

SAN MATEO COUNTY

Audit Report

SERIOUSLY EMOTIONALLY DISTURBED PUPILS: OUT-OF-STATE MENTAL HEALTH SERVICES PROGRAM

Chapter 654, Statutes of 1996

July 1, 2003, through June 30, 2006



JOHN CHIANG
California State Controller

December 2008



JOHN CHIANG
California State Controller

December 31, 2008

The Honorable Adrienne J. Tissier, President
San Mateo County Board of Supervisors
400 County Center, Hall of Justice
Redwood City, CA 94063

Dear Ms. Tissier:

The State Controller's Office audited the costs claimed by San Mateo County for the legislatively mandated Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services Program (Chapter 654, Statutes of 1996) for the period of July 1, 2003, through June 30, 2006.

The county claimed \$329,956 for the mandated program. Our audit disclosed that \$44,582 is allowable and \$285,374 is unallowable. The costs are unallowable because the county claimed ineligible vendor payments for out-of-state residential placement of SED pupils in facilities that are owned and operated for profit, claimed unsupported treatment costs, claimed case management and travel costs that were also claimed under the mandated Handicapped and Disabled Students Program, and applied indirect cost (administrative) rates to duplicate direct costs. The State paid the county \$225,387. The amount paid exceeds allowable costs claimed by \$180,805.

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 CSM's Web site, at www.csm.ca.gov (Guidebook link); you may obtain IRC forms by telephone, at (916) 323-3562, or by e-mail, at csminfo@csm.ca.gov.

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/sk

cc: The Honorable Tom Huening, Controller
San Mateo County
Patrick Sutton, Fiscal Officer
Administration, Behavioral Health and Recovery Services
San Mateo County Health Department
Todd Jerue, Program Budget Manager
Corrections and General Government
Department of Finance
Stacey Wofford
Special Education Program
Department of Mental Health
Cynthia Wong, Manager
Special Education Division
California Department of Education

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Audit Report

Summary

The State Controller's Office (SCO) audited the costs claimed by San Mateo County for the legislatively mandated Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services Program (Chapter 654, Statutes of 1996) for the period of July 1, 2003, through June 30, 2006.

The county claimed \$329,956 for the mandated program. Our audit disclosed that \$44,582 is allowable and \$285,374 is unallowable. The costs are unallowable because the county claimed ineligible vendor payments for out-of-state residential placement of SED pupils in facilities that are owned and operated for profit, claimed unsupported treatment costs, claimed case management and travel costs that were also claimed under the mandated Handicapped and Disabled Students Program, and applied indirect cost (administrative) rates to duplicate direct costs. The State paid the county \$225,387. The amount paid exceeds allowable costs claimed by \$180,805.

Background

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

On May 25, 2000, the Commission on State Mandates (CSM) determined that Chapter 654, Statutes of 1996, imposed a state mandate reimbursable under Government Code section 17561 for the following:

- Payment of out-of-state residential placements for SED pupils;
- Case management of out-of-state residential placements for SED pupils. 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 Individualized Education Plan;
- Program management, which includes parent notifications, as required, payment facilitation, and all other activities necessary to ensure a county's out-of-state residential placement program meets the requirements of Government Code section 7576.

The program's parameters and guidelines establish the state mandate and define reimbursement criteria. CSM adopted the parameters and guidelines on October 26, 2000. In compliance with Government Code section 17558, the SCO issues claiming instructions for mandated programs, 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 SED Pupils: Out-of-State Mental Health Services Program for the period of July 1, 2003, through June 30, 2006.

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 Mateo County claimed \$329,956 for costs of the SED Pupils: Out-of-State Mental Health Services Program. Our audit disclosed that \$44,582 is allowable and \$285,374 is unallowable.

For the fiscal year (FY) 2003-04 claim, the State mad no payment to the county. Our audit disclosed that \$39,070 is allowable. The State will pay allowable costs claimed that exceed the amount paid, totaling \$39,070, contingent upon available appropriations.

For the FY 2004-05 claim, the State paid the county \$92,284. Our audit disclosed that \$5,512 is allowable. The State will offset \$86,772 from other mandated program payments due the county. Alternatively, the county may remit this amount to the State.

For the FY 2005-06 claim, the State paid the county \$133,103. Our audit disclosed that none of the costs is allowable. The State will offset \$133,103 from other mandated program payments due the county. Alternatively, the county may remit this amount to the State.

**Views of
Responsible
Official**

We issued a draft audit report on October 23, 2008. Bob Adler, Assistant Auditor-Controller, responded by letter dated November 21, 2008 (Attachment), agreeing with the audit results except for Finding 1. This final audit report includes the county's response.

Restricted Use

This report is solely for the information and use of San Mateo 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 31, 2008

**Schedule 1—
Summary of Program Costs
July 1, 2003, through June 30, 2006**

Cost Elements	Actual Costs Claimed	Allowable per Audit	Audit Adjustment	Reference ¹
<u>July 1, 2003, through June 30, 2004</u>				
Direct costs:				
Mental health services:				
Vendor reimbursements	\$ 88,289	\$ 39,070	\$ (49,219)	Finding 1
Case management	8,810	—	(8,810)	Finding 2
Travel	5,739	—	(5,739)	Finding 3
Total direct costs	102,838	39,070	(63,768)	
Indirect costs	881	—	(881)	Finding 4
Total program costs	<u>\$ 103,719</u>	39,070	<u>\$ (64,649)</u>	
Less amount paid by the State		—		
Allowable costs claimed in excess of (less than) amount paid		<u>\$ 39,070</u>		
<u>July 1, 2004, through June 30, 2005</u>				
Direct costs:				
Mental health services:				
Vendor reimbursements	\$ 88,371	\$ 5,512	\$ (82,859)	Finding 1
Case management	2,610	—	(2,610)	Finding 2
Travel	1,042	—	(1,042)	Finding 3
Total direct costs	92,023	5,512	(86,511)	
Indirect costs	261	—	(261)	Finding 4
Total program costs	<u>\$ 92,284</u>	5,512	<u>\$ (86,772)</u>	
Less amount paid by the State		(92,284)		
Allowable costs claimed in excess of (less than) amount paid		<u>\$ (86,772)</u>		
<u>July 1, 2005, through June 30, 2006</u>				
Direct costs:				
Mental health services:				
Vendor reimbursements	\$ 116,921	\$ —	\$ (116,921)	Finding 1
Case management	13,605	—	(13,605)	Finding 2
Travel	2,066	—	(2,066)	Finding 3
Total direct costs	132,592	—	(132,592)	
Indirect costs	1,361	—	(1,361)	Finding 4
Subtotal	133,953	—	(133,953)	
Less late claim penalty	(850)	(850)	—	
Adjustment to eliminate negative balance	—	850	850	
Total program costs	<u>\$ 133,103</u>	—	<u>\$ (133,103)</u>	
Less amount paid by the State		(133,103)		
Allowable costs claimed in excess of (less than) amount paid		<u>\$ (133,103)</u>		

Schedule 1 (continued)

Cost Elements	Actual Costs Claimed	Allowable per Audit	Audit Adjustment	Reference ¹
<u>Summary: July 1, 2003, through June 30, 2006</u>				
Direct costs:				
Mental health services:				
Vendor reimbursements	\$ 293,581	\$ 44,582	\$ (248,999)	
Case management	25,025	—	(25,025)	
Travel	<u>8,847</u>	<u>—</u>	<u>(8,847)</u>	
Total direct costs	327,453	44,582	(282,871)	
Indirect costs	<u>2,503</u>	<u>—</u>	<u>(2,503)</u>	
Subtotal	329,956	44,582	(285,374)	
Less late claim penalty	(850)	(850)	—	
Adjustment to eliminate negative balance	<u>—</u>	<u>850</u>	<u>850</u>	
Total program costs	<u>\$ 329,106</u>	44,582	<u>\$ (284,524)</u>	
Less amount paid by the State		<u>(225,387)</u>		
Allowable costs claimed in excess of (less than) amount paid		<u>\$ (180,805)</u>		

¹ See the Findings and Recommendations section.

Findings and Recommendations

**FINDING 1—
Ineligible vendor costs**

The county overstated vendor costs by \$ 248,999 for the audit period.

The county claimed ineligible vendor payments of \$245,343 (treatment costs) for out-of-state residential placement of SED pupils in facilities that are owned and operated for profit. Further, the county claimed unsupported treatment costs of \$3,656.

The program’s 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 California Code of Regulations, Title 2, sections 60100 and 60110.

The California Code Regulations, Title 2, 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 parameters and guidelines also state that all costs claimed must be traceable to source documents that show evidence of the validity of such costs and their relationship to the state-mandated program.

The following table summarizes the unallowable vendor costs claimed:

	Fiscal Year			Total
	2003-04	2004-05	2005-06	
Ineligible placements:				
Treatment	\$ (45,563)	\$ (82,859)	\$ (116,921)	\$ (245,343)
Unsupported payment	(3,656)	—	—	(3,656)
Total	\$ (49,219)	\$ (82,859)	\$ (116,921)	\$ (248,999)

Recommendation

We recommend that the county implement policies and procedures to ensure that out-of-state residential placements are made in accordance with laws and regulations. Further, we recommend that the county claim only eligible treatment and board and care costs corresponding to the authorized placement period of each eligible client.

County’s Response

The County disagrees with your office’s finding that indicated that only not-for-profit placements are eligible for reimbursement. The claiming instructions and parameters and guidelines make no mention of this limitation on reimbursable costs. The draft report cites Welfare and Institution Code (WIC) Section 11460 mentioned in the original statement of decision for the mandate as the basis for the disallowance. The County does not believe that the mere existence of that code section prevents the costs from being mandated by the state. San Mateo

county has had this program audited previously with no finding related to non-profit status of vendors and believes this new interpretation began showing up in Controllers Office field audits in 2007 of this program. If the Controller's office believed the existence of this code section prevents cost being claimed, claiming instructions and parameters and guidelines should be modified to reflect this. Because that was not completed, the County assumes that case law would prevail. Several recent text cases have challenged the validity of that code section's content and are discussed in detail below.

Residential placement of children can be extremely litigious. Many instances where County placements do not meet the needs or wishes of the parents and/or students often end up in court. These legal actions result in administrative hearings where the merits of the interested parties as well as the precedence of the state statutes are often decided well after a statement of decision is made by the Commission on State Mandates. Because of this after-the-fact clarification by the courts, the statement of decision cannot be relied upon as the sole source for mandated cost claim eligibility, as the draft report asserts.

The courts and various administrative hearings related to out-of-state placement have caused California counties to make mandated placements in facilities that are for-profit. Recent case law in Riverside County, changes the landscape of placements in for-profit facilities. In Case No. N2007090403 (decision on December 31, 2007), a student challenged conventional protocol for placement in a for-profit facilities. In this case, Riverside County relied on the WIC Code Section mentioned in the draft audit report, stating that it was prevented from placing the student in a for-profit facility.

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 (California Code of Regulations, Title 2, §60100, subdivision (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).

The county relied on that assumption to support its contention 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 (Free Appropriate Public Education). The United State Department of Education is explicit in its requirements under the Section 504 of the Rehabilitation Act of 1973, "all qualified persons with disabilities within the jurisdiction of a school district receive a free appropriate public education.

The for-profit debate is further explained by an earlier 2005 case in San Bernardino County (Yucaipa-Calimesa Joint Unified School District and San Bernardino County Department of Behavioral Health (Yucaipa), OAI I Case No. N2005070683). The ruling in Yucaipa, emphasized that the regulation language used the mandatory term "shall," and consequently there was an absolute prohibition from funding for a for-profit placement. The Administrative Law Judge (ALJ) however, did not deliver a resulting denial of FAPE for Student. In Yucaipa several non-profit placement options were suggested, including residential placement in California. In this case, 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 both cases the County Mental Health department is essentially mandated by court decisions and case law to place the child out-of-state in a for-profit facility. Regardless of WIC code sections 11460, subdivisions (c)(2) through (c)(3) states, the claiming instructions and parameters and guidelines of this mandate do not prevent these reimbursable costs from being claimed.

In addition, San Mateo County would like to emphasize that the placement related to the National Deaf Academy was a unique case. Unlike most out-of-state placements, Social Services did not facilitate nor pay for the residential placement. Instead, the Northern Bay Area Regional Center made the residential placement and paid for the residential placement costs. San Mateo County only paid for the mental health services expenses provided to the Student while at the National Deaf Academy. San Mateo asserts that these mental health service costs are eligible for reimbursement via the mandated cost process and should be viewed separately from other residential placements conducted by Social Services.

This issue is not unique to San Mateo County and has become an issue of statewide concern. These costs are a direct result of mandate legislation. The California Assembly passed a bill to correct this issue in the form of AB 1805. The bill was approved on September 16, 2008 and sought to amend WIC code section 18350 to clarify the issue. Because of budget constraints, the governor vetoed the bill, but the legislature has concurred with our County's interpretation of this issue.

SCO's Comments

The finding remains unchanged.

We have not conducted an audit of this program at San Mateo County in prior years. Therefore, there are no prior findings related to the for-profit status of vendors.

The program's 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 California Code of Regulations, Title 2, sections 60100 and 60110. California Code of Regulations, Title 2, 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 (c)(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 the regulation.

The Office of Administrative Hearings (OAH) cases cited by the county are not precedent-setting and have no legal bearing. In the first case cited (OAH Case No. N2007090403), the administrative law judge found that not placing the student in an appropriate facility (for-profit) was denying the student a free appropriate public education (FAPE) under federal regulations. Contrarily, in the second case cited (OAH Case No. N2005070683), the administrative law judge found that there is an absolute prohibition from the county funding a for-profit placement citing the aforementioned Welfare and Institutions Code. In the former case, the issue of funding residential placements made outside of the regulation was not specifically addressed. In the latter case, the denial of a FAPE was not dealt with in the decision rendered. Nevertheless, the fact remains that the SED Pupils: Out-of-State Mental Health Services Program is a state-mandated cost program and the county filed a claim seeking reimbursement from the State under the provisions of the California Code of Regulations, Title 2, section 60100, and Welfare and Institutions Code section 11460, subdivision (c)(3). Residential placements made outside of the regulation are not subject to reimbursement under the state-mandated cost program.

Regarding the county's placement of a client in the National Deaf Academy, the Florida-based out-of-state residential facility is not organized and operated on a nonprofit basis. The parameters and guidelines provide reimbursement for SED pupils placed in accordance with the California Code of Regulations, Title 2, section 60100, subdivision (h), and Welfare and Institutions Code section 11460, subdivisions (c)(2) through (c)(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. Again, the program's parameters and guidelines do not provide reimbursement for out-of-state residential placements made outside the regulation for special circumstances.

We agree that the residential placement issue is not unique to San Mateo County, and that other counties are concerned about this issue as well. The proponents of Assembly Bill 1805 sought to change the regulations and allow payment 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. Therefore, counties must comply with the governing regulations cited in the SED Pupils: Out-of-State Mental Health Services Program's parameters and guidelines.

**FINDING 2—
Ineligible case
management costs**

The county claimed unallowable case management costs of \$25,025 for the audit period.

The county claimed case-management employee salary costs on the mandated SED pupils claims that were also included in the pool of direct costs used to compute the unit rates in the county’s cost report submitted to the California Department of Mental Health. Consequently, case-management costs claimed under the mandated SED pupils program were also allocated through the unit rates to various mental health programs, including the mandated Handicapped and Disabled Students Program. Additionally, the county claimed employee costs that included other treatment services not related to case management.

The parameters and guidelines specify that case management costs of out-of-state residential placements are reimbursable.

The parameters and guidelines also states that all costs claimed must be traceable to source documents that show evidence of the validity of such costs and their relationship to the state mandated program.

The following table summarizes the unallowable case management costs claimed:

	Fiscal Year			Total
	2003-04	2004-05	2005-06	
Case management costs	\$ (8,810)	\$ (2,610)	\$ (13,605)	\$ (25,025)

Recommendation

We recommend that the county use a consistent cost allocation methodology to minimize any potential duplication with other mental health programs.

County’s Response

The county agreed with the finding.

**FINDING 3—
Ineligible travel costs**

The county claimed unallowable travel costs of \$8,847 for the audit period.

The county claimed travel costs under the SED Pupils: Out-of-State Mental Health Services Program that were also included in the pool of direct costs used to compute the unit rates in the county’s cost report submitted to the California Department of Mental Health. Consequently, travel costs claimed under the SED Pupils: Out-of-State Mental Health Services Program were also allocated through unit rates to various mental health programs, including the Handicapped and Disabled Students Program.

The parameters and guidelines (section IV.C.3) specify that the mandate reimburses counties for travel costs necessary 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 specified in the California Code of Regulations, Title 2, section 60110.

The parameters and guidelines also states that all costs claimed must be traceable to source documents that show evidence of the validity of such costs and their relationship to the state-mandated program.

The following table summarizes the unallowable travel costs claimed:

	Fiscal Year			Total
	2003-04	2004-05	2005-06	
Travel costs	\$ (5,739)	\$ (1,042)	\$ (2,066)	\$ (8,847)

Recommendation

We recommend that the county use a consistent cost allocation methodology to minimize any potential duplication with other mental health programs.

County’s Response

The county agreed with the finding.

**FINDING 4—
Ineligible indirect
(administrative) costs**

The county claimed unallowable indirect (administrative) costs of \$2,503 for the audit period.

The county applied its indirect cost (administrative) rates to duplicated direct costs. The county also accumulated its case management units for the SED Pupils: Out-of-State Mental Health Services Program under Handicapped and Disabled Students Program claims; therefore, administrative costs related to these units were also claimed in the Handicapped and Disabled Students Program claims.

The parameters and guidelines specify that administrative costs incurred in the performance of the mandated activities and adequately documented are reimbursable.

The parameters and guidelines further specify that to the extent that the California Department of Mental Health has not already compensated reimbursable indirect costs from categorical funding sources, the costs may be claimed.

The following table summarizes the unallowable indirect costs claimed:

	Fiscal Year			Total
	2003-04	2004-05	2005-06	
Indirect (administrative) costs	\$ (881)	\$ (261)	\$ (1,361)	\$ (2,503)

Recommendation

We recommend that the county prepare its claims consistent with the cost report submitted to the California Department of Mental Health and that it ensures that the indirect cost administrative rate is applied only to eligible direct costs.

County's Response

The county agreed with the finding.

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



HEALTH DEPARTMENT

November 21, 2008

Via PDF, emailed

Mr. Jeff Brownfield
State Controller's Office – Audits Division Chief
300 Capitol Mall, Suite 518
Sacramento, CA 95814

Subject: County of San Mateo – Mandated Cost Audit FY 2003-04 to 2005-06
Chapter 1747 of 1984 – Ser. Emotionally Disturbed Pupils: Out-of-State

Dear Mr. Brownfield:

Thank you for providing the County of San Mateo with the draft findings for your audit for the Seriously Emotionally Disturbed Pupils: Out-of-State mandated program. The County disagrees with the one of the findings outlined in the draft audit report received by our office on October 27, 2008. Our comments are as follows:

Finding #1 – Ineligible Vendor Costs

The County disagrees with your office's finding that indicated that only not-for-profit placements are eligible for reimbursement. The claiming instructions and parameters and guidelines make no mention of this limitation on reimbursable costs. The draft report cites Welfare and Institution Code (WIC) Section 11460 mentioned in the original statement of decision for the mandate as the basis for the disallowance. The County does not believe that the mere existence of that code section prevents the costs from being mandated by the state. San Mateo County has had this program audited previously with no finding related to non-profit status of vendors and believes this new interpretation began showing up in Controllers Office field audits in 2007 of this program. If the Controller's office believed the existence of this code section prevents cost being claimed, claiming instructions and parameters and guidelines should be modified to reflect this. Because that was not completed, the County assumes that case law would prevail. Several recent test cases have challenged the validity of that code section's content and are discussed in detail below.

Residential placement of children can be extremely litigious. Many instances where County placements do not meet the needs or wishes of the parents and/or students often end up in court. These legal actions result in administrative hearings where the merits of the interested parties as well as the precedence of the state statutes are often

MENTAL HEALTH SERVICES DIVISION

Board of Supervisors: Mark Church • Rose Jacobs Gibson • Richard S. Gordin • Jerry Hill • Adrienne Tessier • Health Director: Charlene Silva
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decided well after a statement of decision is made by the Commission on State Mandates. Because of this after-the-fact clarification by the courts, the statement of decision cannot be relied upon as the sole source for mandated cost claim eligibility, as the draft report asserts.

The courts and various administrative hearings related to out-of-state placement have caused California counties to make mandated placements in facilities that are for-profit. Recent case law in Riverside County, changes the landscape of placements in for-profit facilities. In Case No. N2007090403 (decision on December 31, 2007), a student challenged conventional protocol for placement in for-profit facilities. In this case, Riverside County relied on the WIC Code Section mentioned in the draft audit report, stating that it was prevented from placing the student in a for-profit facility.

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 (California Code of Regulations, Title 2, § 60100, subdivision (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).

The county relied on that assumption to support its contention 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 (Free Appropriate Public Education). The United State Department of Education is explicit in its requirements under the Section 504 of the Rehabilitation Act of 1973. "all qualified persons with disabilities within the jurisdiction of a school district receive a free appropriate public education.

The for-profit debate is further explained by an earlier 2005 case in San Bernardino County (Yucaipa-Calimesa Joint Unified School District and San Bernardino County Department of Behavioral Health (Yucaipa), OAI Case No. N2005070683). 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 Administrative Law Judge (ALJ) however, did not deliver a resulting denial of FAPE for Student. In Yucaipa several non-profit placement options were suggested, including residential placement in California. In this case, 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 both cases the County Mental Health department is essentially mandated by court decisions and case law to place the child out-of-state in a for-profit facility. Regardless of WIC code sections 11460, subdivisions (c) (2) through (c) (3) states, the claiming

instructions and parameters and guidelines of this mandate do not prevent these reimbursable costs from being claimed.

In addition, San Mateo County would like to emphasize that the placement related to the National Deaf Academy was a unique case. Unlike most out-of-state placements, Social Services did not facilitate nor pay for the residential placement. Instead, the Northern Bay Area Regional Center made the residential placement and paid for the residential placement costs. San Mateo County only paid for the mental health services expenses provided to the Student while at the National Deaf Academy. San Mateo asserts that these mental health service costs are eligible for reimbursement via the mandated cost process and should be viewed separately from other residential placements conducted by Social Services.

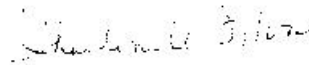
This issue is not unique to San Mateo County and has become an issue of statewide concern. These costs are a direct result of mandate legislation. The California Assembly passed a bill to correct this issue in the form of AB 1805. The bill was approved on September 16, 2008 and sought to amend WIC code section 18350 to clarify the issue. Because of budget constraints, the governor vetoed the bill, but the legislature has concurred with our County's interpretation of this issue.

The County of San Mateo thanks the State Controller's Office for this opportunity to comment on the draft report. We respectfully disagree with Finding #1 in your draft report and ask that you forward this response to legal counsel before proceeding with your audit report. If you have any questions about this response, please do not hesitate to contact me at 650-573-4891.

Sincerely,



Bob Adler, Assistant Auditor-Controller
San Mateo County Controller's Office



Charlene A. Silva, Interim Chief
San Mateo County Health System

cc: Jim Spano, Audit Chief
Patrick Sutton, Fiscal Officer, Behavioral Health & Recovery
Louise Rogers, Director, Behavioral Health & Recovery
Paul K. Sorbo, Deputy Director, Child/Youth Services
Patrick Dyer, MGT of America

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