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13  
 14 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 15 FOR THE COUNTY OF LOS ANGELES

16  
 17 CONSUMER WATCHDOG, a non-profit  
 18 organization; and ANSHU BATRA, M.D.,  
 19 F.A.A.P.,  
 20  
 21 Petitioners and Plaintiffs,

22 v.

23 CALIFORNIA DEPARTMENT OF  
 24 MANAGED HEALTH CARE; LUCINDA  
 25 "CINDY" EHNES, in her official capacity as  
 26 Director of the California Department of  
 27 Managed Health Care; and DOES 1 through 20,  
 28 inclusive,

Respondents and Defendants.

(Dept. 85)

**CONFORMED COPY**  
 OF ORIGINAL FILED  
 Los Angeles Superior Court  
 JUN 30 2003

John A. Clarke, Executive Officer/Clerk  
 BY MARY GARCIA, Deputy

**BS181897**

CASE NO.  
 VERIFIED PETITION FOR WRIT  
 OF MANDATE AND COMPLAINT  
 FOR DECLARATORY AND  
 INJUNCTIVE RELIEF

(Code Civ. Proc., §§ 525, 526 1060,  
 1085; Mental Health Parity Act,  
 Health & Saf. Code, § 1374.72; Knox-  
 Keene Health Care Service Plan Act  
 of 1975, as amended, Health & Saf.  
 Code, § 1340 et seq.; Administrative  
 Procedures Act, Gov. Code, § 11340  
 et seq.; Public Records Act, Gov.  
 Code, § 6250 et seq.)

1 Comes now Petitioners and Plaintiffs Consumer Watchdog and Dr. Anshu Batra and allege  
2 as follows:

3 **INTRODUCTION**

4 1. This Petition and Complaint challenges the validity of several policies,  
5 practices, and actions of the California Department of Managed Health Care (the  
6 “Department” or the “DMHC”), and its Director, Lucinda “Cindy” Ehnes, who is sued herein  
7 in her official capacity, each of which violates state law and has resulted in the denial of  
8 critically needed, medically necessary treatment for autistic children and their families.

9 2. The DMHC is the state agency responsible for regulating all “full service”  
10 health care service plans (“health plans” or “plans”), including health maintenance  
11 organizations (“HMOs”) and two of the largest preferred provider organizations (“PPOs”)  
12 that transact business in the State of California. The plans regulated by the DMHC  
13 collectively insure more than 21 million Californians, and include some of the State’s largest  
14 health insurers, including Kaiser Foundation Health Plan, Inc., Anthem Blue Cross, and Blue  
15 Shield of California.

16 3. As a part of its regulatory responsibilities, the Department is charged with  
17 ensuring that health plans comply with both the Knox-Keene Health Care Service Plan Act  
18 of 1975, as amended, Health and Safety Code section 1340 et seq. (the “Knox-Keene Act”),  
19 which establishes a framework for licensing and regulating HMOs and some PPOs, and the  
20 Mental Health Parity Act, Health and Safety Code section 1374.72, which requires all full-  
21 service health plans to provide coverage for the diagnosis and medically necessary treatment  
22 of severe mental illnesses, including autism, under the same terms and conditions as apply  
23 to other medical conditions. The DMHC has required compliance with neither statute. To  
24 the contrary, the DMHC and its Director have:

- 25 ● Permitted the plans that they regulate to deny coverage for Applied Behavioral  
26  
27  
28

1 analysis Analysis (“ABA”), a well-established, mainstream treatment<sup>1</sup> for autism, in  
2 plain violation of the Mental Health Parity Act and its implementing regulations,  
3 which *require all full-service health plans to cover any medically necessary*  
4 *treatment for autism, including ABA.*

- 5 ● Acted in derogation of their duty to enforce the law by failing to properly resolve  
6 consumer complaints regarding plan denials of coverage for ABA and other medically  
7 necessary treatments for autism.
- 8 ● Acceded to the demands of the health plans that they regulate by agreeing, as set forth  
9 in a March 9, 2009 *“memorandum” that constitutes an illegal underground*  
10 *regulation*, to re-classify all denials of treatment for autism as “coverage issues” in  
11 the first instance, rather than issues of medical necessity, so that the denials may be  
12 routed through the DMHC’s internal “grievance system” rather than through the  
13 transparent “Independent Medical Review” (“IMR”) system, in which appeals are  
14 reviewed by a team of independent doctors to determine whether the recommended  
15 treatment is “medically necessary.”
- 16 ● Illegally adopted, through this same March 9, 2009 underground regulation, a policy  
17 and practice of denying ABA and other autism treatments based on claims of  
18 inadequate licensure, despite the fact that the law clearly requires health plans to  
19 cover all medically necessary treatments for autism, including ABA, whenever such  
20 services are *provided or supervised by a licensed or certified professional.*
- 21 ● Illegally withheld public documents properly requested under the California Public  
22 Records Act (“PRA”), Government Code section 6250 et seq., which would expose  
23 how the DMHC conducts its “grievance system,” and which would reveal the full  
24 extent of the Department’s violations of the Mental Health Parity Act and the Knox-  
25 Keene Act.

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27 <sup>1</sup>The terms “treatment,” “therapy,” and “service” are used interchangeably throughout  
28 this Petition and Complaint.

1 4. Unless the relief requested in this Petition and Complaint is granted,  
2 California’s thousands of autistic children and their families will continue to suffer as the  
3 DMHC and its Director fail to carry out their mandatory duties under the law to ensure that  
4 the health plans that they regulate provide coverage for ABA as a medically necessary  
5 treatment for autism.

6 **PARTIES**

7 5. Petitioner and Plaintiff Consumer Watchdog is a nationally-recognized,  
8 California-based, non-profit public benefit corporation organized to represent the interests  
9 of consumers. One of Consumer Watchdog’s chief missions is to ensure access to affordable  
10 health care for all Californians. Consumer Watchdog has served as an advocate for health  
11 care consumers before the DMHC, the Legislature, and in the courts by: conducting research  
12 and issuing reports regarding consumers’ access to health care and industry practices; fighting  
13 health plan abuses and working to uncover corruption in the health care industry; drafting and  
14 advocating for legislation to increase affordable access to high-quality health care;  
15 participating in legislative and administrative proceedings on behalf of health care  
16 consumers; and educating the public and policymakers concerning health care industry  
17 practices and consumer rights. In particular, Consumer Watchdog has conducted education,  
18 advocacy, and litigation to enforce the Knox-Keene Act, including:

19 a. Drafting legislation and leading efforts in the Legislature to: (i) ban the  
20 practice of denying health care coverage to consumers on the basis of past medical  
21 conditions; (ii) require insurance and HMO policies to cap out-of-pocket costs of  
22 consumers; (iii) require health care insurers to set rates based on community, not  
23 health conditions; (iv) allow patients who are seriously harmed to collect damages  
24 from HMOs that deny them medically necessary treatment; (v) stop efforts to  
25 eliminate the DMHC’s 24-hour HMO abuse hotline; and (vi) stop an attempt to limit  
26 fines to HMOs that violate the law.

27 b. Exposing in the media and to the public the fraudulent practice of  
28 insurers retroactively canceling — “rescinding” — the coverage of innocent patients

1 after they file claims for serious health problems.

2 c. Encouraging the DMHC to investigate Blue Cross of California, Kaiser  
3 Permanente, and other insurers regarding illegal, retroactive rescissions. In  
4 September 2006, the DMHC fined Blue Cross \$200,000 for illegally rescinding an  
5 insurance policy. The DMHC also fined Kaiser Permanente \$325,000 for two illegal  
6 rescissions. On March 22, 2007, the DMHC issued a survey, finding that in all 90  
7 cases reviewed, Blue Cross violated Health and Safety Code section 1389.3, which  
8 limits rescission of policies to cases where an applicant willfully misrepresented his  
9 or her medical history, and fined Blue Cross \$1 million.

10 d. Catalyzing — through effective media advocacy — five settlements  
11 requiring insurers to provide new coverage to 6,000 formerly rescinded patients.

12 e. Leading a national effort to focus Congressional leaders on the need to  
13 establish federal limits on insurance contract rescissions, particularly to protect  
14 patients innocent of fraud in the application process from losing coverage when they  
15 become ill and need it most.

16 f. Exposing health insurers' discriminatory denial of coverage to entire  
17 occupations, like firefighters, and patients with minor health conditions. Consumer  
18 Watchdog's release of the internal "underwriting" guidelines of California's largest  
19 health insurers received wide print and broadcast coverage, which resulted in  
20 policymakers supporting policies to ban the practice.

21 g. Leading a statewide and national media and public-education campaign  
22 to ensure that both elected officials and consumers understand that "junk insurance"  
23 does not provide real protection when patients get sick. Consumer Watchdog's  
24 public-education campaign was widely credited for the United States Senate's  
25 rejection of a measure that would have preempted states' efforts to prevent the sale  
26 of such insurance.

27 h. Working to protect patients by successfully advocating for changes in  
28 the Anthem/Wellpoint and UnitedHealth/Pacificare mergers, including assurances that

1 enrollees<sup>2</sup> would not pay merger financing costs.

2 i. Writing and publishing, with the assistance of the DMHC and the  
3 California Department of Consumer Affairs, an HMO Patient Guide, available online  
4 at <[www.CalPatientGuide.org](http://www.CalPatientGuide.org)>.

5 Consumer Watchdog has more than 75,000 members nationwide, many of whom are  
6 California health care consumers who are enrollees of plans regulated by Respondents and  
7 Defendants.

8 6. Anshu Batra, M.D., F.A.A.P. graduated from University of Michigan Medical  
9 School and completed her pediatric training at University of North Carolina, Chapel Hill. She  
10 has been a dedicated pediatrician in private practice for 15 years, specializing in the  
11 evaluation and treatment of children with early childhood developmental delays, including  
12 autism. In addition to running her own private practice, Dr. Batra has acted as a visiting  
13 physician to gain practice guideline-training regarding Autistic Spectrum Disorders and  
14 Developmental Delays at the Descanso Medical Center in La Canada, California, the UCLA  
15 Autism Clinic, and OC-Kids in Anaheim, California. She has also presented numerous  
16 community-based lectures and seminars to educate parents and others about the medical  
17 management, therapeutic interventions, and the impact on the family of autism and other  
18 developmental disorders. Dr. Batra has board certification as a Diplomate of the American  
19 Board of Pediatrics in Developmental and Behavioral Pediatrics.

20 7. She is the proud mother of three children, one of whom is diagnosed with  
21 autism. Dr. Batra's personal journey with this disorder has additionally made her an  
22 outspoken advocate for early identification and intervention of children with developmental  
23 disabilities, especially autism. Based on her clinical and professional experience, Dr. Batra  
24 believes that ABA is a proven, effective treatment for neurologically based developmental  
25 disorders such as autism. ABA, when provided intensively and as early as possible, has been  
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27 <sup>2</sup>“‘Enrollee’ means a person who is enrolled in a plan and who is a recipient of services  
28 from the plan.” (Health & Saf. Code, § 1345, subd. (c).)

1 proven to improve the medical prognosis of autistic children.

2           8.       Respondent and Defendant California Department of Managed Health Care is  
3 one of thirteen Departments under the jurisdiction of California’s Business, Transportation,  
4 and Housing Agency. As a part of its regulatory responsibilities, and at all relevant times  
5 herein, the DMHC was and is vested under state law with the authority to ensure “the  
6 execution of the laws of this state relating to health care service plans and the health care  
7 service plan business including, but not limited to, those laws directing the [D]epartment to  
8 ensure that health care service plans provide enrollees with access to quality health care  
9 services and protect and promote the interests of enrollees.” (Health & Saf. Code, § 1341,  
10 subd. (a).) Consistent with these duties, as set forth above, and at all time relevant herein, the  
11 DMHC was and is responsible for administering, overseeing, and enforcing the Mental  
12 Health Parity Act and the Knox-Keene Act, including those provisions that establish the  
13 procedures governing how a denial by a DMHC-regulated plan of a requested health care  
14 treatment must be resolved: (a) the “IMR system,” which is codified in Health and Safety  
15 Code section 1374.30; and (b) the “grievance system,” which is codified in Health and Safety  
16 Code section 1368.

17           9.       Respondent and Defendant Lucinda “Cindy” Ehnes is the Director of the  
18 Department of Managed Health Care and is sued herein in her official capacity. Pursuant to  
19 Health and Safety Code section 1341, subdivision (b), the Director of the Department of  
20 Managed Health Care is the “chief officer” of the Department. As required by statute, and  
21 at all times relevant herein, Director Ehnes was and is “responsible for the performance of  
22 all duties, the exercise of all powers and jurisdiction, and the assumption and discharge of all  
23 responsibilities vested by law in the [D]epartment.” (Health & Saf. Code, § 1341, subd. (c).)

24           10.       Petitioners and Plaintiffs are unaware of the true names and capacities of  
25 Respondents and Defendants DOES 1 through 20, inclusive, and they are therefore sued by  
26 such fictitious names pursuant to Code of Civil Procedure section 474. Petitioners and  
27 Plaintiffs allege on information and belief that each such fictitiously named Respondent and  
28 Defendant is responsible or liable in some manner for the events and happenings referred to

1 herein, and Petitioners and Plaintiffs will seek leave to amend this Petition and Complaint to  
2 allege their true names and capacities after the same have been ascertained.

### 3 JURISDICTION AND VENUE

4 11. This Court has jurisdiction to issue writs of mandate pursuant to Code of Civil  
5 Procedure section 1085, and in the case of the Public Records Act, pursuant to Government  
6 Code section 6259, subdivision (a). The Court has jurisdiction to grant declaratory and  
7 injunctive relief pursuant to Code of Civil Procedure sections 525, 526, and 1060, and in the  
8 case of the Administrative Procedures Act, this Court also has jurisdiction to grant  
9 declaratory relief pursuant to Government Code section 11350.

10 12. Venue is proper in the County of Los Angeles pursuant to Code of Civil  
11 Procedure section 393, subdivision (b).

### 12 GENERAL ALLEGATIONS

13 13. Autism<sup>3</sup> is a neurological disorder “that profoundly affects a person’s ability  
14 to communicate, form relationships with others, and respond appropriately to the  
15 environment.” (Cal. Dept. of Developmental Services, “The Epidemiology of Autism,” p.  
16 2, at <[http://www.dds.ca.gov/autism/docs/1exec\\_summ.pdf](http://www.dds.ca.gov/autism/docs/1exec_summ.pdf)> [as of June 17, 2009].) Often  
17 referred to as “Autism Spectrum Disorder,” it is a lifelong developmental disability that is  
18 typically diagnosed before the age of three and affects individuals differently and to varying  
19 degrees. (See *ibid.*; Andrew T. Cavagnaro, Ph.D., Cal. Dept. of Developmental Services,  
20 “Autistic Spectrum Disorders: Changes in the California Caseload, An Update: June  
21 1987-June 2007,” p. 1, at <[http://www.dds.ca.gov/Autism/docs/AutismReport\\_2007.pdf](http://www.dds.ca.gov/Autism/docs/AutismReport_2007.pdf)> [as  
22 of June 17, 2009].) “Although some children with [autism] can develop typical or advanced  
23 skills, the majority exhibit a wide range of serious behavioral, cognitive, and emotional  
24

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25 <sup>3</sup>“Autism” is used throughout this Petition and Complaint to refer generally to Autism  
26 Spectrum Disorder, which includes Autistic Disorder, Pervasive Developmental Disorder Not  
27 Otherwise Specified (including Atypical Autism), and Asperger’s Disorder, in accordance  
28 with the Diagnostic and Statistical Manual of Mental Disorders, 4th ed. (DSM-IV) of the  
American Psychiatric Association. (See also Cal. Code Regs., tit. 28, § 1300.74.72,  
subd. (e).)



1 challenges.” (Cavagnaro, *supra*, at p. 1.) Many children with autism demonstrate profound  
2 and disabling deficits in social interaction, and verbal and nonverbal communication, as well  
3 as repetitive and sometimes injurious behaviors. (See *ibid.*; National Institute of Mental  
4 Health, “Autism Spectrum Disorders,” at <[http://www.nimh.nih.gov/health/publications/  
5 autism/complete-index.shtml](http://www.nimh.nih.gov/health/publications/autism/complete-index.shtml)> [as of June 8, 2009].) Without proper treatment interventions  
6 and therapy, autism can be extremely debilitating, and can prevent people from being able  
7 to perform even the most basic self-care functions. (See *ibid.*; National Institute of  
8 Neurological Disorders and Stroke, “Autism Fact Sheet,” at  
9 <[http://www.ninds.nih.gov/disorders/autism/detail\\_autism.htm](http://www.ninds.nih.gov/disorders/autism/detail_autism.htm)> [as of June 17, 2009].)  
10 Nearly one out of every 150 children born in the United States is diagnosed with autism.  
11 (United States Department of Health and Human Services, Centers for Disease Control and  
12 Prevention, “Autism Information Center: Frequently Asked Questions — Prevalence,” at  
13 <[http://www.cdc.gov/ncbddd/Autism/faq\\_prevalence.htm](http://www.cdc.gov/ncbddd/Autism/faq_prevalence.htm)> [as of June 17, 2009].) As of  
14 2007, the California Department of Developmental Services provided care to nearly 37,000  
15 people with autism. (Cal. Dept. Of Developmental Services Fact Book, 11th ed. (Oct. 2008),  
16 p. 18, at <[http://www.dds.ca.gov/factsStats/docs/factbook\\_11th.pdf](http://www.dds.ca.gov/factsStats/docs/factbook_11th.pdf)> [as of June 29, 2009].)

17 14. In 1999, responding to widespread outrage over the refusal of health plans to  
18 cover treatment for autism and other severe mental illnesses, the California Legislature  
19 enacted the Mental Health Parity Act, Health and Safety Code section 1374.72. The  
20 Legislature specifically found and declared that the Act was necessary because “most private  
21 health insurance policies provide[d] coverage for mental illness at levels far below coverage  
22 for other physical illnesses,” because these coverage limitations resulted in “inadequate  
23 treatment for persons with these illnesses,” and because the inadequate treatment caused  
24 “untold suffering for individuals with mental illness and their families.” (AB 88 (1999), Stat.  
25 1999, ch. 534, § 1(b)(2)-(4).) The Legislature also observed that the failure of private health  
26 insurance policies to adequately cover mental illnesses, including autism, resulted in  
27 “significant increased expenditures for state and local governments.” (*Id.* at § (c)(2).)

28 15. The Mental Health Parity Act, when read together with its implementing

1 regulations and with the general requirements of the Knox-Keene Act, clearly mandates that  
2 all full-service health plans regulated by the DMHC provide coverage for the diagnosis and  
3 medically necessary treatment of autism and other mental illnesses under the same terms and  
4 conditions as apply to other medical conditions. Section 1374.72, subdivision (d), expressly  
5 includes autism as one of the “severe mental illnesses” covered by the law. Thus, under  
6 California law, ***it is illegal for a health plan to refuse to cover any treatment for autism that***  
7 ***is deemed medically necessary.***

8         16. Applied Behavioral Analysis (“ABA”) is a form of behavioral therapy that has  
9 been proven to improve brain function in autistic children. More specifically, ABA is the  
10 design, implementation, and evaluation of environmental modifications to produce socially  
11 significant improvements in human behavior, through skill acquisition and the reduction of  
12 undesirable behaviors. (See, e.g., Cal. Code Regs., tit. 17, § 54342, subds. (8), (11)-(13).)  
13 ABA is a standard treatment for autism based upon nationally recognized professional  
14 standards, and is proven in the medical literature to be effective. According to a 2007 article  
15 in Pediatrics, the official journal of the American Academy of Pediatrics, “[c]hildren who  
16 receive early and intensive [ABA] have been shown to make substantial, sustained gains in  
17 IQ, language, academic performance, and adaptive behavior as well as some measures of  
18 social behavior, and their outcomes have been significantly better than those of children in  
19 control groups.” (Myers, Johnson, “Clinical Report: Management of Children with Autism  
20 Spectrum Disorders,” Pediatrics, vol. 120, no. 5, at p. 1142, at <[http://www.pediatrics.org/  
21 cgi/content/full/120/5/1142](http://www.pediatrics.org/cgi/content/full/120/5/1142)> [as of Feb. 23, 2009].) Indeed, the Centers for Disease Control  
22 and Prevention, the National Institute of Mental Health, and the United States Surgeon  
23 General all concur that behavioral interventions, such as ABA, are an important part of any  
24 comprehensive autism treatment program. (Autism Information Center, Centers for Disease  
25 Control and Prevention, at <<http://www.cdc.gov/ncbddd/autism/treatment.htm>> [as of April  
26 14, 2009] [“[B]ehavioral interventions are key parts of comprehensive treatment programs  
27 for children with autism.”]; National Institute of Mental Health, “Autism Spectrum  
28 Disorders,” at <<http://www.nimh.nih.gov/health/publications/autism/complete-index.shtml>>

1 [as of June 8, 2009] [“[A]ppplied behavior analysis (ABA) has become widely accepted as an  
2 effective treatment.”]; Mental Health: A Report of the Surgeon General, ch. 3, at  
3 <<http://www.surgeongeneral.gov/library/mentalhealth/chapter3/sec6.html#autism>> [as of  
4 April 2, 2009] [“Thirty years of research demonstrated the efficacy of applied behavioral  
5 methods in reducing inappropriate behavior and in increasing communication, learning, and  
6 appropriate social behavior.”].)

7         17. Typically, an ABA behavior modification program is designed and supervised  
8 by a licensed psychologist, family therapist, clinical social worker, or other qualified health  
9 professional with the requisite education and training, such as a Board Certified Behavior  
10 Analyst who is certified by the Behavior Analysis Certification Board (“BACB”) — the  
11 national organization that certifies behavior analysis practitioners. Implementing this  
12 program can require as many as 40 hours per week of direct service (i.e., one-on-one  
13 interaction). Direct service is usually provided by someone with at least a bachelor’s or  
14 master’s degree in a related field such as psychology or education, and specialized training  
15 in behavior modification.

16         18. Respondents and Defendants have failed to ensure that the health plans that  
17 they regulate fulfill their mandatory, legal duty to provide coverage for ABA when medically  
18 necessary. Indeed, as stated below, Respondents and Defendants have affirmatively acted  
19 to permit the health plans to deny this effective, well-established, and medically necessary  
20 treatment.

21         19. When a health plan enrollee is dissatisfied with a plan decision to deny a  
22 specific treatment, California law provides two different systems by which enrollee  
23 complaints are reviewed and resolved by the DMHC. Which system is proper depends upon  
24 the basis for the plan’s denial of treatment. If the denial is based in whole or in part on a  
25 determination that the treatment is not “medically necessary,” either because it is  
26 experimental or investigational, or because it is not medically necessary for that individual  
27 patient, the enrollee has the right to appeal the treatment denial through the DMHC’s IMR  
28 system. (Health & Saf. Code, § 1374.30.) IMR appeals are reviewed by a team of doctors

1 unaffiliated with the health plan at issue. If the IMR appeal is resolved in favor of the  
2 enrollee, the plan is legally obligated to cover the treatment.

3         20. In contrast to the IMR system, if the denial of a requested treatment is based  
4 not on medical necessity or experimental grounds, but on an allegation that the treatment is  
5 not a covered benefit under the plan, the denial is reviewed through the DMHC's separate  
6 "grievance system." (Health & Saf. Code, § 1368.) Unlike the IMR system, in which  
7 independent doctors evaluate whether a treatment should be provided, the grievance system  
8 is conducted by the DMHC itself and involves a review of the contractual terms of the plan  
9 rather than consultation with medical experts. A decision of the DMHC via the grievance  
10 system is binding on the plan in question.

11         21. After the passage of the Mental Health Parity Act, plans sought to deny autistic  
12 children ABA on the alleged ground that the therapy was unproven and therefore was not  
13 "medically necessary." Accordingly, the DMHC traditionally referred enrollee complaints  
14 regarding ABA denials to the IMR system for review.

15         22. Initially, enrollees had only sporadic success in obtaining ABA through the  
16 IMR system. However, because the scientific evidence supporting the medical necessity of  
17 ABA is now uncontroverted, ***health plans have been ordered to provide ABA in every IMR***  
18 ***appeal challenging the denial of the treatment since September 2007.*** For example, in a  
19 May 17, 2008 IMR decision, the independent physician, who is board certified in neurology,  
20 child neurology, and pediatrics, and was assigned to evaluate the plan's initial decision  
21 denying ABA, stated:

22             ABA therapy has been shown to be efficacious in the treatment of autism and  
23 autism spectrum disorders. Improvements as a result of intensive early  
24 intervention with ABA therapy have been demonstrated in terms of measured  
25 IQ as well as in adaptive, social, and communicative skills in comparison to  
26 control patients who did not have ABA treatment. These gains have been  
27 shown to be sustained over time, with documented follow-up of as long as 6  
years in one follow-up study. Further, these findings have been replicated by  
other studies. . . . There is no alternative treatment modality that would be as  
effective for the treatment of this [autistic] patient. . . . [T]he requested therapy  
is medically necessary . . . [and] [t]he Health Pan's denial should be  
overturned." (Exhibit A, Bates p. 000104.)

28 True and correct copies of this and other illustrative IMR decisions are attached hereto as

1 Exhibit A.<sup>4</sup>

2 23. Since the IMR appeal system has resulted in order after order compelling plans  
3 to provide ABA services to their autistic enrollees, the health insurance industry has been  
4 searching for a new strategy to avoid paying for ABA. Their latest ruse is to claim that ABA  
5 is not a covered health care service, either because ABA is “educational” or because the  
6 treatment was not delivered by a licensed provider. This new strategy is intended to ensure  
7 that ABA denials are funneled through the DMHC’s grievance system rather than the IMR  
8 system, which has resulted in consistent rulings in favor of patients in recent years.

9 24. For example, in a June 18, 2008 letter from the President and CEO of the  
10 California Association of Health Plans to the Director of the DMHC, a true and correct copy  
11 of which is attached hereto as Exhibit B, the industry suggested this exact approach. The  
12 letter acknowledged that the industry’s goal is to ensure that “private health insurance . . . not  
13 bear the sole responsibility of financing and providing all of these services” for autistic  
14 patients. The letter then falsely claimed that there is “confusion” as to whether health plans  
15 must cover ABA, and that “plans appropriately exclude [ABA] from coverage for medically  
16 necessary care under the standard definitions of health plan services.” The letter urged the  
17 DMHC to cease its practice of reviewing ABA denials through the IMR system.

18 25. Similarly, in a November 15, 2008 letter to the DMHC, a true and correct of  
19 copy of which is attached hereto as Exhibit C, Kaiser Permanente clearly stated that it  
20 believes that ABA is educational and is not a covered “health care service,” and that the  
21 DMHC has been improperly referring ABA denials to IMR rather than affirming Kaiser’s  
22 claim that ABA is not a covered benefit:

23 “[M]embers with ASD [autism spectrum disorder] may need varying types of  
24 special or unique education to acquire the skills and knowledge that members  
25 without ASD acquire from social interactions and in school. All children,  
26 including children with ASD, benefit from the acquisition of skills and  
27 knowledge — members with ASD may need to be taught those skills and  
28 acquire that knowledge differently. We do not arrange for, pay for, or

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27 <sup>4</sup>These IMR decisions have been redacted to protect the identities of the patients and  
28 their families.

1 reimburse for the many teaching methods currently available to teach these  
2 members, *including applied behavioral analysis* and discrete trial training, or  
for other teaching methods offered by various providers.”

3 “*The [DMHC] has expressed a view that the mental health parity statute in*  
4 *California requires health care service plans to cover all medically necessary*  
5 *service for ASD children, and that because there may be potential benefit from*  
6 *ABA, it is therefore medically necessary.* As a result, the [DMHC] has  
7 forwarded to IMR requests for services that have not traditionally been viewed  
8 as health care services. In so doing, the [DMHC] has implicitly determined  
9 that these are covered services, but has not articulated clear standards for this  
10 determination. . . . [T]he [DMHC’s] view of the parity statute and its  
11 application of medical necessity to services which are not health care services  
12 has significant implications for the allocation of responsibility between health  
13 insurance and other sectors and ultimately for the affordability of health  
14 insurance in California since this interpretation could apply to a number of  
15 educational services for a range of developmental disabilities.” (Emphasis  
16 added.)

17 Similarly, Kaiser Permanente’s Associate Executive Director was quoted in the press as  
18 stating: “IMR was intentionally set up to address individual, specific issues. We don’t think  
19 that the issue of contract can be or should be or was intended to be resolved through the  
20 [IMR] process.” A true and correct copy of this news report is attached hereto as Exhibit D.  
21 (Carolyn Johnson, “Woman fights Kaiser on autism policy,” Nov. 9, 2008, at  
22 <[http://abclocal.go.com/kgo/story?section=news/assignment\\_7&id=6493262](http://abclocal.go.com/kgo/story?section=news/assignment_7&id=6493262)> [as of May 7,  
23 2009].)

24 26. A February 12, 2009 report in the Los Angeles Daily Journal suggested that,  
25 at the request of several unspecified health plans, the DMHC had temporarily suspended the  
26 processing of IMR appeals from parents whose autistic children had been denied ABA. A  
27 true and correct copy of this article is attached hereto as Exhibit E. The article specifically  
28 states that the review of fifteen such IMR appeals was suspended in January and that the  
appeals were being held in abeyance pending the DMHC’s “re-review[ of] eligibility rules.”  
A spokesperson from the DMHC told the Daily Journal that the DMHC planned to  
“announc[e] some new guidelines or criteria in the coming weeks . . . . The [D]epartment is  
going to be looking at the legal question of how coverage issues square with current state law,  
and provide additional clarification to patients and health plans because we do have a gray  
area now.”

1           27.     In response to this article, on February 24, 2009, Petitioner and Plaintiff  
2 Consumer Watchdog sent a strongly worded letter to the DMHC reminding the Department  
3 that there is no “gray area,” and that the DMHC is legally obligated to enforce the Mental  
4 Health Parity Act, which requires plans to provide coverage for all medically necessary  
5 treatments for autism, including ABA. The letter also reminded the DMHC that it is required  
6 to timely process all IMR appeals, and that the failure to do so jeopardizes the health and  
7 safety of plan consumers. A true and correct copy of this letter is attached hereto as Exhibit  
8 F.

9           28.     Less than two weeks later, on March 9, 2009, the DMHC issued its anticipated  
10 “new guidelines or criteria” in the form of a memorandum from DMHC Deputy Director  
11 Richard D. Martin to “Licensed Full Service Health Plans and Specialized Mental Health  
12 Care Service Plans” (hereinafter referred to as the “Directive”). A true and correct copy of  
13 the Directive, which is entitled “Improving Plan Performance to Address Autism Spectrum  
14 Disorders,” is attached hereto as Exhibit G.

15           29.     As foreshadowed by the letters from the industry, and by the statement from  
16 the DMHC spokesperson, the Directive sets forth a new procedure regarding the manner in  
17 which DMHC will review appeals of plan denials of treatments for autism, stating: “The  
18 DMHC will initially make a determination whether the service being sought is a covered  
19 health care service. If that determination is made in the affirmative, then any claim that a  
20 service is either: (1) experimental or investigational; or (2) is not medically necessary to treat  
21 the patient’s condition, will be referred for IMR as required under California law.” (Exh. G.,  
22 p. 3.)

23           30.     The Directive also embellishes upon — and departs from — existing law  
24 regarding licensure. Specifically, the Directive states that (1) “Plans must assure that  
25 treatment plans are developed by qualified and licensed providers . . . .”; and (2) “Health care  
26 plans must . . . [p]rovide mental health services only through providers who are licensed or  
27 certified in accordance with applicable California law.” (Exh. G, pp. 2-3.) But there are no  
28 statutes or regulations that contain these requirements. To the contrary, state law mandates

1 that all full-service DMHC-regulated plans cover any medically necessary treatment for  
2 autism when it is provided by a licensed provider, a provider that is certified by a professional  
3 organization, or individuals who are *supervised* by a licensed or certified provider.

4 31. The March 9 Directive is also inconsistent with the way that Respondents and  
5 Defendants have previously handled licensure issues. As reflected in the two IMR decisions  
6 from June and September 2008 that are attached hereto as a part of Exhibit A, consumer  
7 appeals of ABA denials based on a plan's claim that an ABA provider was not adequately  
8 licensed have historically been resolved through the IMR rather than the grievance system.  
9 Both of these IMR decisions also make clear that ABA is medically necessary for the  
10 treatment of autism, and that the therapy is properly provided so long as the supervisor is  
11 appropriately certified or licensed. As the independent physician, who is board certified in  
12 pediatrics and neurology, and who is a professor of both at an academic medical institution,  
13 explained in the September 2008 IMR decision:

14 The medical literature confirms the success of ABA, both after several years  
15 of therapy and after long-term follow-up. In this instance, the therapy is  
16 being supervised by qualified and licensed psychologists and social workers.  
17 The utilization of trainees in the medical arts has a long tradition of  
18 encouraging and depending on unlicensed personnel. Medical students and  
19 interns are supervised, but practice unlicensed medicine. Post-graduate  
20 psychologists and family therapists all need to spend three years of supervised  
21 clinical practice to be able to sit for the licensing examination. Thus,  
22 supervised therapy by a licensed therapist is licensed therapy by proxy. . . .  
23 [T]he [ABA] therapy at issue was and is medically necessary for the treatment  
24 of the patient's [autism]. The Health Plan's denial should be overturned.  
25 (Exh. A, Bates p. 000118.)

26 32. The March 9 Directive concludes by acknowledging that the policies that it  
27 purports to adopt require a rulemaking pursuant to the Administrative Procedures Act  
28 ("APA"). (Exh. G, p. 3.)

31 33. Upon receipt of the Directive, on March 11, 2009, Petitioner and Plaintiff  
32 Consumer Watchdog wrote to the DMHC to explain that the Directive is an illegal  
33 underground regulation and demanded that it be immediately withdrawn. A true and correct  
34 copy of this letter is attached hereto as Exhibit H.

35 34. Rather than withdraw the Directive, on March 23, 2009, the General Counsel



1 for the DMHC responded by letter. The DMHC’s response letter claims that the Directive  
2 is nothing more than a “reiteration of existing law,” but the letter fails to cite either statutes  
3 or regulations detailing the many new requirements and procedures contained in the  
4 Directive. With respect to the new “coverage first” procedure for reviewing appeals of  
5 autism treatment denials, the letter states only: “[R]eferences to the grievance and  
6 independent medical review process are well supported in existing California statutes and  
7 regulations.” The letter nowhere acknowledges that these allegedly “well supported”  
8 “references to the grievance and [IMR] process” at the very least constitute *interpretations*  
9 of the law as applied to treatment for autistic enrollees — the very definition of an  
10 underground regulation. (Gov. Code, § 11342.600 [“‘Regulation’ means every rule,  
11 regulation order, or standard of general application . . . adopted by an state agency to  
12 implement, *interpret*, or make specific the law enforced or administered by it, or to govern  
13 its procedure.”] (emphasis added).)

14         35. Similarly, with respect to the Directive’s imposition of a new licensure  
15 requirement, the DMHC response letter claims that the March 9 Directive did little more than  
16 “mention[] the duty owed by plans to ensure that patients with [autism] are treated through  
17 licensed providers as is required under the existing regulations and is required for all other  
18 medical conditions.” But the text of the Directive contains more than simply a restatement  
19 of existing law. To the contrary, the Directive flatly contradicts existing law, which permits  
20 ABA to be either directly provided *or supervised* by a professional who is licensed to practice  
21 or is certified by an appropriate professional organization, such as BACB, the national  
22 organization that certifies behavior analysis practitioners. (See, e.g., Cal. Admin. Code, tit.  
23 28, §§ 1300.67(a)(1) [“The plan may also include, when provided by the plan, consultation  
24 and referral . . . to other health professionals who are defined as dentists, nurses, podiatrists,  
25 optometrists, physician’s assistants, clinical psychologists, social workers, pharmacists,  
26 nutritionists, occupational therapists, physical therapists and other professionals engaged in  
27 the delivery of health services who are licensed to practice, are certified, or practice under  
28 authority of the plan, a medical group, or individual practice association or other authority

1 authorized by applicable California law.”]; & (c) [requiring delivery of, among other things,  
2 services provided at “any appropriate facility which is not required by law to be licensed, if  
3 the professionals delivering such services are licensed to practice, are certified, or practice  
4 under the authority of the plan, a medical group, or individual practice association or other  
5 authority authorized by applicable California law”].) A true and correct copy of this DMHC  
6 response letter is attached hereto as Exhibit I.

7         36. Following this exchange of correspondence with the DMHC, Petitioner and  
8 Plaintiff Consumer Watchdog met with Braulio Montesino, General Counsel at the DMHC,  
9 on April 23, 2009, to discuss its concerns regarding the Directive, including its concerns  
10 regarding the DMHC’s new policy of treating all appeals from denials of ABA as raising  
11 coverage issues in the first instance, and the DMHC’s corresponding practice of funneling  
12 all such appeals through the grievance system rather than through the IMR system. At this  
13 meeting, Petitioner and Plaintiff Consumer Watchdog again requested that the DMHC rescind  
14 the Directive.

15         37. Following this meeting, on May 5, 2009, the DMHC informed Petitioner and  
16 Plaintiff Consumer Watchdog that the March 9 Directive would not be withdrawn.

17         38. Petitioners and Plaintiffs are informed and believe, and on that basis allege, that  
18 since March 9, 2009, the DMHC has been implementing its Directive by routing all appeals  
19 of ABA service denials through the grievance system and by affirming plan decisions to deny  
20 ABA on coverage grounds. The DMHC’s actions are a clear violation of the Mental Health  
21 Parity Act and other provisions of state law including but not limited to Health and Safety  
22 Code section 1367, subdivision (i), and section 1345 (b), as well as section 1300.67 of title  
23 28 of the California Code of Regulations.

24         39. Indeed, a May 11, 2009 article in the Los Angeles Daily Journal confirmed that  
25 at least five families were recently sent letters affirming plan denials of ABA for their autistic  
26 children on coverage grounds through the DMHC’s grievance system. A true and correct  
27 copy of this article is attached hereto as Exhibit J. Petitioners and Plaintiffs have been able  
28 to obtain copies of two such denials, true and correct copies of which are attached hereto as

1 Exhibit K.<sup>5</sup> These two denials illustrate the grab bag of strategies employed by the DMHC  
2 to affirm the industry’s efforts to find ways to avoid paying for ABA on spurious coverage  
3 grounds. These strategies include: (a) supporting plan claims that ABA is educational and  
4 is therefore not a “health care service”; (b) asserting that ABA falls under the exclusion in  
5 many health plans for “custodial care”; and (c) claiming that the individual delivering the  
6 particular ABA services at issue is not appropriately licensed or certified. All of these alleged  
7 grounds for denying ABA have no basis in law, and violate the Mental Health Parity Act.

8 40. Petitioners and Plaintiffs have been unable to obtain copies of any additional  
9 denials of ABA treatment generated through the DMHC’s grievance system because the  
10 DMHC has also failed to comply with a Public Records Act Request (“PRA”) made by  
11 Consumer Watchdog.

12 41. On April 10, 2009, pursuant to the PRA, Government Code section 6250 et  
13 seq., Petitioner and Plaintiff Consumer Watchdog requested that the DMHC produce copies  
14 of the following public records (the “April 10 PRA Request”):

15 a. All “summar[ies] of [Department] findings” and information about any  
16 corrective actions taken regarding the final disposition of ABA grievances, including  
17 documents showing the reasons why the DMHC found the plan to be, or not to be, in  
18 compliance with any applicable laws, regulations, or orders of the Director regarding  
19 ABA treatments pursuant to Health and Safety Code section 1368, subdivisions  
20 (b)(5)(A)-(C), from January 1, 2000 to the present.

21 b. Copies of all IMR appeals regarding ABA treatments pursuant to Health  
22 and Safety Code section 1374.30, subdivision (m), and copies of the corresponding  
23 IMR decisions from January 1, 2000 to the present.

24 c. Any consumer call logs, databases, or complaint analyses or summaries  
25 of consumer complaints to the California HMO Help Center (1-888-466-2219)  
26

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27 <sup>5</sup> These grievance decisions have been redacted to protect the identities of the patients  
28 and their families.

1 regarding health plan denials of ABA on the grounds that ABA is not a covered  
2 benefit or is not medically necessary, including documents showing how the  
3 complaints were resolved from January 1, 2000 to the present.

4 d. Any records of consumer grievances regarding denials of ABA  
5 treatment in which the Department concluded that the grievance was eligible for  
6 review under the IMR system pursuant to Health and Safety Code section 1368,  
7 subdivision (b)(3), and documents showing the outcome of those IMR decisions from  
8 January 1, 2000 to the present.

9 e. DMHC comment letters issued between January 1, 2001 and December  
10 31, 2002 regarding coverage exclusions in, and revisions to, Evidence of Coverage  
11 (“EOC”) and/or subscriber contracts.

12 f. DMHC comment letters issued between January 1, 2001 and December  
13 31, 2002 regarding coverage exclusions in, and revisions to, EOC or subscriber  
14 contracts in connection with health plan compliance with the Mental Healthy Parity  
15 Act.

16 A true and correct copy of the April 10 PRA Request is attached hereto as Exhibit L.

17 42. Although the DMHC produced all formal IMR decisions regarding ABA  
18 treatment, it readily acknowledges that it is in possession, custody, and control of many other  
19 non-privileged, non-exempt public records responsive to the April 10 Request *that it has*  
20 *failed to produce*. The DMHC made clear in a May 26, 2009 telephone conversation with  
21 Consumer Watchdog that the Department has no intention of conducting any further reviews  
22 of its files to identify or produce any additional responsive documents, which Consumer  
23 Watchdog confirmed via letter dated June 16, 2009.

24 43. The DMHC violated the PRA by failing to produce all non-privileged, non-  
25 exempt public records requested by Petitioner and Plaintiff Consumer Watchdog in its April  
26 10 PRA Request.

27 44. The documents requested by Petitioner and Plaintiff Consumer Watchdog in  
28 its April 10 PRA Request are necessary to determine whether Respondents and Defendants

1 are properly enforcing the Mental Health Parity Act by requiring plans under their authority  
2 to cover any medically necessary treatment for autism, including ABA. In addition, the  
3 records will reveal whether Respondents and Defendants are properly administering their  
4 grievance system, and whether they are carrying out their general obligation to safeguard “the  
5 execution of the laws of this state relating to health care service plans and the health care  
6 service plan business including, but not limited to, those laws directing the [D]epartment to  
7 ensure that health care service plans provide enrollees with access to quality health care  
8 services and protect and promote the interests of enrollees.” (Health & Saf. Code, § 1341,  
9 subd. (a).) The withheld information is therefore of significant interest to Petitioners and  
10 Plaintiffs, to Consume Watchdog’s members, and to all California health care consumers.

11 **FIRST CAUSE OF ACTION**

12 (Violation of the Mental Health Parity Act, Health & Saf. Code, § 1374.72  
13 and the Knox-Keene Health Care Service Plan Act of 1975, as amended,  
14 Health & Saf. Code, § 1340 et seq. and their implementing regulations  
15 by all Petitioners and Plaintiffs against all Respondents and Defendants)

16 (Writ of Mandate, Code Civ. Proc., §1085)

17 45. Petitioners and Plaintiffs re-allege and incorporate by reference the allegations  
18 set forth in paragraphs 1 through 44 above.

19 46. As noted above, under the Mental Health Parity Act, Health and Safety Code  
20 section 1374.72, and the Knox-Keene Act, and their implementing regulations, all full-service  
21 health plans regulated by Respondents and Defendants must provide coverage for any  
22 medically necessary treatment for autism, including ABA, when that treatment is provided  
23 by a licensed provider, a provider that is certified by a professional organization, or  
24 individuals who are supervised by a licensed or certified provider.

25 47. In failing to compel the full-service plans that they regulate to provide  
26 coverage for ABA when ABA is both medically necessary and the ABA treatment will be or  
27 has been provided or supervised by a licensed or certified professional, Respondents and  
28 Defendants have violated, and will continue to violate, their clear, present, and mandatory  
duty to enforce and administer all applicable state laws including, *inter alia*, the Mental

1 Health Parity Act and the Knox-Keene Act.

2 48. Specifically, and as alleged above, under the Mental Health Parity Act and the  
3 Knox-Keene Act, in all cases in which an enrollee of a DMHC-regulated full-service health  
4 plan has filed an appeal that is treated by the DMHC as a grievance pursuant to Health and  
5 Safety Code section 1368, Respondents and Defendants have a clear, present, and ministerial  
6 duty to “order” any plan that has denied coverage for ABA to an autistic enrollee — where  
7 ABA was both medically necessary and was to have been provided or supervised by a  
8 licensed or certified professional — to either “promptly offer and provide” ABA to the  
9 enrollee, or to “promptly reimburse” the enrollee for “any reasonable costs” associated with  
10 obtaining ABA, whichever is applicable. (Health & Saf. Code, § 1368, subd. (6)(A)-(B).)

11 49. A writ of mandate may be issued under Code of Civil Procedure section 1085  
12 “to compel the performance of an act which the law specifically enjoins, as a duty resulting  
13 from an office.”

14 50. If not otherwise directed by this Court’s issuance of the requested writ of  
15 mandate, Respondents and Defendants will continue to violate their clear, present, and  
16 ministerial duty to compel the health plans that they regulate to cover ABA for autistic  
17 children, as described above. Issuance of the requested writ of mandate is therefore necessary  
18 to prevent Respondents and Defendants from continuing to violate California law and to  
19 ensure that autistic children receive critically needed ABA therapy. And time is of the  
20 essence in providing for the delivery of ABA, as the medical evidence conclusively  
21 demonstrates that early and consistent ABA therapy is most effective.

22 51. Petitioner and Plaintiff Consumer Watchdog has a beneficial interest in the  
23 issuance of a writ of mandate, apart from the public at large, in that Consumer Watchdog is  
24 a nonprofit consumer advocacy organization that has served as an advocate on behalf of its  
25 members and all health care consumers before the DMHC, the Legislature, and the courts for  
26 over a decade, including as detailed in paragraphs 5(a)-(i) and as specifically incorporated  
27 herein by this reference.

28 52. Petitioner and Plaintiff Dr. Anshu Batra has a beneficial interest in the issuance

1 of a writ of mandate, apart from the public at large, in that Dr. Batra is a developmental  
2 pediatrician who has a personal and professional interest in ensuring that her patients receive  
3 ABA — a proven, effective treatment for autism. Dr. Batra routinely treats autistic children  
4 that are enrolled in DMHC-regulated health plans and she frequently prescribes ABA to her  
5 autistic patients as a medically necessary treatment for autism.

6 53. Petitioners and Plaintiffs have no plain, speedy, and adequate remedy in the  
7 ordinary course of law, in that no damages or other legal remedy could compensate them or  
8 the members of Consumer Watchdog for the harm that they and the thousands of autistic  
9 children, parents, and health care consumers that they represent will suffer if Respondents  
10 and Defendants continue to evade their clear, present, and ministerial duty to compel full-  
11 service health plans to provide coverage for ABA whenever ABA is both medically necessary  
12 and is provided by a licensed provider, a provider that is certified by a professional  
13 organization, or individuals who are supervised by a licensed or certified provider.

14 **SECOND CAUSE OF ACTION**

15 (Violation of the Mental Health Parity Act, Health & Saf. Code, § 1374.72  
16 and the Knox-Keene Health Care Service Plan Act of 1975, as amended,  
17 Health & Saf. Code, §§ 1340 et seq. and their implementing regulations  
18 by all Petitioners and Plaintiffs against all Respondents and Defendants)

19 (Injunctive Relief, Code Civ. Proc., §§ 525 & 526)

20 54. Petitioners and Plaintiffs re-allege and incorporate by reference the allegations  
21 set forth in paragraphs 1 through 53 above.

22 55. By their actions set forth above, Respondents and Defendants have  
23 demonstrated a policy and practice since the issuance of the DMHC’s March 9, 2009  
24 Directive, to refuse to comply with the aforementioned provisions of the Health and Safety  
25 Code and their corresponding regulations. Specifically, Petitioners and Plaintiffs are  
26 informed and believe, and on that basis allege, that Respondents and Defendants have failed,  
27 in all cases in which an enrollee of a DMHC-regulated full-service health plan has filed an  
28 appeal that is treated by the DMHC as a grievance pursuant to Health and Safety Code  
section 1368, to carry out their clear, present, and ministerial duty to “order” any plan that has

1 denied ABA to an autistic enrollee, where ABA is both medically necessary and was or will  
2 be provided by a licensed provider, a provider that is certified by a professional organization,  
3 or individuals who are supervised by a licensed or certified provider, to either “promptly offer  
4 and provide” ABA to the enrollee, or to “promptly reimburse” the enrollee for “any  
5 reasonable costs” associated with obtaining ABA, whichever is applicable. (Health & Saf.  
6 Code, § 1368, subd. (6)(A)-(B).) In failing to adhere to this mandatory legal obligation,  
7 Respondents and Defendants have violated, and will continue to violate, their duty to enforce  
8 and comply with the Mental Health Parity Act, the Knox-Keene Act, and their implementing  
9 regulations.

10         56. Respondents and Defendants’ refusal to comply with the aforementioned  
11 provisions of California law has caused and threatens to cause Petitioners and Plaintiffs, the  
12 more than 75,000 members of Consumer Watchdog, all children with autism and their  
13 parents, and all California health care consumers irreparable and substantial harm. Autistic  
14 children and their families have been denied or have received delayed access to  
15 critically-needed ABA treatment as a result of the policy or practice of Respondents and  
16 Defendants. And time is of the essence in providing for the delivery of ABA, as the medical  
17 evidence conclusively demonstrates that early and consistent ABA therapy is most effective.  
18 No amount of monetary damages or other legal remedy can adequately compensate  
19 Petitioners and Plaintiffs and those that they represent for the irreparable harm that they and  
20 the members of Consumer Watchdog, as well as all children with autism and their parents,  
21 and all California health care consumers, have suffered and will continue to suffer from the  
22 violations of law described herein.

23         57. Petitioners and Plaintiffs have no plain, speedy, and adequate remedy at law,  
24 in that unless Respondents and Defendants are enjoined by this Court from continuing to  
25 violate their duty to enforce and comply with the Mental Health Parity Act, the Knox-Keene  
26 Act, and their implementing regulations in administering the grievance system, Respondents  
27 and Defendants will continue to deny autistic enrollees and their families their right to  
28 coverage for ABA from all DMHC-regulated full-service health plans, whenever ABA is



1 both medically necessary and is provided by a licensed provider, a provider that is certified  
2 by a professional organization, or individuals who are supervised by a licensed or certified  
3 provider.

4 **THIRD CAUSE OF ACTION**

5 (Violation of the Mental Health Parity Act, Health & Saf. Code, § 1374.72  
6 and the Knox-Keene Health Care Service Plan Act of 1975, as amended,  
7 Health & Saf. Code, § 1340 et seq. and their implementing regulations  
8 by all Petitioners and Plaintiffs against all Respondents and Defendants)

9 (Declaratory Relief, Code Civ. Proc., § 1060)

10 58. Petitioners and Plaintiffs re-allege and incorporate by reference the allegations  
11 set forth in paragraphs 1 through 57 above.

12 59. An actual controversy has arisen and now exists between Petitioners and  
13 Plaintiffs and Respondents and Defendants concerning the obligations and duties of  
14 Respondents and Defendants under the Mental Health Parity Act, the Knox-Keene Act, and  
15 their implementing regulations. As set forth more fully above, Petitioners and Plaintiffs  
16 contend that Respondents and Defendants have a legal duty to enforce the Mental Health  
17 Parity Act, the Knox-Keene Act, and their implementing regulations, which require that all  
18 full-service health plans regulated by Respondents and Defendants provide coverage for any  
19 medically necessary treatment for autism, including ABA, when the treatment is provided by  
20 a licensed provider, a provider that is certified by a professional organization, or individuals  
21 who are supervised by a licensed or certified provider. Petitioners and Plaintiffs are informed  
22 and believe, and on that basis allege, that Respondents and Defendants contend in all respects  
23 to the contrary. A judicial determination and declaration as to the legal obligations of  
24 Respondents and Defendants is therefore necessary and appropriate in order to determine the  
25 duties of Respondents and Defendants and the rights of the health care consumers that  
26 Petitioners and Plaintiffs represent.

1 **FOURTH CAUSE OF ACTION**

2 (Violation of Administrative Procedures Act, Gov. Code, § 11340 et seq.  
3 by all Petitioners and Plaintiffs against all Respondents and Defendants)

4 (Writ of Mandate, Code Civ. Proc., § 1085)

5 60. Petitioners and Plaintiffs re-allege and incorporate by reference the allegations  
6 set forth in paragraphs 1 through 59 above.

7 61. Respondents and Defendants have a clear, present, and ministerial duty to  
8 comply with the APA, Government Code section 11340 et seq., which provides, *inter alia*,  
9 that “[n]o state agency shall issue, utilize, enforce, or attempt to enforce any guideline,  
10 criterion, bulletin, manual, instruction, order, standard of general application, or other rule,  
11 which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin,  
12 manual, instruction, order, standard of general application, or other rule has been adopted as  
13 a regulation and filed with the Secretary of State pursuant to this chapter.” (Gov. Code,  
14 § 11340.5, subd. (a).) Government Code section 11340.600, in turn, broadly defines a  
15 “regulation” as a “rule, regulation, order, or standard of general application or the  
16 amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any  
17 state agency to implement, interpret, or make specific the law enforced or administered by  
18 it, or to govern its procedure.” (*Id.* at § 11340.600; see also *Tidewater Marine Western, Inc.*  
19 *v. Bradshaw* (1996) 14 Cal.4th 557, 571 [describing regulation definition as “very broad[.]”].)

20 62. Courts apply the following two-part test set forth by the California Supreme  
21 Court in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, to determine  
22 whether an agency rule that was not adopted pursuant to the APA amounts to an underground  
23 regulation: “First the agency must intend its rule to apply generally, rather than to a specific  
24 case[, and s]econd, the rule must ‘implement, interpret, or make specific the law enforced or  
25 administered by [the agency], or . . . govern [the agency’s] procedure.’” (*Tidewater*, 14  
26 Cal.4th at p. 571 [quoting Gov. Code, § 11342, subd. (g)].) If the rule constitutes a  
27 “regulation,” and there is no express statutory exemption excusing the agency from  
28 complying with the APA’s strict procedural requirements, then the underground regulation

1 is invalid and cannot be enforced. (14 Cal.4th at p. 576.)

2       63. As set forth above, on March 9, 2009, the DMHC issued a memorandum from  
3 DMHC Deputy Director Richard D. Martin to “Licensed Full Service Health Plans and  
4 Specialized Mental Health Care Service Plans,” which is entitled “Improving Plan  
5 Performance to Address Autism Spectrum Disorders.” (See Exh. G.)

6       64. The Directive was not issued pursuant to the strict public notice and other  
7 requirements of the APA.

8       65. The Directive was intended to apply generally rather than to a specific case.

9       66. Petitioners and Plaintiffs are informed and believe, and on that basis allege, that  
10 Respondents and Defendants have utilized, enforced, and attempted to enforce the Directive  
11 since its issuance, and that the Directive has affected policy, practice, or procedure within the  
12 DMHC.

13       67. The Directive constitutes an underground regulation in that it applies generally,  
14 and it implements, interprets, or makes specific the law enforced or administered by  
15 Respondents and Defendants, or governs the procedure of Respondents and Defendants.

16       68. There is no express statutory exemption excusing Respondents and Defendants  
17 from complying with the APA’s strict procedural requirements with respect to the Directive.

18       69. A writ of mandate may be issued under Code of Civil Procedure section 1085  
19 “to compel the performance of an act which the law specifically enjoins, as a duty resulting  
20 from an office.”

21       70. If not otherwise directed by this Court’s issuance of the requested writ of  
22 mandate, Respondents and Defendants will continue to violate their clear, present, and  
23 ministerial duty to comply with the APA by continuing to utilize, enforce, or attempt to  
24 enforce the March 9 Directive, which constitutes an illegal underground regulation. Issuance  
25 of the requested writ of mandate is therefore necessary to prevent Respondents and  
26 Defendants from continuing to violate California law and to ensure that the March 9  
27 Directive is not used by Respondents and Defendants to deny critically needed ABA therapy  
28 to autistic children and their families.

1           71.     Petitioner and Plaintiff Consumer Watchdog has a beneficial interest in the  
2 issuance of a writ of mandate, apart from the public at large, in that Consumer Watchdog is  
3 a non-profit consumer advocacy organization that has served as an advocate on behalf of its  
4 members and health care consumers before the DMHC, the Legislature, and the courts for  
5 over a decade, including as detailed in paragraphs 5(a)-(i), above, and as specifically  
6 incorporated by reference herein. Petitioner and Plaintiff Consumer Watchdog has also been  
7 advocating on behalf of its members and health care consumers in corresponding and meeting  
8 with the DMHC regarding this illegal underground regulation since the possibility of its  
9 issuance was first reported in the press earlier this year, as set forth in detail above, and as  
10 specifically incorporated by reference herein.

11           72.     Petitioner and Plaintiff Dr. Anshu Batra has a beneficial interest in the issuance  
12 of a writ of mandate, apart from the public at large, in that Dr. Batra is a developmental  
13 pediatrician who has a personal and professional interest in ensuring that her patients receive  
14 ABA — a proven, effective treatment for autism. Dr. Batra routinely treats autistic children  
15 that are enrolled in DMHC-regulated health plans and she frequently prescribes ABA to her  
16 autistic patients as a medically necessary treatment for autism.

17           73.     Petitioners and Plaintiffs have no plain, speedy, and adequate remedy in the  
18 ordinary course of law, in that no damages or other legal remedy could compensate them or  
19 the members of Consumer Watchdog for the harm that they and the thousands of autistic  
20 children, parents, and health care consumers that it represents will suffer if Respondents and  
21 Defendants continue to evade their clear, present, and ministerial duty to comply with the  
22 APA and continue to enforce the March 9 Directive, which constitutes an illegal underground  
23 regulation.

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1 **FIFTH CAUSE OF ACTION**

2 (Violation of Administrative Procedures Act, Gov. Code, § 11340 et seq.  
3 by all Petitioners and Plaintiffs against all Respondents and Defendants)

4 (Declaratory Relief, Code Civ. Proc., § 1060; Gov. Code, § 11350)

5 74. Petitioners and Plaintiffs re-allege and incorporate by reference the allegations  
6 set forth in paragraphs 1 through 73 above.

7 75. An actual controversy has arisen and now exists between Petitioners and  
8 Plaintiffs and Respondents and Defendants concerning the obligations and duties of  
9 Respondents and Defendants under the APA. As set forth more fully above, Petitioners and  
10 Plaintiffs contend that the March 9 Directive constitutes an illegal underground regulation  
11 that the DMHC has issued, utilized, enforced, or attempted to enforce in violation of the  
12 APA, and Petitioners and Plaintiffs are informed and believe, and on that basis allege, that  
13 Respondents and Defendants contend in all respects to the contrary. A judicial determination  
14 and declaration as to the legal obligations of Respondents and Defendants is therefore  
15 necessary and appropriate in order to determine the duties of the Respondents and Defendants  
16 and the rights of the health care consumers that Petitioners and Plaintiffs represent.

17 **SIXTH CAUSE OF ACTION**

18 (Violation of Administrative Procedures Act, Gov. Code, § 11340 et seq.  
19 by all Petitioners and Plaintiffs against all Respondents and Defendants)

20 (Injunctive Relief, Code Civ. Proc., §§ 525 & 526)

21 76. Petitioners and Plaintiffs re-allege and incorporate by reference the allegations  
22 set forth in paragraphs 1 through 75 above.

23 77. By their actions set forth above, Respondents and Defendants have  
24 demonstrated a policy and practice of enforcing the DMHC’s March 9, 2009 Directive, which  
25 is an illegal underground regulation that was issued in direct violation of the APA as set forth  
26 above. Petitioners and Plaintiffs are informed and believe, and on that basis allege, that  
27 Respondents and Defendants will continue to enforce the Directive unless enjoined from  
28 doing so by an order of this Court.

1 78. Respondents’ and Defendants’ refusal to comply with the aforementioned  
2 provisions of California law has caused and threatens to cause Petitioners and Plaintiffs and  
3 the members of Consumer Watchdog, as well as all children with autism and their parents,  
4 and all California health care consumers irreparable and substantial harm. Autistic children  
5 and their families have been denied or have received delayed access to critically-needed ABA  
6 treatment as a result. And time is of the essence in providing for the delivery of ABA, as the  
7 medical evidence conclusively demonstrates that early and consistent ABA therapy is most  
8 effective. No amount of monetary damages or other legal remedy can adequately compensate  
9 Petitioners and Plaintiffs or those that they represent for the irreparable harm that they have  
10 suffered and will continue to suffer from the violations of law described herein.

11 79. Petitioners and Plaintiffs have no plain, speedy, and adequate remedy at law,  
12 in that unless Respondents and Defendants are enjoined by this Court from enforcing the  
13 March 9 Directive, Respondents and Defendants will continue to violate the APA, and their  
14 duty to enforce and comply with the Mental Health Parity Act, and the Knox-Keene Act by  
15 continuing to enforce their illegal underground regulation, which will result in the continued  
16 denial of critically needed ABA treatment for autistic enrollees and their families.

17 **SEVENTH CAUSE OF ACTION**

18 (Violation of the California Public Records Act, Gov. Code § 6250 et seq.  
19 by Petitioner and Plaintiff against all Respondents and Defendants)

20 (Writ of Mandate, Code Civ. Proc., § 1085; Gov. Code, §§ 6250 et seq.)

21 80. Petitioner and Plaintiff re-alleges and incorporates by reference the allegations  
22 set forth in paragraphs 1 through 79 above.

23 81. In enacting the Public Records Act, Government Code section 6250 et seq., the  
24 Legislature recognized that “access to information concerning the conduct of the people’s  
25 business is a fundamental and necessary right of every person in this state.” (Gov. Code,  
26 § 6250.)

27 82. The Legislature also recognized, through the passage of the PRA, that it is  
28 essential that the requested public records be provided in a timely fashion by mandating that

1 they be provided “promptly” (*id.* at § 6253, subd. (b)), and by specifically requiring that the  
2 “times for responsive pleadings and for hearings” in PRA cases be set “with the object of  
3 securing a decision as to these matters at the earliest possible time” (*id.* at § 6258).

4 83. In addition, in establishing the DMHC, the Legislature declared that “[t]he  
5 [DMHC] [D]irector, as a general rule, shall publish or make available for public inspection  
6 any information filed with or obtained by the [D]epartment.” (Health & Saf. Code, §1341.5,  
7 subd. (a).)

8 84. Government Code section 6258 provides that “[a]ny person may institute  
9 proceedings for injunctive or declarative relief or writ of mandate in any court of competent  
10 jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or  
11 class of public records under this chapter.”

12 85. As set forth above, on April 10, 2009, Petitioner and Plaintiff Consumer  
13 Watchdog requested copies of particular public records from the DMHC pursuant to the  
14 PRA. A copy of this Request is attached hereto as Exhibit L.

15 86. Although the DMHC produced all formal IMR decisions regarding ABA  
16 treatment, and it readily acknowledges that it is in possession, custody, and control of many  
17 other responsive documents, it has failed to produce any other documents responsive to the  
18 April 10 Request. The DMHC made clear in a May 26, 2009 telephone conversation with  
19 Consumer Watchdog that the Department has no intention of conducting any further reviews  
20 of its files to identify or produce any additional responsive documents, which Consumer  
21 Watchdog confirmed by letter dated June 16, 2009.

22 87. The DMHC violated the PRA by failing to produce all non-privileged, non-  
23 exempted public records requested by Petitioner and Plaintiff Consumer Watchdog in its  
24 April 10 Request.

25 88. The documents requested by Petitioner and Plaintiff Consumer Watchdog in  
26 its April 10 PRA Request are necessary to determine whether Respondents and Defendants  
27 are properly enforcing the Mental Health Parity Act by requiring plans under their authority  
28 to provide all medically necessary treatment for autism, including ABA. In addition, the

1 records will reveal whether Respondents and Defendants are properly administering their  
2 grievance system, and whether they are carrying out their general obligation to safeguard “the  
3 execution of the laws of this state relating to health care service plans and the health care  
4 service plan business including, but not limited to, those laws directing the [D]epartment to  
5 ensure that health care service plans provide enrollees with access to quality health care  
6 services and protect and promote the interests of enrollees.” (Health & Saf. Code, § 1341,  
7 subd. (a).) The withheld information is therefore of significant interest to Petitioners and  
8 Plaintiffs, to the members of Consumer Watchdog, and to all California health care  
9 consumers.

10           89.     Respondents and Defendants have a clear, present, and ministerial duty under  
11 the Public Records Act, including, *inter alia*, Government Code section 6253, to promptly  
12 search for and produce all non-privileged, non-exempted public records requested in the  
13 April 10 Request.

14           90.     Petitioner and Plaintiff Consumer Watchdog has a beneficial interest in the  
15 issuance of a writ of mandate, apart from the public at large, in that Consumer Watchdog is  
16 a non-profit consumer advocacy organization that requested the documents at issue here to  
17 make public Respondents’ and Defendants’ failure to ensure that the plans that they regulate  
18 cover all medically necessary treatments for their autistic enrollees, including ABA.

19           91.     Petitioner and Plaintiff Consumer Watchdog has no plain, speedy, and adequate  
20 remedy in the ordinary course of law, in that no damages or other legal remedy could  
21 compensate it and its members for the harm that they and all California health care consumers  
22 will suffer if Respondents and Defendants are not compelled to immediately produce and  
23 make public the requested documents.

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1 **PRAYER FOR RELIEF**

2 WHEREFORE, Petitioners and Plaintiffs pray for judgment as follows:

3 1. That this Court issue a peremptory writ of mandate commanding Respondents  
4 and Defendants to do the following:

5 a. In response to any enrollee complaint or grievance regarding a health  
6 plan’s decision to deny ABA treatment to an autistic enrollee on the ground that it is  
7 not a covered benefit, Respondents and Defendants shall “order” the plan — where  
8 ABA is both medically necessary and is provided by a licensed provider, a provider  
9 that is certified by a professional organization, or individuals who are supervised by  
10 a licensed or certified provider — to either “promptly offer and provide” ABA to the  
11 enrollee, or to “promptly reimburse” the enrollee for “any reasonable costs”  
12 associated with obtaining ABA, whichever is applicable. (Health & Saf. Code,  
13 § 1368, subd. (6)(A)-(B).)

14 b. Immediately cease implementing, utilizing, enforcing, or attempting to  
15 enforce the March 9, 2009 memorandum from DMHC Deputy Director Richard D.  
16 Martin to “Licensed Full Service Health Plans and Specialized Mental Health Care  
17 Service Plans,” which is entitled “Improving Plan Performance to Address Autism  
18 Spectrum Disorders,” and is attached hereto as Exhibit G.

19 c. Immediately produce copies of all non-privileged, non-exempted public  
20 records requested in Consumer Watchdog’s April 10 Request.

21 2. That this Court issue an injunction compelling Respondents and Defendants  
22 to do the following:

23 a. In response to any enrollee complaint or grievance regarding a health  
24 plan’s decision to deny ABA treatment to an autistic enrollee on the ground that it is  
25 not a covered benefit, Respondents and Defendants shall “order” the plan — where  
26 ABA is both medically necessary and is provided by a licensed provider, a provider  
27 that is certified by a professional organization, or individuals who are supervised by  
28 a licensed or certified provider — to either “promptly offer and provide” ABA to the

1 enrollee, or to “promptly reimburse” the enrollee for “any reasonable costs”  
2 associated with obtaining ABA, whichever is applicable. (Health & Saf. Code,  
3 § 1368, subd. (6)(A)-(B).)

4 b. Immediately cease implementing, utilizing, enforcing, or attempting to  
5 enforce the March 9, 2009 memorandum from DMHC Deputy Director Richard D.  
6 Martin to “Licensed Full Service Health Plans and Specialized Mental Health Care  
7 Service Plans,” which is entitled “Improving Plan Performance to Address Autism  
8 Spectrum Disorders,” and is attached hereto as Exhibit G.

9 3. That this Court declare the following:

10 a. Respondents and Defendants have a legal duty to enforce the Mental  
11 Health Parity Act and the Knox-Keene Act to require that health plans shall provide  
12 coverage for ABA when both medically necessary and provided by a licensed  
13 provider, a provider that is certified by a professional organization, or individuals who  
14 are supervised by a licensed or certified provider.

15 b. The March 9, 2009 memorandum from DMHC Deputy Director Richard  
16 D. Martin to “Licensed Full Service Health Plans and Specialized Mental Health  
17 Service Care Providers,” which is entitled “Improving Plan Performance to Address  
18 Autism Spectrum Disorders,” and is attached hereto as Exhibit G, constitutes an  
19 illegal underground regulation, which may not be implemented, utilized, or enforced  
20 by Respondents and Defendants.

21 4. That this Court award Petitioners and Plaintiffs their costs of suit herein,  
22 including out-of-pocket expenses and reasonable attorneys’ fees under Code of Civil  
23 Procedure section 1021.5, Government Code section 6259, subdivision (d), and any other  
24 applicable statute.

25 5. That this Court grant Petitioners and Plaintiffs such other, different, or further  
26 relief as the Court may deem just and proper.

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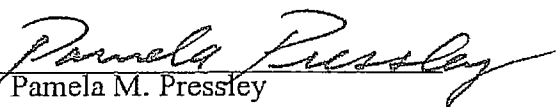
DATE: June 30, 2009

Respectfully Submitted,

STRUMWASSER & WOOCHELLP  
Fredric D. Woocher  
Aimee Dudovitz

By   
Fredric D. Woocher

CONSUMER WATCHDOG  
Harvey Rosenfield  
Pamela M. Pressley  
Todd M. Foreman

By   
Pamela M. Pressley

*Attorneys for Petitioners and Plaintiffs  
Consumer Watchdog and Dr. Anshu Batra*

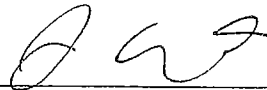
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**VERIFICATION**

I, Jamie Court, declare:

I am the President of Consumer Watchdog, Petitioner and Plaintiff in the above-entitled action. I have read the foregoing VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF and know the contents thereof to be true of my own knowledge, except as to those matters that are alleged on information and belief, and as to those matters I believe them to be true. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 29 day of June, 2009, at Los Angeles, California.



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Jamie Court  
President, Consumer Watchdog