

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 01/03/11

HONORABLE ROBERT H. O'BRIEN

JUDGE A. FAJARDO

DEPT. 85

HONORABLE

JUDGE PRO TEM

DEPUTY CLERK

J. DE LUNA, C.A.

Deputy Sheriff

NONE

ELECTRONIC RECORDING MONITOR

Reporter

1:53 pm

BS121397

CONSUMER WATCHDOG ET AL

Plaintiff
Counsel

VS

Defendant
Counsel

CALIFORNIA DEPARTMENT OF MANAGE
HEALTH CARE ET AL

NO APPEARANCES

NATURE OF PROCEEDINGS:

RULING ON HEARING ON PETITION FOR WRIT OF MANDATE

The Court having taken the above stated matter under submission on 12/13/10, now rules as more fully reflected in the "Decision Re: Petition for Writ of Mandate", consisting of eight (8) pages, which is signed and filed this date.

The Writ will be denied as to paragraph 1a of the prayer. The Writ will be granted as to paragraph 1b of the prayer.

Paragraph 1c of the prayer is moot as noted above.

Paragraph 2a and 2b are subsumed in the ruling as to paragraph 1.

As to paragraph 3, the Court denies declaring the contents of 3a. As to paragraph 3b, it is subsumed by the ruling as to paragraph 1.

Paragraph 3c is subsumed by the ruling in paragraph 1.

Paragraph 4 of the prayer will be left to a post-judgment motion.

Counsel for the Petitioner is to prepare and serve a proposed Judgment and Writ on opposing Counsel to approve as to form.

MINUTES ENTERED
01/03/11
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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HEALTH CARE ET AL

NATURE OF PROCEEDINGS:

CLERK'S CERTIFICATE OF MAILING/ NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 1/3/11 upon each party or counsel named below by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully prepaid.

Date: 1/3/11

John A. Clarke, Executive Officer/Clerk

By: _____

A. Fajardo
A. Fajardo

MINUTES ENTERED
01/03/11
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 01/03/11

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NONE

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NO APPEARANCES

VS

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Counsel

CALIFORNIA DEPARTMENT OF MANAGE
HEALTH CARE ET AL**NATURE OF PROCEEDINGS:**

BEVERLY GROSSMAN PALMER
 FREDRIC D. WOOCHEER
 BYRON F. KAHR
 Strumwasser & Wooccher LLP
 10940 Wilshire Blvd., Ste 2000
 Los Angeles, CA 90024

PAMELA PRESSLEY, ESQ.
 JERRY FLANAGAN
 Consumer Watchdog
 1750 Ocean Park Blvd., Ste 200
 Santa Monica, CA 90405-4938

MICHAEL MCCLELLAND
 DREW BRERETON
 Department of Managed Health Care
 980 9th St., Ste 500
 Sacramento, CA 95814

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FILED
Superior Court of California
County of Los Angeles

DEC 30 2010

John A. Clarke, Executive Officer/Clerk
By *A. Fajardo*, Deputy
ANNETTE FAJARDO

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

CONSUMER WATCHDOG, et al.,
Petitioners,
vs.
CALIFORNIA DEPARTMENT OF
MANAGED HEALTH CARE, et al.,
Respondents\Defendants.

Case No. BS121397

DECISION RE: PETITION
FOR WRIT OF MANDATE

The three causes of action in the First Amended Petition and Complaint are focused on a CCP § 1085 Petition for Writ of Mandate (first cause of action):

- 1) To compel Respondent to order health plans that deny ABA treatment to autistic enrollees on the ground there is no coverage, to provide coverage to licensed ABA providers or ABA providers who are certified for private professional organizations, or ABA providers who are supervised by a licensed or certified ABA provider;
- 2) To compel Respondent to cease implementing the March 9, 2009 memorandum;
- 3) To compel Respondent to produce all non-privileged, non-exempt public records listed in the April 10, 2010 request.

///

1 The complaint also seeks an injunction (second cause of action)¹ and declaratory
2 relief (third cause of action) relating to the same subjects set out above. The injunction
3 relief and declaratory cause of action turn on the mandate decision.

4 Public Records Act

5 The court deems this request as negligible and tangential to the main purpose of the
6 writ. Petitioner's counsel indicated that petitioner does not intend to pursue this claim with
7 respect to the substantive part of the present petition -- that is, Respondents' failure to
8 produce everything petitioner asserts is producible does not, and will not, affect the
9 decision on the mandamus, impact its position on the substantive merits. As the court
10 observed during the hearing, it would be unproductive to rule on the writ portion, and if
11 petitioner is unsuccessful then have petitioner come back to court after receiving the
12 documents requested and want to have the writ process heard again. Counsel assures the
13 court that the substantive part of the writ as it exists now does not and will not depend on
14 the missing documents if there are any.

15 Thus, the court deems this part of the petition moot to being revived in some other
16 setting or case. Moreover, petitioner apparently was denied access to the documents
17 before the December 18, 2010 trial on the petition and did not bring a motion to compel
18 before trial.

19 By this order the court does not intend to rule on Respondent's objection to the
20 Public Records Act claim.

21 Evidence and Other Objections

22 Respondent's objections:

23 - Use of privileged material (Jacobson Declaration) sustained. The last page of
24 Exhibit B to Jacobson declaration may be removed. Counsel shall coordinate removal with
25 the court's judicial assistant.

26 - 75 objections filed November 22, 2010.

27
28 _____
¹Injunction relief is a remedy and not a cause of action.

1 - Overruled. Some of the declaration's evidence encroaches into legal
2 conclusions, which are not admissible under any circumstances, or other conclusory
3 statements that might not be received in a live witness trial. Also, other questionable
4 evidence sometimes has crept into some of the declarant's statements. However, the court
5 can discern the important and clearly admissible opinions, as well as the direct and indirect
6 evidence, in evaluating the submitted declarations. The court automatically ignores any
7 legal opinions or conclusions that are offered.

8 - Objection to Exhibits D and E to Kahn declaration (objection filed December 13,
9 2010).

10 - Sustained. Legal conclusion.

11 - Objection to Jacobson declaration Exhibits (objection filed December 13, 2010).

12 - Overruled.

13 - Objection to Exhibits attached to Reply.

14 - Overruled. (Respondent could have asked for further briefing but didn't.)

15 - Objection to post-hearing letter.

16 - Overruled. The letter was simply responding to respondent's oral argument
17 that supplemented respondent's written brief.

18 - Objections made during Donahue deposition.

19 - Overruled.

20 Petitioner's objections:

21 - Evidence objections to several declarations (filed December 6, 2010).

22 - Overruled.

23 - Objection to Supplemental Declaration of Donahue (filed December 9, 2010).

24 - Overruled.

25 Requests for Judicial Notice:

26 - Petitioner's Requests (filed November 2, 2010 and December 6, 2010) - granted.

27 ///

28 ///

1 - Respondent's Requests (filed November 22, 2010).

2 - Denied as to Exhibits II, and JJ.

3 - Grant rest.

4 Impact of Demurrer

5 Petitioner asserts that the court has already rejected current arguments by virtue of
6 the ruling on demurrer. (Reply p. 1, lines 18-21; opening brief, p. 11, lines 24-28, and p.
7 19, lines 5-7.)

8 A demurrer admits the truth of all material facts properly pled but not contentions,
9 deductions, or conclusions of fact or law. (Aubrey v. Tri-City Dist., 2 Cal.4th 962, 966-967.)

10 If petitioner's position is correct that the court has already rejected Respondent's
11 arguments, there would be no need for a mandate hearing at all.

12 A ruling on a demurrer is an attack on the pleadings and is not binding on
13 subsequent procedures such as summary judgment or trial. (See e.g. Aerojet General
14 Corp. v. Commercial Union Ins. Co., 155 Cal.App.4th 132, 139 fn. 6.)

15 2052

16 Business and Professions Code section 2052 is limited to the practice of medicine
17 and the licensing of physicians, osteopaths, podiatrists, and perhaps mid-wives.

18 Other healing arts (psychologists, nurses, occupational therapists, etc.) have
19 separate regulatory and licensing provisions. (See e.g. West's annotated Calif. Codes,
20 Business & Professions, Vol. 3A, Pt. 2, p. 2 and 2010 Revised Pocket Part, p. 1 listing the
21 myriad of specialities including Health Care Providers.) Section 2052 does not prohibit
22 non-licensed ABA specialists from practicing.

23 Ministerial Duty

24 Health care service plans administered by the Respondent are required to be
25 licensed by the state of California (Health & Saf. Code, § 1349).

26 Respondent has the duty to "ensure that health care service plans provide enrollees
27 with access to quality health care services and protect and promote the interests of
28 enrollees" (Health & Saf. Code, § 1341(a), emphasis added).

1 Mandamus is not available to compel an act that Respondent has no legal duty to
2 perform. (Shamsion v. Dept. of Conservation, 136 Cal.App.4th 621, 639.) Also,
3 mandamus requires not only a ministerial duty, it requires that the petitioner have a clear,
4 present, and beneficial right to the performance of the duty. (See Cooper v. Estevo Mun.
5 Imp. Dist., 70 Cal.2d 645, 650.) Respondents do not challenge the petition on the
6 "beneficial right" of petitioners. In any event, when the public interest is extant, as here,
7 there is an exception to the beneficial right condition.

8 A ministerial act or duty is one in which someone (including a public officer or entity)
9 is required to perform in a prescribed manner and without regard to its judgment or opinion;
10 contrasted to where the public officer or entity has the power to act according to the
11 dictates of its own discretion judgment, and reasonable application of law.

12 In this case there is no clear direction compelling Respondent to perform in the
13 manner requested by the petitioner. Indeed, the Department's primary statutory duty is to
14 insure that plans provide quality health care services in order to protect the interests of the
15 enrollees. The Department has determined, given the extensive licensing model in
16 California for health care services, that requiring licensing for the type of intense behavior
17 analysis provided to autistic patients is the proper standard by which to insure quality
18 service and protection for enrollees. That doesn't mean ABA is not medically necessary
19 in appropriate cases. It just means that the quality of that analysis cannot be measured by
20 private entities over which the state has no control.

21 What's wrong with requiring licensing? Why delegate quality control to a private
22 entity especially in dealing with health care and in particular with autistic young people?
23 The state would lose control over quality by delegating qualification decisions to the
24 certification process of BACB. There is no ministerial duty to do so.

25 Petitioner's remedy is with the Legislature and not by mandamus.

26 The court does not doubt that ABA is an acceptable therapy for autism, in
27 conjunction with several other disciplines. There is no evidence that it is the only
28 acceptable or effective therapy.

1 Many people, including experts, have the opinion that "whatever works" is an
2 acceptable mode of approach to unsolved, or not readily curable, conditions like autism,
3 cancer, etc. However, that does not translate into a legal requirement that Respondent has
4 a "ministerial duty" to compel coverage for unlicensed specialists.

5 The court does, in no way, intend to demean the BACB or its members and
6 certificate holders. ABA most certainly should continue as a possible treatment for autism
7 -- it just means that the respondent is not obliged, under its duty, to compel insurance
8 coverage for an unlicensed provider. As noted above, the court has determined that here
9 is no illegality to ABA practice under Bus. & Prof. Code, § 2052, the only argument
10 presented that purports to establish that the unlicensed practice of ABA is illegal.

11 "Underground" Regulation

12 The court does not recall any statute using the term "illegal underground regulation."
13 If there is, counsel will advise the court and the term will be so used henceforth.

14 Again, petitioner relies on the Demurrer decision in asserting a closed-deal argument
15 (p. 19, lines 5-7 of opening brief).

16 On March 9, 2009, the Department issued a Memorandum to insurance plans
17 entitled "Improving Plan Performance to Address Autism Spectrum Disorders." The
18 Department claims that the Memo is not a regulation because it sets forth "the only legally
19 tenable interpretation" of the law.

20 The two-part test for determining whether such a memorandum constitutes a
21 "regulation" subject to the Administrative Procedures Act ("APA") is well established. "First,
22 the agency must intend its rule to apply generally . . . Second, the rule must 'implement,
23 interpret, or make specific the law enforced or administered by [the agency], or . . . govern
24 [the agency's] procedure.'" Tidewater Marine Western, Inc. v. Bradshaw, (1996) 14 Cal.4th
25 557, 571 (quoting Gov. Code, § 11342(g)).² This definition sweeps "very broadly" (Id. at
26

27 ²Tidewater Marine Western Ins. v. Bradshaw, 14 Cal.4th 557, 571, relied on by petitioner (and
28 referred to in the demurrer opinion) quotes from former Gov. Code, § 11342(g) defining "Regulation."
Section 11342(g) has since been repealed with part of it continued as in (§ 11342.600) (defining Regulation)
and (§ 11340.9(d) (exclusions from administrative Regulations).

1 p. 571) to ensure that all stakeholders may participate through a formal, public process in
2 the adoption of any "regulation." (*Id.* at pp. 568-569.)

3 The Memo's grievance procedure is a regulation. It provides that for any appeal of
4 a treatment denial for an autistic enrollee, "[t]he DMHC will initially make a determination
5 whether the service being sought is a covered health care service," and the appeal will be
6 referred to IMR only if "that determination is made in the affirmative" and the dispute
7 involves a claim that a service is either "experimental or investigational" or "is not medically
8 necessary to treat the patient's condition." In other words, the Memo provides that an
9 enrollee appeal raising both coverage and medical necessity issues will first be reviewed
10 by the Department for coverage issues.

11 This interpretation is not "patently compelled" by statute, however. Health and
12 Safety Code section 1374.30(d)(3) expressly declares that "[i]f there appears to be any
13 medical necessity issue, the grievance shall be resolved pursuant to an independent
14 medical review." This statute can be interpreted to mean that if an appeal raises both
15 coverage and medical necessity issues, it must be sent to IMR. On the other hand, it can
16 be interpreted to mean the Department must refer to IMR only if an issue of medical
17 necessity remains after the Department's determination of coverage.

18 Nonetheless, the Department's interpretation is not merely repetitive of the statutory
19 language and is not the only legally tenable interpretation. As such, it is an attempt to
20 "implement, interpret, or make specific the law" (Gov. Code, § 11342(g)), the essence of
21 a regulation.

22 The fact alone that the court determines that the March 9, 2010 purports to be a
23 "regulation" that needs to comply with the Administrative Procedures Act (Gov. Code, §
24 11340), does not detract from or impact respondent's discretionary decision to continue its
25 practice of determining coverage issues on the general basis of denying the demand to
26 compel plans to cover non-licensed ABA specialists. Moreover, petitioner's argument that
27 the court should issue a writ commanding Respondent to also "return to its prior system of
28 referring complaints . . . to IMR for an independent medical panel's decision . . ." to

1 determine "medically necessary," is not within the scope of this Petition.

2 There is nothing prohibiting Respondent from deciding coverage issues before
3 "medical necessity" issues are decided. Every "medically necessity" procedure does not
4 *a fortiori* mean that the procedure is covered, i.e. if the procedure purports to be
5 administered by a non-licensed specialist.

6 Conclusion

7 The writ will be denied as to paragraph 1a of the prayer. The writ will be granted as
8 to paragraph 1b of the prayer.

9 Paragraph 1c of the prayer is moot as noted above.

10 Paragraph 2a and 2b are subsumed in the ruling as to paragraph 1.

11 As to paragraph 3, the court denies declaring the contents of 3a. As to paragraph
12 3b, it is subsumed by the ruling as to paragraph 1.

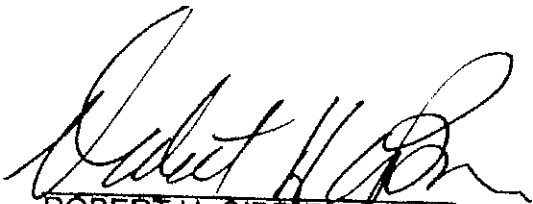
13 Paragraph 3c is subsumed by the ruling in paragraph 1.

14 Paragraph 4 of the prayer will be left to a post-judgment motion.

15 Counsel for Petitioner to prepare, serve and file in Department 85 a Proposed
16 Judgment and Proposed Writ forthwith. The Court will hold these proposals for seven days
17 before signing the Judgment.

18
19

20 Dated: DEC 30 2010



ROBERT H. O'BRIEN
Judge of the Superior Court

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