Case No. B232338

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION THREE

COURT OF APPEAL - SECOND DIST.
FILED
JOSEPH A. LANE Clerk
V. GRAY Deputy Clerk

CONSUMER WATCHDOG, a non-profit organization,
and ANSHU BATRA, M.D., F.A.A.P.,
Petitioners/Plaintiffs, Appellants and Cross- Respondents,

vs.

CALIFORNIA DEPARTMENT OF MANAGED HEALTH CARE,
LUCINDA "CINDY" EHNES, in her official capacity as
Director of the California Department of Managed Health Care; and
DOES 1 through 20, inclusive,
Defendants/Respondents, Respondents and Cross-Appellants.

COURT OF APPEAL - SECOND DIST.
FILED
JUL 11 2011
JOSEPH A. LANE Clerk
Z. CLAYTON Deputy Clerk

On Appeal from the Judgment of the
Superior Court of the State of California, Los Angeles County
Honorable Robert H. O'Brien, Judge
Honorable James C. Chalfant, Judge

APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* CALIFORNIA ASSOCIATION FOR BEHAVIOR ANALYSIS IN SUPPORT OF POSITION OF APPELLANTS CONSUMER WATCHDOG, et al.; PROPOSED BRIEF; SUPPORTING DECLARATION OF ROBERT SCHWARTZ; SUPPORTING DECLARATION OF MATTHEW MCALEAR; PROPOSED ORDER

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APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* CALIFORNIA ASSOCIATION FOR BEHAVIOR ANALYSIS IN SUPPORT OF POSITION OF APPELLANTS CONSUMER WATCHDOG, ET AL

The California Association for Behavior Analysis (hereinafter "CalABA" or "Respondents") requests leave to file an *amicus curiae* brief in support of the position of Petitioners/Plaintiffs, Appellants and Cross-Respondents, Consumer Watchdog and Anshu Batra, M.D., F.A.A.P. (hereinafter referred to collectively as "Appellants" or "CWD") in the above-captioned matter. By letter of April 22, 2013 to the parties, the Court invited any amici to address any alternative argument, pertinent to the issues raised by this appeal, which was not briefed by the parties. In the letter, the Court set a deadline of May 31, 2013 for receipt of the amici briefs. In response to time extension requests received by potential amici, the Court, on May 29, 2013, issued an order modifying the briefing schedule to provide that all amici briefs should be filed by June 28, 2013. The Court has since granted permission for CalABa to file its amicus brief on July 1, 2013.

Interest of *Amicus Curiae*.[1] The California Association for Behavior Analysis ("CalABA"), a nonprofit scientific and professional organization founded in 1998, is the largest major association of behavior analysts in California. It is also the largest state affiliate of the Association

1 No party or counsel for a party in the pending appeal authored the proposed amicus curiae brief in whole or in part, nor made a monetary contribution intended to fund the preparation or submission of the brief. In addition, no persons or entities other than CalABA made a monetary contribution intended to fund the preparation or submission of the proposed amicus brief.

for Behavior Analysis International. CalABA works to advance behavior analysis as a science and as a profession through the support of research, education and practice. CalABA's membership includes more than 1,400 researchers, educators, clinicians, consultants, and students, approximately 52% of whom are Board Certified Behavior Analysts.

In addition to Board Certified Behavior Analysts, CalABA's membership includes practitioners from a cross-spectrum of licensed professions, including psychologists, marriage and family therapists, educational psychologists, speech-language pathologists, and social workers. Additionally, CalABA is accredited as a provider of continuing education by the following organizations:

- the Behavior Analyst Certification Board, the national certification agency for the behavior analyst profession ("BACB");
- the California Board of Behavioral Sciences which regulates marriage and family therapists, clinical social workers, educational psychologists, professional clinical counselors, and social workers ("BBS");
- the California Speech-Language Pathology and Audiology and Hearing Aid Dispensers Board which regulates speech-language pathologists, audiologists and heaing aid dispensers ("SLPAHADB"); and California Psychological Association ("CPA"), the state association for psychologists.

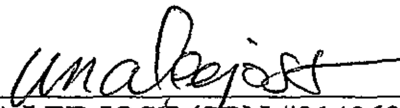
Thus, CalABA is vitally interested in the outcome in this case. CalABA has a fundamental concern with the law governing its members in this state, as well as in the precedent that may potentially affect thousands more behavior analysts across the United States and countless behavioral

health patients.

Through *amicus curiae* participation, CalABA seeks to provide an experienced and knowledgeable perspective on the impact of judicial decisions on behavioral health problems and behavioral health treatment, including Applied Behavior Analysis ("ABA") therapy for children with autism. In this case, CalABA is familiar with the questions before the Court and with the nature of the arguments made thus far. CalABA believes that its participation as *amicus curiae* will significantly aid the Court's resolution of this case. CalABA is especially well-suited to comment on behavior analysts' education, training, and competence in providing ABA therapy for individuals with autism. Thus, CalABA respectfully submits this brief to assist the Court in evaluating the trial court's decision and the arguments presented by the parties and other amici.

Dated: July 1, 2013

Respectfully submitted,



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INTRODUCTION

California health plans have made multiple excuses for their long-standing pattern of denying coverage of ABA services to those who need them.[1] One excuse given is that behavior analysts are not licensed by the State of California. The California Association for Behavior Analysis ("CalABA"), its advocates, allies and consumers of behavior analytic services have long fought this argument. Finally, a consumer advocacy non-profit, Consumer Watchdog, along with Dr. Anshu Batra, a board-certified pediatrician in developmental and behavioral pediatrics and mother of a three including a child with autism (collectively, "Appellants" or "Consumer Watchdog"), filed suit in June 2009 against California's Department of Managed Care and Lucinda "Cindy" Ehnes, in her official capacity as then-Director of the DMHC (collectively "Respondents" or "DMHC") for siding with health plans and insurance companies on this issue.

In response to this lawsuit now on appeal before this Court, the DMHC charged that behavior analysts were illegally engaged in the practice of medicine without a license. Consumer Watchdog responded vigorously to this and other charges. CalABA responded to this absurd claim by corresponding with the DMHC in December 2010. A true and correct copy of CalABA's letter to DMHC representatives is attached as Exhibit "A" to CalABA's Request for Judicial Notice filed on June 28, 2013. CalABA also, together with representatives from the Behavior

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1 *See* Cal. Dept. of Ins., Ntc. of Proposed Emergency Action Pursuant to Gov. Code § 11346.1 and Ins. Code § 12921.7 (approved April 12, 2013 by the Cal. Ofc of Admin. Law.) 18-19 <http://www.insurance.ca.gov/0100-consumers/0070-health-issues/0025-autism/#EmergencyReg> (as of June 27, 2013)(hereafter "CDI Autism Emergency Regs.").

Analysis Certification Board ("BACB®"), initiated an informal "meet and greet" with DMHC representatives in March 2012 to inform DMHC regarding BACB's credentialing program for behavior analysts.

The Court issued its ruling on January 4, 2011. And although it found the DMHC guilty of changing state policy without a public hearing, it failed to clarify its position with regard to the issue of licensure vs. certification. In CalABA's cumulative years of practice, none of its members has ever before had to defend against allegations that his or her practice of behavioral intervention therapy, including Applied Behavior Analysis ("ABA") therapy, is the UNAUTHORIZED PRACTICE OF MEDICINE. Sadly, that is just the argument put forth by the DMHC in the lawsuit on appeal before this Court.

The steadfast resistance by the health insurance industry to the coverage of ABA therapy necessitated the filing of the lawsuit, and the absurd claim that behavior analysts are engaged in the practice of medicine is just the most recent assault waged against the coverage of applied behavior analysis in the State of California. Consumer Watchdog and CalABA have both been wrestling with the apparent requirement of health plans (deferring to the Department of Managed Health Care), that covered services be provided by state-recognized (licensed) professionals. Under California law, however, ABA therapy must be covered by health plans regulated by the DMHC when it is administered or supervised by behavior analysts certified by the nationally accredited Behavior Analyst Certification Board ("BACB®"). In fact, the vast majority of behavior analysts in California do not possess any state *license,* but instead are certified by the BACB ("Board Certified Behavior Analyst" or

"BCBA®").[2] Indeed, *no state licensing scheme even exists* for behavior analysts.

Therefore, DMHC's illegal and arbitrary state-licensure rule excluding many of the most qualified ABA therapists from ABA provider networks, forces parents of children with autism enrolled in publicly-funded health plans under DMHC's jurisdiction to seek ABA therapy from a pool of individuals who are less qualified, more expensive, and less available to provide such treatment. Such a problem is compounded by the fact that there is already a known shortage of BCBAs in the State of California. Studies have shown that the efficient and effective delivery of ABA therapy is crucial and can lead to significant and meaningful gains for the individuals we serve and considerable cost savings to the State of California.[3] DMHC's arbitrary state-licensure rule is thus clearly against the best interests of children with autism and the State of California.

Moreover, without clarification from the Court regarding the scope of health plans' and health insurers' obligations to provide coverage of medically necessary ABA therapy when provided by BCBAs who do not also possess a state license, DMHC will continue to raise the specter that BCBAs are practicing medicine without a license. To the best of CalABA's knowledge, no BCBA has ever been prosecuted by the State of California as engaging in the unauthorized practice of medicine, but the DMHC has made the claim.

2 For example, the results of CalABA's most recent provider survey conducted in April 2013 reveals that while 87.63% of respondents were certified as a BCBA or BCBA-D (doctoral-level BCBA), *only 17.53%* possessed a California state license. *See* McAlear Decl., *infra*, at 2-3, ¶ 4.
3 *See* CDI Emergency Autism Regs., *supra* at 7-9, 13-14, 47-49.

STATEMENT OF THE CASE

Appellants Consumer Watchdog and Anshu Batra, M.D., F.A.A.P., (collectively "Appellants" or "Consumer Watchdog") filed a petition for writ of mandate against California Department of Managed Health Care and Lucinda Ehnes, in her official capacity as Director of the California Department of Managed Health Care (collectively, "Respondents" or "DMHC"). The writ petition was concerned with the issue of whether DMHC was required to order health plans within its jurisdiction to provide coverage for Applied Behavior Analysis ("ABA") treatment for children with autism when prescribed as medically necessary but provided (or supervised) by a behavior analyst who was not licensed by the state, but was certified by the national Behavioral Analyst Certification Board ("BACB®"). Appellants sought a writ of mandate directing the DMHC, "[i]n response to any enrollee complaint or grievance regarding a health plan's decision to deny ABA treatment to an autistic enrollee on the ground that it is not a "covered benefit" to order the plan to provide the services or reimburse the enrollee for the costs of services, as applicable.

The trial court concluded that the DMHC did not have a clear, present ministerial duty to order the provision of ABA treatment by unlicensed (although BACB-certified) practitioners, and therefore denied the requested relief on that portion of the petition.

While this appeal was pending, the Legislature enacted Senate Bill No. 946, which provides, among other things, that health plans must provide coverage for "behavioral health treatment" for autism, no later than July 1, 2012. The statute specifically provides that behavioral health treatment includes ABA, and further provides that the treatment may be provided by a person certified by the BACB or an uncertified individual

supervised by someone so certified. However, the statute excludes from its coverage three specific categories of health plans under the jurisdiction of the DMHC. Thus, this Court must determine whether the law pre-existing Senate Bill No. 946 required the DMHC to order health plans to provide coverage for ABA services which are determined to be medically necessary but are to be provided by practitioners who are unlicensed, but certified by the BACB.

As it is the health plans who would be required to pay for the provision of those services, the Court invited amicus briefing from the California Association of Health Plans ("CAHP"). Similarly, based on the parties' representation that the California Department of Insurance ("CDI") has taken a contrary position to that of the DMHC with respect to health plans under its jurisdiction, the Court therefore invited amicus briefing from CDI, as any determination this Court would make regarding the requirements of the law would impact that state regulatory entity.

It is undisputed that health plans are required to provide medically necessary "treatment" for autism. (Health & Saf. Code §1374.72, subds. (a) & (d)(7)). The DMHC takes the position that if the provider of medically necessary ABA is licensed to practice medicine (or otherwise exempted from the licensing requirements), the treatment is required to be covered by health plans. However, if the provider of medically necessary ABA is not licensed (or otherwise exempted), the provider would be "treat[ing]...a mental condition" without a license, and would be committing the unlicensed practice of medicine (Bus. & Prof. Code §2052). Recognizing that ABA is frequently provided by individuals certified by BACB but unlicensed by California, the DMHC argues that, when ABA occurs under such a situation, it is simply not medical "treatment," and

therefore not required to be covered.

The trial court concluded that Business and Professions Code section 2052 is limited to only the practice of medicine, and does not prohibit non-licensed ABA specialists from practicing behavioral therapy. However, the court concluded that the DMHC was not statutorily required to direct health plans to provide ABA services provided by unlicensed practitioners. The court reasoned that DMHC's "primary statutory duty is to insure that plans provide quality health care services in order to protect the interests of the enrollees," and that therefore the DMHC had discretion to determine that licensing "is the proper standard by which to insure quality service and protection for enrollees" (emphasis in original).

Thus, the critical dispute between the parties in the pending appeal is whether California law requires that health care plans must provide coverage for medically necessary ABA treatments *only when* the ABA services are administered by health care professionals who are *licensed* by the state as the DMHC contended below, or whether such treatments may lawfully be provided and are required to be covered by health care plans when administered by behavior analysts who do not possess a state license but who are *certified* by the BACB or are *supervised* by a licensed or BACB-certified therapist, as Consumer Watchdog contended.

The Court sought amicus briefing, and additional briefing from the parties on several issues. The parties were permitted to submit additional briefs addressing the issues on or before May 31, 2013. In addition, if any amici wished to submit a brief to the Court on any or all of the questions presented by the Court, the brief was required to be filed and served on counsel for the parties by May 31, 2013. The Court has since extended the deadline for the filing of any amici briefs to June 28, 2013.

STATEMENT OF THE FACTS

CalABA adopts the factual presentation of the case as articulated in the Opening Brief and supplemental briefs of Appellants.

SUMMARY OF THE ARGUMENT

The trial court correctly concluded that Business and Professions Code section 2052 is limited to only the practice of medicine, and does not prohibit non-licensed ABA specialists from practicing behavioral therapy.

However, the court *incorrectly* concluded that the DMHC was not statutorily required to direct health plans to provide coverage for ABA therapy provided by behavior analysts credentialed by the nationally accredited Behavioral Analyst Certification Board ("BACB"). The court reasoned that DMHC's "primary statutory duty is to insure that plans provide quality health care services in order to protect the interests of the enrollees," and that the DMHC was thereby permitted to determine that licensing "is the proper standard by which to insure quality service and protection for enrollees" (emphasis in original).

In this instance, there is no rational basis for the DMHC to conclude that licensing "is the proper standard by which to insure quality service and protection for enrollees." By taking such a position, DMHC arbitrarily excludes from the pool of ABA providers those individuals credentialed by the BACB as Board Certified Behavior Analysts ("BCBAs"). Especially since no state licensing scheme for ABA providers presently exists in California, BACB's credentialing program plays an important role in assisting governments, consumers, insurers, and others in identifying those individuals qualified to provide behavioral health treatment, including ABA therapy.

Therefore, DMHC's arbitrary rule requiring publicly-funded health plans within its jurisdiction to provide insurance coverage for medically necessary ABA therapy *only if* a licensed individual directly provides such treatment is absurd on many levels.

1. Less Qualified Providers: Not only would the vast majority of BCBAs, the individuals most qualified to provide ABA therapy, be excluded from ABA provider networks, they would be committing a *misdemeanor* by providing such treatment according to the DMHC. DMHC's rule restricting ABA provider networks to only those individuals who possess a state license (necessarily in an area *other* than behavior analysis since no licensing scheme presently exists in California for behavior analysts) would therefore result in a pool of providers less qualified (and in some cases, without any qualification or training) to provide such treatment.[4]

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4 For example, under DMHC's state-licensure rule, marriage and family therapists would be eligible to provide ABA therapy simply because the scope of their licensure includes "the use of applied psychotherapeutic techniques, to enable individuals to mature and grow within marriage and the family." (Bus. & Prof. Code § 4980.02.)

At the July 13, 2011 Informational Hearing of the Senate Select Committee on Autism & Related Disorders, Sally Bremel, a mother of a 10-year-old with severe autism testified regarding the "farce" of being required to hire a licensed provider as a condition for obtaining insurance coverage of ABA treatment for her son:

> My BCBA had to go out and hire a licensed provider to provide Jonah's care, although BCBA's are, as you know, trained to do this intervention, that's the intervention he needed....She went out a hired an LMFT [licensed marriage and family therapist] to provide Jonah's care....And then that licensed marriage and family therapist has honestly, honestly, got to be supervised by the BCBA, because although she does have some autism experience, the BCBA's are the ones that

2. More Expensive Providers: DMHC's state-licensure rule would also result in driving up the costs of medically necessary ABA therapy since the rates charged for direct treatment by a state-licensed individual is more expensive than rates charged for treatment by BCBAs. This is so because BCBAs typically provide such treatment through a cost-effective, time-tested tiered service delivery model in which the ABA therapy is provided directly by the BCBA or through less costly Board Certified Assistant Behavior Analysts ("BCaBA") or other paraprofessionals under the BCBA's supervision.[5]

> know how to deal with the behaviors of my child running into the street to go play basketball. It's a farce. The whole licensing requirement is a farce. But we got through that farce. You know, we hired the person, the BCBA to help supervise that person [the LMFT]."

See Transcript of DVD recording of the Senate Select Committee on Autism and Related Disorders' July 13, 2011 Informational Hearing on Health Insurance Coverage for Autism Spectrum Disorders (ASD) 69:6-70:18 (Appellants' Request for Judicial Notice ("RJN"), Exh. 2)

5 *See* BACB, *Guidelines: Health Plan Coverage of Applied Behavior Analysis Treatment for Autism Spectrum Disorder, Ver. 1.1* (Copyright © 2012 by the Behavior Analyst Certification Board, Inc.) 24-25, BACB <http://www.bacb.com/index.php?page=100772> [discussing the common practice of BCBA's provision of ABA treatment through tiered service delivery models and the use of behavioral technicians under the BCBA's supervision] (hereafter "BACB Health Plan Coverage Guidelines"),

In addition, CDI's packet of documents submitted in response to the Senate Select Committee on Autism & Related Disorders included a letter from Peter Himber, M.D., a board-certified adult and child neurologist and Chief Medical Officer of the state-funded Regional Center of Orange County ("RCOC") to Senator Darrel Steinberg, in which Dr. Himber described the common practice of BCBAs utilizing BCaBAs or other paraprofessionals in administering ABA treatment at RCOC: "Over 1000 children per year receive ABA services funded by RCOC and those services

3. <u>Less Available Providers:</u> DMHC's state-licensure rule would further result in a drastically less available pool of ABA providers capable of providing the medically necessary ABA therapy, when there is already a dire shortage of ABA providers.[6]

Unlike the DMHC, CDI does *not* require ABA providers to hold a state license as a condition for their services to be "covered" by insurers. In fact, CDI's emergency regulations interpret California's Mental Health Parity Act and Senate Bill No. 946 as *prohibiting* insurers from denying or unreasonably delaying coverage for medically necessary ABA treatment on the grounds that a BCBA lacks a state license. BCBAs have for more than a decade provided ABA therapy for children with autism as authorized vendors (and employees) in state-funded Regional Centers and as part of the ABA provider network for many public and private health plans.[7] To

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are generally provided by individuals who do not hold licenses from the State of California." *See* CDI, Responses to Panel Questions, Senate Select Committee on Autism & Related Disorders July 13, 2011 Informational Hearing on Health Insurance Coverage for Autism Spectrum Disorders (ASD): Current Regulatory Oversight of Behavioral Intervention Therapy (July 13, 2011) 55, Exh. D (Appellants' Request for Judicial Notice ("RJN"), Exh. 1 at 55)(hereafter "CDI Packet Submission to Senate").

6 As established at trial, Kristin Johnson, co-founder of Autism Deserves Equal Coverage, described how Blue Shield insisted that ABA treatment "authorizations" be conditioned on 100% of the hours being provided by a licensed provider or state-registered intern; however, she noted Blue Shield had no such providers in its network and placed the responsibility of finding such a provider on the families. She also noted how families were unable to find enough licensed therapists or registered interns to provide 100% of the ABA treatments because "this is not the standard clinical ABA service delivery model and there are insufficient licensed professionals to meet even the tiniest percent of the demand for ABA." *See* Declaration of Kristin Johnson in Support of Petition for Writ of Mandate, ¶¶ 17-18 (JA 2329:17-2331:18) (hereafter "Johnson Decl.").

7 A survey conducted by the Autism Society of California in

date, CalABA is unaware of any instance in which a BCBA has been charged with a *misdemeanor* for the unauthorized practice of medicine. Yet, DMHC's assertion -- that a BCBA lacking a state license is engaging in the unauthorized practice of medicine -- is the very reason DMHC relies upon for refusing to require publicly-funded health plans under its jurisdiction to provide insurance coverage for ABA therapy provided by BCBAs.

Regardless of the setting in which a BCBA provides and is reimbursed for medically necessary ABA therapy – through the state's Regional Centers, in a private setting reimbursed by health plans, or elsewhere – a BCBA's provision of ABA therapy for children with autism is the same medically necessary treatment that has been recognized in the scientific literature and by governmental entities.[8]

To restrict the pool of BCBAs capable of providing the medically necessary ABA therapy such that access to the needed services is unreasonably delayed or even rendered non-existent is clearly against the best interests of the estimated ***27,000 children*** with autism enrolled in publicly-funded managed health plans under DMHC's jurisdiction, ***over 1800*** of which are under the age of 5, a critical juncture point for receiving medically necessary ABA therapy.[9]

January/February 2012 (prior to the effective July 1, 2012 date of Senate Bill No. 946) showed that 41% of families in California's autism community received behavioral therapy, including ABA services, through the Regional Centers. In addition, 5% of families received behavioral therapy, including ABA, through health insurance. *See* Autism Society of California, Autism in California 2012 Survey (Apr. 2012) 20, fig. 2 <https://autismsocietyca.org/> (as of June 28, 2013) (hereafter "Autism Society Statistics").

8 *See* CDI Emergency Autism Regs., *supra* at 7-9, 13-15.

9 *See* Section II.C, *infra,* for arrival of estimates.

I. NATIONAL BOARD CERTIFIED BEHAVIOR ANALYSTS ARE TRAINED AND CERTIFIED TO PROVIDE APPLIED BEHAVIOR ANALYSIS THERAPY.

A. Behavior Analysis Certification Board Credentialing Program

The Behavior Analyst Certification Board® ("BACB®"), founded in 1998, is the professional credentialing group for behavior analysts. The BACB is endorsed by the behavioral analysis profession, both nationally and internationally, as well as Division 25 (Behavior Analysis) of the American Psychological Association.[10] As the only accredited certification group for behavior analysts nationwide (and internationally), only a professional certified by the BACB has demonstrated minimum competence in behavior analysis through graduate coursework, supervised experience, and a standardized national exam.[11]

B. Certification Levels[12]

The BACB provides certification at the following two levels: (i) Board Certified Behavior Analyst® ("**BCBA®**") for those who have at least a Master's degree; and (ii) Board Certified Assistant Behavior Analyst ("**BCaBA®**") for those who have at least a Bachelor's degree. The BACB

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10 *See* Shook and Johnston, *Training and Professional Certification in Applied Behavior Analysis* in Handbook of Applied Behavior Analysis (Fisher, et al. Edits., © 2011 The Guildford Press), 488.

11 *See* Assoc. for Behavior Analysis Internat., Autism Special Interest Group ("Autism SIG"), *Consumer Guidelines for Identifying, Selecting, and Evaluating Behavior Analysts Working with Individuals with Autism Spectrum Disorders* (May 22, 2007) 5, Cambridge Center for Behavioral Studies <http://www.behavior.org/resource.php?id=339 > (hereafter "Autism SIG Guidelines").

12 *See generally* Behavior Analyst Certification Board ("BACB"), Eligibility Standards <http://www.bacb.com/index.php?page=53> (as of June 16, 2013).

also offers an additional designation for qualifying BCBAs with a Doctorate degree ("**BCBA-D**")

1. Board Certified Behavior Analyst® ("BCBA®")

In order to qualify for certification as a Board Certified Behavior Analyst ("BCBA"), a person must meet the following requirements:

1. Degree: Have a Master's degree from an accredited university in behavior analysis or other natural science, education, human services, engineering, medicine or a field related to behavior analysis and approved by the BACB;
2. Training & Experience:[13]
    - *Coursework:* Have at least 225 hours of graduate coursework in behavior analysis;
    - *Supervised Experience:* Complete at least the minimal number of hours of required supervised experience in behavior analysis (1500 hours of supervised independent fieldwork, 1000 hours of practicum work, or 750 hours of intensive practicum hours); and
3. Exam: Pass the national standardized BACB exam.

2. Board Certified Behavior Assistant Analyst® ("BCaBA®")

In order to qualify for certification as a Board Certified Assistant Behavior Analyst (BCaBA), a person must meet the following requirements:

13 The BACB offers alternative options for meeting the training and experience requirements for the BCBA certification for those who teach graduate coursework in behavior analysis (College Teaching Option) or have at least ten years of post-doctoral experience in behavior analysis. (Doctorate/BCBA Review).

1. Degree: Have a Bachelor's degree from an accredited university;
2. Training & Experience:
   - *Coursework:* Have at least 135 hours of undergraduate or graduate coursework in behavior analysis;
   - *Supervised Experience:* Complete at least the minimal number of hours of required supervised experience in behavior analysis (1000 hours of supervised independent fieldwork, 670 hours of practicum work, or 500 hours of intensive practicum hours); and
3. Exam: Pass the national standardized BCaBA exam.

3. Board Certified Behavior Analyst – Doctoral ("BCBA-D")

Active BCBAs with a Doctorate degree may also qualify for an additional designation as a Board Certified Behavior Analyst – Doctoral ("BCBA-D"). Doctorate degrees must be earned from an accredited university in applied behavior analysis, human services, education, science, medicine, or other field approved by the BACB and strongly related to applied behavior analysis.[14]

C. Accreditation Standards[15]

BACB's certification programs are accredited by the National Commission for Certifying Agencies ("NCCA"), the accreditation arm of the Institute for Credentialing Excellence ("ICE") based in Washington, D.C. ***The NCCA was created in 1987 in cooperation with the federal government "to help ensure the health, welfare, and safety of the public***

14 *See* BACB, Board Certified Behavior Analyst – Doctoral (BCBA-D) <http://www.bacb.com/index.php?page=7> (as of June 16, 2013).
15 *See generally* Institute for Credentialing Excellence ("ICE"), NCCA Accreditation <http://www.credentialingexcellence.org/p/cm/ld/fid=86> (as of June 16, 2013).

through the accreditation of a variety of certification programs/organizations that assess professional competence. The NCCA is considered the premier organization which defines and enforces the highest standards in its certifying groups.[16] ***In fact, NCCA's standards of accreditation for its certifying groups (including the BACB) exceed the requirements set forth by the American Psychological Association and the U.S. Equal Employment Opportunity Commission.***[17]

To date, NCCA has accredited certification programs for more than 120 organizations, including programs for many professions in the health industry such as occupational therapists, social workers, audiologists, nurses, podiatrists, optometrists, oral surgeons, pharmacists, and more. BACB's certification programs are accredited by the NCAA as certification programs within the health industry as well.[18]

D. National Standardized Exam[19]

Applicants seeking BACB certification must meet degree, coursework and experience requirements prior to being allowed to take the BCBA or BCaBA exam. Eligible applicants are administered a 4-hour

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16 *See* W. Va. Legis. Auditor, Performance Evaluation & Research Div., Sunrise Report: Board Certified Behavior Analysts of West Virginia – Audit Overview (June 2012, PE 12-03-516) 11 <www.legis.state.wv.us/Joint/PERD/perdrep/PE%2012-03-516.pdf> (as of June 16, 2013).
17 *See* ICE, About Us: History of ICE <http://www.credentialingexcellence.org/p/cm/ld/fid=21> (as of June 16, 2013).
18 *See* ICE, Accredited Member Organization Search <http://www.credentialingexcellence.org/p/cm/ld/fid=121> (as of June 16, 2013); and ICE, About NCCA <http://www.credentialingexcellence.org/ncca (as of June 16, 2013).
19 *See* BACB, General Information about the Examinations <http://www.bacb.com/index.php?page=66> (as of June 18, 2013).

multiple-choice exam (approximately 150 questions for the BCBA exam, and 135 questions for the BCaBA exam).

BACB's exams are regularly updated in accordance with the psychometric standards for certifying professionals (e.g., based on a valid and current job task analysis, developed by subject matter experts, administered in a secure and uniform setting, psychometrically scored consistent with a valid cut-score study, and subjected to extensive post-administration psychometric review). In particular, BACB's exams are based on the results of a formal Job Analysis and survey involving subject matter expert review panels and extensive surveys of thousands of professional behavior analysts worldwide. Such procedures are designed to identify the knowledge, skills, and abilities require to practice ABA, and are repeated every few years to ensure that the exam content reflects new developments in the behavior analysis field. (JA 0568, ¶ 29.)

The most recent pass-rate information indicates 55-62% of first-time takers completed the exam with a passing score.[20]

E. Continuing Education[21]

Once certified, the minimal required hours of continuing education must be met every three years to maintain certification (36 hours for BCBAs and 24 hours for BCaBAs).[22]

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20 *See* BACB, Examination Administration Results <http://www.bacb.com/index.php?page=67> (as of June 18, 2013).
21 *See* BACB, General Information about the Examinations <http://www.bacb.com/index.php?page=66> (as of June 18, 2013).
22 *See* BACB, Maintaining Certification, Revised Sept. 2012, <http://www.bacb.com/index.php?page=100365> (as of June 22, 2013).

F. Regular Updating of Certification Standards[23]

The BACB reviews and raises standards for its certification programs on an ongoing basis to reflect growth and refinement in the field of behavior analysis.[24] For example, several upcoming changes to the certification standards include the following:

- Increased Continuing Education Hours: Effective December 31, 2014, the minimal required hours of continuing education must be met every two years to maintain certification (32 for BCBAs, and 20 for BCaBAs), which represent 33% and 25% increases in continuing education hours, respectively.
- Increased Coursework Hours: Effective with the first examination in 2015, the required coursework hours will be increased for all BCBA and BCaBA applicants (from 225 to 270 hours for BCBAs, and from 135 to 180 hours for BCaBAs).
- Degree Requirement Refinement: Effective December 31, 2015, the degree requirement for BCBA applicants will be further restricted to having a Master's degree in one of the following areas: (i) behavior analysis, (ii) education, (iii) psychology, or (iv) in a degree program in which the applicant completed a BACB-approved course sequence. This change was made as a step toward a possible long-term goal of requiring a degree in behavior analysis (or equivalent) for certification as a BCBA.

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23 *See generally* BACB, BACB Newsletter - Special Ed. on New Standards <http://www.bacb.com/index.php?page=100259> (as of June 21, 2013).
24 *See* BACB, Model Act for Licensing/Regulating Behavior Analysts, Revised Sept. 2012 <http://www.bacb.com/index.php?page=100285> (as of June 22, 2013).

G. Professional Disciplinary and Ethical Standards[25]

Behavior analysts are also required to provide services in an ethical manner in accordance with BACB's Professional Disciplinary and Ethical Standards. Formal complaints may be submitted to the BACB. Each complaint is evaluated by BACB's legal department and if there appears to be merit to the complaint it is forwarded to a Review Committee which reviews cases and renders decisions. If its decision is appealed, an in-person hearing is conducted by an Appeals Committee. Once a decision is rendered by the Appeals Committee, it is deemed final.

According to BACB's website, since its inception, five individuals have had their certification revoked and three have had it suspended.[26]

H. Behavior Analysts' Special Skills and Autonomy from Other Professions

Like all scientific disciplines, behavior analysis has conceptual, experimental, and applied branches. Applied Behavior Analysis ("ABA") is the applied branch of behavior analysis which focuses on the use of principles and methods derived from research (the experimental branch) to bring about meaningful changes in socially important behaviors. (JA 0562-0563, ¶ 12.)

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25 *See* BACB, Disciplinary and Ethical Standards, Procedures for Appeals <http://www.bacb.com/index.php?page=85> (as of June 16, 2013).

26 *See* BACB, BACB Disciplinary Actions <http://www.bacb.com/index.php?page=100180> (as of June 16, 2013).

The BACB defines ABA as follows:[27]

> ABA is the design, implementation, and evaluation of environmental modifications to produce socially significant improvement in human behavior. ABA includes the use of direct observation, measurement, and functional analysis of the relations between environment and behavior. ABA uses changes in environmental events, including antecedent stimuli and consequences, to produce practical and significant changes in behavior. These relevant environmental events are usually identified through a variety of specialized assessment methods. ABA is based on the fact that an individual's behavior is determined by past and current environmental events in conjunction with organic variables such as their genetic endowment and ongoing physiological variables. ABA focuses on treating behavioral difficulties by changing the individual's environment rather than focusing on variables that are, at least presently, beyond our direct access.
>
> The successful remediation of core deficits of ASD, and the development or restoration of abilities, documented in hundreds of peer-reviewed studies published over the past 50 years has made ABA the standard of care for the treatment of ASD.

Research shows that children's interactions with their physical and social environments directly influence the structure and functioning of their brains. (JA 0562-0563, ¶12.) By carefully engineering physical and social environments to ensure that children with autism have as many opportunities to acquire and practice useful skills, ABA therapy provides experiences for children with autism that can alter the course of their brain development, resulting in acquisition of functional skills and reduction of

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27 *See* BACB, *Guidelines: Health Plan Coverage of Applied Behavior Analysis Treatment for Autism Spectrum Disorder, Ver. 1.1* (Copyright © 2012 by the Behavior Analyst Certification Board, Inc.), p. 4, BACB <http://www.bacb.com/index.php?page=100772> (hereafter "BACB Health Plan Coverage Guidelines").

problem behaviors throughout their lifespan. (JA 0563-0564, ¶¶14-15.) ABA therapy for people with autism in fact is very similar to therapy commonly provided to people with other neurological conditions or who suffer neurological illnesses and injuries. (JA 0565, ¶20.) For instance, intensive and long-term treatment to build essential communication, self-care, and daily living skills is often required for children and adults who have strokes or brain injuries. (*Ibid.*)

Unlike Board Certified Behavior Analysts, most licensed professionals in California do not have training and experience in ABA.[28] For example, even though behavior analysis began as a school or sub-field within the discipline of psychology[29], a recent 2010 practice analysis by the

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28 Dr. Linda Copeland, a pediatrician and BCBA, testified to the paucity of training in medical education about behavior analysis at the Senate Select Committee on Autism and Related Disorders' July 13, 2011 Informational Hearing on Health Insurance Coverage for Autism Spectrum Disorders (ASD):

> I'm a board certified behavior pediatrician, also a board certified behavior analyst. I'm a BCBA. And I want to verify that the process of becoming a board certified behavior analyst is a very rigorous scientific professional process...One other issue, and I'm speaking as an individual physician, that ***I've been licensed as a physician for 32 years, is that there's a paucity of training in medical education about behavior analysis as a science***, and that should be addressed, I think, by separate legislation, especially if doctors within health plans are going to be making issues of medical necessary [sic] on a distinctive discipline that they have no training in. I'm one of those rare cross-trained individuals.

(Appellants' RJN, Exh. 2, p. 153); *also see* BACB Health Plan Coverage Guidelines, *supra* at 6 ["ABA is a specialized behavioral health treatment and most graduate or postgraduate training programs in psychology, counseling, social work, or other areas of clinical practice do not provide in-depth training in this discipline."]

29 *See* Fisher, et al., *Applied Behavior Analysis: History, Philosophy, Principles, and Basic Methods* in Handbook of Applied Behavior Analysis (Fisher, et al. Edits., © 2011 The Guildford Press) 3 (hereafter "ABA Handbook").

Association of State and Provincial Psychology Boards ("ASPPB"), the alliance of boards responsible for the licensure and certification of psychologists in the United States and Canada, did not include behavior analysis, ABA, or even behavioral psychology, among the major areas of training or practice of psychologists.[30] By way of example, most people *without* any medical training know how to treat common colds or headaches. This knowledge, however, does *not* make them a medical doctor. Similarly, some licensed professionals may understand and have taken a course or two in behavior analysis or the principles of reinforcement. However, this alone does *not* give them the ability to develop and implement an ABA treatment plan for individuals with autism.[31] Only a professional credentialed by the BACB has demonstrated minimum competence to practice ABA through graduate coursework, supervised experience, and a standardized national exam.[32] Of course, a BCBA must also recognize situations that fall outside the scope of his or her competence. For example, BCBAs are required to refer out or consult with professionals from other disciplines when there are client conditions beyond the BCBA's competence, such as a suspected medical condition or psychological concerns related to an anxiety or mood disorder.[33]

30 *See* Greenberg, S., et al., Study of the Practice of Licensed Psychologists in the U.S. and Canada (© 2010 Association of State and Provincial Psychology Boards) 31-34, tables 14 & 16 <http://www.asppb.net/i4a/pages/index.cfm?pageid=3580> (as of June 27, 2013).

31 *See* CDI Packet Submission to Senate, *supra* at 47, Exh. D [letter from Daniel Shabani, Ph.D., BCBA-D of CalABA to the Senate Select Committee on Autism] (Appellants' RJN, Exh. 1).

32 *See* Autism SIG Guidelines, *supra* at 5.

33 *See* BACB, BACB Guidelines for Responsible Conduct for Behavior Analysts, Guideline 1.02 <http://www.bacb.com/index.php?page=57#1> (as of June 22, 2013); and *see* BACB Health Plan Coverage Guidelines, *supra* at 36.

Indeed, behavior analysis is a distinct scientific discipline that has developed powerful techniques for changing behavior;[34] the practice of ABA is therefore a distinct profession; it is not the same as clinical or developmental psychology, educational or school psychology, counseling, social work, or special education, for instance. (JA 0567, ¶ 26.) In California, BACB-approved course sequences are currently housed in the departments of a cross-hybrid of disciplines, including psychology, school psychology, and special education.[35] Since BACB's formation in 1998, the number of universities across the country offering degrees specifically in behavior analysis has increased.[36] The BACB has also taken steps *toward a* possible long-term goal of requiring a degree in behavior analysis (or equivalent) for certification as a BCBA.[37]

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34 Behavior analysis is a discipline that studies behavior, in contrast to the discipline of psychology which studies the psyche. *See generally* Fraley, L.E. & Vargas, Ernest A., *Separate Disciplines: The Study of Behavior and the Study of the Psyche* (1986) 9 The Behavior Analyst 47 <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2741867/> (as of June 27, 2013).

35 *See* BACB, Approved University Training <http://www.bacb.com/index.php?page=100358> (as of June 22, 2013).

36 *See* Martinez-Diaz, *The BACB: The Best Stimulant for Behavior Analysis Training Programs* in BACB Online Newsletter (Jan. 2007) 1 <http://www.bacb.com/index.php?page=100259> (as of June 27, 2013).

37 *See* BACB, BACB Newsletter – Special Edition on New Standards (Feb. 2013) 1 <http://www.bacb.com/index.php?page=100259> (as of June 27, 2013).

As a distinct discipline, the behavior analyst profession has grown to have its own professional associations,[38] credentialing group,[39] scientific journals,[40] conferences,[41] and awards.[42] Since BACB's formation in 1998, the number of BCBAs has steadily grown to approximately 11,000 worldwide,[43] including approximately 1700 in California as of May 2013.[44] As of the 2009-2010 academic year, there were 169 universities in the

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38 For example, the Association for Professional Behavior Analysis International ("ABAI") <http://www.abainternational.org>, California Association for Behavior Analysis ("CalABA") <http://www.calaba.org>, the Association of Professional Behavior Analysts ("APABA") <http://www.apbahome.net/>, and Cambridge Center for Behavioral Studies ("CCBS") <http://www.behavior.org/>.

39 The BACB was formed to serve as a certification group for behavior analysts worldwide, and is endorsed by the Association for Behavior Analysts International. *See* BACB, About the BACB <http://www.bacb.com/index.php?page=1> (as of June 22, 2013).

40 For example, the Cambridge Center for Behavioral Studies publishes the following two scientific journals: (i) Behavior and Philosophy; and (ii) Behavioral Technology Today. *See* Cambridge Center for Behavioral Studies, Journals <http://www.behavior.org/scholarship.php?tab=Journal> (as of June 22, 2013).

41 For example, every year, ABAI organizes a convention in North American, an autism conference, and a single-track conference. In addition, ABAI organizes a bi-ennial international conference. *See generally* ABAI <http://www.abainternational.org/events.aspx> (as of June 22, 2013). Further, APABA holds an annual convention, and CalABA holds an annual conference. *See generally* Association of Professional Behavior Analysts <http://www.apbahome.net/> (as of June 22, 2013); and CalABA <http://www.calaba.org> (as of June 22, 2013).

42 For example, two awards are presented at CalABA's annual conference, (i) the Julie Vargas Research Award to promote student research in behavior analysis, and (ii) the B.F. Skinner Foundation Research Award to promote graduate student research in behavior analysis. *See* CalABA, Julie Vargas Award <http://www.calaba.org/2014Conf/vargasaward.shtm> (as of June 22, 2013); and CalABA, Skinner Foundation Research Award <http://www.calaba.org/2014Conf/bfsf-researchaward.shtm> (as of June 22, 2013). In addition, the BACB presents an annual Michael Hemingway Behavior Analysis Award to an individual who has helped promote the

United States, and 33 universities in other countries.[45] In California, there are sixteen universities with BACB-approved course sequences; this includes eight California State University campuses and a University of California campus (Santa Barbara).[46]

Like other health professions, specialized training and experience is required to practice ABA competently and safely. (JA 0567, ¶26.) The BACB reports that reviews of research have demonstrated there are a number of unproven, ineffective and sometimes dangerous treatments for Autistic Spectrum Disorders.[47] BACB credentials thus play a critical role in assisting consumers, governments, insurers, and others to identify those

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understanding of behavior analysis or is known for their advocacy for persons to access such service; this award was presented at CalABA's annual conference in 2011. *See* BACB, The Michael Hemingway Behavior Analysis Award <http://bacb.com/index.php?page=80> (as of June 22, 2013).

43 *See* BACB, BACB Newsletter (May 2013) 1 <http://bacb.com/index.php?page=100259> (as of June 22, 2013).

44 *See* BACB, Certificant Registry <http://www.bacb.com/index.php?page=100155&by=state> (as of June 18, 2013)(hereafter "BACB Registry").

45 Since BACB's formation in 1998, other countries have shown a great deal of interest in BACB's certification programs. Currently, BACB has approved course-sequences in the universities of the following countries: Canada, Croatia, France, Greece, Hong Kong, India, Ireland, Israel, Italy, New Zealand, Nigeria, Northern Ireland, Norway, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, South Korea, Spain, Sweden, Taiwan, and the United Kingdom. *See* ABA Handbook, *supra* at 502; Shook, *News and Notes,* in BACB, Newsletter (Jan. 2007) 7 <http://www.bacb.com/index.php?page=100259> (as of June 27, 2013); and BACB, Approved University Training <http://www.bacb.com/index.php?page=100358> (as of June 22, 2013).

46 *See* BACB, Approved University Training <http://www.bacb.com/index.php?page=100358> (as of June 18, 2013).

47 *See* BACB Health Plan Coverage Guidelines, *supra* at 36 <http://www.bacb.com/index.php?page=100772> (as of June 22, 2013).

individuals who have obtained the requisite specialized training and experience to provide ABA therapy competently and safely.

II. DMHC's ARBITRARY STATE-LICENSURE RULE IN DISREGARD OF BOARD CERTIFIED BEHAVIOR ANALYSTS IS ABSURD ON MANY LEVELS

DMHC's rule requiring publicly-funded health plans within its jurisdiction to provide insurance coverage for medically necessary ABA therapy *only if* the provider holds a state license and *directly* provides such therapy (regardless of whether the provider is a Board Certified Behavior Analyst or not) is absurd on many levels.

A. DMHC's Arbitrary State-Licensure Rule Results in A Pool of Less Qualified ABA Providers.

Since no state licensing scheme for ABA therapists currently exists in California, whether or not an ABA provider possesses a state license carries no relevance as to whether the provider has the requisite training to provide ABA therapy safely and competently. ABA is a specialized behavioral health treatment and most graduate or postgraduate training programs in psychology, counseling, social work, or other areas of clinical practice do not provide in-depth training in this discipline.[48] Suffice it to say, recognizing a state license based on non-behavior-analytic content usually does little to identify those qualified in behavior analysis. In contrast, BCBAs are the only professionals who have demonstrated minimum competence in behavior analysis through coursework, training, and a national standardized exam *in behavior analysis*.[49]

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48 *Id.* at 6; *also see supra* fn.28-31 and accompanying text.
49 *See* Autism SIG Guidelines, *supra* at 5.

Health plans are obligated to take reasonable steps to assure the safety, efficacy, and quality of care it provides for their enrollees.[50] ***One of the most common ways that health plans can assure high quality care is to require that the providers they cover meet widely recognized and accepted minimum standards for knowledge, training and experience.[51] In this instance, the only available nationally (and internationally) recognized credential for behavior analysts is through the BACB.***[52]

However, instead of recognizing BACB credentials for behavior analysts, DMHC imposes an arbitrary rule requiring health plans within its jurisdiction to provide coverage for ABA therapy *only if* ABA providers possess a license that has *no relevance* to one's expertise in behavior analysis. DMHC's rule restricting ABA provider networks to only those individuals who possess a state license (necessarily in an area *other* than behavior analysis since no licensing scheme presently exists in California for behavior analysts) would therefore result in a pool of providers less qualified (and in some cases, without any qualification or training) to provide such treatment.[53]

For example, CalABA's membership data as of June 14, 2003 reveals that only 13% of CalABA members certified as a BCBA or BCBA-

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50 *See* U.S. Dept. of Defense, Department of Defense Report and Plan on Services to Military Dependent Children with Autism (July 2007) 11 [noting that in the absence of state licensing or regulation of ABA providers, TRICARE, the health plan for U.S. military personnel and their families, established a requirement that ABA providers be certified by the BACB] <www.bacb.com/Downloadfiles/707_DoD_TRICARE_rpt.pdf> (as of June 28, 2013).

51 *Ibid.*

52 *See* Autism SIG Guidelines, *supra* at 5.

53 *See* fn.4, *supra.*

D (doctoral-level BCBA) also possessed a state license.[54] DMHC's arbitrary licensure rule thus *excludes* the vast majority of BCBAs from health plan networks, the very people who have demonstrated the requisite coursework, training and competence in behavior analysis to provide ABA therapy safely and competently. Not only that, DMHC asserts that BCBAs are committing a *misdemeanor* and practicing medicine without a license by providing ABA therapy. DMHC's arbitrary state-licensure rule thus results in a pool of *less qualified* ABA providers and criminalizes ABA treatment performed by the most qualified ABA providers.

B. DMHC's Arbitrary State-Licensure Rule Results in A Pool of More Expensive ABA Providers.

DMHC's arbitrary state-licensure rule would also result in driving up the costs of ABA therapy since rates charged by a state-licensed individual can be more expensive than rates charged for care by BCBAs who typically provide such treatment through a cost-effective and time-tested tiered service delivery model in which treatment is provided directly by the BCBA or through Board Certified Assistant Behavior Analysts ("BCaBA") and other paraprofessionals under the BCBA's supervision.[55]

As with other types of allied health professions, a common model for ABA therapy is for properly credentialed professionals with advanced degrees and training – BCBAs and BCBA-Ds – to design and oversee implementation of the treatment plan for each individual. (JA 0570, ¶ 37.) Some or most of the direct treatment is provided by BCaBAs and/or paraprofessionals who are provided with competency-based training and ongoing direct supervision by the BCBA or BCBA-D. (*Ibid.*)

54 *See* supporting Declaration of Robert Schwartz, ¶ 7, Exh. 2 (hereafter "Schwartz Decl.")
55 *See* BACB Health Plan Coverage Guidelines, *supra* at 24-25.

The supervising behavior analyst reviews data on the client's progress, observes the direct interventionists and provides them with feedback on their performance, and adjusts the intervention procedures as needed on a regular, frequent basis. (JA 0571, ¶ 38.) The supervisor may also deliver some of the treatment directly, and model implementation of all treatment procedures for the supervisees. (*Ibid.*) Again, this is analogous to other allied health professions where paraprofessionals and/or assistants with undergraduate degrees deliver some components of treatment plans that are prescribed, planned, and overseen by professionals with advanced training and credentials. (JA 0571, ¶ 38.) Therefore, in the area of ABA therapy for autism, appropriately certified or qualified professionals oversee treatment provided by unlicensed persons. The BACB notes that this type of tiered service delivery model is "the model that ABA therapy for autism has been operating under for many years and has proven to be effective for improving the lives of individuals diagnosed with autism and their families."[56]

The frequency and amount of supervision provided by a BCBA or BCBA-D depends on the nature of the treatment in each case, which must always be individualized to the characteristics and circumstances of the individual client and his or her family and other caregivers. (JA 0571, ¶ 39.) For instance, a BCBA who is providing "focused" ABA therapy for a limited number of targets with an individual with autism – such as reducing a risky problem behavior and increasing some specific appropriate alternative behaviors, increasing the range of foods consumed, or building a few specific personal safety or hygiene skills – might work directly with the person with autism for several hours each week and train others

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56 *Ibid.*

(paraprofessionals, family members) to implement the treatment procedures for several additional hours each week, with the supervisor observing that implementation periodically (e.g., biweekly). (JA 0571-JA 0572, ¶ 39.)

When treatment is comprehensive and intensive, as is often the case with ABA therapy for young children with autism and those who exhibit severe dangerous behaviors, the demands on the supervising behavior analyst are substantially greater than in cases where treatment is focused. Such treatment plans require a great deal of careful assessment, planning, orchestration, training, and monitoring, so the need for supervision and oversight is increased proportionally. (JA 0571-JA 0572, ¶ 39.) Again, the frequency and quantity of supervision depends on the nature of the treatment and other factors in each individual case. (JA 0572, ¶ 35.)

Requiring ABA therapy to be provided only through direct treatment administered by a state-licensed individual would preclude a BACB's provision of such services via the time-tested and more cost-effective tiered service delivery model, thereby driving up the costs of ABA therapy. According to CalABA's membership data as of June 2013, CalABA has a total of 120 state-licensed individuals, 94 of whom were BCBAs or BCBA-Ds. Of the 94 BCBAs or BCBA-Ds who also possessed a state license, most were licensed by the California Board of Behavioral Sciences (55), followed by the California Board of Psychology (52), and followed further by the California Speech-Language Pathology and Audiology and Hearing Aid Dispensers Board (13).[57]

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57 *See* Schwartz Decl., ¶ 7, Exh. 2. The proportion of CalABA members holding various state licenses roughly approximates the BACB survey results of the proportion of BACB certificants holding other credentials. *See* Shook, *On-Line Certificant Survey* in BACB Online Newsletter (Jan. 2007) 4 <http://www.bacb.com/index.php?page=100259> (as of June 23, 2013).

According to the U.S. Occupational Handbook, the 2012 annual mean wage in California for the licensed professions represented in CalABA's membership were as follows: $83,710 for speech-language pathologists; $79,520 for clinical, counseling, and school psychologists; $50,480 for mental health social workers; $47,230 for marriage and family therapists; and $46,530 for mental health counselors.[58] While there does not appear to be a separate category for behavior analysts in the U.S. Occupational Outlook Handbook, CalABA's recent provider survey reflects that average hourly rates charged for licensed psychologists were higher rates for BCBAs or BCBA-Ds. Hourly fees charged to funding agencies for licensed psychologists were in the range of $115.00-$125.00 (25.42%), while most hourly fees were in the range of $95.00-$115.00 for BCBA-Ds (24.59%) and $60.00-$115.00 for BCBAs.[59] In addition, hourly fees charged to funding agencies for BCaBAs and other paraprofessionals providing direct treatment were even lower, in the range of less than $50.00.[60]

Thus, DMHC's rule restricting ABA provider networks to only state-licensed individuals providing direct treatment 100% of the time would

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58 *See* U.S. *Dept.* of Labor, Bur. of Labor Statistics, May 2012 State Occupational Employment and Wage Estimates, California <http://www.bls.gov/oes/current/oes_ca.htm#25-0000> (as of June 23, 2013).
59 *See* supporting Declaration of Matthew McAlear, ¶ 6, Exh. 1 (hereafter "McAlear Decl.").
60 *Ibid.* A 2009 employment survey conducted by the Association of Professional Behavior Analysts ("APBA") showed similar results, reflecting that close to 40% of BCaBAs charged hourly fees between $30.00-$45.00, while rates charged by BCBAs tend to be fairly evenly distributed across fees of $45.00 to over $105.00. *See* Assoc. of Prof. Behavior Analysts, APBA 2009 Professional Employment Survey Results 11-12, fig. 14.

drastically increase the costs of ABA therapy. In contrast, without DMHC's arbitrary state licensure rule, BCBAs would be able to either provide ABA therapy directly (in the range of $60.00-$115.00 per hour) or utilize even less-costly BCaBAs or other paraprofessionals under their supervision (less than $50.00 per hour).

C. DMHC's Arbitrary State-Licensure Rule Results in Less Available ABA Providers When There is Already a Dire Shortage of Providers.

DMHC's arbitrary state-licensure rule would further result in a drastically smaller pool of ABA providers available to provide medically necessary ABA therapy when there is already a dire shortage of ABA providers.

A recent study by the U.S. Centers for Disease and Control and Prevention ("CDC") estimates the prevalence of autism at 1 in 88 children, an increase of 23 percent over two years.[61] The U.S. Census Bureau ("Bureau") estimates California's population to be 38,041,430.[62] Considering that 24.6% of California's population are persons under 18 years of age,[63] there is an estimated 9.3 million children (9,358,182) in the State of California. Taking into account CDC's estimated prevalence of autism at 1 in 88 children, this means ***more than 100,000*** (106,343) of the estimated 9.3 million children in California have autism.

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61 *See* U.S. Centers for Disease Control and Prevention – Autism Spectrum Disorders: Data & Statistics <http://www.cdc.gov/ncbddd/autism/data.html> (as of May 28, 2013) (hereafter "CDC Autism Statistics").
62 *See* U.S. Dept. of Commerce, U.S. Census Bur. ("Bureau") – State & County Quickfacts: California <http://quickfacts.census.gov/qfd/states/06000.html> (as of May 28, 2013) (hereafter "Cal. Population Statistics").
63 *Ibid.*

Despite the high number of children with autism in California, a review of BACB's online certificant registry identifies only ***1,699 individuals with either BCBAs or BCBA-Ds*** in California as of June 19, 2013.[64] This means that in the State of California, there is ***only one BCBA for every 59 children with autism*** in the State of California. The average caseload for one behavior analyst varies between 6-24 patients, depending on whether the behavior analyst is providing focused or comprehensive ABA therapy, and whether or not the therapy is provided with or without support of a behavior analyst assistant.[65] Even assuming each BCBA carries the average maximum caseload of 24 patients and focuses solely on treating children with autism, this translates to at minimum approximately ***60,000 children*** (59,465) out of the estimated 100,000 children with autism (106,343), or ***at least 3 out of 5 children with autism*** in the State of California unable to receive any care from a BCBA.

As the evidence presented in the trial court established[66], and which CalABA's membership data and provider surveys confirm,[67] the vast majority of behavior analysts capable of providing the needed ABA therapy do not possess any state license, but are instead Board Certified Behavior Analysts. It stands to reason that DMHC's arbitrary state-licensure rule would result in the pool of BCBAs, already in dire shortage, to become drastically smaller such that medically necessary ABA therapy becomes out of reach for the vast majority of children with autism who need such services.

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64 *See* BACB Registry <http://www.bacb.com/index.phppage=100155&by=state> (as of June 18, 2013)
65 *See* BACB Health Plan Coverage Guidelines, *supra* at 31.
66 *See supra* fn. 6.
67 *See* Schwartz Decl., ¶ 7, McAlear Decl., ¶ 6, Ex. 1.

By way of illustration, according to CalABA's membership data as of June 14, 2003, CalABA has more than 1400 members, 727 of whom are BCBAs or BCBA-Ds (52%).[68] Of the 727 members who are BCBAs or BCBA-Ds (collectively "BCBA/Ds"), 94 also possessed a state license.[69] By restricting the pool of ABA providers to only state-licensed individuals, the number of CalABA members qualified to provide the necessary treatment under DMHC's arbitrary state-licensure rule decreases from 727 (the number of BCBA/Ds) to 94 providers (the number of BCBA/Ds who also possessed a state license). ***Thus, DMHC's arbitrary state-licensure rule would restrict the pool of qualified ABA providers in CalABA's membership to only 13% of CalABA's pool of BCBAs.***

A review of BACB's online certificant registry reveals 1699 Board Certified Behavior Analysts and 156 Board Certified Assistant Behavior Analysts in California.[70] CalABA's membership (727 BCBAs or BCBA-Ds) therefore represents roughly 43% of all BACB registrants in California. Thus, assuming the same proportion of BCBA/Ds versus state-licensed individuals as reflected in CalABA's membership, DMHC's arbitrary state-licensure rule would restrict the pool of qualified ABA providers in California to only 13% of California's pool of BCBAs. ***This means that under DMCH's arbitrary state-licensure rule, families seeking BCBAs for the more than 100,000 children with autism in California would be able to look to only a mere pool of approximately 220 state-licensed BCBAs in the entire State of California.*** Again, assuming each state-licensed individual carries the average maximum caseload of 24

68 *See* Schwartz Decl., ¶ 7. The vast majority of remaining CalABA members (467, or 33%) identified themselves as students.
69 *Ibid.*
70 *See* BACB Registry <http://www.bacb.com/index.php?page=100155&by=state> (as of June 18, 2013)

patients and focuses solely on treating children with autism (total maximum caseload of 5304), this translates to at minimum ***over 100,000 children*** (101,039) out of the estimated 106,343 children with autism (106,343), or ***more than 9 out of 10 children with autism*** in the State of California unable to access medically necessary ABA therapy. Clearly, DMHC's rule restricting the ABA provider network to only state-licensed individuals has an enormous negative impact on a consumer's access to ABA therapy.[71]

With respect to the issue before this court, DMHC takes the position that its arbitrary state-licensure rule applies to children with autism enrolled in publicly-funded health care programs under DMHC's jurisdiction (Healthy Families Program, CalPERS, and Medi-Cal[72]). By DMHC's own estimates (which DMHC itself describes as "conservative"), there are ***over 13,500*** children with autism covered by managed health plans that contract with the Healthy Families Program and CalPERS alone under DMHC's

71 *See* fn.6, *supra*.

72 As set forth by DMHC in the "Informative Digest/Policy Statement Overview," the Healthy Families program is California's low-cost insurance program that provides health, dental and vision coverage to children who do not have insurance and do not qualify for no-cost Medi-Cal; as of April 2012, the Healthy Families program had over 870,000 enrolled children, with approximately 420,000 children enrolled in the three largest health plans regulated by DMHC – Kaiser Foundation Health Plan, Inc. ("Kaiser"), Blue Shield of California ("BSC"), and Anthem Blue Cross ("ABC"). CalPERS is the largest purchaser of health benefits in California, providing comprehensive health benefits to more than 1.3 million California state employees, retirees and their families, and local government agency and school employees; Kaiser and BSC alone have approximately 930,000 CalPERS enrollees. *See* Cal. Dept. of Managed Health Care ("DMHC"), Notice of Rulemaking Action: Pervasive Developmental Disorder and Autism Coverage (approved April 8, 2013 by the Cal. Ofc of Admin. Law) 9 (as of June 27, 2013)(Appellants' December 28, 2012 Letter Brief to the Court, Exh. 1, p. 5) (hereafter "DMHC Autism Regs.").

jurisdiction (9,886 children in the Healthy Families program[73], and 3,693 CalPERS members).[74]

The number of children with autism affected by DMHC's arbitrary state-licensure rule is likely greater, however, since DMHC's figures do not account for the number of children with autism enrolled in managed health plans contracted with Medi-Cal. However, since approximately 7 million people are covered under Medi-Cal, 69% of whom are enrolled in managed health plans,[75] this means more than 4.8 million are enrolled in managed health plans that contract with Medi-Cal. Further, since 24.6% of California's population are under 18 years of age,[76] and autism prevalence is at 1 in 88 children,[77] there is an estimated 13,500 (13,502) children with autism enrolled in managed health plans contracted with Medi-Cal under DMHC's jurisdiction.

In sum, taking into account DMHC's estimated number of children with autism in the Healthy Families Program and CalPERS under its

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73 It is to be noted that, as a result of the federal Patient Protection and Affordable Care Act ("ACA"), all children in the Healthy Families Program ("HFP") are in the process of transitioning to Medi-Cal over a one-year period beginning January 1, 2013. As a result, the number of children with autism transitioning from HFP to Medi-Cal to remain on managed care health plans is unclear; however, the California Healthcare Foundation notes that most Medi-Cal enrollees will be shifted to managed care. *See* California HealthCare Foundation ("CHCF"), California Health Care Almanac, Medi-Cal Facts and Figures: A Program Transforms (May 2013) 21 <http://www.chcf.org/publications/2013/05/medical-facts-figures> (hereafter "CHCF Medi-Cal Facts").

74 *See* DMHC Autism Regs., *supra* at 9.

75 *See* CHCF Medi-Cal Facts, *supra* at 5, 26.

76 *See* Cal. Population Statistics <http://quickfacts.census.gov/qfd/states/06000.html> (as of May 28, 2013)

77 *See* CDC Autism Statistics <http://www.cdc.gov/ncbddd/autism/data.html> (as of May 28, 2013).

jurisdiction (13,500), plus the additional estimated 13,500 children with autism enrolled in Medi-Cal under DMHC's jurisdiction, there is an ***estimated total of 27,000 children with autism enrolled in publicly-funded health plans under DMHC's jurisdiction*** subject to *DMHC's* arbitrary state-licensure rule. If DMHC is permitted to continue with its arbitrary state-licensure rule, at least 9 out of 10 children in this group of 27,000 children with autism will be unable to access medically necessary ABA therapy. Moreover, since 6.7% of California's population is under the age of 5[78] ***approximately 1809 of this group of 27,000 children with autism are under the age of 5, a critical juncture point for receiving medically necessary ABA therapy.***

As DMHC notes in its Notice of Proposed Rulemaking pertaining to pervasive developmental disorder and autism insurance, research has shown that early and immediate intervention is vital to effective treatment of autism.[79] If autism symptoms are apparent before the age of 3 years, treatment for the condition should begin immediately upon diagnosis. DMHC further notes that delay in treatment can result in stifled improvement, severe impairment, and *permanent* developmental damage that may not be regained through later treatment.[80] ***Thus, DMHC's arbitrary state-licensure rule restricting the pool of BCBAs capable of providing the medically necessary ABA therapy such that access to the needed services is unreasonably delayed or even rendered non-existent is clearly against the best interests of the estimated 27,000 children with autism enrolled in publicly-funded managed health plans under DMHC's***

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78 *See* Cal. Population Statistics <http://quickfacts.census.gov/qfd/states/06000.html> (as of May 28, 2013)
79 *See* DMHC Autism Regs., *supra* at 4.
80 *Id.* at 5.

jurisdiction, over 1800 of which are under the age of 5, a critical juncture point for receiving medically necessary ABA therapy.

III. BOARD CERTIFIED BEHAVIOR ANALYSTS HAVE BEEN PROVIDING APPLIED BEHAVIOR ANALYSIS THERAPY FOR YEARS.

Unlike the DMHC, the CDI does *not* require ABA therapists to possess a state license as a condition for their provision of services to be covered by health plans. In fact, the CDI has issued emergency regulations interpreting California's Mental Health Parity Act and Senate Bill No. 946 as *prohibiting* health plans from denying or unreasonably delaying coverage for services provided by BCBAs.[81]

In addition to the fact that no licensing scheme for ABA therapists currently exists in California, DMHC's arbitrary state-licensure rule is made all the more absurd in light of the commonly accepted practice of BCBAs functioning independently of licensed health care professionals, providing ABA therapy for patients with autism and other developmental disabilities. With widespread approval, BCBAs, with or without a state license, have served as autonomous professionals in a variety of settings for more than a decade, including as authorized vendors (and employees) for state-funded Regional Centers throughout the State of California, and as providers for many health plans, both public and private.

A. State-Funded Regional Centers

The State of California funds community-based services for people with developmental disabilities through twenty-one nonprofit corporations known as "regional centers."[82] California's state-funded Regional Center

81 *See* CDI Autism Emergency Regs., *supra* at 8, 11-12.

82 Cal. Dept. of Developmental Services, Welcome to DDS

system was first established in the late 1960's to provide individuals with developmental disabilities a community alternative to being institutionalized in costly state development centers (previously called "state hospitals").[83] The Regional Center system serves individuals with all types of developmental disabilities, including those with mental retardation, cerebral palsy, epilepsy, autism and related conditions.[84]

There are currently twenty-one Regional Centers throughout the State of California contracted by the California Department Developmental Services ("DDS") to provide a variety of services.[85] The Regional Centers, in turn, contract with nonprofit and for-profit organizations known as service providers to provide services to support individuals with developmental disabilities.[86] Regional Centers are required to be the "funder of last resort" meaning that all other potential funding sources including health plans must be exhausted before Regional Centers can fund for a service. (Appellants' RJN, Exh. 1, p. 54.) Service providers desiring to provide services through California's Regional Centers must first be approved as a vendor before they can provide and be reimbursed for their services.[87]

In response to CalABA's petition, the DDS, in 2001, amended the Title 17 regulations to add Behavior Analysis as a vendor category and

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<https://dds.ca.gov/DDSHomePage.cfm> (as of June 27, 2013).

83 Assoc. of Regional Center Agencies ("ARCA"), Information Brief: Unique Factors Impacting Regional Centers' Budget Growth (May 2009) 1 <www.arcanet.org/pdfs/ARCA_POS_information_brief.pdf> (as of June 27, 2013).

84 *Ibid.* at 1, fn.1.

85 *See* Autism Society Statistics, *supra* at 27.

86 *Ibid.*

87 Cal. Dept. of Developmental Services, Vendorization and Rates Home Page <https://dds.ca.gov/Rates/Home.cfm> (as of June 27, 2013).

Behavior Analyst as a profession, permitting behavior analysts to be contracted by the twenty-one Regional Centers throughout the state to provide services to people with developmental disabilities. In addition, BACB credentials for BCBAs were adopted by DDS as a way of determining those individuals qualified to serve as Behavior Analysts[88]:

> (11) Behavior Analyst - Service Code 612. Behavior Analyst means an individual who assesses the function of a behavior of a consumer and designs, implements, and evaluates instructional and environmental modifications to produce socially significant improvements in the consumer's behavior through skill acquisition and the reduction of behavior. Behavior Analysts engage in functional assessments or functional analyses to identify environmental factors of which behavior is a function. A Behavior Analyst shall not practice psychology, as defined in Business and Professions Code section 2903. ***A regional center shall classify a vendor as a Behavior Analyst if an individual is recognized by the national Behavior Analyst Certification Board as a Board Certified Behavior Analyst.***

(Cal. Code Regs. tit. 17, § 54342, subd. (a)(11).)

Since 2001, BCBAs had provided increasing levels of behavioral treatment for people with developmental disabilities throughout California through the Regional Center system. In 2004, DDS made a similar amendment to the Title 17 vendor regulations to add Associate Behavior Analyst (working under the supervision of a Behavior Analyst) as a vendor category as well as to adopt BACB credentials for BCaBAs as a way for determining those individuals qualified to serve as Associate Behavior

88 *See* Keyworth, *Legislative Report* in CalABA Focal Point (Fall 2001) 2 <http://www.calaba.org/newsletter.shtm> (as of June 23, 2013); and Keyworth, *CalABA is Pursuing an Active Legislative Agenda* in CalABA Focal Point (Fall 2001), <http://www.calaba.org/newsletter.shtm> 3 (as of June 23, 2013).

Analysts.[89] (*See* Cal. Code Regs. tit. 17, § 54342, subd. (a)(8).)[90]

BCBAs, through CalABA, have continued to serve as a resource for DDS in the Regional Centers. In 2011, CalABA's Public Policy Committee was invited by DDS to nominate three individuals to serve on DDS' behavioral services workgroup to assist DDS in setting parameters for Regional Center funding of early autism intervention services in light of existing budget reductions.[91] CalABA convened a taskforce that prepared a March 2011 report on recommended service delivery standards for ABA treatment to help ensure that young children who rely on ABA intervention would continue to have access to comprehensive programs while balancing funding-agencies' critical need for cost-savings.[92]

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89 *See* BACB, *Vendorization of Board Certified Associate Behavior Analysts* in CalABA Focal Point (Fall 2004) 9 <http://www.calaba.org/newsletter.shtm> (as of June 28, 2013). In January 2009, the BACB implemented a name change for BCaBAs (associate to assistant). *See* BACB, *Quality and Standards Enforcement* in BACB Online Newsletter (Jan. 2011) 2 <http://bacb.com/index.php?page=100259> (as of June 28, 2013).

90 Government Code section 95021 also sets forth standards for the delivery of ABA at the Regional Centers and defining ABA as "the design, implementation, and evaluation of systematic instructional and environmental modifications to promote positive social behaviors and reduce or ameliorate behaviors which interfere with learning and social interaction." (Gov't Code § 95021.)

91 *See* Howard, et al., *Spring 2011 Report of the CalABA Public Policy Committee* in CalABA Focal Point (Spring 2011) 6 <http://www.calaba.org/newsletter.shtm> (as of June 23, 2013).

92 *See* CalABA, Report of the Task Force of the California Association for Behavior Analysis, Guidelines for Applied Behavior Analysis (ABA) Services, Recommendations for Best Practices for Regional Center Consumers (Mar. 2011) <http://www.calaba.org/sstf/guidelines-abatx.shtm> (as of June 28, 2013).

In addition to providing ABA services as Regional Center vendors, BCBAs have also provided ABA services as Regional Center employees. For example, as Dr. Himber (a Board Certified Adult and Child Neurologist and Chief Medical Officer at Regional Center of Orange County) noted in his letter to Senator Darrell Steinberg as part of CDI's packet submitted to the Senate Select Committee on Autism & Related Disorders: "We have six Board Certified Behavior Analysts (BCBAs) on staff which attests to the importance of behavioral services to the consumers that we serve."[93]

As a result, BCBAs have for more than a decade provided ABA therapy as vendors (and employees) in California's state-funded Regional Centers. In fact, a survey conducted by the Autism Society of California in January/February 2012 showed that 41% of families in California's autism community received behavioral therapy, including ABA services, through the Regional Centers.[94]

B. Health Plans (Public and Private)

BCBAs have also served for many years as providers for many health plans, both public and private. For example, TriCare, the public health plan covering military personnel and their dependents; self-insured private health plans; and private health plans whose coverage denials were overturned by the Independent Medical Review Board – all utilized BCBAs in their covered provider networks.[95] In fact, a survey conducted by the

93 *See* CDI Packet Submission to Senate, *supra* at 54, Exh. D (Appellants' RJN, Exh. 1 at 54).

94 *See* Autism Society Statistics, *supra* at 20, fig. 2.

95 *See* Green, Gina, *Licensing Behavior Analysts: Risks and Alternatives,* 2(1) Behav. Anal. Pract. 59-64 (Spring 2009)["We have noted that the U.S. military's healthcare plan (TRICARE; see http://manuals.tricare.osd.mil/), and the healthcare plans of several self-insured companies currently recognize BCBAs as qualified providers."]; *also see* Johnson Decl, ¶¶ 18-

Autism Society of California in January/February 2012 showed that 5% of families in California's autism community received behavioral therapy, including ABA services, through health insurance[96]. Of course, through Senate Bill No. 946 specifically mandating insurance coverage for ABA therapy provided by BCBAs to individuals enrolled in private health plans, the number of BCBAs who are part of ABA provider networks has increased significantly.

C. CalABA Provider Surveys

CalABA Provider Surveys conducted in October 2011 and April 2013 confirm *that **a significant number of CalABA members, the vast majority of whom were BCBAs or BCBA-Ds who did not also possess a state license, provided behavioral health treatment to autistic individuals as Regional Center vendors (and employees) and as health plan providers, both before and after the effective date of Senate Bill No. 946.***[97]

1. October 2011 Survey (before effective date of SB 946)[98]

The CalABA Provider Survey conducted in October 2011 (prior to the July 1, 2012 effective date of Senate Bill No. 946) was administered

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22 (JA 2330:20-JA 2330) [identifying several self-insured health plans that do not require ABA therapists to possess a state license, but instead accept licensure and/or rely upon BACB certification]. In addition, as Appellants note in their Opening Brief, "[a]s the scientific evidence supporting the effectiveness of ABA mounted and it became the 'standard of care' for autism, the IMR panels regularly began overturning the plans' denials of coverage – to the point that from September 2007 on, ***the health plans lost every single IMR appeal involving a denial of ABA therapy as a treatment for autism.***" (JA 3:0676-4:0875.)

96 *See* Autism Society Statistics, *supra* at 20, fig. 2.

97 *See* Schwartz Decl., ¶¶ 3-5; and McAlear Decl., ¶¶ 3-5.

98 *See generally* Schwartz Decl., *supra.*

using a web-based survey tool to individuals subscribed to CalABA's Legislation Alerts electronic mail list ("List"). The subscribers of CalABA's List consisted of both current and past CalABA members as well as interested non-CalABA members who signed up to receive alerts and news from CalABA's Public Policy Committee. The initial invitation to respond to the survey was sent via email on October 19, 2011, and the deadline to complete the survey was extended until November 7, 2011. The initial invitation was sent to the 2889 subscribers of CalABA's List, which included 1238 active CalABA members, 733 of which had identified themselves as having worked full or part-time in behavior analysis at the time of their membership registration or renewal. The invitation requested that individuals who were senior members of an ABA provider agency or sole practitioner on the List participate in the survey. 142 respondents participated in the survey.[99]

The 2011 survey results showed the following:[100]

- 88.03% of respondents identified their organization as a Regional Center vendor , and 3.53% also identified themselves as a public school or Regional Center employee.
- 52.11% of respondents identified their organization as a health plan provider. Respondents were providers of at least 11 health plans, with the top three health plans being TriCare (47.54%), Blue Shield (29.51%), and Aetna (29.51%).
- Respondents provided services all throughout the State of California, with the top three areas being Los Angeles (44.93%), the Bay Area (30.43%), and Orange County (30.43%).

99 *See* Schwartz Decl., ¶ 3.
100 *See* Schwartz Decl., ¶ 4.

- Respondents saw a number of clients every day with most seeing 11-50 clients per day (27.86%) or 50-100 clients per day (25%). A significant number saw voluminous clients per day, including 12.86% who saw 200-500 clients per day, and 7.14% who saw more than 500 clients per day.
- A vast majority of respondents' clientele were diagnosed with Autism Spectrum Disorder ("ASD"), with 50.72% reporting that ASD clients made up more than 50% of their clientele, and 37.68% reporting that ASD clients made up usually 100% of their clientele.
- 84.09% of respondents reported being a BCBA or BCBA-D, while only 17.43% of respondents reported having a California license. Licenses held were for the following professions: marriage family therapist (7.58%), psychologist (6.82%), and speech and language pathologist (3.03%).

2. April 2013 Survey (*after* effective date of SB 946)[101]

A subsequent CalABA Provider Survey conducted in April 2013 (*after* the July 1, 2012 effective date of Senate Bill No. 946) was administered using a web-based survey tool in April 2013 to individuals subscribed to CalABA's Legislation Alerts electronic mail list ("List"). The subscribers of CalABA's List consisted again of both current and past CalABA members as well as interested non-CalABA members who signed up to receive alerts and news from CalABA's Public Policy Committee. The initial invitation was sent to the 4170 subscribers of CalABA's List, which included 1437 active CalABA members, 900 of which had identified themselves as having worked full or part-time in behavior analysis at the

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101 *See generally* McAlear Decl., *supra.*

time of their membership registration or renewal. The invitation requested that individuals who were senior members of an ABA provider agency or sole practitioner on the List participate in the survey. 186 respondents participated in the survey.[102]

The 2013 survey results showed the following:[103]

- 80% identified their organization as a Regional Center vendor , and 9.52% also identified themselves as a public school or Regional Center employee.
- 81.9% of respondents identified their organization as a health plan provider, a significant increase from the 2011 survey results. Respondents were providers of at least 11 health plans, with the top three health plans being Anthem/Blue Cross (68%), Aetna (64%), and Magellan (63%).
- Respondents provided services all throughout the State of California, with the top three areas being Los Angeles (48.04%), the Bay Area (33.33%), and Orange County (32.35%).
- There was a significant increase in the number of clients respondents saw a day compared with the 2011 survey results. Most respondents indicated saw 51-100 clients per day (25.26%) or 11-50 clients per day (20%). A significant number saw voluminous clients per day, including 13.68% who saw 201-500 clients per day, and 12.63% who saw more than 500 clients per day.

102 *See* McAlear Decl., ¶ 3.
103 *See* McAlear Decl., ¶ 4.

- Respondents received a number of ABA referrals a month, with 46.15% receiving 10-25 referrals per month. Of note, 2.2% received 80-100 ABA referrals per month and 6.59% received more than 100 ABA referrals per months.
- A vast majority of respondents' clientele were ASD patients, with 46.59% reporting that ASD clients made up more than 50% of their clientele, and 36.36% reporting that ASD clients made up usually 100% of their clientele.
- 87.63% of respondents reported being a BCBA or BCBA-D, while only 17.53% of respondents reported having a California license. Licenses held were for the following professions: psychologist (8.25%), marriage family therapist (7.22%), speech and language pathologist (1.03%), and social worker (1.03%).

As the CalABA surveys confirm, ***BCBAs have been providing ABA therapy for more than a decade now, both as authorized vendors (and employees) to state-funded Regional Centers as well as ABA providers for both public and private health plans.***[104]

However, CalABA is unaware of <u>any</u> instance in which a BCBA has been charged with a misdemeanor for the unauthorized practice of medicine. Yet, DMHC's assertion -- that a BCBA lacking a state license is engaging in the unauthorized practice of medicine -- is the very reason DMHC relies upon for refusing to require publicly-funded health plans under its jurisdiction to provide insurance coverage for ABA therapy provided by BCBAs.

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104 *See* Schwartz Decl., ¶ 5, Ex. 2; and McAlear Decl., ¶ 5, Ex. 2.

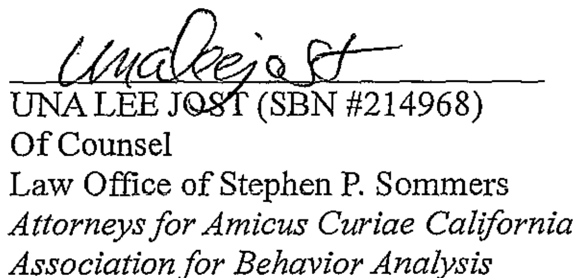
Regardless of the setting in which a BCBA provides and is reimbursed for medically necessary ABA therapy – through the state's Regional Centers, in a private setting reimbursed by health plans, or elsewhere – a BCBA's provision of ABA therapy for children with autism is the same medically necessary treatment that has been recognized in the scientific literature and by govermmental entities.[105]

CONCLUSION

For the reasons herein, and those set forth by Appellants, CalABA urges this court to reverse the decision below, and remand the case to the trial court with directions to enter judgment in favor of Appellants.

Dated: July 1, 2013

Respectfully submitted,



UNA LEE JOST (SBN #214968)
Of Counsel
Law Office of Stephen P. Sommers
Attorneys for Amicus Curiae California Association for Behavior Analysis

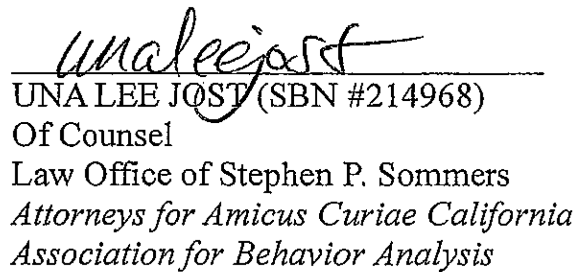
105 *See* CDI Emergency Autism Regs., *supra* at 7-9, 13-15.

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) in the California Rules of Court, the enclosed amended brief of *amicus curiae* California Association for Behavior Analysis is produced using 13-point Roman type including footnotes and contains approximately 12,714 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: July 1, 2013

Respectfully submitted,



UNA LEE JOST (SBN #214968)
Of Counsel
Law Office of Stephen P. Sommers
Attorneys for Amicus Curiae California Association for Behavior Analysis

[PROPOSED] ORDER

The amended application of the California Association for Behavior Analysis for permission to file a brief as *amicus curiae* having been read and filed, and good cause appearing therefore,

IT IS HEREBY ORDERED that the California Association for Behavior Analysis be, and hereby is, permitted to file a brief as *amicus curiae* herein.

Dated: ________________

____
Hon. Joan Dempsey Klein, Presiding Justice

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION THREE	Court of Appeal Case Number: B232338
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* Una Lee Jost (SBN 214968) LAW OFFICE OF STEPHEN P. SOMMERS 301 North Lake Ave., Floor 7 Pasadena, California 91101 TELEPHONE NO.: (626) 793-3995 FAX NO. *(Optional):* (626) 796-0107 E-MAIL ADDRESS *(Optional):* ATTORNEY FOR *(Name):* California Association for Behavior Analysis	Superior Court Case Number: LASC No. BS121397 *FOR COURT USE ONLY*
APPELLANT/PETITIONER: Consumer Watchdog and Anshu Batra, M.D. RESPONDENT/REAL PARTY IN INTEREST: Calif. Dept. Managed Health Care, et al	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* [✓] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party *(name)*: Proposed amicus Cal. Assoc. for Behavior Analysis

2. a. [✓] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	Nature of interest *(Explain):*
(1)		
(2)		
(3)		
(4)		
(5)		

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: July 1, 2013

Una Lee Jost
(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2009]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
www.courtinfo.ca.gov

PROOF OF SERVICE

STATE OF CALIFORNIA, CITY OF PASADENA, COUNTY OF LOS ANGELES

I am employed in the City of Pasadena and County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 301 North Lake Avenue, Seventh Floor, Pasadena, CA 91101, and I am employed in the city and county where this service is occuring.

On July 1, 2013, I caused service of true and correct copies of the documents entitled

APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* CALIFORNIA ASSOCIATION FOR BEHAVIOR ANALYSIS IN SUPPORT OF POSITION OF APPELLANTS CONSUMER WATCHDOG, et al.; PROPOSED BRIEF; SUPPORTING DECLARATION OF ROBERT SCHWARTZ; SUPPORTING DECLARATION OF MATTHEW MCALEAR; PROPOSED ORDER

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upon the persons named in the attached service list, in the following manner:

1. If marked FAX SERVICE, by facsimile transmission this date to the FAX number stated to the person(s) named.

2. If marked EMAIL, by electronic mail transmission this date to the email address stated.

3. If marked U.S. MAIL or OVERNIGHT or HAND DELIVERED, by placing this date for collection for regular or overnight mailing true copies of the within document in sealed envelopes, addressed to each of the persons so listed. I am readily familiar with the regular practice of collection and processing of correspondence for maling of U.S. Mail and for sending of Overnight mail. If mailed by U.S. Mail, these envelopes would be deposited this day in the ordinary course of business with the U.S. Postal Service. If mailed Overnight, these envelopes would be deposited this day in a box or other facility regularly maintained by the express

service carrier, or delivered this day to an authorized courier or driver authorized by the express service carrier to receive documents, in the ordinary course of business, fully prepaid.

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

Executed on July 1, 2013, at Pasadena, California.

Una Lee Jost

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Clerk, Department 85 **[Overnight]** Los Angeles Superior Court 111 N. Hill Street Los Angeles, CA 90012	Office of the Clerk **[Overnight]** California Supreme Court ***4 copies** 350 McAllister Street San Franciso, CA 94102 http://www.courts.ca.gov/9262.html