential programs shall meet the requirements in Welfare and Institutions Code section 11640(c)(2) through (3). The July 21, 2006 correction to the Parameters and Guidelines clarifies that "mental health services" includes residential board and care.

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.

⁶⁵ 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.

⁶⁶ Government Code section 17557; California Code of Regulations, title 2, section 1183.7.

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 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.⁶⁷

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.” 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.”⁶⁸

When the Parameters and Guidelines for the *SED* program were consolidated with *Handicapped and Disabled Students* and the *Handicapped and Disabled Students II* programs for costs incurred beginning July 1, 2006, reimbursement continued to be authorized for the payments to out-of-state residential facilities based on rates established in accordance with Welfare and Institutions Code sections 18350 and 18356. Although the consolidated Parameters and Guidelines do not quote the language in section 60100(h) in full, they plainly state that counties are required to determine that the residential placement “meets all the criteria established in Welfare and Institutions Code sections 18350 through 18356 before authorizing payment,” which as described above includes ensuring that the facility providing the out-of-state services operates on a nonprofit basis pursuant to Welfare and Institutions Code section 11460. Thus, the

⁶⁷ Exhibit K, Final Statement of Reasons for Joint Regulations for Pupils with Disabilities, page 127 (emphasis added).

⁶⁸ Exhibit K, Final Statement of Reasons for Joint Regulations for Pupils with Disabilities, page 128.

requirement that the out-of-state residential facility be operated on a nonprofit basis remained the same when the Parameters and Guidelines were consolidated.

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.⁶⁹ However, section 60020 of the regulations defines “psychotherapy and other mental health services” for *SED* pupils and is part of the same article containing the provisions in section 60100, which further specifies the requirements for out-of-state residential programs. The definition of “psychotherapy and other mental health services” in section 60020 does not change the requirement that an out-of-state residential facility providing treatment services and board and care for *SED* pupils is required to be organized and operated on a non-profit basis under this program.

Moreover, legislation was later 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 a non-profit 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 Senate Bill 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 non-profits to parallel the federal funding requirement. Because of the connection between foster care and *SED* placement requirements, this prohibition applies to placements of *SED* pupils as well. The committee analysis further recognized that the federal government eliminated the requirement that a facility be operated as a non-profit in order to receive federal funding in 1996.⁷⁰ However, the bill did not pass the assembly.⁷¹

⁶⁹ Exhibit A, Incorrect Reduction Claim IRC 11-9705-I-02, page 13; Exhibit B, Incorrect Reduction Claim 12-9705-I-03, page 14.

⁷⁰ Exhibit K, Assembly Committee on Human Services, analysis of Senate Bill No. 292 (2007-2008 Reg. Sess.), June 17, 2009, page 2.

⁷¹ Exhibit K, Complete Bill History, Senate Bill No. 292 (2007-2008 Reg. Sess.).

In 2008, AB 1805, a budget trailer bill, containing identical language to SB 292 was vetoed by the governor.⁷² 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."⁷³

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.⁷⁴ 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.⁷⁵ 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.⁷⁶ 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.⁷⁷ The author notes the discrepancy between California law and federal law, which allows federal funding of for-profit group home placements.⁷⁸ However, the bill did not pass the Assembly and therefore did not move forward.⁷⁹

⁷² Exhibit K, Assembly Committee on Appropriations, analysis of Assembly Bill No. 421 (Reg. Sess. 2009-2010), May 20, 2009, page 3.

⁷³ Exhibit K, Governor's Veto Message, Assembly Bill 1885 (Reg. Sess. 2007-2008), September 30, 2008.

⁷⁴ Exhibit K, Assembly Committee on Appropriations, analysis of Assembly Bill No. 421 (Reg. Sess. 2009-2010), May 20, 2009, page 2.

⁷⁵ Exhibit K, Assembly Committee on Appropriations, analysis of Assembly Bill No. 421 (Reg. Sess. 2009-2010), May 20, 2009, page 1.

⁷⁶ Exhibit K, Assembly Committee on Appropriations, analysis of Assembly Bill No. 421 (Reg. Sess. 2009-2010), May 20, 2009, page 2.

⁷⁷ Exhibit K, Assembly Committee on Appropriations, analysis of Assembly Bill No. 421 (Reg. Sess. 2009-2010), May 20, 2009, page 2.

⁷⁸ Exhibit K, Assembly Committee on Appropriations, analysis of Assembly Bill No. 421 (Reg. Sess. 2009-2010), May 20, 2009.

⁷⁹ Exhibit K, Complete Bill History, Assembly Bill No. 421 (Reg. Sess. 2009-2010).

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, 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.⁸⁰

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

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

As indicated above, reimbursement is required only if the out-of-state service vendor that provides board and care and treatment services to SED pupils is organized and operated on a nonprofit basis. Costs claimed for out-of-state service vendors that are organized and operated on a for-profit basis are beyond the scope of the mandate and are not eligible for reimbursement as a matter of law. The Parameters and Guidelines also require that the claimant provide documentation in support of the costs claimed for contract services, including the name of the contractor and the services performed to implement the reimbursable activities.

In this case, the Controller concluded that the vendor payments made by the claimant to eight out-of-state facilities were not allowable because the documentation provided by the county did not support that the costs were incurred for services provided by nonprofit residential facilities. Since the facilities providing the treatment and board and care are for-profit facilities, the Controller found that the costs were not eligible for reimbursement under the Parameters and Guidelines.⁸¹

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

The claimant makes no argument disputing the Controller's findings that the facilities providing treatment and board and care services for its SED pupils are for-profit. Claimant contends, however, that reimbursement is required because "it contracted with nonprofit facilities to provide all program services." Specifically the county asserts that it

...contracted for out-of-state residential services with Mental Health Systems, Inc. (whose facilities include: Provo Canyon School and Logan River Academy), Aspen Solutions, Inc. (whose facilities include: Island View, Aspen Ranch, Youth Care of Utah, and SunHawk Academy), and Kids Behavioral Health of Alaska, Inc. (whose facilities

⁸⁰ California Constitution, article III, section 3.5; *Robin J. v. Superior Court* (2004) 124 Cal.App.4th 414, 425.

⁸¹ Exhibit D, Controller's Late Comments on IRC 11-9705-I-02, page 14; Exhibit E, Controller's Late Comments on IRC 12-9705-I-03, page 18.

includes Copper Hills Youth Center). Each of the entities that the County contracted with are organized as nonprofit organizations...the County contracted with these providers in a manner consistent with the requirements of the California Code of Regulations and Welfare and Institutions Code reference above.⁸²

The County also provided copies of the Articles of Incorporation, an IRS verification of tax exempt status letter, and Certificate of Good Standing, as verification that Mental Health Systems, Inc., Aspen Solutions, Inc., and Kids Behavioral Health of Alaska, Inc., are nonprofit entities.⁸³ Claimant further argues that

Neither the federal nor the state government has provided procedures or guidelines to specify if and/or exactly how counties should determine for-profit or nonprofit status. Although counties have used many of these out-of-state facilities for SED student placement for years, the State only recently has begun to question their nonprofit status. Nor has the State ever provided the County with a list of facilities that it deems to be nonprofit, and therefore acceptable to the State. The State's history of paying these costs without question encouraged the County to rely upon the State's acceptance of prior claims for the very same facilities now characterized as for-profit.⁸⁴

Although the claimant may have contracted with nonprofit entities, the evidence in the record supports the Controller's findings that the board and care and treatment services for the SED pupils were provided by out-of-state, *for-profit* entities.

The Controller found that the county claimed vendor costs for Aspen Solutions, Inc., and Mental Health Systems, Inc., California nonprofit entities. However, these nonprofit entities contracted with for-profit facilities where the out-of-state placements occurred (Youth Care of Utah and Charter Provo Canyon Schools) to provide the services. Copies of the contracts for the provision of mental health services to SED pupils between Aspen Solutions, Inc., and Youth Care of Utah, Inc. (Youth Care contract),⁸⁵ Mental Health Services, Inc. (MHS), and Charter Provo Canyon School, LLC (Provo Canyon contract),⁸⁶ and MHS, Inc., and UHS of Provo Canyon (Provo

⁸² Exhibit A, Incorrect Reduction Claim 11-9705-I-02, page 12; see also, Exhibit J, Claimant's Comments on the Draft Proposed Decision, pages 1-2.

⁸³ Exhibit A, Incorrect Reduction Claim 11-9705-I-02, pages 21, 24, and 26.

⁸⁴ Exhibit A, Incorrect Reduction Claim 11-9705-I-02, pages 12-13; Exhibit B, Incorrect Reduction Claim 12-9705-I-03, page 10.

⁸⁵ Exhibit D, Controller's Late Comments on IRC 11-9705-I-02, pages 100-108 (Tab 12, Contract between Aspen Solutions, Inc., and Youth Care of Utah, Inc.); Exhibit E, Controller's Late Comments on IRC 12-9705-I-03, pages 238-246 (Tab 14, Contract between Aspen Solutions, Inc., and Youth Care of Utah, Inc.).

⁸⁶ Exhibit D, Controller's Late Comments on IRC 11-9705-I-02, pages 110-120 (Tab 13, Contract between Mental Health Services, Inc. (MHS), and Charter Provo Canyon School, LLC); Exhibit E, Controller's Late Comments on IRC 12-9705-I-03, pages 248-258 (Tab 15, Contract between Mental Health Systems, Inc., and Charter Provo Canyon School, LLC).

Canyon II contract),⁸⁷ are in the record. These agreements demonstrate that the vendor payments to the nonprofit entities were for services provided by for-profit facilities. In the Youth Care contract, Youth Care of Utah, Inc., is described as a Delaware corporation and the contract states:

Youth has the sole responsibility for provision of therapeutic services.
ASI...shall not exercise control over or interfere in any way with the exercise of professional judgment by Youth or Youth's employees in connection with Youth's therapeutic services.⁸⁸

In the Provo Canyon contract, Charter Provo Canyon School, LLC is described as a Delaware for-profit limited liability contract and the contract states "Provo Canyon has agreed to provide the services of qualified professionals to provide care to those persons authorized to receive mental health services."⁸⁹

In the Provo Canyon II contract, UHS of Provo Canyon, Inc., is described as a Delaware for-profit limited liability company and the contract states "Provo Canyon has agreed to provide the services of qualified professionals to provide care to those persons authorized to receive mental health services."⁹⁰

The claimant similarly claimed that it had contractual agreements with Aspen Solutions, Inc., and Mental Health Systems, Inc., for placement of SED pupils in four other facilities: Aspen Ranch, Island View, SunHawk Academy, and Logan River, LLC. However, the claimant did not provide any documentation to support the nonprofit status of the facilities that provided the services, or show the business relationship between the facilities and the California nonprofits.⁹¹ Instead, claimant provided documentation titled "List of Providers for the Provision of Mental Health Outpatient Services for Fiscal Years 2002-03, 2003-04, and 2004-05" which lists: Aspen Ranch (For-Profit), Island View, and SunHawk under a bullet for Aspen Solutions, Inc., and

⁸⁷ Exhibit D, Controller's Late Comments on IRC 11-9705-I-02, pages 124-135 (Tab 14, Contract between MHS, Inc., and UHS of Provo Canyon, Inc.); Exhibit E, Controller's Late Comments on IRC 12-9705-I-03, pages 260-271 (Tab 16, Contract between MHS, Inc., and USH of Provo Canyon, Inc.).

⁸⁸ Exhibit D, Controller's Late Comments on IRC 11-9705-I-01, page 100; Exhibit E, Controller's Late Comments on IRC 12-9705-I-03, page 238.

⁸⁹ Exhibit D, Controller's Late Comments on IRC 11-9705-I-02, page 110; Exhibit E, Controller's Late Comments on IRC 12-9705-I-03, page 248.

⁹⁰ Exhibit D, Controller's Late Comments on IRC 11-9705-I-02, page 124; Exhibit E, Controller's Late Comments on IRC 12-9705-I-03, page 260.

⁹¹ Exhibit D, Controller's Late Comments on IRC 11-9705-I-02, page 17; Exhibit E, Controller's Late Comments on IRC 12-9705-I-03, page 20.

Logan River in parenthesis next to Mental Health Systems, Inc.⁹² This documentation does not support the nonprofit status of the facilities providing the services.

The claimant also contracted with Kids Behavioral Health of Alaska, Inc., for placement of SED pupils in Copper Hills Youth Center in fiscal years 2005-2006 through 2008-2009. With respect to Kids Behavioral Health of Alaska, the claimant provided a Certificate of Good Standing from the State of Alaska and Certificate of Registration of a foreign nonprofit from the State of Utah.⁹³ However, the Certificate of Registration for nonprofit status was not approved until December 7, 2007. Moreover, no documentation has been provided by the claimant showing that Copper Hills Youth Center was organized and operated on a nonprofit basis.

And for one of the vendors claimed in fiscal years 2003-2004 and 2004-2005, National Deaf Academy, the Controller states that the claimant acknowledged that the facility is for-profit and did not provide any evidence in support of its nonprofit status.⁹⁴

Therefore 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.

2. Claimant's reliance on the decisions issued by OAH and the federal courts is misplaced.

The claimant further argues that decisions issued by the OAH and the United States District Court in *Riverside County Department of Mental Health v. Sullivan* support the position that reimbursement is required if a SED pupil is placed in a for-profit facility that complies with federal IDEA law.⁹⁵ These decisions involve 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

⁹² Exhibit D, Controller's Late Comments on IRC 11-9705-I-02, page 137 (Tab 15, "Exhibit A, List of Providers for the Provision of Mental Health Outpatient Services for Fiscal Years 2002-03, 2003-04, and 2004-05"); Exhibit E, Controller's Late Comments on IRC 12-9705-I-03, page 278 (Tab 18, "Exhibit A, List of Providers for the Provision of Mental Health Outpatient Services for Fiscal Years 2002-03, 2003-04, and 2004-05").

⁹³ Exhibit D, Controller's Late Comments on IRC 11-9705-I-02, pages 139 (Tab 16, Certificate of Good Standing from the State of Alaska) and 141 (Tab 17, Certificate of Registration, Corporation- Foreign- Non-Profit, State of Utah); Exhibit E, Controller's Late Comments on IRC 12-9705-I-03, pages 278 (Tab 19, Certificate of Good Standing from the State of Alaska) and 282 (Tab 20, Certificate of Registration, Corporation- Foreign- Non-Profit, State of Utah).

⁹⁴ Exhibit D, Controller's Late Comments on IRC 11-9705-I-02, page 17. The for-profit status of National Deaf Academy is confirmed in the OAH case relied on by claimant and submitted for decision in 2007 (Exhibit A, Incorrect Reduction Claim 11-9705-I-02, pages 29-38).

⁹⁵ Exhibit A, Incorrect Reduction Claim 11-9705-I-02, pages 10-11; Exhibit B, Incorrect Reduction Claim 12-9705-I-03, pages 12-13.

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. Both OAH and the federal District Court 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.⁹⁶ The 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.⁹⁷

Although the District Court's decision in *Riverside County* is binding with respect to the placement of that student,⁹⁸ the court did not address state-mandated reimbursement under article XIII B, section 6. Moreover, the claimant has provided no documentation or evidence that the costs claimed in these claims were incurred as a result of a court order finding that no other alternative placement was identified for a SED pupil during the audit years in question. Thus, the Commission does not need to reach the issue whether reimbursement under article XIII B, section 6 would be required in such a case.

The claimant also relies on the U.S. Supreme Court decision in *Florence County School District Four v. Carter*,⁹⁹ for the proposition that local government will be subject to increased litigation with the Controller's interpretation.¹⁰⁰ In the *Florence* case, the court held that parents can be reimbursed under the IDEA when they unilaterally withdraw their child from an inappropriate placement in a public school and place their child in a private school, even if the placement in the private school does not meet all state standards or is not state-approved. Although the court found that parents are entitled to reimbursement under such circumstances only if a federal court concludes both that the public placement violated IDEA and the private school placement was proper under IDEA, the court's decision in such cases is *equitable*. "IDEA's grant of equitable authority empowers a court 'to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such

⁹⁶ Exhibit A, Incorrect Reduction Claim 11-9705-I-02, pages 29-38, 40-52; Exhibit B, Incorrect Reduction Claim 12-9705-I-03, pages 27-36, 38-50.

⁹⁷ Exhibit A, Incorrect Reduction Claim 11-9705-I-02, pages 40-52; Exhibit B, Incorrect Reduction Claim 12-9705-I-03, pages 38-50.

⁹⁸ Absent "unusual circumstances," or an intervening change in the law, the decision of the reviewing court establishes the law of the case and binds the agency and the parties to the action in all further proceedings addressing the particular claim. (*George Arakelian Farms, Inc., v. Agricultural Labor Relations Board* (1989) 49 Cal.3d 1279, 1291.)

⁹⁹ *Florence County School District v. Carter* (1993) 510 U.S. 7.

¹⁰⁰ Exhibit A, Incorrect Reduction Claim 11-9705-I-02, page 13; Exhibit B, Incorrect Reduction Claim 12-9705-I-03, pages 13-14.

placement, rather than a proposed IEP, is proper under the Act.”¹⁰¹ Unlike the court’s equitable powers under IDEA, the reimbursement requirements of article XIII B, section 6, must be strictly construed and not applied as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”¹⁰²

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

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

V. Conclusion

Based on the foregoing, the Commission finds that the Controller’s reductions are correct as a matter of law and denies these IRCs.

¹⁰¹ *Florence County School District, supra*, 510 U.S. 5, 12 (citing its prior decision in *School Comm. of Burlington v. Department of Ed. of Mass.* (1985) 471 U.S. 359, 369.)

¹⁰² *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1281 (citing *City of San Jose v. State* (1996) 45 Cal.App.4th 1802, 1817).



RE: **Decision**

Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services,
11-9705-I-02

Government Code Section 7576, as amended by Statutes 1996, Chapter 654 (AB 2726);
California Code of Regulations, Title 2, Division 9, Chapter 1, Sections 60100 and 60110
Fiscal Years: 2001-2002, 2002-2003, 2003-2004, 2004-2005, and 2005-2006

And


Handicapped and Disabled Students; Handicapped and Disabled Students II; and
Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services,
12-9705-I-03

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 Orange, Claimant

On September 23, 2016, the foregoing Decision of the Commission on State Mandates was
adopted on the above-entitled matters.



Heather Halsey, Executive Director

Dated: September 28, 2016

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

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

On September 28, 2016, I served the:

Decision

Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services, 11-9705-I-02

Government Code Section 7576, as amended by Statutes 1996, Chapter 654 (AB 2726); California Code of Regulations, Title 2, Division 9, Chapter 1, Sections 60100 and 60110 Fiscal Years: 2001-2002, 2002-2003, 2003-2004, 2004-2005, and 2005-2006

And

Handicapped and Disabled Students; Handicapped and Disabled Students II; and Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services, 12-9705-I-03

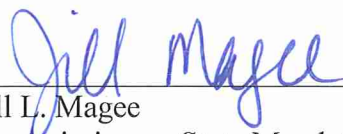
Government Code Sections 7571, 7572, 7572.5, 7572.55, 7576, 7581, and 7586 as added by Statutes 1984, Chapter 1747 (AB 3632); and as amended by Statutes 1985, Chapter 1274 (AB 882); Statutes 1994, Chapter 1128 (AB 1892); Statutes 1996, Chapter 654 (AB 2726); California Code of Regulations, Title 2, Division 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 Orange, Claimant

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on September 28, 2016 at Sacramento, California.



Jill L. Magee
Commission on State Mandates
980 Ninth Street, Suite 300
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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 9/14/16

Claim Number: 11-9705-I-02 Consolidated with 12-9705-I-03

Matter: Handicapped and Disabled Students; Handicapped and Disabled Students;
Seriously Emotionally Disturbed Pupils (SED): Out-of-State Mental Health
Services

Claimant: County of Orange

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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

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