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Lucinda "Cindy" Ehnes, Director  
California Department of Managed Health Care  
California Help Center  
980 9th Street, Suite 500  
Sacramento, CA 95814-2725

**RE:** *Consumer Watchdog, et al. v. Calif. Dept. of Managed Health Care, et al.*

Dear Director Ehnes,

I am writing to you on behalf of my client, the California Association for Behavior Analysis (hereinafter "CAL ABA"), with regard to positions taken by the Department of Managed Health Care (hereinafter "Department") concerning applied behavior analysis (hereinafter "ABA") services in the aforementioned case, *Consumer Watchdog, et al. v. Calif. Dept. of Managed Health Care, et al.*<sup>1</sup>

The Department asserts that "it is facially illegal to provide any health care treatment without a license or approval by the State."<sup>2</sup> This assertion is absurd on its face. There is no standard definition of "health care treatment." In fact, care such as that provided by family members and first aid provided by good Samaritans can constitute "health care treatment." This assertion simply is part of the Department's attempt to rationalize its decision not to address these services in the context of the treatment of Autism Spectrum Disorder ("ASD") under the Mental Health Parity Act.

The Department also asserts that "[p]ersons who do not possess a medical license may not diagnose or provide any treatment for *any* physical or mental

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<sup>1</sup> *Consumer Watchdog v. Calif. Dept. of Managed Health Care* (2010 Los Angeles Super. Ct.) Case No. BS121397.

<sup>2</sup> *Id.*, Respondent's MPA in Opp. to Pet. for Writ of Mandate, p. 3, ln. 15-16.

condition unless the Legislature affirmatively grants them an exception to the prohibition.”<sup>3</sup> This statement does not relate to the issue at hand.

The Department cites Business and Professions Code section 2052, which addresses the practice of *medicine*. ABA services are health care services, but they do not constitute the practice of medicine. Hence, the Department’s reliance upon Section 2052 is entirely misplaced.

The practice of “healing arts” is regulated in Division 2 of the Business and Professions Code. It addresses various areas of health care services that the Legislature has chosen to regulate. (There are other health care-related services, such as laboratory services, that are regulated in the Health and Safety Code.) However, simply because a service is unregulated does not mean it is not a health care service. Indeed, most of the professions regulated in the Business and Professions Code became regulated only after the professions themselves sought regulation. They usually did so in order to establish recognition of standards for practice of the particular discipline that had been developed by academicians, other professionals that had already been regulated, and national accrediting bodies.

It is well established that the law lags behind the development of science and technology, and the same is true in the regulation of disciplines in health care. As disciplines are developed and refined, the need for regulation becomes more obvious and acute. We have arrived at that place with ABA services, and CAL ABA sponsored legislation last year for the State to recognize national certification of ABAs by the Behavior Analyst Certification Board. As with every profession seeking regulation, it is a multi-year process, and CAL ABA will again undertake the effort.

The Department’s assertion that the practice of ABA by an individual who is not licensed constitutes the illegal practice of medicine, and therefore, that it must not be a health care service but rather an educational service, is tantamount to a denial of the existence and legitimacy of virtually every discipline regulated in Division 2 of the Business and Professions Code prior to those disciplines being regulated by the State. Just because a discipline is currently unregulated by the State does not automatically mean that an individual is violating the law when he or she practices in that discipline.

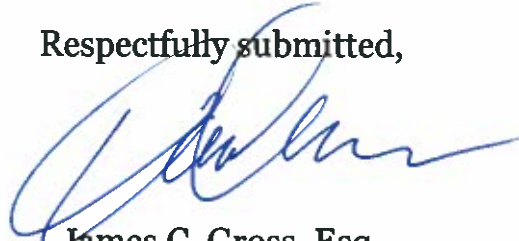
CAL ABA recognizes the difficulties the Department has encountered in resolving the dispute between health care service plans and families seeking coverage for ABA services. However, denying the existence of something does not make it disappear. Therefore, CAL ABA asks that you reconsider, and

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<sup>3</sup> *Id.* at p. 13, ln. 11-13. Emphasis in original.

ultimately reverse, the Department's somewhat circular assertion that ABA is the practice of medicine, or an educational service. By doing so, we believe you will assist the Department in addressing the real issues at hand in this debate.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "James C. Gross", written in a cursive style.

James C. Gross, Esq.