CASE NO. F071023

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

DEPARTMENT OF HEALTH CARE SERVICES,

Petitioner and Appellant,

vs.

DIRECTOR, OFFICE OF ADMINISTRATIVE HEARINGS,

Respondent,

PARENTS ON BEHALF OF STUDENT, SONORA ELEMENTARY SCHOOL DISTRICT, TUOLUMNE COUNTY OFFICE OF EDUCATION,

Real Parties in Interest.

On Appeal from the January 21, 2015 Order After Hearing on Petition for Writ of Mandate by the Superior Court, Tuolumne County, Case No CV58418 Honorable Kate Powell Segerstrom

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APPLICATION TO FILE AMICUS BRIEF AND AMICUS CURIAE BRIEF OF CALIFORNIA SCHOOL BOARD ASSOCIATION on behalf of the TUOLUMNE COUNTY OFFICE OF EDUCATION and SONORA ELEMENTARY SCHOOL DISTRICT

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

Pursuant to Rule 8.20(c) of the California Rules of Court, the California School Board Association's Education Legal Alliance ("CSBA/ELA"), respectfully requests permission to file an amicus curiae brief that follows this application. This accompanying brief is submitted in support of Real Parties in Interest, Sonora Elementary School District and Tuolumne County Office of Education.

I. INTERESTS OF AMICUS CURIAE

The California School Boards Association ("CSBA") is a non-profit, membership organization composed of nearly 1,000 California school district governing boards and county boards of education. CSBA advances the interests of California's more than 6 million public school students by supporting and advocating on behalf of school districts and other educational agencies.

As part of CSBA, the Education Legal Alliance ("ELA") helps to ensure that local school boards retain their authority to fully exercise the responsibilities vested in them by law to make appropriate policy and fiscal decisions for their local educational agencies. The ELA's activities include joining in litigation where legal issues of statewide concern affecting public education are at stake.

In the instant case, Amicus represents the interests of its school district members that are responsible for providing a free, appropriate public education to all special needs students enrolled within their districts. 20 U.S.C. §1412; Ed. Code §56026. School districts and the public agencies governed by the California Department of Health Care Service, California's Children Services ("CCS"), jointly serve these eligible students, with school districts providing educationally necessary occupational and physical therapy services and CCS providing medically

necessary services. Gov. Code §§7570, *et seq.*; 2 Cal. Code Regs. §§60000, *et seq.* CSBA's members across the state develop educational programs for special needs students on a daily basis, and work collaboratively with CCS to provide occupational and physical therapy services to students when they are needed for both educational and medical reasons pursuant to federal and state law, their implementing regulations, and local interagency agreements.

Here, CCS seeks a declaration that it is not bound by the decision OAH rendered against it when a parent filed for due process, but that instead the educational agencies involved should be required to provide the student with the occupational and physical therapy CCS was ordered to provide, despite the fact that those agencies had already reached a settlement with the Parents. It is of critical importance to CSBA's members to obtain clarity in the law as to their ability to settle due process filings with parents over the provision of occupational and physical therapy services, to ensure that CCS is held to its obligations to provide and pay for therapy services that are included in students' IEPs, and to require CCS to bring its concerns about financial responsibility for IEP services to the educational agencies they work with at the lowest possible level first, without immediately resorting to litigation.

II. HOW THE AMICUS CURIAE BRIEF WILL ASSIST THE COURT

Amicus has reviewed the briefs submitted by the parties and is familiar with the issues involved in this case. Amicus believes that its brief will assist the Court by addressing relevant points of law and arguments not discussed or not fully explored in the briefs of the parties, and by clarifying the scope of the interagency obligations between school districts and CCS and the procedures for resolving financial disputes between them. Presentation of such legal argument is the very

reason for affording amicus curiae status to interested and responsible parties such as the California School Boards Association Education Legal Alliance. *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 405 fn. 14. Accordingly CSBA/ELA seeks the Court's permission to submit this brief.

III. INDEPENDENCE OF AMICUS CURIAE

No party or counsel for a party has authored any part of this brief, nor has any person or entity made a monetary contribution intended to fund the preparation and submission of this brief, other than Amicus, its members, and counsel of record.

DATED: January 13, 2016 Respectfully submitted,

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CERTIFICATE OF INTERESTED PARTIES

There are no interested entities or persons that must be listed in this certificate. Cal. Rules of Court, Rule 8.208(e)(3).

DATED: January 13, 2016 DANNIS WOLIVER KELLEY

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In this case, California Children's Services ("CCS"), through the California Department of Health Care Services, has sued two educational agencies who did the right thing by the parents of a disabled student and settled all educational issues with them relating to the student's educationally necessary occupational and physical therapy services. The parents were left to pursue any remaining claims they had about these services with CCS. The parents invoked their procedural protections under the Individuals with Disabilities Education Act ("IDEA") and filed for a due process hearing against CCS, resulting in an order that CCS provide the student with additional services. Despite the fact that CCS is clearly subject to the IDEA's procedural safeguards and bound by this hearing decision, it is now crying foul and trying to shift the costs for the services it was ordered to provide to the educational agencies who settled their disputes. This action not only violates the interagency agreement between the various agencies, but also undermines the strong public policy in favor of informal resolution of disputes with the parents. Moreover, it is contrary to federal law, which provides that non-educational public agencies' financial responsibility to provide services to disabled students *precedes* the responsibility of the educational agencies. For these reasons and those explained below, CSBA/ELA urges this Court to affirm the order of the trial court and deny this appeal.

II. FACTUAL AND PROCEDURAL BACKGROUND

L.M. is a student in the Sonora Elementary School District with an orthopedic and visual impairment. Her Parents filed for due process under the Individuals with Disabilities Education Act ("IDEA") against California Children's Services regarding its failure to provide L.M. with occupational

therapy ("OT") and physical therapy ("PT") services as called for in her IEP. CCS joined the Tuolumne County Office of Education ("TCOE" or "County Office") and the Sonora Elementary School District ("SESD" or "District") to the case, and those educational agencies entered into a settlement with the Parents resolving all claims as to L.M.'s educationally necessary OT and PT. The Parents then proceeded to due process against CCS alone.

On July 15, 2013, the California Office of Administrative Hearings ("OAH") determined that CCS had committed procedural violations of the IDEA by unilaterally modifying L.M.'s OT and PT services, outside the individualized education plan ("IEP") process, and without parental consent. It ordered several remedies, including compensatory services for the lost OT and PT that should have been provided under the IEP.

CCS, via its parent agency the California Department of Health Care Services ("DHCS"), sought to overturn the OAH decision in state court, naming OAH as the respondent and the Parents and the educational agencies as real parties in interest. It also filed a cause of action for declaratory relief against the County Office and the District, asserting that those agencies were responsible for providing L.M. with the relief that OAH had ordered CCS to provide. However, prior to filing suit, CCS failed to avail itself of any of the administrative remedies available for resolving its dispute with the educational agencies, under either state law or the interagency agreement between them.

The Tuolumne County Superior Court ruled in favor of the County Office, the District and the Parents on all claims. CCS then filed the instant appeal.[1]

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[1] All facts are taken from the briefs of the parties since CSBA has not independently reviewed the entire record on appeal.

III. STATUTORY FRAMEWORK

A. The Obligation to Provide a Free Appropriate Public Education

The IDEA requires that each state receiving funds under that law ensure that a free appropriate public education ("FAPE") is available to all children with qualifying disabilities in the state. 20 U.S.C. §1412(a)(1). "FAPE" is defined as "special education and related services" provided at public expense, that meet state educational standards, and that conform to the child's individual education plan ("IEP"). 20 U.S.C. §1401(9); Ed. Code §§56031, 56040. An IEP must be developed for each eligible child to meet his or her unique educational needs, in accordance with 20 U.S.C. section 1414(d).

The IDEA leaves it up to each state to assign responsibility for providing special education and related services among its agencies. 20 U.S.C. §1412(a)(12)(A); 34 C.F.R., section 300.154(a); *Letter to Forer* 211 IDELR 244 (OSEP November 4, 1980) ("the State may assign the burden of funding FAPE to any State agency or, through interagency agreements, to any combination of State agencies in order to meet its own particular needs") (Request for Judicial Notice ("RJN"), Ex. 1).

In California, Chapter 26.5 of the Government Code assigns "joint responsibility" for the provision of related services, and specifically the provision of OT and PT, to the Superintendent of Public Instruction ("SPI") and the Secretary of the Health and Human Services Agency. Responsibility for these services is spread between these two agencies to "ensur[e] maximum utilization of all state and federal resources available to provide a child with a disability ... with a free appropriate public education..." Gov. Code §7570. These two state agencies have delegated their responsibilities for the provision of a FAPE to local educational

agencies ("LEAs") and CCS, respectively. See Gov. Code §7575(a)(1); *Nevada Cnty. Off. of Ed. v. Riles* (1983) 149 Cal.App.3d 767, 772 ("In addition to the obligation that local education agencies provide therapy services as part of special education, California law requires [California Children's] Services to provide therapy to physically handicapped persons who meet their specific disability criteria").

Under Government Code section 7575(a)(1), CCS is charged with providing "medically necessary" OT and PT services ... "by reason of medical diagnosis and when contained in the child's individualized education program." CCS, not the local educational agency in which the student is enrolled, determines whether a student requires "medically necessary" OT or PT services. Gov. Code §7575(b). If the determination is made that the "medically-necessary" services are required for the student to benefit from special education, the services are to be incorporated into the student's IEP. Gov. Code §7572(c), (d); 2 Cal. Code Regs. §60325(f). Any further OT and PT services "not deemed to be medically necessary ... that the [IEP] team determines are necessary in order to assist a child to benefit from special education," are the responsibility of the local education agency. Gov. Code §7575(a)(2).

Once incorporated into a child's IEP, CCS' services become "related services" as that term is used in the IDEA and part of the student's FAPE. Gov. Code §7570 (referencing 20 U.S.C. §1401(26) and Ed. Code §56363). Related services are those services required for the child "to benefit from special education." 20 U.S.C. §1401(26)(A) (the term "related services" includes physical and occupational therapies "as may be required to assist a child with a disability to benefit from special education"). Indeed, the very purpose for including CCS services in a student's IEP would be to confirm that educationally (and medically) necessary related services are being

provided by CCS, and to make them subject to the procedural protections of the IDEA, including due process.

Services provided in an IEP must of course be delivered. An IEP is developed by a team of individuals including the student's teachers and service providers, an administrative designee of the school district and the child's parents. 34 C.F.R. §300.321. It is a violation of the IDEA to materially fail to implement the components of a student's IEP. *Van Duyn v. Baker Sch. Dist. 5J,* 502 F.3d 811, 815, 822 (9th Cir. 2007). It is also a violation of the IDEA to change the student IEP services without parental consent. 20 U.S.C. §1414(a)(1)(D)(i)(II); 34 C.F.R. §300.300(b); Ed. Code §56346. To that end, if CCS decides to increase, decrease, change the type of intervention it provides, or discontinue services to the student, it is to notify the parent and the IEP team of that decision. 2 Cal. Code Regs. §60325(c). It cannot, as happened here, unilaterally terminate services outside the IEP process.

B. Procedural Requirements of the IDEA

In addition to guaranteeing a substantive FAPE to eligible students, the IDEA also requires that parents be provided a variety of procedural protections to ensure their meaningful participation in the IEP process. *W.G. v. Board. of Trustees of Target Range Sch. Dist.*, 960 F.2d 1479, 1483 (9th Cir. 1992). The Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982), explained that there are two parts to the FAPE analysis. First, a judge must determine whether the public agency has complied with the procedures of the IDEA, and second, she must decide whether the IEP developed through those procedures was designed to meet the student's unique needs and was reasonably calculated to provide him with an educational benefit. *Rowley*, at 206-07.

In *Rowley*, the Court emphasized the importance of the procedural protections that guarantee the parents' right to participate in the IEP development process.

> … [W]e think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process … as it did upon the measurement of the resulting IEP against a substantive standard.

Rowley, at 205-06; see also, *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 524 (2007). One of the cornerstones of the IDEA's procedural protections is the parents' right to be involved in the development of their child's IEP and to be apprised of proposed changes to the IEP. *Shapiro v. Paradise Valley Unif. Sch. Dist.*, 317 F.3d 1072, 1077 (9th Cir. 2003); *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1526 (9th Cir. 1994).

Nonetheless, procedural mishaps in the development of the IEP do not automatically give rise to a denial of FAPE. Only procedural violations that result in the loss of educational opportunity to the student or seriously infringe on the parent's opportunity to participate in the IEP process rise to that level. *W.G.*, at 1484; 20 U.S.C. §1415(f)(3)(E)(ii). Mere technical violations will not render an IEP invalid, as "any other rule would exalt form over substance." *Cleveland Heights-Univ. Heights City Sch. Dist. v. Boss By & Through Boss*, 144 F.3d 391, 399 (6th Cir. 1998) (internal citations omitted); *Ms. S. ex rel. G. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1129 (9th Cir. 2003).

A procedural violation that rises to the level of a substantive denial of FAPE, however, is sufficient to find a violation of the IDEA and to justify a remedy for the parent. Thus, if an administrative tribunal or a court finds a procedural violation has resulted in the denial of FAPE, it

need not reach the issue of whether the IEP met the IDEA's substantive requirements. *Shapiro,* at 1079; *M.M. v. Lafayette Sch. Dist.,* 767 F.3d 842, 856 (9th Cir. 2014).

C. Due Process Protections

Among the procedural protections afforded to parents under the IDEA is the right to a due process hearing before an impartial fact-finder. 20 U.S.C. §1415(a)-(h); see also, Ed. Code, section 56505. A due process hearing is available to resolve disputes regarding "... a proposal to initiate or change the ... educational placement of the child or the provision of a free appropriate public education to the child." Ed. Code §56501(a)(1). The special education due process hearing procedures extend not only to parents but to "... the public agency involved in any decisions regarding a pupil." Ed. Code §56501(a).

Section 56500.1 of the Education Code clarifies that "each noneducational and educational agency that provides education, related services, or both, to children who are individuals with exceptional needs," must maintain the IDEA's procedural safeguards. Ed. Code, section 56500.1; see also 2 Cal. Code Regs. §60550(a) (affirming the application of the due process hearing procedures in disputes between a parent and a public agency regarding the provision of "special education and related services to a pupil").

More specifically, Government Code section 7572(c)(3) provides that "[a]ny disputes between the parent and team members representing the public agencies regarding a recommendation" for OT or PT services shall be resolved by the due process procedures outlined in Education Code sections 56000 et seq.. Government Code section 7586(a) also expressly states that "all state departments, and their designated local agencies" are governed by the procedural safeguards of the IDEA and that "[r]esolution of all issues shall be through the due process hearing process established in

Chapter 5 (commencing with Section 56500) of Part 30 of Division 4 of the Education Code. The decision issued in the due process hearing shall be binding on the department having responsibility for the services in issue as prescribed by this chapter." Thus it is clear that the IDEA's due process protections can apply to disputes between parents and the educational and non-educational agencies responsible for providing the student with FAPE.

However, while these procedures govern disputes between parents and educational or non-educational public agencies regarding FAPE, they ordinarily do not provide an outlet for the educational and the non-educational public agency to litigate financial responsibility between them. Government Code section 7586(d) provides that "[n]o public agency, state or local, may request a due process hearing pursuant to Section 56501 of the Education Code against another public agency." Instead, those issues are resolved through interagency agreements and other dispute resolution mechanisms as discussed below.

IV. OAH HAD JURISDICTION TO RESOLVE THE PARENTS' COMPLAINT AGAINST CCS

As explained above, once medically necessary OT or PT services are included in a student's IEP, they become part of the program necessary to provide the student with FAPE. As such, at least certain disputes between the parent and CCS regarding whether those services should continue at their present levels may be resolved through the due process hearing procedures set forth in the Education Code. Ed. Code §§56501(a), 56500.1; Gov. Code §§7572(c)(3), 7586.

Here, it appears that OAH was not resolving the issue of whether L.M.'s OT and PT services were medically necessary as CCS contends, but only whether the IDEA's procedural protections were observed by CCS when it unilaterally reduced and/or terminated services. OAH Decision, Clerk Transcript ("CT") No. 29-65, ¶¶39, 57-58 (Ex. 1 to Petition for Writ

of Mandate) (adjudicating procedural violations and declining to reach issue of whether CCS denied Student a FAPE by failing to provide adequate levels of medically necessary OT and PT). Whether CCS' actions comported with the Parents' procedural rights under the IDEA was within the scope of OAH's jurisdiction. See *Parents v. Calif. Children's Services* (2015) OAH No. 2014120903, 115 LRP 30635 (SEA CA. July 2, 2015) (RJN, Ex. 2).

In *Corbett v. Regional Center for the East Bay, Inc*., 676 F.Supp. 964 (N.D.Cal. 1988), the Court was confronted with a similar situation involving a Regional Center's unilateral termination of a residential placement for a disabled student. There the parents contended that the Regional Center could be enjoined under the IDEA's stay put provisions from changing his placement because a residential placement was a related service under the IDEA. *Id.,* at 966-67. The Court agreed that it "has jurisdiction under §1415 over non-educational state agencies which provide [IDEA]-related services" (*id*., at 967), and that "[a]ll state departments which provide educational and related services are required to adhere to the procedural safeguards of 20 U.S.C. §1415, and the decisions made in the statutorily-mandated due process hearings before the Department of Education are binding on all state departments responsible for providing [IDEA]-related services" (*id*., at 968).

It held that "[i]f such a state agency attempts to make a change in a residential placement which is a related service under the Act, the Court can enjoin the change …." *Id*., at 968. However, it ultimately concluded that the Regional Center could not be enjoined in that case because it was not providing related services to the student, but only services under its independent state law mandate to make residential placements for developmentally disabled individuals, as no educational agency had been involved with the placement. *Id*., at 969. Here, it is clear that CCS was

providing L.M. with a related service since the service was in her IEP. Accordingly, CCS was bound by the IDEA's procedural safeguards and OAH had jurisdiction to adjudicate whether the Parents' procedural rights were violated.

Because the ALJ here did not venture into an analysis of whether CCS had offered adequate levels of medically necessary OT and PT, this case is distinguishable from *Douglas v. California Office of Administrative Hearings*, 78 F.Supp.3d 942 (N.D. Cal. 2015). In *Douglas*, the federal district court was presented with the issue of whether OAH had the authority to conduct a due process hearing to review a "medical necessity determination" by the Department of Health Care Services. *Id*., at 946. The parents claimed they were not limited to challenging CCS' medical necessity determination only through CCS' appeal procedure, but that OAH had jurisdiction to resolve the question of whether a student needed OT for medical reasons.

In *Douglas*, the student's IEP included OT provided by his school and OT provided by CCS at the level that CCS had determined was medically necessary. *Id*., at 944-45. The parents did not use the CCS appeal process to challenge the level of medically necessary OT, but instead filed for due process against the Department and the two LEAs responsible for implementing his IEP. *Id*., at 945. The parents settled with the LEAs, and the agreement recited that they agreed with the level of OT being providing by the LEAs in the IEP, and that they would pursue any further OT services from CCS. *Id*. The parents proceeded to due process against the Department only "on their claim that more therapy was 'medically necessary' than CCS had determined." *Id*. After hearing, the ALJ issued a decision which found that CCS had failed to offer adequate OT to meet the student's needs, and ordered the Department to provide additional OT services prospectively and as compensatory education. *Id*.

On appeal, the District Court agreed with the Department that "the question of what is medically necessary is determined pursuant to the requirements of the Health & Safety Code not as part of an arbitration concerning a student's educational needs." *Id*., at 948. However, the Court was careful to explain that if what has been determined to be medically necessary was also found to be educationally necessary and included in the IEP, the Department must provide those services. *Id*., at 948-49. The Court explained:

> In the instant case, there is no contention that CCS failed to provide the OT services it determined were medically necessary and were included in J.C.'s IEP that was the subject of the Parents' appeal. Rather, the contention is that CCS's determination of what it was required to provide as medically necessary was erroneous. That is a different question than whether CCS failed to provide the OT that was in J.C.'s IEP and was medically necessary. Nothing in Government Code § 7585 prevents a parent from filing for a due process hearing to challenge what is educationally required. Cal. Govt. Code § 7586.

Douglas, at 948. Here, the Parents claimed at due process that CCS failed to implement the OT and PT that had been agreed upon and included in the IEP as both educationally and medically necessary. Accordingly, nothing in the *Douglas* decision affects the validity of the ALJ's decision here.

Indeed, as the *Douglas* court noted, "[p]arents may pursue an educationally necessary determination in a due process hearing, and as the Department is responsible for providing services that are both educationally and medically necessary, the Department is an appropriate party to a due process hearing …." *Id*., at 951. This was true even though the LEAs had settled with the parents and were not part of the OAH decision. *Id*., at 950-51.

Further, it makes no difference that CCS had determined, outside the IEP process, that L.M. no longer needed OT and PT services at the same

levels. The fact that they were in her IEP binds CCS to continue those levels until the IDEA's procedural safeguards have been met. Accordingly, the ALJ, upon finding that CCS had committed procedural violations, had broad equitable power to order an appropriate remedy, including compensatory services. *Burlington Sch. Comm. v. Mass. Dep't of Educ.*, 471 U.S. 359 (1985).

V. THERE IS NO BASIS TO SHIFT COSTS FOR IEP SERVICES CCS WAS OBLIGATED TO PROVIDE TO THE EDUCATIONAL AGENCIES

Here, despite the fact that the County Office and the District settled all claims with the Parents, CCS is attempting to shift the obligation to provide the remedy that OAH ordered against it to those educational agencies. However, there is no legal basis for doing so.

As discussed above, non-educational public agencies that are responsible for providing services under federal or state law which are also considered related services under the IDEA are subject to the IDEA. The IDEA provides:

> If any public agency other than an educational agency is otherwise obligated under Federal or State law, or assigned responsibility under State policy pursuant to subparagraph (A) [interagency agreement], to provide or pay for any services that are also considered special education or related services … that are necessary for ensuring a free appropriate public education to children with disabilities within the State, *such public agency shall fulfill that obligation or responsibility*, either directly or through contract or other arrangement ….

20 U.S.C. §1412(a)(12)(B)(i) (emphasis added); see also, *County of Los Angeles v. Smith* (1999) 74 Cal.App.4th 500, 518-19 (a county that placed a ward of the court who was also a special education student in a residential treatment center was a "public agency" subject to the IDEA, and could not

shift the cost of the placement to the parent since that would violate the IDEA's guarantee of a free public education).

Under the statutory scheme governing the provision of special education and related services, there is a "single line of responsibility" in the state and local educational agencies to provide what is necessary for a student's FAPE. 20 U.S.C. §1412(a)(12(B)(ii). Thus, if any public agency other than an educational agency fails to provide or pay for special education or related services it is obligated to provide, the LEA must provide those services to ensure the student's IEP is implemented. Id. However, the non-educational agency's financial responsibility *precedes* the financial responsibility of the LEA. 20 U.S.C. §1412(a)(12)(A)(i); 34 C.F.R. §300.154(a)(1). Thus, as a corollary to the LEAs' obligation to ensure there is no disruption of services for a student, LEAs have a corresponding right to obtain reimbursement from the other public agencies who were responsible for providing those services.

Here, the TCOE and SESD fulfilled their responsibilities by settling the educational claims against them with the Parents. This settlement ensured that the Student's services were not unduly interrupted after CCS unilaterally decided not to provide the OT and PT services called for in the IEP. Such a settlement was exactly what the IDEA contemplates. In addition to promoting its strong policy in favor of early resolution of disputes, the settlement also ensured that the Student's needs were expeditiously met.

Thus, contrary to CCS' assertions, CCS does not have a cause of action against the LEAs to require them to pay for IEP services it was ordered to pay. Instead, the LEAs actually had a cause of action against CCS. The IDEA provides:

> If a public agency other than an educational agency fails to provide or pay for the special education and related services

> …, the local educational agency (or State agency responsible for developing the child's IEP) shall provide or pay for such services to the child. Such local educational agency or State agency is authorized to claim reimbursement for the services from the public agency that failed to provide or pay for such services and such public agency shall reimburse the local educational agency or State agency pursuant to the terms of the interagency agreement or other mechanism described in subparagraph (A)(i).

20 U.S.C. §1412(a)(12)(B)(ii); see also, 20 U.S.C. §1412(a)(12)(A); 34 C.F.R. §300.154(a), (b)(2).

The purpose of these provisions is to leverage the resources of other public agencies to provide services for special needs children under their independent obligations to do so, and not put the sole burden for the cost of special education on the LEAs. See, Gov. Code §7570 ("Ensuring maximum utilization of all state and federal resources available to provide a child with a disability, … with a free appropriate public education, … related services, … and designated instruction and services"); *J.B. v. Killingly Bd. of Educ.*, 990 F.Supp. 57, 69-70, 78-79 (D.Conn. 1997).

There is certainly nothing in federal or state law that would make the LEAs solely responsible for payment for services that are contained in a student's IEP. Such an interpretation would eviscerate Government Code section 7575, which provides that:

> *Notwithstanding any other provision of law*, the State Department of Health Care Services, or any designated local agency administering the California Children's Services, *shall be responsible* for the provision of medically necessary occupational therapy and physical therapy, … by reason of medical diagnosis and *when contained in the child's individualized education program*.

Gov. Code §7575(a)(1) (emphasis added).

Similarly, while 20 U.S.C. section 1412(a)(11)(A) assigns general responsibility for ensuring a FAPE to the state educational agency, the

IDEA specifies that this "shall not limit the responsibility of agencies in the State other than the State educational agency to provide, or pay for some or all of the costs of, a free appropriate public education for any child with a disability in the State." 20 U.S.C. §1412(a)(11)(B).

Thus, while CSBA does not dispute that LEAs are responsible for educationally necessary OT and PT services which are not medically required, federal and state law clearly hold CCS responsible for OT and PT services included in a student's IEP that are both educationally and medically necessary. And, nothing in the law allows CCS to shift such responsibility to the LEAs. CSBA therefore urges the Court to issue a decision that makes clear that educational agencies cannot be liable to CCS or other non-educational agencies for the costs of IEP services those non-educational agencies are responsible to provide.

VI. CCS HAS NOT PROPERLY EXHAUSTED ITS ADMINISTRATIVE REMEDIES

SESD and TCOE have argued that CCS cannot sue them over who is financially responsible for providing services to the Student without first exhausting their administrative remedies. CCS argues, in substance, that it has exhausted its administrative remedies as to the educational agencies because it joined them as parties to the due process hearing. Appellants' Reply, at 19.[2] It cites to Government Code section 7586(c) which states that "all hearing requests that involve multiple services that are the responsibility of more than one state department shall give rise to one hearing with all responsible state or local agencies joined as parties." While this may be true as a general proposition, CCS ignores section 7586(d), which says that "[n]o public agency, state or local, may request a

[2] CCS also argues that the issue of its failure to exhaust its administrative remedies is not properly before this Court. Appellants' Reply, at 18-19. CSBA expresses no opinion on this issue.

due process hearing pursuant to Section 56501 of the Education Code against another public agency."

A. Joining an Educational Agency to a Due Process Case Does Not Exhaust Administrative Remedies for a Financial Dispute Between Public Agencies

Generally speaking, OAH has only found it appropriate to resolve financial issues between agencies when those agencies have all been joined in the case *by the parents*. Thus, when the parents have named multiple respondents to a due process case because multiple agencies may have conflicting or overlapping obligations to the student, all the agencies may be properly joined in one proceeding as contemplated by Government Code section 7586(c). In these instances where the parent has sought relief from multiple agencies, ALJs have determined which agency had responsibility to the student, when, and in what amount. See e.g., *Los Angeles Cnty. Office of Education, California Dep't of Mental Health, Torrance Unif. Sch. Dist., and Los Angeles Cnty. Dep't. of Mental Health*, OAH No. 2010110325, 111 LRP 21575 (SEA CA, March 6, 2011) (RJN, Ex. 3).; *Los Angeles Cnty. Office of Education and California Dep't of Mental Health*, OAH No. 2010110301, 111 LRP 10630 (SEA CA, February 7, 2011). (RJN, Ex. 4).

The courts have agreed that financial responsibility between multiple agencies can be apportioned when the parents have sought relief from the agencies. For example, in *Orange County Department of Education v. California Department of Education*, 668 F.3d 1052 (9th Cir. 2011), the Orange County Department of Education ("OCDE") fronted the costs of a student's educational placement in a residential treatment center ("RTC") pursuant to an IEP "[w]ithout conceding financial responsibility" for the placement. *Orange County*, at 1054. The student filed a special education due process request against the OCDE, the Los Angeles Unified School

District, Charter Oaks Unified School District, and the California Department of Education ("CDE"), that resulted in a hearing where "the only issue … was which public agency was responsible for funding [the student's] placement at [the RTC]." *Id*. In its administrative decision, OAH named OCDE as the responsible agency, and OCDE appealed to the District Court contending that CDE was the responsible party. *Id.*, at 1055. The Court denied CDE's motion to dismiss, and ultimately agreed with OCDE that it was not the responsible agency. Instead, it found CDE responsible during one of the time periods at issue, and noted that "[a]ccordingly, Orange County is entitled to reimbursement from CDE for this period of time." *Id*., at 1063-64, citing 20 U.S.C. §1412(a)(11)(A).

However, when educational or non-educational agencies have attempted to join other agencies to a due process case solely for the purposes of resolving interagency disputes, judges have generally demurred. For instance, in *Nevada County Office of Education v. Riles* (1983) 149 Cal.App.3d 767, the parent sought OT from the County Office of Education and the County Office referred the student to CCS through their interagency agreement. CCS found the student not eligible for medically necessary OT, and so OT was not added to the student's IEP. The parent filed for due process against the County Office for failure to provide educationally necessary OT, and the County Office sought to join CCS to the proceeding. However, the ALJ refused to join CCS as a party. *Riles*, at 770-71. The court held that "[w]hile County may in fact be correct about Services' obligation, it is wrong in concluding that federal and state law require all government agencies that may be involved in funding therapy be present at the due process hearing; indeed, such a requirement would effectively defeat the goal of providing 'an expeditious and effective

process' by involving issues unrelated to a child's educational need for medical services." *Riles*, at 775.[3]

Because agencies generally cannot adjudicate financial responsibility against other agencies by joining them to a due process case, CCS cannot here have exhausted its administrative remedies by joining the educational agencies to the parents' due process case. In other words, because the ALJ would not have adjudicated the issue of financial responsibility here (especially in light of the settlement between the educational agencies and the Parents), simply joining the agencies to the due process case did not serve to exhaust that issue.

B. Other Mechanisms to Resolve this Dispute Were Available and Should Have Been Utilized

Instead, there are other mechanisms that were available to CCS that should have been used before filing suit against TCOE and SESD.

1. The Interagency Agreement Dispute Resolution Procedures

First, as the educational agencies note, the interagency agreement between the parties provided for a dispute resolution process which was never utilized. The interagency agreement that the educational agencies rely upon is not just a local agreement entered into for the convenience of the parties. It is, instead, one of the mechanisms authorized by the IDEA for resolving the very type of dispute at issue here – whether an educational agency or another public agency is financially responsible for services to a special education student.

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[3] *Riles'* conclusion about whether CCS could be joined to a due process proceeding may be obsolete in light of Government Code section 7586(c) which does permit joinder of multiple agencies in due process cases. Nonetheless, its point that due process may not be brought between two agencies just to resolve their financial disputes is still valid. Gov. Code §7586(d).

The IDEA requires the states to ensure there is an interagency agreement or other mechanism in place for interagency coordination between each public agency responsible for IEP services. 20 U.S.C. §1412(a)(1)(A). That agreement must include:

> (i) Agency financial responsibility
>
> An identification of, or a method for defining, the financial responsibility of each agency for providing services … to ensure a free appropriate public education to children with disabilities, provided that the financial responsibility of each public agency described in subparagraph (B), including the State Medicaid agency and other public insurers of children with disabilities, shall precede the financial responsibility of the local educational agency (or the State agency responsible for developing the child's IEP).
>
> (ii) Conditions and terms of reimbursement
>
> The conditions, terms, and procedures under which a local educational agency shall be reimbursed by other agencies.
>
> (iii) Interagency disputes
>
> Procedures for resolving interagency disputes (including procedures under which local educational agencies may initiate proceedings) under the agreement or other mechanism to secure reimbursement from other agencies or otherwise implement the provisions of the agreement or mechanism. …

20 U.S.C. §1412(a)(1)(A)(i)-(iii).

Pursuant to these provisions, California requires that the Superintendent of Public Instruction and the Director of the Department of Health Care Services develop written interagency agreements or adopt joint regulations for the provision of special education and related services in accordance with 20 U.S.C. section 1412(a)(12). Ed. Code §56475(a). Further, "[t]he Governor or designee … shall ensure that each agency under the Governor's jurisdiction enters into an interagency agreement with the Superintendent to ensure that all services that are needed to ensure a free appropriate public education are provided." Ed. Code §56476.

The interagency agreement at issue here is the local implementation of the state level agreement between the SPI and the Director of the DHCS. See, *Riles*, at 770 (noting the existence of a state level agreement regarding OT); 2 Cal. Code Regs. §60210 (mandating local interagency agreements between LEAs and CCS). It would clearly be illogical for Congress and the California Legislature to have required the creation of interagency agreements with mechanisms for resolving financial disputes between the parties if those agreements could simply be ignored whenever a dispute arose.[4]

2. Other Dispute Resolution Procedures

In addition, as noted by the court in *Tri-County Special Education Local Plan Area v. County of Tuolumne* (2004) 123 Cal.App.4th 563, 574-75, there are two other mechanisms that provide potential avenues for relief from financial disputes between agencies – the process contained in Chapter 26.5 of the Government Code ("Interagency Responsibilities for Providing Services to Children with Disabilities") and the process contained in the California Code of Regulations for handling Uniform Complaints.

Here, the interagency agreements between the parties contained a dispute resolution procedure that included local dispute resolution meetings, followed by use of the process contained in Chapter 26.5 of the Government Code. Government Code section 7585 provides that a parent, student, or LEA can provide notice to the SPI or the Secretary of the California Health and Human Services Department "[w]henever a

[4] It seems self-evident that parties to the agreement can be bound by the agreement and expected to carry out its terms. *In Re Jesus G*. (2013) 218 Cal.App.4th 157 (court obligated to follow its own protocol); *Calif. Sch. Bds. Ass'n v. State Bd. of Educ.* (2010) 186 Cal.App.4th 1298, 1324-27 (mandamus lies to compel State Board to enforce conditions it imposed for approval of charter schools).

department or local agency designated by that department fails to provide a related service or designated instruction and service required pursuant to Section 7575, and specified in the pupil's individualized education program." Gov. Code §7585(a). See also, 2 Cal. Code Regs. §60610 ("Once the dispute resolution procedures have been completed, the department or local agency determined responsible for the service shall pay for, or provide the service, and shall reimburse the other agency which provided the service …). The court in *Riles* mentioned this process for resolving interagency conflicts where a public agency fails to provide services specified in an IEP that the agency is required to provide by law or interagency agreement. *Riles*, at 776, fn. 9 (quoting former Education Code section 56476). This process "also applies when the responsibility for providing services, ordered by a hearing officer or agreed to through mediation pursuant to Sections 56503 and 56505 of the Education Code, is in dispute among or between the public agencies." 2 Cal. Code Regs. §60600(a). CSBA expresses no opinion on whether this process applies here by virtue of the fact that the parties incorporated it into their interagency agreement or because CCS is attempting to shift responsibility for services ordered by a hearing officer.[5]

[5] To be clear, the LEA reimbursement mechanism under the Government code is not an obligation for the SESD and TCOE in this case. This is because between the settlement by Student and the LEAs and OAH's Decision, the issue that Appellants attempt to resurrect has been resolved, and unilateral cessation of services under Student's IEP contrary to OAH's Decision is not a lawful option for CCS and DHCS. Moreover, as discussed in the LEAs' Respondent's Brief and in part here, there are administrative remedies that CCS and DHCS were required to exhaust, which have not been exhausted – and those procedures cannot be excused via unilateral action by CCS in an attempt to place the burden on the LEAs to have to seek reimbursement under applicable Government Code provisions.

Tri-County noted another procedure as well, which does apply to this situation. Under the joint regulations for interagency coordination of services required by the IDEA and Government Code 7587, "[a]llegations of failure by an LEA or CCS to comply with these regulations, shall be resolved pursuant to Chapter 5.1, commencing with Section 4600, of Division 1 of Title 5 of the California Code of Regulations," the Uniform Complaint Procedure. 2 Cal. Code Regs. §60560.

The Uniform Complaint Procedure permits any individual to file a written complaint alleging a violation of certain federal and state laws and regulations including those pertaining to special education. 5 Cal. Code Regs. §4610(b)(7); 5 Cal. Code Regs. §4600(d), (e). If the complaint alleges that there is a "violation of federal law governing special education … or its implementing regulations," the complainant may file his or her complaint directly with the California Department of Education and "the CDE shall directly intervene …." 5 Cal. Code Regs. §4650(a)(7)(E). Upon a finding of violation by the local agency, CDE can order it to take corrective action to reestablish compliance. 5 Cal. Code Regs. §4670. The Department "may use any means authorized by law to effect compliance" including without limitation, withholding of public funds, imposing probationary eligibility for future state or federal support, and initiating litigation to seek an order to compel compliance. (*Id*.)

Tri-County involved a funding dispute between a Special Education Local Plan Area ("SELPA") and a County Mental Health ("CMH") Department, when funding to CMH programs throughout the state was reduced to almost nothing for the 2002-2003 fiscal year. Because of the lack of funding, Tuolumne County Mental Health had terminated services that were included in multiple students' IEPs, forcing the SELPA to pay for those services. At the time, CMH was obligated by statute and regulation to provide the mental health services for disabled students contained in

their IEPs. *Tri-County*, at 570. *Tri-County* found that the Uniform Complaint Procedure applied to CMH, and should have been used. *Tri-County*, at 575-76.

Further, *Tri-County* noted that these dispute resolution mechanisms were exclusive, and that the SELPA had no private right of action against CMH for reimbursement or declaratory relief. *Tri-County*, at 576 ("there is no cause of action vested in a local administrative agency to seek *judicial* enforcement of another agency's obligations under IDEA. The statutory and regulatory scheme vests that cause of action in the Superintendent of Public Instruction, and a local agency's exclusive remedy is through the administrative process established by the uniform complaint procedures") (emphasis in original).

Since these dispute resolution procedures were available to CCS and not used, CCS' claim for declaratory relief to determine the educational agencies' financial responsibility to it or to the Student should be barred. This Court should hold that CCS is required to exhaust applicable administrative remedies, including those contained in its local interagency agreements, in order to resolve any financial disputes it may have with an LEA.

VII. CONCLUSION

The educational agencies here have already settled their disputes with the parents in order to avoid the burden and expense of a due process proceeding and potential appeals, and to best serve the interests of the Student. CCS is asking these agencies to pay twice, so that it can unilaterally stop providing OT and PT services to disabled students regardless of their IEP program. This Court should require CCS to comply with the IDEA and the procedural safeguards that protect parents from these arbitrary actions. It should further require CCS to abide by its

interagency agreements and the other mechanisms available to resolve its financial disputes with the educational agencies at the lowest possible level. CSBA/ELA urges that this Court affirm the decision of the trial court.

Dated: January 13, 2016 Respectfully submitted,

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CERTIFICATION OF BRIEF LENGTH
[Cal. Rules of Court, Rules 8.204(c), 8.520(c)]

The text of this brief is generated in 13-point Times New Roman print type and consists of 6,910 words as counted by the Microsoft Word 2013 word-processing program used to generate this brief.

Dated: January 13, 2016

/s/Amy R. Levine

_____
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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN FRANCISCO)

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is: 275 Battery Street, Suite 1150, San Francisco, CA 94111.

On the date set forth below I served the foregoing document described as

APPLICATION TO FILE AMICUS BRIEF

on interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 13, 2016 at Novato, California.

/s/ *Christopher Davis*
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