BEFORE THE
COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE INCORRECT REDUCTION CLAIM ON: Statutes of 1984, Chapter 1659 Fiscal Years 1996-1997 and 1997-1998 Filed by San Diego Unified School District, Claimant.	Case No.: 01-4241-I-03 *Emergency Procedures, Earthquake and Disasters* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5. ARTICLE 7 *(Adopted on July 28, 2011)*

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this incorrect reduction claim during a regularly scheduled hearing on July 28, 2011. Mr. Jim Spano appeared for the State Controller's Office and Mr. Art Palkowitz appeared for the claimant.

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

The Commission adopted the staff analysis at the hearing by a vote of 6-0 to partially approve this incorrect reduction claim.

EXECUTIVE SUMMARY

Overview

This is an incorrect reduction claim filed by San Diego Unified School District (District)[1] challenging a reduction made by the State Controller's Office to the District's reimbursement claim for costs incurred in fiscal years 1996-1997 and 1997-1998 for the *Emergency Procedures, Earthquake and Disasters* program. Under that program, local agencies and school districts are eligible to claim reimbursement for the costs to school districts to establish an earthquake emergency procedure system in every public or private school building having an occupant capacity of 50 or more students or more than one classroom.

The dispute here involves the costs incurred in fiscal years 1996-1997 and 1997-1998 to implement the mandate. Following an audit, the State Controller's Office reduced the entire claimed reimbursement amounts of $588,819 for fiscal year 1996-1997 and $612,617 for fiscal

[1] Incorrect Reduction Claim of San Diego Unified School District (IRC), p. 3.

year 1997-1998, for a total of $1,201,436. The Controller cited a number of reasons for the reduction, all of which are discussed below.

The District seeks a determination from the Commission on State Mandates (Commission) pursuant to Government Code section 17551(d) that the State Controller's Office incorrectly reduced the claim, and requests that the State Controller's Office reinstate the $1,201,436 reduced.

Procedural History

On July 23, 1987, the Commission found that Education Code sections 35295, 35296, and 35297 constitute a reimbursable state-mandated program upon school districts and county offices of education within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

On November 26, 1997, the District filed a reimbursement claim for fiscal year 1996-1997 in the amount of $588,810, and on November 16, 1998, the District filed a reimbursement claim for fiscal year 1997-1998 for $612,617. On December 22, 2000, the State Controller's Office sent the District a letter disallowing $1,201,436, the entire claimed amount. On March 26, 2000, the District filed an incorrect reduction claim with the Commission.

On June 3, 2011, staff issued the draft staff analysis. No comments were received.

Commission Responsibilities

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

Government Code Section 17551(d) requires the Commission to hear and decide a claim that the State Controller's Office has incorrectly reduced payments to the local agency or school district. If the Commission determines that a reimbursement claim has been incorrectly reduced, section 1185.7 of the Commission's regulations requires the Commission to send the statement of decision to the State Controller's Office and request that the costs in the claim be reinstated.

Analysis

The State Controller's Office cited a number of reasons for its reduction. This incorrect reduction claim involves four areas of dispute, each of which is discussed briefly below.

First, the State Controller's Office argues that the claims data submitted by the District "included time not related to the mandate, such as time related to fires, civil defense, and other school emergencies and disasters."[2] For example, during the audit, the Controller conducted interviews with school site personnel who "indicated that claimed activities included non-reimbursable full disaster preparedness drills conducted during classroom hours."[3]

[2] Response by the State Controller's Office to the IRC (SCO Response), p. 7-15.

[3] San Diego Unified School District Audit Report (SCO Audit), p. 3.

The District argues that it performed reimbursable activities and submitted claims with adequate documentation. It argues that "[t]here can be no doubt that the 'District' school site staff performed the reimbursable activities. . . .[4]

The Commission finds from a review of the test claim statute, the Commission's statement of decision and parameters and guidelines, and the Controller's claiming instructions that the only reimbursable activities are those related to earthquake safety.

Second, the State Controller's Office sent the District a letter in which it adjusted the claim by a total of $174,957 for costs incurred to pay the salaries of teachers for in-classroom time spent on earthquake preparedness. The District argues that this was inappropriate because "[t]he amounts claimed by the 'District' are the District's costs for salaries and benefits to perform the mandated activities."[5]

The parameters and guidelines applicable to this claim were adopted in 1989 and amended in 1991. Section V (B) of the amended parameters and guidelines states "No reimbursement can be claimed for in-classroom teacher time spent on the instruction of students on emergency procedure systems."[6] The documentation submitted by the District to the State Controller's Office indicates that $167,423 in salaries and benefits was being claimed for teacher in-classroom instruction. This activity is prohibited by the clear language of the parameters and guidelines because there are no increased costs incurred by a district for activities that take place during in-classroom time.[7] The Commission finds that the State Controller's Office properly adjusted the claim by this amount plus the 4.5% indirect cost rate attributable to the claimed cost.

Third, the District and the State Controller's Office disagree about the documentation that the District must supply to satisfy the requirements of the parameters and guidelines. The District argues that it performed mandated activities and that its documentation was adequate. The State Controller's Office argues that the documentation is lacking in numerous respects discussed in section III (C) of this analysis. The parameters and guidelines state, "For auditing purposes, all costs claimed may be traceable to source documents and/or worksheets that show evidence of the validity of such costs." This is very general language that provided little guidance to the District as to precisely what documentation it should maintain for auditing purposes.

The District's documentation clearly shows that the District performed mandated activities and that it maintained some documentation to satisfy the requirements of the parameters and guidelines. While the documentation submitted to the State Controller's Office by the District left a lot to be desired, the Commission finds that the District should not be penalized for maintaining somewhat vague and imprecise documentation when it was following the vague and imprecise parameters and guidelines adopted by the Commission.

The Commission finds that the reduction by the State Controller's Office to zero on the basis of the District's perceived deficiencies in documentation is incorrect because it is arbitrary and not based on the very general language in the parameters and guidelines.

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[4] IRC, p. 5.

[5] IRC, p. 6.

[6] Amended parameters and guidelines, p. 2.

[7] *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1195.

Fourth, the District argues that the State Controller's Office failed to complete its audit of the District's 1996-1997 reimbursement claim in a timely fashion. Pursuant to section 17558.5, the District was "subject to audit by the Controller" until December 31, 1999, two years after the end of the calendar year in which the reimbursement claim was filed. The Commission finds from the context of section 17558.5(a) that the State Controller's interpretation is the better one, and that the State Controller's Office was required only to initiate its audit within the two-year timeframe.

The State Controller's Office states, "the audit was started in October 1999." The District does not dispute this. Accordingly, the Commission finds that the audit was timely because it was initiated within two years after December 31, 1999, the end of the calendar year in which the reimbursement claim was filed.

Conclusion

The Commission concludes that the State Controller's Office properly reduced the District's fiscal year 1996-1997 reimbursement claim by $174,957 for the costs incurred to pay the salaries of teachers for in-classroom time spent on earthquake preparedness, because under the 1991 amended parameters and guidelines, no reimbursement can be claimed for in-classroom teacher time. The Commission further concludes that the State Controller's Office properly reduced the District's reimbursement claims to the extent they sought reimbursement for activities not related to earthquake emergencies.

However, the Commission also concludes that the State Controller's Office incorrectly reduced the remaining costs incurred by San Diego Unified School District in fiscal years 1996-1997 and 1997-1998 for the *Emergency Procedures, Earthquake and Disasters* program.

The Commission remands this claim back to the State Controller's Office and requests that it determine the amount of the District's reimbursement claim that is attributable to earthquake emergencies, and reimburse the District for that amount, less the $174,957 for in-classroom time that the State Controller's Office properly reduced.

ANALYSIS

District

San Diego Unified School District

Chronology

07/23/1987	Commission adopts statement of decision on *Emergency Procedures, Earthquake and Disasters* test claim
03/23/1989	Commission adopts parameters and guidelines on *Emergency Procedures, Earthquake and Disasters*
02/28/1991	Commission adopts amended parameters and guidelines for *Emergency Procedures, Earthquake and Disasters*

06/1993	SCO issues its first claiming instructions for *Emergency Procedures, Earthquakeand Disasters*
'95,'96,&'98	SCO issues revised claiming instructions
11/26/1997	District files reimbursement claim for costs incurred for fiscal year 1996-1997 in the amount of $588,819
12/16/1998	District files reimbursement claim for costs incurred for fiscal year 1997-1998 in the amount of $612,717
12/22/2000	SCO sends letter to district stating that $1,201,436, the entire amount of the claims for fiscal years 1996-1997 and 1997-1998, is not allowed
07/23/2001	SCO sends two letters to district, one disapproving $588,819, the entire amount of the reimbursement claim for fiscal year 1996-1997, and another disapproving $612,617, the entire amount of the reimbursement claim for fiscal year 1997-1998
03/26/2000	District files incorrect reduction claim with Commission
08/13/2002	SCO submits responses to District's incorrect reduction claim
03/23/2011	Commission conducts informal hearing with claimant, the State Controller's Office, and interested parties

I. Background

This is an incorrect reduction claim filed by San Diego Unified School District (District) challenging a reduction made by the State Controller's Office to the District's reimbursement claim for costs incurred in fiscal years 1996-1997 and 1997-1998 for the *Emergency Procedures, Earthquake and Disasters* program. This program was enacted by Statutes 1984, chapter 1659 (the "1984 legislation"), in recognition of the fact that California will experience moderate to severe earthquakes in the foreseeable future and that all public and private schools should develop an earthquake emergency procedure system. (Ed. Code, § 35295.) The program required the governing board of each private school and school district and the superintendent of schools for each county to establish an earthquake emergency procedure system in every public or private school building having an occupant capacity of 50 or more students or more than one classroom. (Ed. Code, § 35296.)

The 1984 legislation stated that the earthquake emergency procedure system shall include, but not be limited to, all of the following:

(a) A school building disaster plan, ready for implementation at any time, for maintaining the safety and care of students and staff.

(b) A drop procedure. As used in this article, "drop procedure" means an activity whereby each student and staff member takes cover under a table or desk, dropping to his or her knees, with the head protected by the arms, and the back to the windows. A drop procedure practice shall be held at least once a semester in secondary schools.

(c) Protective measures to be taken before, during, and following an earthquake.

(d) A program to ensure that the students and staff are aware of, and properly trained in, the earthquake emergency procedure system.[8]

On December 1, 1986, the Los Angeles Unified School District filed a test claim with the Commission, alleging a reimbursable state-mandated program was imposed on school districts by the 1984 legislation. On July 23, 1987, the Commission found that Education Code sections 35295, 35296, and 35297 constitute a reimbursable state-mandated program upon school districts and county offices of education within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

The Commission adopted parameters and guidelines for the test claim on March 23, 1989. On February 28, 1991, the Commission amended the parameters and guidelines to delete reimbursement for in-classroom teacher time while allowing reimbursement for other non-teacher costs resulting from the instruction of students in emergency procedures.[9] On September 19, 2002, the State Controller's Office requested the Commission again amend the parameters and guidelines to clarify that reimbursement for the emergency and disaster procedures is limited to establishing an emergency procedure system that addresses *earthquake* emergencies only. On May 29, 2003, the Commission amended the parameters and guidelines to clarify the reimbursable activities and track the statutory language.

The dispute here involves the costs incurred in fiscal years 1996-1997 and 1997-1998 to implement the mandate. Accordingly, the 1991 amended parameters and guidelines are applicable to this claim.

Following an audit, the State Controller's Office reduced the entire claimed reimbursement amounts of $588,819 for fiscal year 1996-1997 and $612,617 for fiscal year 1997-1998, for a total reduction of $1,201,436. The Controller cited a number of reasons for the reduction, all of which are discussed below.

The District seeks a determination from the Commission pursuant to Government Code section 17551(d), that the State Controller's Office incorrectly reduced the claim and requests that the Controller reinstate the $1,201,436 reduced.

II. Positions of the Parties

A. The District

The San Diego Unified School District contends that the State Controller's Office incorrectly reduced its claims for reimbursement. The District argues that its claims were complete and

[8] The 1984 legislation also amended the Education Code to require the governing board of any school district to: (a) grant the use of school facilities for mass care and welfare shelters to public agencies such as the American Red Cross in the event of a disaster or other emergency affecting the public health and welfare; and (b) cooperate with such public agencies in furnishing and maintaining those services as the governing board may deem necessary to meet the needs of the community. (Ed. Code, § 40041.5.) This incorrect reduction claim does not involve these activities.

[9] Amended parameters and guidelines.

were prepared in accordance with the 1991 amended parameters and guidelines and claiming instructions issued for this program.

The District believes that the State Controller's Office incorrectly reduced its claims to $0 "despite the fact that it was never disputed the activities were performed."[10] The District states "[t]here can be no doubt that the "District" school site staff performed the reimbursable activities." The District also argues that the audit performed by the State Controller's Office was not timely pursuant to Section 17558.5 because it was not completed within two years after the end of the calendar year in which the claim was filed or last amended.

B. State Controller's Office

The State Controller's Office argues that the District's claim was deficient in several ways. First, the District sought reimbursement for activities unrelated to the mandate. Second, the District claimed reimbursement for teacher in-classroom instruction, an activity expressly disallowed by the 1991 amended parameters and guidelines. Third, the District failed to provide adequate documentation to demonstrate the costs claimed had actually been incurred. Finally, the State Controller's Office argues that its audit was timely.

III. Discussion

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

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

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

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

The State Controller's audit found that the District "could not provide adequate documentation substantiating the employees and hours charged to the mandate. Therefore, the State Controller's Office disallowed the entire salaries, benefits, and related indirect costs claimed."[11]

The following is an analysis of the issues raised by the District and the State Controller's Office.

A. The District is only entitled to reimbursement for activities related to earthquake safety, not other emergency activities

The District argues that it performed reimbursable activities and submitted claims with adequate documentation:

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[10] IRC, p. 1.

[11] SCO Audit, p. 3.

> There can be no doubt that the "District" school site staff performed the reimbursable activities. Each school site annually reviews and prepares or updates an emergency preparedness plan. . . . The district provided sufficient documentation to prove each school site performed activities of reviewing, preparing, and updating the emergency procedures required by the mandate. . . . [T]he "District" provided sufficient evidence that all school site personnel spend time preparing to implement district emergency and disaster plans . . . . [E]ach school site evaluates their evacuation drill and makes appropriate changes to the emergency preparedness plans . . . .[12]

The Controller's Office argues that the claims data submitted by the District "included time not related to the mandate, such as time related to fires, civil defense, and other school emergencies and disasters."[13] For example, during the audit, the Controller conducted interviews with school site personnel "who indicated that claimed activities included non-reimbursable full disaster preparedness drills conducted during classroom hours."[14]

It is clear from a review of the test claim statute, the Commission's statement of decision and parameters and guidelines, and the Controller's claiming instructions that the only reimbursable activities are those related to earthquake safety.

As discussed below, the Commission finds that the District's reimbursement claims contain costs for activities that go beyond the scope of the mandate and are not reimbursable. These activities are not mandated by the state and are not reimbursable under the test claim statute, the statement of decision, and the parameters and guidelines.

1. Education Code

The 1984 legislation is codified in Article 10.5 of the Education Code, entitled "Earthquake Emergency Procedures." During all relevant times, Article 10.5 contained only three sections, sections 35295, 35296, and 35297. Section 35295(c) stated, "It is therefore the intent of the Legislature in enacting this article to authorize the establishment of *earthquake emergency procedure systems* in kindergarten and grades 1 through 12 in all the public or private schools in California." (Emphasis added.) Section 35296 stated, "The governing board of each private school and school district and the county superintendent of schools of each county shall establish an *earthquake emergency procedure system* in every public or private school building . . . ." (Emphasis added.) Finally, section 35297 stated, "The *earthquake emergency procedure system* shall include . . . ." (Statutes 1984, chapter 1659, emphasis added.) The test claim statute was clearly focused on activities related to earthquakes, not other emergencies.

2. Statement of decision

Section II of the statement of decision echoes the language of the test claim statute: "Article 10.5 . . . of the Education Code . . . requires the governing body of each school district or private school and the county superintendent of schools of each county to establish an *earthquake emergency procedure* in each school building under its jurisdiction." (Emphasis added.) Section III of the statement of decision states: "The Los Angeles Unified School District has established

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[12] IRC, p. 5.

[13] SCO Response, p. 7-15.

[14] SCO Audit, p. 3.

that this statute has imposed a new program by requiring the governing board of any school district to establish *an earthquake emergency procedure system*, and by requiring the governing board of any school district to grant the use of school facilities, grounds and equipment for mass care and welfare shelters to public agencies in the event of a disaster or other emergency without the ability to recover direct costs from the user." (Emphasis added.) The statement of decision also clearly focused on activities related to earthquakes, not other emergencies.[15]

3. 1991 Amended parameters and guidelines

The first paragraph of the amended parameters and guidelines recites verbatim the language from the statement of decision quoted above that makes it clear that the only reimbursable activities are those related to earthquakes. Under section V (B), "Reimbursable activities," the amended parameters and guidelines state:

> 1. Emergency Procedures
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> a. The salaries and related employee benefits of employees with assigned responsibility to prepare and implement district emergency and disaster plans and procedures. The salaries and related employee benefits of non-teacher district employees, including consultants, directly engaged in providing instruction to other employees and students of the district in earthquake and disaster procedures. The cost incurred by the district of employees attending these meetings to receive instruction.
>
> The reimbursable costs incurred by non-teacher personnel in providing instruction to students shall be limited to the scope of the mandate as stated in EC section 35297 which is described as the instruction of students in the elements of the School Building Master Plan by personnel specifically assigned to this task. This includes, but is not limited to, drop procedures, and protective measures to be taken before, during, and after an earthquake; the preparation and dissemination to students of standard lesson plans on a district-wide basis; and the preparation of a standard testing program to ensure that students are properly trained.
>
> Assistance in developing an Emergency Procedures System is available to school districts from the California State Office of Emergency Services and the Seismic Safety Commission.
>
> b. Printing, postage, and supply costs incurred by the district directly related to the establishment of an emergency procedure system.

Read in isolation, the references in this and other sections of the parameters and guidelines to the general term "emergency procedures" might suggest that the Commission intended reimbursement for activities related to emergencies other than earthquakes. However, read in the context of the test claim and statement of decision, it is clear that the only reimbursable activities are those related to *earthquake* emergencies. Moreover, the parameters and guidelines cannot enlarge the scope of reimbursable activities beyond what is in the statute and statement of decision. (Gov. Code section 17557.)

[15] Statement of decision (CSM 4241).

On March 19, 2001, the State Controller's Office filed a request with the Commission to amend the parameters and guidelines. On May 29, 2003, the Commission adopted the final staff analysis to amend the parameters and guidelines. It states:

> The SCO proposed amendments [to] narrow the parameters and guidelines to clarify that this program only applies to earthquake plans. Therefore, consistent with statutory language, the requested modifications were made, where applicable. (Final Staff Analysis, p. 6.)

This final staff analysis notes that the purpose of the amendments was to "clarify" that the statement of decision only applies to earthquake-related activities. The Commission adopted this staff analysis.

Accordingly, it is clear that the Commission intended to clarify what was always the case: that only earthquake-related activities are reimbursable. Generally, the same rules of construction and interpretation that apply to statutes govern the construction and interpretation of an administrative agency's rules, such as the Commission's parameters and guidelines.[16] The interpretation of an administrative agency rule, like the parameters and guidelines, is a question of law.[17] The Commission's clarification of existing law may be applied to reimbursement claims for costs that predate the parameters and guidelines amendment. The Commission's clarification is merely a statement of what the law has always been.[18]

4. Claiming instructions

The claiming instructions cannot authorize reimbursement for more than what the test claim statute or the Commission's statement of decision or parameters and guidelines authorize. (Gov. Code section 17558(b).) Moreover, a fair reading of the claiming instructions reveals that they are targeted toward earthquake emergencies. The first paragraph of both the original and amended claiming instructions states that the test claim statutes "require the governing body of each school district and the county superintendent of schools of each to establish an earthquake emergency procedure in each school building under its jurisdiction."[19]

5. Activities performed prior to the period of reimbursement

The State Controller's Office also disallowed reimbursement for emergency procedures plans prepared by the District. The State Controller argues that these plans had been originally drafted prior to the reimbursement period and therefore are not reimbursable:

> The SCO auditor interviewed seven school principals. The principals stated that the emergency preparedness plans had been developed prior to FY 1996-97 and were merely updated each year thereafter. Review of the plans disclosed that the only changes made during the audit period were updates to the fiscal year, the names of the disaster preparedness committee members (including school staff), and the maps.

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[16] *Cal. Drive-in Restaurant Ass'n v. Clark* (1943) 22 Cal.2d 287, 292.

[17] *Culligan Water Conditioning v. State Board of Equalization* (1976) 17 Cal.3d 86, 93.

[18] *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 471.

[19] State Controller's Claiming Instructions.

> The district did not identify employees with assigned responsibility to prepare district earthquake procedures plans and their related costs. The SCO review also disclosed that the emergency preparedness plans relate to disaster preparedness as well as earthquake drills, and not to earthquake drills alone.
>
> Consequently, time include on the Data Collection sheets was unsupported and included time not related to the mandate such as time related to fires, civil defense, and other school emergencies and disasters.[20]

The District counters that "[t]he plans are prepared or reviewed and updated each year and the plans provided to the auditors were the plans in effect during the audit period."[21] While the District is not entitled to reimbursement for any costs incurred prior to the reimbursement period, it is entitled to work done on the plans related to earthquake emergencies that was performed during the reimbursement period.

6. Summary

The District is only entitled to reimbursement for activities related to earthquake emergencies. It appears, however, that some of the District's reimbursement requests involve activities other than earthquake emergency procedures. For example, for one category of activities that the District described as, "Preparing and implementing district earthquake emergency plans and procedures," the documentation shows that for fiscal year 1997-1998, the District sought reimbursement for two hours of time[22] for each of the involved principals, vice principals, nurses, teachers, support staff, and maintenance staff to attend a meeting.

While conducting its audit, the State Controller's Office obtained copies of the agenda for this meeting. The two-hour meeting included 8 numbered topics and a total of 26 bulleted items. One of those bulleted items is entitled "Earthquake." The State Controller's Office noted, "The agenda did not identify whether earthquake procedures were discussed or the time spent discussing them. The SCO requested copies of agendas or meeting minutes for the other schools but none were provided."[23]

The test claim statute mandated school districts to perform activities related to earthquake emergencies, and the Commission's statement of decision clearly reflected this. To the extent the District submitted reimbursement requests for activities not related to earthquakes, the State Controller's Office was justified in reducing claims accordingly. It is not clear from the record how much of the documented time was spent by the District on earthquake-related activities and how much documented time was spent on other activities. Nor is it clear how much of the State Controller's reduction was based on the District's inclusion of activities unrelated to the mandate and how much was based on the State Controller's perceived inadequate documentation. The

[20] SCO Response, p. 7-15.

[21] IRC, p. 5.

[22] The District sought only one hour of time for counselors.

[23] SCO Response, p. 9-15.

State Controller's Office states, "The unallowable costs resulted primarily from lack of documentation substantiating claimed costs."[24]

The Commission finds that the District's reimbursement claims contain costs for activities that go beyond the scope of the mandate and are not reimbursable. A reduction of these costs would be correct and in accordance with the test claim statute, the statement of decision, the parameters and guidelines, and the claiming instructions.

However, because the State Controller's Office cited several reasons for reducing the District's claims to zero, it is impossible to determine from the record how much of the reduction was attributable to the fact that the District requested reimbursement for activities unrelated to earthquake emergencies. Accordingly, this matter must be remanded back to the State Controller's Office so it can determine how much of the claimed activities were attributable to mandated earthquake-related activities.

B. The SCO's August 16, 1999 adjustment of $174,957 to the District's fiscal year 1996-1997 reimbursement claim was appropriate for the costs incurred to pay the salaries of teachers for in-classroom time spent on earthquake preparedness

On August 16, 1999, the State Controller's Office sent the District a letter in which it adjusted the claim by a total of $174,957.[25] The District argues that this was inappropriate:

> The SCO never provided any basis for the adjustment of the amount of $176,739. The amounts claimed by the "District" are the District's costs for salaries and benefits to perform the mandated activities. The SCO had no basis to adjust the claim . . . . [26]

Section V (B) of the parameters and guidelines states "No reimbursement can be claimed for in-classroom teacher time spent on the instruction of students on emergency procedure systems." The documentation submitted by the District to the State Controller's Office indicates that $167,423 in salaries and benefits was being claimed for teacher in-classroom instruction. This activity is prohibited by the clear language of the parameters and guidelines because there are no increased costs incurred by a district for activities that take place during in-classroom time.[27] The Commission finds that the State Controller's Office properly adjusted the claim by this amount plus the 4.5% indirect cost rate attributable to the claimed cost.

C. The documentation submitted by the District support the hours claimed for reimbursement

The District and the State Controller's Office disagree about the documentation that the District must supply to satisfy the requirements of the parameters and guidelines. Section VI of the

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[24] SCO Response, p. 1-15.

[25] According to the SCO, this letter "inadvertently calculated the indirect cost through the desk review to be $9,316 rather than $7,534, an overstatement of $1,782. Consequently, the SCO offset of $176,739 should have been $174,957. The difference was corrected during the SCO audit." (SCO Response, p. 12-15.)

[26] IRC, p. 6.

[27] *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1195.

parameters and guidelines requires that the districts "attach a statement showing the actual increased costs incurred to comply with the mandate . . . ." Section VIII states, "For auditing purposes, all costs claimed may be traceable to source documents and/or worksheets that show evidence of the validity of such costs." This is very general language that provides little guidance as to precisely what documentation the State Controller's Office can properly require from the District.

The District argues that District school personnel performed reimbursable activities and that the District submitted sufficient documentation to meet the requirements of the parameters and guidelines:

> The "District" provided SCO time logs of the actual effort expended by the "District's" personnel on the mandated activities for the period indicated. The time logs (after-the-fact certifications) were completed by the individuals who performed the tasks or by a supervisory official having first hand knowledge of the activity performed by employees. . . . The "District's" method of determining the actual costs of performing the mandated activities is reasonable. In Fiscal Year 1996-97, 87 of the 165 school sites, or approximately 53 percent of the sites, provided time logs. In Fiscal Year 1997-98, 97 of the 169 school sites, or approximately 57% of the sites, provided time logs. The district performed a statistical analysis of the time logs provided by these sites in order to determine the actual time spent by all school site personnel on the mandate. The time claimed for each employee is less than the average and median times that are supported by the statistical analysis. For example, the average and median times for principals for Fiscal Year 1997-98 were 7.35 and 5 hours, respectively, and the time claimed for principals was 2 hours.[28]

The "Data Collection" sheets submitted by the District reflect the estimated time spent on four different activities by seven employee classifications: principals, vice principals, nurses, counselors, teachers, support staff, and maintenance staff. The four activities are as follows:

1. Preparing and implementing the district earthquake emergency plans and procedures;
2. Training all staff in the earthquake emergency plans and procedures;
3. Preparing standard lesson plans for training students in earthquake emergency procedures; and
4. Preparing a standard testing program to ensure that students are properly trained in the plan.

The State Controller's Office believes that the District's data is lacking in a number of ways, as discussed in more detail below. The State Controller's final Audit Report issued in December 2000 states:

> During this audit, the district could not provide adequate documentation substantiating the employees and hours charged to the mandate. Therefore, the SCO disallowed the entire salaries, benefits, and related indirect costs claimed. The only documents provided by the district were: (1) J-200 Summary, which

[28] IRC, p. 4-6.

shows the authorized, excess, and vacant positions for each employee classification; (2) Emergency Procedures Plans, which were not developed during the audit period and encompassed all types of emergencies; and (3) Data Collection Sheets, which show year-end estimates of hours supposedly spent on the mandate during the year.

The hours claimed by the district consisted of the number of authorized positions, plus or minus excess or vacant positions, multiplied by estimated hours. The number of actual employees performing mandated activities was not provided. The district did not maintain workload data throughout the year or any other supportive documentation to substantiate either the estimated hours or whether the hours were spent for activities required under the mandate. Interviews with school site personnel indicated that claimed activities included non-reimbursable full disaster preparedness drills conducted during classroom hours.

The district provided the SCO auditor with Data Collection Sheets as support for the filed claims. These sheets could not be reconciled to the filed claims. The Data Collection Sheets are completed by principals and vice principals of individual schools within the district at the end of each fiscal year. These sheets show only year-end estimates of hours by position classification (not by employee) supposedly spent on the mandate. These sheets report the number of positions (for example, 25 teachers) that participated in the mandate during the fiscal year, multiplied by an estimated number of hours for each activity. No corroborating documentation was provided to the SCO auditor to confirm the information reported on these sheets. Additionally, all schools within the district did not submit Data Collection Sheets to the district.[29]

1. What documentation is required to support a claim that employees performed reimbursable activities?

Section VI (B)(1)(a) of the 1991 amended parameters and guidelines states:

> For those employees whose function is to prepare and implement emergency plans and to provide instruction, *provide a listing of each employee*, describe their function, their hourly rate of pay and related employee benefit costs and the number of hours devoted to their function as they relate to this mandate. (Emphasis added.)

The State Controller's Office states that the District "provided no time records or time logs to support claimed costs" for a number of activities. The State Controller's Office argues, "The Data Collection sheets do not provide the names of each employee or the specific date and time of the charges, as required by the *Amended Parameters and Guidelines* Section VI.B.1(a)."[30] As can be seen from the quoted language above, the parameters and guidelines do not require the "names of each employee" as the State Controller's Office argues; rather, they require a much more general "listing of each employee." Nor do the parameters and guidelines require "the

[29] SCO Audit, p. 3.

[30] SCO Response, p. 5-15.

specific date and time of the charges" as the State Controller's Office argues; rather, they require "the number of hours devoted to their function as they relate to this mandate."[31]

Moreover, the State Controller's Office's proffered interpretation is not consistent with its own claiming instructions. Section 7, Claim Forms and Instructions, of the claiming instructions states:

> Identify the employee(s), *and/or show the classification of the employee(s) involved*, describe the mandated functions performed as these relate to preparing and implementing emergency plans and providing instruction, specify the actual number of hours devoted to the man dated functions, the productive hourly rate, and the related fringe benefits.
>
> Source documents required to be maintained by the claimant may include, but are not limited to, employee time cards and/or cost allocation reports. (Emphasis added.)[32]

While the State Controller's Office overstates the requirements of the parameters and guidelines, as well as its own claiming instructions, it nevertheless raises a critical issue as to what documentation it may properly require so that it can fulfill its responsibility under Government Code section 17561 to audit and, where appropriate, reduce claims that it determines are "excessive or unreasonable."

The District's data collection worksheets do not provide the names of each employee but do provide a listing of each classification of employee (e.g. principal, vice principal) and in some cases the number of hours devoted to the mandated activities by each employee classification. However, the information in the data collection worksheets is not clear. The worksheets reflect data acquired from just over half (53% in FY '96-'97 and 57% in FY 97-98) of all schools within the District to determine how much each school spent on reimbursable activities. The District states that this data was "completed by the individuals who performed the tasks *or by a supervisory official* having first hand knowledge of the activity performed by the employees." (Emphasis added.)[33] Therefore, only some undefined portion of the data was supplied by the individual employees who actually performed the work and who would be in the best position to accurately identify the number of hours they spent on mandated activities.

The District sent worksheets to each school in the District. The District then extrapolated from the data from the schools that responded to arrive at an estimate of the average amount of time spent by each school on reimbursable activities. The District notes that "the time claimed for each employee is less than the average and median times that are supported by the statistical analysis. For example, the average and median times for principals for Fiscal Year 1997-98 were 7.35 and 5 hours, respectively, and the time claimed for principals was two hours."[34] The District apparently somehow derived these figures from the data collection worksheets submitted

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[31] SCO Response, p. 5-15; Amended parameters and guidelines.

[32] Amended claiming instructions, revised 10/98, p. 3.

[33] IRC, p. 4.

[34] IRC, p. 6.

by the schools within the District. The State Controller's Office supplied seven samples of these data collection worksheets from schools within the District.[35]

It is not at all clear how the District arrived at the average and median times it claims are represented in the worksheets. The instructions on the worksheet direct the preparer to indicate which staff members (principals, vice principals, nurses, counselors, teachers, support staff, maintenance personnel, and other) participated in each of the four types of activities described in the worksheet. Beside each classification of staff member, schools are instructed to identify the "approximate amount of time spent on the activity" per year.

Of the seven worksheets in the record, supplied by five different schools within the District, no two are exactly alike. The form worksheet provides very little explanation, and each school filled the worksheet out in its own way. One school's worksheet shows a handwritten number of hours in the "time spent per year" column that corresponds to each classification of employee. In the margin beside some of those numbers are indecipherable calculations. It is not clear if these are the preparer's personal notes or if they are intended to convey some information to the reader.[36]

Another school's worksheet states "15-20 hrs." on the first line at the top of the "time spent per year" column, with no indication of whether that is supposed to be the number of hours spent by the principal or if those hours are supposed to somehow be divided up among all eight employee categories.[37] Cryptically, in the margin to the right of the "time spent per year" column, the preparer has written "2*" with an arrow down the length of the column. Does this mean that the 15-20 hours is to be divided up two hours each between the eight employee categories? If so, that adds up to a total of 16 hours, which makes the "15-20 hrs." irrelevant. The asterisk beside the "2" does not clearly refer to anything in a footnote or anywhere else. In addition, beside the "other" employee classification, the preparer has written "parents" for three of the four mandated activities. One can reasonably presume that this preparer intended to mean that some of the hours spent that year were attributable to parents, whose time would not be reimbursable.

Each of the eight worksheets is signed at the bottom. Two indicate that the signatory is the principal of the school. It is not clear who the other signers are. It is also not clear what process any of the preparers used to compile the information.

2. What type of statistical analysis is allowable?

The State Controller's Office argues that the District used an improper statistical analysis to come up with the average amount of time spent by each employee on reimbursable activities. According to the State Controller's Office:

> [The District's] method of determining the actual costs of performing the mandated activities is not reasonable. In FY 1996-97, 87 of the 165 school sites, or approximately 53 percent of the sites, submitted time logs. In FY 1997-98, 97 of the 169 school sites, or approximately 57 percent of the sites, submitted time

[35] SCO Response.

[36] Ibid.

[37] Ibid.

> logs. The district states that it performed a statistical analysis of the time logs provided by these sites in order to determine the actual time spent by all school site personnel on the mandate. However, the analysis does not meet the requirements for a statistical analysis because the hours from the Data Collection sheets were estimates and, therefore, not verifiable. In addition, the 87 sites for FY 1996-97 and the 97 sites for FY 1997-98 were not randomly selected. This lack of randomness prevents the results of the samples from being projected to the total school sites for both years.[38]

The parameters and guidelines are silent regarding the propriety of using a statistical analysis. While the State Controller's Office argues that the District's statistical analysis is wanting, it cites no authority for this position. Nor does the State Controller's Office provide any discussion of what type of statistical analysis would be acceptable. By stating that the District's statistical analysis is unacceptable, the implication is that statistical analyses are acceptable to the State Controller's Office but that the District's is insufficient. The State Controller's Office's website includes a PDF document entitled "Time-Study Guidelines" that describes the circumstances under which a time study is appropriate.[39] The document, dated June 23, 2008, states:

> In certain cases, a time study may be used as a substitute for continuous records of actual time spent on multiple activities and/or programs. A time study can be used for an activity when the task is repetitive in nature. Activities that require varying levels of effort are not appropriate for time studies.

While it does not appear that the documentation submitted by the District to the State Controller's Office would meet the requirements of the Time-Study Guidelines, those guidelines demonstrate that the State Controller's Office accepts documentation that does not specifically identify every claimed activity.

The District argues that "after-the-fact" certifications are a recognized and acceptable means of determining costs for a cost objective. As one source of authority for its position, the District points to OMB Circular A-87.[40] The District states:

> After-the-fact certifications are a recognized and acceptable means of determining labor costs for a cost objective. The Office of Management and Budget's OMB Circular A-87 and California Department of Education memoranda set forth several types of after-the-fact determinations that are acceptable for federal programs.[41]

The parameters and guidelines do not indicate that either OMB Circular A-87 or memoranda from the California Department of Education are appropriate resources to use to comply with the parameters and guidelines. More importantly, to the extent these resources identified by the

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[38] SCO Response.

38 This link can be found at http://www.sco.ca.gov/Files-ARD-Local/mancost_timestudyguidelines.pdf as of June 3, 2011.

[40] OMB Circular.

[41] SCO Response, p. 5.

District provide useful guidance, the District didn't follow that guidance. For example, OMB Circular A-87, section 11(h), states that personnel activity reports "must be prepared at least monthly and must coincide with one or more pay periods" and "must be signed by the employee." The District makes no attempt to argue that the documentation it supplied meets either of these criteria. Data collection sheets – which are compilations of numerous employees' activities – were prepared at the end of the year and contained only one signature, that of the principal or other school official.

Nevertheless, the District should not be presumed to have the statistical analysis skills of the State Controller's Office. The evidence shows the District performed the activities eligible for reimbursement. There is no dispute that the District acted in good faith. It produced worksheets in accordance with the parameters and guidelines, and it signed its claims under penalty of perjury.

3. How does the *Clovis* decision impact this analysis?

Last year, California's Third District Court of Appeal issued an opinion[42] in which it held that the contemporaneous source document rule (CSDR) applied by the State Controller's Office to a number of mandate reimbursement claims was invalid as an underground regulation. The CSDR states that actual costs must be traceable to source documents that were created at or near the time the actual cost was incurred for the event or activity in question. While the parameters and guidelines at issue here did not include the CSDR, the *Clovis* case nevertheless provides some guidance. The court stated:

> From 1991 until June 2, 2003, the Commission's P & G's for the [Emergency Procedures, Earthquake and Disaster program] required school districts seeking state-mandated reimbursement for employee salary and benefit costs: (1) to "provide a listing of each employee … and the number of hours devoted to their [mandated] function"; and (2) "[f]or auditing purposes, all costs may be traceable to source documents and/or worksheets that show evidence of the validity of such costs." The Controller's [Emergency Procedures, Earthquake and Disaster program-specific] Claiming Instructions, since 1986, have stated that "Source documents required to be maintained by the [reimbursement] claimant may include, but are not limited to, employee time cards and/or cost allocation reports."
>
> . . . .
>
> [W]e conclude that the Controller's CSDR is an underground, unenforceable regulation as applied to the audits of the School Districts' [Emergency Procedures, Earthquake and Disaster programs] for the applicable periods roughly encompassing the fiscal years 1998 to 2003. These audits are invalidated to the extent they used this CSDR.[43]

In this matter, the State Controller's Office did not explicitly apply the CSDR to the District's

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[42] *Clovis Unified School District et al. v. John Chiang, as State Controller* (Clovis) (2010) 188 Cal.App.4th 794.

[43] *Clovis* at p. 806.

claims. Instead, it concluded more generally that "During this audit, the district could not provide adequate documentation substantiating the employees and hours charged to the mandate. Therefore, the SCO disallowed the entire salaries, benefits, and related indirect costs claimed."[44]

Of particular relevance to this matter is the *Clovis* court's finding of substantial evidence to show that prior to the use of the CSDR, the State Controller's Office allowed reimbursement for employee salary and benefit costs based on "an annual accounting of time determined by the number of mandated activities and the average time for each activity."[45]

4. Summary

The parameters and guidelines provided the District with little guidance as to what documentation it should maintain. Section VIII of the parameters and guidelines states, "For auditing purposes, all costs claimed may be traceable to source documents and/or worksheets that show evidence of the validity of such costs." This language did not put the District on notice as to what documentation was required. Moreover, the use of "may" rather than "shall" could lead the District to reasonably believe it was not bound by this directive but could choose to follow it or not.

While the District did not submit documents from the original "sources," namely each employee who performed reimbursable activities, the District did submit data collection worksheets. These worksheets "show evidence" that some costs were incurred even if the evidence is unclear, as discussed above. For several reasons, however, the "validity" of these costs is open to question. First, the primary data from the worksheets was, for the most part, not prepared by the employee who actually performed the mandated activities. OMB Circular A-87 – cited by the District as evidence that after-the-fact determinations are acceptable – requires that the time records be prepared monthly and be signed by the employee who performed the work. The information submitted by the District meets neither of these criteria.

Second, the data collection sheets in the record do not clearly show how much time was spent on the reimbursable activities by each classification of employee. To prepare what the District described as "average" and "mean" times for each employee classification, the District necessarily made assumptions about what the primary data in the worksheets actually meant.

Third, the District received data collection sheets from just over half of all schools within the District. The District then extracted the dubious data from these data collection sheets, and purported to develop a District-wide average number of hours spent by each employee on each of the four mandated activities.

Despite these deficiencies, the Commission finds that the undisputed evidence in the record clearly shows that the District performed reimbursable mandated activities. The District requested schools within the District to prepare worksheets in an effort to maintain evidence of the validity of the costs claimed. More than half of the schools did indeed prepare worksheets. Given the vagueness of the parameters and guidelines, the District could reasonably believe that

[44] SCO Audit, p. 3.

[45] *Clovis* at p. 802.

the data collection sheets were an adequate means of meeting the requirements. The Commission cannot require claimants to meet a standard that they were not on notice they were required to meet. The amended parameters and guidelines simply do not provide clear instructions regarding the type of documentation a claimant must maintain.

In 2002, Commission staff held several workshops with the claimant community and representatives of state agencies, including the State Controller's Office. Participants at the meeting discussed a number of changes to the parameters and guidelines boilerplate language as proposed by the State Controller's Office. On December 18, 2002, the Commission adopted parameters and guidelines amendments for the *School Bus Safety I and II* program and incorporated new language regarding the documentation that claimants must maintain. The following is a comparison between the boilerplate language in the 1991 amended parameters and guidelines applicable to the District in this matter, and the new language added in 2002 (that has subsequently been amended):

1991 amended parameters and guidelines boilerplate language:

> For auditing purposes, all costs claimed may be traceable to source documents and/or worksheets that show evidence of the validity of such costs.

2001 parameters and guidelines boilerplate language:

> Actual costs must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.
>
> Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, training packets, and declarations. . . . Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

Had the District been claiming under the new language, the State Controller's argument that the District's documentation is lacking would be more persuasive. However, that is not the case. The District was bound by the very general language in the 1991 amended parameters and guidelines. The District should not be penalized for being vague and imprecise when it was following the vague and imprecise parameters and guidelines adopted by the Commission.

Accordingly, the Commission finds that the reduction by the State Controller's Office to zero is incorrect because it is arbitrary and not based on the very general language in the parameters and guidelines. Pursuant to section 1185.7 of the Commission's regulations, if the Commission determines that a reimbursement claim has been incorrectly reduced, the Commission is required to send the statement of decision on the incorrect reduction claim to the State Controller's Office and request that the costs in the claim be reinstated.

The Commission remands these reimbursement claims back to the State Controller's Office and requests that it reimburse the District in accordance with this analysis.

D. SCO's fiscal year 1996-1997 reimbursement claim audit was timely

The District argues that the State Controller's Office failed to complete its audit of the District's 1996-1997 reimbursement claim in a timely fashion pursuant to Government Code section 17558.5. The District states:

> Section 17558.5 requires that any audit be completed no later than two years after the end of the calendar year in which the claim was filed or last amended. The district's Fiscal Year 1996-1997 reimbursement claim was filed on November 26, 1997. Therefore, the audit of the Fiscal Year 1996-1997 must have been completed no later than December 31, 1999. The draft audit report, with respect to Fiscal Year 1996-97, was not timely issued and has no force or effect.[46]

The District misstates the law. The version of Government Code section 17558.5(a), in effect at the relevant time states:

> A reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter *is subject to audit* by the Controller no later than two years after the end of the calendar year in which the reimbursement claim is filed or last amended. However, if no funds are appropriated for the program for the fiscal year for which the claim is made, the time for the Controller *to initiate an audit* shall commence to run from the date of the initial payment of the claim. (Stats. 1995, c. 945 (SB 11), emphasis added.)

The District filed its reimbursement claim on November 26, 1997. Pursuant to section 17558.5, the District was "subject to audit by the Controller" until December 31, 1999, two years after the end of the calendar year in which the reimbursement claim was filed. The District seems to be arguing that the "subject to audit" language in section 17558.5 means that the State Controller's Office must *complete* its audit within the two-year timeframe. The State Controller's Office argues that the language means that it must *initiate* its audit within the two-year timeframe.[47]

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[46] IRC, p. 7.

[47] Commission staff reviewed the legislative history of the various bills that led to what ultimately became Government Code section 17558.5. Within the voluminous files at the California State Archives, one can find many individual pieces of information that seem to argue in favor of one conclusion or another, but there is nothing definitive that settles the issue. For example, the files contain support letters and committee analyses that compare the timeframe imposed on the State Controller's Office as a "statute of limitations," similar to the limitations period imposed on auditors from the Internal Revenue Service. One analysis states that the bill "would require that any such audit be completed within four years after the end of the calendar year in which the claim is filed or last amended." These snippets by themselves would mitigate in favor of the conclusion advanced by the District. However, the files also contain snippets of information like a floor statement (which may or may not have actually been read) that the bill "would specify a date upon which the statute of limitations will begin and will provide the Controller with four years after that date to begin an audit." This by itself would mitigate in favor of the conclusion advanced by the State Controller's Office.

The Commission finds from the context of section 17558.5 (a), that the State Controller's interpretation is the better one. While one rule of statutory construction states that the use of differing language in otherwise parallel statutory provisions supports an inference that a difference in meaning was intended, the Commission finds that inference is not supportable in this case.[48]

Section 17558.5(a), is not a model of clarity. However, a careful reading of the language of the first and second sentences reveals that the primary difference between the two is with regards to appropriations. The second sentence clearly refers to situations where funds *are not* appropriated. It can reasonably be inferred from the context that the first sentence, in contrast, refers to situations where funds *are* appropriated. The use of the word "however" to begin the second sentence signals the contrast between these two situations (when funds are appropriated versus when they are not).

There is nothing about the structure or language of the two sentences to suggest that the Legislature intended any other substantive differences between these two parallel sentences. In each situation, when there is an appropriation (first sentence) and when there is not (second sentence), the State Controller's Office must perform some activity within a two-year period. The use in the second sentence of the phrase "the time for the Controller to initiate an audit" refers back to "the time" defined in the first sentence, namely two years. Similarly, the use of "initiate" in the second sentence refers to what the Controller is required to do within the two-year period. Read in this way, the two sentences are parallel. In the first sentence, when there is an appropriation, the time to initiate an audit is two years. In the second sentence, when there is no appropriation, the time to initiate an audit is also two years. The only difference between the two situations is the triggering event (an appropriation) that determines when the two-year period to initiate an audit begins to run.

In 2002, the relevant language of section 17558.5 (a), was amended to read as follows (added text is underlined):

> A reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter is subject to <u>the initiation of an</u> audit by the Controller no later than . . . . (Stats. 2002, ch. 1128 (AB 2834).)

The Commission found nothing in the legislation or the legislative history of AB 2834 to suggest that the underlined language was intended to be anything other than clarifying language. Pursuant to the rules of statutory construction, a clarification of existing law may be applied to transactions predating its enactment without being considered a retroactive application of the law. The clarified law is merely a statement of what the law has always been.[49]

It is generally recognized that an agency's interpretation of its own regulations and governing statutes is entitled to great weight.[50] The *Colmenares* court stated "we are required to give great weight to an administrative agency's interpretation of its own regulations and the statutes under

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[48] *Fairbanks v. Superior Court* (2009) 46 Cal.4th 56, 62.

[49] *McClung, supra,* 34 Cal.4th at 471.

[50] *U.S. v Larionoff* (1977) 431 U.S. 864, 872; p. .; *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019.

which it operates."[51] The Commission interprets section 17558.5(a) to mean that the State Controller's Office was required to initiate an audit no later than two years after the end of the calendar year in which the District's reimbursement claim was filed.

The State Controller's Office states, "the audit was started in October 1999." The District does not dispute this. Accordingly, the Commission finds that the audit was timely because it was initiated within two years after December 31, 1997, the end of the calendar year in which the reimbursement claim was filed.

On June 3, 2011, staff issued the draft staff analysis. No comments were received.

IV. Conclusion

The Commission concludes that the State Controller's Office properly reduced the District's fiscal year 1996-1997 reimbursement claim by $174,957 for the costs incurred to pay the salaries of teachers for in-classroom time spent on earthquake preparedness, because under the 1991 amended parameters and guidelines, no reimbursement can be claimed for in-classroom teacher time. The Commission further concludes that the State Controller's Office properly reduced the District's reimbursement claims to the extent they sought reimbursement for activities not related to earthquake emergencies.

The Commission also concludes that the State Controller's Office incorrectly reduced the remaining costs incurred by San Diego Unified School District in fiscal years 1996-1997 and 1997-1998 for the *Emergency Procedures, Earthquake and Disasters* program.

The Commission remands this claim back to the State Controller's Office to request that it determine the amount of the District's reimbursement claim that is attributable to earthquake emergencies, and reimburse the District for that amount, less the $174,957 for in-classroom time that the State Controller's Office properly reduced.

[51] *Colmenares*, at p. 1029.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE INCORRECT REDUCTION CLAIM ON: Government Code Sections 7570-7588 Statutes 1984, Chapter 1747 (AB 3632) Statutes 1985, Chapter 1274 (AB 882) California Code of Regulations, Title 2, Sections 60000-60610 (Emergency regulations effective January 1, 1986 [Register 86, No. 1], and re-filed June 30, 1986, designated effective July 12, 1986 [Register 86, No. 28 Fiscal Years 1997-1998, 1998-1999, 2000-2001 County of Orange, Claimant.	Case Nos.: 05-4282-I-02 and 09-4282-I-04 *Handicapped and Disabled Students* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5. ARTICLE 7 *(Adopted July 28, 2011)*

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this incorrect reduction claim during a regularly scheduled hearing on July 28, 2011. The claimant did not make an appearance and submitted the case on the record. Mr. Jim Spano appeared for the State Controller's Office.

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

The Commission adopted the staff analysis at the hearing by a vote of 6 to 0 to deny this incorrect reduction claim.

Summary of Findings

This is an incorrect reduction claim filed by the County of Orange regarding reductions made by the State Controller's Office to reimbursement claims for costs incurred in three fiscal years (1997-1998, 1998-1999, and 2000-2001), in the total amount of $2,676,659 to provide medication monitoring services to seriously emotionally disturbed pupils under the *Handicapped and Disabled Students* program.

The *Handicapped and Disabled Students* program was enacted by the Legislature to implement federal law that requires states to guarantee to disabled pupils the right to receive a free and appropriate public education that emphasizes special education and related services, including psychological and other mental health services, designed to meet the pupil's unique educational needs. The program shifted to counties the responsibility and funding to provide mental health services required by a pupil's individualized education plan (IEP).

The State Controller's Office contends that medication monitoring is not a reimbursable activity during the audit period, and did not become reimbursable until fiscal year 2001-2002. The State Controller's Office also argues that the County's first incorrect reduction claim filed for fiscal years 1997-1998 and 1998-1999 was not timely filed.

The County disagrees with the State Controller's Office. The County seeks a determination from the Commission pursuant to Government Code section 17551(d), that the State Controller's Office incorrectly reduced the claim, and requests that the Controller reinstate the $2,676,659 reduced for fiscal years 1997-1998 through 2000-2001.

The Commission finds that the County timely filed the first incorrect reduction claim for the 1997-1998 and 1998-1999 fiscal year costs.

The Commission further finds that the State Controller's Office correctly reduced the County's reimbursement claims for medication monitoring costs incurred in fiscal years 1997-1998, 1998-1999, and 2000-2001. The *Handicapped and Disabled Students* program has a long and complicated history. However, the substantive issue presented in this claim relates to the sole issue of whether providing medication monitoring services is reimbursable in fiscal years 1997-1998, 1998-1999, and 2000-2001. As described in the analysis, the Commission has previously addressed the issue of medication monitoring and decisions have been adopted on the issue. These decisions are now final and must be followed here. Thus, the Commission finds that the County is not eligible for reimbursement for providing medication monitoring services until July 1, 2001.

BACKGROUND

This is an incorrect reduction claim filed by the County of Orange for costs incurred in three fiscal years (1997-1998, 1998-1999, and 2000-2001) to provide medication monitoring services to seriously emotionally disturbed pupils under the *Handicapped and Disabled Students* program.[1] The State Controller's Office reduced the County's reimbursement claims in the amount of $2,676,659, arguing that medication monitoring is not a reimbursable activity during the audit period, and did not become reimbursable until fiscal year 2001-2002.

Position of the Parties

Position of the State Controller's Office

The State Controller's Office contends that medication monitoring is not a reimbursable activity under the parameters and guidelines in effect during the audited years. The State Controller's Office further argues that the County's incorrect reduction claim filed for the fiscal year

[1] The reduction of costs for medication monitoring for these fiscal years are as follows:

Fiscal year	Amount of Reduction
1997-1998	$ 759,114
1998-1999	$ 870,701
2000-2001	$1,046,844
Total	$2,676,659

1997-1998 and 1998-1999 costs (05-4282-I-02) was filed after the time required in the Commission's regulations, and should therefore not be considered by the Commission.

Claimant's Position

The County disagrees with the reduction of costs by the State Controller's Office and contends that medication monitoring is a reimbursable activity during the audit period in question. The County argues that the parameters and guidelines state that "any" costs related to the mental health treatment services rendered under the Short-Doyle Act are reimbursable and, while "medication monitoring" is not specifically identified, it is not excluded either. The County asserts that "medication monitoring" has always been part of the treatment services rendered under the Short-Doyle Act. The County further asserts that the Commission clarified this point when it adopted the parameters and guidelines in *Handicapped and Disabled Students II*, specifically listing "medication monitoring" as a reimbursable activity.

The County further argues that its first incorrect reduction claim on this issue (05-4282-I-02) was filed within the statute of limitations.

The County seeks a determination from the Commission pursuant to Government Code section 17551(d), that the State Controller's Office incorrectly reduced the claim, and requests that the Controller reinstate the $2,676,659 reduced for fiscal years 1997-1998, 1998-1999, and 2000-2001.

II. COMMISSION FINDINGS

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

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

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

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

A. The State Controller's Office correctly reduced the County's reimbursement claims for the costs incurred to provide medication monitoring services in fiscal years 1997-1998, 1998-1999, and 2000-2001.

Costs incurred for this program in fiscal years 1997-1998, 1998-1999, and 2000-2001 are eligible for reimbursement under the parameters and guidelines for *Handicapped and Disabled Students* (CSM 4282). The test claim in *Handicapped and Disabled Students* was filed on Government Code section 7570 et seq., as added and amended by Statutes 1984 and 1985, and on the initial emergency regulations adopted in 1986 by the Departments of Mental Health and

Education to implement this program.[2] In 1990 and 1991, the Commission approved the test claim and adopted parameters and guidelines, authorizing reimbursement for mental health treatment services as follows:

> Ten (10) percent of any costs related to mental health treatment services rendered under the Short-Doyle Act:
>
> 1. The scope of the mandate is ten (10) percent reimbursement.
> 2. For each eligible claimant, the following cost items, for the provision of mental health services when required by a child's individualized education program, are ten (10) percent reimbursable (Gov. Code, § 7576):
>   a. Individual therapy;
>   b. Collateral therapy and contacts;
>   c. Group therapy;
>   d. Day treatment; and
>   e. Mental health portion of residential treatment in excess of the State Department of Social Services payment for the residential placement.
> 3. Ten (10) percent of any administrative costs related to mental health treatment services rendered under the Short-Doyle Act, whether direct or indirect.

While the County acknowledges that medication monitoring is not expressly listed as a reimbursable activity in the parameters and guidelines, the County argues that medication monitoring is a reimbursable activity and that the parameters and guidelines authorize reimbursement for "any costs related to mental health treatment services rendered …."

The County's interpretation of the issue, however, conflicts with prior final decisions of the Commission on the issue of medication monitoring.

The *Handicapped and Disabled Students* (CSM 4282) decision addressed Government Code section 7576 and the implementing regulations as they were originally adopted in 1986. Government Code section 7576 required the county to provide psychotherapy or other mental health services when required by a pupil's IEP. Former section 60020 of the Title 2 regulations defined "mental health services" to include the day services and outpatient services identified in sections 542 and 543 of the Department of Mental Health's Title 9 regulations. (Former Cal. Code Regs., tit. 2, § 60020(a).) Section 543 defined outpatient services to include "medication." "Medication" was defined to include "prescribing, administration, or dispensing of medications necessary to maintain individual psychiatric stability during the treatment process," and "shall include the evaluation of side effects and results of medication."

In 2004, the Commission was directed by the Legislature to reconsider its decision in *Handicapped and Disabled Students*. On reconsideration of the program in *Handicapped and Disabled Students* (04-RL-4282-10), the Commission found that the phrase "medication

[2] California Code of Regulations, title 2, division 9, sections 60000-60610 (Emergency Regulations filed December 31, 1985, designated effective January 1, 1986 (Register 86, No. 1) and re-filed June 30, 1986, designated effective July 12, 1986 (Register 86, No. 28)).

monitoring" was not included in the original test claim legislation. "Medication monitoring" was added to the regulations for this program in 1998 (Cal. Code Regs. tit. 2, § 60020). The Commission determined that:

> "Medication monitoring" is part of the new, and current, definition of "mental health services" that was adopted by the Departments of Mental Health and Education in 1998. The current definition of "mental health services" and "medication monitoring" is the subject of the pending test claim, *Handicapped and Disabled Students II* (02-TC-40 and 02-TC-49), and will not be specifically analyzed here.[3]

Thus, the Commission did not approve reimbursement for medication monitoring in *Handicapped and Disabled Students* (CSM 4282) or on reconsideration of that program (04-RL-4282-10).

The 1998 regulations were pled in *Handicapped and Disabled Students II* (02-TC-40/02-TC-49), however. *Handicapped and Disabled Students II* was filed in 2003 on subsequent statutory and regulatory changes to the program, including the 1998 amendments to the regulation that defined "mental health services." On May 26, 2005, the Commission adopted a statement of decision finding that the activity of "medication monitoring," as defined in the 1998 amendment of section 60020, constituted a new program or higher level of service *beginning July 1, 2001*. The Commission's decision in *Handicapped and Disabled Students II* states the following:

> The Department of Finance argues that "medication monitoring" does not increase the level of service provided by counties. The Department states the following:
>
> > It is our interpretation that there is no meaningful difference between the medication requirements under the prior regulations and the new regulations of the test claim. The existing activities of "dispensing of medications, and the evaluation of side effects and results of medication" are in fact activities of medication monitoring and seem representative of all aspects of medication monitoring. To the extent that counties are already required to evaluate the "side effects and results of medication," it is not clear that the new requirement of "medication monitoring" imposes a new or higher level of service. [footnote omitted.]
>
> The Commission disagrees with the Department's interpretation of section 60020, subdivisions (i) and (f), of the regulations, and finds that "medication monitoring" as defined in the regulation increases the level of service required of counties.
>
> The same rules of construction applicable to statutes govern the interpretation of administrative regulations. [Footnote omitted.] Under the rules of statutory construction, it is presumed that the Legislature or the administrative agency intends to change the meaning of a law or regulation when it materially alters the language used. [Footnote omitted.] The courts will not infer that the intent was

[3] Statement of decision, *Reconsideration of Handicapped and Disabled Students* (04-RL-4282-10), page 42.

only to clarify the law when a statute or regulation is amended unless the nature of the amendment clearly demonstrates the case. [Footnote omitted.]

In the present case, the test claim regulations, as replaced in 1998, materially altered the language regarding the provision of medication. The activity of "dispensing" medications was deleted from the definition of mental health services. In addition, the test claim regulations deleted the phrase "evaluating the side effects and results of the medication," and replaced the phrase with "monitoring of psychiatric medications or biologicals as necessary to alleviate the symptoms of mental illness." The definitions of "evaluating" and "monitoring" are different. To "evaluate" means to "to examine carefully; appraise."[4] To "monitor" means to "to keep watch over; supervise."[5] The definition of "monitor" and the regulatory language to monitor the "psychiatric medications or biologicals as necessary to alleviate the symptoms of mental illness" indicate that the activity of "monitoring" is an ongoing activity necessary to ensure that the pupil receives a free and appropriate education under federal law. This interpretation is supported by the final statement of reasons for the adoption of the language in section 60020, subdivision (f), which state that the regulation was intended to make it clear that "medication monitoring" is an educational service that is provided pursuant to an IEP, rather than a medical service that is not allowable under the program.[6]

Neither the Department of Mental Health nor the Department of Education, agencies that adopted the regulations, filed substantive comments on this test claim. Thus, there is no evidence in the record to contradict the finding, based on the rules of statutory construction, that "medication monitoring" increases the level of service on counties.

Therefore, the Commission finds that the activity of "medication monitoring," as defined in section 60020, subdivisions (f) and (i), constitutes a new program or higher level of service.[7]

In 2001, the Counties of Los Angeles and Stanislaus filed separate requests to amend the parameters and guidelines for the original program in *Handicapped and Disabled Students* (CSM 4282). As part of the requests, the Counties wanted the Commission to apply the 1998 regulations, including the provision of medication monitoring services, to the original parameters and guidelines. On December 4, 2006, the Commission denied the request, finding that the 1998 regulations were not pled in original test claim, and cannot by law be applied retroactively to the original parameters and guidelines in *Handicapped and Disabled Students* (CSM 4282). The analysis adopted by the Commission on the issue states the following:

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[4] Webster's II New College Dictionary (1999) page 388.

[5] *Id.* at page 708.

[6] Final Statement of Reasons, page 7.

[7] Statement of decision, *Handicapped and Disabled Students II* (02-TC-40/02-TC-49), pages 37-39.

The counties request that the Commission amend the provision in the parameters and guidelines for mental health services to include the current regulatory definition of "mental health services," medication monitoring, and crisis intervention. The counties request the following language be added to the parameters and guidelines:

> For each eligible claimant, the following cost items, for the provision of services when required by a child's individualized education program in accordance with Section 7572(d) of the Government Code: psychotherapy (including outpatient crisis-intervention psychotherapy provided in the normal course of IEP services when a pupil exhibits acute psychiatric symptoms, which, if untreated, presents an imminent threat to the pupil) as defined in Section 2903 of the Business and Professions Code provided to the pupil individually or in a group, collateral services, medication monitoring, intensive day treatment, day rehabilitation, and case management are reimbursable (Government Code 7576). "Medication monitoring" includes medication support services with the exception of the medications or biologicals themselves and laboratory work. Medication support services include prescribing, administering, dispensing and monitoring of psychiatric medications or biologicals necessary to alleviate the symptoms of mental illness. [Footnote omitted.]

The counties' proposed language, however, is based on regulations amended by the Departments of Mental Health and Education effective July 1, 1998. (Cal. Code Regs., tit. 2, § 60020, subds. (i) and (f).) The 1998 regulations were considered by the Commission in *Handicapped and Disabled Students II* (02-TC-40/02-TC-49), and approved for the following activities beginning July 1, 2001:

- Provide individual or group psychotherapy services, as defined in Business and Professions Code section 2903, when required by the pupil's IEP. This service shall be provided directly or by contract at the discretion of the county of origin. (Cal. Code Regs., tit. 2, § 60020, subd. (i).)
- Provide medication monitoring services when required by the pupil's IEP. "Medication monitoring" includes all medication support services with the exception of the medications or biologicals themselves and laboratory work. Medication support services include prescribing, administering, and monitoring of psychiatric medications or biologicals as necessary to alleviate the symptoms of mental illness. This service shall be provided directly or by contract at the discretion of the county of origin. (Cal. Code Regs., tit. 2, § 60020, subds. (f) and (i).)

The Commission's findings in *Handicapped and Disabled Students II* (02-TC-40/02-TC-49), approving reimbursement for medication monitoring and psychotherapy services as currently defined in the regulations were not included in the original test claim (CSM 4282) and, thus, cannot be applied retroactively to the original parameters and guidelines. Based on Government Code section 17557, subdivision (e), the reimbursement period for the activities

> approved by the Commission in *Handicapped and Disabled II* begins July 1, 2001.
>
> Therefore, the proposed amendment to add language based on the current definition of "mental health services," including medication monitoring, is inconsistent with, and not supported by the Commission's original 1990 Statement of Decision in *Handicapped and Disabled Students* (CSM 4282).[8]

These decisions of the Commission are final, binding decisions and were never challenged by the parties. Once "the Commission's decisions are final, whether after judicial review or without judicial review, they are binding, just as judicial decisions."[9] Accordingly, based on these decisions, counties are not eligible for reimbursement for medication monitoring until July 1, 2001.

Therefore, the State Controller's Office correctly reduced the reimbursement claims of the County of Orange for costs incurred in fiscal years 1997-1998, 1998-1999, and 2000-2001 to provide medication monitoring services to seriously emotionally disturbed pupils under the *Handicapped and Disabled Students* program.

B. The County's first incorrect reduction claim (05-4282-I-02) was filed within the time required by the Commission's regulations and, thus, the Commission has jurisdiction to determine the claim.

The State Controller's Office argues that the County failed to file the incorrect reduction claim for fiscal years 1997-1998 and 1998-1999 (05-4282-I-02) within the time required by the Commission's regulations. The Controller's Office states the following:

> Section 1185, subdivision (b) states that "[a]ll incorrect reduction claims shall be filed with the commission no later than three (3) years following the date of the Office of State Controller's remittance advice or other notice of adjustment notifying the claimant of a reduction." In this case, the remittance advice and accompanying letter were dated April 28, 2003 (See pages 2-5 of Exhibit C of the Claimant's IRC). Therefore, the last date to file an IRC was April 28, 2003. However, the Claimant did not file its claim until May 1, 2003, outside the time frame provided, and thus, the IRC is precluded by the limitations provision of Section 1185.

Using the date of the remittance advice, the County's filing is timely. Section 1181.1(g) of the Commission's regulations defines "filing date" as follows:

> . . . the date of delivery to the commission office during normal business hours. For purposes of meeting the filing deadlines required by statute, the filing is timely if:
>
> (1) The filing is submitted by certified or express mail or a common carrier promising overnight delivery, and

[8] Analysis adopted by Commission on December 4, 2006, in 00-PGA-03/04.

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

(2) The time for its filing had not expired on the date of its mailing by certified or express mail as shown on the postal receipt or postmark, or the date of its delivery to a common carrier promising overnight deliver as shown on the carrier's receipt.

Section 1181.2 further states that "service by mail is complete when the document is deposited in the mail."

In this case, the County mailed the incorrect reduction claim (05-4282-I-02) by express mail with a postmark of April 28, 2006, three years to the day of the remittance advice. Although the Commission received the filing on May 1, 2006, the claim would still be considered timely, when using the date of the remittance advice. The time for filing had not expired when the claim was deposited in the mail on April 28, 2006.

However, at the time the County filed its incorrect reduction claim, section 1185 of the Commission's regulations provided that the three year deadline to file an incorrect reduction claim starts to run from "the date of the Office of State Controller's remittance advice *or other notice of adjustment notifying the claimant of a reduction*." The audit report for the County's reimbursement claims filed for fiscal years 1997-1998 and 1998-1999 identifies the Controller's intention to reduce the County's claims for medication monitoring and is dated December 26, 2002, four months earlier than the remittance advice. Three years from the date of the audit report would be December 26, 2005 (more than four months before the County filed its claim).

The Controller's Office does not base its statute of limitations argument on the date of the audit report, however. Moreover, section 1185 of the Commission's regulations does not require the running of the time period from when a claimant *first* receives notice; but simply states that the time runs from either the remittance advice *or* other notice of adjustment.

Thus, when viewed in a light most favorable to the County, and based on the policy determined by the courts favoring the disposition of cases on their merits rather than on procedural grounds,[10] staff finds that the County timely filed the incorrect reduction claim for the fiscal year 1997-1998 and 1998-1999 costs.

III. CONCLUSION

The Commission concludes that the State Controller's Office correctly reduced the County's reimbursement claims for costs incurred in fiscal years 1997-1998, 1998-1999, and 2000-2001, for providing medication monitoring services to seriously emotionally disturbed pupils under the *Handicapped and Disabled Students* program.

[10] *O'Riordan v. Federal Kemper Life Assurance* (2005) 36 Cal.4th 281, 284; *California Department of Corrections and Rehabilitation v. State Personnel Board* (2007) 147 Cal.App.4th 797, 805.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE INCORRECT REDUCTION CLAIM ON: Government Code Sections 7570-7588 Statutes 1984, Chapter 1747 (AB 3632); Statutes 1985, Chapter 1274 (AB 882); Statutes 1994, Chapter 1128 (AB 1892); Statutes 1996, Chapter 654 (AB 2726); California Code of Regulations, Title 2, Sections 60000-60610 (Emergency regulations effective January 1, 1986 [Register 86, No. 1], and re-filed June 30, 1986, designated effective July 12, 1986 [Register 86, No. 28]; and Emergency regulations effective July 1, 1998 [Register 98, No. 26], final regulations effective August 9, 1999 [Register 99, No. 33]) Fiscal Years 2003-2004, 2004-2005, and 2005-2006 County of Santa Clara, Claimant.	Case No.: 09-4282-I-05 *Handicapped and Disabled Students* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5. ARTICLE 7 *(Adopted on May 26, 2011)*

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this incorrect reduction claim during a regularly scheduled hearing on May 26, 2011. Greta Hansen and Juniper Downs appeared for the County of Santa Clara. Shawn Silva and Chris Ryan appeared for the State Controller's Office. Charles Anders and Willie Deon appeared for the Department of Mental Health.

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

The Commission adopted the staff analysis at the hearing by a vote of five to one to partially approve this incorrect reduction claim.

Summary of Findings

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

The *Handicapped and Disabled Students* program was enacted by the Legislature to implement federal special education law (Individuals with Disabilities Education Act, or IDEA) that requires states to guarantee to disabled pupils the right to receive a free and appropriate public education that emphasizes special education and related services, including psychological and other mental health services, designed to meet the pupil's unique educational needs. The program shifted to counties the responsibility and funding to provide mental health services required by a pupil's individualized education plan (IEP).

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

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

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

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

BACKGROUND

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

Federal Special Education Law

The *Handicapped and Disabled Students* program (also known as the "AB 3632" program) was initially enacted in 1984 and 1985 as the state's response to federal legislation (Individuals with Disabilities Education Act, or IDEA) that guaranteed to disabled pupils, including those with mental health needs, the right to receive a free and appropriate public education, including psychological and other mental health services, designed to meet the pupil's unique educational needs.

Special education is defined under the IDEA as "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.[1] To be eligible for services under the IDEA, a child must be between the ages of three and twenty-one and have a qualifying disability.[2] If it is suspected that a pupil has a qualifying disability, the Individual Education Program, or IEP, process begins. The IEP is a written statement for a disabled child that is developed and implemented in accordance with federal IEP regulations.[3] Pursuant to federal regulations on the IEP process, the child must be evaluated in all areas of suspected handicaps by a multidisciplinary team. Parents also have the right to obtain an independent assessment of the child by a qualified professional. Local educational agencies are required to consider the independent assessment as part of their educational planning for the child.

A child that is assessed during the IEP process as "seriously emotionally disturbed" has a qualifying disability under the IDEA.[4] "Seriously emotionally disturbed" children are children who have an inability to learn that cannot be explained by intellectual, sensory, or health factors; who are unable to build or maintain satisfactory interpersonal relationships with peers and teachers; who exhibit inappropriate types of behavior or feelings under normal circumstances; who have a general pervasive mood of unhappiness or depression; or who have a tendency to develop physical symptoms or fears associated with personal or school problems. One or more of these characteristics must be exhibited over a long period of time and to a marked degree, and must adversely affect educational performance in order for a child to be classified as "seriously emotionally disturbed." Schizophrenic children are included in the "seriously emotionally disturbed" category. Children who are socially maladjusted are not included unless they are otherwise determined to be emotionally disturbed.[5]

Related services designed to assist the handicapped child to benefit from special education include psychological services counseling, and such developmental, corrective, and other supportive services) as may be required to assist a handicapped child to benefit from special education.[6]

Each public agency must provide special education and related services to a disabled child in accordance with the IEP. [7] In addition, each public agency must have an IEP in effect at the beginning of each school year for every disabled child who is receiving special education from

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

[2] Title 20 United States Code section 1412.

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

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

[5] Title 34 Code of Federal Regulations section 300.7.

[6] Title 20 United States Code section 1401; Title 34 Code of Federal Regulations section 300.34.

[7] Title 34 Code of Federal Regulations section 300.323.

that agency. The IEP must be in effect before special education and related services are provided, and special education and related services set out in a child's IEP must be provided as soon as possible after the IEP is finalized. Each public agency shall initiate and conduct IEP meetings to periodically review each child's IEP and, if appropriate, revise its provisions. A meeting must be held for this purpose at least once a year.

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

Before the enactment of the *Handicapped and Disabled Students* program, the state adopted a plan to comply with federal law. Under prior law, the state and the local educational agencies (school districts and county offices of education) provided all related services, including mental health services, to children with disabilities. The responsibility for supervising special education and related services was delegated to the Superintendent of Public Instruction. Local educational agencies (LEAs) were financially responsible for the provision of mental health services required by a pupil's IEP. [8]

The *Handicapped and Disabled Students* program became effective on July 1, 1986 and shifted the responsibility and funding of mental health services required by a pupil's IEP to county mental health departments. A test claim on *Handicapped and Disabled Students* (CSM 4282) was filed on Government Code section 7570 et seq., as added and amended by Statutes 1984 and 1985, and on the initial emergency regulations adopted by the Departments of Mental Health and Education to implement this program.[9]

In 1990, the Commission adopted a statement of decision approving the *Handicapped and Disabled Students* test claim (CSM 4282) as a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for the reimbursement period beginning July 1, 1986. The Commission found that the activities of providing mental health assessments; participation in the IEP process; and providing psychotherapy and other mental health treatment services were reimbursable and that providing mental health treatment services was funded as part of the Short-Doyle Act,[10] based on a cost sharing formula with the state. Beginning July 1, 2001, however, the 90 percent-10 percent cost sharing ratio for providing psychotherapy and other mental health treatment services no longer applies and counties are entitled to receive reimbursement for 100 percent of the costs to perform these services.[11]

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

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

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[8] Education Code sections 56000 et seq.

[9] California Code of Regulations, title 2, division 9, sections 60000-60610 (Emergency Regulations filed December 31, 1985, designated effective January 1, 1986 (Register 86, No. 1) and re-filed June 30, 1986, designated effective July 12, 1986 (Register 86, No. 28).

[10] Former Welfare and Institutions Code sections 5600 et seq.

[11] Statutes 2002, chapter 1167 (AB 2781, §§ 38, 41).

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

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

    a. Individual therapy;

    b. Collateral therapy and contacts;

    c. Group therapy;

    d. Day treatment; and

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

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

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

In 2004, the Legislature directed the Commission to reconsider *Handicapped and Disabled Students* (CSM 4282). (Stats. 2004, ch. 493 (SB 1895).) In May 2005, the Commission adopted a statement of decision on reconsideration (04-RL-4282-10), and determined that the original statement of decision correctly concluded that the 1984 and 1985 test claim statutes and the original regulations adopted by the Departments of Mental Health and Education impose a reimbursable state-mandated program on counties pursuant to article XIII B, section 6. The Commission concluded, however, that the 1990 statement of decision did not fully identify all of the activities mandated by the state or the offsetting revenue applicable to the program. Thus, for costs incurred beginning July 1, 2004, the Commission identified the activities expressly required by the test claim statutes and regulations that were reimbursable, identified the offsetting revenue applicable to the program, and updated the new funding provisions enacted in 2002 that required 100 percent reimbursement for mental health treatment services. The Commission further concluded that, based on the plain language of the statute directing reconsideration, the period of reimbursement for its decision on reconsideration would begin July 1, 2004.

On reconsideration, the Commission agreed with its earlier decision that Government Code section 7576 and the initial regulations adopted by the Departments of Mental Health and Education required counties to provide psychotherapy or other mental health treatment services to a pupil, either directly or by contract, when required by the pupil's IEP. The Commission further found that the regulations defined "psychotherapy and other mental health services" to include the day services and outpatient services identified in sections 542 and 543 of the Department of Mental Health title 9 regulations.[12] These services included day care intensive services, day care habilitative (counseling and rehabilitative) services, vocational services, socialization services, collateral services, assessment, individual therapy, group therapy, medication (including the prescribing, administration, or dispensing of medications, and the evaluation of side effects and results of the medication), and crisis intervention.

[12] Former California Code of Regulations, title 2, section 60020, subdivision (a).

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

> Provide psychotherapy or other mental health treatment services, as defined in regulations, when required by the IEP (Gov. Code, § 7576; Cal. Code Regs., tit. 2, §§ 60020, subd. (a), 60200, subds. (a) and (b).)
>
> - Providing psychotherapy or other mental health services identified in a pupil's IEP, as defined in sections 542 and 543 of the Department of Mental Health regulations. However, the activities of providing vocational services, socialization services, and crisis intervention to pupils, and dispensing medications necessary to maintain individual psychiatric stability during the treatment process, do not constitute a state-mandated new program or higher level of service.

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

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

In *Handicapped and Disabled Students II* (02-TC-40/02-TC-49), the Commission found that the regulatory definition of "mental health services" changed as follows:

> "Mental health services" means mental health assessment and the following services when delineated on an IEP in accordance with Section 7572(d) of the Government Code: psychotherapy as defined in Section 2903 of the Business and Professions Code provided to the pupil individually or in a group, collateral services, medication monitoring, intensive day treatment, day rehabilitation, and case management. These services shall be provided directly or by contract at the discretion of the community mental health service of the county of origin.

The Commission found that the following activities imposed a new program or higher level of service: provide case management services and individual or group psychotherapy services, as defined in Business and Professions Code section 2903, when required by the pupil's IEP. This service shall be provided directly or by contract at the discretion of the county of origin.

The Commission further found that section 60020 of the test claim regulations continued to include mental health assessments, collateral services, intensive day treatment, and day rehabilitation within the definition of "mental health services."[13]

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

1. Provide case management services and individual or group psychotherapy services, as defined in Business and Professions Code section 2903, when required by the pupil's IEP. This service shall be provided directly or by contract at the discretion of the county of origin. (Cal. Code Regs., tit. 2, § 60020, subd. (i).)
2. *Beginning July 1, 2004*, Provide mental health assessments, collateral services, intensive day treatment, and day rehabilitation services when required by the pupil's IEP. These services shall be provided directly or by contract at the discretion of the county of origin. (Cal. Code Regs., tit. 2, § 60020, subd. (j).)

All parameters and guidelines authorize reimbursement for providing psychotherapy and other mental health treatment services by using either the standard direct cost reporting method or the cost report method. The cost report method was included in the parameters and guidelines at the request of the State Controller's Office for the following reasons:

> The majority of claimants use this method to claim costs for the mental health portion of their claims. The resulting costs represent actual costs consistent with the cost accounting methodology used to report overall mental health costs to the State Department of Mental Health. The method is also consistent with how counties contract with mental health service vendors to provide services.[14]

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

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

> Under this claiming method, the mandate reimbursement claim is still submitted on the State Controller's claiming forms in accordance with claiming instructions. A complete copy of the annual cost report, including all supporting schedules attached to the cost report as filed with the Department of Mental Health, must also be filed with the claim forms submitted to the State Controller.

According to the State Controller's Office and Department of Mental Health, the cost report method identifies various services by mode and service function, and accumulates associated

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[13] Exhibit A, statement of decision, *Handicapped and Disabled Students II* (02-TC-40/49), page 387, 422-423. (Exhibit and page number citations in this decision reference the Commission's record on the incorrect reduction claim [May 26, 2011 hearing, Item 10].)

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

units of service relative to each service type. The costs are reported in accordance with Medi-Cal definitions because a portion of the units of service provided relative to each cost category are for Medi-Cal eligible clients. For each mental health service claimed, the county computes its direct costs by multiplying the corresponding units of service by the applicable unit rate.[15]

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

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

On June 23, 2008, the Department issued an all county letter (DMH Information Notice No. 08-15) to clarify the funding of mental health rehabilitation services for children in the "AB 3632" program. The letter states that "Mental health services may include mental health rehabilitation services when such services are determined to be the most appropriate in meeting a student's specialized needs." The letter further identifies funding sources for the provision of mental health rehabilitation services, including Medi-Cal, IDEA funds, and state general funds distributed by the Department of Mental Health.[16]

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

> In February 2005, Los Angeles County Department of Mental Health (County) submitted a declaration to the Commission after reviewing a January 20, 2005 Commission Staff Analysis regarding a Reconsideration of the HDS Program (04-RL-4282-10). [Footnote omitted.] In that declaration, the County asserted that "Rehabilitation," as defined in Section 1810.243 of the Title 9 of the California Code of Regulations [footnote omitted], should be included in the array of mental health services available to children served through the HDS program. [Footnote omitted.]
>
> On May 26, 2005, the Commission on State Mandates issued a Final Staff Analysis that addressed the County's assertion. In footnote #103, beginning on page SA-39 of the Final Staff Analysis, Commission Staff disagreed with the County's request. In part, footnote #103 reads:
>
> > … The plain language of test claim regulations (Cal. Code Regs., tit. 2, §§ 60000 et seq.) does not require or mandate counties to perform the activities defined by section 1810.243 of the Department's title 9 regulations. In addition, the test claim regulations do not reference section 1810.243 of the Department's title 9 regulations for any definition relevant to the program at issue in this case.

[15] The Commission has not approved any unit costs or reasonable reimbursement methodologies with respect to the *Handicapped and Disabled Students* program.

[16] Exhibit A, page 220.

> On October 26, 2006, the Commission on State Mandates adopted consolidated Parameters and Guidelines for the HDS, HDS II, and SED Pupils: Out-of-State Mental Health Services consolidated program, which identifies reimbursable activities under this program. However, the Parameters and Guidelines do not specifically exclude rehabilitation, as a mental health service, from the list of reimbursable activities. Page 9 of the Parameters and Guidelines states "*When providing psychotherapy or other mental health services, the activities of crisis intervention, vocational services, and socialization services are not reimbursable*" but makes no mention of rehabilitation. Rehabilitation services are also not mentioned in the list of mental health services eligible for reimbursement. However, DMH questions the need to specifically identify rehabilitation as a particular type of mental health service allowable under this program. Pursuant to the Final Statement of Reasons for Section 1810.242 of Title 9 of the California Code of Regulations, rehabilitation is an essential component of many mental health services.[17]

The Commission's Chief Legal Counsel responded to the Department's letter on February 27, 2009, informing the Department that the Commission no longer had jurisdiction over the test claims for *Handicapped and Disabled Students,* and that the statement of decision on reconsideration was adopted and was not challenged by the parties. Thus, the statement of decision on reconsideration was a final decision of the Commission and the Commission no longer had authority to consider it. The letter informed the Department that a local agency or the State could file a written request with the Commission to amend the parameters and guidelines as a way to get clarification of the issue presented.[18] To date, there has not been a request filed with the Commission to amend the parameters and guidelines.

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

> Certain rehabilitation service activities allowable for reimbursement under the AB 3632 program continue to be under dispute based on rulings by the Commission on State Mandates. DMH is working to resolve these issues with county mental health departments, the California Department of Education, the Commission on State Mandates, and the Office of the State Controller to ensure consistency in the provision of mental health services required by a pupil's Individualized Education Plan (IEP) and the identification of appropriate funding sources.
>
> This rescission notices does not change existing Federal and State requirements governing the AB 3632 program nor does it change existing funding sources. All existing laws and regulations are still applicable when administering the AB 3632 program. The county mental health departments' obligations and responsibilities under Sections 7570 et seq. of Chapter 26.5 of the California Government Code and Sections 60000 et seq. of Division 9 of Title 2 of the California Code of

[17] Exhibit I.

[18] Exhibit A, pages 231-232.

> Regulations have not changed. For further guidance on allowable service activities under the AB 3632 program, please see the Consolidated Parameters and Guidelines adopted by the Commission on State Mandates on October 26, 2006 …
>
> Pursuant to Section 300.101 of the Code of Federal Regulations (CFR), a Free Appropriate Public Education (FAPE) must be available to all children residing in the State between the ages of 3 and 21. The mental health services of an IEP must constitute an offer of FAPE. Pursuant to Section 300.103(c) of the CFR, there should be no delay in implementing the child's IEP, including any case in which the payment source for providing or paying for special education and related services to the child is being determined.[19]

On August 28, 2009, the Department of Mental Health issued a written summary of options for possible amendments to the Title 2 regulations that implement the *Handicapped and Disabled Students* program. The summary states that the Commission adopted parameters and guidelines that do not include rehabilitation services as a type of mental health service eligible for reimbursement. The summary further states that "the decision to exclude rehabilitation services from reimbursement was based on the exclusion of reference to 'rehabilitation' in the definition of 'mental health services' in CCR Title 2, Section 60020(i)." The summary identifies four options for defining "rehabilitation services" within the scope of the *Handicapped and Disabled Students* program.[20]

Position of the Parties

Claimant's Position

For fiscal years 2003-2004 through 2005-2006, the County of Santa Clara claimed reimbursement for costs to provide outpatient mental health rehabilitation services to children with disabilities pursuant to the pupils' IEPs through the following contractors: Gardner Family Care Corporations; AchieveKids; EMQ FamiliesFirst; Rebekah Childrens' Services; and Asian Americans for Community Involvement. The costs were claimed under the "treatment services" category of the claim and, according to the County, total approximately $8.6 million for the three fiscal years in question.[21]

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[19] Exhibit A, 233-234.

[20] Exhibit F.

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

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

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

- The parameters and guidelines specifically identify "day rehabilitation" as a reimbursable mental health service.
- The Department of Mental Health's exclusion of vocational and socialization services from the definition of "mental health services" under the program is not material, since the County's rehabilitation services do not consist of vocational and socialization services.
- Contrary to the Controller's assertions, the 2005 statement of decision does not define mental health rehabilitation services as non-reimbursable.
- Whether the County's rehabilitation services fall within the broad Medi-Cal definition of "rehabilitation" has no bearing on whether they are covered by section 60020 of the test claim regulations.
- The Department of Mental Health, in a letter dated February 19, 2009, to the Commission's Chief Legal Counsel, has confirmed that mental health rehabilitation services fall within section 60200 of its Title 2 regulations.
- Mental health rehabilitative services are addressed, and found reimbursable, in the Commission's Statements of Decision.
- If section 60020 of the Title 2 regulations excluded mental health rehabilitation services, it would be inconsistent with federal law and the Government Code, and would therefore be invalid.

In support of its position, the County has submitted a declaration from Laura Champion, Executive Director of EMQ Families First.[22] EMQ Families First has contracted with the County since 1995 to provide mental health services pursuant to the pupil's IEP under the *Handicapped and Disabled Students* program. Her declaration states the following:

> Since 1995, EMQFF has been under contract with the Santa Clara County Mental Health Department to provide mental health services to children eligible for such services pursuant to their IEPs. One type of mental health services [sic] EMQFF provides is "mental health rehabilitation services."
>
> Mental health rehabilitation services are targeted, one-on-one mental health interventions incorporating evidence-based practices such as Cognitive Behavioral Treatment and Positive Behavioral Intervention and Support. Mental health rehabilitation services are provided in the child's usual environments – typically at home, in school, and in the child's community – consistent with the therapeutic needs of the child. Because mental health rehabilitation services are provided on an individual basis in a variety of settings, they can be tailored to meet the child's unique needs.

[22] Exhibit A, incorrect reduction claim, page 222.

> Contemporary, peer reviewed research shows that the mental health rehabilitation services treatment model – in which the service provider works with the child in the settings in which his or her mental health symptoms actually arise and coaches the child on how to deal with those symptoms safely and appropriately – tends to be more effective for many children than traditional therapy provided by a licensed therapist in his or her office. My clinical experience and my experience managing clinical care bear this out. Through mental health rehabilitation services, children learn to cope with their environments and to modify their behavior experientially, and they generally learn these new skills more quickly and in a more lasting way than they would through a therapy-only treatment plan. In addition, the provision of services in the child's usual environments enables the counselor providing these services to model, for the child's parents, caregivers, and/or teachers, how to respond when the child is demonstrating the symptoms associated with his or her mental health diagnosis, which helps to effect a transfer of skills to the child's parents, caregivers, or teachers. When a child receives only therapy or out-of-home care, this comprehensive, coordinated service delivery does not typically occur, and there is a lower likelihood that the therapeutic gains made in treatment will be sustained.
>
> [¶]
>
> All of the children receiving mental health rehabilitation services from EMQFF have a demonstrable need for these services documented in their IEPs. Each child's IEP team has determined that the child is at imminent risk of residential placement or other institutional placement. . . . For each of these children, EMQFF was selected to provide mental health rehabilitation services as a cost-effective alternative to the more expensive and restrictive option of out-of-home residential placement.

In addition, the County has submitted letters from the following contract service providers describing similar "rehabilitation services" they provided pursuant to a pupil's IEP: Miguel Valencia, Ph.D., Mental Health Director of Gardner Family Care Organization; AchieveKids; Jerry Doyle, Chief Executive Officer of EMQ FamiliesFirst; Mary Kaye Gerski, Executive Director of Rebekah Children's Servives; and Sarita Kohli, Director of Mental Health Programs of Asian Americans for Community Involvement.[23] These services are described as flexible, tailored to the needs of each child, and provided in the child's natural environment of home and school during the day and night. The rehabilitation helps to identify the events that trigger the acting out behaviors and to learn appropriate coping skills. Services also include collateral sessions with parents, caregivers, and teachers to coach them with discipline techniques and to create a healthy and safe environment for children to grow.

The County has also retained an expert witness, Dr. Margaret Rea, an independent psychologist and researcher at the University of California at Davis who specializes in child and adolescent psychology, to review a representative sample of 53 patient files for children who received mental health rehabilitation services from the County under the *Handicapped and Disabled*

[23] Exhibit A, incorrect reduction claim, supporting documentation, pages 61-72.

Students program during the fiscal years in question and to prepare a report.[24] The 53 patient files were chosen at random from the files of children not enrolled in Medi-Cal. Each file contained the child's "Chapter 26.5 Mental Health Assessment," the mental health goals and objectives, the intake and update assessments, the child's treatment plan, and progress notes. The County asked Dr. Rea to determine, based on her professional experience and expertise, whether the services provided by the County aligned with the mental health services identified in section 60020 of the Title 2 test claim regulations. Dr. Rea reviewed the patient files and the description of the care being provided under the label "rehabilitation services" indicated in the progress notes for each session with the child, the language of section 60020 of the Title 2 regulations and the amendments to that regulation.[25]

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

> 10. The mental health rehabilitation services being provided to these patients can be described, at a general level, as behavioral interventions designed to maximize the children's ability to function in the classroom as well as at home. The focus of the interventions was to assist the children in developing more adaptive coping skills that would help them in better managing their clinical symptoms with the ultimate goal of reaching their educational goals and developing an age-appropriate level of independent functioning. The interventions I reviewed were necessary because the children's mental health impairments precluded them from functioning independently without behavioral intervention. They were receiving interventions addressing such issues as anger management, communication skills, impulse control, and emotional regulation. The children's mental health issues required that they receive a behaviorally focused intervention that would help them function safely and adaptively within their school and home environments. All of the patients whose files I reviewed would be unable to function in any educational environment without this level of behavioral intervention.
>
> 11. The interventions described in the progress notes were consistent with what is known in clinical and research arenas as behavioral evidence-based practices. The interventions described were generally consistent with cognitive behavioral interventions for depression, anxiety, PTSD, and impulse control, the typical mental health issues that were barriers to the children functioning in school. . . . For example, the files described interventions such as:
>
> - Cognitive Restructuring: helping children to think in more constructive ways, these interventions focus on decreasing the number of negative thoughts,

[24] Exhibit A, incorrect reduction claim, pages 201-219.

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

increasing the number of positive thoughts, learning to challenge unhelpful thoughts, and questioning unrealistic thoughts.

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

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

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

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

The costs were claimed under the "treatment services" category of the reimbursement claims and, according to the County, total approximately $8.6 million for the three fiscal years in

question. The County used the cost report method for claiming treatment costs by using cost reports submitted under Medi-Cal guidelines to the Department of Mental Health as a basis for its claim. The County and its vendors identified and reported rehabilitation costs for "day rehabilitation services" under Mode 10-Day Mode of Service and "rehabilitation services" under Mode 15-Outpatient Mode of Service.

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

Position of the State Controller's Office

The State Controller's Office did not file a response to the incorrect reduction claim when it was initially issued for comment in June 2010. The State Controller's Office issued its final audit report on June 30, 2009, reducing the County's reimbursement claims for costs incurred to provide outpatient rehabilitation services to seriously emotionally disturbed pupils. (Audit Finding 1.)[26]

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

> We do not dispute the following assertions in the county's response:
>
> - The Individuals with Disabilities Education Act (IDEA) entitles qualifying students to a free appropriate public education (FAPE) in the least restrictive environment. FAPE includes special education and related services to meet the needs of a child with a disability.
> - California Education Code section 56363 defines "related services" and includes "psychological services, physical and occupational therapy, recreation … and counseling services, including rehabilitation counseling."
> - Under federal regulations (…, section 300.34), rehabilitation counseling services "means services provided by qualified personnel in individual or group sessions that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community of a student with a disability. The term also includes vocational rehabilitation services provided to a student with a disability by vocational rehabilitation programs funded under the Rehabilitation Act."
> - Regarding the discussion of the shift in responsibilities from local educational agencies (LEAs) to county mental health departments, we agree that Chapter 26 of the Government Code, commencing with section 7570, and Welfare and Institutions Code section 5651 (added and amended by Chapter 1747, Statutes of 1984, and Chapter 1274, Statutes of 1985) requiring counties to participate in the mental health assessment for "individuals with exceptional needs," participate in the expanded "Individualized Educational Program " (IEP) team, and provide case management services for "individuals with exceptional needs" who are designated as "seriously

[26] Exhibit A, pages 95-166, Final Audit Report.

emotionally disturbed." The Commission on State Mandates (CSM) determined that these requirements impose a new program or higher level of service on counties.

- Title 2, section 60020, subdivision (i), provides the basis for the services in the state mandated cost program. This section includes "mental health assessments and the following services when delineated on an IEP in accordance with Section 7572(d) of the Government Code: psychology as defined in Section 2903 of the Business and Profession Code provided to the pupil individually or in a group, collateral services, medication monitoring, intensive day treatment, day rehabilitation, and case management. These services shall be provided directly or by contract at the discretion of the community mental health service of the county of origin."
- Title 9, CCR, section 542, defines day services. These services are designed to provide alternatives to 24-hour care and supplement other modes of treatment and residential services, and include day care intensive services, day care habilitative services, vocational services and socialization services. The CSM determined that the state-mandated cost program includes only day care intensive services and day care habilitative (rehabilitation) services as eligible services.
- Title 9, CCR, section 543, defines outpatient services. These services are designed to provide short-term or sustained therapeutic intervention for individuals experiencing acute or ongoing psychiatric distress, and include collateral services, assessment, individual therapy, group therapy, medication and crisis intervention. The CSM determined that the state-mandated cost program includes all services with the exception of crisis intervention. Outpatient services do not include rehabilitation services.
- On May 26, 2005, CSM adopted the statement of decision on the reconsideration of Handicapped and Disabled Students program, refusing to include a definition of rehabilitation services consistent with Title 9, CCR, section 1810.243.

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

- The program's parameters and guidelines do not identify outpatient rehabilitation services as an eligible service.
- Outpatient rehabilitation services are not included in the underlying regulations (Title 2, section 60020, subd. (i)). As noted in the Commission's decision on reconsideration, a county argued that outpatient rehabilitation services, medication monitoring, and crisis intervention services should be included in the parameters and guidelines. The Commission "refused" to include outpatient rehabilitation services and crisis intervention services, including only medication monitoring in the parameters and guidelines. If the rehabilitation definition was adopted by the Commission, outpatient rehabilitation services would be eligible for reimbursement.
- The outpatient rehabilitation services put forth by the County are not consistent with the day care habilitative (rehabilitation) services. Day care habilitative (rehabilitation) services do not include vocational services or socialization services, as these are separate and distinct services. In contrast, outpatient rehabilitation services is defined by federal and state regulations to include elements of vocational services and socialization services.

Furthermore, the County's Clinical Record Documentation Manual for Outpatient Mental Health Services defines rehabilitation services to include medication education and compliance, grooming and personal hygiene skills, meal preparation skills, money management, leisure skills, social skills, developing and maintaining a support system, maintaining current housing situation. Vocational and socialization services are not reimbursable.

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

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

> On May 26, 2005, the CSM issued a statement of decision on the reconsideration of the HDS program finding that rehabilitation services, as defined by Title 9, CCR, section 1810.243, are not reimbursable. More recently, the CSM responded to the Department of Mental Health's (DMH's) request for clarification on February 27, 2009, stating that rehabilitation services, as defined by Title 9, CCR, section 1810.243, are not reimbursable. The CSM stated that the test claim regulations do not require or mandate counties to perform activities defined by section 1810.243.
>
> Contrary to the county's position, we believe that rehabilitation services claimed by the county are separate and distinct from day rehabilitation services by definition and in terms of service delivery. The definition of each rehabilitation service in the county's Clinical Record Documentation Manual for Outpatient Mental Health Services is consistent with the service definitions in Title 9, CCR. The way in which these services were reported on the county's cost report submitted to DMH and for Medi-Cal Federal Financing Participation funds reimbursement is also consistent with the definition in Title 9, CCR. The county's rehabilitation services definition is consistent with section 1810.243, while the day rehabilitation service definition is consistent with section 1810.212.
> . . .

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

On April 22, 2011, the Controller's Office filed a response disagreeing with the draft staff analysis and over 900 pages of supporting documentation, including the Controller's record on

this claim and response to the incorrect reduction claim.[27] The Controller also filed additional comments on May 9, 2011.[28]

The Controller's Office argues that:

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

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

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

- The rehabilitation services under Mode 10 and Mode 15 also differ in terms of service delivery. Under Mode 15, outpatient rehabilitation services are delivered in minutes, while day rehabilitation services under Mode 10 are delivered in half-day or full-day increments of at least three hours. A portion of the rehabilitation services provided by the County do not meet the required service available of at least three hours and, thus, are consistent with the outpatient services provided under Mode 15.

- The reports prepared by the County's witnesses do not address the differences between the two rehabilitation services in the context of the cost report. If outpatient rehabilitation services are actually day rehabilitation services, the County has reported erroneous information to both federal and state agencies.

- The County's Manual for Outpatient Mental Health Services is relevant to this claim. The County's manual identifies and defines services that are provided, tracked, and reported on its cost reports submitted to the Department of Mental Health, and the service definitions in the County's manual are consistent with Medi-Cal requirements and DMH guidelines.

- The Commission should fully consider the issue of potential offsetting revenues received by the County from the Wraparound program - non-federal Aid to Families with

[27] Exhibit F.

[28] Exhibit G.

Dependent Children Foster Care (AFDC-FC). "Although [the issue] may not have been fully developed in the audit, the problem was raised in the audit and is an appropriate subject for the commission to consider."

The Controller's Office summarizes its position as follows:

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

Position of the Department of Mental Health

The Department of Mental Health filed comments on April 22, 2011, agreeing with the Controller's reduction of costs "because outpatient rehabilitation services are not reimbursable under the legislatively mandated Handicapped and Disabled Students Program."[29] The Department of Mental Health states the following:

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

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

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

Recognizing the differences between outpatient rehabilitation services and day rehabilitation services, outpatient rehabilitation services were excluded from Title 2 C.C.R. § 60020 (i), which governs reimbursable services under the program. Title 2 C.C.R. § 60020 (i) defines "mental health services" as "mental health assessments and the following services when delineated on an Individualized Education Program in accordance with Section 7572(d) of the Government Code: psychology as defined in Section 2903 of the Business and Professions Code provided to the pupil individually or in a group, collateral services, medication monitoring, intensive day treatment, day rehabilitation, and case management."

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

Consistent with Title 2 and the HDS and HDS II Parameters and Guidelines, CSM declared in it's Statement of Decision issued on May 26, 2005 and by letter to DMH dated February 27, 2009, that rehabilitation services, as defined under Title 9 C.C.R. § 1810.243, are not reimbursable services. CSM stated that the test

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for Section 1810.242 of Title 9 of the California Code of Regulations, rehabilitation is an essential component of many mental health services.

claim regulations do not require or mandate counties to perform activities defined by section 1810.243. As can be seen, outpatient rehabilitation services have been consistently excluded from reimbursable activities under HDS.

II. COMMISSION FINDINGS

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

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

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

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

The County's claim was reduced on the ground that the costs incurred for the activities performed by the County (providing outpatient rehabilitation services to seriously emotionally disturbed pupils) are not reimbursable. The analysis requires the Commission to interpret the activities identified in the parameters and guidelines to provide "psychotherapy and other mental health treatment services" to pupils based on approved IEPs pursuant to Government Code section 7576 and sections 60020 and 60200 of the Title 2 regulations – regulations adopted to implement the *Handicapped and Disabled Students* program.

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

Although the County's reimbursement claim identifies the outpatient rehabilitation costs under Mode 15, the County argues that the outpatient rehabilitation services it provided fall within the category of "day rehabilitation" under the Title 2 *Handicapped and Disabled Students* regulations. The State Controller's Office and the Department of Mental Health argue, however, that under the *Title 9 Medi-Cal regulations*, "day rehabilitation" is a different category of service

defined in section 1810.212 and is billed separately under Mode 10.[30] The Controller's Office believes the County is now taking a position contrary to the reimbursement claims and cost reports it certified and filed under penalty of perjury. The Controller's Office questions the "potential ramifications arising from the [County's] possible misreporting of services to federal and state agencies" for Medi-Cal reimbursement.

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

> As the Controller admits, the mode and service function codes are derived from the Medi-Cal reimbursement system. The Medi-Cal codes differentiate services based on billable units, not on service type, and therefore cannot be used to assess whether a particular service fits within a programmatic or clinical definition. It is therefore immaterial whether the County codes it mental health rehabilitation services as Outpatient Services or Day Services for Medi-Cal billing purposes; the only question is whether the actual services the County provides fit within the set of mental health services that are reimbursable under the AB 3632 Parameters and Guidelines.[31]

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

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

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

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

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

[31] Exhibit G.

Title 2 regulations that implements the *Handicapped and Disabled Students* program.

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

> In comments to the draft staff analysis, the County of Los Angeles asserts that "rehabilitation" should be specifically defined to include the activities identified in section 1810.243 of the regulations adopted by the Department of Mental Health under the Medi-Cal Specialty Mental Health Services Consolidation program. (Cal. Code Regs., tit. 9, § 1810.243.) These activities include "assistance in improving, maintaining, or restoring a beneficiary's or group of beneficiaries' functional skills, daily living skills, social and leisure skills, grooming and personal hygiene skills, meal preparation skills, and support resources and/or medication education."
>
> The Commission disagrees with the County's request. The plain language of [the] test claim regulations (Cal. Code Regs., tit. 2, §§ 60000 et seq.) does not require or mandate counties to perform the activities defined by section 1810.243 of the Department's title 9 regulations. In addition, the test claim regulations do not reference section 1810.243 of the Department's title 9 regulations for any definition relevant to the program at issue in this case.

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

Section 1810.243 is a regulation adopted by the Department of Mental Health to implement the Medi-Cal Specialty Mental Health Services program, which provides managed mental health care for Medi-Cal beneficiaries. It defines rehabilitation services under *that* program as "a service activity, which includes, but is not limited to assistance in improving, maintaining, or restoring a beneficiary's or group of beneficiaries' functional skills, daily living skills, social and leisure skills, grooming and personal hygiene skills, meal preparation skills, and support resources and/or medication education."

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

In addition, the plain language contained in the regulations that implement the *Handicapped and Disabled Students* program do not contain the words requiring the provision of assistance in

functional skills, daily living skills, social and leisure skills, grooming and personal hygiene skills, meal preparation skills, and support resources and/or medication education. Thus, on its face, section 1810.243 has nothing to do with the test claim regulations at issue here and is not relevant to the *Handicapped and Disabled Students* program.

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

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

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

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

- The words "outpatient rehabilitation," do not appear in section 60020 of the Title 2 regulations, which defines "mental health services" under the program, or in the parameters and guidelines.
- The activities claimed by the County fall within the definition of "rehabilitation" provided in section 1810.243 of the Title 9 regulations, which the Commission denied.
- The services provided by the County include socialization and vocational services; services which the Commission denied. Socialization and vocational services are also defined in categories separate and apart from the Title 9 regulations that define day care habilitative or rehabilitation services.

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

As determined by the Commission, Government Code section 7576 requires the county to provide psychotherapy or other mental health services when required by a pupil's IEP. Section 60200 of the regulations adopted to implement the *Handicapped and Disabled Students* program requires the County to pay for the mental health services included in an IEP.[32] Section 60020 of the Title 2 regulations defines "mental health services."

When adopting the statements of decision and parameters and guidelines for this program, the Commission found that socialization services, vocational services, and crisis intervention services, as those terms were defined in former section 60020 of the Title 2 regulations before

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

they were amended in 1998, were no longer mandated as a "mental health service" to be provided under the program. The Commission's statement of decision and parameters and guidelines are final decisions, and must be followed here.[33]

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

Pursuant to the rules of statutory interpretation, the plain language of the regulations adopted to implement the *Handicapped and Disabled Students* program must be construed in the context of the entire statutory and regulatory scheme of the *Handicapped and Disabled Students* program, and not in the context of other mental health programs, so that every provision of the law may be harmonized and have effect.[34] Regulations that alter, amend, enlarge, or impair the scope of the governing statutes are void and the courts will strike down such regulations.[35]

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

- Government Code sections 7570 states that the *Handicapped and Disabled Students* program was enacted to ensure the maximum utilization of state and federal resources available to provide a child with a disability with a free appropriate public education in accordance with the federal IDEA.
- Government Code section 7576, which requires counties to provide and pay for mental health services identified in a pupil's IEP, includes legislative intent that the referral of the student to the county for an assessment and possible treatment under the *Handicapped and Disabled Students* program is "subject to the requirements of state and federal special education law."
- In 2005, the Legislature amended Education Code section 56363, the statute that defines "designated instruction and services" for purposes of the special education services provided under the federal IDEA, to clarify that "designated instruction and services" means "related services" as that term is defined in the [IDEA] and section 300.34 of the Code of Federal Regulations.[36] Pursuant to Government Code section 7572, all assessments of pupils that are placed in the *Handicapped and Disabled Students* program under sections 7570 et seq. of the Government Code are made in accordance with "Article 2 (commencing with Section 56320) of Chapter 4 of Part 30 of the Education Code," which includes section 56363.

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

[34] *People v. Simon* (1995) 9 Cal.4th 493, 514.

[35] *Dyna–Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1388–1389.

[36] Statutes 2005, chapter 653 (AB 1662).

- The Title 2 regulations implementing the *Handicapped and Disabled Students* program, beginning with section 60000, expressly state that the regulations are intended to "assure conformity" with the federal IDEA. Section 60000 further requires that the regulations "shall be construed as supplemental to, and in the context of federal and state laws and regulations relating to interagency responsibilities for providing services to pupils with disabilities."
- Section 60010, subdivision (s), of the Title 2 regulations defines "related services" as those services that are necessary for a pupil with a disability to benefit from his or her special education program in accordance with the federal IDEA. "Related services" under federal law includes mental health services.
- Government Code section 7587 requires that the regulations adopted to implement the *Handicapped and Disabled Students* program be reviewed by the Superintendent of Public Instruction, prior to filing with the Office of Administrative Law, "in order to ensure consistency with federal and state laws and regulations governing the education of disabled children."

With respect to the last bulleted point, it is presumed that the official duty of the Superintendent of Public Instruction under Government Code section 7587 was performed and that the Title 2 regulations for this program are consistent with state and federal special education law.[37]

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

1) "Related services" under federal law

The IDEA guarantees to disabled pupils, including those with mental health needs, the right to receive a free and appropriate public education, including psychological and other mental health services, specially designed to meet the pupil's unique educational needs in the least restrictive environment. Each public agency is required by the IDEA to ensure that the special education and related services are made available to a child in accordance with the IEP developed for that child.[38] A material failure to implement an IEP violates the IDEA.[39]

Section 300.34 of the Code of Federal Regulations defines "related services" to specifically include "psychological services" and "counseling services."[40] "Psychological services" includes

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

[38] Title 34 Code of Federal Regulations section 300.323.

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

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

"planning and managing a program of psychological services, including psychological counseling for children and parents, and assisting in developing positive behavioral intervention strategies." "Counseling services" means "services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel."

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

Since the list of related services is not exhaustive, the list can be viewed as providing examples of the types of services designed to meet a pupil's unique educational needs. Related services may include other developmental, corrective, or supportive services as long as the service is required to assist a disabled child to benefit from special education.[41,]

The student's IEP, which identifies the related services to be provided, defines the relevant goals to measure whether a student is getting an educational benefit in the placement of the related service.[42] The correct standard for measuring whether a related service provides an educational benefit under the IDEA and is therefore required to be provided, has been identified by the courts as "whether the child makes progress toward the goals set forth in the pupil's IEP" and not whether the placement is "reasonably calculated to provide the child with educational benefits."[43] Thus, under the IDEA, educational benefit is not limited to academic needs, but includes the social and emotional needs that affect academic progress, school behavior, and socialization.[44]

An example of the application of this standard is explained in *County of San Diego v. California Special Education Hearing Office*. In that case, the pupil in question was designated by the school district as seriously emotionally disturbed whose IEP goals were not being met with "outpatient therapy" and "day treatment."[45] The school district and special education hearing officer determined that placing the pupil in a residential treatment program at the expense of the County would achieve the pupil's IEP goals and the County challenged those decisions. The court noted that the pupil's IEP goals were not limited to academic benefits, but also included behavioral and emotional growth. The court upheld the residential placement and found it proper under the IDEA. The court held as follows:

"rehabilitation counseling" is limited to vocational rehabilitation. For the reasons in the analysis, the Commission disagrees with the Controller's Office.

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

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

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

[44] *Id*. at page 1467.

[45] *Id*. at pages 1463.

> In *Clovis Unified School District v. California Office of Administrative Hearings*, 903 F.2d 635 (9th Cir. 1990), this circuit identified three possible tests for determining when to impose responsibility for residential placements on the special education system: (1) where the placement is "supportive" of the pupil's education; (2) where medical, social or emotional problems that require residential placement are intertwined with educational problems; and (3) when the placement is primarily to aid the student to benefit from special education. *Id.* at 643. The hearing officer applied all three tests to the present case and found that Rosalind's placement at a residential facility satisfied all three.
>
> First, the placement is "supportive" of her education in that it provides structure, discipline, and support she needs to achieve her IEP and mental health goals. Second, Rosalind's difficulties clearly include substantial educational problems that are related to noneducational problems. Finally, Rosalind's primary therapeutic need is educational and the primary purpose of her residential placement is educational. Thus, Rosalind satisfies all three tests entitling her to residential treatment provided by the County.[46]

Many other courts have recognized that services provided under the IDEA to improve behavioral and emotional skills can be considered necessary for educational purposes and may be required by a pupil's IEP under federal law.[47] In 1997, Congress amended the IDEA to clarify that one of its purposes is to ensure that special education and related services disabled children receive are designed to "prepare them for employment and independent living."[48]

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

As stated above, it is a violation of federal law if a public agency fails to implement the services identified in the IEP. In this case, the Controller does not dispute that the services provided by the County fall within the requirements of the federal IDEA. The final audit report states that "we do not dispute the need for nor the basis to provide rehabilitation services prescribed within a pupil's IEP in accordance with federal IDEA regulations.[49]

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[46] *Id.* at page 1468.

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

[48] 20 U.S.C. section 1400(d)(1)(A), amended June 4, 1997.

[49] Exhibit A, Final Audit Report, Finding 1, page 110.

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

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

Government Code section 7576 and section 60040, subdivision (a), of the Title 2 regulations provide that a local education agency, the IEP team, or the parent may initiate a referral to the county for an assessment of a pupil's social and emotional status pursuant to Education Code section 56320. The IEP team (made up of the parents, regular education teacher, special education teacher, a representative of the local educational agency, a person who can interpret instructional implications of assessment results, and the pupil)[50] may refer a pupil suspected of needing mental health services to the county when the pupil has been assessed by qualified school personnel as having emotional or behavioral characteristics that impede the pupil from benefitting from educational services and when the pupil's functioning in school would benefit from mental health services. The pupil can be referred when he or she has emotional or behavioral characteristics that are: (1) observed by qualified educational staff; (2) impede the pupil from benefitting from educational services; (3) are significant as indicated by their rate of occurrence and intensity; and (4) are associated with a condition that cannot be described solely as a temporary adjustment problem that can be resolved with less than three months of counseling. Furthermore, the local educational agency has already provided counseling, psychological, or guidance services to the pupil pursuant to Education Code section 56363 and the IEP team has determined that the services do not meet the pupil's educational needs.[51]

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

If it is determined by the IEP team (which does not include the county unless residential placement is recommended)[52] that a mental health service is necessary for the pupil to benefit from special education, the following documents are placed in the pupil's IEP pursuant to section 60050 of the Title 2 regulations: a description of the present levels of social and emotional performance; the goals and objectives of the mental health services with objective criteria and evaluation procedures to determine whether they are being achieved; a description of the types of

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

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

[52] Government Code section 7572.5; California Code of Regulations, title 2, section 60100.

mental health services to be provided; the initiation, duration and frequency of the mental health services; and parental approval for the provisions of mental health services.

Pursuant to Government Code section 7576, subdivision (a), and section 60200 of the Title 2 regulations, the county is then responsible for providing and paying for the mental health services "required in the IEP of a pupil." Any changes to the mental health services must be proposed to the IEP team. The County has no authority to unilaterally change the mental health services identified in the pupil's IEP.[53]

If the County fails to provide or pay for the treatment services identified in the IEP, an administrative complaint may be filed by the parent or local education agency with the Office of Administrative Hearings to enforce the provisions of the IEP pursuant to Government Code section 7585. The administrative procedures before the Office of Administrative Hearings must be exhausted before the parties resort to relief from the courts.[54]

Accordingly, once the service is identified in the IEP, the County is required by the *Handicapped and Disabled Students* program to provide and pay for the service. The Commission found this to be reimbursable.[55]

The County maintains in this case that all outpatient rehabilitation services were required by the pupils' IEPs and determined by the IEP team to provide an educational benefit to the pupil, and thus it was required to provide and pay for these services. The record supports this contention.[56]

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

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

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

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

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

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

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

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

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

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

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

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

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

Both the County's reimbursement claims and the Controller's audit report generally identify the *Handicapped and Disabled Students* program without specifying the set of parameters and guidelines used. Since both sets of parameters and guidelines cover costs for all fiscal years at issue here based on section 60020 as originally adopted and as amended in 1998, both versions are analyzed below. However, the 90/10 cost sharing formula identified in the original parameters and guidelines for CSM 4282 no longer applies to the costs for the mental health services provided under Government Code section 7576, and sections 60020 and 60200 of the regulations. Any reimbursement approved for costs incurred for providing mental health treatment services under the original parameters and guidelines are 100 percent reimbursable.[57]

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

[57] Statutes 2002, chapter 1167 (AB 2781).

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

   a) Individual therapy;

   b) Collateral therapy and contacts;

   c) Group therapy;

   d) Day treatment; and

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

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

The Short-Doyle Act was enacted in 1957 (before the enactment of the IDEA) to provide counties with state funds for local mental health programs. The purpose of the Short-Doyle Act was to encourage community and state participation in mental health care by providing a means to share funding of community programs.[58] As indicated in the background, the provision of mental health services under the *Handicapped and Disabled Students* program was initially funded through the Short-Doyle Act, with the state paying 90 percent and the counties paying 10 percent of the treatment services.

However, in 1991, after the initial parameters and guidelines on the *Handicapped and Disabled Students* program were adopted, the Legislature enacted realignment legislation that repealed the Short-Doyle Act and replaced the sections with the Bronzan-McCorquodale Act. (Stats. 1991, ch. 89, §§ 63 and 173.) In 2002, the Legislature enacted Statutes 2002, chapter 1167 (Assem. Bill 2781), which prohibited the funding provisions of the Bronzan-McCorquodale Act from affecting the responsibility of the state to fund psychotherapy and other mental health treatment services for handicapped and disabled pupils and required the state to provide reimbursement to counties for those services for "all allowable costs incurred."[59]

Thus, although sections 542 and 543 provide mental health definitions for services under the Short-Doyle and Bronzan-McCorquodale Acts, and are incorporated by reference in section 60020 to implement the *Handicapped and Disabled Students* program – the definitions must not be construed in the context of these other Acts.[60] Rather, the mental health definitions must be

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

[59] Statutes 2002, chapter 1167, section 38 stated the following:

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

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

interpreted to "assure conformity" with the federal IDEA and "be construed as supplemental to, and in the context of federal and state laws and regulations relating to interagency responsibilities for providing services to pupils with disabilities."[61]

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

- Day care intensive services are "services designed and staffed to provide a multidisciplinary treatment program of less than 24 hours per day as an alternative to hospitalization for patients who need active psychiatric treatment for acute mental, emotional, or behavioral disorders and who are expected, after receiving these services, to be referred to a lower level of treatment, or maintain the ability to live independently or in a supervised residential facility."
- Day care habilitative services are "services designed and staffed to provide counseling and rehabilitation to maintain or restore personal independence at the best possible functional level for the patient with chronic psychiatric impairments who may live independently, semi-independently, or in a supervised residential facility which does not provide this service."

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

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

- "Socialization skills" are "services designed to provide life-enrichment and social skill development for individuals who would otherwise remain withdrawn and isolated. Activities should be gauged for multiple age groups, be culturally relevant, and focus upon normalization."
- "Vocational skills" are "services designed to encourage and facilitate individual motivation and focus upon realistic and obtainable vocational goals. To the extent possible, the intent is to maximize individual client involvement in skill seeking and skill enhancement, with the ultimate goal of meaningful productive work."

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

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

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

The evidence in this case shows that the outpatient rehabilitation services required by the IEPs and provided by the County consisted of a series of behavioral interventions (including cognitive restructuring, communication training, behavioral activation, emotional regulation, problem solving, relaxation training, and safety planning)[62] provided while the pupil was in school or at home. The treatment also included collateral sessions with the parent and teacher. It is undisputed that these services were determined by the IEP team to assist the child to better manage the skills necessary to function in school.

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

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

> "Mental health services" means mental health assessment and the following services when delineated on an IEP in accordance with Section 7572(d) of the Government Code: psychotherapy as defined in Section 2903 of the Business and Professions Code provided to the pupil individually or in a group, collateral services, medication monitoring, intensive day treatment, day rehabilitation, and case management. These services shall be provided directly or by contract at the discretion of the community mental health service of the county of origin.

The Commission found that providing case management services and individual or group psychotherapy services, as defined in Business and Professions Code section 2903, when required by the pupil's IEP were new services mandated by the state. Psychotherapy services under the Business and Professions Code are broadly defined to include any of the following:

> Psychotherapy within the meaning of this chapter means psychological methods in a professional relationship to assist a person or persons to acquire greater human effectiveness or to modify feelings, conditions, attitudes, and behavior which are emotionally, intellectually, or socially ineffectual or maladjustive.

[62] The intervention labeled "social skills" is discussed in the next section of this analysis.

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

Although the amendment created a slight wording change with these services, the Commission found that intensive day treatment, day rehabilitation services, and collateral services were not new activities required by the 1998 amendments, but continued to be mandated by section 60020 when required by a pupil's IEP. [63]

Thus, the Commission treated "intensive day treatment" the same as "day care intensive services" and treated day rehabilitation services" the same as "day care habilitative services." "Habilitative" services under former section 60020 were expressly defined to include "rehabilitation," the same term used in the 1998 regulations. Both the original and amended versions of section 60020 specify that the intensive treatment and rehabilitative services are designed to be provided during the "day" as opposed to 24-hour residential care. Moreover, there is no indication in the final statement of reasons supporting the 1998 regulatory amendment to suggest that the purpose of the amendment was to change the requirement imposed on counties to provide rehabilitation services.[64] The Commission also treated "collateral services" the same as prior law.

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

- Provide case management services and individual or group psychotherapy services, as defined in Business and Professions Code section 2903, when required by the pupil's IEP. This service shall be provided directly or by contract at the discretion of the county of origin. (Cal. Code Regs., tit. 2, § 60020, subd. (i).) [beginning July 1, 2001]
- *Beginning July 1, 2004*, provide mental health assessments, collateral services, intensive day treatment, and day rehabilitation services when required by the pupil's IEP. These services shall be provided directly or by contract at the discretion of the county of origin. (Cal. Code Regs., tit. 2, § 60020, subd. (i).)

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

A look at all of the relevant terms in section 60020 produces a dizzying list of mental health services that are difficult to understand: related services, rehabilitation services, outpatient services, day care habilitative services, day rehabilitation services, day care intensive services,

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

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

intensive day treatment, collateral services, individual therapy. However, the Commission's charge is to determine what is reimbursable by interpreting the meaning of these terms.

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

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

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

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

To support its contention, the Controller's Office submitted several progress reports showing the County's treatment provided to pupils that addressed issues related to grooming and social skills.[65]

The County acknowledges that that some of the specific interventions described in the pupils' files may develop a child's socialization or vocational skills. But the County asserts that the primary goal of the interventions was not to develop social or vocational skills, but to equip the children in the least restrictive environment with the skills necessary to function independently in an educational environment.[66]

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

In the statement of decision for *Handicapped and Disabled Students II*, the Commission found that the service categories of socialization, vocational skills, and crisis intervention in former section 60020 were no longer mandated by the state based on the deletion of these words from

[65] Exhibit F.

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

section 60020 and the final statement of reasons issued by the Departments of Mental Health and Education that explained the amendment to section 60020. The statement of decision in *Handicapped and Disabled Students II* (which has a reimbursement period beginning July 1, 2001) states the following:

> However, the activities of crisis intervention, vocational services, and socialization services were deleted by the test claim regulations. The final statement of reasons, in responding to a comment that these activities remain in the definition of "mental health services," states the following:
>
> > The provision of vocational services is assigned to the State Department of Rehabilitation by Government Code section 7577.
> >
> > Crisis service provision is delegated to be "from other public programs or private providers, as appropriate" by these proposed regulations in Section 60040(e) because crisis services are a medical as opposed to educational service. They are, therefore, excluded under both the Tatro and Clovis decisions. These precedents apply because "medical" specialists must deliver the services. A mental health crisis team involves specialized professionals. Because of the cost of these professional services, providing these services would be a financial burden that neither the schools nor the local mental health services are intended to address in this program.
> >
> > The hospital costs of crisis service provision are explicitly excluded from this program in the Clovis decision for the same reasons.
> >
> > Additionally, the IEP process is one that responds slowly due to the problems inherent in convening the team. It is, therefore, a poor avenue for the provision of crisis services. While the need for crisis services can be a predictable requirement over time, the particular medical requirements of the service are better delivered through the usual local mechanisms established specifically for this purpose.
>
> Thus, counties are not eligible for reimbursement for providing crisis intervention, vocational services, and socialization services since these activities were repealed as of July 1, 1998. [67]

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

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

> "Subsection (i) [of section 60020], which defines the term 'mental health services,' clarifies the nature and scope of such services, including assessments. Section 7576 of Chapter 26.5 of the Government Code requires such clarification.[68]

Nevertheless, the Commission is bound by its decision. The decision, adopted in 2005, is a final binding decision and was never challenged by the parties. The parameters and guidelines clearly state that "when providing psychotherapy and other mental health treatment services, the activities of crisis intervention, vocational services, and socialization services are not reimbursable." Once "the Commission's decisions are final, whether after judicial review or without judicial review, they are binding, just as judicial decisions."[69]

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

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

- Cognitive Restructuring: helping children to think in more constructive ways, these interventions focus on decreasing the number of negative thoughts, increasing the number of positive thoughts, learning to challenge unhelpful thoughts, and questioning unrealistic thoughts.
- Communication Training: helping children to improve the manner in which they express themselves; improving eye contact; using active listening; learning to give both positive and negative feedback; making requests of others in a more productive and appropriate manner.
- Behavioral Activation: activity scheduling, which involves helping children engage in both pleasing and success-oriented activities.
- Emotional Regulation: helping children to identify the triggers that can lead them to emotional disregulation (anger outbursts, self-harm, violent acts, anxiety) and to develop alternative healthier responses.
- Problem-Solving: children are taught strategies that can empower them to approach problems with adaptive skills, to brainstorm and fully consider their options, and to implement and evaluate solutions.

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[68] Exhibit A, Final Statement of Reasons, page 239.

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

- Relaxation Training: these techniques are offered to children to help them manage emotional lability and anxiety as an alternative to maladaptive behaviors.
- Safety Planning: developing structured cognitive and behavioral plans to insure safety for the child.
- Social Skills Training: using cognitive behavioral techniques to expand and improve interpersonal interactions and to broaden the child's social support circle.

The County asserts that the reduction of costs for socialization is immaterial because the services provided were *designed* for the purpose of providing an educational benefit to the students, and were not designed to develop social skills.

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

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

The only category of intervention and service provided by the County which clearly falls within the definition of "socialization services" is the "social skills training." As stated by the County, social skills training uses cognitive behavioral techniques to expand and improve interpersonal interactions and helps to broaden the child's social support circle; i.e., the service provides life-

enrichment and social skill development as defined in former section 60020 under "socialization skills."

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

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

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

The Controller's Final Audit report states the following:

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

Although the Controller "did not pursue" the issue of potential offsetting revenue received by the County under the Wraparound program, the Controller's Office now urges the Commission to address the issue. In comments filed on April 22, 2011, the Controller states that "[a]lthough [the issue] may not have been fully developed in the audit, the problem was raised in the audit and is an appropriate subject for the commission to consider."[70] In the Controller's comments filed May 9, 2011, it asserts that the revenues received from the Wraparound program apply to some of the services provided by pupils under the *Handicapped and Disabled Students* program and are relevant as potential offsetting revenue. The Controller's Office further asserts that the County did not respond to audit inquiries or address the issue in its response to the draft audit report. The Controller's Office states that "[d]espite the lack of response from the county, we continue to believe that Wraparound revenues deserve consideration in the determination of the eligibility of outpatient rehabilitation services."[71]

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

In this case, the evidence shows that the audit was underway in December 2008, when the Controller's Office conducted an exit conference with the County before issuing the draft audit

[70] Exhibit F.

[71] Exhibit H.

report.[72] Thus, pursuant to Government Code section 17558.5, more than two years have passed since the audit was commenced. Although the Controller's Office may have inquired about the Wraparound funds during the audit, there is no evidence that the reductions were made because the County failed to identify offsetting revenue. Rather, the reductions were based on the Controller's contention that the costs incurred for outpatient rehabilitation services were not reimbursable. The Controller's final audit report states that the Wraparound issue was not pursued "since outpatient rehabilitation services are excluded from reimbursement under the mandated cost program." Based on this language in the final audit report, the County has not been put on notice that its claim was reduced on the ground that it did not properly identify offsetting revenue. Since more than two years have lapsed since the audit of the County's reimbursement claims were commenced, the Commission has no authority to re-open the audit period to address potential new grounds for reducing the County's claims.

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

III. CONCLUSION

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

[72] Exhibit A, Draft Audit Report, page 55.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE INCORRECT REDUCTION CLAIM ON: Education Code Section 76355 Statutes 1984, Chapter 1 (1983-1984 2nd Ex. Sess.) (AB 1) Statutes 1987, Chapter 1118 (AB 2336) Fiscal Years 2002-2003, 2003-2004, 2004-2005, 2005-2006, 2006-2007, 2007-2008, 2008-2009 Citrus Community College District, Cerritos Community College District, Los Rios Community College District, Redwoods Community College District, Allan Hancock Joint Community College District, Rancho Santiago Community College District, and Pasadena Area Community College District, Claimants.	Case Nos.: 09-4206-I-19, 09-4206-I-20, 09-4206-I-23, 09-4206-I-26, 09-4206-I-27, 09-4206-I-28, 09-4206-I-30 *Health Fee Elimination* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5. ARTICLE 7 *Adopted: October 27, 2011*

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this consolidated incorrect reduction claim during a regularly scheduled hearing on October 27, 2011. Keith Petersen appeared on behalf of Citrus, Cerritos, Los Rios, Redwoods, Rancho Santiago, and Pasadena Area Community College Districts. Shawn Silva and Steve Van Zee appeared on behalf of the State Controller's Office.

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

The Commission adopted the staff analysis to partially approve the incorrect reduction claims at the hearing by a vote of 5-0.

Summary of the Findings

This analysis looks at seven consolidated incorrect reduction claims filed by seven community college districts (Districts) regarding reductions made by the State Controller's Office (Controller) to reimbursement claims for costs incurred during fiscal years 2002-2003 through 2008-2009 for providing health services to all community college students under the *Health Fee Elimination* program.

Health Fee Elimination Program

Prior to 1984, community college districts were authorized to charge almost all students a general fee (health service fee) for the purpose of providing health services. In 1984, the Legislature enacted legislation eliminating community college districts' fee authority for health services. The 1984 legislation also required any district which provided health services during the 1983-1984 fiscal year, for which it was previously authorized to charge a fee, to maintain the health services at the level provided during the 1983-1984 fiscal year for every subsequent fiscal year until January 1, 1988. The result was that community college districts, which previously had fee authority to provide health services, had to maintain health services provided in the 1983-1984 fiscal year without any fee authority for this purpose.

In 1987, the Legislature required the maintenance of effort requirement to continue after January 1, 1988. As a result, all community college districts that provided health services during the 1986-1987 fiscal year were required to maintain those services every subsequent fiscal year. In addition, on January 1, 1988, the community college district fee authority for health services was reestablished.

At the November 20, 1986 Commission hearing, the Commission determined that the 1984 legislation, which required community college districts to maintain health services while repealing the districts' fee authority for those services, imposed a reimbursable state-mandated "new program" upon community college districts. On August 27, 1987, the Commission adopted parameters and guidelines for the *Health Fee Elimination* program.

At the May 25, 1989 Commission hearing, the Commission adopted amendments to the parameters and guidelines for the *Health Fee Elimination* program to reflect amendments made by the 1987 legislation. The 1987 legislation reestablished community college districts' fee authority for the provision of health services and extended the maintenance of service provision such that all community college districts that provided health services during the 1986-1987 fiscal year were required to maintain that level of service each fiscal year thereafter. As a result, the 1989 parameters and guidelines reflected a change in eligible claimants, and the reestablishment of community college districts' fee authority for the *Health Fee Elimination* program.

The Commission concludes that the Controller incorrectly reduced costs incurred that are attributable to physicals for athletes by using the health service fee community college districts were authorized to charge as offsetting revenue for reimbursement claims made by the following community college districts, for the following fiscal years, and at issue in the following incorrect reduction claims:

- Cerritos Community College District claimed costs associated with providing physicals for athletes during fiscal years 2002-2003 through 2006-2007 (CSM 09-4206-I-20).
- Los Rios Community College District claimed costs associated with providing physicals for athletes during fiscal years 2005-2006 through 2007-2008 (CSM 09-4206-I-23).
- Redwoods Community College District claimed costs associated with providing physicals for athletes during fiscal years 2002-2003 through 2006-2007 (CSM 09-4206-I-26).

The above community college districts' reimbursement claims are hereby remanded back to the Controller to determine the portion of the total costs claimed that are attributable to physicals for athletes. The costs for physicals for athletes should be reinstated.

Additionally, the Commission concludes that the Controller incorrectly reduced costs incurred that were attributable to physicals for employees by using the health service fee community college districts were authorized to charge as offsetting revenue for reimbursement claims made by the following community college districts, for the following fiscal years, and at issue in the following incorrect reduction claims:

- Cerritos Community College District claimed costs associated with providing physicals for employees during fiscal years 2002-2003 through 2006-2007 (CSM 09-4206-I-20).
- Redwoods Community College district claimed costs associated with providing physicals for employees during fiscal years 2002-2003 through 2006-2007 (CSM 09-4206-I-26).

The above community college districts' reimbursement claims are hereby remanded back to the Controller to determine the portion of the total costs claimed that are attributable to physicals for employees. The costs for physicals for employees should be reinstated.

The Commission also concludes that the Controller correctly reduced all other costs incurred during all other fiscal years claimed by Citrus Community College District, Cerritos Community College District, Los Rios Community College District, Redwoods Community College District, Allan Hancock Joint Community College District, Rancho Santiago Community College District, and Pasadena Area Community College District for the *Health Fee Elimination* program by the amount of health service fees that the districts were authorized to charge.

Health Fee Elimination Program

The *Health Fee Elimination* program required community college districts that provided health services during fiscal year 1983-1984 to maintain the health services at the level provided in fiscal year 1983-1984 for every subsequent fiscal year until January 1, 1988. This requirement was imposed while also eliminating the fee authority that the districts had for the health services provided.

In 1987, the Legislature required the maintenance of effort requirement to continue after January 1, 1988. As a result, all community college districts that provided health services during the 1986-1987 fiscal year were required to maintain those services every subsequent fiscal year. In addition, on January 1, 1988, the community college district fee authority for health services was reestablished.

COMMISSION FINDINGS

Chronology

01/22/87	Commission adopts statement of decision for *Health Fee Elimination* test claim (CSM 4206)
08/27/87	Commission adopts parameters and guidelines for the *Health Fee Elimination* program
05/25/89	Commission adopts amendments to parameters and guidelines for the *Health Fee Elimination* program

01/07/04	Citrus Community College District files reimbursement claim for fiscal year 2002-2003
01/12/04	Cerritos Community College District files reimbursement claim for fiscal year 2002-2003
01/13/04	Redwoods Community College District files reimbursement claim for fiscal year 2002-2003
01/13/04	Allan Hancock Joint Community College District files reimbursement claim for fiscal year 2002-2003
12/13/04	Citrus Community College District files reimbursement claim for fiscal year 2003-2004
12/13/04	Allan Hancock Joint Community College District files reimbursement claim for fiscal year 2003-2004
01/07/05	Cerritos Community College District files reimbursement claim for fiscal year 2003-2004
12/20/05	Citrus Community College District files reimbursement claim for fiscal year 2004-2005
12/30/05	Allan Hancock Joint Community College District files reimbursement claim for fiscal year 2004-2005
01/12/06	Redwoods Community College District files reimbursement claim for fiscal year 2003-2004
01/12/06	Redwoods Community College District files reimbursement claim for fiscal year 2004-2005
01/12/06	Pasadena Area Community College District files reimbursement claim for fiscal year 2004-2005
01/17/06	Cerritos Community College District files reimbursement claim for fiscal year 2004-2005
01/04/07	Los Rios Community College District files reimbursement claim for fiscal year 2005-2006
01/09/07	Citrus Community College District files reimbursement claim for fiscal year 2005-2006
01/16/07	Redwoods Community College District files reimbursement claim for fiscal year 2005-2006
01/16/07	Allan Hancock Joint Community College District files reimbursement claim for fiscal year 2005-2006
01/16/07	Pasadena Area Community College District files reimbursement claim for fiscal year 2005-2006
12/21/07	Rancho Santiago Community College District files reimbursement claim for fiscal year 2005-2006

01/11/08	Cerritos Community College District files reimbursement claim for fiscal year 2005-2006
01/11/08	Allan Hancock Joint Community College District files reimbursement claim for fiscal year 2006-2007
01/18/08	Redwoods Community College District files reimbursement claim for fiscal year 2006-2007
02/05/08	Los Rios Community College District files reimbursement claim for fiscal year 2006-2007
02/08/08	Rancho Santiago Community College District files reimbursement claim for fiscal year 2006-2007
01/29/09	Cerritos Community College District files reimbursement claim for fiscal year 2006-2007
01/30/09	Citrus Community College District files reimbursement claim for fiscal year 2006-2007
02/03/09	Los Rios Community College District files reimbursement claim for fiscal year 2007-2008
02/06/09	Rancho Santiago Community College District files reimbursement claim for fiscal year 2007-2008
07/01/09	Controller issues claim adjustment letters to Cerritos Community College District for fiscal years 2003-2004 through 2006-2007
07/01/09	Controller issues claim adjustment letters to Pasadena Area Community College District for fiscal years 2004-2005 and 2005-2006
07/02/09	Controller issues claim adjustment letter to Cerritos Community College District for fiscal year 2002-2003
07/02/09	Controller issues claim adjustment letters to Redwoods Community College District for fiscal years 2002-2003 through 2005-2006
07/05/09	Controller issues claim adjustment letters to Citrus Community College District for fiscal years 2003-2004 through 2005-2006
07/06/09	Controller issues claim adjustment letter to Citrus Community College District for fiscal years 2002-2003 and 2006-2007
07/09/09	Controller issues claim adjustment letter to Redwoods Community College District for fiscal year 2006-2007
07/10/09	Controller issues claim adjustment letters to Allan Hancock Joint Community College District for fiscal years 2002-2003 and 2006-2007
07/12/09	Controller issues claim adjustment letters to Allan Hancock Joint Community College District for fiscal years 2003-2004 through 2005-2006
07/19/09	Controller issues claim adjustment letter to Los Rios Community College District for fiscal years 2005-2006 and 2007-2008

07/22/09	Controller issues claim adjustment letter to Los Rios Community College District for fiscal year 2006-2007
09/24/09	Cerritos Community College District files incorrect reduction claim (09-4206-I-20)
09/24/09	Citrus Community College District files incorrect reduction claim (09-4206-I-19)
10/01/09	Los Rios Community College District files incorrect reduction claim (09-4206-I-23)
10/19/09	Redwoods Community College District files incorrect reduction claim (09-4206-I-26)
10/20/09	Controller issues claim adjustment letter with audit report to Citrus Community College District for fiscal years 2002-2003 through 2006-2007
10/20/09	Controller issues claim adjustment letter with audit report to Cerritos Community College District for fiscal years 2002-2003 through 2006-2007
10/20/09	Controller issues claim adjustment letter with audit report to Redwoods Community College District for fiscal years 2002-2003 through 2006-2007
10/20/09	Controller issues claim adjustment letter with audit report to Pasadena Area Community College District for fiscal years 2004-2005 through 2005-2006
10/21/09	Controller issues claim adjustment letter with audit report to Allan Hancock Joint Community College District for fiscal years 2002-2003 through 2006-2007
10/21/09	Controller issues claim adjustment letter with audit report to Los Rios Community College District for fiscal years 2005-2006 through 2007-2008
01/29/10	Commission adopts amendments to parameters and guidelines for the *Health Fee Elimination* program
02/10/10	Rancho Santiago Community College District files reimbursement claim for fiscal year 2008-2009
04/22/10	Controller issues claim adjustment letter with audit report to Rancho Santiago Community College District for fiscal years 2005-2006 through 2008-2009
05/29/10	Controller issues claim adjustment letters to Rancho Santiago Community College District for fiscal years 2005-2006 through 2008-2009
06/07/10	Allan Hancock Joint Community College District files incorrect reduction claim (09-4206-I-27)
06/15/10	Pasadena Area Community College District files incorrect reduction claim (09-4206-I-30)
06/16/10	Rancho Santiago Community College District files incorrect reduction claim (09-4206-I-28)
09/21/10	Third District Court of Appeal issues decision in *Clovis Unified School Dist. v. Chiang*

12/13/10	Commission staff issues notice of proposed consolidation of incorrect reduction claims (09-4206-I-19, 20, 23, 26, 27, 28, and 30) filed by Citrus, Cerritos, Los Rios, Redwoods, Allan Hancock Joint, Rancho Santiago, and Pasadena Community College Districts and request for further briefing and information
01/11/11	Citrus, Cerritos, Los Rios, Redwoods, Rancho Santiago, and Pasadena Area Community College Districts file response to the consolidation of the incorrect reduction claims and request for further briefing and information
04/14/11	Controller files response to the consolidation of the incorrect reduction claims and request for further briefing and information
07/20/11	Commission staff issues draft staff analysis
09/01/11	Citrus, Cerritos, Los Rios, Redwoods, Rancho Santiago, and Pasadena Area Community College Districts file response to the draft staff analysis
09/02/11	Controller files response to the draft staff analysis

I. Background

This analysis looks at seven consolidated incorrect reduction claims filed by the Citrus, Cerritos, Los Rios, Redwoods, Allan Hancock Joint, Rancho Santiago, and Pasadena Area Community College Districts (the Districts) regarding reductions made by the Controller to reimbursement claims for costs incurred by the seven districts during fiscal years 2002-2003 through 2008-2009 for providing health services to all community college students under the *Health Fee Elimination* program.[1] The reductions made by the Controller reduced all or part of each district's reimbursement claims for costs incurred during fiscal years 2002-2003 through 2008-2009 based on the Controller's calculation of total health service fees that each district was authorized by law to charge to offset the costs incurred by the Districts.

Health Fee Elimination Program

Prior to 1984, former Education Code section 72246 authorized community college districts to charge almost all students a general fee (health service fee) for the purpose of voluntarily providing health supervision and services, direct and indirect medical and hospitalization

[1] Citrus Community College District claimed costs in the amount of $513,010 incurred in fiscal years 2002-2003 through 2006-2007. Cerritos Community College District claimed costs in the amount of $487,933 incurred in fiscal years 2002-2003 through 2006-2007. Los Rios Community College District claimed costs in the amount of approximately $2.8 million incurred in fiscal years 2005-2006 through 2007-2008. Redwoods Community College District claimed costs in the amount of $439,666 incurred in fiscal years 2002-2003 through 2006-2007. Allan Hancock Joint Community College District claimed costs in the amount of $341,318 incurred in fiscal years 2002-2003 through 2006-2007. Rancho Santiago Community College District claimed costs in the amount of approximately $2.5 million incurred in fiscal years 2005-2006 through 2008-2009. Pasadena Area Community College District claimed costs in the amount of $398,015 incurred in fiscal years 2004-2005 and 2005-2006.

services, and operation of student health centers.[2] In 1984, the Legislature enacted legislation to repeal former Education Code section 72246, and thus left community college districts without fee authority for health services.[3] However, the legislation included a provision that reenacted the code section, which was to become operative on January 1, 1988.[4]

In addition to repealing community college districts' fee authority, the 1984 legislation required any district which provided health services during the 1983-1984 fiscal year, for which it was previously authorized to charge a fee, to maintain the health services at the level provided during the 1983-1984 fiscal year for every subsequent fiscal year until January 1, 1988. The result was that community college districts, which previously had fee authority for the provision of health services, had to maintain health services provided in the 1983-1984 fiscal year without any fee authority for this purpose.

In 1987, the Legislature amended former Education Code section 72246, which was to become operative January 1, 1988, to incorporate and extend the maintenance of effort provisions of former Education Code section 72246.5.[5] As a result, in 1988 all community college districts that provided health services in the 1986-1987 fiscal year were required to maintain health services in the 1987-1988 fiscal year and each year thereafter. In addition, the community college districts regained fee authority for the provision of the health services.

In 1993, former Education Code section 72246 was renumbered to Education Code section 76355.[6]

Commission Decisions

At the November 20, 1986 Commission hearing, the Commission determined that the 1984 legislation, which required community college districts to maintain health services while repealing community college districts' fee authority for those services, imposed a reimbursable state-mandated new program upon community college districts.[7] On August 27, 1987, the Commission adopted parameters and guidelines for the *Health Fee Elimination* program.

At the May 25, 1989 Commission hearing, the Commission adopted amendments to the parameters and guidelines for the *Health Fee Elimination* program to reflect amendments made by the 1987 legislation.[8] The 1987 legislation reestablished community college districts' fee authority for the provision of health services and extended the maintenance of service provision

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[2] Statutes 1981, chapter 763. Students with low-incomes, students that depend upon prayer for healing, and students attending a college under an approved apprenticeship training program, were exempt from the fee.

[3] Statutes 1984, 2nd Extraordinary Session 1984, chapter 1.

[4] *Ibid*.

[5] Statutes 1987, chapter 1118.

[6] Statutes 1993, chapter 8, section 34.

[7] Statement of decision, *Health Fee Elimination* (CSM 4206, adopted January 22, 1987). Reference to 1984 legislation refers to Statutes 1984, 2nd Extraordinary Session 1984, chapter 1.

[8] Amendments to parameters and guidelines, *Health Fee Elimination* (CSM 4206, adopted May 25, 1989). Reference to 1987 legislation refers to Statutes 1987, chapter 1118.

such that all community college districts that provided health services during the 1986-1987 fiscal year were required to maintain that level of service each fiscal year thereafter. As a result, the 1989 parameters and guidelines reflected a change in eligible claimants for the *Health Fee Elimination* program, and the reestablishment of community college districts' fee authority for the *Health Fee Elimination* program.

Reductions Made by the Controller

The Controller reduced reimbursement claims filed by the Districts for the *Health Fee Elimination* program based on the determination that the Districts understated the health service fees which are required to be deducted from the costs claimed by failing to account for health service fees that districts were *authorized* to charge. The Districts filed seven individual incorrect reduction claims as a result of the adjustments made to the reimbursement claims. The Districts argue that they were only required to offset costs by health service fees that were *actually* charged and received.

On September 21, 2010, after the filing of the incorrect reduction claims, the Third District Court of Appeal issued its opinion in *Clovis Unified School Dist. v. Chiang* (*Clovis*), which specifically addressed this disputed issue. The court found that community college districts were required to offset costs claimed for the *Health Fee Elimination* program by the health service fees that community college districts were *authorized* to charge.[9]

On December 13, 2010, Commission staff consolidated the seven incorrect reduction claims filed by the Districts.

II. Position of the Parties

Claimant's Position

For fiscal years 2002-2003 through 2008-2009, the Districts claimed reimbursement for costs to provide health services to community college students under the *Health Fee Elimination* program. During these fiscal years the Districts accounted only for health service fees actually received as offsetting revenue and subtracted that amount from the costs incurred as a result of providing health services.

The Districts contend that the Controller incorrectly reduced the costs for providing health services to students. Prior to the court's decision in *Clovis* the Districts asserted in their incorrect reduction claims that:

- Community college districts are required to reduce costs only by offsetting revenue received.
- The Controller did not provide the required explanation of the adjustments. "The Controller's actions ... deny the District the opportunity to comprehensively contest the adjustments through this Incorrect Reduction Claim."[10]

[9] *Clovis Community College Dist. v. Chiang* (2010) 188 Cal.App.4th 794, 810-812.

[10] At the time of the Districts' filing of the incorrect reduction claims, the State Controller's Office had yet to provide an explanation for the adjustments made to reimbursement claims made by the Districts.

- No audit was conducted, "Therefore the Controller has no factual basis to make a conclusion that the costs claimed were excessive or unreasonable, as required by Government Code section 17561(d)(2)."
- The second sentence of Government Code section 17558.5(a) provides that if no payment has been made to a claimant for a fiscal year for which a 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. The second sentence is impermissibly vague. As a result, the statute of limitations should commence to run upon filing of a claim by a claimant.

In January 2011, Districts also filed a response to the consolidation of the incorrect reduction claims and request for further briefing and information by the Commission.[11] The Districts' comments generally provide that:

- Increasing the health service fees by the same percentage increase to the Implicit Price Deflator for State and Local Purchases of Goods and Services is within the authority of only community college districts. As a result, without action by a community college district the maximum amount of health service fees that can be charged by the district are the amounts specified in Education Code section 76355 (a)(1). Additionally, the Controller cannot use information provided by the California Community College Districts Chancellor's Office (Chancellor's Office) to determine the maximum health service fee authority because only the districts have the authority to increase the health service fee.
- The Controller reduced the claims for reimbursement by too much.
    - Although the Controller excluded students exempt from paying the health service fees from the calculation of the amount of health service fees that a district is authorized to charge, the Controller did not account for the cost of providing services to these exempt students.
    - The Controller's calculations of the total amount of health service fees that a district is authorized to charge includes all students regardless of whether there is a student health service center at a student's location of attendance.
    - The scope of health services provided pursuant to the *Health Fee Elimination* program exceeds the scope of authorized uses of the health service fee.
- The Controller improperly utilized enrollment data from the Chancellor's Office for the calculation of collectible fees.

In addition, the Districts reassert that no audit was conducted. The Districts state that "the [State Controller's Office] did not audit the districts' enrollment or program costs. The Controller does not assert that the claimed costs were excessive or unreasonable. It would therefore appear that the entire findings are based upon the wrong standard for review."[12]

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[11] Comments filed by Citrus, Cerritos, Los Rios, Redwoods, Rancho Santiago, and Pasadena Area Community College Districts, dated January 1, 2011 (Exhibit I).

[12] Comments filed by Citrus, Cerritos, Los Rios, Redwoods, Rancho Santiago, and Pasadena Area Community College Districts, *supra*, page 9 (Exhibit I).

On September 1, 2011, the Districts filed a response disagreeing with the draft staff analysis, and clarifying and reiterating the arguments above.

Position of the Controller

The Controller filed comments disagreeing with the incorrect reduction claims filed by the Districts, and responding to the Commission's request for further briefing and information, focusing on the effect of the *Clovis* decision on the incorrect reduction claims.[13] The Controller specifically asserts:

- In regard to the Districts' assertion that districts are required to reduce costs only by offsetting revenue received, "the issues surrounding offsetting revenue based on authorized fees have been fully resolved by the court in the [*Clovis*] case. In that case the court concluded that the "Health Fee Rule" implemented by the [State] Controller's Office, which reduced reimbursement by the amount of the health fee authorized, was valid."
- In response to the Districts' assertion that the Controller did not provide the required explanation of the adjustments and in doing so has denied the Districts the opportunity to comprehensively contest the adjustments through the incorrect reduction claims, a detailed analysis of all claim reductions was provided (after the incorrect reductions were filed). In addition, "The [Districts] may file an amended Incorrect Reduction Claim pursuant to Title 2, California Code of Regulations (CCR), section 1185."
- In response to the Districts' assertion that no audit was conducted, and that the Controller does not assert that the costs claimed were excessive or unreasonable, "We disagree. The [Controller] reviewed the [Districts'] claims and concluded that the [Districts] did not properly report authorized health service fees." Additionally, "The [Controller] did in fact conclude that the [Districts'] claim was *excessive*."
- In response to the Districts' assertion that the statute of limitations applicable to audits conducted on reimbursement claims for which no payment has been made is impermissibly vague, "the language of the statute in [*sic*] not vague, the Claimants simply prefer a different outcome. The statute clearly predicates the running of the statute of limitations on the 'date of initial payment,' in cases where no funds are appropriated or no payment is made. . . . . Ultimately, the argument concerning vagueness is moot, as the [Commission] has no authority to determine that statute, or any portion thereof, is unconstitutional."

On September 2, 2011, the Controller submitted comments agreeing with the conclusions regarding issues of law in the draft staff analysis, but pointed out two factual errors: (1) Citrus Community College District did not claim costs for providing physicals to athletes; and (2) Rancho Santiago Community College District is not eligible for reimbursement for providing physicals for athletes because it did not provide that service in fiscal year 1986-1987.

[13] Comments filed by the State Controller's Office, "Response by the State Controller's Office to the Incorrect Reduction Claim by [the Districts]," dated April 14, 2011 (Exhibit J). The same arguments were made by the State Controller's Office to all incorrect reduction claims filed by the Districts.

III. Discussion

Government Code section 17561(b) 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 the local agency or school district. If the Commission determines that a reimbursement claim has been incorrectly reduced, section 1185.7 of the Commission's regulations requires the Commission to send the statement of decision to the Controller and request that the costs in the claim be reinstated.

For the reasons provided in the following analysis, the Commission finds that the Controller incorrectly reduced the Districts' reimbursement claims to the extent that the Controller applied health service fees to offset the claimed costs that are attributable to physicals for athletes and employees. The Commission finds that all other costs were correctly reduced by the Controller application of authorized health service fees as offsetting revenue.

The following analysis will address: (1) The effect of the *Clovis* decision on the Districts' incorrect reduction claims; (2) whether the Controller conducted an audit, and whether the Controller met the applicable statute of limitations or procedural notification requirements to conduct an audit; (3) whether the scope of reimbursable services under the *Health Fee Elimination Program* as described in the parameters and guidelines exceeds the permitted uses of health service fees; and (4) whether the Commission has the authority to remand a reimbursement claim to the Controller to correct reductions incorrectly made to the reimbursement claim.

A. What is the effect of the *Clovis* decision on the Districts' incorrect reduction claims?

This section will address the following issues: (1) the court's ruling on the Controller's use of the "Health Fee Rule" which offsets reimbursement claims for the *Health Fee Elimination* program by the maximum amount of health service fees that community college districts are authorized to charge; and (2) the propriety of imposing the health service fee on students that cannot access student health services in a practical manner.

1) Pursuant to the *Clovis* decision, the Controller appropriately used Education Code section 76355(a)(2) to determine the maximum health service fee authority of community college districts.

After the Districts filed their incorrect reduction claims, the Third District Court of Appeal issued its opinion in *Clovis*, which specifically addressed the issue of whether the Controller properly reduced reimbursement claims for state-mandated health services provided by community college districts pursuant to the *Health Fee Elimination* program using the "Health Fee Rule." The "Health Fee Rule" is the Controller's practice of reducing district claims by the maximum fee amount that districts are statutorily authorized to charge students, even when a district chooses not to charge its students those fees. As quoted by the court, the Health Fee Rule states in pertinent part:

> Eligible claimants will be reimbursed for health service costs at the level of service provided in the 1986/87 fiscal year. The reimbursement will be reduced

> by the amount of student health fees authorized per the Education Code [section] 76355.[14] (Underline in original.)

As shown by the quote above, the Health Fee Rule upheld by the court includes all of Education Code section 76355(a), which provides in relevant part:

> (a)(1) The governing board of a district maintaining a community college may require community college students to pay a fee in the total amount of not more than ten dollars ($10) for each semester, seven dollars ($7) for summer school, seven dollars ($7) for each intersession of at least four weeks, or seven dollars ($7) for each quarter for health supervision and services, including direct or indirect medical and hospitalization services, or the operation of a student health center or centers, or both.
>
> (a)(2) The governing board of each community college district may increase [the health service fee] by the same percentage increase as the Implicit Price Deflator for State and Local Government Purchase of Goods and Services. Whenever that calculation produces an increase of one dollar ($1) above the existing fee, the fee may be increased by one dollar ($1).

Pursuant to the plain language of Education Code section 76355(a)(2), the fee authority given to districts automatically increases by the same percentage increase as the Implicit Price Deflator for State and Local Government Purchase of Goods and Services.[15] This increase occurs without the need of any legislative action by a community college district or any other entity (state or local).

The court upheld the Controller's use of the "Health Fee Rule" to reduce reimbursement claims based on the fees districts are *authorized* to charge. In making its decision the court notes that the basic principle underlying the state mandates process that Government Code section 17514 and 17556(d) embody is:

> To the extent a local agency or school district "has the authority" to charge for the mandated program or increased level of service, that charge cannot be recovered as a state-mandated cost.[16]

The court also notes that, "this basic principle flows from common sense as well. As the Controller succinctly puts it, 'Claimants can choose not to require these fees, but not at the state's expense.'"[17] Additionally, in responding to the community college districts' argument

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[14] *Clovis Unified School Dist. v. Chiang*, *supra*, 188 Cal.App.4th at page 811.

[15] The Implicit Price Deflator for State and Local Purchase of Goods and Services is a number computed annually (and quarterly) by the United States Department of Commerce as part of its statistical series on measuring national income and product, and is used to adjust government expenditure data for the effect of inflation.

[16] *Clovis Unified School Dist. v. Chiang*, *supra*, 188 Cal.App.4th at page 812.

[17] *Ibid.*

that, "since the Health Fee Rule is a claiming instruction, its validity must be determined *solely* through the Commission's P&G's."[18] The court held:

> To accept this argument, though, we would have to ignore, and so would the Controller, the fundamental legal principles underlying state-mandated costs. We conclude *the Health Fee Rule is valid*.[19] (Italics added.)

Thus, pursuant to the court's decision the Health Fee Rule used by the Controller to adjust reimbursement claims filed by the Districts for the *Health Fee Elimination* program is valid. The Commission is bound by the court's decision in *Clovis*, and bound to apply the Health Fee Rule set forth by the court.[20] The Districts argue that the Commission is not bound to apply the Health Fee Rule in this incorrect reduction claim because there are factual issues here not considered by the *Clovis* court.[21] The Commission disagrees with this argument. The court was clear that to the extent that a local agency or school district has the authority to charge for the mandated program or increased level of service, by law that charge cannot be recovered as a state-mandated cost.[22] The factual issues asserted by the Districts do not affect this underlying rule of law.

The Districts also attempt to separate the automatic increase in the health fee authority pursuant to Education Code section 76355(a)(2) from the "Health Fee Rule," which the court in *Clovis* found to be valid.[23] In doing so, the Districts assert that the Commission must make an independent finding regarding the use of Education Code section 76355(a)(2) to determine the maximum fee authority granted by Education Code section 76355 for auditing purposes.

To support the Districts' argument, the Districts make variations of the argument that Education Code section 76355(a)(2) is not self-implementing and requires action by the community college districts, not a state agency, in order to take effect.[24] The Districts assert that the Controller cannot use Education Code section 76355(a)(2) to calculate the maximum fee authority that community college districts are required to use as offsets for purposes of claiming reimbursement for the *Health Fee Elimination* program (or information from the Chancellor's

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[18] *Ibid.* (Original italics.)

[19] *Clovis Unified School Dist. v. Chiang*, *supra*, 188 Cal.App.4th at page 812.

[20] *Darsie v. Darsie* (1942) 49 Cal.App.2d 491, 495, in which the court held, "[a] question once deliberately examined and decided should be considered as settled and closed to further arguments."

[21] Response to the draft staff analysis filed by Citrus, Cerritos, Los Rios, Redwoods, Rancho Santiago, and Pasadena Area Community College Districts, September 1, 2011, p. 5 (Exhibit L).

[22] *Clovis Unified School Dist. v. Chiang*, *supra*, 188 Cal.App.4th at page 812.

[23] Comments filed by Citrus, Cerritos, Los Rios, Redwoods, Rancho Santiago, and Pasadena Area Community College Districts, dated January 11, 2011, pages 4-6 (Exhibit I). See also, response to the draft staff analysis filed by Citrus, Cerritos, Los Rios, Redwoods, Rancho Santiago, and Pasadena Area Community College Districts, *supra*, p. 5 (Exhibit L).

[24] *Ibid*.

Office calculated according to Education Code section 76355(a)(2)).[25] The Districts are incorrect.

As discussed above, the court fully resolved the issue of the Controller's use of the Health Fee Rule, which includes all of section 76355(a). The court held that the Health Fee Rule is valid because community college districts are not entitled to reimbursement for costs for which the districts have the *authority* to charge a fee.[26] This rule is applicable regardless of the fee that community college districts decide to actually charge. The Health Fee Rule also includes any automatic increases in fee *authority* resulting from the calculation set forth by the plain language in Education Code section 76355(a)(2). To find that the Controller cannot use Education Code section 76355(a)(2) to determine the maximum health service fee authority for purposes of adjusting reimbursement claims for the *Health Fee Elimination* program would require the Commission to disregard or overrule the court's decision in *Clovis* and disregard the plain language of the statute. The Commission does not have the authority to do either.[27]

Thus, the Districts' "self-implementation" argument is incorrect in light of the court's decision in *Clovis*. Pursuant to the decision in *Clovis*, the Commission finds that for purposes of auditing reimbursement claims for the *Health Fee Elimination* program it is necessary for the Controller to use Education Code section 76355(a)(2) to identify the maximum health service fees that community college districts had the authority to charge and were required to use as offsetting revenue for claims of reimbursement for the *Health Fee Elimination* program.

2) <u>The Controller correctly included students that cannot access student health services in a practical manner in the calculation of the maximum amount of health service fees that a community college district has the authority to charge.</u>

The Districts argue:

> Many community colleges have academic "learning centers" located significant distances away from the main campus location of the student health service center and other student services or programs. . . . It would be unreasonable for the district to charge a student at these remote locations for services that will not be provided because they are not practically accessible.
>
> The Controller's calculation of collectible fees includes all students regardless of whether there is a student health service center at their location of attendance. The result is that the Controller is offsetting the cost of services provided to other students for students from whom the district does not collect a revenue or incur a program cost. The *Clovis* decision has concluded that if a charge can be made, then a cost is not incurred. No charge can reasonably be made for students that cannot access the services, so total program costs should not be reduced by health service fees never collected, perhaps, at the very least as a matter of "common sense."

[25] *Ibid.*

[26] *Clovis Unified School Dist. v. Chiang, supra,* 188 Cal.App.4th at page 812.

[27] *Darsie v. Darsie, supra,* 49 Cal.App.2d at 495.

> This issue is also applicable to other students that either by district governing board determination, or otherwise, cannot access the student health services: non-credit students enrolled in off-campus classes or events, adult education students who are not enrolled in the college, and concurrently enrolled high school students without legal capacity to consent to health care services. Each district may have other factual variations of students without access to health care services.[28]

The Districts also argue that because the scope of reimbursable services is limited to the student health services provided in fiscal year 1986-1987 (the base year), the scope of nonexempt students to be included in the collectible fees offset should be limited to the base year.[29]

As discussed above, for purposes of mandate reimbursement the issue as identified by the court in *Clovis* is whether community college districts have the *authority* to charge the health service fee regardless of the decision made by the community college districts to actually impose the fee or not.

Under the plain language of Education Code section 76355 community college districts are authorized to charge all students the health service fee, except: (1) students who depend exclusively upon prayer for healing in accordance with the teachings of a bona fide religious sect, denomination, or organization; (2) students who are attending a community college under an approved apprenticeship training program; and until January 1, 2006; and (3) low-income students.[30] This health fee authority is not limited to the scope of students the Districts decided to charge the fee in the base year. The Districts acknowledge that the Controller has excluded the students exempted from the fee in calculating the maximum amount of health service fees that the Districts had the authority to charge.[31] Unless the students referenced in the Districts' argument above fall into any of the three categories of exempt students, the Districts have the authority to charge the students the health service fee.

In addition, there is no prohibition in the statutory or regulatory scheme that governs the use of health fees that prohibits the use of fees for the cost of services provided to exempt students. Thus, the Districts' assertion that authorized health fees cannot be used to offset the cost of providing health services to exempt students is incorrect.

The Commission recognizes that charging the health service fee to all non-exempt students, including those that do not use community college health services, may be a difficult policy

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[28] Comments filed by Citrus, Cerritos, Los Rios, Redwoods, Rancho Santiago, and Pasadena Area Community College Districts, *supra*, page 5 (Exhibit I). See also, response to draft staff analysis filed by Citrus, Cerritos, Los Rios, Redwoods, Rancho Santiago, and Pasadena Area Community College Districts, *supra*, p. 6 (Exhibit L), which reiterates these arguments.

[29] Response to draft staff analysis filed by Citrus, Cerritos, Los Rios, Redwoods, Rancho Santiago, and Pasadena Area Community College Districts, *supra*, pgs. 6-7 (Exhibit L).

[30] Statutes 2005, chapter 320, repealed the exemption for low-income students from Education Code section 76355.

[31] Comments filed by Citrus, Cerritos, Los Rios, Redwoods, Rancho Santiago, and Pasadena Area Community College Districts, *supra*, page 6 (Exhibit I).

decision for a community college district's governing board to make. However, non-use of a community college district's health services, whether due to the distance of a student from the services or simply by choice of a student not to use the services, is not an exemption from the fee that community college districts are *authorized by law* to charge. Thus, the Commission finds that the State Controllers' Office properly included all students that do not fall within the three categories of students exempt from the health service fee as students which the Districts have the *authority* to charge the health service fee.

B. Has the Controller failed to properly conduct an audit or to meet the applicable statute of limitations or procedural notification requirements in conducting its audit? If so, what are the effects on the Controller audit and subsequent reduction of the Districts' reimbursement claims?

The following discussion will first address whether the Controller has properly conducted an audit and whether the Controller has met the statute of limitations to initiate and complete the audit. Second, the discussion will address the effect of the Controller's failure to provide an explanation within 30 days of adjustments made to reimbursement claims as required by Government Code section 17558.5(c).

1) The Controller has properly conducted an audit and met the statute of limitations to initiate and complete the audit.

The Districts make the following assertions: (a) the Controller has improperly used enrollment data and fee authority calculations provided by the Chancellor's Office to conduct the audits; (b) the Controller has based its adjustments to the Districts' reimbursement claims on the wrong standard of review; and (c) the Controller did not initiate and complete an audit within the applicable statute of limitations.

a. The Controller has not improperly utilized the health fee calculations and enrollment data provided by the Chancellor's Office to conduct the audits.

Government Code section 17561(d)(2) sets forth the duty of the State Controller to pay reimbursement claims, the authority to audit claims, and the authority to reduce claims determined to be excessive or unreasonable. Specifically, Government Code section 17561(d)(2) provides in relevant part:

> The Controller shall pay these claims [for reimbursement] from funds appropriated therefor except as follows:
>
> (A) The Controller may audit any of the following:
>
> (i) Records of any local agency or school district to verify the actual amount of mandated costs.
>
> (ii) The application of a reasonable reimbursement methodology.
>
> (iii) The application of a legislatively enacted reimbursement methodology under Section 17573.
>
> (B) The Controller may reduce any claim that the Controller determines is excessive or unreasonable.

In addition, Government Code section 12410 imposes the duty on the Controller to:

> [S]uperintend the fiscal concerns of the state. The Controller shall audit all claims against the state, and may audit the disbursement of any state money, for correctness, legality, and for sufficient provisions of law for payment.

In order to carry out the duty to audit all claims against the state, Government Code section 12410 gives the Controller broad discretion in how to perform its duty, providing in relevant part:

> Whenever, in [the Controller's] opinion, the audit provided for by [Government Code section 925 et seq.] is not adequate, the Controller *may make such field or other audit* of any claim or disbursement of state money *as may be appropriate to such determination*. (Italics added.)

The Controller exercised its discretion by reducing the amounts claimed by the Districts based on the maximum amount of health service fees that the Districts were authorized to collect during the relevant fiscal years multiplied by all students enrolled in each district that are not exempt from the fee. For purposes of auditing the Districts' reimbursement claims the Controller used health fee authority calculations provided by the Chancellor's Office and enrollment data provided by the Chancellor's Office from its management information system (MIS).

The Districts argue that the Controller cannot rely on fee authority calculations and enrollment data provided by the Chancellor's Office for purposes of conducting an audit of the Districts' reimbursement claims. The Districts assert, without any reference to legal authority, that although the Controller has discretion in conducting audits of claims against the state, the Controller inappropriately used its discretion by using third-party data for the purpose of audit adjustments absent validation of the data.[32] The Commission disagrees.

Although the statutory scheme in Government Code section 17500 et seq. does not specify the standard of review by which the Commission examines an audit by the Controller resulting in an incorrect reduction claim, courts have held that an ordinary mandate is used to review decisions made by an agency where the agency was not required to hold an evidentiary hearing.[33] In addition, courts have found:

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[32] Comments filed by Citrus, Cerritos, Los Rios, Redwoods, Rancho Santiago, and Pasadena Area Community College Districts, dated January 11, 2011, page 8 (Exhibit I). See also, response to the draft staff analysis filed by Citrus, Cerritos, Los Rios, Redwoods, Rancho Santiago, and Pasadena Area Community College Districts, p. 9-11 (Exhibit L).

[33] *Johnston v. Sonoma County Agricultural* (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; and *Harris v. Civil Service Com.* (1998) 65 Cal.App.4th 1356, 1363, in which the court finds:

> We question, as the [San Francisco civil service commission] does, whether review by administrative mandate is available. Unless (1) a hearing, (2) the taking of evidence and (3) discretion to determine facts are all required "by law" (§1094.5, subd. (a)), review can be had only by traditional mandate [Citation].

> Ordinary mandamus may be used to compel the performance of a duty that is purely ministerial in nature [citation] or to correct an abuse of discretion [citation]. 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.]' "[34]

Also, in a petition for writ of ordinary mandate the petitioner bears the burden of pleading and proving the facts on which the claim for relief is based.[35]

Like a petition for writ of ordinary mandate, the Districts' request is that the Commission review the Controller's use of discretion in an audit, in which the Controller is not required to hold an evidentiary hearing, and find that the Controller has abused its discretion. The Commission finds that the Districts bear the burden of pleading and proving that the Controller's decisions were arbitrary, capricious, or entirely lacking in evidentiary support. The Commission further finds that the Commission may not reweigh the evidence or substitute its judgment for that of the agency. Instead, the Commission must determine whether the Controller's decisions were arbitrary, capricious, or entirely lacking in evidentiary support.

The Commission must review the Controller's actions in light of the fact that the initial burden of providing evidence for a claim of reimbursement also lies with the Districts. The *Health Fee Elimination* parameters and guidelines provided during the claiming period at issue:

> For auditing purposes, *all costs claimed must be traceable to source documents and/or worksheets that show evidence of the validity of such costs*. This would include documentation for the fiscal year 1986-1987 program to substantiate a maintenance of effort. These documents must be kept on file by the agency submitting the claim for a period of no less than three years from the date of the final payment of the claim pursuant to this mandate, and made available on the request of the State Controller or his agent.[36] (Italics added.)

As shown by the language of the parameters and guidelines, the Districts must provide evidence of the validity of the costs claimed and the Controller is tasked with the review of the evidence provided in conducting an audit to determine the validity of the claimed costs (i.e. whether the claimed costs were excessive or unreasonable).

> Those three elements codify the essence of "adjudicatory function" [Citation], as opposed to legislative or quasi-legislative function, in an administrative body.

[34] *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California, supra*, 162 Cal.App.4th at pgs. 547-548.

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

[36] *Health Fee Elimination* parameters and guidelines, as amended on May 25, 1989 (Exhibit N).

To prepare a claim for reimbursement, the *Health Fee Elimination* parameters and guidelines specifically require claimants to:

1. Show the total number of full-time students enrolled per semester/quarter.
2. Show the total number of full-time students enrolled in the summer program.
3. Show the total number of part-time students enrolled per semester/quarter.
4. Show the total number of part-time students enrolled in the summer program.[37]

Despite the fact that the *Health Fee Elimination* parameters and guidelines specifically require the inclusion of total student enrollment numbers,[38] only 8 of the 29 reimbursement claims contained enrollment data for the fiscal years claimed.[39] After receiving the reimbursement claims from the Districts, the Controller issued letters to the Districts requesting student enrollment data and fee amounts by semester as originally requested by the claiming forms and instructions.[40] The claiming forms and instructions requested the maximum fee authorized, total enrollment numbers, and enrollment numbers for students that fall within the health fee exemptions.[41] In response, the Districts stated:

> As you may know, when we prepare the annual claim, we utilize actual student health insurance income received by the [Districts] to determine the net reimbursable costs rather than calculate the "amount collectible." We consider the amount collectible calculation method (total students subject to the student health insurance fee multiplied by the highest authorized student health insurance

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[37] Amendments to parameters and guidelines, *Health Fee Elimination* (CSM 4206, adopted May 25, 1989), p. 6 (Exhibit N).

[38] *Ibid*.

[39] Incorrect reduction claims filed by the Districts. Enrollment numbers were identified by Citrus Community College District for fiscal years 2003-2004 through 2005-2006; Los Rios Community College District for fiscal year 2007-2008; Redwoods Community College District for fiscal year 2002-2003; Allan Hancock Joint Community College District for fiscal year 2004-2005; and Rancho Santiago for fiscal years 2007-2008 and 2008-2009 (Exhibits A-G).

[40] State Controller's Office letter to Citrus Community College District for information for fiscal year 2006-2007, dated July 1, 2008; State Controller's Office letter to Cerritos Community College District for information for fiscal years 2004-2005 through 2006-2007, dated July 1, 2008; State Controller's Office letter to Los Rios Community College District for information for fiscal years 2004-2005 through 2006-2007, dated July 1, 2008; State Controller's Office letter to Redwoods Community College District for information for fiscal years 2004-2005 through 2006-2007, dated July 1, 2008; State Controller's Office letter to Allan Hancock Joint Community College District for information for fiscal years 2005-2006 through 2006-2007, dated July 2, 2008; State Controller's Office letter to Rancho Santiago Community College District for information for fiscal years 2005-2006 through 2006-2007, dated July 1, 2008; State Controller's Office letter to Pasadena Area Community College District for information for fiscal years 2004-2005 and 2005-2006 (Exhibit J).

[41] Education Code sections 76355(c)(1)-(3), which set forth the exemptions based on religion, enrollment as an apprentice, and income.

> fee per student) to be less accurate than actual revenues received. This difference in reporting methods has been the subject of past field audits, pending incorrect reduction claims, and pending litigation. We will continue to utilize the actual income received amount until the dispute is decided by competent authority in order to preserve the [Districts'] rights.
>
> This letter transmits an HFE 1.1 form for each fiscal year which includes the student enrollment data that you requested. The individual student health insurance fee amount is not included since it is the Controller's policy to use the highest authorized rate regardless of the rate charged by the [Districts]. The highest authorized rate is a matter of public record available to the Controller's staff, so is not provided here.[42]

As quoted above, the Districts did not provide any information regarding the authorized fee authority despite the requirement in the parameters and guidelines that "all costs claimed" be supported by evidence. The Districts base the offsetting revenue for their reimbursement claims on "income received" rather than fee authority, in clear violation of the Health Fee Rule as set forth in *Clovis*.

In addition, it is unclear whether the enrollment data provided by the Districts in response to the Controller's request represents total enrollment of students not exempt from the health service fee or total enrollment of students that the Districts *decided* to charge the health service fee. Specifically, the enrollment data provided by the Districts in response to the Controller's request does not identify any students exempt from the health service fee on the basis of religion (Ed. Code, § 76355(c)(1)). Additionally, the data provided by the Districts identifies only two districts and one fiscal year that had students that were exempt from the health service fee on the basis of students attending the college under an apprenticeship training program (Ed. Code, § 76355(c)(2)).[43] No other districts identify students enrolled in an apprenticeship training program.

In regard to students who were exempt from the health service fee based on income (former Ed. Code, § 76355(c)(3)), most of the Districts identified full-time and part-time enrollment "net of BOG [*sic*] waivers," without identifying how many students were actually excluded from the enrollment numbers identified. Also, the income exception was inoperative as of January 1, 2006. It is unclear from the evidence in the record whether the Districts excluded low-income students after January 1, 2006 from the health service fee for reimbursement claims

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[42] Incorrect reduction claims filed by the Districts, "Exhibit C" of Citrus Community College District's incorrect reduction claim; "Exhibit C" of Cerritos Community College District's incorrect reduction claim; "Exhibit C" of Los Rios Community College District's incorrect reduction claim; "Exhibit C" of Redwoods Community College District's incorrect reduction claim; "Exhibit B" of Allan Hancock Joint Community College District's incorrect reduction claim; "Exhibit A" of Rancho Santiago Community College District's incorrect reduction claim; and "Exhibit B" of Pasadena Area Community College District's incorrect reduction claim (Exhibits A-G).

[43] Cerritos Community College District and Allan Hancock Joint Community College District identify enrollment numbers of students attending each district under an apprenticeship training program for fiscal year 2006-2007.

made during fiscal year 2005-2006. Viewing the enrollment data described above in conjunction with the Districts' response to the Chancellor's Office request for the enrollment data, it is unclear whether or not the Districts provided the total enrollment of students minus students exempted from the health service fee or if the Districts provided enrollment numbers of students the Districts *actually* charged the health service fee.

In explaining why all of the evidence was not provided, the Districts argue that the information requested by the Controller, by letter and by the claiming instructions, is not required by the parameters and guidelines, and therefore, the Controller's requests did not have the force of law.[44] In addition, the Districts assert that the information requested "was irrelevant until the *Clovis* decision."[45] Although the parameters and guidelines do not specifically require *all*[46] of the information requested by the Controller, the parameters and guidelines do require that all costs claimed be traceable to source documents or worksheets that show evidence of the validity of such costs. In addition, the parameters and guidelines require the Districts to provide such documents or worksheets on the request of the Controller.

Here, pursuant to the Health Fee Rule as described by the court in *Clovis*, in order to show the validity of costs claimed under the Health Fee Elimination program it is necessary to have evidence of the total enrollment of non-exempt students and the maximum health service fee authorized. The Districts' assertion that the information requested was not relevant until the *Clovis* decision implicitly acknowledges that the information requested is relevant in the determination of total authorized health fees. In addition, the Districts' assertion that the information was not relevant *until* the *Clovis* decision is incorrect because the decision on the Health Fee Rule was based on the court's interpretation of existing law and the basic principle underlying the state mandate process as they existed prior to the decision.[47]

Absent the relevant information requested from the Districts and in light of the Districts' response to the Controller's request, the Controller used evidence provided by a third party (the Chancellor's Office) to determine the validity of the Districts' reimbursement claims. The Districts do not assert that the health fee calculations and enrollment data are actually incorrect in light of the *Clovis* decision, nor do they provide evidence that they are incorrect in light of the *Clovis* decision. In addition, the Districts do not provide evidence of what they believe are the correct health fee calculations and enrollment data in light of *Clovis*. In effect, the Districts'

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[44] Response to the draft staff analysis filed by Citrus, Cerritos, Los Rios, Redwoods, Rancho Santiago, and Pasadena Area Community College Districts, *supra*, p. 10 (Exhibit L).

[45] *Ibid*.

[46] As noted in the analysis, the *Health Fee Elimination* parameters and guidelines specifically required the inclusion of: (1) the total number of full-time students enrolled per semester/quarter; (2) the total number of full-time students enrolled in the summer program; (3) the total number of part-time students enrolled per semester/quarter; and (4) the total number of part-time students enrolled in the summer program. However, the parameters and guidelines do not specifically require the inclusion of enrollment numbers of students exempt from the health service fee or the maximum health service fees authorized.

[47] *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th at p. 812.

argument attempts to shift the burden of providing evidence of the validity of all costs claimed to the Controller.

The ultimate conclusion of the Districts' argument would have the Commission re-weighing the evidence provided to the Controller by the Districts and the Chancellor's Office, and substituting the Controller's judgment with that of the Commission. As noted above, in reviewing the Controller's exercise of discretion the Commission may not reweigh the evidence or substitute its judgment for that of the Controller. Instead, the Commission must ensure that the Controller has considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purpose of the enabling statute.

Under the Health Fee Rule, it is necessary to have the maximum health service fee authorized during the fiscal years claimed and the total enrollment numbers of students not exempt from the health service fee in order to calculate the total offsets for the *Health Fee Elimination* program. In light of the Districts' refusal to provide the maximum health service fee calculation, the Controller utilized the calculations provided by the Chancellor's Office, which provides advice to community college districts on the specific matter of the maximum health service fee that districts are authorized to charge.[48] The Controller did not act arbitrarily or capriciously.

As discussed above, pursuant to the plain language of Education Code section 76355(a)(2), the fee authority given to districts automatically increases by the same percentage increase as the Implicit Price Deflator for State and Local Government Purchase of Goods and Services.[49] This increase occurs "[*w*]*henever* that calculation produces an increase of one dollar ($1) above the existing fee"[50] without the need of any legislative action by a community college district or any other entity (state or local).

The Implicit Price Deflator is a number computed annually (and quarterly) by the United States Department of Commerce as part of its statistical series on measuring national income and product, and is used to adjust government expenditure data for the effect of inflation. The Chancellor's Office has the duty to provide general supervision over community college districts and to advise and assist community college districts on the implementation and interpretation of state laws affecting community colleges.[51] In carrying out its duty, when the percentage increase in the Implicit Price Deflator produces an increase of $1 in the health service fee the

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[48] Education Code section 70901(b) and (b)(14); and <http://www.cccco.edu/ChancellorsOffice/Divisions/FinanceFacilities/FiscalServices/FiscalStandardsInformation/StudentHealthFee/tabid/353/Default.aspx> [September 8, 2011].

[49] The Implicit Price Deflator for State and Local Purchase of Goods and Services is a number computed annually (and quarterly) by the United States Department of Commerce as part of its statistical series on measuring national income and product, and is used to adjust government expenditure data for the effect of inflation.

[50] Education Code section 76355(a)(2) (Italics added).

[51] Education Code section 70901(b) and (b)(14).

Chancellor's Office advises community college districts of this change and the resulting increase in the districts' health service fee authority.[52]

Similarly, in light of the Districts' response to the Controller's request for information and the enrollment data provided by the Districts, the Controller utilized enrollment data provided by the Chancellor's Office from its MIS. The Chancellor's Office MIS collects and organizes information submitted by community college districts regarding the districts' students, faculty and staff, and courses. This information is collected and maintained by the Chancellor's Office and the Board of Governors to fulfill their role of providing general supervision over the community college districts.[53] This supervision includes conducting necessary system-wide research on community colleges and providing appropriate information services, including, but not limited to, definitions for the purpose of uniform reporting, collection, compilation, and analysis of data for effective planning and coordination, and dissemination of information.[54] Pursuant to these duties, the Chancellor's Office published the MIS user's manual for district data submission and the MIS Data Element Dictionary. As described by the MIS user's manual for district data submission:

> As a condition of receiving the grant funds, districts certified that they would fully implement the collection and reporting requirements of [MIS], pursuant to the standards adopted by the Chancellor's Office as specified in the MIS Data Element Dictionary. Participation is required of all 72 districts (108 colleges).[55]

The data and information *reported by the community college districts* includes student headcount (MIS data element STD7), enrollment in apprenticeship programs (MIS data element SB 23, Code 1), and BOGG recipients (MIS data element SF21, all codes beginning with B or F).[56] These are the data elements used by the Chancellor's Office to identify total student enrollment and students exempt from the health service fee.

Specifically, the Chancellor's Office identified total enrollment from MIS data element STD7, codes A through G, which identifies total student headcount based on enrollment type.[57]

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[52]See, <http://www.cccco.edu/ChancellorsOffice/Divisions/FinanceFacilities/FiscalServices/FiscalStandardsInformation/StudentHealthFee/tabid/353/Default.aspx> [September 8, 2011].

[53] Chancellor's Office Management Information System, Data Element Dictionary, page 1.01. Education Code section 70901(b) (Exhibit N).

[54] Education Code section 70901(b) (3).

[55] Chancellor's Office Management Information System, User's Manual: Data Submission (2004). Since the publishing of the user's manual, four colleges have been created within the districts (Exhibit N).

[56] MIS "Data Element Dictionary – STD Student Characteristics Derived Data Elements, Student Characteristics Data Elements (SB), and Student Financial Aid Data Elements (SF) and (FA)" at <http://www.cccco.edu/SystemOffice/Divisions/TechResearchInfo/MIS/DED/tabid/266/Default.aasp> as of July 6, 2011 (Exhibit N).

[57] Chancellor's Office Data Element Dictionary, page L.015-L.016. Code "A" identifies credit students enrolled in a weekly/daily census section; code "B" identifies students enrolled in a

Duplicate students were eliminated by students' social security numbers.[58] From the total headcount, the Controller subtracted students enrolled in apprenticeship training programs as identified by the Chancellor's Office with the MIS data element SB23, which identifies students registered as apprentices.[59] Also, the Controller subtracted from the total enrollment number BOGG recipients (low income students receiving a Board of Governors Grant) identified by the Chancellor's Office with the MIS data element SF21, all codes beginning with B or F, which identifies students in receipt of a BOGG.[60] In doing the above, the Controller identified the total number of students that the Districts were authorized to charge the health service fee.

Although the enrollment numbers provided by Cerritos Community College District differ from those identified by the Controller, Cerritos Community College District acknowledges that the enrollment data it provided came from the Chancellor's Office's MIS.[61] Thus, the Chancellor's Office MIS is a reasonable and reliable source for enrollment data of community college districts, and the Controller's use of the MIS for enrollment data for auditing the Districts' claims is not arbitrary or capricious.

The Districts' validation argument suggests that there may be issues with the accuracy of the enrollment data received from the Chancellor's Office. Specifically:

> The MIS system data output directly depends upon the district input. There is no evidence on the record that the data inputs are satisfactory. For example, it appears that the MIS system relies upon "headcount" which is an enrollment statistic reported by the districts on various dates. The total number of students subject to payment of health fees throughout a semester would be different based on date of enrollment or subsequent departure from college and refund of fees before and after the headcount. The DSA does not consider that the data available

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positive attendance section with 8 or more hours or 0.50 or more units earned; code "C" identifies the students enrolled in an independent study section with 0.50 or more units earned; code "D" identifies credit students enrolled in positive attendance section with less than 8 hours and less than 0.50 units earned; code "E" identifies credit students enrolled in an independent study with less than 0.50 units earned; code "F" identifies noncredit students enrolled in a positive attendance section with 8 or more hours; and code "G" identifies noncredit students enrolled in a positive attendance section with less than 8 hours (Exhibit N).

[58] Comments filed by the State Controller's Office, dated April 14, 2011. Response to Citrus Community College incorrect reduction claim, "Tab 5." Response to Cerritos Community College incorrect reduction claim, "Tab 5." Response to Los Rios Community College incorrect reduction claim, "Tab 5." Response to Redwoods Community College District incorrect reduction claim, "Tab 5." Response to Allan Hancock Joint Community College District, "Exhibit B." Response to Rancho Santiago Community College District, "Exhibit A." Response to Pasadena Area Community College District, "Exhibit B." (Exhibit J.)

[59] Chancellor's Office Data Element Dictionary (Exhibit N).

[60] Chancellor's Office Data Element Dictionary (Exhibit N).

[61] Incorrect reduction claim filed by Cerritos Community College District, *supra*, "Exhibit C." (Exhibit B.)

> at the time the annual claim is prepared may not be the same data available or used for the MIS input.[62]

However, the Districts do not provide any evidence to support their assertions, nor do the Districts assert that the enrollment data provided by the Chancellor and used by the Controller is actually incorrect. As noted above, the Districts bear the burden of pleading and proving that the Controller's decisions were arbitrary, capricious, or entirely lacking in evidentiary support. The Commission finds that the Districts have not met the burden of proving the Controller's decisions to use the health fee calculations and enrollment data provided by the Chancellor's Office and subsequent audit determinations to be arbitrary, capricious, or entirely lacking in evidentiary support.

The Commission makes this finding in light of: (1) the Districts' initial burden to provide evidence showing the validity of all costs claimed; (2) the need to calculate total offsetting revenue pursuant to the Health Fee Rule as set forth in *Clovis* in order to determine the validity of all costs claimed; (3) the need to have total enrollment numbers of students not exempt from the health service fee and the maximum health service fee authorized in order to calculate offsetting revenue pursuant to the Health Fee Rule; (4) the enrollment data provided by the Districts, which did not clearly identify the information needed to calculate offsetting revenue pursuant to the Health Fee Rule; (5) the Districts' response to the Controller's request for the information necessary to calculate offsetting revenue; and (6) the source of the health fee calculations and enrollment data used by the Controller. As a result, the Commission finds the Controller has not improperly utilized the health fee calculations and enrollment data provided by the Chancellor's Office and conducted an audit.[63]

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[62] Response to the draft staff analysis filed by Citrus, Cerritos, Los Rios, Redwoods, Rancho Santiago, and Pasadena Area Community College Districts, *supra*, p. 11 (Exhibit L).

[63] As a corollary issue the Districts assert that the Controller's use of the health fee calculations and the enrollment data provided by the Chancellor's Office constitutes a rule of general application. Because the alleged rule was not adopted under the Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.) it is invalid as an underground regulation. However, the Commission does not have jurisdiction to determine whether the Controller's actions, or any other administrative agency's actions, constitute underground regulations. As a result, the Commission makes no findings on this issue.

Even if the Commission did have jurisdiction over this issue, the Districts make the assertion that the Controller's use of the Chancellor's Office health fee authority calculations and enrollment data constitutes a rule of general application based on the State Controller's Office's use of such information "for audits for several years." However, the fact that the auditors have used the Chancellor's Office health fee calculations and enrollment data for audits for several years does not lead to a conclusion that there was a rule generally applied to reimbursement claim audits. Rather, it could indicate that individual auditors found the Chancellor's Office enrollment data to be more reliable evidence in light of what was provided by the Districts in each reimbursement claim filed. Although the Controller recommends the use of the Chancellor's Office enrollment data for reimbursement claims, there is no indication that if the Districts provided more information from a different source to support its data that the Controller would not have relied upon the Districts' data.

b. The Controller has adjusted the Districts' claims based on the correct standard.

In addition to arguing that the Controller has not conducted an audit pursuant to Government Code section 17561(d)(2), the Districts argue that the Controller does not "assert that the claimed costs were excessive or unreasonable. It would therefore appear that the entire findings are based upon the wrong standard of review."[64]

In response the State Controllers' Office argues:

> The SCO did in fact conclude that the district's claim was excessive. Excessive is defined as "Exceeding what is usual, *proper*, *necessary*, [emphasis added] or normal." The [Districts'] mandated cost claims exceeded the proper amount based on the reimbursable costs allowed by statutory language and the program's parameters and guidelines.[65]

The Commission agrees with the Controller that it did find that costs claimed were excessive. The Districts acknowledge offsetting reimbursement claims by the health service fees actually charged and collected, not by the amount that the Districts were authorized to charge.[66] Pursuant to the court's decision in *Clovis*, the Districts are not entitled to reimbursement for costs of the mandated program to the extent the Districts had the authority to charge a fee for the mandated program. The Commission finds that the Controller adjusted the Districts' claims for reimbursement based on the correct standard.

c. The Controller has met the statute of limitations to initiate and complete the audits.

The Districts assert that Government Code section 17558.5(a) is impermissibly vague, and thus unenforceable. The Districts propose a different statute of limitations and argue that the Controller has failed to meet the statute of limitations to conduct audits for some of the reimbursement claims filed by the Districts during certain fiscal years. As a result, the Districts contend that reductions made to reimbursement claims during these fiscal years are void and should be withdrawn.

The Districts make this assertion for claims made by the following districts during the following fiscal years:

- Citrus Community College District claims made for fiscal years 2002-2003 and 2003-2004, filed on January 4, 2004 and December 13, 2004.

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[64] Comments filed by Citrus, Cerritos, Los Rios, Redwoods, Rancho Santiago, and Pasadena Area Community College Districts, *supra*, page 9 (Exhibit I). See also, response to the draft staff analysis filed by Citrus, Cerritos, Los Rios, Redwoods, Rancho Santiago, and Pasadena Area Community College Districts, *supra*, p. 4 (Exhibit L), in which the Districts reiterate this argument.

[65] Comments filed by the State Controller's Office, "Response by the State Controller's Office to the Incorrect Reduction Claims by [the Districts]." (Exhibit J.)

[66] Incorrect reduction claims filed by the Districts, "Letters in response to the State Controller's Office request for enrollment information and health fee data." (Exhibits A-G.)

- Cerritos Community College District claims made for fiscal years 2002-2003 and 2003-2004, filed on January 12, 2004 and January 7, 2005.
- Redwoods Community College District claims made for fiscal years 2002-2003 and 2003-2004, filed January 13, 2004 and January 12, 2006.
- Allan Hancock Joint Community College District claims made for fiscal years 2002-2003 through 2004-2005, filed January 13, 2004, December 13, 2004, and December 30, 2005.

The statute of limitations for the Controller to initiate an audit is set forth in Government Code section 17558.5(a). As applicable to reimbursement claims filed before January 1, 2005, Government Code section 17558.5(a) provided in relevant part:

> (a) A reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim.[67]

For reimbursement claims filed on and after January 1, 2005, section 17558.5(a) requires the Controller to complete any audit not later than two years after commencement of the audit.[68]

The Controller states, and has included evidence in the record to support, that it has only made payments on the claims made by Citrus, Cerritos, Redwoods, and Allan Hancock Joint Community College Districts for fiscal year 2002-2003, and that payment for these claims were made on October 25, 2006.[69] Based on the plain language of Government Code section 17558.5(a), the second sentence of subdivision (a) applies because no payment was made for the claims for fiscal year 2002-2003 until October 25, 2006. The audits for the claims made for fiscal year 2002-2003 were required to be initiated by October 25, 2009 (three years from the date of initial payment). The Controller states, and has included evidence in the record to support, that these audits were initiated by May 8, 2009. Thus, the Controller has met the statute of limitations set forth in the second sentence of subdivision (a).

In the incorrect reduction claims for Citrus, Cerritos, Redwoods, and Allan Hancock Joint Community College Districts, the Districts do not dispute that the Controller has met the statute of limitations set forth in the second sentence of Government Code section 17558.5(a). However, the Districts assert that the second sentence of Government Code section 17558.5(a) is impermissibly vague, and therefore unenforceable. As a result, the Districts contend that the running of the three-year statute of limitations begins when the reimbursement claim is filed or last amended, as provided in the first sentence of section 17558.5(a).

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[67] Government Code section 17558.5(a), as amended by Statutes 2002, chapter 1128.

[68] Government Code section 17558.5(a), as amended by Statutes 2004, chapter 890.

[69] Comments filed by the State Controller's Office, Response by the State Controller's Office to the Incorrect Reduction Claims filed by Citrus, Cerritos, Redwoods, and Allan Hancock Joint Community College Districts, *supra* (Exhibit J).

In response, the Controller argues:

> [T]he language of the statute in [*sic*] not vague, the Claimants simply prefer a different outcome. The statute clearly predicates the running of the statute of limitations on the "date of initial payment," in cases where no funds are appropriated or no payment is made. . . . Ultimately, the argument concerning vagueness is moot, as the [Commission] has no authority to determine that a statute, or any portion thereof, is unconstitutional. [Citation omitted] This power is reserved to the Judiciary. For this reason, the Commission should reject the Claimants' vagueness argument and hold that the statute of limitations begins to run on the date of initial payment.[70]

The Controller is correct in stating that the Commission lacks the authority to determine that a statute is unconstitutional and therefore unenforceable.[71] As a result, the Commission makes no findings on the constitutionality of Government Code section 17558.5(a), and must treat all of subdivision (a) as enforceable.

In response to the draft staff analysis, the Districts assert:

> [T]he second sentence of Government Code section 17558.5, subdivision (a) references two actions: the appropriation of funds and the payment to claimants from that appropriation. An appropriation of funds for payment of the mandate program by the Legislature and the date of payment of that appropriation by the Controller to the claimants are independent acts. The DSA makes no provision for those fiscal years in which there is an appropriation from which the Controller does not make a payment to the claimant. . . .
>
> The issue still to be addressed is the legal effect to the commencement date of the statute of limitations based on a date of *appropriation* without subsequently *timely* or *any* payment action by the Controller.[72] [Italics in original.]

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[70] The State Controller's Office cites to article III, section 3.5 of the California Constitution (Exhibit J).

[71] Article III, section 3.5 of the California Constitution provides:

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
>
> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> (b) To declare a statute unconstitutional;
>
> (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

[72] Response to the draft staff analysis filed by Citrus, Cerritos, Los Rios, Redwoods, Rancho Santiago, and Pasadena Area Community College Districts, *supra*, p. 3 (Exhibit L).

The Districts use this interpretation to argue that the audit was conducted too late. The Districts incorrectly interpret the plain language of the second sentence of Government Code section 17558.5(a). The language provides:

> 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.[73]

The above language indicates that even if an appropriation has been made, but there has been no payment is made to the claimant, the time to initiate an audit commences to run "from the date of *initial payment of the claim*." Absent a payment to the claimant the time to initiate an audit does not begin to run. Thus, applying the plain language of Government Code section 17558.5(a) to the evidence presented to the Commission, the Commission finds that the Controller has initiated and completed the audits within the statute of limitations. [74]

2) Although the Controller did not provide an explanation of the adjustments made to reimbursement claims within the 30-day time limit of Government Code section 17558.5(c), the Controller has not denied the Districts the opportunity to comprehensively contest the adjustments.

Government Code section 17558.5(c) requires the Controller to notify why an adjustment of a claim for reimbursement was made to claimants in writing within 30 days of issuing a remittance advice for the adjustment made. In regard to Citrus, Cerritos, Los Rios, and Redwoods Community College Districts, the Districts noted in their incorrect reduction claims that the Controller had not provided an explanation of adjustments made to the reimbursement claims filed as required by Government Code section 17558.5(c). After the Districts filed their incorrect

[73] Government Code section 17558.5(a), as amended by Statutes 2002, chapter 1128.

[74] In the claimants' response to the draft staff analysis (see Exhibit L, p. 3), the claimants assert:

> There is a related issue not addressed by the DSA. The Controller later added additional fiscal years to the findings of some of the District's reviews that were not included in the original notice, or never noticed. Since the date of notice of the review is integral to determining the start and expiration of the time period for audit, the staff analysis needs to address the legal effect of the fiscal years added later to the findings, but never or not timely noticed to the Districts.

The claimants do not identify which districts they are referring to. However, pursuant to the discussion above, the statute of limitations issue is *only* relevant to Citrus, Cerritos, Redwoods, and Allan Hancock Joint Community College Districts because these are the *only* districts which received payment from the State Controller's Office, triggering the statute of limitations upon initial payment of the claims made by these districts. Thus, a discussion regarding districts which have not received any payment is unnecessary. To the extent that the claimants are referring to Citrus, Cerritos, Redwoods, and Allan Hancock Joint Community College Districts, the evidence provided by the State Controller's Office, which is discussed in the body of this analysis, indicates that the claimants' assertion is incorrect.

reduction claims and well after 30 days from issuing remittance advices to the Districts, the Controller provided the explanations of the adjustments, missing the 30-day time limit.[75]

Prior to receiving the Controller's explanations, the Districts made the assertion that the Controller's actions deny the Districts the opportunity to comprehensively contest the adjustments through the incorrect reduction claims filed with the Commission. After receiving the Controller's explanations, and in response to the draft staff analysis, the Districts argue that the Commission should treat the Controller's failure to meet the time limit to provide an explanation "as a default."[76] The Commission disagrees.

The Districts seek to imply the penalty or consequence of invalidating *all* of the Controller's actions for failing to meet the time limit in section 17558.5(c) where the Legislature has not provided *any* consequence or penalty. Because the plain language of section 17558.5(c) does not impose a default on the Controller under the circumstances here, the Commission has no authority to impose a default.[77]

Although the Controller did not provide an explanation of adjustments made to the reimbursement claims within the 30-day time limit, the Commission finds that the Districts have not been denied the opportunity to comprehensively contest adjustments made. The Districts do not need to wait to receive the explanation required by Government Code section 17558.5(c) in order to file an incorrect reduction claim. The Districts are authorized to file an incorrect reduction claim with the Commission upon receiving a remittance advice or other notice of adjustment notifying the claimant of a reduction.[78] This is the *beginning* of a claimant's opportunity to contest adjustments made by the Controller.

After a claimant has filed an incorrect reduction claim, the claimant has the ability to amend its incorrect reduction claim and is provided multiple opportunities to submit comments to respond to comments or issues raised during the Commission's incorrect reduction claims process.[79] Also, if the Controller fails to provide a needed explanation of adjustments made to a reimbursement claim, the Commission maintains subpoena power. Here, the Controller provided

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[75] Beginning on July 1, 2009 through July 22, 2009, the State Controller's Office issued remittance advices for reimbursement claims for fiscal years 2002-2003 through 2007-2008 to Citrus, Cerritos, Los Rios, and Redwoods Community College Districts. The State Controller's Office issued notifications explaining the adjustments made to these districts' reimbursement claims on October 20, 2009 and October 21, 2009. Thus, in regard to Citrus, Cerritos, Los Rios, Redwoods, Allan Hancock Joint, and Pasadena Area Community College Districts the State Controller's Office failed to meet the 30-day time limit for issuing a notification explaining adjustments made to the reimbursement claims.

[76] Response to the draft staff analysis filed by Citrus, Cerritos, Los Rios, Redwoods, Rancho Santiago, and Pasadena Area Community College Districts, *supra*, p. 4 (Exhibit L).

[77] *Struckman v. Board of Trustees of Tracy Union High School* (1940) 38 Cal.App.2d 373, 376.

[78] Former California Code of Regulations, title 2, section 1185(b) (Register 2003, No. 17); currently 1185(c) (Register 2010, No. 44).

[79] Former California Code of Regulations, title 2, sections 1185, 1185.01, and 1185.02 (Register 2003, No. 17); currently sections 1185, 1185.1, and 1185.5.

detailed analyses to all of the claim reductions on October 20, 2009 and October 21, 2009, to which the Districts responded on January 11, 2011. Thus, the actions of the Controller have not denied the Districts the opportunity to comprehensively contest adjustments made to the reimbursement claims.

C. Has the Controller improperly reduced reimbursement for the cost of reimbursable services?

This section will address the following issues: (1) whether the Controller properly accounted for the students that fall within the health service fee exemptions; and (2) whether the scope of reimbursable services under the *Health Fee Elimination* program as described in the parameters and guidelines exceeds the permitted uses of health service fees.

1) The Controller properly accounted for students exempt from the Health Service Fee.

In conducting audits on the Districts' claims for reimbursement, the Controller calculated the offsetting revenue from health service fees for each term for each fiscal year claimed by multiplying the maximum fee authority for the term during the fiscal year claimed by the total enrollment minus exempted students for each term.[80] The Controller then subtracted the offsetting revenue for each fiscal year from the total reimbursable claim amounts submitted by the Districts for each fiscal year. Other than the Districts' understating the offsetting revenue generated by the health service fee authorized for each fiscal year, the Controller did not find any other issue with the costs claimed by the Districts.

The Districts argue:

> Education Code section 76355, subdivision (c), *requires* the districts to adopt local rules, that is, to utilize its legislative power, to exempt certain students from payment of the health service fee. To the contrary, Section 76355 merely *authorizes* districts to charge the fee to any other class of student. Subdivision (c) states that the districts cannot charge a fee to apprenticeship students or students that request a religion-based exemption. Until January 1, 2006, students receiving BOGG [Board of Governors Grant] fee waivers (perhaps as much as 30% of the enrollment) were also exempted from paying the fee. Note that these exemptions do not automatically mean that the district can exclude these students from student health services, rather, the district just cannot collect a fee. Thus, to the extent that these students utilize the student health services, the district is incurring an unfunded program cost.
>
> The Controller's collectible fee calculation excludes these exempted students from the calculation of the offsetting revenue, but does not determine the costs of the services to these exempt students. The *Clovis* decision has concluded that if a charge can be made, then a cost is not incurred. Since no charge can be made for exempted students, these costs should be reimbursed without regard to the offsetting savings applied to all other student program costs. The Controller has the burden of going forward on this issue of properly reimbursing the cost of services provided to the exempt students. In these seven "desk" audits, the Controller did not audit any of the program costs, so the Controller

[80] Fee authority x (total enrollment – exempted students) = offsetting revenue for the term.

> inappropriately reduced the health service costs for the exempt students.[81] (Original italics.)

The Districts also argue:

> To properly implement the Health Fee Rule would require the Controller to pro-rate the total program costs between exempt and nonexempt students based on enrollment or similar data, and then apply the calculated authorized fees as a reduction only to the portion of the total costs of services applicable to the nonexempt students. The Controller has performed similar revenue matching calculations in other audits. See the Enrollment Fee Collection and Waivers audit reports for Contra Costa CCD and Gavilan CCD posted on the Controller's website. The Health Fee Elimination audits that are the subject of this consolidated incorrect reduction claim did not match the revenue, so the collectible fees reduction adjustments are incorrect.[82]

The Districts' arguments are based on an incorrect interpretation and application of the *Clovis* decision. The court in *Clovis* found that if a local agency or school district has the authority to charge for the "mandated *program or increased level of service*, that charge cannot be recovered as a state-mandated cost."[83] Here, the Districts have the authority to charge a fee for the "mandated program" of providing student health services to all students, the program is *not* simply the provision of services to students who pay. Absent a limitation stating otherwise, the authorized fee can be used to pay for the program as a whole.

Additionally, the Enrollment Fee Collection and Waivers audit reports for Contra Costa and Gavilan Community College Districts referenced by the Districts are dissimilar to the Health Fee Elimination program. The Enrollment Fee Collection and Waivers program requires community college districts to perform specific activities related to the enrollment fee collection (EFC) and specific activities related to granting enrollment fee waivers (EFW). The districts received revenue from two separate sources. One source is to be used only for activities associated with EFC and the other source only for activities associated with EFW. In the audit reports the Controller agreed with Contra Costa and Gavilan Community College Districts that "the revenue offsets should only be offset to the relevant mandated activity costs, rather than to the total costs claimed for both the EFC and EFW program activities."[84] As stated by Gavilan Community College District, "The revenue sources are for *specific purposes*. The EFC 2% offset does not apply to EFW program costs. The EFW 2% and $.91 per waived unit do not apply to EFC

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[81] Comments filed by Citrus, Cerritos, Los Rios, Redwoods, Rancho Santiago, and Pasadena Area Community College Districts, dated January 1, 2011, pgs. 6-7 (Exhibit I).

[82] Response to the draft staff analysis filed by Citrus, Cerritos, Los Rios, Redwoods, Rancho Santiago, and Pasadena Area Community College Districts, *supra*, p. 8 (Exhibit L).

[83] *Clovis Unified School Dist. v. Chiang, supra*, 188 Cal.App.4th 794, 812.

[84] Audit report of Enrollment Fee Collection and Waivers Program for Contra Costa Community College District (July 1, 1998, through June 30, 2006) by the State Controller's Office, dated March 2011, p. 17-18. See also, audit report of Enrollment Fee Collection and Waivers Program for Gavilan Community College District (July 1, 1998, through June 30 2008) by the State Controller's Office, dated April 2011, p. 33 (Exhibit N).

programs costs."[85] In contrast, the use of the authorized health service fee is not limited for the purpose of health service costs associated with nonexempt students.[86] Instead, the authorized health service fee is to be used for the purpose of providing student health services to all students.

Thus, the cost of health services provided to students exempt from the health service fee is irrelevant for purposes of the consolidated incorrect reduction claims because the Controller did not make any reduction to the reimbursement claims on the basis of the Districts including the cost of providing health services to students exempt from the health service fee. The *only* basis upon which the Controller reduced the Districts' reimbursement claims, was for understating offsetting revenue resulting from the health service fees that the Districts' had the *authority* to charge. Thus, the Commission finds that the Controller properly accounted for students exempt from the health service fee.

2) The scope of reimbursable services under the *Health Fee Elimination* program as described in the parameters and guidelines exceeds the permitted uses of the health service fees.[87]

The Districts argue:

> The scope of reimbursable services described in the parameters and guidelines exceed the program regulations. Therefore, districts are eligible for reimbursement for some parameters and guidelines services that are outside the scope of the Title 5 constraints for use of the fees.

The Commission agrees with the Districts' argument that the scope of reimbursable services described in the parameters and guidelines exceeds the permissible uses of the health service fee paid by students to the extent that it pertains to: (a) physicals for athletes; and (b) physicals for employees.

The question of whether the scope of reimbursable services under the *Health Fee Elimination* program as described in the parameters and guidelines exceeds the permitted uses of the health service fee is a question of law. As a result, the Commission reviews this issue independent of the Controller's legal conclusions.[88]

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[85] Audit report of Enrollment Fee Collection and Waivers Program for Gavilan Community College District (July 1, 1998, through June 30 2008) by the State Controller's Office, *supra*, p. 33 (Exhibit N).

[86] California Code of Regulations, title 5, section 54702.

[87] The Districts' response to the draft staff analysis (see Exhibit L, p. 9) includes a request to direct the Controller to amend its claiming instructions. This request has not been properly filed according to California Code of Regulations, title 2, section 1186, and as a result, will not be addressed in this analysis.

[88] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1810.

a. Physicals for athletes.

The plain language of Education Code section 76355(d)(2) provides:

> Authorized expenditures [of health service fees] shall not include, among other things, athletic trainers' salaries, athletic insurance, medical supplies for athletics, *physical examinations for intercollegiate athletics*, ambulance services, the salaries of health professionals for athletic events, any deductible portion of accident claims filed for athletic team members, or any other expense that is not available to all students. No student shall be denied a service supported by student health fees on account of participation in athletic programs. (Italics added.)

Additionally, Education Code section 76355(g) requires the Board of Governors to adopt regulations that generally describe the types of health services included in the health service program. These regulations are found in California Code of Regulations, title 5, section 54700 et seq. Title 5 section 54706, which sets forth prohibited uses of the health service fee, provides:

> Student health fees shall not be expended for the following expenses:
>
> (a) Salaries of personnel not directly involved in the delivery of student health services;
>
> (b) Administrative salaries (assistant dean level or its equivalent and above);
>
> (c) Athletic trainers' salaries;
>
> (d) Athletic insurance for the intercollegiate athletic team;
>
> (e) Medical supplies for athletics;
>
> (f) *Physical examinations for intercollegiate athletics*;
>
> (g) Ambulance services and salaries of health professionals for athletic events;
>
> (h) Any deductible expenses for accident claims filed for athletic team members;
>
> (i) Sabbatical expenses for health service personnel.
>
> Nothing within these provisions should deny a student participating in athletic programs a service which is properly supported by student health fees. (Italics added.)

The parameters and guidelines for the *Health Fee Elimination* program list physicals for athletes as a reimbursable cost to the extent that the service was provided in fiscal year 1986-1987. However, Education Code section 76355 and its implementing regulations prohibit community college districts from using health service fees charged to students for physicals for athletes. Thus, the health service fees cannot be used to offset the costs of providing physicals for athletes for purposes of mandate reimbursement.

Only the following community college districts claimed reimbursable costs associated with providing physicals for athletes:[89] [90]

[89] Response to the draft staff analysis filed by the State Controller's Office, *supra*, Tab 1 and 3. The Controller indicates that a document for a non-claimant district was mistakenly included as

- Cerritos Community College District claimed costs associated with providing physicals for athletes during fiscal years 2002-2003 through 2006-2007.
- Los Rios Community College District claimed costs associated with providing physicals for athletes during fiscal years 2005-2006 through 2007-2008.
- Redwoods Community College District claimed costs associated with providing physicals for athletes during fiscal years 2002-2003 through 2006-2007.

In the audits of these community college districts, the Controller used the health service fees as offsets for all costs claimed by the districts without delineating the costs claimed by the districts associated with providing physicals for athletes. From the evidence in the record it is not possible for the Commission to determine the costs associated with providing physicals for athletes for each district for each fiscal year claimed. As a result, the Commission finds that the Controller incorrectly reduced reimbursable costs associated with providing physicals for athletes by applying health service fees as offsetting revenue for the community college districts listed above, during the fiscal years listed above.

b. Physicals for employees.

Like physicals for athletes, community college districts are not authorized to use health service fees paid by *students* for physicals for *employees*. California Code of Regulations, title 5, section 54702, which sets forth the proper uses of health service fees paid by students, provides in relevant part:

> The [health service fee] which the governing board of a district may require students to pay shall be expended *only* to cover the direct and indirect costs necessary to provide any, all of, or a portion of the *student* health programs and services approved by the governing board for offering within the district . . . . (Italics added.)

The parameters and guidelines for the *Health Fee Elimination* program list physicals for employees as a reimbursable cost to the extent that the service was provided in fiscal year 1986-1987. However, as shown above, the language of title 5 section 54702, which implements Education Code section 76355, the health service fees paid by students shall be expended only to cover the *student* health programs and services. As a result, the health service fees cannot be used to offset the costs of providing physicals for employees for purposes of mandate reimbursement.

Only the following community college districts claimed reimbursable costs associated with providing physicals for employees:

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evidence that Citrus Community College District provided physicals for athletes during fiscal year 2002-2003. The Controller has provided evidence that Citrus Community College did not provide that service (Exhibit M).

[90] Rancho Santiago Community College District identified costs for physicals for athletes for fiscal years 2007-2008 and 2008-2009. However, Rancho Santiago Community College District did not provide this service in fiscal year 1986-1987, and as a result, these costs are not reimbursable.

- Cerritos Community College District claimed costs associated with providing physicals for employees during fiscal years 2002-2003 through 2006-2007.
- Redwoods Community College district claimed costs associated with providing physicals for employees during fiscal years 2002-2003 through 2006-2007.

In the audits of these community college districts, the Controller used the health service fees as offsets for all costs claimed by the districts without delineating the costs claimed by the districts associated with providing physicals for employees. From the evidence in the record it is not possible for the Commission to determine the costs associated with providing physicals for employees for each district for each fiscal year claimed. As a result, the Commission finds that the Controller incorrectly reduced reimbursable costs associated with providing physicals for employees by applying health service fees as offsetting revenue for the community college districts listed above, during the fiscal years listed above.

D. Does the Commission have authority to remand a matter to the Controller in order to reinstate costs incorrectly reduced?

In the Districts' response to the draft staff analysis the Districts assert:

> The DSA (42) recommends that the Commission remand to the Controller certain adjustments to determine the portion of total program cost attributable to athlete and employee physicals and reinstate those costs. The DSA does not establish the statutory authority for the Commission to remand adjustments for the purpose of correction. The statutory subject matter jurisdiction (Government Code section 17551, subdivision (d)) is to determine whether "the Controller has incorrectly reduced payments to the local agency or school district pursuant to paragraph (2) of subsection (d) of Section 17561." If there is no authority to remand, the scope of the Commission authority may be only to declare the entire relevant adjustment incorrect and not just a portion thereof. Also, even if the Commission determines that it can remand a portion of an adjustment for correction, there is the related issue of whether the Controller can correct adjustments for fiscal periods that are now past the statute of limitations for an audit due to the passage of time since the audit report was issued. Claimants have no statutory standing to correct expired annual claims.[91]

Government Code section 17551(d) imposes the duty on the Commission to hear and decide claims by local agencies and school districts that the Controller incorrectly reduced payments to the agency or district. Government Code section 17527 gives the Commission the authority to adopt rules and regulations in order to carry out its duties, and to "do any and all other actions necessary or convenient to enable it fully and adequately to perform its duties and to exercise the powers expressly granted to it."[92] Pursuant to the authority granted by Government Code section 17527 and in light of the duty imposed by Government Code section 17551(d), the Commission adopted California Code of Regulations, title 2, 1185.7, which provides:

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[91] Response to the draft staff analysis filed by Citrus, Cerritos, Los Rios, Redwoods, Rancho Santiago, and Pasadena Area Community College Districts, *supra*, p. 2 (Exhibit L).

[92] Government Code section 17527(g) and (h) (Stats. 1984, ch. 1459).

> If the commission determines that a reimbursement claim was incorrectly reduced, the commission shall send the statement of decision to the Office of State Controller and request that the Office of State Controller reinstate the costs that were incorrectly reduced.[93]

It is under this authority that the Commission remands the reimbursement claims back to the Controller to adjust payments to correct for the costs that were incorrectly reduced.

The Districts also question the Controller's authority to correct adjustments for fiscal periods that are now past the statute of limitations period. The Districts combine two separate issues, and mistake the authority from which the Controller corrects incorrectly adjusted claims. Whether the Controller has met the statute of limitations to initiate an audit is a separate issue from whether the Controller has the authority to correct incorrectly adjusted claims. As discussed above, the Controller has met the statute of limitations to initiate an audit. The correction of an incorrect adjustment is not conducted pursuant to the authority to initiate an audit under Government Code section 17558.5(a), which sets forth a statute of limitations to initiate an audit. Rather, the correction is made at the request of the Commission pursuant to California Code of Regulations, title 2, section 1185.7 and under the authority granted to the Controller by the Legislature pursuant to Government Code section 17561(d)(2)(C), which provides:

> The Controller shall adjust the payment to correct for any underpayments or overpayments that occurred in previous fiscal years.

Thus, the Commission has the authority to remand incorrectly reduced reimbursement claims to the Controller, who then has the authority to adjust payments to correct for any underpayments.

IV. Conclusion

The Commission concludes that the Controller incorrectly reduced costs incurred that are attributable to physicals for athletes by using the health service fee community college districts were authorized to charge as offsetting revenue for reimbursement claims made by the following community college districts, for the following fiscal years, and at issue in the following incorrect reduction claims:

- Cerritos Community College District claimed costs associated with providing physicals for athletes during fiscal years 2002-2003 through 2006-2007 (CSM 09-4206-I-20).
- Los Rios Community College District claimed costs associated with providing physicals for athletes during fiscal years 2005-2006 through 2007-2008 (CSM 09-4206-I-23).
- Redwoods Community College District claimed costs associated with providing physicals for athletes during fiscal years 2002-2003 through 2006-2007 (CSM 09-4206-I-26).

The above community college districts' reimbursement claims are hereby remanded back to the Controller to determine the portion of the total costs claimed that are attributable to physicals for athletes. The costs for physicals for athletes should be reinstated.

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[93] California Code of Regulations, title 2, 1185.7 (Register 2007, No. 19), former section 1185.1 (Register 2003, No. 17).

Additionally, the Commission concludes that the Controller incorrectly reduced costs incurred that were attributable to physicals for employees by using the health service fee community college districts were authorized to charge as offsetting revenue for reimbursement claims made by the following community college districts, for the following fiscal years, and at issue in the following incorrect reduction claims:

- Cerritos Community College District claimed costs associated with providing physicals for employees during fiscal years 2002-2003 through 2006-2007 (CSM 09-4206-I-20).
- Redwoods Community College district claimed costs associated with providing physicals for employees during fiscal years 2002-2003 through 2006-2007 (CSM 09-4206-I-26).

The above community college districts' reimbursement claims are hereby remanded back to the Controller to determine the portion of the total costs claimed that are attributable to physicals for employees. The costs for physicals for employees should be reinstated.

The Commission also concludes that the Controller correctly reduced all other costs incurred during all other fiscal years claimed by Citrus Community College District, Cerritos Community College District, Los Rios Community College District, Redwoods Community College District, Allan Hancock Joint Community College District, Rancho Santiago Community College District, and Pasadena Area Community College District for the *Health Fee Elimination* program by the amount of health service fees that the districts were authorized to charge.