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Dave Jones, *Insurance Commissioner*

June 28, 2013

The Honorable Presiding Justice Joan Dempsey Klein
and Associate Justices H. Walter Croskey and Patti S. Kitching
Court of Appeal of the State of California
Second Appellate District – Division Three
300 South Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

RE: *Consumer Watchdog, et al. v. California Department of Managed Health Care, et al.*
2d Civ. No. B232338 (Los Angeles Super. Ct. No. BS121397)

Dear Presiding Justice Klein and Associate Justices:

The California Department of Insurance (CDI) appreciates the opportunity to submit its views on the important issues before the Court in this matter. CDI is entirely in accord with Appellants' contention that health plans are required to provide coverage for "all medically necessary treatments for autism under the Mental Health Parity Act ('MHPA')".[1] Insurers are held to the very same requirements because the MHPA is codified in virtually identical terms in Health & Safety Code section 1374.72, which DMHC enforces, and in Insurance Code section 10144.5, which CDI is charged with enforcing.

CDI is also in accord with Appellants' assertion that a large body of empirical evidence demonstrates the effectiveness of Applied Behavior Analysis (ABA) therapy as the standard of care for treatment of autism. Based on the findings of CDI's independent clinicians decisions after Independent Medical Review (IMR) of insurer denials of such treatment, ABA is efficacious, supported by decades of research, widely accepted as an effective treatment modality for young autistic patients and consistent with the recommendations from numerous national governmental agencies, scientific institutions and professional organizations. A summary describing those entities and their recommendations is attached as Addendum A.

[1] Appellants' Opening Brief at p.1.

The issue before this Court is whether DMHC has erroneously interpreted the MHPA to require health plans to cover medically necessary ABA therapy only when it is administered and supervised by licensed individuals, and not by nationally certified behavior analysts. CDI contends that such an interpretation has no support in statutory or decisional law, or in sound public policy. In this letter brief, CDI will respond to the specific questions posed by this Court, as well as to some assertions in the DMHC's supplemental letter brief.

ARGUMENT

I. Question (1) – Whether "treatment" within the meaning of Health and Safety Code section 1374.72, subdivision (a) is defined the same way as "treat[] ... a mental condition" within the meaning of Business and Professions Code section 2052.

No. The Health and Safety Code defines the word "treatment" very differently from the way in which it is defined in the Business and Professions Code. While the Business and Professions Code uses "treatment" to define the professional characteristics of a physician and surgeon, the Health and Safety Code uses "treatment" to convey what is medically necessary to treat the insured. In this case, the "treatment" at issue in Health and Safety Code section 1374.72 refers to ABA therapy for children with autism.

Division Two of the Business and Professions Code categorizes the various aspects of the "Healing Arts" by dividing the topic into chapters, each regulating a different profession. For example, Chapter 5.6 regulates occupational therapists, Chapter 13 regulates marriage and family therapists, and Chapter 10 regulates psychiatric technicians. Of most significance Chapter 5 regulates the medical practice of physicians and surgeons; Section 2052 is contained within Chapter 5.

Given that Chapter 5 only applies to the field of medicine, any mention of a "license" in that Chapter refers to a physician's and surgeon's license, which is granted by the Medical Board of California. Accordingly, it is the role of the Medical Board of California to exercise all licensing, regulatory, and disciplinary functions relating to such a license.[2] A physician's and surgeon's license "authorizes the holder to use drugs or devices in or upon human beings and to sever or penetrate the tissues of human beings and to use any or all other methods in the treatment of diseases, injuries, deformities, and other physical and mental conditions."[3] Section 2052 of Chapter 5 protects patients against unqualified individuals engaging in these types of potentially harmful actions by making it a public offense to "treat[] ... a physical or mental condition [as a physician or surgeon] ... without having ... a valid, unrevoked, or unsuspended" medical license.[4]

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[2] See Bus. & Prof. Code, § 2001.1, § 2050
[3] Bus. & Prof. Code, § 2051
[4] Bus. & Prof. Code, § 2052

Consequently, on its face and as applied, "treatment" in Chapter 5 of the Business & Professions Code only applies to the practice of medicine and the acts required to be performed by licensed physicians and surgeons.[5]

It is totally at odds with the statutory framework governing the field of medicine to apply Section 2052 to the independent profession of behavioral health specialists who render ABA therapy, a specific type of behavioral health treatment, to children with autism. This is because the inappropriate application of a licensure requirement under Section 2052 would require that all individuals who render ABA therapy obtain a medical license from the Medical Board of California. This is an unreasonable standard to impose given that most behavioral health specialists performing ABA therapy hold Ph.D. degrees, and could not obtain a medical license under any circumstances. Thus, Section 2052 cannot have been intended to apply to the behavioral analysis specialists who render ABA therapy. Moreover, there is no California law that establishes a licensure requirement for ABA therapy providers, and no such license exists in the state. Therefore, it follows that individuals who render ABA therapy are not required to have a license given that licensure is only necessary under the Health & Safety Code where licensure "is required by law."[6]

Consequently, *People v. Cole* is irrelevant to this issue.[7] While the Supreme Court long ago decided that the Knox-Keene Act did not exempt providers from the licensing requirements of the Business and Professions Code, such a rule only applies if there is an actual licensure requirement. Since there is no such license requirement for ABA therapy practitioners, this case is inapposite.[8]

By contrast, the focus of the Health and Safety Code, which DMHC enforces, is to regulate health treatments by controlling the conduct of health plans and requiring those plans to provide all medically necessary treatment. The Health and Safety Code is not concerned with the professional limitations of a particular type of health care practice. Consistent with the legislative purpose set forth in Section 1342, to promote the delivery and the quality of health and medical care to health plan enrollees, the Health and Safety Code defines the scope of medically necessary mental health treatment in Section 1374.72 by mandating that "every health care service plan ... that provides hospital, medical, or surgical coverage shall provide coverage for the diagnosis and medically necessary treatment of severe mental illnesses."[9]

In this context, "treatment" addresses any and all modes of working to cure or relieve mental conditions so long as those services are medically necessary. And

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[5] The use of "treatment" depends on the field at issue. For example, "occupational therapy treatment is focused on developing, improving, or restoring functional daily living skills, compensating for and preventing dysfunction, or minimizing disability." (Bus. & Prof. Code, § 2570.2). In contrast, "the practice of marriage and family therapy shall mean that service performed with individuals, couples, or groups wherein interpersonal relationships are examined for the purpose of achieving more adequate, satisfying, and productive marriage and family adjustments." (Bus. & Prof. Code, § 4980.02).

[6] Health & Saf. Code § 1367, subd. (b)

[7] People v. Cole (2006) 38 Cal.4th 964, 975-76 [44 Cal.Rptr.3d 261, 268, 135 P.3d 669, 675]

[8] Id.

[9] Health & Saf. Code § 1374.72, subd. (a)

whether they meet that standard of medical necessity is determined "based on the specific medical needs of the enrollee."[10] ABA therapy is, and has consistently been found by both DMHC and CDI's IMR clinicians to be, medically necessary to children with autism because it is evidenced based, strongly supported by scientific research and widely accepted as the standard of care for young autistic patients.

Not only is this conclusion required based on the facts set forth above, but on accepted standards of interpreting the relevant statutes. "It is an established rule of judicial construction that when a term appears in ... related sections of the same code, the term should be construed as having the same meaning in each instance."[11] The term "treatment" also appears extensively in Health and Safety Code section 1374.73, which is a related section to 1374.72, and in the same code. Section 1374.73, in fact, requires that plans provide "behavioral health treatment" (BHT) "subject to the same requirements as provided in Section 1374.72.[12] Business and Professions Code section 2052, on the other hand, does not appear in the same code as Health and Safety Code section 1374.72, and the relationship between those two sections is tenuous at best.

The existence of a carve-out for public plans in Health and Safety Code section 1374.73 does nothing to diminish the value of that section for purposes of interpreting the language of Health and Safety Code section 1374.72. Specifically, the word "treatment" in Health and Safety Code sections 1374.72 and 1374.73 must be construed to have one and the same meaning, regardless of whether the plan to which the statute is applied is or is not a public plan. The word "treatment" in Health and Safety Code section 1374.73 cannot logically be defined in the same way as "treat[] ... a medical condition" within the meaning of Business Professions Code section 2052, because Health and Safety Code section 1374.73 explicitly provides that BHT, which includes ABA, may be administered by unlicensed persons not supervised by a licensed person. Moreover, citing Health and Safety Code section 1374.73 as the basis for insinuating into Health and Safety Code section 1374.72 any requirement that providers of "treatment" must be either licensed or statutorily exempted from licensure would violate the express language of Health and Safety Code section 1374.73: "Nothing in this section shall be construed to limit the obligation to provide services under Section 1374.72."[13]

For these reasons, the word "treatment" in the Health and Safety Code refers to BHT, and more particularly ABA therapy, for children with autism and its meaning is wholly different and distinct from the way "treatment" is used in the Business & Professions Code.

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[10] Health & Saf. Code § 1374.32, subd. (b); *see also* Ins. Code, § 10169.3, subd. (b).
[11] *Lewis v. Superior Court* (1999) 19 Cal. 4th 1232 (citing *Department of Revenue of Ore. v. ACF Industries, Inc.* (1994) 510 U.S. 332, 342 [114 S. Ct. 843, 849, 127 L. Ed. 2d 165]; *Stillwell v. State Bar* (1946) 29 Cal. 2d 119, 123 [173 P.2d 313]; *Gruschka v. Unemployment Ins. Appeals Bd.* (1985) 169 Cal. App. 3d 789, 792 [215 Cal. Rptr. 484].)
[12] Health & Saf. Code § 1374.73, subd. (a)(1).
[13] Health & Saf. Code § 1374.73, subd. (e).

II. Question (2) - If the determination of whether a physician-prescribed medically necessary practice constitutes medically necessary "treatment" within the meaning of Health and Safety Code section 1374.72 can turn on the identity and licensing status of the individual performing the practice; or if, in the alternative, it is a determination made independent of the prescribed provider, based solely on the nature, methods and anticipated goals of the practice itself:

As a preliminary matter, it is necessary to point out that a practice may be medically necessary when it is applied to one individual but not medically necessary when applied to another individual who, for instance, does not suffer from a condition for which the practice in question is indicated. Thus, we understand the Court's use of the term "medically necessary practice" to mean a practice or service that, for some patients, is medically necessary. Accordingly, if we start from the assumption that a given practice is medically necessary in some cases, the question of whether that practice constitutes medically necessary treatment in any particular case depends entirely on what the practice is and whether or not it is appropriate for the patient in question, i.e., on the nature, methods and anticipated goals of the practice in the case at hand.

DMHC has implemented an IMR process pursuant to Health and Safety Code sections 1374.30, et seq., which sheds light on the considerations at issue in medical necessity determinations. In order to obtain an independent medical review, a plan must first provide the contracted IMR organization with:

> (1)(A) A copy of all of the enrollee's medical records in the possession of the plan or its contracting providers relevant to each of the following:
> (i) The enrollee's medical condition.
> (ii) The health care services being provided by the plan and its contracting providers for the condition.
> (iii) The disputed health care services requested by the enrollee for the condition.[14]

The IMR organization must have demonstrated that it has a quality assurance mechanism in place that ensures that its method for "selecting medical professionals for individual cases achieves a fair and impartial panel of medical professionals who are qualified to render recommendations regarding the clinical conditions and the medical necessity of treatments or therapies in question."[15] And, in stark contrast with Health & Safety Code section 1374.72, the Legislature has here imposed a licensing requirement for panelists: "Notwithstanding any other provision of law, the medical professional shall

[14] Health & Saf. Code § 1374.30, subd. (n)(1)(A)

[15] Health & Saf. Code § 1374.32, subd. (d)(3)(C)

hold a nonrestricted license in any state of the United States, and for physicians, a current certification by a recognized American medical specialty board in the area or areas appropriate to the condition or treatment under review."[16] The medical necessity determination is then made on the following basis:

> Following its review, the reviewer or reviewers shall determine whether the disputed health care service was medically necessary based on the specific medical needs of the enrollee and any of the following:
> (1) Peer-reviewed scientific and medical evidence regarding the effectiveness of the disputed service.
> (2) Nationally recognized professional standards.
> (3) Expert opinion.
> (4) Generally accepted standards of medical practice.
> (5) *Treatments* that are likely to provide a benefit to a patient for conditions for which other treatments are not clinically efficacious.[17]

We know of no circumstance in which the identity or licensing status of the provider factors into the question of medical necessity. The licensing status of the provider, on the other hand, may conceivably be a factor in the medical necessity determination, but only to the extent that licensure is a nationally recognized professional standard — or is required by generally accepted standards of medical practice — in the context of the health care service in question. However, the question of licensure, per se, does not necessarily enter into any determination of medical necessity. But to the extent that questions of licensure do enter into the analysis, they must already have been answered by the time of any inquiry into whether or not a "practice" that may be medically necessary in some cases is a medically necessary treatment to address the specific needs of that particular patient.

The Legislature, in its wisdom, has left to the medical community the task of determining whether and to what extent licensure is an element of medical necessity determinations. The Legislature is quite capable of articulating a licensure requirement in the Health and Safety Code, and yet has refrained from doing so in Health and Safety Code section 1374.72. Accordingly, it would be inappropriate for DMHC or this Court to import any such licensure requirement into that statute and, in doing so, to narrow and limit the Legislature's mandate of mental health parity.

Since scientific and medical literature, expert opinion and accepted standards of practice — and not the licensure status of providers — are among the components of medical necessity analysis as set forth in Health and Safety Code section 1374.33, we now review considerations that are more appropriate to an analysis BHT's medical necessity.

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[16] Health & Saf. Code § 1374.32, subd. (d)(4)(B)
[17] Health & Saf. Code § 1374.33, subd. (b). (Emphasis added.)

Behavioral health therapy has been recognized in the scientific literature as appropriate treatment for ameliorating the core deficits of autism, which include severe, pervasive impairment in social interaction, verbal and nonverbal communication, and repetitive behaviors. Therefore, the MHPA requires insurers to provide coverage for such therapy to treat autism whenever it is medically necessary, subject only to the financial terms and conditions that apply equally to all benefits under the policy.

Children with autism may be moderately to severely impaired and may exhibit the following problem behaviors: aerophagy/swallowing, aggression, bruxism/teeth grinding, coprophagy/feces eating, dawdling, destruction, depression, disruption/tantrum, drooling, elective mutism, elopement (running), feces smearing, fears, food refusal, food theft, genital stimulation, hallucinating, hyperactive behavior, hyperventilation, inappropriate vocalizations, insomnia, noncompliance, obesity, obsessive compulsive disorder, pica, public disrobing, rapid eating, rectal digging, rumination, seizure behavior, self-injurious behavior, stereotypy, tongue protrusion, and vomiting.[18]

The scientific literature further recognizes that early intervention is critically important to enable these children to function in their families, schools and society. The seminal Lovaas study found that 47% of children who received early intensive behavioral intervention therapy could be mainstreamed into regular classrooms by first grade. Those children also significantly outperformed those in the two control groups. Although all three groups were similar at intake, by age 7, the mean IQ of the ABA treatment group was 83 compared to 52 and 58 in the two control groups, respectively. Most significantly, 9 of the 19 ABA treated children received passing grades without special assistance in classes for typically developing children, compared to only 1 of 40 in the two control groups.[19]

In a follow-up study by Lovaas and colleagues, when the children averaged 12 years old, the intensively ABA-treated children maintained their gains over the control group. They also functioned more satisfactorily on adaptive behavior and personality measures. Of the 9 experimental subjects who had achieved the best outcomes at age 7, fully 8 of those 9 subjects were indistinguishable from average children on tests of intelligence and adaptive behavior. Thus, behavioral treatment produces long-lasting and significant gains for many young children with autism.[20]

ABA was found effective in another study comparing the results of intensive ABA treatment with eclectic special education services for a year. The 13 children who received ABA made significantly larger gains than the comparison group — 17 points in IQ, 13 points in language comprehension, 23 points in expressive language, and 11 points in adaptive behavior. The comparison group increased only 4 points in IQ, decreased by one point in language comprehension and by 2 points in expressive

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[18] Horner, supra note 8, at 431.

[19] O. Ivar Lovaas, Behavioral Treatment and Normal Educational and Intellectual Functioning in Young Autistic Children, 55 J. of Consulting and Clinical Psychology 3, 3-9 (1987).

[20] McEachin, supra note 8, at 359-72.

language, and was unchanged on adaptive behavior. ABA-treated children were also found to have achieved average standardized test scores more often than the control group.[21]

A 2005 survey of the autism treatment literature emphasized the significance of early diagnosis and treatment, citing many studies finding that children with autism spectrum disorders (ASDs) who receive services prior to 48 months of age make greater improvements than those who enter programs after that age. In one study, 22% of the children's IQs changed from mental retardation to average. The author also found that behavioral approaches resulted in good outcomes for teaching language content, including single word vocabulary, describing objects and pictures, responding to questions, and increasing the intelligibility of speech. The author concluded that the evidence from a variety of programs and studies suggests that early intervention leads to better outcomes for young autistic patients.[22]

As that survey indicates, the importance of early treatment is generally accepted within the scientific community. A National Institutes of Health meeting in 2006, attended by scientists who focus on investigating treatment of ASDs, revealed a consensus that early intervention is the most effective for significantly altering outcomes. Participants noted that the deficits in very basic skills that are usually present in infants and toddlers with ASD, the pervasiveness of these deficits, and the very early onset of symptoms require interventions that are as comprehensive as the disorders are pervasive, and that begin as early as the disorders are recognized.[23]

A 2010 study of toddlers with ASD as young as 12 months involved behavioral intervention programs and found significantly increased IQ scores after one year of treatment and significantly improved cognitive ability, receptive and expressive language skills, and adaptive behavior after two years of treatment, compared to children in the control group receiving community based services. Moreover, there were significant differences in the number of children in the behavioral intervention group whose diagnoses improved after two years of treatment, from autistic disorder to pervasive developmental disorder. Of greatest significance, only 56% of the children who received behavioral intervention were still diagnosed as autistic after two years of treatment, while 71% of the children receiving community based services retained their ASD diagnosis.[24]

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[21] Svein Eikeseth et al., Intensive Behavioral Treatment at School for 4- to 7-Year Old Children with Autism: A 1-Year Comparison Controlled Study, 20 Behavior Modification 49, 63-64 (2002) (citing results that are particularly significant in showing the value of ABA treatment because the ABA treated group did not differ from the comparison group at the beginning of the trial, yet they made larger gains).

[22] Christina M. Corsello, Early Intervention in Autism, 18 Infants and Young Children 74, 75, 80-81 (2005).

[23] Catherine Lord et al., Challenges in Evaluating Psychosocial Interventions for Autism Spectrum Disorders, 35 J. of Autism and Developmental Disorders 695, 695-708 (2005).

[24] Geraldine Dawson et al., Randomized, Controlled Trial of an Intervention for Toddlers With Autism: The Early Start Denver Model, 125 Pediatrics 17, 21-23 (2010).

The Lovaas Institute's Eric Larsson and Scott Cross provided CDI with a summary of the scientific literature regarding the evidentiary basis for ABA treatment in connection with CDI's autism emergency regulation, approved by the Office of Administrative Law on March 11, 2013[25]. Those studies found that the benefits of ABA include improved developmental functioning, decreased maladaptive behaviors, and decreased symptom severity. The research also found that the substantial benefits of behavioral programs include increases in IQ, and cognitive and language ability, and that recovery from autism is possible in a significant minority of cases. These studies demonstrate that early intervention treatment is the optimal treatment approach, leading to improvement in overall functioning to the point children are able to function successfully in their homes, school classrooms, and communities without specialized services and may no longer be autistic.[26]

Moreover, the standard of care does not include licensure for the provision of BHT or ABA therapy, but encompasses the use of the three tiered system approved by the Legislature in Senate Bill 946, codified in Health and Safety Code Section 1374.73 and Insurance Code Section 10144.51. Section 1367 of the Health and Safety Code is fully consistent with the standard of care in the industry in that it requires health plans to "utilize allied health manpower for the furnishing of services to the extent permitted by law and consistent with good medical practice."[27] "Allied health professionals include the professionals and paraprofessionals specified in SB 946. They also ... [include] the use, where appropriate, of dieticians, and nutritionists," who are unlicensed personnel.[28] The focus of "treatment" is to actualize good medical practice and meet the standard of care. DMHC strongly conveyed this position in its adoption of regulations implementing SB 946.[29] "Subsequent to the implementation ... of SB 946, [DMHC expressly recognized that] health plans are authorized by the Legislature to utilize non-licensed professionals and paraprofessionals to deliver ABA therapy so long as ... they are nationally certified, properly supervised, and [in accordance with] other specified criteria."[30] Thus, DMHC has indisputably acknowledged the importance of meeting the standard of care and providing patients with medically necessary services, without regard to the licensing status of BHT practitioners. Had licensure truly determined treatment, DMHC could not have construed SB 946 in the manner that it did before the Office of Administrative Law (OAL). Hence, the position that DMHC currently puts forth before this Court completely contradicts its stance in promulgating an emergency regulation construing SB 946. There is telling inconsistency between its position before OAL and its argument to this Court that the identity and licensing status of the provider determines whether a service is medical or medically necessary.

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[25] Cite to where it can be found on website and check date of approval

[26] Larsson & Cross, Analysis of the Evidence Base for ABA and EIBI for Autism (2012) (unpublished manuscript submitted to the Department of Insurance) (included as Addendum M).

[27] Health & Saf. Code, § 1367

[28] Health & Saf. Code, § 127900

[29] Cal Code Regs. tit. 28, § 1300.74.73

[30] Notice of Adoption of Emergency Regulations,p.11 [undated]. This emergency rulemaking action added Cal. Code Regs., tit. 28, § 1300.74.73, which became effective September 6, 2012.

Accordingly, the licensure status of the provider is largely irrelevant to the question whether services are medical or medically necessary treatment, except as specifically noted above. Moreover, the standard of care of autism treatment is to use BCBA certified personnel, who are specifically training in the specialized techniques of BHT and ABA, and are the most capable of rendering effective and safe treatment to children with autism. The process of BCBA certification is robust, requiring academic education and clinical experience.[31] It further ensures the quality of treatment by providing for disciplinary measures against behavioral analysts who do not adhere to professional standards of care.[32] For these reasons, use of BCBAs provides children with autism with effective, safe, and transformative treatment, as the Legislature found in enacting SB 946.

III. Question (3A) – Does DMHC require licensing (or exemption from licensing requirements) for the provision of all medically necessary treatments?

No. DMHC does not require licensing (or exemption from licensing) for the provision of all medically necessary treatments.

Pursuant to Health & Safety Code section 1367.51 "diabetes outpatient self-management training, education, and medical nutrition therapy services ... shall be provided by appropriately licensed *or registered health care professionals* as prescribed by a health care professional legally authorized to prescribe the services."[33] (Emphasis added.) Furthermore, Insurance Code section 10176.6 elaborates on the law by stating that "diabetic daycare self-management and education programs shall be provided by health care professionals including ... registered dietitians," individuals who provide medical nutrition therapy despite being unlicensed personnel. While registered dietitians are not licensed, state law recognizes their privately issued certification as sufficient evidence of their ability to safely and effectively render treatment.[34] DMHC

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[31] See e.g., Behavior Analyst Certification Board, http://www.bacb.com/index.php?page=1 (last visited June 26, 2013)

[32] Id.

[33] It is relevant to note that "registered health care professionals" serve as a legal alternative to licensed health care professionals with regard to diabetes outpatient self-management training, education, and medical therapy services.

[34] Bus.& Prof.§ 2585. (a) Any person representing himself or herself as a registered dietitian shall meet one of the following qualifications:

(1) Been granted, prior to January 1, 1981, the right to use the term "registered dietitian" by a public **or private agency** or institution recognized by the State Department of Health Services as qualified to grant the title, provided that person continues to meet all requirements and qualifications periodically prescribed by the agency or institution for the maintenance of that title. (Emphasis added.)

(e) Notwithstanding any other provision of law or regulation that limits reimbursement to state licensed health care providers and upon referral by a physician and surgeon the following persons may be reimbursed for the nutritional advice or advice concerning proper nutrition as set forth in Section 2068, or for the nutritional assessments, counseling, and treatments as set forth in Section 2586:

(1) Registered dietitians.

plainly does not require licensing (or exemption from licensing) for the provision of all medically necessary treatments.

As for registered dietitians, current state law recognizes the private certification of ABA therapy providers is sufficient to provide behavioral health treatment for autism in Insurance Code section 10144.5 and Health & Safety Code section 1374.73. Their private certification is also accepted under the processes and procedures of the Department of Developmental Services (DDS). Government Code section 95021 states that the DDS oversees ABA therapy rendered by vendors contracted by Regional Centers.[35] As part of such oversight, the DDS has adopted the private certification conferred by the national Behavior Analyst Certification Board (BACB) as a necessary qualification for individuals who render ABA therapy.[36] If the Legislature intended to require state licensure for ABA therapy professionals in California, it would have done so when it enacted section 95021 of the Government Code. Given that the Legislature did not do so even prior to the enactment of SB 946, the Legislature implicitly recognized the certification of behavioral health practitioners by the privately established accreditation board as sufficient to ensure effective treatment and patient safety.

IV. Questions (3B) – If not, is there a legal basis on which DMHC can impose a licensing requirement for ABA treatment and not other medically necessary treatment?

No. There is no legal basis on which DMHC can impose a licensing requirement for ABA treatment and not for other medically necessary treatment. The Legislature has charged DHMC with "the execution of the laws of this state relating to health care service plans and the health care service plan business including, but not limited to, those laws directing the department to ensure that health care service plans provide enrollees with access to quality health care services and protect and promote the interests of enrollees."[37] It is simply not within the capacity of DMHC to make new law or to enforce laws that do not exist. Given that there are no laws stating that individuals who render ABA therapy required a license at any time, it is far beyond the capacity of the DMHC to have imposed a licensing requirement for ABA therapy, even before the enactment of SB 946. Licensure is only needed where it "is required by law."[38]

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(2) **Other nutritional professionals with a master's or higher degree in a field covering clinical nutrition sciences, from a college or university accredited by a regional accreditation agency, who are deemed qualified to provide these services by the referring physician and surgeon.** (Emphasis added.)

[34] See also Ins. Code Sections 10133.65 (g)(1) [""health care provider" definition in the Health Care Providers' Bill of Rights], 10178.3(d)(5) [disclosure regarding sale, lease or transfer of provider contracts"], 10123.137, 10123.147.

[35] Regional Centers are non-profit private corporations that contract with the Department of Developmental Services to provide or coordinate services and supports for eligible individuals with developmental disabilities. Regional Centers arrange for ABA therapy to be provided to eligible individuals.

[36] See 17 Cal Code Regs., §54342 (11) ["A regional center shall classify a vendor as an Associate Behavior Analyst if an individual is recognized by the National Behavior Analyst Certification Board as a Board Certified Behavior Analyst."]

[37] Health & Saf. Code, § 1341

[38] Health & Saf. Code, § 1367, subd. (b)

Moreover, the alleged licensure requirement that DMHC bases its arguments on is not within its enforcement authority. The Business and Professions code is the responsibility of the Department of Consumer Affairs. "The boards, bureaus, and commissions in the [Department of Consumer Affairs] are established for the purpose of ensuring that those private businesses and professions deemed to engage in activities which have potential impact upon the public health, safety, and welfare are adequately regulated in order to protect the people of California."[39] Therefore, not only is there no licensure requirement for ABA therapy, if there were, it would be the role of the Department of Consumer Affairs and not the DMHC to investigate and pursue the matter, if warranted.

V. Response to the DMHC's Supplemental Letter Brief

CDI finally addresses the remaining arguments put forth in the letter brief submitted to the Court by the Attorney General of California on behalf of DMHC in response to the Court's second question. The prior sections of this letter brief have already addressed their erroneous responses to questions one and three.

California law quite plainly requires that ABA therapy, where a medically necessary treatment for children with autism, must be covered by all health plans, other than specialized plans such as those that provide only dental or vision services.[40] Moreover, in California, there is no licensure scheme for personnel who render ABA therapy. Therefore, it is impossible for ABA therapy to be rendered in California by an individual who is licensed to deliver ABA therapy.

The additional arguments and rationale in this portion of the joint brief are astounding for their lack of support in applicable law, medical practice, and common sense: "if the determination were based exclusively on the characteristics of the service, anything a physician found helpful would have to be covered by the health plans. That would include coverage of things such as music therapy, personal trainers, gym memberships, horse therapy, whirlpool tubs, yoga sessions, and non-medical weight-loss programs." Since there is no California license for ABA therapists, the Attorney General and DMHC equate ABA therapy with the listed unlicensed health services, contending that although they may be medically helpful, their lack of a licensure requirement makes them non-medically necessary and consequently not covered by health plans. The argument that construing the word "treatment" as conveying its plain meaning in Health and Safety Code section 1374.72 would require anything a physician found to be helpful to be covered by health plans is wholly without merit. The statute on its face mandates coverage of medically necessary treatment,

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[39] Bus. & Prof. Code, § 101.6

[40] Health & Saf. Code, § 1374.73 ["Every health care service plan contract that provides hospital, medical, or surgical coverage shall also provide coverage for behavioral health treatment for pervasive developmental disorder or autism..."]

determined by the statutory criteria governing IMR, not medically helpful treatment.

The Attorney General and DMHC reach and assert a wholly erroneous conclusion because the identity and licensing status of the individual performing the practice has no bearing on the question of whether or not a physician-prescribed *medically necessary* practice constitutes medically necessary treatment. Rather, the determination is based solely on the nature, methods and anticipated goals of the practice itself with respect to the documented circumstances of the individual enrollee to whom the services in question are proposed to be rendered.

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CONCLUSION

The term "treatment" in Health and Safety Code section 1374.72, subdivision (a) has an entirely different meaning from "treat[] ... a mental condition" within the meaning of only tangentially related Business and Professions Code section 2052. The determination of whether a physician-prescribed medically necessary practice constitutes medically necessary "treatment" within the meaning of Health and Safety Code section 1374.72 can never turn on the identity and licensing status of the individual performing the practice; instead, once it is established that the service in question is a medically necessary practice, the determination of whether that practice constitutes medically necessary treatment in any particular case depends entirely on what the practice is and whether or not it is appropriate for the patient in question, i.e., on the nature, methods and anticipated goals of the practice in the case at hand. Not all medically necessary treatments are required by DMHC to be provided by a licensed person or by a person who is exempted from licensure requirements; registered dieticians, for instance, provide medically necessary services and yet are neither licensed nor exempted. There is no legal basis on which DMHC can impose a licensing requirement for ABA treatment and not other medically necessary treatment; rather, the standard of care for ABA is acknowledged by Health and Safety Code section 1374.73 to include treatment by unlicensed persons. Finally, the argument that construing the word "treatment" as conveying its plain meaning in Health and Safety Code section 1374.72 would require anything a physician found to be helpful to be covered by health plans is wholly without merit. The statute on its face mandates coverage of medically necessary treatment, and not medically helpful treatment.

Respectfully submitted,

DAVE JONES
Insurance Commissioner

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PATRICIA STURDEVANT
Deputy Commissioner & Health Enforcement Advisor

Addendum A

"ABA Therapy for Autism is Nationally Accepted and Approved"

List of Agencies

ABA Therapy for Autism is Nationally Accepted and Approved

Many governmental agencies, scientific institutions and professional organizations have concluded, based on the empirical evidence, that behavioral intervention therapies, and specifically ABA-based procedures, are efficacious and represent best clinical practices for individuals with autism.

The Surgeon General of the United States

The Surgeon General serves as America's Doctor by providing Americans the best scientific information available on how to improve their health and reduce the risk of illness and injury. The Surgeon General has issued a Report on Mental Health, which is the product of collaboration between the Substance Abuse and Mental Health Services Administration (SAMHSA) and The National Institutes of Health (NIH), which supports and conducts research on mental illness and mental health through the National Institute of Mental Health (NIMH).

The Surgeon General Report recognizes autism as a severe, chronic developmental disorder, which results in significant lifelong disability. The goal of treatment is to promote the child's social and language development and minimize behaviors that are maladaptive and interfere with the child's functioning at home and at school. The Surgeon General's position on behavior therapy, based on thirty years of research is that sustained behavioral therapy and applied behavior analysis (ABA), early in life is effective in reducing inappropriate behavior and in acquiring language skills, increasing communication, ability to learn, and appropriate social behavior. See http://www.surgeongeneral.gov/library/mentalhealth/chapter3/sec6.html#autism

National Institute of Mental Health

The mission of the National Institute of Mental Health (NIMH) is to further the understanding and treatment of mental illness through clinical and basic research. Utilizing the evidence and results from their research, their goal is to create a path toward prevention, recovery, and cure for mental illness.

NIMH recognizes that applied behavior analysis (ABA) has become widely accepted as an effective treatment for individuals with autism. The goal of behavioral management is to reinforce desirable behaviors and reduce undesirable ones. Effective programs will teach early communication and social interaction skills. In children younger than 3 years, appropriate interventions usually take place in the home or a child care center. These interventions target specific deficits in learning, language, imitation, attention, motivation, compliance, and initiative of interaction. Included are behavioral methods, communication, occupational and physical therapy along with social play interventions. Often the day will begin with a physical activity to help develop coordination and body awareness; children string beads, piece puzzles together, paint, and participate in other motor skills activities. At snack time the teacher encourages social interaction and models how to use language to ask for more juice. The children learn by doing. Working with the children are students, behavioral therapists, and parents who have received extensive training. Positive reinforcement is used in teaching the children. See http://www.nimh.nih.gov/health/publications/a-parents-guide-to-autism-spectrum-disorder/how-is-asd-treated.shtml

American Psychological Association

Based in Washington, D.C., the American Psychological Association (APA) is a scientific and professional organization that represents psychology in the United States. APA's mission APA is to advance the creation, communication and application of psychological knowledge to benefit society and improve people's lives. With more than 54,000 members, it is the largest association of psychologists worldwide.

The APA believes that medications on their own rarely improve behavior, so behavioral interventions are crucial. Many treatment programs emphasize "operant conditioning," which uses rewards to encourage good behavior and punishments to discourage bad behavior. APA's position is consistent with the Surgeon General's report on autism treatment. The APA also concurs with the findings of psychologist Ivar Lovaas, Ph.D. First developed in the 1960s by Dr. Lovaas, at the University of California, Los Angeles (UCLA), ABA therapy for autism makes use of the idea that when people--autistic or otherwise--are rewarded for a behavior, they are likely to repeat that behavior. In ABA treatment, the therapist gives the child a stimulus--like a question or a request to sit down--along with the correct response. The therapist uses attention, praise or a tangible incentive like toys or food to reward the child for repeating the right answer or completing the task; any other response is ignored. In a landmark 1987 study, Lovaas found that nearly half the children who received 40 hours per week of ABA therapy were eventually able to complete normal first-grade classes, while none of children who received the therapy only 10 hours per week were able to do the same. See http://www.apa.org/monitor/dec04/autism.aspx

American Speech-Language-Hearing Association

The American Speech-Language-Hearing Association (ASHA) is the nation's leading professional, credentialing, and scientific organization for speech-language pathologists, audiologists, and speech/language/hearing scientists. ASHA has been initiating the development of national standards for audiologists and for speech-language pathologists and certifying professionals for 55 years.

The American Speech-Language-Hearing Association's Speech-language pathologists prioritize assessment and intervention. They draw on empirically supported approaches to meet specific needs of children with autism. Speech-language pathologists assist communication partners in recognizing the potential communicative functions of challenging behavior and designing environments to support positive behavior. This treatment option comes from their article from the American Speech-Language-Hearing Association. (2004). Preferred practice patterns for the profession of speech-language pathology http://www.asha.org/policy/GL2006-00049.htm

Autism Society of America

The Autism Society, the nation's leading grassroots autism organization, exists to improve the lives of all affected by autism. They focus on increasing public awareness about the day-to-day issues faced by people on the autism spectrum, advocating for appropriate services for individuals across the lifespan, and providing the latest information regarding treatment, education, research and advocacy. The Autism Society is the leading source of trusted and reliable information about autism. Through its strong chapter network, the Autism Society has

spearheaded numerous pieces of state and local legislation, including the 2006 Combating Autism Act, the first federal autism-specific law. The Autism Society's website is one of the most visited websites on autism in the world and its quarterly journal has a broad national readership.

The Autism Society of America believes that Applied Behavior Therapy (ABA) now is the most recognized and scientifically supported treatment for autism. By changing the antecedents and consequences of behaviors symptomatic of autism, ABA specialists teach children the skills in which they are delayed, thereby replacing challenging and aberrant behaviors with functional and adaptive skills. Research has shown that with early intensive ABA therapy, a large percent of children with autism fully recover and lead healthy lives. See http://support.autism-society.org/site/Search?query=ABA+therapy&inc=10

National Institute of Neurological Disorders and Stroke Center

The National Institute of Neurological Disorders and Stroke (NINDS) conducts and supports research on brain and nervous system disorders. Created by the United States Congress in 1950, NINDS is one of the more than two dozen research institutes and centers that comprise the National Institutes of Health (NIH). The NIH, located in Bethesda, Maryland, is an agency of the Public Health Service within the United States Department of Health and Human Services. NINDS has occupied a central position in the world of neuroscience for more than 50 years. NINDS also works with the National Institute of Mental Health to collaborate and share research findings and methods of treatment for serious mental illnesses.

NINDS' stance on the treatment of autism is one that is supportive of the findings of the Lovaas Institute. This stance is also consistent with the National Institute Mental Health. These finding include viewing applied behavior analysis (ABA) as widely accepted as an effective treatment for autism. See http://www.ninds.nih.gov/disorders/autism/autism.htm

National Institute of Child Health and Human Development

The NICHD was initially established to investigate the broad aspects of human development as a means of understanding developmental disabilities, including intellectual and developmental disabilities, and the events that occur during pregnancy. Today, the Institute conducts and supports research on all stages of human development, from preconception to adulthood, to better understand the health of children, adults, families, and communities. The NICHD has achieved an impressive array of scientific advances in its pursuit to enhance lives throughout all stages of human development, improving the health of children, adults, families, communities, and populations. Research supported and conducted by the NICHD has helped to explain the unique health needs of many, and has brought about novel and effective ways to fulfill them.

In general the National Institute of Child Health and Human Development concludes that behavior management therapy works to reinforce wanted behaviors and reduce unwanted behaviors. At the same time, these methods also suggest what caregivers should do before or between episodes of problem behaviors, and what to do during or after these episodes. Behavioral therapy is often based on Applied Behavior Analysis (ABA). NICHD believes that ABA therapy is a way to help minimize the symptoms of autism and to maximize learning. See http://www.nichd.nih.gov/pages/search.aspx?q=applied%20behavior%20therapy

Lovaas Institute

The Lovaas Institute has performed rigorous research at the University of California at Los Angeles (UCLA) under the direction of Dr. Ivar Lovaas, for decades, proving its effectiveness in treating children with autism. Treatment follows the procedures described by Dr. Lovaas, published along with long-term outcome data in peer-reviewed journals, and supported by additional long-term outcome research as recently as 2006. Dr. Lovaas and his staff have conducted countless studies and published more than 500 articles in the field of Applied Behavioral Analysis (ABA). The Lovaas Model of ABA is based on 40 years of research and is backed by published studies showing that half of children with autism who receive this intensive treatment become indistinguishable from other children on tests of cognitive and social skills by the time they complete first grade.

The Lovaas Institute is a proponent of ABA because they have demonstrated that a sizable group of children diagnosed with autism, pervasive developmental disorders and related developmental disorders have been able to achieve normal educational and intellectual functioning by 7 years of age because of ABA therapy. The Lovaas Institute personnel help develop a child's language and social interactions with parents and peers while reducing interfering behaviors such as tantrums. Their research shows these children have been mainstreamed into regular classrooms and have advanced successfully through the school system without additional assistance. After ABA treatment, children show significant increases in intellectual functioning and perform within normal ranges on standardized tests of intelligence. They also appear indistinguishable from their peers in measures of social and emotional functioning. Even for children who do not reach the level of typically-developing peers, their quality of life is greatly improved from what they learn through ABA; sizable decreases in inappropriate behaviors and acquisition of basic language skills are most often achieved. These children become more active members of their family and are usually able to learn in less restrictive special education classrooms or supervised regular education classrooms. See http://www.lovaas.com/approach-detailed.php

The Kennedy Krieger Institute

The Kennedy Krieger Institute is an internationally recognized hospital, research, and teaching institution located in Baltimore, Maryland with outpatient clinics specializing in neurobehavioral health services. A renowned authority in research on behalf of children with brain, spinal cord and musculoskeletal related disorders, Kennedy Krieger also provides professional training by eminent experts. Faculty at Kennedy Krieger are among some of the world's leading experts in this field having made crucial medical discoveries leading to innovative treatments involving individuals with disabilities.

The treatment of autistic patients at Kennedy Krieger Institute emphasizes applied behavior analysis (ABA). The institute's official position is that ABA is a form of therapy that has been shown to reduce problem behavior and increase appropriate skills for individuals with intellectual disabilities. Their research, along with the large body of studies into ABA treatment, provides empirical evidence indicating that procedures developed using ABA-based principles are effective at assessing and treating a variety of maladaptive behaviors engaged in by individuals with a variety of diagnoses, including autism, and intellectual and developmental disabilities. See http://www.kennedykrieger.org

Center for Autism and Related Disorders

The Center's CARD I and CARD II programs include comprehensive and cutting-edge curricula that can be tailored to the specific needs of individuals from birth to 21 years of age. These programs help children learn to communicate, develop friendships, and lead happy, healthy lives. CARD Specialized Outpatient Services (SOS) provides assistance with specific areas of concern for a family and develops and implements strategies to diminish problem behaviors and teach necessary skills. Its Director, Dr. Doreen, studied autism treatment for 12 years under the direction of renowned autism treatment scientist Dr. Ivar Lovaas at the University of California, Los Angeles. Dr. Lovaas discovered that intensive early intervention using applied behavior analysis treatment yielded a 47 percent recovery rate among children with autism who participated in his study. Building off these findings, Dr. Doreen and her associates developed the CARD treatment curriculum for children diagnosed with autism. Their methodology and treatment forms are based on the Lovaas model of applied behavior analysis (ABA).
CARD is committed to remaining at the forefront of research on ABA-based methods of autism assessment and treatment. In August 2009, CARD researchers published a study documenting recovery in a large group of children with autism. The primary focus of their research is ABA-based methods of assessment and treatment. They believe treatment approaches grounded in ABA are now considered to be at the forefront of therapeutic and educational interventions for children with autism. In general, this behavioral framework utilizes manipulation of antecedents and consequences of behavior to teach new skills and eliminate maladaptive and excessive behaviors. The Discrete Trial is a particular ABA teaching strategy which enables the learner to acquire complex skills and behaviors by first mastering the subcomponents of the targeted skill. See http://www.centerforautism.com/continuing-edu.aspx

Association for Science in Autism Treatment

ASAT is a not-for-profit organization of parents and professionals committed to improving the education, treatment, and care of people with autism. Its mission is to educate parents, professionals, and consumers by disseminating accurate, scientifically-sound information about autism and its treatment and by combating inaccurate or unsubstantiated information. In doing so, ASAT promotes the use of effective, science-based treatments for all people with autism, regardless of age, severity of condition, income or place of residence.
ASAT agrees with studies that show ABA is effective in increasing adaptive behaviors and teaching new skills. In addition, many studies demonstrate that ABA is effective in reducing problem behavior. A number of studies also indicate that, when implemented early in life, ABA may produce large gains in development and reductions in the need for special services. ASAT maintains ABA is an effective intervention for many individuals with autism spectrum disorders. ABA interventions should be supervised by behavior analysts. See
http://www.asatonline.org/treatment/autismtreatments

National Alliance of Autism Research

Autism Speaks was founded in February 2005 by Bob and Suzanne Wright, grandparents of a child with autism. Since then, Autism Speaks has grown into the nation's largest autism science and advocacy organization, dedicated to funding research into the causes, prevention, treatments

and cure for autism; increasing awareness of autism spectrum disorders; and advocating for the needs of individuals with autism and their families.

Autism Speaks uses a network of treatment called the Interactive Autism Network (IAN)

a project collecting information online from families of children with autism spectrum disorders (ASDs) from throughout the United States, containing reports on the use of speech and language therapy. Autism Speaks has ranked ABA therapy in the top three most used methods for effective treatment of autism. Moreover, their verbal behavior therapy is based on the applied behavior analysis (ABA), method of treatment. They therefore acknowledge the efficacy of ABA therapy and have adapted and modified its use to gain the desired results in improving verbal skills by intensive behavior treatment. See
http://www.autismspeaks.org/search/apachesolr_search/what%20is%20ABA

Autism Science Foundation

The Autism Science Foundation was founded in 2009 as a nonprofit corporation organized for charitable and educational purposes, and exempt from taxation under section 501(c)(3) of the IRS code.

The Autism Science Foundation's mission is to support autism research by providing funding and other assistance to scientists and organizations conducting, facilitating, publicizing and disseminating autism research. The organization also provides information about autism to the general public and serves to increase awareness of autism spectrum disorders and the needs of individuals and families affected by autism.

Scientists agree that the earlier in life a child receives early intervention services the better the child's prognosis. All children with autism can benefit from early intervention, and some may gain enough skills to be able to attend mainstream school. Research tells us that early intervention in an appropriate educational setting for at least two years prior to the start of school can result in significant improvements for many young children with Autism Spectrum Disorders. As soon as autism is diagnosed, early intervention instruction should begin. Effective programs focus on developing communication, social, and cognitive skills.

Early diagnosis of ASD, coupled with swift and effective intervention, is paramount to achieving the best possible prognosis for the child. Even at ages as young as six months, diagnosis of ASD is possible. Regular screenings by pediatric psychiatrists are recommended by the Centers for Disease Control (CDC). Even if your child is not diagnosed with an ASD before the age of 3, under the Individuals with Disabilities Education Act (IDEA), your child may be eligible for services provided by your state.

The most effective treatments available today are applied behavioral analysis (ABA), occupational therapy, speech therapy, physical therapy, and pharmacological therapy. Treatment works to minimize the impact of the core features and associated deficits of ASD and to maximize functional independence and quality of life.
http://www.autismsciencefoundation.org/what-is-autism/autism-diagnosis/treatment-options

Autism Speaks

Autism Speaks was founded in February 2005 by Bob and Suzanne Wright, grandparents of a child with autism. Their longtime friend Bernie Marcus donated $25 million to help financially launch the organization. Since then, Autism Speaks has grown into the world's leading autism science and advocacy organization, dedicated to funding research into the causes, prevention, treatments and a cure for autism; increasing awareness of autism spectrum disorders; and advocating for the needs of individuals with autism and their families. We are proud of what we've been able to accomplish and look forward to continued successes in the years ahead. http://www.autismspeaks.org/what-autism/treatment

Centers for Disease Control and Prevention

According to reports by the American Academy of Pediatrics and the National Research Council, behavior and communication approaches that help children with ASDs are those that provide structure, direction, and organization for the child in addition to family participation.

A notable treatment approach for people with an ASD is called applied behavior analysis (ABA). ABA has become widely accepted among health care professionals and used in many schools and treatment clinics. ABA encourages positive behaviors and discourages negative behaviors in order to improve a variety of skills. The child's progress is tracked and measured. http://www.cdc.gov/ncbddd/autism/treatment.html

Autism Research Institute

ARI is dedicated to developing a standard of care for individuals with autism spectrum disorders and their families. We rely on the generosity of donors to help us advance autism research and provide needed information and support for families and individuals with autism spectrum disorders. We need and appreciate your support. The Autism Research Institute (ARI) is a non-profit 501(c)3 organization focused on conducting and sponsoring research aimed at improving the quality of life for today's generation of children and adults with autism spectrum disorders. http://www.autism.com/index.php/treat_behavioralintervention

In the Matter of	)	DECLARATION OF SERVICE: BY MAIL
	)	
Consumer Watchdog, et al. v. California Department of Managed Health Care, et al.	)	Appeal No. **B232338**

I am over the age of 18 years, and not a party to this cause.

I am an employee at the Department of Insurance, State of California, employed at 45 Fremont Street, 21st Floor, San Francisco, CA 94105.

On June 27, 2013, at San Francisco, California, I sealed into an envelope and deposited in the United States mail, postage there upon fully prepaid, true copies of the following documents in the above entitled matter; the original, or a true copy, of each document served is attached hereto; said copies were addressed as follows:

SUPPLEMENTAL LETTER BRIEF and DECLARATION OF SERVICE were mailed to:

SEE ATTACHED SERVICE LIST

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

Executed on June 27, 2013, at San Francisco, California.

Declarant

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