

SAN DIEGO COUNTY

Revised Audit Report

CONSOLIDATED HANDICAPPED AND DISABLED STUDENTS (HDS), HDS II, AND SEDP PROGRAM

Chapter 1747, Statutes of 1984; Chapter 1274,
Statutes of 1985; Chapter 1128, Statutes of 1994; and
Chapter 654 Statutes of 1996

July 1, 2006, through June 30, 2009



JOHN CHIANG
California State Controller

December 2012



JOHN CHIANG
California State Controller

December 20, 2012

Honorable Ron Roberts, Chairman
Board of Supervisors
County Administration Center
San Diego County
1600 Pacific Highway, Room 335
San Diego, CA 92101

Dear Mr. Roberts:

The State Controller's Office audited the costs claimed by San Diego County for the legislatively mandated Consolidated Handicapped and Disabled Students (HDS), HDS II, and Seriously Emotionally Disturbed Pupils (SEDP) Program (Chapter 1747, Statutes of 1984; Chapter 1274, Statutes of 1985; Chapter 1128, Statutes of 1994; and Chapter 654, Statutes of 1996) for the period of July 1, 2006, through June 30, 2009.

This revised final report supersedes our previous report dated March 7, 2012. Subsequent to the issuance of our final report, the California Department of Mental Health finalized its Early and Periodic Screening, Diagnosis and Treatment (EPSDT) reimbursements for fiscal year (FY) 2008-09. We recalculated EPSDT revenues for FY 2008-09 and revised Finding 4 to reflect the actual funding percentages based on the final settlement. The revision has no fiscal effect on allowable total program costs for FY 2008-09.

The county claimed \$14,484,766 (\$14,494,766 less a \$10,000 penalty for filing a late claim) for the mandated program. Our audit disclosed that \$11,651,891 is allowable and \$2,832,875 is unallowable. The costs are unallowable because the county overstated mental health services costs, administrative costs, and residential placement costs, duplicated due process hearing costs, and understated offsetting reimbursements. The State paid the county \$4,106,959. The State will pay allowable costs claimed that exceed the amount paid, totaling \$7,544,932, contingent upon available appropriations.

If you disagree with the audit findings, you may file an Incorrect Reduction Claim (IRC) with the Commission on State Mandates (CSM). The IRC must be filed within three years following the date that we notify you of a claim reduction. You may obtain IRC information at the CSM's website at www.csm.ca.gov/docs/IRCForm.pdf.

If you have any questions, please contact Jim L. Spano, Chief, Mandated Cost Audits Bureau, at (916) 323-5849.

Sincerely,

Original signed by

JEFFREY V. BROWNFIELD
Chief, Division of Audits

JVB/bf

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Revised Audit Report

Summary

The State Controller's Office audited the costs claimed by San Diego County for the legislatively mandated Consolidated Handicapped and Disabled Students (HDS), HDS II, and Seriously Emotionally Disturbed Pupils (SEDP) Program (Chapter 1747, Statutes of 1984; Chapter 1274, Statutes of 1985; Chapter 1128, Statutes of 1994; and Chapter 654 Statutes of 1996) for the period of July 1, 2006, through June 30, 2009.

The county claimed \$14,484,766 (\$14,494,766 less a \$10,000 penalty for filing a late claim) for the mandated program. Our audit disclosed that \$11,651,891 is allowable and \$2,832,875 is unallowable. The costs are unallowable because the county overstated mental health services costs, administrative costs, and residential placement costs, duplicated due process hearing costs, and understated other reimbursements. The State paid the county \$4,106,959. The State will pay allowable costs claimed that exceed the amount paid, totaling \$7,544,932, contingent upon available appropriations.

Background

Handicapped and Disabled Students (HDS) Program

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) require counties to participate in the mental health assessment for "individuals with exceptional needs," participate in the expanded "Individualized Education Program" (IEP) team, and provide case management services for "individuals with exceptional needs" who are designated as "seriously emotionally disturbed." These requirements impose a new program or higher level of service on counties.

On April 26, 1990, the Commission on State Mandates (CSM) adopted the statement of decision for the HDS Program and determined that this legislation imposed a state mandate reimbursable under Government Code section 17561. The CSM adopted the parameters and guidelines for the HDS Program on August 22, 1991, and last amended it on January 25, 2007.

The parameters and guidelines for the HDS Program state that only 10% of mental health treatment costs are reimbursable. However, on September 30, 2002, Assembly Bill 2781 (Chapter 1167, Statutes of 2002) changed the regulatory criteria by stating that the percentage of treatment costs claimed by counties for fiscal year (FY) 2000-01 and prior fiscal years is not subject to dispute by the SCO. Furthermore, this legislation states that, for claims filed in FY 2001-02 and thereafter, counties are not required to provide any share of these costs or to fund the cost of any part of these services with money received from the Local Revenue Fund established by Welfare and Institutions Code section 17600 et seq. (realignment funds).

Furthermore, Senate Bill 1895 (Chapter 493, Statutes of 2004) states that realignment funds used by counties for the HDS Program “are eligible for reimbursement from the state for all allowable costs to fund assessments, psychotherapy, and other mental health services” and that the finding by the Legislature is “declaratory of existing law” (emphasis added).

The CSM amended the parameters and guidelines for the HDS Program on January 26, 2006, and corrected them on July 21, 2006, allowing reimbursement for out-of-home residential placements beginning July 1, 2004.

Handicapped and Disabled Students (HDS) II Program

On May 26, 2005, the CSM adopted a statement of decision for the HDS II Program that incorporates the above legislation and further identified medication support as a reimbursable cost effective July 1, 2001. The CSM adopted the parameters and guidelines for this new program on December 9, 2005, and last amended them on October 26, 2006.

The parameters and guidelines for the HDS II Program state that “Some costs disallowed by the State Controller’s Office in prior years are now reimbursable beginning July 1, 2001 (e.g., medication monitoring). Rather than claimants re-filing claims for those costs incurred beginning July 1, 2001, the State Controller’s Office will reissue the audit reports.” Consequently, we are allowing medication support costs commencing on July 1, 2001.

Seriously Emotionally Disturbed Pupils (SEDP) Program

Government Code section 7576 (added and amended by Chapter 654, Statutes of 1996) allows new fiscal and programmatic responsibilities for counties to provide mental health services to seriously emotionally disturbed pupils placed in out-of-state residential programs. Counties’ fiscal and programmatic responsibilities include those set forth in California Code of Regulations section 60100, which provide that residential placements may be made out of state only when no in-state facility can meet the pupil’s needs.

On May 25, 2000, the CSM adopted the statement of decision for the SEDP Program and determined that Chapter 654, Statutes of 1996, imposed a state mandate reimbursable under Government Code section 17561. The CSM adopted the parameters and guidelines for the SEDP Program on October 26, 2000. The CSM determined that the following activities are reimbursable:

- Payment of out-of-state residential placements;
- Case management of out-of-state residential placements (case management includes supervision of mental health treatment and monitoring of psychotropic medications);

- Travel to conduct quarterly face-to-face contacts at the residential facility to monitor level of care, supervision, and the provision of mental health services as required in the pupil's IEP; and
- Program management, which includes parent notifications as required; payment facilitation; and all other activities necessary to ensure that a county's out-of-state residential placement program meets the requirements of Government Code section 7576.

The CSM consolidated the parameters and guidelines for the HDS, HDS II, and SEDP Programs for costs incurred commencing with FY 2006-07 on October 26, 2006, and last amended them on September 28, 2012. On September 28, 2012, the CSM stated that Statutes of 2011, Chapter 43, "eliminated the mandated programs for counties and transferred responsibility to school districts, effective July 1, 2011. Thus, beginning July 1, 2011, these programs no longer constitute reimbursable state-mandated programs for counties." The consolidated program replaced the prior HDS, HDS II, and SEDP mandated programs. The parameters and guidelines establish the state mandate and define reimbursable criteria. In compliance with Government Code section 17558, the SCO issues claiming instructions to assist local agencies and school districts in claiming mandated program reimbursable costs.

Objective, Scope, and Methodology

We conducted the audit to determine whether costs claimed represent increased costs resulting from the Consolidated HDS, HDS II, and SEDP Program for the period of July 1, 2006, through June 30, 2009.

Our audit scope included, but was not limited to, determining whether costs claimed were supported by appropriate source documents, were not funded by another source, and were not unreasonable and/or excessive.

We conducted this performance audit under the authority of Government Code sections 12410, 17558.5, and 17561. We did not audit the county's financial statements. We conducted the audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

We limited our review of the county's internal controls to gaining an understanding of the transaction flow and claim preparation process as necessary to develop appropriate auditing procedures.

Conclusion

Our audit disclosed instances of noncompliance with the requirements outlined above. These instances are described in the accompanying Summary of Program Costs (Schedule 1) and in the Findings and Recommendations section of this report.

For the audit period, San Diego County claimed \$14,484,766 (\$14,494,766 less a \$10,000 penalty for filing a late claim) for costs of the Consolidated HDS, HDS II, and SEDP Program. Our audit disclosed that \$11,651,891 is allowable and \$2,832,875 is unallowable.

For the FY 2006-07 claim, the State paid the county \$4,106,959. Our audit disclosed that \$5,687,326 is allowable. The State will pay allowable costs claimed that exceed the amount paid, totaling \$1,580,367, contingent upon available appropriations.

For the FY 2007-08 claim, the State made no payment to the county. Our audit disclosed that \$5,964,565 is allowable. The State will pay allowable costs claimed that exceed the amount paid, totaling \$5,964,565, contingent upon available appropriations.

For the FY 2008-09 claim, the State made no payment to the county. Our audit disclosed that claimed costs are unallowable.

Views of Responsible Officials

We issued a draft audit report on February 6, 2012. Lisa Macchione, Senior Deputy County Counsel, responded by letter dated February 29, 2012 (Attachment), disagreeing with the audit results for Finding 2. The county did not respond to Findings 1, 3, and 4. We issued the final report on March 7, 2012.

Subsequently, we revised our audit report based on finalized Early and Periodic, Screening, Diagnosis and Treatment revenues for FY 2008-09. We recalculated offsetting reimbursements and revised Finding 4. The revision has no effect on allowable total program costs for FY 2008-09. On October 30, 2012, we advised Chona Penalba, Principal Accountant, Fiscal Services Division, of the revisions. This revised final report includes the county's response to our March 7, 2012, final report.

Restricted Use

This report is solely for the information and use of San Diego County, the California Department of Finance, and the SCO; it is not intended to be and should not be used by anyone other than these specified parties. This restriction is not intended to limit distribution of this report, which is a matter of public record.

Original signed by

JEFFREY V. BROWNFIELD
Chief, Division of Audits

December 20, 2012

Revised Schedule 1— Summary of Program Costs July 1, 2006, through June 30, 2009

Cost Elements	Actual Costs Claimed	Allowable per Audit	Audit Adjustment	Reference ¹
<u>July 1 2006, through June 30, 2007</u>				
Direct and indirect costs: ²				
Referral and mental health assessments	\$ 884,162	\$ 880,170	\$ (3,992)	Finding 1
Transfers and interim placements	1,923,625	1,890,217	(33,408)	Findings 1, 2
Authorize/issue payments to providers	5,802,928	4,741,441	(1,061,487)	Finding 2
Psychotherapy/other mental health services	7,868,926	7,837,430	(31,496)	Finding 1
Participation in due process hearings	5,330	-	(5,330)	Finding 3
Total direct and indirect costs	16,484,971	15,349,258	(1,135,713)	
Less offsetting reimbursements	(9,887,542)	(9,651,932)	235,610	Finding 4
Total claimed amount	6,597,429	5,697,326	(900,103)	
Less late claim penalty	(10,000)	(10,000)	-	
Total program cost	<u>\$ 6,587,429</u>	5,687,326	<u>\$ (900,103)</u>	
Less amount paid by State ³		(4,106,959)		
Allowable costs claimed in excess of (less than) amount paid		<u>\$ 1,580,367</u>		
<u>July 1 2007, through June 30, 2008</u>				
Direct and indirect costs: ²				
Referral and mental health assessments	\$ 1,040,292	\$ 1,032,856	\$ (7,436)	Finding 1
Transfers and interim placements	1,827,332	1,822,587	(4,745)	Findings 1, 2
Authorize/issue payments to providers	6,738,212	6,257,153	(481,059)	Findings 2
Psychotherapy/other mental health services	8,565,332	8,514,338	(50,994)	Finding 1
Participation in due process hearings	10,071	-	(10,071)	Finding 3
Total direct and indirect costs	18,181,239	17,626,934	(554,305)	
Less offsetting reimbursements	(11,589,942)	(11,662,369)	(72,427)	Finding 4
Total claimed amount	6,591,297	5,964,565	(626,732)	
Total program cost	<u>\$ 6,591,297</u>	5,964,565	<u>\$ (626,732)</u>	
Less amount paid by State ³		-		
Allowable costs claimed in excess of (less than) amount paid		<u>\$ 5,964,565</u>		
<u>July 1 2008, through June 30, 2009</u>				
Direct and indirect costs: ²				
Referral and mental health assessments	\$ 1,625,079	\$ 1,207,589	\$ (417,490)	Finding 1
Transfers and interim placements	722,633	548,944	(173,689)	Findings 1, 2
Authorize/issue payments to providers	6,224,038	6,125,362	(98,676)	Finding 2
Psychotherapy/other mental health services	9,749,679	9,198,502	(551,177)	Finding 1
Participation in due process hearings	46,636	46,636	-	
Total direct and indirect costs	18,368,065	17,127,033	(1,241,032)	
Less offsetting reimbursements	(17,062,025)	(17,382,168)	(320,143)	Finding 4
Total claimed amount	1,306,040	(255,135)	(1,561,175)	
Adjustment to eliminate negative balance	-	255,135	255,135	
Total program cost	<u>\$ 1,306,040</u>	-	<u>\$ (1,306,040)</u>	
Less amount paid by State ³		-		
Allowable costs claimed in excess of (less than) amount paid		<u>\$ -</u>		

Revised Schedule 1 (continued)

Cost Elements	Actual Costs Claimed	Allowable per Audit	Audit Adjustment	Reference ¹
<u>Summary: July 1 2006 through June 30, 2009</u>				
Direct and indirect costs: ²				
Referral and mental health assessments	\$ 3,549,533	\$ 3,120,615	\$ (428,918)	
Transfers and interim placements	4,473,590	4,261,748	(211,842)	
Authorize/issue payments to providers	18,765,178	17,123,956	(1,641,222)	
Psychotherapy/other mental health services	26,183,937	25,550,270	(633,667)	
Participation in due process hearings	62,037	46,636	(15,401)	
Total direct and indirect costs	53,034,275	50,103,225	(2,931,050)	
Less offsetting reimbursements	(38,539,509)	(38,696,469)	(156,960)	
Total claimed amount	14,494,766	11,406,756	(3,088,010)	
Adjustment to eliminate negative balance	-	255,135	255,135	
Less late claim penalty	(10,000)	(10,000)	-	
Total program cost	<u>\$ 14,484,766</u>	11,651,891	<u>\$ (2,832,875)</u>	
Less amount paid by State ³		(4,106,959)		
Allowable costs claimed in excess of (less than) amount paid		<u>\$ 7,544,932</u>		

¹ See the Findings and Recommendations section.

² The county incorrectly claimed indirect costs associated with each cost component under the direct cost component.

³ County received Categorical payment from the California Department of Mental Health from FY 2009-10 budget.

Revised Findings and Recommendations

**FINDING 1—
Overstated mental
health services unit
costs and indirect
(administrative) costs**

The county overstated mental health services unit costs and indirect (administrative) costs by \$1,261,745 for the audit period.

The county claimed mental health services costs to implement the mandated program that were not fully based on actual costs. The county determined its service costs based on preliminary units and rates. The county ran unit-of-service reports to support its claims. These reports did not fully support the units of service claimed and contained duplicated units and unallowable costs including crisis intervention, individual rehabilitation, group rehabilitation, family rehabilitation, and rehabilitation evaluation services.

The county claimed rehabilitation costs for individual rehabilitation, group rehabilitation, family rehabilitation, and rehabilitation evaluation services. The services are provided in accordance with a definition that includes a broad range of services, including certain fringe services such as social skills, daily living skills, meal preparation skills, personal hygiene, and grooming. Based on the Commission on State Mandate's (CSM) statement of decision dated May 26, 2011, the portions of rehabilitation services related to socialization are not reimbursable under the parameters and guidelines. The statement of decision relates to an incorrect reduction claim filed by Santa Clara County for the Handicapped and Disabled Students (HDS) Program. In light of the CSM decision, the county must separate the ineligible portions of the service. To date, the county has not provided our office with sufficient documentation to identify the eligible portion of claimed rehabilitation services.

We recalculated mental health services unit costs based on actual, supportable units of service provided to eligible clients using the appropriate unit rates that represented actual cost to the county. We excluded duplicated units and ineligible crisis intervention, individual rehabilitation, group rehabilitation, family rehabilitation, and rehabilitation evaluation services.

The county incorrectly capped its administrative rates at 15% and applied the rates to costs based on preliminary units and rates. For fiscal year (FY) 2007-08 and FY 2008-09 the county understated its administrative rate by incorrectly capping it at 15%. Additionally, the county incorrectly used FY 2007-08 data when computing its FY 2008-09 administrative rate.

We recalculated administrative cost rates using a method that is consistent with the cost reports submitted to the California Department of Mental Health (DMH) and by not capping the rates at 15%. We applied the rates to eligible direct costs.

The following table summarizes the overstated mental health services unit costs and indirect (administrative) costs claimed:

	Fiscal Year			Total
	2006-07	2007-08	2008-09	
Referral and mental health assessments:				
Units of service/unit rates	\$ (3,406)	\$ (10,025)	\$ (423,591)	\$ (437,022)
Administrative costs	(586)	2,589	6,101	8,104
Total referral and mental health assessments	(3,992)	(7,436)	(417,490)	(428,918)
Transfers and interim placements:				
Units of service/unit rates	(18,165)	(9,455)	(178,999)	(206,619)
Administrative costs	(2,561)	4,710	5,310	7,459
Total transfers and interim placements	(20,726)	(4,745)	(173,689)	(199,160)
Psychotherapy/other mental health services:				
Rehabilitation costs	-	-	(129,585)	(129,585)
Units of service/unit rates	(27,089)	(52,308)	(425,730)	(505,127)
Administrative costs	(4,407)	1,314	4,138	1,045
Total psychotherapy/other mental health services	(31,496)	(50,994)	(551,177)	(633,667)
Audit adjustment	\$ (56,214)	\$ (63,175)	\$ (1,142,356)	\$ (1,261,745)

The program's parameters and guidelines specify that the State will reimburse only actual increased costs incurred to implement the mandated activities that are supported by source documents that show the validity of such costs. The parameters and guidelines do not identify crisis intervention as an eligible service.

The parameters and guidelines (section IV.H.) reference Title 2, *California Code of Regulations* (CCR), section 60020, subdivision (i), for reimbursable psychotherapy or other mental health treatment services. This regulation does not include socialization services. The CSM's May 26, 2011 statement of decision also states that the portion of the services provided that relate to socialization are not reimbursable.

The parameters and guidelines further specify that to the extent the DMH has not already compensated reimbursable administrative costs from categorical funding sources, the costs may be claimed.

Recommendation

In our previous final report dated March 7, 2012, we recommended the following:

- Ensure that only actual and supported costs for program-eligible clients are claimed in accordance with the mandate program.
- Compute indirect cost rates using a method that is consistent with the cost allocations in the cost report submitted to the DMH and apply administrative cost rates to eligible and supported direct costs.
- Apply all relevant administrative revenues to valid administrative costs.

No recommendation is applicable for this revised report as the consolidated program no longer is mandated.

County's Response

The county did not respond to the audit finding.

**FINDING 2—
Overstated residential
placement costs**

The county overstated residential placement costs by \$1,653,904 for the audit period.

The county claimed board-and-care costs and mental health treatment “patch” costs for residential placements in out-of-state facilities that are operated on a for-profit basis. Only placements in facilities that are operated on a not-for-profit basis are eligible for reimbursement.

The county claimed board-and-care costs for clients incurred outside of the clients’ authorization period. Only payments made for clients with a valid authorization for placement in a residential facility are eligible for reimbursement.

The county claimed board-and-care costs net of the California Department of Social Services reimbursement (40% state share). However, the county did not consider Local Revenue Funds applied to SED costs when computing its net costs.

We adjusted costs claimed for residential placements in out-of-state facilities that are operated on a for-profit basis, as well as costs associated with board-and-care costs for clients incurred outside of the clients’ authorization period. Additionally, we applied Local Revenue Funds to eligible board-and-care costs in order to arrive at the county’s net cost.

The following table summarizes the overstated residential placement costs claimed:

	Fiscal Year			Total
	2006-07	2007-08	2008-09	
Transfers and interim placements:				
Local revenue funds	\$ (12,682)	\$ -	\$ -	\$ (12,682)
Total transfers and interim placements	(12,682)	-	-	\$ (12,682)
Authorize/issue payments to providers:				
Ineligible placements:				
Board and care	(451,719)	(251,128)	(50,777)	(753,624)
Treatment	(373,380)	(215,136)	(44,955)	(633,471)
Local revenue funds	(217,649)	-	-	(217,649)
Unauthorized payments	(18,739)	(14,795)	(2,944)	(36,478)
Total authorize/issue payments to providers	(1,061,487)	(481,059)	(98,676)	(1,641,222)
Audit adjustment	<u>\$(1,074,169)</u>	<u>\$(481,059)</u>	<u>\$ (98,676)</u>	<u>\$(1,653,904)</u>

The parameters and guidelines (section IV.C.1) specify that the mandate is to reimburse counties for payments to vendors providing mental health services to pupils in out-of-state residential placements as specified in Government Code section 7576, and Title 2, CCR, sections 60100 and 60110.

Title 2, CCR, section 60100, subdivision (h), specifies that out-of-state residential placements shall be made only in residential programs that meet the requirements of Welfare and Institutions Code section 11460, subdivision (c)(2) through (3). Welfare and Institutions Code section 11460, subdivision (c)(3), states that reimbursement shall be paid only to a group home, organized, and operated on a nonprofit basis.

The parameters and guidelines (section IV.G.) reference Welfare and Institutions Code (WIC), section 18355.5, which prohibits a county from claiming reimbursement for its 60% share of the total residential and non-educational costs of a seriously emotionally disturbed child placed in an out-of-home residential facility if the county claims reimbursement for these costs from the Local Revenue Fund identified in WIC section 17600 and receives these funds.

Recommendation

In our previous final report dated March 7, 2012, we recommended the following:

We recommend that the county take steps to ensure that:

- Only actual and supported costs for program eligible clients are claimed in accordance with the mandate program.
- It only claims out-of-state residential placements that are in agencies owned and operated on a non-profit basis.
- Each residential placement has a valid authorization for placement.
- Costs claimed are reduced by the portion funded with Local Revenue Funds.

No recommendation is applicable for this revised report as the consolidated program no longer is mandated.

County's Response

The State's position is that the County overstated residential placement costs by \$1,653,904 for the audit period; and the County disputes this finding. The County specifically disputes the finding that it claimed ineligible vendor payments of \$1,387,095 (board and care costs of \$753,624 and treatment costs of \$633,471) for out-of-state residential placement of SED pupils owned and operated for profit [*sic*]. In support of its position, the State cites the California Code of Regulations, Title 2, section 60100, subdivision (h), which provides that out-of-state residential placements will be made only in residential programs that meet the requirements of Welfare and Institutions Code section 11460(c)(2) through (3). Welfare and Institutions Code section 11460(c)(3) provides that reimbursement will only be paid to a group home organized and operated on a nonprofit basis. The State also cites the parameters and guidelines in support of their position.

The County asserts that it is entitled to the entire amount claimed less the sum already paid by the State. Please see Summary of Program Costs for Out-of-State Residential Placements for Profit facilities for July 1, 2006 – June 30, 2009 attached hereto as Exhibit A-4. In support of its position, the County provides the following arguments and Exhibits A through C attached hereto.

1. California Law Prohibiting For-Profit Placements is Inconsistent with Both Federal Law, Which No Longer Has Such a Limitation, and With IDEA’s “Most Appropriate Placement” Requirement.

In 1990, Congress enacted IDEA (20 U.S.C.S. § 1400-1487) pursuant to the Spending Clause (U.S. Const., art. I, § 8, cl. 1). According to Congress, the statutory purpose of IDEA is “. . . to assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs. . . .” 20 U.S.C. § 1400(d)(1)(A); *County of San Diego v. Cal. Special Educ. Hearing*, 93 F.3d 1458, 1461 (9th Cir. 1996).

To accomplish the purposes and goals of IDEA, the statute “provides federal funds to assist state and local agencies in educating children with disabilities but conditions such funding on compliance with certain goals and procedures.” *Ojai Unified School Dist. v. Jackson*, 4 F.3d 1467, 1469 (9th Cir. 1993); see *Ciresoli v. M.S.A.D. No. 22*, 901 F. Supp. 378, 281 (D.Me. 1995). All 50 states currently receive IDEA funding and therefore must comply with IDEA. *County of L.A. v. Smith*, 74 Cal. App. 4th 500, 508 (1999).

IDEA defines “special education” to include instruction conducted in hospitals and institutions. If placement in a public or private residential program is necessary to provide special education, regulations require that the program must be provided at no cost to the parents of the child. 34 C.F.R. § 300.302 (2000). Thus, IDEA requires that a state pay for a disabled student’s residential placement when necessary. *Indep. Schl. Dist. No. 284 v. A.C.*, 258 F. 3d 769 (8th Cir. 2001). Local educational agencies (LEA) initially were responsible for providing all the necessary services to special education children (including mental health services), but Assembly Bill 3632/882 shifted responsibility for providing special education mental health services to the counties.

Federal law initially required residential placements to be in nonprofit facilities. In 1997, however, the federal requirements changed to remove any reference to the tax identification (profit/nonprofit) status of an appropriate residential placement as follows: Section 501 of the Personal Responsibility and Work Opportunity Responsibility Act of 1996 states, Section 472(c)(2) of the Social Security Act (42 U.S.C. 672(c)(2) is amended by striking “nonprofit.” That section currently states:

“The term ‘child-care institution’ means a private child-care institution, or a public child-care institution which accommodates no more than twenty-five children, which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing or approval of institutions of this type, as meeting the

standards established for such licensing, but the term shall not include detention facilities, forestry camps, training schools, or any other facility operated primarily for the detention of children who are determined to be delinquent.”

The California Code of Regulations, title 2, section 60100, subdivision (h) and Welfare and Institutions Code section 11460(c)(2) through (3) are therefore inconsistent with the Social Security Act as referenced above, as well as inconsistent with a primary principle of IDEA as described below.

IDEA “was intended to ensure that children with disabilities receive an education that is both appropriate and free.” *Florence County School District Four v. Carter*, 510 U.S. 7, 13, 126 L. Ed. 2d 284, 114 S. Ct. 361 (1993). A “free appropriate public education” (FAPE) includes both instruction and “related services” as may be required to assist a child with a disability. 20 U.S.C. § 1401 (22). Both instruction and related services, including residential placement, must be specially designed to suit the needs of the individual child. 20 U.S.C. §1401(25). The most appropriate residential placement specially designed to meet the needs of an individual child may not necessarily be one that is operated on a nonprofit basis. Consequently, to limit the field of appropriate placements for a special education student would be contrary to the FAPE requirement referenced above. Counties and students cannot be limited by such restrictions because the most appropriate placement for a student may not have a nonprofit status. This need for flexibility becomes most pronounced when a county is seeking to place a student in an out-of-state facility which is the most restrictive level of care. Such students have typically failed California programs and require a more specialized program that may not necessarily be nonprofit.

In contrast to the restrictions placed on counties with respect to placement in nonprofits, LEAs are not limited to accessing only nonprofit educational programs for special education students. When special education students are placed in residential programs, out-of-state LEAs may utilize the services provided by certified nonpublic, nonsectarian schools and agencies that are for profit. See Educ. Code § 56366.1. These nonpublic schools become certified by the state of California because they meet the requirements set forth in Education Code sections 56365 *et seq.* These [sic] requirements do not include nonprofit status, but rather, among other things, the ability to provide special education and designated instruction to individuals with exceptional needs which includes having qualified licensed and credentialed staff. LEAs monitor the out-of-state nonpublic schools through the Individualized Education Program process and are also required to monitor these schools annually which may include a site visit. Consequently, counties and LEAs should not be subject to different criteria when seeking a placement in out-of-state facilities for a special education student. Consistent with federal law, counties must have the ability to place students in the most appropriate educational environment out-of-state and not be constrained by nonprofit status.

2. Parents Can be Reimbursed When Placing Students in Appropriate For-Profit Out-of-State Facilities. County Mental Health Agencies Are Subject to Increased Litigation Without the Same Ability to Place Seriously Emotionally Disturbed Students in Appropriate For-Profit Out-of-State Facilities.

In *Florence County School District Four, et al. v. Shannon Carter*, 510 U.S. 7, 114 S.Ct. 361 (1993), the U.S. Supreme Court found that although the parents placed their child in a private school that did not meet state education standards and was not state approved, they were entitled to reimbursement because the placement was found to be appropriate under IDEA. The parents in *Carter* placed their child in a private school because the public school she was attending provided an inappropriate education under IDEA.

In California, if counties are unable to access for profit out-of-state programs, they may not be able to offer an appropriate placement for a child that has a high level of unique mental health needs that may only be treated by a specialized program. If that program is for profit, that county will therefore be subject to potential litigation from parents who through litigation may access the appropriate program for their child regardless of for profit or nonprofit status.

County Mental Health Agencies recommend out-of-state residential programs for special education students only after in state alternatives have been considered and are not found to meet the child's needs. See Covet Code §§ 7572.5 and 7572.55. As described in Sections 7572.5 and 7275.55, such decisions are not made hastily and require levels of documented review, including consensus from the special education student's individualized education program team. Further, when students require the most restrictive educational environment, their needs are great and unique. Consistent with IDEA, counties should be able to place special education students in the most appropriate program that meets their unique needs without consideration for the programs for profit or nonprofit status so that students are placed appropriately and counties are not subject to needless litigation.

3. The State of California Office of Administrative Hearings Special Education Division (OAH) has Ordered a County Mental Health Agency to Fund an Out-of-State For-Profit Residential Facility When no Other Appropriate Residential Placement is Available to Provide Student a FAPE.

In *Student v. Riverside Unified School District and Riverside County Department of Mental Health*, OAH Case No. N 2007090403, OAH ordered the Riverside County Department of Mental Health (RCDMH) and the Riverside Unified School District to fund the placement of a student with a primary disability of emotional disturbance with a secondary disability of deafness in an out-of-state for-profit residential facility because there was no other appropriate facility available to provide the Student a FAPE. A copy of *Student v. Riverside Unified School District and Riverside County Department of Mental Health*, OAH Case No. N 2007090403 is attached hereto as Exhibit B for your convenience. In the *Riverside* case, the Administrative Law Judge (ALJ) concluded that Section 60100 subdivision (h) of title 2 of the California Code of Regulations is "inconsistent with the federal statutory and regulatory law by which California has chosen to abide." The ALJ further concluded in her opinion that:

"California education law itself mandates a contrary response to Welfare and Institutions code section 11460, subdivision (c) (3), where no other placement exists for a child. Specifically, "It is the further intent of the legislature that this part does not abrogate any rights provided to individuals with exceptional needs and their parents or guardians under the federal Individuals with Disabilities Education

Act.” (Ed.Code § 56000, subd. (e) (Feb. 2007).) A contrary result would frustrate the core purpose of the IDEA and the companion state law, and would prevent student from accessing educational opportunities.”

Consequently, it is clear the ALJ agrees that there is a conflict that exists between state and federal law when there are no appropriate residential placements for a student that are nonprofit and that the right of the student to access a FAPE must prevail.

4. County Contracted with Nonprofit Out-of-State Residential Program for SED Pupils.

During the audit period, the County contracted with Mental Health Systems, Inc. (Provo Canyon School) the provider of the out-of-state residential services that are the subject of the proposed disallowance that the county disputes in this Response. As referenced in the April 28, 2007 letter from the Internal Revenue Service (attached hereto as Exhibit C) Mental Health Systems, Inc. (Provo Canyon School) is a nonprofit entity. The County contracted with this provider in a manner consistent with the requirements of the California Code of Regulations and Welfare and Institutions Code referenced above. The State never provided any guidance to counties as to how to access or contract with appropriate out-of-state facilities that meet State criteria or qualifications. The State never provided counties a list of appropriate out-of-state facilities that meet State requirements. County should not be penalized now for fulfilling the requirements of the law with little or no guidance from the State.

5. There are no Requirements in Federal or State Law Regarding the Tax Identification Status of Mental Health Treatment Services Providers. Thus, There are No Grounds to Disallow the County’s Treatment Costs.

Government Code section 7572 (c) provides that “Psychotherapy and other mental health assessments shall be conducted by qualified mental health professionals as specified in regulations developed by the State Department of Mental Health in consultation with the State Department of Education. . . .” The California Code of Regulations, title 2, division 9, chapter 1, article 1, section 60020 (i) and (j) further describe the type of mental health services to be provided in the program as well as who shall provide those services to special education pupils. There is no mention that the providers have a nonprofit or for profit status. The requirements are that the services “shall be provided directly or by contract at the discretion of the community mental health service of the county of origin” and that the services are provided by “qualified mental health professionals.” Qualified mental health professionals include licensed practitioners of the healing arts such as: psychiatrists, psychologists, clinical social workers, marriage, family and child counselors, registered nurses, mental health rehabilitation specialists and others who have been waived under Section 5751.2 of the Welfare and Institutions Code. The County has complied with all these requirements. Consequently, because there is no legal requirement that treatment services be provided by nonprofit entities the State cannot and shall not disallow the treatment costs.

SCO's Comment

The finding remains unchanged. The residential placement issue is not unique to this county; other counties are concerned about it as well. In 2008 the proponents of Assembly Bill (AB) 1805 sought to change the California regulations and allow payments to for-profit facilities for placement of SED pupils. This legislation would have permitted retroactive application, so that any prior unallowable claimed costs identified by the SCO would be reinstated. However, the Governor vetoed this legislation on September 30, 2008. In the next legislative session, AB 421, a bill similar to AB 1805, was introduced to change the regulations and allow payments to for-profit facilities for placement of SED pupils. On January 31, 2010, AB 421 failed passage in the Assembly. Absent any legislative resolution, counties must continue to comply with the governing regulations cited in the SED Pupils: Out-of-State Mental Health Services Program's parameters and guidelines. Our response addresses each of the five arguments set forth by the county in the order identified above.

1. California law prohibiting for-profit placements is inconsistent with both federal law, which no longer has such a limitation, and with IDEA's "most appropriate placement" requirement.

The parameters and guidelines (section IV.C.1.) specify that the mandate is to reimburse counties for payments to service vendors providing mental health services to SED pupils in out-of-state residential placements as specified in Government Code section 7576 and Title 2, *California Code of Regulations* (CCR), sections 60100 and 60110. Title 2, CCR, section 60100, subdivision (h), specifies that out-of-state residential placements shall be made only in residential programs that meet the requirements of Welfare and Institutions Code section 11460, subdivision (c)(2) through (3). Welfare and Institutions Code section 11460, subdivision (c)(3), states that reimbursement shall only be paid to a group home organized and operated on a nonprofit basis. The program's parameters and guidelines do not provide reimbursement for out-of-state residential placements made outside of the regulation.

We agree that there is inconsistency between the California law and federal law related to IDEA funds. Furthermore, we do not dispute the assertion that California law is more restrictive than federal law in terms of out-of-state residential placement of SED pupils; however, the fact remains that this is a State-mandated cost program and the county filed a claim seeking reimbursement from the State under the provisions of Title 2, CCR, section 60100.

We also agree that Education Code sections 56366.1 and 56365 do not restrict local educational agencies (LEAs) from contracting with for-profit schools for educational services. These sections specify that educational services must be provided by a school certified by the California Department of Education.

2. **Parents can be reimbursed when placing students in appropriate for-profit out-of-state facilities. County mental health agencies will be subject to increased litigation without the same ability to place seriously emotionally disturbed students in appropriate for-profit out-of-state facilities.**

Refer to previous comment.

3. **The State of California Office of Administrative Hearings Special Education Division (OAH) has ordered a county mental health agency to fund an out-of-state for-profit residential facility when no other appropriate residential placement is available to provide student a FAPE.**

Office of Administrative Hearings (OAH) Case No. N 2007090403 is not precedent-setting and has no legal bearing. In this case, the administrative law judge found that not placing the student in an appropriate facility (for-profit) was to deny the student a free appropriate public education (FAPE) under federal regulations. The issue of funding residential placements made outside of the regulation was not specifically addressed in the case. Nevertheless, the fact remains that this is a State-mandated cost program and the county filed a claim seeking reimbursement from the State under the provisions of Title 2, CCR, section 60100, and Welfare and Institutions Code section 11460, subdivision (c)(3). Residential placements made outside of the regulation are not reimbursable under the State-mandated cost program.

4. **County contracted with nonprofit out-of-state residential program for SED pupils.**

As noted in the finding, the mandate reimburses counties for payments to service vendors (group homes) providing mental health services to SED pupils in out-of-state residential placements that are organized and operated on a nonprofit basis. Based on documents the county provided us in the course of the audit, we determined that Mental Health Systems, Inc., a California nonprofit corporation, contracted with Charter Provo Canyon School, a Delaware for-profit limited liability company, to provide out-of-state residential placement services. The referenced Provo Canyon, Utah residential facility was not organized and operated on a nonprofit basis until its Articles of Incorporation as a nonprofit entity in the state of Utah were approved on January 6, 2009. We only allowed costs incurred by the county for residential placements made at the Provo Canyon facility when it became a nonprofit.

5. **There are no requirements in federal or state law regarding the tax identification status of mental health treatment services providers. Thus, there are no grounds to disallow the county's treatment costs.**

We do not dispute that Government Code section 7572 requires mental health services to be provided by qualified mental health professionals. As noted in the finding and our previous response, the

mandate reimburses counties for payments to service vendors (group homes) providing mental health services to SED pupils in out-of-state residential placements that are organized and operated on a nonprofit basis. The unallowable treatment and board-and-care vendor payments claimed result from the county placement of clients in non-reimbursable out-of-state residential facilities. The program's parameters and guidelines do not include a provision for the county to be reimbursed for vendor payments made to out-of-state residential placements outside of the regulation.

**FINDING 3—
Duplicate due process
hearing costs**

The county claimed \$15,401 in duplicate due process hearing costs for the audit period.

The county claimed allowable due process hearing costs. For FY 2006-07 and FY 2007-08 the county included these costs in the pool of direct costs used to compute the unit rates in the county's cost reports submitted to the DMH. Consequently, due process hearing costs claimed for FY 2006-07 and FY 2007-08 were also allocated through the unit rates to various mental health programs, including the Consolidated HDS, HDS II, and SEDP Program claims. Allowing the FY 2006-07 and FY 2007-08 due process hearing costs would result in duplicate reimbursement.

We did not allow the claimed FY 2006-07 and FY 2007-08 due process hearing costs because they resulted in a duplication of claimed costs.

The following table summarizes the duplicated due process hearing costs claimed:

	Fiscal Year			Total
	2006-07	2007-08	2008-09	
Participation in due process hearings	\$ (5,330)	\$ (10,071)	\$ -	\$ (15,401)
Audit adjustment	\$ (5,330)	\$ (10,071)	\$ -	\$ (15,401)

The parameters and guidelines specify that the State will reimburse only actual increased costs incurred to implement the mandated activities and supported by source documents that show the validity of such costs.

Recommendation

In our previous final report dated March 7, 2012, we recommended the following:

We recommend that the county ensure that only actual and supported costs for program-eligible clients are claimed in accordance with the mandate program. Furthermore, we recommend that the county only claim reimbursement for allowable direct costs that are not included as a part of its total cost used to compute the unit rates.

No recommendation is applicable for this revised report as the consolidated program no longer is mandated.

County's Response

The county did not respond to the audit finding.

**FINDING 4—
Understated offsetting
reimbursements**

The county understated other reimbursements by \$156,960 for the audit period.

The county understated Individuals with Disabilities Education Act (IDEA) grant reimbursements for the audit period, and DMH Categorical grant reimbursements for FY 2008-09, by claiming preliminary grant amounts.

The county overstated Short-Doyle/Medi-Cal Federal Financing Participation Funds (SD/MC FFP), and Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) reimbursements by applying the funding shares to service costs not fully based on actual costs. The county determined its service costs based on preliminary units and rates. The county ran unit-of-service reports to support its claims. These reports did not fully support the units of service claimed and contained duplicate units and unallowable costs including crisis intervention, individual rehabilitation, group rehabilitation, family rehabilitation, and rehabilitation-evaluation services.

The county claimed costs for individual rehabilitation, group rehabilitation, family rehabilitation, and rehabilitation-evaluation services that may include ineligible socialization services that are not reimbursable under the parameters and guidelines. Based on the CSM's statement of decision dated May 26, 2011, the portions of rehabilitation services related to socialization are not reimbursable under the parameters and guidelines. The county must separate the ineligible portions of the rehabilitation service. To date, the county has not provided our office with any documentation to identify the eligible portion of claimed rehabilitation services. Therefore, we are excluding the portion of reimbursements that relate to claimed rehabilitation services.

The following table summarizes the overstated offsetting reimbursements claimed:

	Fiscal Year			Total
	2006-07	2007-08	2008-09	
IDEA	\$ 202,469	\$ (90,847)	\$ (487,781)	\$ (376,159)
DMH Categorical payment	-	-	(406,984)	(406,984)
SD/MC FFP:				
Rehabilitation costs			48,090	48,090
Units of service/unit rates	(11,373)	(17,438)	11,132	(17,679)
EPSDT:				
Rehabilitation costs			24,326	24,326
Units of service/unit rates	44,514	35,858	491,074	571,446
Total other reimbursements	<u>\$ 235,610</u>	<u>\$ (72,427)</u>	<u>\$ (320,143)</u>	<u>\$ (156,960)</u>

The parameters and guidelines specify that any direct payments (Categorical funds, SD/MC FFP, EPSDT, IDEA, and other offsets such as private insurance) received from the State that are specifically allocated to the program, and/or any other reimbursement received as a result of the mandate, must be deducted from the claim.

Recommendation

In our previous final report dated March 7, 2012, we recommended the following:

We recommend that the county ensure that appropriate revenues are identified and applied to valid costs.

No recommendation is applicable for this revised report as the consolidated program no longer is mandated.

County's Response

The county did not respond to the audit finding.

SCO's Comment

Subsequent to the issuance of our final report on March 7, 2012, the DMH issued its EPSDT settlement for FY 2008-09. We recalculated offsetting reimbursements and revised Finding 4 to reflect the actual funding percentage. As a result, the finding was reduced by \$184,731.

**Attachment—
County’s Response to
Draft Audit Report**



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February 29, 2012

Jim L. Spano, Chief, Mandated Cost Audits Bureau
California State Controller's Office
Division of Audits
Post Office Box 942850
Sacramento, California 94250-5874

Re: Response to Consolidated Handicapped and Disabled Students (HDS), HDS II,
and SEDP Program Audit for the Period of July 1, 2006 through June 30, 2009

Dear Mr. Spano:

The County of San Diego (County) is in receipt of the State Controller's Office draft audit report of the costs claimed by County for the legislatively mandated Consolidated Handicapped and Disabled Students (HDS), HDS II, and SEDP Program Audit for the Period of July 1, 2006 through June 30, 2009. The County received the report on February 7, 2012 and received an extension from Mr. Jim L. Spano, Chief, Mandated Audits Bureau to submit its response to the report on or before February 29, 2012. The County is submitting this response and its management representation letter in compliance with that extension on February 29, 2012.

As directed in the draft report, the County's response will address the accuracy of the audit findings. There were four Findings in the above-referenced Draft Report and the County disputes Finding 2 – Overstated Residential Placement Costs. The County claimed \$14,484,766 for the mandated programs for the audit period and \$4,106,959 has already been paid by the State. The State Controller's Office's audit found that \$11,651,891 is allowable and \$2,832,875 is unallowable. The unallowable costs as determined by State Controller's Office occurred primarily because the State alleges the County overstated residential placement costs by \$1,653,904 (the County disputes

Mr. Spano

-2-

February 29, 2012

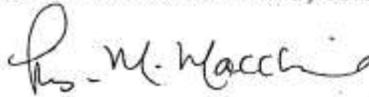
\$1,387,095) for the audit period. As stated above, the County disputes Finding 2 and asserts that \$1,387,095 are allowable costs that are due the County for the audit period.

If you have any questions please contact Lisa Macchione, Senior Deputy County Counsel at (619) 531-6296.

Very truly yours,

THOMAS E. MONTGOMERY, County Counsel

By



LISA M. MACCHIONE, Senior Deputy

LMM:vf
11-01866
Encs.

**COUNTY OF SAN DIEGO'S RESPONSE TO LEGISLATIVELY MANDATED
CONSOLIDATED HANDICAPPED AND DISABLED STUDENTS (HDS), HDS II, AND
SERIOUSLY EMOTIONALLY DISTURBED PUPILS (SEDP) PROGRAM AUDIT
FOR THE PERIOD OF JULY 1, 2006 THROUGH JUNE 30, 2009**

Summary

The State Controller's Office audited the costs claimed by County for the legislatively mandated Consolidated handicapped and Disabled Students (HDS), HDS II, and Seriously Emotionally Disturbed Pupils (SEDP) Program for the period of July 1, 2006 through June 30, 2009. The County claimed \$14,484,766 for the mandated program, and the State found \$11,651,891 is allowable and \$2,832,875 is unallowable. The State alleges that the unallowable costs occurred because the County overstated mental health services costs, administrative costs, and residential placement costs, duplicated due process hearing costs, and understated other reimbursements. The State has broken down the unallowable costs claimed into four findings. The County disputes the second finding regarding the alleged overstated residential placement costs and does not dispute the first finding relating to overstated mental health services unit costs and indirect (administrative) costs, the third finding relating to duplicate due process hearing costs or the fourth finding relating to understated other reimbursements.

The County disputes Finding 2 – overstated residential placement costs - because the California Code of Regulations section 60100(h) and Welfare and Institutions Code section 11460(c)(3) cited by the State are in conflict with provisions of federal law, including the Individuals with Disabilities Education Act (IDEA) and Section 472(c)(2) of the Social Security Act (42 U.S.C.672 (c)(2).

Response To Finding 2 – Overstated Residential Placement Costs

The State's position is that the County overstated residential placement costs by \$1,653,904 for the audit period; and the County disputes this finding. The County specifically disputes the finding that it claimed ineligible vendor payments of \$1,387,095.00 (board and care costs of \$753,624 and treatment costs of \$633,471) for out-of-state residential placement of SED pupils owned and operated for profit. In support of its position, the State cites the California Code of Regulations, Title 2, section 60100, subdivision (h), which provides that out-of-state residential placements will be made only in residential programs that meet the requirements of Welfare and Institutions Code section 11460(c)(2) through (3). Welfare and Institutions Code section 11460(c) (3) provides that reimbursement will only be paid to a group home organized and operated on a nonprofit basis. The State also cites the parameters and guidelines in support of their position.

The County asserts that it is entitled to the entire amount claimed less the sum already paid by the State. Please see Summary of Program Costs for Out-of-State Residential Placements for Profit facilities for July 1, 2006 - June 30, 2009 attached hereto as Exhibit A-4.

In support of its position, the County provides the following arguments and Exhibits A through C attached hereto.¹

I. California Law Prohibiting For-Profit Placements is Inconsistent with Both Federal Law, Which Does Not Have Such a Limitation, and With IDEA's "Most Appropriate Placement" Requirement.

In 1990, Congress enacted IDEA (20 U.S.C.S. § 1400-1487) pursuant to the Spending Clause (U.S. Const., art. I, § 8, cl. 1). According to Congress, the statutory purpose of IDEA is "... to assure that all children with disabilities have available to them ... a free appropriate public education which emphasizes special education and related services designed to meet their unique needs. . . ." 20 U.S.C. § 1400(d)(1)(A); *County of San Diego v. Cal. Special Educ. Hearing*, 93 F.3d 1458, 1461 (9th Cir. 1996).

To accomplish the purposes and goals of IDEA, the statute "provides federal funds to assist state and local agencies in educating children with disabilities but conditions such funding on compliance with certain goals and procedures." *Ojai Unified School Dist. v. Jackson*, 4 F.3d 1467, 1469 (9th Cir. 1993); see *Ciresoli v. M.S.A.D. No. 22*, 901 F. Supp. 378, 381 (D.Me. 1995). All 50 states currently receive IDEA funding and therefore must comply with IDEA. *County of L.A. v. Smith*, 74 Cal. App. 4th 500, 508 (1999).

IDEA defines "special education" to include instruction conducted in hospitals and institutions. If placement in a public or private residential program is necessary to provide special education, regulations require that the program must be provided at no cost to the parents of the child. 34 C.F.R. § 300.302 (2000). Thus, IDEA requires that a state pay for a disabled student's residential placement when necessary. *Indep. Schl. Dist. No. 284 v. A.C.*, 258 F. 3d 769 (8th Cir. 2001). Local educational agencies (LEA) initially were responsible for providing all the necessary services to special education children (including mental health services), but Assembly Bill 3632/882 shifted responsibility for providing special education mental health services to the counties.

Federal law initially required residential placements to be in nonprofit facilities. In 1997, however, the federal requirements changed to remove any reference to the tax identification (profit/nonprofit) status of an appropriate residential placement as follows: Section 501 of the Personal Responsibility and Work Opportunity Responsibility Act of 1996 states, Section 472(c)(2) of the Social Security Act (42 U.S.C. 672(c)(2) is amended by striking "nonprofit." That section currently states:

¹ County acknowledges that as of July 1, 2011 the various sections of the Government Code, Welfare and Institutions Code, Education Code and Family Code mandating that counties provide educationally related mental health services to students on individualized education plans ("IEP") became inoperative and as of January 1, 2012 these sections were repealed. It should be made clear, however, that counties were still mandated to provide educationally related mental health services to eligible students on IEPs during the audit period and therefore, all arguments made within this audit response are relevant and valid for the audit period.

“The term ‘child-care institution’ means a private child-care institution, or a public child-care institution which accommodates no more than twenty-five children, which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing or approval of institutions of this type, as meeting the standards established for such licensing, but the term shall not include detention facilities, forestry camps, training schools, or any other facility operated primarily for the detention of children who are determined to be delinquent.”

The California Code of Regulations, title 2, section 60100, subdivision (h) and Welfare and Institutions Code section 11460(c)(2) through (3) are therefore inconsistent with the Social Security Act as referenced above, as well as inconsistent with a primary principle of IDEA as described below.

IDEA “was intended to ensure that children with disabilities receive an education that is both appropriate and free.” *Florence County School District Four v. Carter*, 510 U.S. 7, 13, 126 L. Ed. 2d 284, 114 S. Ct. 361 (1993). A “free appropriate public education” (FAPE) includes both instruction and “related services” as may be required to assist a child with a disability. 20 U.S.C. § 1401 (22). Both instruction and related services, including residential placement, must be specially designed to suit the needs of the individual child. 20 U.S.C. § 1401(25). The most appropriate residential placement specially designed to meet the needs of an individual child may not necessarily be one that is operated on a nonprofit basis. Consequently, to limit the field of appropriate placements for a special education student would be contrary to the FAPE requirement referenced above. Counties and students cannot be limited by such restrictions because the most appropriate placement for a student may not have a nonprofit status. This need for flexibility becomes most pronounced when a county is seeking to place a student in an out-of-state facility which is the most restrictive level of care. Such students have typically failed California programs and require a more specialized program that may not necessarily be nonprofit.

In contrast to the restrictions placed on counties with respect to placement in nonprofits, LEAs are not limited to accessing only nonprofit educational programs for special education students. When special education students are placed in residential programs, out-of-state LEAs may utilize the services provided by certified nonpublic, nonsectarian schools and agencies that are for profit. See Educ. Code § 56366.1. These nonpublic schools become certified by the state of California because they meet the requirements set forth in Education Code sections 56365 *et seq.* These requirements do not include nonprofit status, but rather, among other things, the ability to provide special education and designated instruction to individuals with exceptional needs which includes having qualified licensed and credentialed staff. LEAs monitor the out-of-state nonpublic schools through the Individualized Education Program process and are also required to monitor these schools annually which may include a site visit. Consequently, counties and LEAs should not be subject to different criteria when seeking a placement in out-of-state facilities for a special education student. Consistent with federal law, counties must have the ability to place students in the most appropriate educational environment out-of state and not be constrained by nonprofit status.

2. Parents Can be Reimbursed When Placing Students in Appropriate For-Profit Out-of-State Facilities. County Mental Health Agencies Are Subject to Increased Litigation Without the Same Ability to Place Seriously Emotionally Disturbed Students in Appropriate For-Profit Out-of-State Facilities.

In *Florence County School District Four, et al. v. Shannon Carter*, 510 U.S. 7, 114 S.Ct. 361 (1993), the U.S. Supreme Court found that although the parents placed their child in a private school that did not meet state education standards and was not state approved, they were entitled to reimbursement because the placement was found to be appropriate under IDEA. The parents in *Carter* placed their child in a private school because the public school she was attending provided an inappropriate education under IDEA.

In California, if counties are unable to access for profit out-of-state programs, they may not be able to offer an appropriate placement for a child that has a high level of unique mental health needs that may only be treated by a specialized program. If that program is for profit, that county is therefore subject to potential litigation from parents who through litigation may access the appropriate program for their child regardless of for profit or nonprofit status.

County Mental Health Agencies recommend out-of state residential programs for special education students only after in state alternatives have been considered and are not found to meet the child's needs. See Gov't Code §§ 7572.5 and 7572.55. As described in Sections 7572.5 and 7275.55, such decisions are not made hastily and require levels of documented review, including consensus from the special education student's individualized education program team. Further, when students require the most restrictive educational environment, their needs are great and unique. Consistent with IDEA, counties should be able to place special education students in the most appropriate program that meets their unique needs without consideration for the programs for profit or nonprofit status so that students are placed appropriately and counties are not subject to needless litigation.

3. The State of California Office of Administrative Hearings Special Education Division (OAH) has Ordered a County Mental Health Agency to Fund an Out-of-State For-Profit Residential Facility When no Other Appropriate Residential Placement is Available to Provide Student a FAPE.

In *Student v. Riverside Unified School District and Riverside County Department of Mental Health*, OAH Case No. N 2007090403, OAH ordered the Riverside County Department of Mental Health (RCDMH) and the Riverside Unified School District to fund the placement of a student with a primary disability of emotional disturbance with a secondary disability of deafness in an out-of-state for-profit residential facility because there was no other appropriate facility available to provide the Student a FAPE. A copy of *Student v. Riverside Unified School District and Riverside County Department of Mental Health*, OAH Case No. N 2007090403 is attached hereto as Exhibit B for your convenience. In the *Riverside* case, the Administrative Law Judge (ALJ) concluded that Section 60100 subdivision (h) of title 2 of the California Code

of Regulations is “inconsistent with the federal statutory and regulatory law by which California has chosen to abide.” The ALJ further concluded in her opinion that:

“California education law itself mandates a contrary response to Welfare and Institutions code section 11460, subdivision (c) (3), where no other placement exists for a child. Specifically, “It is the further intent of the legislature that this part does not abrogate any rights provided to individuals with exceptional needs and their parents or guardians under the federal Individuals with Disabilities Education Act.” (Ed.Code § 56000, subd. (e) (Feb. 2007).) A contrary result would frustrate the core purpose of the IDEA and the companion state law, and would prevent student from accessing educational opportunities.”

Consequently, it is clear the ALJ agrees that there is a conflict that exists between state and federal law when there are no appropriate residential placements for a student that are nonprofit and that the right of the student to access a FAPE must prevail.

4. County Contracted with Nonprofit Out-of-State Residential Program for SED Pupils.

During the audit period, the County contracted with Mental Health Systems, Inc. (Provo Canyon School) the provider of the out-of-state residential services that are the subject of the proposed disallowance that the County disputes in this Response. As referenced in the April 28, 2007 letter from the Internal Revenue Service (attached hereto as Exhibit C) Mental Health Systems, Inc. (Provo Canyon School) is a nonprofit entity. The County contracted with this provider in a manner consistent with the requirements of the California Code of Regulations and Welfare and Institutions Code referenced above. The State never provided any guidance to counties as to how to access or contract with appropriate out-of-state facilities that meet State criteria or qualifications. The State never provided counties a list of appropriate out-of-state facilities that meet State requirements. County should not be penalized now for fulfilling the requirements of the law with little or no guidance from the State.

5. There are no Requirements in Federal or State Law Regarding the Tax Identification Status of Mental Health Treatment Services Providers. Thus, There are No Grounds to Disallow the County's Treatment Costs.

Government Code section 7572 (c) provides that “Psychotherapy and other mental health assessments shall be conducted by qualified mental health professionals as specified in regulations developed by the State Department of Mental Health in consultation with the State Department of Education. . . .” The California Code of Regulations, title 2, division 9, chapter 1, article 1, section 60020 (i) and (j) further describe the type of mental health services to be provided in the program as well as who shall provide those services to special education pupils. There is no mention that the providers have a nonprofit or for profit status. The requirements are that the services “shall be provided directly or by contract at the discretion of the community mental health service of the county of origin” and that the services are provided by “qualified

mental health professionals." Qualified mental health professionals include licensed practitioners of the healing arts such as: psychiatrists, psychologists, clinical social workers, marriage, family and child counselors, registered nurses, mental health rehabilitation specialists and others who have been waived under Section 5751.2 of the Welfare and Institutions Code. The County has complied with all these requirements. Consequently, because there is no legal requirement that treatment services be provided by nonprofit entities the State cannot and shall not disallow the treatment costs.

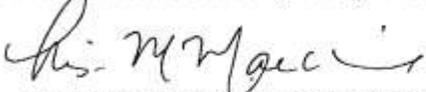
Conclusion

In conclusion, the County asserts that the costs of \$1,387,095.00 as set forth in Exhibits A-1 through A-4 should be allowed.

Dated: February 29, 2012

Respectfully submitted,

THOMAS E. MONTGOMERY, County Counsel

By 

LISA M. MACCHIONE, Senior Deputy
Attorneys for the County of San Diego

Summary of July 01 2006- June 30 2007

Direct and Indirect Costs:

- Referral and mental health assessments
- Transfers and interim placements
- Psychotherapy /other mental health services
- Authorization payments to providers:

Vendor Reimbursement

Travel

Participation in due process hearings

Sub-Total program costs

Less: Other reimbursements

Total claimed amount

Less: Late filing penalty

Total Program Costs

Less: Amount paid by the State

Allowable costs claimed in excess of amount paid

Allowable per State Audit (Residential Placement Costs)

Amount being appealed (Payments to Profit Facility)

Breakdown:

Out of State Residential Placement (Treatment Cost) Provo Canyon PO#606325

Out of State Residential Placement (Room and Board) Provo Canyon PO#606325

Total

	Actual Costs Claimed	Allowable	Adjustments
\$	884,162	\$ 880,170	\$ (3,992)
\$	1,823,625	1,890,217	(33,408)
\$	7,888,926	7,837,430	(31,496)
\$	5,788,131	5,726,243	(1,061,487)
\$	14,797	14,797	-
\$	5,330	-	(5,330)
\$	16,484,971	15,349,258.00	(1,135,713)
\$	(9,887,842)	(9,651,932)	235,910
\$	6,597,429	5,697,326	(900,103)
\$	(10,000)	(10,000)	-
\$	6,587,429	5,687,326	(900,103)
\$		(4,108,959)	
\$		1,580,367	
\$		15,240,367	
\$		15,240,367	
\$		373,380.00	
\$		451,719.00	
\$		825,099.00	

Summary of July 01 2007 - June 30 2008

Direct and Indirect Costs:

Referral and mental health assessments
 Transfers and inpatient placements
 Psychotherapy /other mental health services
 Authorization payments to providers:
 Vendor Reimbursement

Travel

Participation in due process hearings

Sub-Total program costs

Less: Other reimbursements

Total claimed amount

Total Program Costs

Less: Amount paid by the State

Allowable costs claimed in excess of amount paid

Allowable per State Audit (Residential Placement Costs)

Amount being appealed (Payments to Profit Facility)

Breakdown:

Out of State Residential Placement (Treatment Cost) Provo Canyon PO#506325

Out of State Residential Placement (Room and Board) Provo Canyon PO#506325

Total

	Actual Costs Claimed	Allowable	Adjustments
\$	1,040,292	\$ 1,032,865	\$ (7,427)
\$	1,827,332	\$ 1,822,587	\$ (4,745)
\$	8,595,332	\$ 8,514,338	\$ (80,994)
\$	6,724,027	\$ 6,643,033	\$ (80,994)
\$	14,185	\$ 14,185	\$ -
\$	10,071	\$ -	\$ (10,071)
\$	18,181,239	\$ 17,826,934	\$ (354,305)
\$	(11,589,842)	\$ (11,562,359)	\$ (27,483)
\$	6,591,397	\$ 6,264,575	\$ (326,822)
\$	8,581,297	\$ 8,042,260	\$ (539,037)
\$	\$ -	\$ -	\$ -
\$	\$ -	\$ 8,042,260	\$ -
\$	\$ -	\$ 8,042,260	\$ -
\$	\$ -	\$ 465,264,000	\$ -
\$	\$ -	\$ 215,136.00	\$ -
\$	\$ -	\$ 251,128.00	\$ -
\$	\$ -	\$ 465,264,000	\$ -

Summary of July 01 2008 - June 30 2009

Direct and Indirect Costs:

Referral and mental health assessments
 Transfers and interim placements
 Psychotherapy /other mental health services
 Authorization/issue payments to providers:
 Vendor Reimbursement
 Travel
 Participation in due process hearings
 Sub-Total program costs
 Less: Other reimbursements
 Total claimed amount
 Adjustment to eliminate negative balance
 Total Program Costs
 Less: Amount paid by the State
 Allowable costs claimed in excess of amount paid

Allowable per State Audit (Residential Placement Costs)

Amount being appealed (Payments to Profit Facility)

Breakdown:

Out of State Residential Placement (Treatment Cost) Provo Canyon PC#060325
 Out of State Residential Placement (Room and Board) Provo Canyon PC#060325
 Total

	Actual Costs Claimed	Allowable	Adjustments
\$	1,626,079	\$ 1,207,589	\$ (417,490)
\$	722,633	\$ 548,944	\$ (173,689)
\$	9,749,678	\$ 8,198,502	\$ (551,177)
\$	6,211,666	\$ 5,252,803	\$ (98,876)
\$	12,472	\$ 12,472	\$ -
\$	48,638	\$ 48,638	\$ -
\$	18,368,095	\$ 17,127,033	\$ (1,241,032)
\$	(17,062,025)	\$ (17,556,899)	\$ (504,874)
\$	1,306,040	\$ 439,886	\$ (1,745,966)
\$	-	\$ 439,886	\$ 439,886
\$	1,306,040	\$ -	\$ (1,306,040)
\$	-	\$ -	\$ -
\$	1,306,040	\$ 439,886	\$ (866,154)
\$	44,865.00	\$ 44,865.00	\$ -
\$	50,777.00	\$ 50,777.00	\$ -
\$	95,642.00	\$ 95,642.00	\$ -

Summary of July 01 2006- June 30 2009
Direct and Indirect Costs:

Referral and mental health assessments
Transfers and interim placements
Psychotherapy /other mental health services
Authorize/issue payments to providers:
Vendor Reimbursement
Travel
Participation in due process hearings
Sub-Total program costs
Less: Other reimbursements
Total claimed amount
Adjustment to eliminate negative balance
Less: Late filing penalty
Total Program Costs
Less: Amount paid by the State
Allowable costs claimed in excess of amount paid

	Actual Costs Claimed	Allowable	Adjustments
\$	3,549,533	\$ 3,120,815	\$ (428,718)
\$	4,473,590	\$ 4,261,748	\$ (211,842)
\$	28,183,937	\$ 25,550,270	\$ (2,633,667)
\$	18,723,724	\$ 17,082,502	\$ (1,641,222)
\$	41,454	\$ 41,454	\$ -
\$	52,037	\$ 46,636	\$ (5,401)
\$	53,034,275	\$ 50,103,225	\$ (2,931,050)
\$	(38,539,509)	\$ (38,881,200)	\$ (341,691)
\$	14,494,766	\$ 11,222,025	\$ (3,272,741)
\$	(10,000)	\$ (10,000)	\$ -
\$	14,484,766	\$ 11,651,851	\$ (2,832,915)
\$		\$ (4,106,959)	\$ -
\$		\$ 7,544,892	\$ -

Allowable per State Audit (Residential Placement Costs)

\$ 17,082,502.00

Total amount being appealed (Payments to Profit Facility)

\$ 1,387,055.00

Breakdown:

Out of State Residential Placement (Treatment Cost) Provo Canyon PO#506325

\$ 633,471.00

Out of State Residential Placement (Room and Board) Provo Canyon PO#506325

\$ 753,624.00

Grand Total

\$ 1,387,095.00

Administration

MAY 07 2007

Internal Revenue Service

Date: April 28, 2007

MENTAL HEALTH SYSTEMS INC
9465 FARNHAM ST
SAN DIEGO CA 92123

Department of the Treasury
P. O. Box 2508
Cincinnati, OH 45201

Person to Contact:
T. Buckingham 29-70700
Customer Service Representative
Toll Free Telephone Number:
877-829-5500
Federal Identification Number:

Dear Sir or Madam:

This is in response to your request of April 26, 2007, regarding your organization's tax-exempt status.

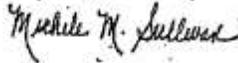
In November 1982 we issued a determination letter that recognized your organization as exempt from federal income tax. Our records indicate that your organization is currently exempt under section 501(c)(3) of the Internal Revenue Code.

Our records indicate that your organization is also classified as a public charity under section 509(a)(2) of the Internal Revenue Code.

Our records indicate that contributions to your organization are deductible under section 170 of the Code, and that you are qualified to receive tax deductible bequests, devises, transfers or gifts under section 2055, 2106 or 2522 of the Internal Revenue Code.

If you have any questions, please call us at the telephone number shown in the heading of this letter.

Sincerely,



Michele M. Sullivan, Oper. Mgr.
Accounts Management Operations 1

EXHIBIT B

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

Petitioner,

v.

RIVERSIDE UNIFIED SCHOOL
DISTRICT and RIVERSIDE COUNTY
DEPARTMENT of MENTAL HEALTH,

Respondents.

OAH CASE NO. N 2007090403

DECISION

Administrative Law Judge Judith L. Pasewark, Office of Administrative Hearings, Special Education Division, State of California (OAH), heard this matter by written stipulation and joint statement of facts presented by the parties, along with written argument and closing briefs submitted by each party.

Heather D. McGunigle, Esq., of Disability Rights Legal Center, and Kristelia Garcia, Esq., of Quinn Emanuel Urquhart Oliver & Hedges, represented Student (Student).

Ricardo Soto, Esq., of Best Best & Krieger, represented Riverside Unified School District (District).

Sharon Watt, Esq., of Filarsky & Watt, represented Riverside County Department of Mental Health (CMH).

Student filed his first amended Request for Due Process Hearing on September 25, 2007. At the pre-hearing conference on December 7, 2007, the parties agreed to submit the matter on a written Joint Stipulation of Facts, and individual written closing arguments. The documents were received, the record closed, and matter was submitted for decision on December 31, 2007.

EXHIBIT C

ISSUE

May the educational and mental health agencies place Student in an out-of-state for-profit residential center under California Code of Regulations section 60100, subdivision (h), and California Welfare and Institutions Code section 11460, subdivision (c)(2) and (3), when no other appropriate residential placement is available to provide Student a FAPE?

CONTENTIONS

All parties agree that Student requires a therapeutic residential placement which will meet his mental health and communication needs pursuant to his October 9, 2007 Individual Educational Plan (IEP). The District and CMH have conducted a nation-wide search and have been unable to locate an appropriate non-profit residential placement for Student.

Student contends that, as the District and CMH's searches for an appropriate non-profit residential placement have been exhausted, the District and CMH are obligated to place Student in an appropriate out-of-state for-profit residential program in order to provide Student with a free and appropriate public education (FAPE).

Both the District and CMH contend that they do not have the authority to place Student at an out-of-state for-profit residential program.

JOINT STIPULATION OF FACTS¹

1. Student is 17 years old and resides with his Mother (Mother) within the District in Riverside County, California. Student's family is low-income and meets Medi-Cal eligibility requirements.
2. Student is deaf, has impaired vision and an orthopedic condition known as legg-perthes. Student has been assessed as having borderline cognitive ability. His only effective mode of communication is American Sign Language (ASL). Student also has a long history of social and behavioral difficulties. As a result, Student is eligible for special education and related services and mental health services through AB2726/3632 under the category of emotional disturbance (ED), with a secondary disability of deafness.
3. Student requires an educational environment in which he has the opportunity to interact with peers and adults who are fluent in ASL. Student attended the California

¹ The parties submitted a Stipulated Statement of Undisputed Facts and Evidence which is admitted into evidence as Exhibit 67, and incorporated herein. The stipulated facts have been consolidated and renumbered for clarity in this decision. As part of the same document, the parties stipulated to the entry of the joint Exhibits 1 through 66, which are admitted into evidence.

School for the Deaf, Riverside (CSDR) between January 2005 and September 2006, while a resident of the Monrovia Unified School District.

4. CSDR does not specialize in therapeutic behavior interventions. In January 2005, CSDR terminated Student's initial review period due to his behaviors. CSDR removed Student from school as suicide prevention because Student physically harmed himself. At that time, both CSDR and Monrovia USD believed Student to be a danger to himself and others. They, therefore, placed him in home-hospital instruction.

5. Between June 2005 and October 2005, Student's behaviors continued to escalate. Student was placed on several 72-hour psychiatric holds for which he missed numerous days of school. On one occasion, Student was hospitalized for approximately two weeks. On another occasion, he was hospitalized at least a week.

6. Pursuant to a mental health referral, on September 14, 2006, Monrovia USD and Los Angeles County Department of Mental Health (LACDMH) met, and determined that Student had a mental disturbance for which they recommended residential placement.² At that time, Amy Kay, Student's ASL-fluent therapist through LACDMH's AB2726 program, recommended a residential placement at the National Deaf Academy (NDA). Ms. Kay specifically recommended that Student be placed in a residential placement at NDA due to his need for a higher level of care to address his continuing aggressive and self-injurious behaviors. Additionally, the rehabilitation of these behaviors would be unsuccessful without the ability for Student to interact with deaf peers and adults. Ms. Kay further indicated that the use of an interpreter did not provide an effective method for Student to learn due to his special needs.

7. On August 5, 2006, NDA sent Student a letter of acceptance into its program. Monrovia USD and LACDMH, however, placed Student at Willow Creek/North Valley Non-public School. This placement failed as of March 2007, at which time both Monrovia USD and LACDMH indicated they were unable to find a residential placement for Student that could meet his mental health and communication needs. They did not pursue the residential treatment center at NDA because of its for-profit status.

8. Student and his mother moved to the District and Riverside County in April 2007.

9. On April 20, 2007, the District convened an IEP meeting to develop Student's educational program. The District staff, CMH staff, staff from CSDR, Student, his mother and attorney attended and participated in the IEP meeting. The IEP team changed Student's primary disability classification from emotional disturbance to deafness with social-emotional overlay. The parties agreed to this change in eligibility as CSDR required that

² As noted in Student's prior IEP, Student also required an educational environment which provided instruction in his natural language and which facilitated language development in ASL.

deafness be listed as a student's primary disability in order to be admitted and no other appropriate placements were offered. The IEP team offered placement at CSDR for a 60-day assessment period, individual counseling, speech and language services through CSDR, and individual counseling through CMH. The IEP team also proposed to conduct an assessment to determine Student's current functioning and to make recommendations concerning his academic programming based upon his educational needs.

10. CSDR suspended Student within its 60-day assessment period. CSDR subsequently terminated Student when, during his suspension, Student was found in the girl's dormitory following an altercation with the staff.

11. On May 23, 2007, the District convened another IEP meeting to discuss Student's removal from CSDR. The IEP team recommended Student's placement at Oak Grove Institute/Jack Weaver School (Oak Grove) in Murrieta, California, with support from a deaf interpreter pending the assessment agreed to at the April 2007 IEP meeting. CMH also proposed conducting an assessment for treatment and residential placement for Student.

12. On August 3, 2007, the District convened an IEP meeting to develop Student's annual IEP, and to review the assessments from CSDR and CMH. District staff, Oak Grove staff, CMH staff, Student's mother and attorney attended the IEP meeting. Based upon the information reviewed at the meeting, the IEP team proposed placement at Oak Grove with a signing interpreter, deaf and hard of hearing consultation and support services from the District, and individual counseling with a signing therapist through CMH. Mother and her attorney agreed to implementation of the proposed IEP, but disagreed that the offer constituted an offer of FAPE due to its lack of staff, teachers and peers who used ASL.

13. On October 9, 2007, the District convened another IEP meeting to review Student's primary disability. District staff, Oak Grove staff, CMH staff, Student's mother and attorney attended the IEP meeting. At this meeting, the IEP team once again determined Student's primary special education eligibility category as emotional disturbance with deafness as a secondary condition. The IEP team recommended placement in a residential treatment program, as recommended by CMH. Placement would remain at Oak Grove with a signing interpreter pending a residential placement search by CMH. Mother consented to the change in eligibility and the search for a residential placement. Mother also requested that Student be placed at NDA.

14. CMH made inquiries and pursued several leads to obtain a therapeutic residential placement for Student. CMH sought placements in California, Florida, Wyoming, Ohio and Illinois. All inquiries have been unsuccessful, and Student has not been accepted in any non-profit residential treatment center. At present CMH has exhausted all leads for placement of Student in a non-profit, in-state or out-of-state residential treatment center.

15. Student, his mother and attorney have identified NDA as an appropriate placement for Student. NDA, located in Mount Dora, Florida, is a residential treatment center for the treatment of deaf and hard-of-hearing children with the staff and facilities to

accommodate Student's emotional and physical disability needs. NDA also accepts students with borderline cognitive abilities. In addition, nearly all of the service providers, including teachers, therapists and psychiatrists are fluent in ASL. The residential treatment center at NDA is a privately owned limited liability corporation, and is operated on a for-profit basis. The Charter School at NDA is a California certified non-public school. All parties agree that NDA is an appropriate placement which would provide Student a FAPE.

16. Student currently exhibits behaviors that continue to demonstrate a need for a residential treatment center. Student has missed numerous school days due to behaviors at home. As recently as December 11, 2007, Student was placed in an emergency psychiatric hold because of uncontrollable emotions and violence to himself and others.

LEGAL CONCLUSIONS

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528], the party who files the request for due process has the burden of persuasion at the due process hearing. Student filed this due process request and bears the burden of persuasion.

2. A child with a disability has the right to a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA or the Act) and California law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.) The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), effective July 1, 2005, amended and reauthorized the IDEA. The California Education Code was amended, effective October 7, 2005, in response to the IDEIA. Special education is defined as specially designed instruction provided at no cost to parents and calculated to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); Ed. Code, § 56031.)

3. In *Board of Education of the Hendrick Hudson Central School District, et. al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L. Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the IDEA consists of access to specialized instruction and related services which are individually designed to provide educational benefit to a child with special needs." *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is "sufficient to confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Court concluded that the standard for determining whether a local educational agency's provision of services substantively provided a FAPE involves a determination of three factors: (1) were the services designed to address the student's unique needs, (2) were the services calculated to provide educational benefit to the student, and (3) did the services conform to the IEP. (*Id.* at p.176; *Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F. 2d 1307, 1314.) Although the IDEA does not require that a student be provided with the best available education or services or that the services maximize each child's potential, the "basic floor of opportunity"

of specialized instruction and related services must be individually designed to provide some educational benefit to the child. De minimus benefit or trivial advancement is insufficient to satisfy the *Rowley* standard of "some" benefit. (*Walczak v. Florida Union Free School District* (2d Cir. 1998) 142 F.3d at 130.)

4. Under California law, "special education" is defined as specially designed instruction, provided at no cost to parents, that meets the unique needs of the child. (Ed. Code, § 56031.) "Related services" include transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from special education. State law refers to related services as "designated instruction and services" (DIS) and, like federal law, provides that DIS services shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program." (Ed. Code, § 56363, subd. (a).) Included in the list of possible related services are psychological services other than for assessment and development of the IEP, parent counseling and training, health and nursing services, and counseling and guidance. (Ed. Code, § 56363, subd. (b).) Further, if placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parent of the child. (34 C.F.R. § 300.104.) Thus, the therapeutic residential placement and services that Student requests are related services/DIS that must be provided if they are necessary for Student to benefit from special education. (20 U.S.C. § 1401(22); Ed. Code, § 56363, subd. (a).) Failure to provide such services may result in a denial of a FAPE.

5. A "local educational agency" is generally responsible for providing a FAPE to those students with disabilities residing within its jurisdictional boundaries. (Ed. Code, § 48200.)

6. Federal law provides that a local educational agency is not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility. (20 U.S.C. § 1412(a)(10)(C)(i).)

7. Under California law, a residential placement for a student with a disability who is seriously emotionally disturbed may be made outside of California only when no in-state facility can meet the student's needs and only when the requirements of subsections (d) and (e) have been met. (Cal. Code Regs., tit. 2, § 60100, subd. (h).) An out-of-state placement shall be made only in residential programs that meet the requirements of Welfare and Institutions Code sections 11460, subdivisions (c)(2) through (c)(3).

8. When a school district denies a child with a disability a FAPE, the child is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*School Comm. of the Town of Burlington v. Dept. of Educ.* (1985) 471 U.S. 359, 374 [105 S.Ct. 1996].) Based on the principle set forth in *Burlington*, federal courts have held that compensatory education is a form of equitable relief which may be granted for the denial of appropriate

special education services to help overcome lost educational opportunity. (See e.g. *Parents of Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) The purpose of compensatory education is to "ensure that the student is appropriately educated within the meaning of the IDEA." (*Id.* at p. 1497.) The ruling in *Burlington* is not so narrow as to permit reimbursement only when the placement or services chosen by the parent are found to be the exact proper placement or services required under the IDEA. (*Alamo Heights Independent Sch. Dist. v. State Bd. of Educ.* (6th Cir. 1986) 790 F.2d 1153, 1161.) However, the parents' placement still must meet certain basic requirements of the IDEA, such as the requirement that the placement address the child's needs and provide him educational benefit. (*Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 13-14 [114 S.Ct. 361].)

Determination of Issues

9. In summary, based upon Factual Findings 2, 3, and 6 through 16, all parties agree that the placement in the day program at Oak Grove NPS with an interpreter cannot meet Student's unique educational needs because it does not sufficiently address his mental health and communication needs and does not comport with his current IEP. All parties agree that Student requires a therapeutic residential placement in order to benefit from his education program. Further, all parties agree that the nationwide search by the District and CMH for an appropriate non-profit residential placement with a capacity to serve deaf students has been exhausted, and Student remains without a residential placement. Lastly, all parties agree that the National Deaf Academy can meet both Student's mental health and communication needs. Further, the charter school at NDA is a California certified NPS.

10. The District and CMH rely upon Legal Conclusion 7 to support their contentions that they are prohibited from placing Student in an out-of-state for-profit residential placement, even if it represents the only means of providing Student with a FAPE.

11. As administrative law precedent, CMH cites *Yucaipa-Calimesa Joint Unified School District and San Bernardino County Department of Behavioral Health (Yucaipa)*, OAH Case No. N2005070683 (2005), which determined that the District and County Mental Health were statutorily prohibited from funding an out-of-state for-profit placement. The *Yucaipa* case can be distinguished from the one at hand. Clearly, the ruling in *Yucaipa*, emphasized that the regulation language used the mandatory term "shall," and consequently there was an absolute prohibition from funding a for-profit placement. The ALJ, however, did not face a resulting denial of FAPE for Student. In *Yucaipa*, several non-profit placement options were suggested, including residential placement in California, however, the parent would not consider any placement other than the out-of-state for-profit placement. In denying Student's requested for-profit placement, the ALJ ordered that the parties continue to engage in the IEP process and diligently pursue alternate placements. In the current matter, however, pursuant to Factual Findings 12 through 14, CMH has conducted an extensive multi-state search, and all other placement possibilities for Student have been exhausted. Pursuant to Factual Finding 15, NDA is the only therapeutic residential placement remaining, capable of providing a FAPE for Student.

12. "When Congress passed in 1975 the statute now known as the Individuals with Disabilities Act (IDEA or Act), it sought primarily to make public education available to handicapped children. Indeed, Congress specifically declared that the Act was intended to assure that all children with disabilities have available to them. . . appropriate public education and related services designed to meet their unique needs, to assure the rights of children with disabilities and their parents or guardians are protected. . . and to assess and assure the effectiveness of efforts to educate children with disabilities." (*Hacienda La Puente Unified School District v. Honig* (1992) 976 F.2d 487, 490.) The Court further noted that the United States Supreme Court has observed that "in responding to these programs, Congress did not content itself with passage of a simple funding statute...Instead, the IDEA confers upon disabled students an enforceable substantive right to public education in participating States, and conditions federal financial assistance upon a State's compliance with the substantive and procedural goals of the Act." (*Id.* at p. 491.)

13. California maintains a policy of complying with IDEA requirements in the Education Codes, sections 56000, et seq. With regard to the special education portion of the Education Code, the Legislature intended, in relevant part, that every disabled child receive a FAPE. Specifically, "It is the further intent of the Legislature to ensure that all individuals with exceptional needs are provided their rights to appropriate programs and services which are designed to meet their unique needs under the Individuals with Disabilities Education Act." (Ed. Code, § 56000.)

14. California case law explains further, "although the Education Code does not explicitly set forth its overall purpose, the code's primary aim is to benefit students, and in interpreting legislation dealing with our educational systems, it must be remembered that the fundamental purpose of such legislation is the welfare of the children." (*Katz v. Los Gatos-Saratoga Joint Union High School Dist.* (2004) 117 Cal.App. 4th 47, 63.)

15. Pursuant to Legal Conclusion 6, a district is not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if the district made a free appropriate public education available to the child. All parties concur, in Factual Findings 12 through 15, that the District has been unable to provide a FAPE to Student because no appropriate placement exists except in an out-of-state for-profit residential program.

16. Assuming the District's interpretation of section 60100, subdivision (h) of Title 2 of the California Code of Regulations is correct, it is inconsistent with the federal statutory and regulatory law by which California has chosen to abide. California education law itself mandates a contrary response to Welfare and Institutions Code section 11460, subdivision (c)(3), where no other placement exists for a child. Specifically, "It is the further intent of the Legislature that this part does not abrogate any rights provided to individuals with exceptional needs and their parents or guardians under the federal Individuals with Disabilities Education Act." (Ed. Code, § 56000, subd. (e) (Feb. 2007).) A contrary result

would frustrate the core purpose of the IDEA and the companion state law, and would prevent Student from accessing educational opportunities.³

17. Regardless of whether the District and CMH properly interpreted Legal Conclusion 7, Student has ultimately been denied a FAPE since May 23, 2007, when he was terminated from attending CSDR, as indicated in Factual Findings 10 through 16. Pursuant to Factual Findings 6 and 16, Student's need for therapeutic residential placement with ASL services continues. As a result of this denial of FAPE, Student is entitled to compensatory education consisting of immediate placement at the National Deaf Academy through the 2008-2009 school years. The obligation for this compensatory education shall terminate forthwith in the event Student voluntarily terminates his attendance at NDA after his 18th birthday, or Student's placement is terminated by NDA.

ORDER

The District has denied Student a free appropriate public education as of May 23, 2007. The District and CMH are to provide Student with compensatory education consisting of immediate placement at the National Deaf Academy and through the 2008-2009 school year. The obligation for this compensatory education shall terminate forthwith in the event Student voluntarily terminates his attendance at NDA after his 18th birthday, or Student's placement is terminated by NDA.

PREVAILING PARTY

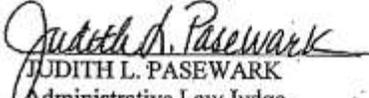
Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Student has prevailed on the single issue presented in this case.

³ Further, there appears to be no argument that had Mother completely rejected the District's IEP offer, and privately placed Student at NDA, she would be entitled to reimbursement of her costs from the District, if determined that the District's offer of placement did not constitute a FAPE. By all accounts, Student's low income status prevented placement at NDA, and therefore precluded Student from receiving a FAPE via reimbursement by the District.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision. (Ed. Code, § 56505, subd. (k).)

Dated: January 15, 2008


JUDITH L. PASEWARK
Administrative Law Judge
Special Education Division
Office of Administrative Hearings.

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