

September 25, 2013

BY HAND AND U.S. MAIL

Presiding Justice Joan Dempsey Klein, Justice Walter Croskey,  
and Justice Patti S. Kitching  
California Court of Appeal  
Second Appellate District, Division Three  
Ronald Reagan State Office Building  
300 South Spring Street, 2nd Floor  
Los Angeles, California 90013

Re: *Consumer Watchdog et al. v. California Department of Managed  
Health Care et al.*  
2d Civ. No. B232338 (LASC Case No. BS121397)

Dear Justices Klein, Croskey, and Kitching:

Autism Speaks and Autism Deserves Equal Coverage, amici curiae in this appeal, submit this letter brief in support of the Petition for Reconsideration filed by Plaintiffs, Appellants and Cross-Respondents Consumer Watchdog and other interested parties.

As set forth in our June 28, 2013 brief to the Court, amicus Autism Speaks is the nation's leading autism science and advocacy organization. Amicus Autism Deserves Equal Coverage is a California organization that advocates for comprehensive health insurance coverage for the diagnosis and treatment of autism spectrum disorders.

The Court's Decision, issued on September 10, 2013, raises serious concerns for the continuing access by individuals with autism and their families to medically necessary Applied Behavior Analysis ("ABA") services in California. In particular, amici are concerned about the practical ramifications of the Court's determination that the provision of ABA constituted the unlawful practice of psychology, and that, but for the soon-to-sunset SB94, Board Certified Behavior Analysts ("BCBAs") providing or supervising these services would be engaged in illegal activities. The Court's ruling on this point calls into question longstanding state-sanctioned and supported treatment, and threatens continued access to this medically necessary care in the

future. The Court should order additional briefing from the parties on this issue and reconsider its Decision in light of that briefing.

The Court's holding that (i) ABA constitutes the practice of psychology, and (ii) is therefore illegal if not performed by a licensed psychologist was made without the benefit of arguments or record evidence. As the Court noted, this point was never raised below, and no party ever sought such a determination at trial or on appeal. *See* Decision at 35. As set forth in Amici's prior briefing at pp. 11-16, the view that BCBA's who provide and supervise ABA to autism sufferers are acting contrary to state licensure laws is unsupported by the law or practice in any other state. Moreover, the Court's holding is belied by the longstanding interpretations and practices of California agencies who oversee these services and enforce the State's licensure laws.

For example, before SB946, the California Board of Behavioral Services considered whether to recommend licensure legislation for the "profession of applied behavior analysis" and concluded that the "Business and Professions Code does not apply any requirements to the practice of ABA" which is "commonly used to treat autism spectrum disorders." *Board of Behavior Services*, Board Meeting Minutes, May 18-19, 2011, p.28, available at [http://www.bbs.ca.gov/pdf/board\\_minutes/2011/0511\\_bd\\_minutes.pdf](http://www.bbs.ca.gov/pdf/board_minutes/2011/0511_bd_minutes.pdf).

Similarly, more than decade ago, the California Department of Consumer Affairs -- the agency responsible for regulating the practice of psychology and enforcing these laws -- issued a legal opinion confirming that applied behavior analysis does not constitute the practice of psychology. *See* Letter from Don Chang, Supervising Counsel of the California Department of Consumer Affairs, to Cathy Barankin of Sacramento Advocacy, dated February 11, 2000.

The general rule is that statutes with criminal sanctions should be strictly construed, and administrative determinations, such as those discussed above, should be accorded deference. *See Diablo Valley College Faculty Senate v. Contra Costa Community College Dist.*, 148 Cal. App. 4th 1023, 1035, 56 Cal. Rptr.3d 294, 302 (2007) ("An agency has a potential interpretive advantage over the courts if it has developed a specialized expertise, especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion."). Such agency deference is particularly appropriate in the case of the practice of ABA because of the complex professional and technical judgments inherent in determining the applicability of ABA to California's statutory schemes.

The Court's determination that the practice of ABA was unlawful until SB946 does not take account of what has been the reality of ABA provision in California for many years. For very many years, California has authorized and paid for the delivery of ABA by BCBA's through the state's Regional Centers pursuant to the Lanterman Act. The Administrative Code enabling these practices makes clear that ABA delivered by BCBA's *does not* constitute the practice of psychology under the Business and Professions Code. *See* Cal. Admin. Code tit. 17 § 54342. The implication from the Decision, however, is that the State has systematically permitted, and through the Regional Centers has directly supported, illegal unlicensed activity. While history alone cannot justify unlawful conduct, the longstanding, explicit authorization of ABA provided

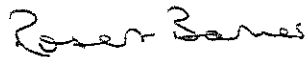
and supervised by BCBAs in the Regional Centers is powerful evidence that this Court's ruling is incorrect.

Moreover, SB 946 has been in effect for only one year. Because of the Court's ruling, any number of actions and activities previously understood to be completely lawful may now be deemed illegal, with as-yet unknown implications for individual liability and public policy. For example, the evolving implementation of the federal Affordable Care Act poses a range of complexities that may impact SB946.

The Court has rightly recognized that BCBAs are appropriate and qualified providers of critically needed, high quality ABA, and that ABA can only be delivered to the thousands who need and are entitled to these services through BCBAs. The fate of individuals and families in California struggling to access life changing health care should not, and need not, be subjected to such uncertainty.

For all of these reasons, the Court should reconsider its ruling with the benefit of input from the parties. Amici respectfully request that Plaintiff/Appellant's Petition for Reconsideration be granted.

Respectfully submitted,



Robert Barnes

Attorneys for Amici Autism Speaks and Autism Deserves  
Equal Coverage

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1999 Avenue of the Stars, Suite 1700, Los Angeles, California 90067.

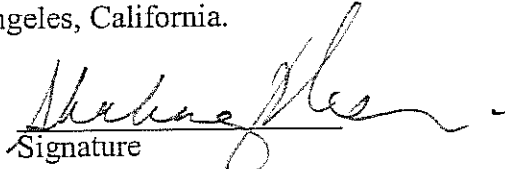
On September 25, 2013, I served the documents described as:

**LETTER BRIEF IN SUPPORT OF THE PETITION FOR RECONSIDERATION**

- by CM/ECF (I electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing)
- by E-MAIL
- by FACSIMILE
- by U.S. MAIL (I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.)
- by FEDERAL EXPRESS (by causing such envelope to be delivered to the office of the addressee by overnight delivery via Federal Express or by other similar overnight delivery service.
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Executed on September 25, 2013, at Los Angeles, California.

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