SELPA Administrators of California
Position Paper on the California Children's Services Program
July 2019

As the state embarks upon educational realignment, the purpose of this paper is to explain the role that school districts currently play in the provision of California Children Services and Medical Therapy Programs. As this medical program is funded through special education dollars, we propose a reform of the current practices.

Background on CCS

California Children's Services (CCS) is a state program that provides diagnostic and treatment services, medical case management, and medically necessary physical and occupational therapy to children under age 21 with eligible chronic and severe medical conditions. The Medical Therapy Program is a component of the CCS program. The Medical Therapy Program provides individuals under that age of 21 medically necessary outpatient physical therapy and/or medically necessary occupational therapy as prescribed by a physician and in accordance with the individual's medical treatment plan (MTP). These services are provided at medical therapy units (MTUs) located on public school sites. About 90% of CCS beneficiaries are also eligible for Medi-Cal for their general health care needs; however, CCS is also available to higher income families if the estimated cost of care in one year would exceed 20% of the family's adjusted gross income.

California Children's Services (CCS), which covers approximately 180,000 children, is administered as a partnership between the Department of Health Care Services (DHCS) and counties. It is one of the few remaining children's health care programs that was "carved out" of Medi-Cal managed care, in most cases, health plans neither pay for nor arrange for health care related to CCS conditions. Instead, county personnel determine medical and financial eligibility and then coordinate care within a network of specialized providers.

The Role of Education in the CCS Medical Therapy Program

Under the federal Individuals with Disabilities Education Act (IDEA), school districts must provide special education to eligible children ages birth through 21. Part of the obligation to provide special education is a requirement to provide "related services," which are defined as "developmental, corrective and other supportive services as are required to assist a child with a disability to benefit from special education." [*See* 34 C.F.R § 300.34.] However, this section of federal law, as well as California Education Code Section 56363, limits districts' responsibility for medical services to only those that are for diagnostic and evaluation purposes.

The IDEA holds school districts responsible to work cooperatively with other public and private agencies to assure that children with disabilities receive education and related services as identified in their Individualized Education Programs (IEPs) for children 3 – 22 years of age or Individual Family Services Plans (IFSPs) for children 0–2 years, 11 months of age. One method of meeting this responsibility is the use of interagency agreements, which specify each agency's program and fiscal responsibilities for provision of special education and related services.

The California Legislature codified interagency responsibilities for related services under the IDEA in 1984, delineating the division of responsibilities between the Superintendent of Public Instruction and the Secretary of the Health and Human Services Agency to provide medically necessary occupational therapy, physical therapy, psychotherapy and other mental health assessments to children eligible for special education. In doing so, the Legislature recognized that "a number of state and federal programs make funds available for provision of education and related services to children with handicaps who are of school age" and that such funds are to be expended for the delivery of special education and related services to ensure that children receive free and appropriate public education (FAPE). [*See* California Government Code § 7570.]

Medically necessary therapy services for children with conditions eligible for the CCS MTP are mandated under the California Health and Safety Code and Title 22 of the California Code of Regulations. A child's medical need for PT and OT is assessed during the medical treatment conference (MTC), when the child, his or her parent, a physician, and the physical or occupational therapist meet to review and approve the child's therapy plan. Consistent with the requirement that the therapy be "medically necessary," a CCS-approved physician must issue a medical prescription for treating the patient's eligible condition. To the extent that a child would receive educational benefit from OT or PT that is not deemed medically necessary by CCS, a child is entitled to receive those services from his or her district. [*See* 2 C.C.R. § 60320.] It is the responsibility of Special Educational Local Plan Areas (SELPAs) to provide the Medical Therapy Unit (MTU) facilities, including the maintenance and modernization and/or rebuilding of these facilities if required.

Need for Reform

More than thirty years after the Legislature established a mandate for interagency responsibility for medically necessary OT and PT services, this approach is no longer meeting the needs of CCS, children with disabilities or school districts for the reasons specified below:

1) **Current Delivery Models Resulting in Noncompliance and Costly Litigation**

   When the interagency agreement related to special education was adopted in 1984, most children with physical disabilities were educated in special day classes located in "centers" or special schools for "handicapped" children. It was more efficient to locate MTUs at these locations rather than on school sites. CCS staff used the MTUs to provide medically necessary OT and PT to students, as well as for office space and space for specialized equipment.

   Today, these MTUs are a relic of a bygone era. With increased emphasis on the least restrictive environment (LRE) under IDEA and California Education Code, as well as the

requirement that all students have access to quality instruction and common core standards with typical peers to the fullest extent possible, most students with physical disabilities are now attending neighborhood schools rather than segregated day classes or special schools. In many cases, students must now be transported to MTUs that are not located on their school site during the school day, which takes away from classroom time and other educational needs in order to receive services that are medical in nature. The California Department of Education requires that more than 49.2% of students with disabilities receive special education services inside a regular classroom for 80% or more of the school day. The need to bus children to the MTUs to receive CCS services makes it increasingly difficult to meet this goal. [*See* State Performance Plan for Individuals with Disabilities Education Act of 2004, Performance Indicator #5].

California law requires DHCS to provide "medically-necessary services" as a related service when a district establishes those services as "educationally necessary" to provide the student with a free appropriate public education (FAPE). Yet when these DHCS provided services are listed on a student's IEP there is a lack of clarity regarding the process to change medically necessary OT and PT services for children, which has resulted in lengthy and costly litigation.

In 2012, Sonora Elementary and Cupertino Union School Districts each had students who were receiving both medical OT provided by CCS and educational OT provided by the district. In both cases the amount and frequency of medical OT services provided by CCS were specifically listed in each student's IEP. In both cases, CCS eventually made the unilateral determination that the amount of medical OT should be reduced and started reducing services without going through the IEP process. Thereafter, in both cases, the parents filed for due process against CCS and the respective school districts.

During the summer of 2013 Office of Administrative Hearings (OAH) issued decisions in two separate cases finding that it had jurisdiction over the CCS under the IDEA and in both cases ordered CCS to provide compensatory OT. Thereafter, DHCS appealed both OAH decisions by filing suit against OAH. Both school districts were brought back into the legal fray as real parties in interest. The Sonora Elementary School District case was originally filed by CCS in the Superior Court for Tuolumne County and then removed to the District Court for the Eastern District of California. The Judge in the Eastern District of California found that the Sonora Elementary School District case was an interagency dispute regarding state law and not a case under the IDEA and remanded the case back to the Superior Court. On January 2, 2015, the Tuolumne County Superior Court found that CCS was subject to the jurisdiction of OAH, that OAH had the authority to make a determination regarding the Medical OT services in a student's IEP and CCS was ordered to provide the compensatory medical OT as originally ordered by OAH.

Meanwhile, CCS filed its appeal of the Cupertino Union School District decision with the Federal Court and the Judge in the Northern District of California found that the Cupertino Union School District case was a case appropriately brought under the IDEA.

On January 21, 2015, the U. S. District Court for the Northern District of California made the exact opposite determination from the Sonora case and found that OAH could not review CCS's determination regarding the medical necessity of the student's OT. Additionally, the Judge found that pursuant to Title 20 U.S.C. sections 1415(j) and 1412(a) (12) (B)(ii) the school, not CCS, should have been responsible for providing the medically necessary OT while the case was pending as part of the child's stay put.

The respective school districts were trapped in the middle of both of these legal cases resulting in litigation expenses related to the denial of medical OT services that the districts were not legally required to provide. These decisions demonstrate that the legal waters are very murky with respect to the appropriate roles and responsibilities of CCS and school districts in providing OT and PT services and the avenues of redress for families when there are disputes over services. Over the past several years the increasing number of legal cases confirms the need to redact the remaining portion of the Government Code Sections 7570-7575.

2) Lack of Cooperation and an Expired State Interagency Agreement

CCS Information Notice: 07-01, a January 2007 Memorandum of Understanding (MOU) between the Special Education Division of the Department of Education and the Department of Health Care Services, delineated an extensive list of requirements and agreements for and between SELPAs (the entities that coordinate with school districts and county offices of education to provide a continuum of services for students receiving special education services) and CCS in order to create a cooperative system that benefits children with disabilities. This included an obligation to have MOUs in place between SELPAs and their local CCS administrators.

In recent years CCS has increasingly resisted entering into these MOUs. In a May 2014 letter from CCS, personnel across the state were directed not to enter into a new special education/local educational agency (LEA) interagency agreements or MOUs until a revised template could be developed by DHCS. [*See* CCS Information Notice: 14-05.] This directive has resulted in CCS not currently having an MOU in place with numerous SELPAs. In a recent survey of the 136 SELPAs in California, 70 out of 80 SELPAs that responded noted that they did not have a current MOU with CCS and some not since 2005. This breakdown has led to confusion for students, families, CCS administrators, and school districts. Additionally, CCS has refused to provide student names to LEAs of children receiving both special education and CCS services. Stating that to do so would violate HIPAA – yet under FERPA the school does have a legitimate right to know which special education students receive CCS services so they can be invited to the student's IEP meeting, which is required under the State Interagency agreement.

The last State Interagency Cooperative Agreement between California Department of Education and The California Department of Health Services (currently DCHS) was drafted in 2007 and is eleven (11) years overdue for revision, as specified in Section IV, Review of Interagency Agreement states "the document will be reviewed by CDE, Special Education Division, and DHS CCS at least every 3 years and modified as necessary."

Another ongoing issue is the refusal of CCS in some cases to participate in IEP team meetings as required in GC 7570, and/or CCS making decisions that impact a student's IEP plan without consultation. These decisions have resulted in litigation, causing major expenses and stress to families and school districts involved in the cases.

Lastly, the burden to provide and maintain the MTU facilities is an increasing fiscal and programmatic issue for SELPAs and LEAs. There is an ever-growing need for facility space among LEAs due to class size reductions, all day kindergarten, and other school programs requiring space. As the MTUs are often housed and/or provided space from LEAs, there has been an increased need to end these arrangements and take back the facility at the LEA level. This causes the SELPAs to absorb exorbitant costs in either rebuilding and/or modernizing other buildings to meet the extensive facility requirements of the MTUs. The building requirements and regulations for MTUs are outdated and antiquated, and are unreasonable for SELPAs and LEAs to adhere to and fund. Recently one SELPA was required to rebuild the MTU and the incurred cost to the SELPA was $2.7 million. As the MTU facilities are to be solely used for CCS, the use of special education funds for housing, maintaining, and rebuilding these facilities is inappropriate, especially as not all those served through CCS are eligible for special education.

3) Improper Use of Special Education Resources

California Education Code Section 56836.04(b) states that "funds apportioned to special education local plan areas pursuant to this chapter are to assist local educational agencies to provide special education and related services to individuals with exceptional needs and shall be expended exclusively for programs operated under this part." However, recent data from CCS in various SELPAs indicates that there are many students eligible under CCS criteria for medically-necessary OT and PT who are not eligible for special education – the percentage is as high as 33 percent of CCS caseloads. SELPAs reported spending as much as $2.7 million in special education funds to build new MTUs and costs range from $500,000 to $1,000,000 for recent MTU upgrades. Transportation to MTUs from school sites is another cost borne by the school districts. It is important to note that not all SELPAs, and therefore not all LEAs, utilize CCS for any of their OT and PT services pursuant to the IEP, as they employ their own providers. Even though these SELPAs utilize their own staff for these IEP services, they remain fiscally responsible for the MTU, using special education funding sources for these costs.

Special Education funding is categorical yet special education dollars are clearly providing medical services to students who are not eligible for special education. It is necessary to assure that funds provided from the IDEA are used to meet the educational needs of children with disabilities who are eligible for special education and/or related services in accordance with federal and state mandates. Pursuant to Section 56205 of the Education Code, LEAs/SELPAs are required to comply with the requirements of IDEA, the Rehabilitation Act of 1998, and the Americans with Disabilities Act of 1990, and the current use of special education funding to provide medical services under CCS runs afoul of these requirements. It is essential that each agency be accountable for those funds so the needs of children with disabilities are met without duplication of services.

Proposed Remedy

In October 2011, the Governor signed AB 114, which removed the interagency obligation of the Department of Health and Human Services to provide any educationally-related mental health services (ERMHS) to students in special education, placing the full obligation for ERMHS with the schools along with funds previously allocated to the Department of Human Services for this purpose. This change in law left CCS as the only outside agency required to participate in the special education process and be listed as a service provider on students' IEPs. For the reasons stated in this paper, this requirement creates confusion for staff, eligible students and their parents.

The SELPA Administrators of California respectfully submit that it is time to remove the interagency obligation. MTUs do not need to be located on public school campuses in order to provide quality medical care via MTCs, which coordinate the patent's needs for referral to medical specialists, durable medical equipment, rehabilitation therapies, orthotic and prosthetic services and community resources. Under the current model, children are often bussed long distances to the MTUs to receive these services, and as a result they often miss academic instruction and social interaction with their peers.

The state should restructure the delivery of medically-necessary services to students with qualifying conditions as part of the CCS Whole-Child Model. MTUs should be folded into the Whole-Child Model along with access to mental health services to better coordinate and ensure access to an array of services. Schools will continue to assess students' needs for educationally-related OT and PT and provide those services during the student's instructional day.

This can be accomplished by repealing the provisions of Government Code Sections 7570-7575 related to interagency responsibilities for OT and PT in the same manner that AB114 repealed the interagency responsibilities for mental health services. This will separate the responsibilities for OT and PT for educationally necessary and medically necessary services to LEAs and CCS, respectively. Schools have developed the capacity to fulfill their service responsibilities and are well-equipped to provide independent educationally-related OT and PT services. The number of PTs and OTs employed by school districts reported in 2014 is approximately 1500 OTs and 200 PTs (as opposed to none at the time Section 7570 was originally enacted). In counties where the relationship between the SELPA and CCS is collaborative and effective, SELPAs should be allowed to contract for services with CCS as is done for mental health services with County Mental Health. Local flexibility will result in more effective and compliant use of funds and transparency and accountability for our parent and student consumers.