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DEPARTMENT OF MANAGED HEALTH CARE and  
8 LUCINDA "CINDY" EHNES

9 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 IN AND FOR THE COUNTY OF LOS ANGELES

11 CONSUMER WATCHDOG, a non-profit )  
organization; and ANSHU BATRA, M.D., )  
12 F.A.A.P., )

13 Petitioners and Plaintiffs, )

14 v. )

15 CALIFORNIA DEPARTMENT OF )  
16 MANAGED HEALTH CARE; LUCINDA )  
17 "CINDY" EHNES, in her official capacity )  
18 as Director of the Department of Managed )  
19 Health Care; and DOES 1 through 20, )  
inclusive, )

20 Respondents and Defendant(s). )

Case No.: BS121397

RESPONDENTS MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
OPPOSITION TO PETITION FOR WRIT OF  
MANDATE

Dept.: 85  
Judge: Hon. James C. Chalfant  
Date: December 13, 2010  
Time: 9:30 a.m.

Exempt from Fees  
(Gov. Code § 6103)

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1 **I. Summary of Argument**

2 The Department of Managed Health Care (Department) has wrestled for years with the complex  
3 legal dilemma presented by Autism Spectrum Disorder (ASD). Petitioners present a compelling but  
4 simplistic parable in which health plans must cover whatever interventions the parents of a child with  
5 autism believe will ameliorate their child’s behavioral symptoms, from whoever wants to provide it.  
6 They ignore the impact this will have on the affordability of children’s coverage and vilify the  
7 Department for refusing to accept their simplistic vision. In fact, the issues of autism treatment are  
8 complex, expensive, evolving and often heart-wrenching for both parents and this Department, which is  
9 tasked with the charge of helping them while faithfully following the law.

10 Such an issue, like many in health care, is best suited for the considered judgment of the  
11 Legislature and the Department, not the judicial branch. The Legislature vested the Department with the  
12 responsibility to wield broad, but not unbound, discretion on complex public policy matters, evidenced  
13 by statutory provisions regarding the handling of consumer complaints. This grant of judgment and  
14 discretion from the Legislature should not be distorted into a *ministerial* or assembly-line obligation.

15 The law is explicit; the services the plans must provide are only those *health care* services which  
16 must be *covered* under the contract of benefits. The Legislature set forth state licensure as the bright-  
17 line consumer protection regarding practitioners of health services. Those services which can be, but are  
18 not always, health care services must be covered only if they require the skill and expertise of a licensed  
19 provider.

20 Petitioners’ reckless argument – that no license is required to treat the medical condition of a  
21 vulnerable child – is dangerous and limitless, because it would eliminate the ability of the Department to  
22 require licensure in any instance. No doubt this is why it was already uniformly rejected by the  
23 Legislature and the Supreme Court. We ask this Court to reject Petitioners’ attempt to rewrite the  
24 Legislative scheme, which is express, unambiguous and a necessary antecedent to effective consumer  
25 protection.

26 ///

27 ///

1 **II. Introductory Rebuttal**

2 The Knox-Keene Act (KKA) requires health plans (plans) to provide health care services.  
3 Petitioners falsely claim that ABA is always a health care service, and ask the Court to compel the  
4 Department to require health plans to categorically cover and provide the service. Petitioners also  
5 falsely claim that health care services may be provided by persons who are neither licensed nor certified  
6 by the State of California, and thus seek an order that the Department require plans to cover services  
7 provided by persons who are not authorized to perform health care by the State. Petitioners further  
8 claim that the Department must send all plan denials for ABA to Independent Medical Review (IMR),  
9 even though the law states that only those denials based upon medical necessity are eligible for IMR.  
10 Petitioners seek to substitute their own preferred results, or request that the Court substitute its own  
11 discretion, when the law clearly vests the Director of the Department with the discretion to execute these  
12 complex managed health care laws. None of these issues involve merely ministerial duties.

13 Petitioners claim that ABA is the most effective treatment for individuals with autism and, unless  
14 plans are forced to pay for that treatment, some children will not be able to obtain it. The Department  
15 has complied with current law to address the needs of children with ASD. Petitioners ignore current law  
16 and ask this Court for a determination that holds plans financially responsible for providing  
17 interventions that the Legislature did not intend, nor require, to be their responsibility. While the  
18 Department does not dispute that children with autism should receive appropriate treatments, the law  
19 requires that plans cover only those services that are considered to be health care services, and only then  
20 by persons who are authorized under current California law to do so.

21 Despite Petitioner's contentions to the contrary, the Department has been supportive of families  
22 getting the proper coverage for autism treatments to which they are entitled under the law:

- 23
- 24 ● In 2003, the Department, by regulation, confirmed the Mental Health Parity Act must be read as  
a broad mandate, covering health care services for the enumerated conditions. (Exh. AA.)
  - 25 ● Beginning in late 2004, the Department began a focused survey of the seven largest plans to  
26 evaluate their compliance with the Mental Health Parity Act. The Department established the  
27 Mental Health Work Group, a voluntary collaboration of representatives from various  
28 stakeholder groups, to facilitate discussion of alternatives and improvements in mental health  
delivery systems, including problems encountered in obtaining treatment for ASD. (Dec. of

1 Drew Brereton, pg. 3, para. 13.)

- 2 • The Department has required plans to make changes to their Evidence of Coverage documents to  
3 ensure compliance with Mental Health Parity and has resolutely rejected the position that a plan  
4 can exclude autism treatments from coverage. (Dec. of Drew Brereton, pg. 3, para. 14.)

5 Petitioners present this Court with an empathetic red herring, but a red herring nonetheless.

6 However, this case is solely about the following issues:

- 7 • Is ABA therapy always a healthcare service?
- 8 • Must the Department compel plans to commit an illegal act by providing ABA through  
9 unlicensed providers?
- 10 • May this Court by mandamus adjudicate complex issues of public policy?

11 The answers to these questions are straightforward.

- 12 ➤ Petitioners' own evidence proves that ABA is not always a healthcare service. Thus,  
13 there is a coverage decision requiring the exercise of discretion which cannot be steered  
14 by this Court.
- 15 ➤ It is facially illegal in California to provide any healthcare treatment without a license or  
16 approval granted by the State.
- 17 ➤ The Legislature expressly delegated to Respondents, the final authority to decide the  
18 issues raised by Petitioners. Principles of separation of powers require this Court to defer  
19 to the judgments the Legislature entrusted the Department to make.

19 **A. The Knox-Keene Act requires plans to provide covered services.**

20 The genesis of the instant dispute arises over what services plans are required to provide.

21 Petitioners do not dispute that plans are required to provide health care services under the KKA. Under  
22 the KKA, a plan may be obligated to cover a service because it is a basic health care service as defined  
23 in Health and Safety Code section 1345(b), a specifically mandated service, or a service the plan  
24 contractually agreed to provide. There is no dispute that ASD is listed as mental health parity condition  
25 that is required to be treated under the same terms and conditions as medical condition. (Health & Saf.,  
26 § 1374.72; 28 CCR, § 1300.74.72(a) (*att. as Exh. AA*.) However, the issue is not whether or not ASD is  
27 a health care condition, but rather whether ABA is a health care service. ABA involves a wide range of  
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1 applications, some of which may be covered health care services while others are not. Therefore, in  
2 order to evaluate coverage, the threshold determination is whether the requested service is a health care  
3 service.

4 It is significant to note that, the terminology used by the medical and mental health communities  
5 is not always uniform in meaning. At times, the prescribed ABA services may be limited to behavioral  
6 intervention therapy (which may or not be a health care service in the case at issue), while at other times  
7 the treatment plan may also include other services such as speech and language, physical and/or  
8 occupational therapy, which are themselves basic health care services. Since ABA can be utilized for  
9 both medical and educational purposes, the accurate identification and purpose of the services requested  
10 can be difficult, and a case-by-case review must be undertaken to determine whether the requested  
11 service must be covered under the MHPA.

12 For the reasons indicated above, determining whether a requested service is required to be  
13 covered, requires a factual and legal analysis, as well as the exercise of judgment, making writ relief  
14 untenable. ABA is covered only when it meets the requirements of Section 1374.72 (i.e. is treatment).

15 **B. Petitioners Concede ABA is not always a healthcare service.**

16 Petitioners' arguments are a straw man fallacy. The instant case does not concern the efficacy of  
17 ABA. As such, the evidence produced by Petitioners is irrelevant and should not be considered. Rather,  
18 this case is about *who* may render *treatment*, including ABA, to enrollees with autism. Petitioners' case  
19 rests on an inappropriate false choice: that ABA be provided by unlicensed providers or not at all. In  
20 fact, the Department regularly orders coverage of ABA as treatment, where the services require the  
21 skills and expertise of a licensed health care professional. (See e.g., Exh. G, pgs. DMHC11517-11519  
22 (*Dept's Resp. to Req. for Prod.*); see also Dec. of Kevin Donohue, pg. 2, paras. 5-6.)

23 Thus far in 2010 the Department's Help Center has resolved 59 grievances involving health plan  
24 denials of ABA services. In those cases where the ABA issue was resolved exclusively using the  
25 Department's standard complaint process, 88.6% were resolved in favor of the enrollee. In those cases  
26 that involved an Independent Medical Review, only 80% were resolved in favor of the enrollee. (Dec. of  
27 Kevin Donohue, pg. 2, paras. 5-7.) These statistics undercut Petitioners' argument because their  
28

1 requested relief – sending all cases to IMR – actually results in *less* ABA care being provided. The  
2 Court is presented with the perplexing question of whether the Department should rollback protections,  
3 causing autistic enrollees to receive less care.

4 The Department could not order coverage in all cases because only diagnosis and treatment must  
5 be covered under the Mental Health Parity Act and both of those tasks can only be performed by persons  
6 who are licensed by the state. (Health & Saf., § 1374.72; Bus. & Prof., § 2052(a).) In fact, it is a  
7 misdemeanor for an unlicensed person to treat autism. (Bus. & Prof., § 2052(a).) Petitioners' own  
8 evidence reveals that ABA can appropriately be performed by both licensed and unlicensed persons.  
9 According to Petitioners, treatment of children with autism is one of *many* applications for ABA. (Dec.  
10 of Gerald Shook, para. 2.) ABA techniques are commonly utilized to assist persons with autism by  
11 BCBA's and persons under their supervision. (Dec. of Gina Green, Ph.D., paras. 37-38.) Indeed, there is  
12 no doubt such events take place every day to benefit children through schools and the regional centers.  
13 (See Ed. Code, § 56525 [regarding the role of BCBA's in special education]; Gov't Code, § 95021  
14 [setting forth standards for the delivery of ABA at the regional centers and defining ABA as "systematic  
15 instructional and environmental modifications to promote positive social behaviors and reduce or  
16 ameliorate behaviors which interfere with learning and social interaction"]; see also Exh. O, 118:8-119:8  
17 (*Batra depo.*)<sup>1</sup> But those unlicensed services cannot be *treatment* for autism, otherwise those  
18 unlicensed professionals would be guilty of a crime, a presumption the Department refuses to make.  
19 (Bus. & Prof., § 2052.) Since those ABA services are not *treatment*, they need not be covered by a plan  
20

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21 <sup>1</sup> See also, generally, *Ka.D. v. Solana Beach Sch. Dist.* (S.D. Cal. July 23, 2010) 2010 U.S. Dist.  
22 LEXIS 74355, 16-18 (*att. as Exh. KK*); *K.S. v. Fremont Unified Sch. Dist.* (N.D. Cal. 2009) 679  
23 F.Supp.2d 1046, 1055-1056 (*att. as Exh. LL*); *J.R. v. Sylvan Union Sch. Dist.* (E.D. Cal. 2008) 2008 U.S.  
24 Dist. LEXIS 18168, 8-9 (*att. as Exh. MM*); *Arce, supra*, 181 Cal. App. 4th at 479; *Brown v.*  
25 *Bartholomew Consol. Sch. Corp.* (7th Cir. 2006) 442 F.3d 588, 591-592 [IDEA case involving ABA  
26 delivered by educators in home and classroom] (*att. as Exh. NN*); *M.H. v. New York City Dep't of Educ.*  
27 (S.D.N.Y. May 10, 2010) 2010 U.S. Dist. LEXIS 45400, 44-45 & 119-121 [state ordered to pay for  
28 child's tuition at private school for students with autism devoted entirely to an intensive ABA-program]  
(*att. as Exh. OO*); *Sytsema v. Acad. Sch. Dist. No. 20* (D. Colo. Oct. 30, 2009) 2009 U.S. Dist. LEXIS  
105978, 10-11 [district ordered to pay for ABA program for child with autism, defining ABA as "an  
instructional method... to reinforce desired behavior"] (*att. as Exh. PP*); *L.J. v. Audubon Bd. of Educ.*  
(D.N.J. Nov. 5, 2007) 2007 U.S. Dist. LEXIS 81527, 2-3 [education board ordered to provide ABA to  
child with autism, adopting the Administrative Law Judge's definition of ABA as "an educational  
method designed to increase through learning principles and methods behaviors that help children to  
learn and decrease behaviors that impede the ability to learn."] (*att. as Exh. QQ*.)

1 because the only ABA which must be covered is that which is a **treatment** for autism, a service that  
2 requires licensure. (Health & Saf., § 1374.72(a); Bus. & Prof., § 2052(a).)

3 This point is also supported in the relevant literature, relied upon by Petitioners. The preferred  
4 model for the management of autism is an interdisciplinary team model for diagnosis and planning that  
5 includes a range of professionals, only some of whom are health care providers. (*Cal. Dept. Dev. Svcs.*  
6 *Best Practice Guidelines for Screening Diagnosis and Assessment* (2002) pg. 9 (*att. as Exh. UU*); see  
7 also Scott Myers, M.D., et al., *Management of Children With Autism Spectrum Disorders* (2007)  
8 *Pediatrics*, vol. 120, no. 5, pgs. 1163-1174 (*att. as Exh. VV*.) “Professionals most often involved with  
9 persons with ASD include psychologists, psychiatrists, neurologists, pediatricians, other physicians,  
10 speech pathologists, audiologists, occupational therapists, social workers and behavioral and educational  
11 specialists.” (Exh. UU, pg. 9 (*D.D.S. Best Prac. Guidelines*); see also Exh. O, 35:16-22, 44:12-22,  
12 56:12-25 (*Batra depo*.) The various “interventions” used to manage autism are varied and represent a  
13 broad spectrum of specialties covering both health care and education. (Exh. VV at 1163 (*Myers*); see  
14 also Exh. O, 51:1-18, 79:7-80:8 (*Batra depo*.)

15 The American Academy of Pediatrics’ clinical report on the management of autism in 2007  
16 concurs.<sup>2</sup> (Exh. VV at 1162 (*Myers*.) It focused on two primary categories for the management of  
17 autism: educational interventions and medical management. (Exh. VV at 1163-1175 (*Myers*.) The  
18 Academy concluded that educational interventions – such as behavioral strategies – are the cornerstones  
19 in the management of autism. (Exh. VV at 1163 (*Myers*.) Within that group of **educational**  
20 interventions for the management of autism, the Academy specifically included ABA, pointing to  
21 studies suggesting it yielded substantial gains in IQ, language, academic performance, adaptive and  
22 social behavior, and explaining that it is also used by educators and parents in homes, schools, and other  
23 places. (Exh. VV at 1164, 1166 (*Myers*); see also Exh. O, 83:14-87:2 (*Batra depo*); but see Exh. O,  
24 79:7-82:25 (*Batra depo*.)

25 These facts are uncontradicted by Petitioners, indeed are relied upon by them, and are a crucial  
26

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27 <sup>2</sup> That report was cited as authoritative in the Petition. (Exh. HH, pg. 9, lines 13-21 (*Verified 1<sup>st</sup>*  
28 *Amd. Pet.*.)

1 foundation in understanding why California law does not compel the Department to order a plan to  
2 cover ABA treatment by an unlicensed person. In that ABA is not always a health care treatment  
3 because it is not always performed by a licensed provider, its rendition can not always be covered.  
4 Rather, the Department must evaluate each case, to determine whether ABA is being performed as a  
5 healthcare treatment or for some other reason, such as education. Consequently, every ABA case  
6 evaluated by the Department requires the exercise of discretion to determine whether a request for  
7 healthcare treatment of autism has been made. Indeed, it is this case-specific analysis which precludes  
8 writ relief.

### 9 **III. Argument**

10 Petitioners' claims fail because they are not entitled to the relief sought. Their request for  
11 mandamus relief cannot be granted because there is no ministerial duty obligating the Department to  
12 order health plans to cover ABA therapy performed by unlicensed persons, to send all ABA disputes to  
13 Independent Medical Review, or to respond to oppressive Public Records Act requests.

#### 14 **A. Mandamus may not issue to steer the exercise of discretion**

15 The Legislature created the Department and tasked it with "the execution of the laws of this state  
16 relating to health care service plans and the health care service plan business *including, but not limited*  
17 *to, those laws directing the department to ensure that health care service plans provide enrollees with*  
18 *access to quality health care services and protect and promote the interests of enrollees."* (Health &  
19 Saf., § 1341, emphasis added.) Given the enormous complexity of the health care industry, this was not  
20 a simple charge. The Court should not generate ministerial duties in this arena lightly, because managed  
21 care is a complex system which the Department alone has the expertise to bring into the harmony the  
22 Legislature intended. (See *Van de Kamp v. Gumbiner* (1990) 221 Cal.App.3d 1260, 1273-1275.)

#### 23 **1. Separation of Powers principles foreclose this Court's inquiry into the** 24 **Department's handling of enrollee grievances**

25 One Court of Appeal has described the field of managed health care under the Knox-Keene Act  
26 as an arena in which the courts are "ill-equipped to meddle." (*Desert Healthcare Dist. v. PacifiCare*  
27 *FHP* (2001) 94 Cal.App.4th 781, 795-796.) It has likewise warned that in the absence of clear  
28 legislative intent, courts reviewing the Knox-Keene Act should be very careful not to engage in complex

1 health care regulation under the guise of judicial decision-making. (See *Cal. Med. Assn. v. Aetna U.S.*  
2 *Healthcare of Cal.* (2001) 94 Cal.App.4th 151, 167.) The California Supreme Court has similarly held it  
3 is “unwilling to engage in complex economic regulation under the guise of judicial decision making.”  
4 (*Prudential Reinsurance Co. v. Super. Ct.* (1992) 3 Cal.4<sup>th</sup> 1118, 1142.) Further, as one court noted,  
5 courts may not usurp the regulatory authority that the Legislature entrusted to the Department. (*Samura*  
6 *v. Kaiser Found. Health Plan* (1993) 17 Cal.App.4th 1284, 1301-1302.) Specifically, in evaluating the  
7 Department’s processing of enrollee complaints, the Third District held courts “must give substantial  
8 deference to the good faith judgment of the agency that its procedures afford fair consideration of a  
9 party’s claims.” (*Cal. Consumer Health Care Council* (2008) 161 Cal.App.4<sup>th</sup> 684, 692.)

10         Nevertheless, Petitioners seek the exact kind of relief the courts have warned against. Petitioners  
11 request this Court engage in the sort of economic regulation in which our Supreme Court has refused to  
12 indulge. In that Petitioners seek writ relief, they necessarily must prove that the Department has a  
13 ministerial duty, in effect, that no use of discretion is undertaken in reviewing enrollee complaints. The  
14 Department alone was given the discretion to resolve enrollee complaints and the manner in which it  
15 does so is thus not a ministerial duty and cannot be dictated by the courts. (See *id.*; see also *Ridgecrest*  
16 *Charter Sch.* (2005) 130 Cal.App.4<sup>th</sup> 986, 1002.) Thus, Petitioners are not entitled to writ relief.

17         Where, as here, the defendants are public agencies and the plaintiffs seeks to restrain them in the  
18 performance of their duties, public policy considerations also come into play. There is a general rule  
19 against enjoining public officers or agencies from performing their duties. (*Tahoe Keys Prop. Owners*  
20 *Ass’n v. State Water Res. Bd.* (1994) 23 Cal.App.4<sup>th</sup> 1459, 1471.) In reviewing the request for an  
21 injunction in this case, a court must also bear in mind the extent to which separation of powers  
22 principles may affect the propriety of injunctive relief against state officials. (*O’Connell v. Super. Ct.*  
23 (2006) 141 Cal.App.4<sup>th</sup> 1452, 1464.) Further, the Supreme Court held that where the Legislature  
24 chooses to delegate to an executive agency, it is not for the court to second guess the Legislature’s  
25 choice. (*In re Qawi* (2004) 32 Cal.4th 1, 26.) In respecting the constitutional role afforded the  
26 Department as part of the Executive Branch, this Court need make no categorical decisions, but may  
27 instead simply permit the Department to continue to exercise its statutory grant of discretion made  
28

1 express in the Knox-Keene Act.

2 **2. The Adjudication of enrollee complaints was expressly committed to the**  
3 **Department's sound discretion**

4 In light of the above-noted complexities in healthcare regulation, the Legislature created a  
5 bifurcated system for the handling of enrollee complaints regarding health plan denials and offered two  
6 classifications for those denials: (1) a *disputed health care service*—eligible for coverage, but disputed  
7 as to medical necessity; or, (2) a *coverage decision*—questions regarding the contract. (Health & Saf.  
8 Code, §§ 1374.30(b) & (c).) Only disputed health care services qualify for Independent Medical  
9 Review. (See Health & Saf., § 1374.30(b), (d).) All other complaints are eligible for review under the  
10 Department's grievance system. (See Health & Saf., §§ 1368(b), 1374.30(b)-(d); *Cal. Consumer Health*  
11 *Care Council, supra*, 161 Cal.App.4<sup>th</sup> 684, 687-688, *Arce, supra*, 181 Cal.App.4<sup>th</sup> 471, 501.)

12 *Disputed health care services* were defined by the Legislature as those “eligible for coverage.”  
13 Hence, the Legislature intended for issues of coverage to be resolved *before* determining eligibility for  
14 Independent Medical Review. (Health & Saf. Code, § 1374.30(b), see also *Kaiser v. Zingale* (2002) 99  
15 Cal. App. 4<sup>th</sup> 1018, 1024 & 1026.) Petitioners seek to characterize the Department's duties relative to  
16 the classification of denials as ministerial. However Petitioners' argument ignores the exercise of  
17 discretion in making a denial. Indeed, the Department's exercise of discretion was expressly intended:

18 The department shall be the final arbiter when there is a question as to whether an  
19 enrollee grievance is a disputed health care service or a coverage decision. The  
20 department shall establish a process to complete an initial screening of an enrollee  
21 grievance. If there appears to be any medical necessity issue, the grievance shall be  
22 resolved pursuant to an *independent medical review* as provided under this article **or**  
**pursuant to subdivision (b) of Section 1368.** (Health & Saf. Code, § 1374.30(d)(3),  
emphasis added; see also (d)(2).)

23 **3. Mandamus cannot lie to steer discretion or to accomplish an unlawful result**

24 Petitioners do not challenge the Department's exercise of that discretion because they are limited  
25 under the separation of powers doctrine and can only compel the Department to perform a *ministerial*  
26 *act*, which is “an act that a public officer is required to perform in a prescribed manner in obedience to  
27 the mandate of legal authority and without regard to his own judgment or opinion....” (*Rodriguez v.*  
28

1 *Solis* (1991) 1 Cal.App.4th 495, 501-502.) The broad statutory grant of discretion to the Department in  
2 sections 1368 and 1374.30 is unmistakable. The Legislature intended that all such matters are the  
3 province of the Department, and shall not be decided in the courts because the exercise of *discretion*  
4 may not be steered by the courts. (*Ridgecrest Charter Sch.*, *supra*, 130 Cal.App.4<sup>th</sup> 986, 1002.)

5 The courts may also not invade the regulatory authority over health plans that the Legislature  
6 entrusted to Respondents. (*Samura*, *supra*, 17 Cal.App.4th 1284, 1301-1302.) Simply, because  
7 Petitioners own evidence states that ABA is not always a healthcare service, the Department must  
8 exercise its statutory discretion in reviewing all such cases to determine whether ABA in that case is  
9 healthcare treatment. Thus the writ relief Petitioners seek is no less than the hijacking of the  
10 Department's regulatory powers.

11 Further, and as more fully explained *infra*, Petitioners cannot compel Respondents by mandamus  
12 to order coverage of services rendered by unlicensed providers. California law requires professional  
13 licensure to treat autism. Thus, a writ ordering Respondents to mandate coverage for the unlicensed  
14 treatment of autism, an act which is illegal, cannot lie. (See *County of San Luis Obispo v. Super. Ct.*  
15 (2001) 90 Cal.App.4th 288, 292; see also *Pratt v. Adams* (1964) 229 Cal.App.2d 602, 606.) This court  
16 should deny Petitioners their relief.

17 **B. Petitioners cannot compel the coverage of non-healthcare services: the Knox-Keene Act**  
18 **requires plans to diagnose and treat autism spectrum disorders**

19 In the first cause of action Petitioners allege the Department has a ministerial duty to require  
20 health plans to cover ABA where it is medically necessary and provided by: (1) a licensed provider, (2)  
21 a provider merely certified by a professional organization, or (3) an individual supervised by a licensed  
22 or certified person. (Exh. HH, p. 32, para. 1a (*Verified 1<sup>st</sup> Amd. Petition*)). This allegation facially fails  
23 because it presents the Court with a misleading false choice.<sup>3</sup> The Department routinely overrules  
24 denials involving ABA and state-licensed health care providers. (See e.g., Exh. G, pgs. DMHC11517-  
25 11519 (*Dept's Resp. to Req. for Prod.*); see also Dec. of Kevin Donohue, pg. 2, paras. 5-6.) Thus, the  
26

27 <sup>3</sup> Courts commonly reject false choice arguments. (*Kirk v. First American Title Ins. Co.* (2d  
28 Dist. 2010) 183 Cal.App.4th 776, 808; *California Native Plant Society v. City of Santa Cruz* (2009) 177  
Cal.App.4th 957, 1006.)

1 first cause of action actually presents a simple and easily rejected claim: whether persons who are **not**  
2 licensed by the state may provide treatment for autism. Petitioners' cause of action fails because in  
3 California *only* licensed health care providers can lawfully treat autism – private certifications and even  
4 licensed supervision are insufficient. (Bus. & Prof., § 2052(a).)

5 **1. California law requires a health plan to cover the diagnosis and treatment of**  
6 **autism: diagnosis and treatment may only be done by a licensed provider**

7 Petitioners misconstrue the Mental Health Parity Act. That statute requires only that a health  
8 plan provide “diagnosis” and “treatment” for certain enumerated conditions including autism. (Health &  
9 Saf., §1374.72) As already noted, Petitioners' own evidence reveals that ABA is not always a health  
10 care service. The Second District recently set forth a rough framework for addressing coverage under  
11 the Mental Health Parity Act. There, health plan enrollees alleged that Kaiser Foundation Health Plan  
12 (Kaiser) violated the Mental Health Parity Act by categorically denying coverage for services including  
13 ABA. (*Arce, supra*, 181 Cal.App.4th 471, 478.) The Court of Appeal posed the following unanswered  
14 questions: (1) “whether the therapies at issue are ‘health care services’ within the meaning of the Mental  
15 Health Parity Act, and if so, [2] whether the statute requires that services only be provided by persons  
16 licensed or certified by the state.” (*Id.* at 494-95, 501.)

17 As to the first question, although the Legislature never specifically defined health care services,  
18 the Mental Health Parity Act contains sufficient evidence to determine its intent. Unlike the Knox-  
19 Keene Act's primary mandates, the Mental Health Parity Act is not based on a list of health care  
20 services. (*Compare* Health & Saf., §§ 1345(b), 1367(i), *with* Health & Saf., § 1374.72.) The Mental  
21 Health Parity Act surrounds nine mental health *conditions* – including autism – and simply requires  
22 coverage for the **diagnosis** and medically necessary **treatment** of those conditions. (Health & Saf., §  
23 1374.72(a) & (d).) Thus, the health care services which must be covered under the Mental Health Parity  
24 Act are *diagnosis* and *treatment* for the enumerated conditions. This is crucial to the outcome of the  
25 first cause of action, because *diagnosis* and *treatment* of any physical or mental condition is explicitly  
26 regulated in the law. (Bus. & Prof., § 2052.)

27 The Department's regulation on Mental Health Parity is consistent. Specifically, the regulation  
28 clarifies the requirements of the Mental Health Parity Act and specifies that the mental health services

1 required for the diagnosis and treatment of the enumerated diagnoses are all medically necessary “*health*  
2 *care services*” required under the Knox-Keene Act. (28 CCR § 1300.74.72(a) (*att. as Exh. AA*); see also  
3 *Arce, supra*, 181 Cal.App.4th 471, 492.) In so doing, the Department equated the Mental Health Parity  
4 Act’s requirement to provide diagnosis and treatment, with the phrase “health care services.” The  
5 Department’s regulation is entitled to deference. (*Ste. Marie v. Riverside County Regional Park &*  
6 *Open-Space Dist.* (2009) 46 Cal.4th 282, 292.)

7 The second *Arce* question is one of provider licensure.<sup>4</sup> (*Arce, supra*, 181 Cal.App.4th at 501.)  
8 The Legislature defined the term *provider* in the Knox-Keene Act to mean “any professional person,  
9 organization, health facility, or other person or institution ***licensed by the state*** to deliver or furnish  
10 health care services.” (Health & Saf., § 1345(i), emphasis added; see also Health & Saf., 1367(b);  
11 *Palmer v. Super. Ct.* (2002) 103 Cal.App.4th 953, 966.)<sup>5</sup>

12 This relationship between the Knox-Keene Act and the healing arts provisions of the Business  
13 and Professions Code was cemented by the California Supreme Court in *People v. Cole* (2006) 38  
14 Cal.4th 964, 985. The Supreme Court confirmed that the professional restrictions on the healing arts set  
15 forth in the Business and Professions Code apply even where the Knox-Keene Act is also applicable.  
16 (See *id* at 985; see also *Palmer, supra*, 103 Cal.App.4th 953, 965-966.) The Supreme Court will not  
17 construe the Knox-Keene Act to exempt a provider from the restrictions of the Business and Professions  
18 Code without an explicit provision of law unmistakably stating as much. (*People v. Cole, supra*, 38  
19 Cal.4th at 980-983.) Consequently, the Supreme Court and the Knox-Keene Act have restricted this  
20 Court’s licensure analysis to the Business and Professions Code.

21 ///

22 ///

24 \_\_\_\_\_  
25 <sup>4</sup> It is important not to confuse the issues of provider licensure and *health plan* licensure. “In the  
26 Knox-Keene Act, a distinction is made between ‘health care service plans,’ such as an HMO like  
27 PacifiCare, and the ***licensed*** ‘providers’ who are professional persons or organizations who deliver or  
28 furnish health care services.” (*Palmer v. Super. Ct.* (2002) 103 Cal.App.4th 953, 966, emphasis added;  
see also *Watanabe v. Cal. Physicians’ Serv.* (2008) 169 Cal.App.4th 56, 59.)

<sup>5</sup> In addition to this definition, the Knox-Keene Act specifies, “Personnel employed by or under  
contract to the plan shall be licensed or certified by their respective board or agency, ***where licensure or***  
***certification is required by law.***” (Health & Saf., § 1367(b), emphasis added.)

1                   **2. California law requires licensure to treat autism**

2                   In an attempt to bypass the Knox-Keene licensure requirement – which mandates licensure or  
3 certification as required elsewhere in the law – Petitioners mistakenly claim that because the law does  
4 not expressly regulate the delivery of ABA or the holders of private credentials relating to behavioral  
5 analysis, the Court should assume there is no licensing requirement for the use of ABA to treat autism.  
6 Petitioners’ assumption regarding the Legislature’s silence is the **opposite** of the actual rule. (See  
7 *People v. Cantor* (1961) 198 Cal.App.2d Supp. 843, 850.) The health care licensing scheme is not based  
8 on the regulation of individual treatments, it is based on a basic and broad bright-line licensing  
9 requirement. (*Magit v. Bd. of Med. Exam’rs* (1961) 57 Cal.2d 74, 79-87.)

10                  While Petitioners’ motives may be largely altruistic, their characterization of the law is  
11 meretricious. Persons who do not possess a medical license may not diagnose or provide any treatment  
12 for *any* physical or mental condition unless the Legislature affirmatively grants them an explicit  
13 exception to the prohibition. (See Bus. & Prof., § 2052(a); see also 58 Ops.Cal.Atty.Gen. 186, 187-188  
14 (1975) (*att. as Exh. DD*); 66 Ops.Cal.Atty.Gen. 189, 199 (1983) (*att. as Exh. EE*.) Persons who violate  
15 the prohibition are subject to fine and imprisonment. (Bus. & Prof., § 2052(a)-(b).) The MHPA  
16 requires coverage for the *diagnosis* and *treatment* of autism. Since Business and Professions Code  
17 section 2052(a) explicitly requires a license or other Legislative permission to provide *diagnosis* or  
18 *treatment* of any condition, it necessarily follows that the services which a plan must cover can only be  
19 provided by professionals who are licensed or otherwise authorized by the Legislature. (See Bus. &  
20 Prof., § 2052(a); see Health & Saf., § 1374.72; see *Johnson v. Super. Ct.* (2002) 101 Cal.App.4th 869,  
21 878; see also *Palmer, supra*, 103 Cal.App.4th 953, 965-966; *People v. Cole, supra*, 38 Cal.4th at 980-  
22 983; *People v. Merrill* (1914) 24 Cal.App. 206, 210 [a construction will not be adopted to the exclusion  
23 of a possible, plausible interpretation which will promote and put in operation the legislative intent].)  
24 Hence, Petitioners cannot be entitled to a writ of mandate requiring the Department to order coverage of  
25 ABA by unlicensed persons. (Bus. & Prof., § 2052(a); Health & Saf., § 1374.72(a).)

26                  Further, Petitioners’ entire case regarding the efficacy of ABA therapy or the alleged  
27 commonplace rendition of it by unlicensed persons is legally irrelevant and may not be considered by  
28

1 this Court. The California Supreme Court instructed the judiciary to ignore such arguments as  
2 immaterial because the licensing requirement for the diagnosis or treatment of any physical or mental  
3 condition is a bright-line requirement that courts may not set aside. (*Magit v. Bd. of Med. Exam'rs*,  
4 *supra*, 57 Cal.2d 74, 79-87.) The Court explained that such evidence is not pertinent under a statutory  
5 system which protects the public by requiring that “competency be determined by the state and  
6 evidenced by a license.” (*Magit, supra*, at 85; see also *Bowland v. Mun. Ct. for Santa Cruz County Jud.*  
7 *Dist.* (1976) 18 Cal.3d 479, 494.)

8         The 9<sup>th</sup> Circuit, applying California law, rejected a nearly identical attempt by unlicensed  
9 psychoanalysts to use the courts to obtain what the Legislature had not granted. The 9<sup>th</sup> Circuit held  
10 that the Legislature has no obligation to allow a group of providers to perform the healing arts,  
11 regardless of their qualifications. (*Nat’l Ass’n for the Advancement of Psychoanalysis v. Cal. Bd. of*  
12 *Psychology* (9th Cir. Cal. 2000) 228 F.3d 1043, 1053 (*att. as Exh. GG*.) “It simply is not the function  
13 of the courts to tell California how to craft its legislation.” (*Id.* at 1053.) While this could mean that  
14 providers who are arguably qualified are not permitted to practice the healing arts, that is a choice the  
15 Legislature may make. (*Ibid.*) “[I]t is not irrational for the Legislature to progress one step, or one  
16 profession at a time.” (*Ibid.*) The 9<sup>th</sup> Circuit’s reasoning is on point; this Court may not afford  
17 Petitioners their requested relief.

18         Petitioners’ argument is audaciously reckless. Health care in general, and autism specifically,  
19 remain easily misunderstood areas populated by vulnerable persons. Petitioners’ declarant Gina Greene,  
20 Ph.D. provided evidence why each new group seeking a license should be carefully vetted by the  
21 Legislature when she pointed out that many of the therapies being promoted for autism are catchy, with  
22 emotionally appealing slogans, but are essentially frauds. (Maurice, et al., *Behavioral Intervention for*  
23 *Young Children With Autism* (1996) pg. 15-16 (*att. as Exh. AAA*.) While Petitioners’ requested relief  
24 may require private certification to render services, the effect of their argument is to judicially eviscerate  
25 the consumer protections guaranteed by state licensure. (*Magit, supra*, at 85; see also *Bowland, supra*,  
26 18 Cal.3d 479, 494.) In other words, there is no legal or doctrinal reason why, if these Petitioners can  
27 create a judicial loophole in the State’s licensure scheme, persons without private certification would not  
28

1 be entitled to the same relief. More so, the judicial loophole sought by Petitioners would not be captive  
2 simply to autism treatment, but rather would inevitably expand, selling the kind of snake oil state  
3 regulation was intended to stop. (*People v. Privitera* (1979) 23 Cal.3d 697 [no right to use unapproved  
4 cancer treatment].)

5 Simply, this Court has no authority to grant Petitioners what they seek. California law requires  
6 licensure to treat autism. “The role of the judiciary is not to rewrite legislation to satisfy the court’s,  
7 rather than the Legislature’s, sense of balance and order. Judges are not ‘knight[s]-errant, roaming at  
8 will in pursuit of [their] own ideal of beauty or of goodness.’” (*American Academy of Pediatrics v.*  
9 *Lungren* (1997) 16 Cal.4th 307, 421.)

10  
11 **a. A licensed provider may not lend his license to unlicensed persons by or  
through supervision unless explicitly permitted by the Legislature**

12 The Supreme Court has likewise rejected Petitioners claim that even if licensing is required at  
13 the higher levels of health care – the names on the door – it does not apply to those working under their  
14 supervision. The *Magit* Court held that even if the unlicensed professionals are working under the direct  
15 supervision of licensed physicians, it is still a violation of the bright-line rule. (*Magit, supra*, at 84-87.)  
16 A doctor who employs assistants who are not independently authorized to practice the healing arts under  
17 the Business and Professions Code, does so in violation of the law and risks losing his or her license.  
18 (See *Bryce v. Bd. of Med. Quality Assurance* (1986) 184 Cal.App.3d 1471, 1475; *Khan v. Med. Bd.*  
19 (1993) 12 Cal.App.4th 1834, 1843-1845; *O’Reilly v. Bd. of Med. Exam’rs* (1967) 66 Cal. 2d 381, 383-  
20 388.) Thus, to the extent ABA is used to treat a person with autism, the person who delivers the care  
21 must have a license or other explicit permission from the Legislature, regardless of supervision. (Bus. &  
22 Prof., § 2052(a).) This does not mean that licensed health care providers cannot use assistants; it simply  
23 means the providers can only use assistants to the extent authorized by the Legislature.<sup>6</sup>

24  
25 <sup>6</sup> For example, physicians and clinics may use medical assistants, but only under the supervision  
26 of a licensed medical professional who is physically present. (Bus. & Prof. Code, § 2069(b)(3).)  
27 Licensed psychologists and board certified psychiatrists may utilize psychological assistants under their  
28 immediate supervision. (Bus. & Prof. Code, § 2913(c).) Licensed speech pathologists and audiologists  
may supervise aides to the extent allowed by their board, but are responsible for the services performed  
by their aides. (Bus. & Prof. Code, § 2530.6.) A certified occupational therapy assistant may practice  
only under the supervision of an occupational therapist authorized to practice in this state. (Bus. & Prof.  
Code, § 2570.13(b).)

1                                   **b. Privately-certified ABA analysts are not recognized as licensed under the**  
2                                   **Business and Professions Code**

3                   The Knox-Keene Act adopts the Business and Professions Code’s provider *licensure* and  
4 *certification* requirements, and it necessarily follows that the Act also adopt its definitions of those terms  
5 to determine who passes that test. (See *People v. Cole, supra*, 38 Cal.4th at 985; see *Johnson, supra*,  
6 101 Cal.App.4th 869, 878-879; see also *Palmer, supra*, 103 Cal.App.4th 953, 965-966.) In the Business  
7 and Professions Code the terms “license” and “certificate” are used interchangeably to describe any  
8 Legislative recognition permitting someone to engage in a business or profession. (See Bus. & Prof., §§  
9 23.7, 2040; see also *Prince v. Sutter Health Central* (2008) 161 Cal.App.4th 971, 976; *People v. Cole*,  
10 *supra*, 38 Cal.4th at fn. 15.) Thus, holding a state license or certificate is not the only way to pass the  
11 licensure requirement; a legislative exemption will suffice as well. (See *Chosak v. Alameda County*  
12 *Med. Ctr.* (2007) 153 Cal.App.4<sup>th</sup>, 549, 562; see also Bus. & Prof., § 23.7; *Prince, supra*, 161  
13 Cal.App.4th 971, 976.)<sup>7</sup> BACB analysts have neither license nor exemption and therefore may not  
14 lawfully treat any condition in California.

15                   Petitioners’ erroneously rely on title 17 of the California Code of Regulations, section 54342.  
16 This regulation is immaterial because it does not purport to authorize any professionals to practice the  
17 healing arts, and such a suggestion violates Business and Professions Code section 2052(a). (See also  
18 Bus. & Prof., §§ 23.7, 2040.) Rather, section 54342 specifies vendor codes which must be assigned to  
19 vendors for the Regional Centers, including: art therapists, attorneys, dance therapists, diaper services,  
20 interpreters, music therapists, physicians, registered nurses, teachers’ aides, teachers, transportation auto  
21 drivers, and tutors. (17 CCR, § 54342(a) (*att. as Exh. CC.*) Regional Center services are not even  
22 limited to health care services. (See Exh. H, no. 26 and Exh. I, no. 26 (*Petitioners’ Supp. Resp. to Req.*  
23 *for Adm.*); see also *Capitol People First v. State Dept. of Developmental Services* (2007) 155  
24 Cal.App.4th 676, 682-683.) A regulation identifying vendor codes is not equivalent to state licensure to  
25 perform the healing arts. Indeed, the suggestion that it does so would necessarily enable attorneys and  
26 transport drivers to practice the healing arts, an absurd construction this Court should not countenance.

27  
28                   <sup>7</sup> Respondents appropriately enforce this standard against the plans, requiring coverage for  
appropriately supervised services. (See e.g., Exh. F (McClelland letter of June 21, 2010).)

1 Petitioners' unlicensed BCBA's fail the licensure test. *A fortiori*, this Court cannot by mandamus compel  
2 the Department to order coverage for an unlawful act. (*County of San Luis Obispo, supra*, 90  
3 Cal.App.4th 288, 292; see also *Pratt, supra*, 229 Cal.App.2d 602, 606.)

4 **3. The Department exercises appropriate and considered judgment to decide**  
5 **coverage of ABA, while Petitioners and health plans pursue extreme agendas**

6 In a probably well-meaning attempt to broaden the provision of ABA therapy, Petitioners ask  
7 this Court to weaken a century of law which uses State licensure as the backbone of consumer  
8 protection. (*Magit, supra*, 57 Cal.2d 74.) Not only do Petitioners impermissibly ask this Court to usurp  
9 the Legislature's authority to make the laws and to circumscribe the discretion afforded the Department  
10 by legislative delegation, they do so in the name of a false choice. While Petitioners take the extreme  
11 position that ABA is *always* covered as a treatment for autism, even when performed by unlicensed  
12 persons who cannot lawfully treat autism, they ignore that the Department does order treatment for  
13 enrollees with ASD when done in accord with state law, including the licensing provisions of the  
14 Business and Professions Code. (See e.g., Exh. G, pgs. DMHC11517-11519 (*Dept's Resp. to Req. for*  
15 *Prod.*); see also Dec. of Kevin Donohue, pg. 2, paras. 5-6; *People v. Cole, supra*, 38 Cal.4th 964, 985.)

16 At the opposite extreme is the health plan industry, which filed a lawsuit against Respondents in  
17 Sacramento County seeking a declaration from the Court that the Department has gone too far in finding  
18 health care services to be covered under the Mental Health Parity Act. (Exh. JJ.) Some plans, such as  
19 Kaiser, are even taking the position that ABA is always educational and *never* covered. (*Arce, supra*,  
20 181 Cal.App.4th at 494.) Both extremes are wrong. In handling disputes involving denials of ABA  
21 services, using the discretion afforded to it by statute, the Department has found that under the law ABA  
22 is often, but not *always*, covered. Not only is that discretionary judgment a statutory grant, it is  
23 effectively applied. Petitioners seek to force the Department to send all ABA cases to Independent  
24 Medical Review, but the evidence shows that the Department's own internal review and exercise of  
25 judgment results in a greater percentage of enrollees getting the care. (Dec. of Kevin Donohue, pg. 2,  
26 paras. 5-6.)

27 Each extreme fails for contrary reasons: the health plans' litigation is under-inclusive, failing to  
28 recognize ABA is often a healthcare service (where provided by a licensed provider). Petitioners, on

1 the other hand, fail to acknowledge that the mandate to diagnose and treat autism carries limitations. As  
2 Petitioner concedes, ABA does not always require the skills of a person who is licensed to treat autism,  
3 but can also be used by persons including Board Certified Behavior Analysts. (Dec. of Gina Green,  
4 Ph.D., paras. 37-38.) Recognizing these various applications for ABA, the book co-edited by  
5 Petitioners' declarant Gina Greene, Ph.D., identified three possibilities for the funding of a ABA  
6 program: special education, insurance, and the Americans with Disabilities Act. (Maurice, et al.,  
7 Behavioral Intervention for Young Children With Autism (1996) pg. 267 (*att. as Exh. AAA*.)

8 Thus, contrary to the arguments of the health plans and Petitioners, ABA cannot be globally  
9 categorized as a health care service, or as an educational service. (See 54 Ops. Cal. Atty. Gen. 62  
10 (1971) (*att. as Exh. FF*). Indeed, this is specifically why a one-size-fits-all writ of mandamus relative to  
11 ABA is unworkable.

12 **C. There is no underground regulation as Respondents are only enforcing the statutes**

13 Petitioners inaccurately seek to portray the manner in which the Department has handled autism  
14 complaints as evidence of the application of an underground regulation. However, the Department's  
15 processes are merely reflective of the statutes at issue, including section Health and Safety Code section  
16 1374.72 and the Business and Professions Code. While the method in which the complaints are most  
17 commonly resolved has shifted from medical grounds to legal grounds, this evolution has been the result  
18 of changes in the defenses raised by the plans, not a shift in Department policy. Indeed, it is emblematic  
19 of why the Legislature gave the Department discretion to adaptively resolve such disputes. Under  
20 Government Code section 11340.9(f), the APA does not apply to a rule "that embodies the only legally  
21 tenable interpretation of a provision of law." As the Supreme Court explained, if an agency's policies  
22 and procedures are essentially a reiteration of the statutory scheme, then there is no duty to follow the  
23 APA because such a regulation would be duplicative of the statute. (*Morning Star Co. v. State Bd. of*  
24 *Equalization* (2006) 38 Cal.4th 324, 336.)

25 When medical necessity was the only issue, the Department appropriately exercised its discretion  
26 in sending cases to Independent Medical Review. But once coverage was raised by the plans it would  
27 be inappropriate for the Department to ignore that defense. The Legislature explicitly left the final  
28

1 decision to the Department's discretion. (Health & Saf., §§ 1368(b), 1374.72(b), (d).)

2 Then, when the plans raised the issue of coverage, the Department recognized the new defense as  
3 a preliminary question that must be resolved without the use of IMR, just as the Department would do  
4 for any non-autism case. (*Kaiser Found. Health Plan v. Zingale, supra*, 99 Cal.App.4th 1018, 1024 &  
5 1026; see also Exh. M, 161:12-162:1 (*Donohue depo.*)). Consistent with Health and Safety Code section  
6 1374.30(b), that coverage analysis must come before any IMR. In most cases the dispute was resolved  
7 with *only* a coverage decision, because there is no need for an IMR when the plan does not dispute  
8 medical necessity. (Health & Saf., § 1374.30(b); see e.g., Exh. G, pg. DMHC10938; see also Exh. G,  
9 pgs. DMHC04216-04217 [similar example involving a different plan].)

10 Ultimately, for the reasons set forth in this brief, the Department determined that ABA was a  
11 covered service where it was a healthcare treatment for autism because it requires the skills and  
12 expertise of a licensed health care professional. (Exh. M, 194:3-15 (*Donohue depo.*)). The Department  
13 devised questions for the referring professionals to answer for the Department on that subject. (See e.g.,  
14 Exh. G, pgs. DMHC11523-11524.) Due to the challenges associated with getting good responses to  
15 questions posed in a letter format, this soon evolved into an actual questionnaire for providers. (See e.g.,  
16 Exh N (*Exhibit 15 to Donohue depo.*); see also Exh. G, pgs. DMHC11521, 11523-11524.) Where the  
17 professional responded that the enrollee would be best served by the skill and expertise of a licensed  
18 health care provider, such as occurred in the example of DMHC case file 447601, decided on October  
19 29, 2009, the Department appropriately instructed the plan to provide the services. (Exh. G, pgs.  
20 DMHC11517-11519.) Hence, even if the Court determined the Department's letter was a rule of  
21 general application, it was excepted from the APA because the letter merely restates the law. (*Morning*  
22 *Star, supra*, 38 Cal.4th 324, 336.)

#### 23 **D. Petitioners wrongly rely on the demurrer**

24 This case comes before the Court following a ruling favorable to Petitioners on a demurrer as to  
25 the coverage and underground regulation causes of action. This Court is in no way bound by its ruling  
26 on the demurrer. (See *Aerojet-General Corp. v. Commercial Union Ins. Co.* (2007) 155 Cal.App.4th  
27 132, 139, fn. 6; see also *Kelly v. Liddicoat* (1939) 35 Cal.App.2d 559, 564-565.) Moreover, the court  
28

1 should not rely on its ruling because said ruling was a product of Petitioners' mischaracterization of the  
2 law and the facts.

3         Petitioners then, and still, ignore the bright-line licensing rule by erroneously representing that  
4 there is no licensing requirement relative to the use of ABA to treat autism. This premise is false. (Bus.  
5 & Prof., § 2052; *Nat'l Ass'n of Psychoanalysts, supra*, 228 F.3d 1043, 1053.) Petitioners' other  
6 contentions regarding the Legislative scheme regulating health care licensure and its relationship to the  
7 Knox-Keene Act were likewise specious. (*People v. Cole, supra*, 38 Cal.4th 964, 985 and *Magit v. Bd.*  
8 *of Med. Exam'rs, supra*, 57 Cal.2d 74, 79-87.) The law imposes a bright-line licensing requirement  
9 which unlicensed BACBs do not meet. The *Cole* Court made clear that the Knox-Keene Act does not  
10 amend or moot those provisions of the Business and Professions Code. Thus, the relief requested in the  
11 first cause of action is a legal impossibility. (*Id.*) Petitioners may not mislead this Court as to the  
12 applicable law, then treat the matter as closed. Rather, the Court is not bound by the demurrer, and  
13 should not adopt its ruling on the demurrer as dispositive of the issues raised therein.

14         **E. The Department complied with the Public Records Act**

15         Petitioners' Public Records Act claim is likewise less than candid and fails because the  
16 Department complied with the request. While the Public Records Act requires agencies to produce  
17 public records, it is not without imitations. (See e.g., Gov't Code, § 6255; see also *American Civil*  
18 *Liberties Union Found. v. Deukmejian* (1982) 32 Cal.3d 440, 452-453; *State Bd. of Eq. v. Super. Ct.*  
19 (1992) 10 Cal.App.4th 1177, 1190, fn. 14; *Cal. First Amendment Coalition v. Super. Ct.* (1998) 67 Cal.  
20 App. 4th 159, 166.) Though the public interest in producing public records is high, it is not absolute,  
21 and requires a balancing of the interests that should preclude this type of heavy-handed refusal to make  
22 any compromise before filing a lawsuit. (See Gov't Code., § 6255.)

23         Each of Petitioners' requests was overly broad, and some were vague and ambiguous, or  
24 requested information that is clearly privileged. (See Exh. B.) As to each item in the request, the  
25 Department explained that the records were subject to numerous substantive privileges and exemptions  
26 under the Public Records Act, identifying each one specifically and offering supporting law. (See Gov't  
27 Code, § 6254; Exh. B; Dec. of Sarah Ream, pg. 2, para. 5 – pg. 3, para. 8.)  
28

1 For example, the timeframe for categories 1 through 4 were each almost ten years, predating the  
2 creation of the Department and yielding a volume of documents which was overwhelming. (Exh. B.)  
3 The over breadth of items 5 and 6, could have taken the Department thousands of staff hours to identify  
4 the relevant documents, an unreasonable task the law does not expect the Department to undertake. (See  
5 Gov't Code, § 6255; see also *American Civil Liberties, supra*, 32 Cal.3d 440, 452-453; *State Bd. of Eq.,*  
6 *supra*, 10 Cal.App.4th 1177, 1190, fn. 14; *Cal. First Amendment Coalition, supra*, 67 Cal. App. 4th 159,  
7 166; Dec. of Sarah Ream, pg. 3, para. 7.) The Department's letter invited Petitioner to narrow the scope  
8 to a reasonable level so as to facilitate a response. (Exh. B.) But Consumer Watchdog refused to make  
9 *any* amendments to any part of their request, choosing instead to file the present litigation. (Dec. of  
10 Sarah Ream, pg. 3, para. 8 – pg. 4, para. 10.)

11 When, for example, petitioner Consumer Watchdog finally agreed to narrow the scope of the  
12 request for categories 5 and 6, the parties were able to reach an agreement. On October 22, 2010, when  
13 petitioner Consumer Watchdog agreed to limit the scope of the request from all health plans, to just the  
14 six largest plans, and offered to do the necessary search within the narrowed group of relevant files for  
15 potentially responsive documents, the Department dropped its objections and immediately made the  
16 documents available. (Dec. of Sarah Ream, pg. 4, paras. 11-13.)

17 Had Petitioner agreed to narrow its unreasonable requests as to the non-privileged, non-  
18 exempted, documents earlier, then only the privileges and exemptions as to the other categories would  
19 be at issue. The law does not demand a response to oppressive requests. (See Gov't Code, § 6255; see  
20 also *American Civil Liberties, supra*, 32 Cal.3d 440, 452-453; *State Bd. of Eq., supra*, 10 Cal.App.4th  
21 1177, 1190, fn. 14; *Cal. First Amendment Coalition, supra*, 67 Cal. App. 4th 159, 166.) Given the need  
22 to balance the burden and benefit, there should be no reward for a party that refuses to make any effort  
23 to narrow its requests.

24 The Department ultimately produced over 15,000 pages of the requested complaint files in this  
25 litigation. (Dec. of Drew Brereton, pg. 3, para. 12.) These files contain very private and confidential  
26 information. (See Dec. of Kevin Donohue, pg. 2, paras. 8-9.) Redacted or not, this is not information to  
27 be cavalierly disclosed, lest enrollees be discouraged from filing complaints (See Gov't Code, § 6254(f)  
28

1 & (k); Civil Code, § 56.10(c)(5); Evid. Code, § 1040; see also *Fox v. Kramer* (2000) 22 Cal.4th 531, 542  
2 [state medical investigation privileged]; *People v. Super. Ct.* (1977) 70 Cal.App.3d 341, 344.)

3  
4 **IV. Conclusion**

5 The Supreme Court in *Cole* clarified that the Knox-Keene Act is to be harmonized with the  
6 Business and Professions Code, and in *Magit* held that this Court has no jurisdiction to even entertain  
7 Petitioners' claim that an unlicensed person may render healthcare treatment to an autistic child.  
8 Likewise the law is clear that mandamus cannot compel the performance of an unlawful act.  
9 Additionally, because Petitioners concede that ABA is not always a healthcare treatment, they must  
10 concede that there is a coverage decision inherent in all ABA complaints. Hence as the Legislature  
11 vested the Department with the final authority to determine such coverage issues, their claims must fail  
12 because the Court cannot compel the Department to exercise its discretion in a particular manner.  
13 Finally, separation of powers and comity principles require this Court to reject Petitioners attempt to  
14 usurp the Legislature's laws and the Department's discretion.

15 Petitioners Public Records Act claim fails as well because Respondents produced thousands of  
16 pages of documents. As well, the law does not require Respondents to produce privileged documents  
17 nor to respond to an oppressive request. The totality of the circumstances indicates no violation  
18 occurred.

19 Dated: November 18, 2010

DEPARTMENT OF MANAGED  
HEALTH CARE

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