No. 15-15261

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JENNIFER KENT, in her Official Capacity,
as Director of the California Department of Health Care Services,
Petitioner-Appellee,
v.
CALIFORNIA OFFICE OF ADMINISTRATIVE HEARINGS, DIRECTOR
Respondent,
and
PARENTS ON BEHALF OF STUDENT J.C.,
By and Through His Guardians Ad Litem, C.C. and R.C., and Individually,
Real Parties in Interest and Appellants.

On Appeal from the United States District Court
for the Northern District of California
Case No. 5:13-CV-05306-RMW
Honorable Ronald M. Whyte, District Judge

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF BY THE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER-APPELLEE AND AFFIRMANCE OF THE DISTRICT COURT'S DECISION

ORRY P. KORB, County Counsel (Cal. Bar # 114399)
DANNY Y. CHOU, Assistant County Counsel (Cal. Bar # 180240)
GRETA S. HANSEN, Lead Deputy County Counsel (Cal. Bar # 251471)
JENNY S. LAM, Deputy County Counsel (Cal. Bar # 259819)
OFFICE OF THE COUNTY COUNSEL, COUNTY OF SANTA CLARA
70 West Hedding Street, East Wing, Ninth Floor, San José, California 95110-1770
Telephone: (408) 299-5900

Attorneys for *Amicus Curiae*
California State Association of Counties

I.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure, the California State Association of Counties ("CSAC") respectfully moves for leave to file the attached *amicus curiae* brief in support of Petitioner-Appellee Jennifer Kent, in her official capacity as Director of the Department of Health Care Services ("DHCS"). CSAC sought the consent of all parties in this case, but the Appellants and Real Parties in Interest did not consent.

II.

INTERESTS OF *AMICUS CURIAE*

CSAC is a non-profit corporation with a membership consisting of all 58 counties in California. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that member counties have a substantial interest in this case.

Counties provide essential services for the health, safety, and welfare of our residents. Together with DHCS, counties administer the California Children's Services ("CCS") program at issue in this case. CCS provides diagnostic and

treatment services, medical case management, and medically necessary physical and occupational therapy when prescribed to children with qualifying conditions, at no cost to the children or their families.

Reversal of the district court's decision in this case would have broad ramifications for the counties' operation of CCS throughout California. This appeal concerns Appellants' attempt to obtain more services than were determined to be medically necessary by CCS. The case calls into question the proper agency to provide any additional services necessary for Appellants' child, as well as the appeal process that should have been used to challenge CCS' determination of medical necessity. CSAC has a substantial interest in ensuring that its member counties continue to provide medically necessary services in accordance with CCS' legal mandate, funding streams, and medical expertise.

III.

REASONS WHY FILING AN *AMICUS CURIAE* BRIEF IS DESIRABLE

Based on the counties' experience administering CCS over the last several decades, the attached *amicus curiae* brief provides the Court with the counties' understanding of the historical and legal framework in which services are provided to children with disabilities, as well as the likely consequences that reversal of the district court's decision would have for CCS operations and funding, families

negotiating the appeal process, and the counties' ability to provide CCS and other essential services to the public.

IV.

CONCLUSION

For the reasons set forth above, we respectfully request that the Court grant this motion for leave to file the attached *amicus curiae* brief.

Dated: July 31, 2015

Respectfully submitted,

ORRY KORB
COUNTY COUNSEL

By: /S/
JENNY S. LAM
Deputy County Counsel

Attorneys for *amicus curiae* the California State Association of Counties

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JENNY S. LAM, Deputy County Counsel (Cal. Bar # 259819)
OFFICE OF THE COUNTY COUNSEL, COUNTY OF SANTA CLARA
70 West Hedding Street, East Wing, Ninth Floor, San José, California 95110-1770
Telephone: (408) 299-5900

Attorneys for *Amicus Curiae*
California State Association of Counties

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* the California State Association of Counties avers that it is a nonprofit mutual benefit corporation, which does not offer stock and which is not a subsidiary or affiliate of any publicly owned corporation.

RULE 29 STATEMENTS

This brief of *amicus curiae* is submitted under Federal Rule of Appellate Procedure 29(a).

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), the California State Association of Counties states that no party's counsel has authored this *amicus curiae* brief in whole or in part; no party or party's counsel has contributed money intended to fund the preparation or submission of this brief; and no person or entity other than the *amicus curiae* and its counsel has contributed money intended to fund the preparation or submission of this brief.

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IDENTITY AND INTERESTS OF *AMICUS CURIAE*

The California State Association of Counties ("CSAC") respectfully submits this *amicus curiae* brief in support of Petitioner-Appellee Jennifer Kent, in her official capacity as Director of the Department of Health Care Services ("DHCS").

CSAC is a non-profit corporation with a membership consisting of 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that member counties have a substantial interest in this case.

Counties provide essential services for the health, safety, and welfare of our residents. Together with DHCS, counties administer the California Children's Services ("CCS") program, which provides diagnostic and treatment services, medical case management, and medically necessary physical and occupational therapy prescribed to children with qualifying conditions, at no cost to the children or their families. A reversal of the district court's decision in this case would open the floodgates for families to disregard the appropriate, long-established administrative procedures for challenging a CCS physician's determination of the amount of services that are medically necessary. Further, it would require counties

to provide educational services that are the exclusive responsibility of local educational agencies, thereby reducing counties' capacity to provide services to the high-need children enrolled in CCS and compromising other essential services.

I.

INTRODUCTION

This is not a case about the amount of services to which a disabled child is entitled under the Individuals with Disabilities Education Act ("IDEA"). This is also not a case about whether a disabled child received due process. Instead, this is a case about whether the parents of one child can rewrite the California legislature's carefully crafted framework for providing special education services. Under that framework, responsibility for meeting a child's physical and/or occupational therapy needs is allocated between California Children's Services ("CCS") and local education agencies ("LEAs") based on their respective areas of expertise and funding streams. CCS, a program largely funded through California's Medicaid program, provides medically necessary physical therapy ("PT") and occupational therapy ("OT") under a physician's prescription; LEAs provide all other educationally necessary services, using federal special education funds and other public dollars. This framework was designed to ensure that *all* disabled children receive *all* of the medical and educational services that they need.

The parents in this case ("Parents") chose to disregard state law placing exclusive responsibility for non-medically necessary PT and OT on LEAs, and instead demanded that these services be provided by CCS. They ask this Court to order CCS to provide their son, J.C., with services that have *not* been deemed medically necessary by a qualified physician, and to ignore the fact that they deliberately refused to avail themselves of the appropriate administrative process for appealing CCS' medical necessity determination. They make this request even though they could have obtained these services from J.C.'s LEAs, rather than from CCS. In doing so, they disregard state regulations requiring a CCS-approved physician to prescribe any medically necessary services and establishing the procedure for appealing a CCS physician's determination of medical necessity.

Allowing Parents to flout these regulations would significantly disrupt the carefully considered framework created by the California Legislature to provide medically and educationally necessary services to disabled children and result in confusion and service disruption for state agencies, counties, LEAs, parents, and children. The district court refused to reward Parents for their failure to comply with the State's legislative scheme, and CSAC respectfully urges this Court to affirm the district court's decision in favor of the Petitioner-Appellant and to dismiss Real Parties in Interest-Appellants' counterclaim and motion for stay put.

II.

BACKGROUND

A. CCS Has a Long History of Providing Medical Services to Children with Disabilities in California, and the Program Predates the Individuals with Disabilities Education Act.

In addition to being older than the IDEA, Pub. L. 101-476, § 901(a), 104 Stat. 1103, 1141-42 (1990), and the IDEA's predecessor, the Education for All Handicapped Children Act of 1975 ("EAHCA"), Pub. L. 94-142, 89 Stat. 773 (1975), CCS provides children with a broader array of medical services than are available under the IDEA. As one of the oldest public health programs in the State, CCS has provided free medical services to children with physical disabilities for nearly a century. 1927 Cal. Stat. 1021 (establishing the Crippled Children Services program); 1978 Cal. Stat. 2717 (renaming the program as the California Children's Services program). From the beginning, this groundbreaking program has mandated that the State and counties provide "necessary surgical, medical, hospital, physiotherapy, occupational therapy and other service, special treatment, materials, [and] appliances" for children with disabilities whose parents or guardians are unable to pay. (1927 Cal. Stat. 1021.)

CCS' Medical Therapy Program ("MTP"), in particular, has provided medically necessary PT and OT to children with qualifying medical conditions at public schools long before these services were required to fulfill the State's special

education responsibilities under state or federal law. Indeed, the California Legislature established CCS' MTP services as early as 1969, *see* 1968 Cal. Stat. 2490. In contrast, it was not until 1975 that Congress passed the EAHCA, which required that states provide a free appropriate public education ("FAPE") to children with disabilities, along with related services, such as PT and OT, necessary to benefit from FAPE. Pub. L. 94-142, 89 Stat. 773 (1975).

Since its creation, CCS has implemented a carefully crafted process for determining a child's medically necessity for therapy. As part of this process, parents were allowed to contest their child's prescription for therapy by seeking an expert opinion from one of three expert physicians offered by CCS. California Department of Health Services, *CCS Manual of Procedures*, "Chapter 4: The California Children Services Program for Children with Cerebral Palsy and Other Physical Handicaps in the Public Schools," § 4.4.2(H)(2) (taken from CCS Bulletin 80-16, issued September 15, 1980), *available at* http://www.dhcs.ca.gov/services/ccs/Pages/ProviderStandards.aspx. This basic process for determining medical necessity under CCS, and for parents to challenge such a determination, has continued to the present day. *See* Cal. Code Regs. tit. 22, § 42140.

B. Following Adoption of the EAHCA and IDEA, CCS Has Remained Responsible Only for Medically Necessary PT and OT; Local Education Agencies Must Provide Any Other OT or PT Necessary for FAPE.

After Congress passed the EAHCA in 1975, the California Department of Health Services (DHCS)[1] and the California Department of Education ("CDE") coordinated their delivery of services to children with physical disabilities in the school setting. The departments agreed that CCS was responsible for providing any medically necessary therapy prescribed under CCS requirements, and that CDE was responsible for providing any other OT or PT needed to meet a child's educational needs. California Department of Health Services, *supra*, at § 4.7.1.

When the California Legislature codified interagency responsibilities for implementation of the IDEA in 1984, it preserved the existing division of responsibilities between DHCS and CDE, along with CCS' process for determining medical necessity. 1984 Cal. Stat. 671, adding Chapter 26 (commencing with Section 7570) to Division 7 of Title 1 of the Government Code. In doing so, the Legislature recognized that "a number of state and federal programs make funds available for the provision of education and related services to children with handicaps who are of school age" and declared its intent that "*existing services* rendered by state and local government agencies serving

[1] In 2007, the California Department of Health Services was reorganized to create the California Department of Public Health and the California Department of Health Care Services.

handicapped children be *maximized* and *coordinated*." *Id*. at 673 (emphasis added). Thus, the Legislature chose to incorporate CCS in the delivery of special education services only to the extent that CCS was already responsible for providing such services under its existing mandate.

The Government Code's delineation of agency responsibilities for PT and OT has remained essentially unchanged since 1984. The Superintendent of Public Instruction must:

> ensure that *local education agencies* provide special education and those *related services* and designated instruction and services contained in a child's individualized education program that are *necessary for the child to benefit educationally* from his or her instructional program.

Cal. Gov't Code § 7573; Cal. Code Regs. tit. 2 § 60010(k) (emphasis added) (defining "local education agency" as "a school district or county office of education which provides special education and related services"). These "related services" include any PT and OT required to assist a child with a disability to benefit from special education. Cal. Gov't Code § 7570. However, to the extent such services are also *medically* necessary based upon a physicians' diagnosis and assessment, CCS maintains responsibility for providing them:

> *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 or the provision of *medically necessary* occupational therapy and physical therapy, as specified by Article 5 (commencing with Section 123800) of Chapter 3 of Part 2 of Division 106 of the Health and Safety Code, *by reason of medical diagnosis* and when contained in the child's individualized education plan.

Id. § 7575(a)(1) (emphasis added); *see also id*. § 7575(b) (reiterating that DHCS shall determine whether a child needs medically necessary PT and OT), and Cal. Health & Safety Code § 123929(a)(3) (requiring prior authorization for CCS services to be provided and that such services be medically necessary).)[2] The Government Code goes on to reinforce this division of responsibility:

> *Related services* or designated instruction and services *not deemed to be medically necessary* by the State Department of Health Care Services, that the individualized education program team determines are necessary in order to assist a child to benefit from special education, *shall be provided by the local education agency* by qualified personnel . . . .

Cal. Gov't Code § 7575(a)(2) (emphasis added).

A child's medical need for PT and OT is assessed during the CCS Medical Therapy Conference ("MTC"), when the child, his or her parent, a physician, and an occupational therapist and/or physical therapist meet to review and approve the child's therapy plan. Cal. Code Regs. tit. 2, §§ 60300(h), 60323(a), (b). Consistent with the requirement that the therapy be "medically necessary," California regulations require that the physician—who must be CCS-approved and of a specialty appropriate for treating the patient's eligible condition—issue a medical prescription for any therapy determined to be medically necessary. *Id*. §

[2] Indeed, CCS is responsible for providing any and all medically necessary PT and OT that a child with a qualifying condition requires, irrespective of whether the services are educationally necessary. Cal. Health & Safety Code § 123875.

60323 (c), (d). This determination depends on the physician's evaluation of the patient's physical and functional status. *Id*. § 60323(d).

The determination of medical necessity, however, does not end with the CCS Medical Therapy Conference. California regulations establish a CCS-specific process for parents or guardians to contest the frequency of therapy prescribed by CCS, similar in nature to the CCS appeal process that existed before the Legislature codified interagency responsibilities for children with disabilities. Specifically, any parent or guardian who disagrees with a CCS physician's decision "shall be provided with the names of three *expert physicians* from whom the client will choose one, who will evaluate the child at CCS expense," and provide a final opinion. Cal. Code Regs. tit. 22, § 42140(a) (emphasis added). An "expert physician" is one who is certified as a specialist by the American Board of Medical Specialists *and* has a faculty appointment at an accredited medical school. *Id*. § 41427.5.[3]

[3] Parents argue that the CCS appeal process falls short of the due process rights available under the IDEA. Appellants' Opening Br. 23. *Amicus* refers the Court to, and does not repeat here, DHCS' explanation of the process by which CCS' determinations are incorporated into a child's individualized education plan, which may then be challenged pursuant to a due process hearing under the Education Code; rather than review the medical necessity determination, this due process hearing ensures that any services not deemed to be medically necessary are provided by the LEAs if they are nevertheless educationally necessary. Petitioner-Appellee's Answering Br. 16-17, 34-35.

To the extent a child would derive educational benefit from PT or OT that is not deemed, or beyond those deemed, medically necessary by CCS, a child is entitled to receive those services from his or her LEA. Assessments to determine whether a child requires PT or OT that is educationally necessary but not medically necessary are the responsibility of the LEA. *See* Cal. Code Regs. tit. 2, § 60320(a), (b). These determinations of educational necessity alone may be challenged by means of an independent assessment and appealed through a special education due process hearing, such as the one followed by Parents in this case. *See* Cal. Gov't Code § 7572(c); Cal. Educ. Code § 56320 *et seq*.

C. CCS' Process for Determining Medical Necessity Is Wholly Consistent with the IDEA and California Law Implementing the IDEA.

The CCS process for determining medical necessity comports with state and federal law governing the education of children with disabilities. Pursuant to the portion of the Government Code governing interagency responsibilities for service provision to children with disabilities, "[o]ccupational therapy and physical therapy assessments shall be conducted by *qualified medical personnel as specified in regulations developed by the State Department of Health [Care] Services*." Cal. Gov't Code § 7572(b) (emphasis added). Subdivisions (a) and (c) of Government Code section 7572 go on to provide that all PT and OT assessments are governed by Education Code section 56329(b), which recognizes that:

> [a] parent or guardian has the right to obtain, at public expense, an independent educational assessment of the pupil from qualified specialists . . . if the parent or guardian disagrees with an assessment . . . , in accordance with Section 300.502 of Title 34 of the Code of Federal Regulations.

The due process safeguards in these federal regulations require that "the criteria under which the [independent] evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same criteria that the public agency uses when it initiates an evaluation." 34 CFR § 300.502(b), (e). Thus, the Education Code and federal regulations both require that any independent evaluation of CCS' medical necessity determination meet CCS' requirements for evaluation. This includes not only the use of a CCS-approved physician to conduct the assessment but also the selection of an expert physician from a panel offered by CCS. Cal. Code Regs. tit. 2, § 60323(c), (d); Cal. Code Regs. tit. 22, § 42140(a).

Consistent with Government Code section 7572's incorporation of CCS' assessment requirements, Government Code section 7575, subdivision (a)(1) makes CCS responsible for providing PT and OT in accordance with the portion of the Health and Safety Code establishing CCS. Health and Safety Code section 123950 specifies that "[t]he designated county agency shall administer the medical-therapy program in local public schools for physically handicapped children" and that DHCS "may adopt regulations to implement this section . . . ." The regulations concerning interagency responsibility for disabled students also

provide that "medical therapy services must be provided by or under the supervision of a registered occupational therapist or licensed physical therapist *in accordance with CCS regulations and requirements*." Cal. Code Regs. tit. 2, § 60323(f) (emphasis added). Those regulations include the appeal process whereby a parent may obtain an independent evaluation and final opinion by selecting one of three expert physicians offered by CCS. Cal. Code Regs. tit. 22, § 42140.

State and local interagency agreements between CCS and education agencies confirm the application of CCS policies, procedures, and requirements for contesting a determination of medical necessity. The agreement between CDE and DHCS states that the State CCS program shall "[p]rovide technical assistance to county CCS programs to assure that CCS offers dispute resolution *through an expert physician* when the parent is in disagreement with the medical therapy conference decision." State Interagency Cooperative Agreement between The California Department of Education and The California Department of Health Services, Children's Medical Services Branch, California Children Services, Medical Therapy Program (2005), at 13, *available at*: http://www.dhcs.ca.gov/services/ccs/Documents/ccsin0701.pdf (emphasis added). The agreement further requires that the State CCS program "[m]aintain and monitor standards for medically necessary physical therapy and occupational

therapy for MTP eligible children according to CCS policies and procedures." *Id.* at 14. Similarly, the local interagency agreement entered into by and among the County of Santa Clara, the Santa Clara County public school districts, and Santa Clara County Office of Education provides that "[t]he CCS program will evaluate the child's eligibility for the Medical Therapy Program (MTP) according to CCS program policies and guidelines and the requirements of the interagency regulations." Excerpts of Record at 363.

III.

ARGUMENT

A. Reversal of the District Court's Decision Would Disrupt the Long-Standing Division of Responsibilities and Funding Streams for Agencies Serving Children with Disabilities.

Any decision requiring CCS to provide services without a CCS-approved physician's prescription would fundamentally undermine the State's carefully considered scheme for delivering services to children with disabilities.[4] Under the existing scheme, CCS—which has provided medical services to disabled children for almost a century—provides medically necessary PT and OT, and the LEAs—

[4] *Amicus* joins in, and does not repeat here, DHCS' argument that the private evaluations conducted by therapists, rather than a CCS-approved physician, are ineligible for reimbursement and do not constitute evidence of a medical need for additional therapy. *See* Petitioner-Appellee's Answering Br. 39-40; *see also* 34 CFR § 300.502(b)(2)(ii) (providing that independent educational evaluations failing to meet agency requirements are ineligible for reimbursement at public expense).

which has long provided children with educational services—provide any other educationally necessary PT and OT. Because these agencies have developed standards, procedures, and funding streams unique to their area of expertise, the division of responsibilities between these agencies cannot be altered without seriously disrupting the services provided by state and local agencies.

For example, reversal of the district court's decision would lead to a substantial increase in operational costs for CCS; an enormous, unfunded liability for DHCS and the counties operating CCS; and potential cuts in other public services provided by DHCS and the counties. Whereas LEAs pay for IEP-required services through a mix of federal IDEA funds, designated state funds, and their own general funds, Legislative Analyst's Office, *Overview of Special Education in California* (2013), *available at* http://www.lao.ca.gov/reports/2013/edu/special-ed-primer/special-ed-primer-010313.aspx, the vast majority of CCS patients are covered by California's Medicaid program, Medi-Cal, which only reimburses CCS for the cost of medically necessary services, as determined by an accredited physician, provided to covered patients. DHCS, CCS, Program Overview (Jul. 22, 2015, 1:31 PM), *available at* http://www.dhcs.ca.gov/services/ccs/Pages/ProgramOverview.aspx; Petitioner-Appellee's Answering Br. 11-12. The cost of all other CCS services is covered by a mix of federal, State, and county funds. DHCS, *supra*; Petitioner-Appellee's

Answering Br. 11-12. CCS does *not* receive funds under the IDEA to cover PT or OT provided to disabled children, and if CCS were required to provide these services without a CCS-approved physician's prescription, it is uncertain whether any funds currently provided to the LEAs could or would be made available to CCS for such services. Unable to rely on Medi-Cal funding for the services, DHCS and the counties would have to divert funds earmarked for other essential services, such as law enforcement, medical care for the indigent, social services, communicable disease control, and services for the mentally ill.

Forcing CCS to cover services that have not been deemed medically necessary by a physician, much less a CCS-approved physician, would also place DHCS and the counties in a role that they are neither accustomed nor qualified to handle. DHCS and the counties oversee the provision of medical services; they do not oversee the provision of educational services. Needless to say, neither DHCS nor the counties have the experience and expertise needed to provide educational services that are not medically necessary.

Indeed, if CCS had to provide services that are educationally necessary but not medically necessary, the division of responsibility between DHCS and CDE, and the corresponding division of responsibility between CCS and the LEAs, would become unworkable. Instead of having CCS determine whether services are medically necessary, as the law currently requires, parents seeking to challenge

CCS' initial assessments could enlist private therapists—who are not qualified to determine medical necessity—and administrative law judges to decide whether additional services are *medically* necessary. Under this process, DHCS, the counties, and the LEAs would be unable to predict when and to what extent they will be responsible for providing services.

Thus, any alteration to the current system for delivering services to children with disabilities would have far-reaching, deleterious consequences for the operations of state and local government agencies, for the financing of these services, and ultimately, for the families and the larger communities served by these agencies.

B. A Decision in Parents' Favor Would Create a Patchwork of Appeal Processes that Would Be Impossible for CCS to Administer and for CCS Families to Navigate.

For almost a century, CCS has provided far more than just medical services that are educationally necessary. To ensure that disabled children – including those children who have not yet reached school age – receive *all* medically necessary services, CCS has established a carefully crafted process for providing these services, including an appeals process that ensures that covered children can get second opinions from qualified physicians.

When the California Legislature integrated CCS into the State's delivery of FAPE, the Legislature emphasized its desire to "coordinate" existing programs for

children with disabilities. 1984 Stat. 673. "[T]o better serve the educational needs of the state's handicapped children," *id*., the Legislature recognized the importance of CCS and the medical services it provides and preserved CCS' process for appealing medical necessity determinations for medical therapies provided to disabled children in the school setting. Having a single process for appealing all medical necessity determinations minimizes confusion, promotes uniformity of expectations and standards for all CCS patients, parents, and staff, and reduces administrative costs.

However, under the dual appeal process urged by Parents, MTP patients—alone among CCS patients—could contest medical necessity determinations through a separate appeals process without the benefit of any other physician's medical opinion. Under the scheme advanced by Parents, a medical necessity determination involving a child who has not yet reached school age (i.e., a non-MTP patient) could only be appealed according to CCS' process, but once that child reached school age and arguably had an educational need for these medical services, the child could opt for a different appeal process. This dual process would also allow a family to follow one appeal process to contest medical necessity determinations from CCS' MTP but require the family to follow an entirely different appeal process to challenge medical necessity determinations for any other services provided by CCS for that family. Finally, this dual process

would allow that administrative law judges and federal courts decide whether services are medically necessary based on the opinions of non-physicians. Besides defying logic, this scheme would be an administrative nightmare for DHCS and the counties to administer. It is also unduly complex, risks inconsistent decisions, and creates unnecessary confusion for families already confronting difficult and stressful circumstances.

Given that the appeal process urged by Parents would fail to improve the consistency or quality of medical necessity determinations, and would instead create needless confusion among CCS patients, parents and staff, this Court should reject Parents' position.

C. Parents Should Not Be Allowed to Cherry Pick the Process by Which They Contest a Medical Necessity Determination or the Agency that will Provide Services for Their Child.

The present lawsuit is nothing more than an attempt by Parents to circumvent the CCS appeal process and to force CCS to provide services beyond the scope of its mandate. Parents had previous experience with the CCS appeal process but chose not to avail themselves of it again. Instead, Parents filed a claim against both CCS and their child's LEAs, using the IDEA's special education hearing process in the hopes of forcing the agencies to provide additional services. Inexplicably, Parents settled with the LEAs and chose to go after CCS alone for additional PT and OT, even though the LEAs were legally obligated to provide any

additional, educationally necessary services they were seeking. Parents had the right to make these strategic decisions. But they do not have the right to disregard the process carefully crafted by the California Legislature to meet the medical and educational needs of *all* disabled children. Neither federal nor state law gives Parents the power to cherry pick the process for appealing the scope of services provided by CCS.

In 2008, when J.C.'s OT prescription was reduced, Parents obtained firsthand experience with the CCS appeal process. CCS offered a panel of expert physicians for J.C.'s mother to obtain a second opinion, but the expert selected by J.C.'s mother concluded that J.C.'s OT should be reduced rather than increased. (*See* Excerpts of Record at 53:7-15.)

In 2012, by contrast, when Parents were again dissatisfied with the PT and OT prescribed, they deliberately ignored CCS' offer to proceed with the expert physician appeal process at CCS' expense. Instead, they sought second opinions from private therapists and brought a special education due process challenge even though they knew that the appropriate procedure for appealing a medical necessity determination lay with the CCS appeal process.

In addition to refusing to follow the appropriate process for challenging the medical necessity determination, Parents chose to relieve the governmental entity required by law to provide the additional therapy ordered by the administrative law

judge of that responsibility. Under California law, the LEAs were responsible for any additional therapy educationally necessary for J.C. *See* Cal. Gov't Code §§ 7573, 7575(a)(2). Yet, Parents chose to settle with the LEAs and release them from any further responsibility for J.C.'s PT and OT. *See* Petitioner-Appellee's Answering Brief 17. Having agreed to forego any additional therapy from the LEAs, Parents should not be allowed to circumvent state laws to obtain such services from CCS.

Parents knew about the process for challenging the medical necessity determination but chose not to avail themselves of it. Parents also knew that the LEAs would be responsible for any additional therapy that was educationally necessary but not medically necessary but chose to relieve the LEAs of that responsibility. Having made those strategic choices, Parents cannot rewrite the law to their benefit and cherry pick the procedures that they prefer. Like every other parent with a child in CCS, Parents must follow the rules and procedures laid out by the California Legislature to ensure that the medical and educational needs of *all* disabled children can be met.

IV.

CONCLUSION

To provide disabled children with the services they need, the California Legislature has carefully crafted a statutory framework that maximizes and

coordinates existing programs and services. Under this framework, CCS provides all medically necessary services, while the LEAs provide all other educationally necessary services. And as part of this framework, California has created *separate* procedures for challenging decisions made by CCS and the LEAs. The Parents knew about the procedure for appealing CCS' determination but chose to disregard it. The Parents also knew that the LEAs were responsible for providing all educationally necessary services that are not medically necessary but chose to relieve the LEAs of that responsibility through a settlement. Having made these strategic choices, the Parents cannot force CCS to employ their chosen procedure to force CCS to provide services that they are not legally obligated to provide.

A contrary conclusion would have serious repercussions on the provision of services to children with disabilities in California. It would open the floodgates to demands for CCS to provide non-medically necessary PT and OT services. It would allow parents to ignore the requirement that a CCS-certified physician provide a second evaluation of a child whenever they are dissatisfied with the initial CCS determination. It would place the Office of Administrative Hearings and, thereafter, the federal courts in the position of resolving disputes about a child's *medical* need for therapy. And it would upend the State Legislature's long-standing division of agency responsibilities for children with disabilities by forcing CCS to provide services that are not medically necessary. Given CCS' limited

resources and the costly nature of these services, the program's ability to serve truly needy children and to provide other vital public services would be compromised.

For the reasons set forth above, and those in the brief of Petitioner-Appellee, the district court's judgment in favor of Petitioner-Appellee and dismissing Real Parties in Interest-Appellants' counterclaim and motion for stay put should be affirmed.

Dated: July 31, 2015

Respectfully submitted,

ORRY KORB
COUNTY COUNSEL

By: /S/
JENNY S. LAM
Deputy County Counsel

Attorneys for *amicus curiae* the California State Association of Counties

STATEMENT OF RELATED CASES

Attorneys for CSAC are not aware of any related cases pending in this Court, as defined in Ninth Circuit Rule 28-2.6.

Dated: July 31, 2015

Respectfully submitted,

ORRY KORB
COUNTY COUNSEL

By: /S/
JENNY S. LAM
Deputy County Counsel

Attorneys for *amicus curiae* the California State Association of Counties

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c) and Ninth Circuit Rule 32-1, the attached *amicus curiae* brief is proportionately spaced, has a typeface of 14 points or more, and contains approximately 4,851 words.

Dated: July 31, 2015

Respectfully submitted,

ORRY KORB
COUNTY COUNSEL

By: /S/
JENNY S. LAM
Deputy County Counsel

Attorneys for *amicus curiae* the California State Association of Counties

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CERTIFICATE OF ELECTRONIC SERVICE

JENNIFER KENT v. CALIFORNIA OFFICE OF ADMINISTRATIVE HEARINGS, *et al.*

Case No. 15-15261

I hereby certify that I electronically filed the foregoing

BRIEF OF *AMICUS CURIAE* THE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER-APPELLEE

with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 31, 2015.

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/S/
Karen Harris