



August 29, 2012

**AB 114 Residential Care Rates for Group Homes
Paid by Local Education Agencies
For Students Receiving Special Education Services and
Placed in Residential School Settings under their Individualized Education Program Plans**

Context

The California Alliance of Child and Family Services is a statewide association of more than 120 accredited private nonprofit organizations which provide an array of services and support to vulnerable children and families. They include group home programs which serve children and youth with emotional disturbance who may be placed by County child welfare and probation departments with funding provided through the AFDC-Foster Care program and by Local Education Agencies (LEAs; including school districts and charter schools) as part of student's Individualized Education Program plans (IEPs) and funded under AB 114.

Since the enactment of AB 114 in 2011, some school districts have attempted to negotiate with group home programs residential care payment rates that are lower than the AFDC-FC rates established by the California Department of Social Services (CDSS) for foster children. The California Alliance has advised its member agencies that accepting rates for AB 114 placements which are lower than their AFDC-FC rates would place them at serious risk of AFDC-FC audit exceptions, overpayment assessments, and rate reductions by CDSS.

The purpose of this paper is to provide background information describing the source of these risks.

Background

Some students receiving special education services qualify for related services including educationally-related mental health services and out-of-home residential care, usually in the structured setting of a group home, in order to benefit from the free and appropriate public education (FAPE) to which they are entitled under the federal Individuals with Disabilities Education Act (IDEA). Responsibility for administering the provision of such educationally-related mental health services and residential care was transferred from the Counties to the schools by Assembly Bill (AB) 114 (Chapter 43, Statutes of 2011). The transfer of responsibility for residential care was described as follows in a letter to the educational community, dated September 13, 2011, from the Special Education Division of the California Department of Education (CDE):

ASSEMBLY BILL 114: RESIDENTIAL CARE FOR STUDENTS WITH DISABILITIES

On June 30, 2011, Assembly Bill 114, Chapter 43, Statutes of 2011, was signed into law. Under AB 114, several sections of Chapter 26.5 of the California *Government Code (GC)* were amended or rendered inoperative, thereby ending the state mandate on county mental health agencies to provide mental health services to students with disabilities.

With the passage of AB 114, it is clear that local educational agencies (LEAs) are now solely responsible for ensuring that students with disabilities receive special education and related services, including some services previously arranged for or provided by county mental health agencies. This may include residential care when the individualized education program (IEP) team determines those services are necessary for the student to benefit from his or her education.

The Individuals with Disabilities Education Act (IDEA) authorizes residential care for students with disabilities in Section 300.104 of Title 34 of the *Code of Federal Regulations (CFR)*:

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 parents of the child.

Historical Linkage of AFDC-FC Rates and AB 3632 Placements in Group Homes

Prior to the enactment of AB 114, responsibility for residential care for students receiving special education services and whose handicapping condition was Seriously Emotionally Disturbed (SED) lay with the California Department of Social Services (CDSS) at the State level and with County welfare departments at the County level. The residential care payment rates for those students were linked directly to the AFDC-Foster Care (FC) rates established by CDSS for foster children, including the AFDC-FC rates for group homes, by Welfare and Institutions Code (WIC) Section 18350:

18350. (a) Payments for 24-hour out-of-home care shall be provided under this chapter on behalf of any seriously emotionally disturbed child who has been placed out-of-home pursuant to an individualized education program developed under Section 7572.5 of the Government Code. These payments shall not constitute an aid payment or aid program.

(b) Payments shall only be made to children placed in privately operated residential facilities licensed in accordance with the Community Care Facilities Act.

(c) Payments for care and supervision shall be based on rates established in accordance with Sections 11460 to 11467, inclusive.

(d) Payments for 24-hour out-of-home care under this section shall not result in any cost to the seriously emotionally disturbed child or his or her parent or parents.

Emphasis added. Note that WIC Sections 11460 to 11467, inclusive, govern the establishment of AFDC-FC rates by CDSS.]

WIC Section 18350, and the linkage between residential care payment rates for students with SED pursuant to their IEPs and the AFDC-FC rates established by CDSS for foster children, was repealed by AB 114.

Purposes of AFDC-FC Rates for Group Homes

The purpose of AFDC-FC rates is to cover the costs of certain statutorily allowed activities as defined in WIC Section 11460:

11460. (a) Foster care providers shall be paid a per child per month rate in return for the care and supervision of the AFDC-FC child placed with them. The department is designated the single organizational unit whose duty it shall be to administer a state

system for establishing rates in the AFDC-FC program. State functions shall be performed by the department or by delegation of the department to county welfare departments or Indian tribes, consortia of tribes, or tribal organizations that have entered into an agreement pursuant to Section 10553.1.

(b) "Care and supervision" includes food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, reasonable travel to the child's home for visitation, and reasonable travel for the child to remain in the school in which he or she is enrolled at the time of placement. Reimbursement for the costs of educational travel, as provided for in this subdivision, shall be made pursuant to procedures determined by the department, in consultation with representatives of county welfare and probation directors, and additional stakeholders, as appropriate.

(1) For a child placed in a group home, care and supervision shall also include reasonable administration and operational activities necessary to provide the items listed in this subdivision.

(2) For a child placed in a group home, care and supervision may also include reasonable activities performed by social workers employed by the group home provider which are not otherwise considered daily supervision or administration activities.

The AFDC-FC rates established by CDSS are not intended to cover, and may not be used by group home providers to pay for, other categories of costs which do not fall under the definition of "care and supervision" in WIC Section 11460 (b). Such "unallowable" costs include, but are not limited to, medical, dental, mental health, and educational services.

How AFDC-FC Rates for Group Homes are Determined

Under the current AFDC-FC rate-setting system used by CDSS, all group home programs are placed into one of 14 Rate Classification Levels (RCLs) which are designed to reflect the level of care and services they provide. All programs in the same RCL receive the same "standard rate," which is intended to be an amount that would be adequate for a typical provider to cover the reasonable and allowable costs of providing the level of care and services associated with that RCL.

The level of care and services is determined using a point system which measures the number of "paid/awake" hours worked per month by the program's child care and social work staff and their first-line supervisors. These hours are then weighted to reflect the experience, formal education, and ongoing training of the child care staff and the qualifications of social work professionals. These "weighted hours" are then divided by 90% of the program's licensed capacity to compute the program's RCL points.

Federal Law Governing AFDC-FC Rates

California's AFDC-FC program is part of the federal Foster Care and Adoption Assistance Program authorized by Title IV-E of the Social Security Act (also referred to as the Child Welfare Act). Federal law [42 USC § 675 (4) (a)] defines a "foster care maintenance payments," which are AFDC-FC rates in California's terminology, as follows:

(4) (A) The term "foster care maintenance payments" means payments **to cover the cost of** (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, and reasonable

travel to the child's home for visitation. In the case of institutional care, such term shall include the reasonable costs of administration and operation of such institution as are necessarily required to provide the items described in the preceding sentence.

[Emphasis added.]

Group Home Rates Litigation

In 2006, the California Alliance filed suit in federal court against the State of California regarding the adequacy of its AFDC-FC rates for group home programs. The lawsuit contended that the State was out of compliance with the federal Child Welfare Act because the intermittent increases in group home rates granted by the State since the rate-setting system was originally implemented in 1990 had not kept pace with the growth in the average costs of care.

The State conceded that the increase in the average actual costs that some group homes incurred to care for and supervise children exceeded the increases it had granted since 1990. It argued, however, that the federal Child Welfare Act gives States discretion to determine what constitutes an adequate level of funding. On December 14, 2009, the federal Ninth Circuit Court of Appeals ruled against the State, and for the California Alliance, stating that the Child Welfare Act requires States to cover the costs of care “in full, not in part” and remanded the case to the federal district court for disposition.

On February 24, 2010, the federal district court issued a Judgment ordering the State to pay group home rates which were equal to the original schedule of rates it implemented in 1990 plus the cumulative increase in the California Necessities Index (CNI) since 1990. The CNI is the inflation index which is used for the State’s AFDC-FC rate-setting systems to estimate average changes in the costs of care.

In order to ensure that the new court-ordered rates do not fall behind changes in the costs of care in the future, the court also ordered the State to grant CNI-based COLAs annually on July 1, at the beginning of each new State fiscal year. As a result, AFDC-FC rates for group homes received CNI-based COLAs of 1.57% for 2010-11, 1.92% for 2011-12, and 2.98% for 2012-13.

Approximately 60% of the foster children placed in group homes in California are eligible to receive federal financial participation in the costs of their AFDC-FC payments under the Title IV-E foster care programs (they are “federally eligible”). The other 40% do not meet the federal eligibility requirements and the costs of their AFDC-FC payments are paid for with County funds only (they are “nonfederally eligible”). When the Judgment was being developed by the federal district court, the State argued that the new higher group home rates should only apply to foster children who are federally-eligible and that it should be permitted to continue to pay its existing lower rates for those who are nonfederally-eligible. The district court, and subsequently the Ninth Circuit Court of Appeals, rejected this argument.

The federal courts recognized that the State establishes AFDC-FC rates for group home “programs” and that group homes are required by the State to provide the same basic level of care to all children placed in the same “program,” regardless of whether the children are federally eligible. Because group homes do not and may not distinguish between children who are federally-eligible and children who are nonfederally-eligible in terms of the level of care they are provided, it is inevitable that paying group homes lower rates for nonfederally eligible children than for federally-eligible children will inevitably result in a dilution of funds and a reduction in the level of care for the federally-eligible children.

“Mixed Populations” of Children in Group Home Programs

Many group home programs serving children with emotional disturbance have “mixed populations,” which include some foster children placed by County child welfare and probation departments with funding provided through the AFDC-FC program and other children placed under the authority of their Individualized Education Program plans (IEPs) and funded under AB 114.

Such group home programs serving a mixed population of foster children and students placed pursuant to IEPs face the same situation as group home programs serving federally-eligible and nonfederally eligible foster children. All children placed in the same group home “program” must be provided with the same basic level of care. Individual children may and should receive somewhat different levels, ranges, and types of care and services depending upon their individual needs; but, those differences in care and services may not be based on the source of their placement or the funding.

The issue of “mixed populations” of foster children and IEPed students did not arise prior to the enactment of AB 114 despite the fact that the AFDC-FC and SED programs were technically distinct, with each having a separate appropriation in the State budget. Under the statutory linkage created by WIC Section 18350, CDSS effectively operated a single system for the purpose of establishing and auditing ADFC-FC and SED payment rates and for regulating how out-of-home care providers were to use, account for, and report the funds they received through these payment rates. This situation ended with the repeal of WIC Section 18350 by AB 114, and the transfer of responsibility for educational residential placements to the schools.

Risk Accruing to Group Home Providers in Accepting Lower Payment Rates for Students Placed Pursuant to their IEPs

If a group home program currently serving a mixed population of foster children and students placed pursuant to their IEPs agrees to accept a rate from a LEA which is lower than the group home program’s AFDC-FC rate established by CDSS for foster children, CDSS auditors are very likely to conclude that AFDC-FC funds are being used by the program to subsidize the costs of care for the students placed pursuant to their IEPs and reimbursed at a lower rate and, as a result, that the foster children are not receiving all of the care to which are entitled. The CDSS AFDC-FC rate-setting regulations, in Section 11-404, define and limit how AFDC-FC funds may be used by group homes and other types of foster care providers:

11-404 USE OF FEDERAL AND STATE FOSTER CARE FUNDS

- .1 Federal and State AFDC-FC program funds shall be used to meet the cost of providing care and supervision and its associated administrative costs, consistent with the paid rate, **for AFDC-FC eligible children** as specified in Sections 11-402.82 and 11-403(c). **[Emphasis added.]**

Under these circumstances, there is a very great risk that CDSS auditors would assess an overpayment against the group home program for the difference between the AFDC-FC rate and the lower rate being paid by the school district for students placed pursuant to their IEPs.

California Alliance Advice to Member Agencies on Managing Risk

In order to manage this risk, the California Alliance is advising its member agencies operating group programs serving mixed populations – that is, populations including both foster children and students placed pursuant to their IEPs – not to accept payment rates from LEAs that are less than the AFDC-FC rate established by CDSS for their program.

If a group home provider and LEA mutually agree that the student receiving residential care in accordance with his/her IEP does not need the same level, range, and type of care and services as provided to foster children in the provider's existing group home program, there is nothing to preclude the provider from developing an entirely separate program serving exclusively students placed pursuant to IEPs with a rate negotiated with one or more LEAs.

Such a program, however, would have to be operated in a facility separate from the program serving foster children and receiving the AFDC-FC rate, and would have to be staffed by separate personnel. It would not be possible to have foster children and students placed pursuant to IEPs access separate and distinct group home programs while sharing the same living unit or having the same staff provide care without the program placing itself at risk of serious financial penalties.

Operating two separate programs, however, may raise economy-of-scale and vacancy issues for provider organizations which may discourage such diversification. If, for example, a group home program serving a "mixed population" has a vacancy, it is free to accept a foster child or a special education student as a new placement. A provider with one group home program for foster children and another separate program for IEPed students, however, could not fill a vacancy in the education placement program with a foster child or fill a vacancy in the foster care funded program with an education placement. Inevitably, the average vacancy rate for two separate programs will be higher than the average vacancy rate for a single program serving a "mixed population."

Questions and Comments

Questions and comments about this paper may be directed to Doug Johnson, Associate Executive Director, California Alliance of Child and Family Services, by telephone at (916) 449-2273, Extension #201, or by email at djohnson@cacfs.org.