Case No. B232338

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

---

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

*Petitioners/Plaintiffs, Appellants, and Cross-Respondents,*

v.

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

*Defendants/Respondents, Respondents, and Cross-Appellants.*

---

Los Angeles Superior Court Case No. BS121397
The Honorable Robert H. O'Brien, Judge
The Honorable James C. Chalfant, Judge

---

# APPELLANTS' PETITION FOR REHEARING

---


HARVEY ROSENFIELD (SBN 123082)
PAMELA M. PRESSLEY (SBN 180362)
JERRY FLANAGAN (SBN 271272)
CONSUMER WATCHDOG
2701 Ocean Park Blvd., Ste. 112
Santa Monica, CA 90405
T: (310) 392-0522
F: (310) 392-8874

FREDRIC D. WOOCHER (SBN 96689)*
BEVERLY GROSSMAN PALMER (SBN 234004)
STRUMWASSER & WOOCHER LLP
10940 Wilshire Blvd., Ste. 2000
Los Angeles, CA 90024
T: (310) 576-1233
F: (310) 319-0156
*Counsel of Record on Appeal

*Attorneys for Petitioners/Plaintiffs, Appellants, and Cross-Respondents*

## CONTENTS

TABLE OF AUTHORITIES ..... ii

INTRODUCTION ..... 1

I. APPLIED BEHAVIOR ANALYSIS (ABA) IS A DISTINCT SCIENTIFIC DISCIPLINE AND DOES NOT CONSTITUTE THE PRACTICE OF "PSYCHOLOGY" ..... 2

II. SB 946 DID NOT IMPLICITLY *AUTHORIZE* BACB-CERTIFIED PROVIDERS TO PRACTICE ABA WITHOUT A LICENSE, BUT SIMPLY *CONFIRMED* THAT NO SUCH LICENSE WAS REQUIRED TO BEGIN WITH UNDER EXISTING LAW ..... 11

III. REHEARING SHOULD BE GRANTED TO CLARIFY AND CORRECT TWO DISCRETE PORTIONS OF THE COURT'S OPINION THAT DO NOT ACCURATELY DESCRIBE EXISTING LAW ..... 17

IV. THE COURT SHOULD NOT CERTIFY FOR PUBLICATION THE PORTION OF ITS OPINION ADDRESSING THE UNTIMELINESS OF DMHC'S CROSS-APPEAL ..... 21

CONCLUSION ..... 25

CERTIFICATE OF COMPLIANCE WITH RULE 8.204(c) ..... 27

## TABLE OF AUTHORITIES

### State Cases

*American Coatings Assn., Inc. v. South Coast Air Quality Dist.* (2012) 54 Cal.4th 446 . . . . . 6, 7

*Communities for a Better Environment v. State Water Resources Control Bd.* (2005) 132 Cal.App.4th 1313 . . . . . 6

*Lubner v. City of Los Angeles* (1996) 45 Cal.App.4th 525 . . . . . 13, 14

*Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999 . . 6, 15

*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1 . . . . . 7

### Statutes

Bus. & Prof. Code,

§ 101, subd. (z) . . . . . 5

§ 2052 . . . . . 11, 12, 14, 16

§ 2732 . . . . . 14

§ 2903 . . . . . 2, 11, 12, 17

§ 4989.12 . . . . . 7

§ 5058 . . . . . 6

Cal. Rules of Court,

§ 8.268 . . . . . 1

Educ. Code,

§ 49414.7, subd. (b) . . . . . 14

§ 56525 . . . . . 14, 15

Evid. Code,

§ 452, subd. (c) . . . . . 5

Gov. Code,

§ 95021 . . . . . 8

Health & Saf. Code,

§ 1345, subd. (b) . . . . . 19

§ 1345, subd. (b)(2) . . . . . 19, 20

§ 1374.73, subd. (c)(3)(B) . . . . . 18, 19

§ 1374.73, subd. (c)(4)(D) . . . . . 15

§ 106985, subd. (a) . . . . . 14

**Regulations**

17 Cal. Code Regs.,

§ 54342, subd. (a)(8) . . . . . 8

§ 54342, subd. (a)(11) - (13) . . . . . 8

28 Cal. Code Regs.,

§ 1300.67, subd. (a)(1) . . . . . 20, 21

§ 1300.67, subd. (c) . . . . . 21

**Miscellaneous**

Board of Behavioral Sciences Minutes of May 18-19, 2011 . . . . . 7

## INTRODUCTION

Pursuant to rule 8.268 of the California Rules of Court, Plaintiffs and Appellants Consumer Watchdog and Anshu Batra, M.D. ("Appellants") respectfully petition for rehearing of the Court's decision and published opinion in this appeal, issued on September 10, 2013. The principal grounds for the petition are that the decision erroneously holds (1) that "the practice of ABA constitutes the practice of psychology"; and (2) that "prior to the enactment of the ABA statute [SB 946], BACB-certified therapists were engaging in the unlicensed practice of psychology." (Slip Opn., p. 35.) As is set forth briefly below, the Court's conclusion that the practice of ABA constitutes the practice of psychology is factually incorrect and is contrary to the legal opinion issued more than a decade ago by the California Department of Consumer Affairs — the agency charged with licensing and regulating the practice of psychology in California. Likewise, the Court's conclusion that the Legislature's enactment of the ABA statute somehow served to "*implicitly* authoriz[e]" the unlicensed practice of ABA by BACB-certified providers for the first time (*id.* at p. 39) — rather than merely to *confirm* that such practice *was never illegal to begin with* — is inconsistent with the legislative history of that statute and with a host of other legislative and administrative actions from the past decade that *explicitly* recognized and approved the unlicensed practice of ABA by BACB-certified behavior analysts.

## I. APPLIED BEHAVIOR ANALYSIS (ABA) IS A DISTINCT SCIENTIFIC DISCIPLINE AND DOES NOT CONSTITUTE THE PRACTICE OF "PSYCHOLOGY"

The lynchpin of the Court's decision affirming DMHC's denial of coverage for ABA administered by unlicensed BACB-certified analysts prior to the effective date of SB 946 is its holding that "the practice of ABA constitutes the practice of psychology" as defined in Business and Professions Code section 2903. As the Court is undoubtedly aware, however, at no time in this litigation did anyone argue or even suggest that the practice of ABA constitutes the practice of psychology — not Appellants, not Respondents, not any of the amici. To the contrary, as the Court notes in its decision, "DMHC *expressly* does not want to make this argument." (Slip Opn., p. 33, fn. 23 [emphasis in original].)[1] Indeed, to Appellants' knowledge, prior to this Court's decision, *no entity* had *ever* taken the position that the practice of ABA constitutes the practice of "psychology" under California law.

Rather, the Court reached this conclusion *entirely on its own*, in a single

---

[1]Consequently, the Court's statements in the decision that "DMHC argued that if BACB-certified therapists were treating autism, they were engaging in the unlicensed practice of medicine *or psychology* under the Business and Professions Code" (Slip Opn., p. 18 [emphasis added]) and "DMHC took the position that since BACB-certified therapists must not be doing the illegal act of practicing medicine *or psychology* without a license, their ABA must therefore constitute something other than *treatment*" (*ibid.* [first emphasis added; second emphasis in original]) are inaccurate. DMHC never argued that BACB-certified ABA therapists were engaging in the unlicensed or illegal practice of *psychology*, and the italicized language should at a minimum be stricken from the Court's opinion.

paragraph of the opinion, without the benefit of any briefing or factual record, and without any notice to the parties that it was considering addressing, much less resolving, this question in its decision. *For this reason alone*, rehearing should be granted, for it is wholly inappropriate for an appellate court to reach out and decide an issue of first impression that had not been raised or briefed by any of the parties, that was not addressed by the trial court below, and for which no factual record has been developed. This is especially so when, as here, the Court's ruling affects thousands of ABA practitioners and their clients, and could well have widespread and substantial implications beyond the specific circumstances of this case.

Moreover, on the merits, ***the Court's conclusion is manifestly incorrect***: ABA is a distinct discipline from psychology. While there is perhaps some overlap between certain aspects of the two practices, ABA is based upon *different* scientific theories and principles, requires *different* education and training from its analysts, focuses on *different* clinical behaviors and attributes, and uses *different* therapeutic methods and techniques than psychology.

To the extent that there is any evidence pertaining to this issue in the record of this case, *it flatly contradicts* the Court's holding. Thus, Dr. Gina Greene, the Executive Director of the Association of Professional Behavior Analysts, who is a Board Certified Behavior Analyst - Doctoral (BCBA-D)

and also has Bachelor's, Master's, and Ph.D. degrees in psychology, testified below — without refutation or dispute from Respondent DMHC — that "behavior analysis is a distinct scientific discipline that has developed powerful techniques for changing behavior. The practice of ABA is therefore a distinct profession; *it is not the same as clinical, developmental, educational, or school psychology*, counseling, social work, or special education, for instance." (JA 3:567, ¶ 26 [emphasis added]; see also JA 3:661 [Declaration of Gerald L. Shook, BCBA-D, CEO].) Similarly, amicus California Association for Behavior Analysis noted that a recent practice analysis by the Association of State and Provincial Psychology Boards (ASPPB), the alliance of boards responsible for the licensure and certification of psychologists in the United States and Canada, did not include ABA among the major areas of training or practice of psychologists, and that "[a]s a distinct discipline, the behavior analyst profession has grown to have its own professional associations, credentialing group, scientific journals, conferences, and awards." (Brief of Amicus Curiae California Association for Behavior Analysis in Support of Position of Appellants Consumer Watchdog, et al., pp. 19-22 [footnotes omitted].)

Judicially noticeable evidence not contained in the record below — because this issue was never raised below — likewise confirms that ABA practitioners are not engaged in the practice of psychology. Most importantly,

the California Department of Consumer Affairs — the state agency that is charged with licensing and regulating the practice of psychology in California through the Board of Psychology (see Bus. & Prof. Code, § 101, subd. (z)) — has long held that ***behavioral analysts are not engaged in the practice of psychology or marriage and family therapy, and therefore are not required to be licensed as either psychologists or marriage and family therapists under California law***. In a legal opinion issued in February 2000 specifically in order to provide guidance to ABA practitioners on this issue, the Department of Consumer Affairs analyzed the extensive information it had gathered regarding the actual practices and activities of behavior analysts and set forth "our legal opinion that behavioral analysts, performing as represented to us, were not engaged in the practice of psychology or marriage, family and child counseling (now marriage and family therapy)." (Opinion Letter dated February 11, 2000, from Department of Consumer Affairs Supervising Counsel Don Chang and Senior Staff Counsel Daniel Buntjer, p. 2.)[2] Among the factors supporting the agency's conclusion were that (1) "[b]ehavioral analysts do not engage in diagnosing mental disorders or treating mental disorders, but focus on external environmental factors that influence

---

[2]A true and correct copy of the Department of Consumer Affairs' February 11, 2000, opinion letter is attached hereto as Exhibit 1. Appellants request that judicial notice be taken of the letter pursuant to Evidence Code section 452, subdivision (c).

behavior," and (2) "[w]hile behavioral analysts are engaged in behavior modification, it is in a context and methodology different than that of psychologist[s] and marriage, family and child counselors." (*Id*, at pp. 2-3.)

Because the Department of Consumer Affairs' legal opinion represents the agency's longstanding interpretation of a statute it is charged with administering — indeed, of a statute that it is *delegated* with the task of construing (see *Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1013-1014 [Board of Accountancy delegated with task of construing Bus. & Prof. Code § 5058 forbidding use of titles "likely to be confused with" the titles of "certified public accountant" and "public accountant"]) — this Court must defer to the Department's interpretation, upholding its conclusion that ABA does not constitute the practice of psychology "unless the interpretation flies in the face of the clear language and purpose" of the statutory language. (*Communities for a Better Environment v. State Water Resources Control Bd.* (2005) 132 Cal.App.4th 1313, 1330.) This is especially so because the Department of Consumer Affairs has a "comparative interpretive advantage over the courts," in that the statutory language is not only within its area of expertise but "the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion." (*American Coatings Assn., Inc. v. South Coast Air Quality Dist.* (2012) 54

Cal.4th 446, 461 [quoting *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12].)

Just as the Board of Psychology — which licenses and regulates psychologists, psychological assistants, and registered psychologists — has never believed that behavioral analysts and ABA therapists are required to be licensed to practice "psychology," the Board of Behavioral Sciences — which licenses and regulates marriage and family therapists, clinical social workers, and educational psychologists (see Bus. & Prof. Code, § 4989.12) — has similarly never deemed ABA practitioners to be required to possess a license in any of the professions that it regulates. In fact, as amici curiae Autism Speaks and Autism Deserves Equal Coverage pointed out in their brief, back in May 2011, the Board of Behavioral Sciences — specifically noting that "the California Business and Professions Code does not apply any requirements to the practice of ABA" — refused to take a position in support of a proposed bill (AB 1205) that would have required state licensure of behavior analysts and assistant behavior analysts beginning on January 1, 2015, out of concern that the Board lacked the resources it needed to implement its *existing* licensing programs. (See Brief of Amici Curiae Autism Speaks and Autism Deserves Equal Coverage, pp. 17-18 [citing Board of Behavioral Sciences Minutes of May 18-19, 2011, p. 28, available at <http://www.bbs.ca.gov/bd_activity/bd_mtgs_2011.shtml> (last visited 9/24/13)].)

In short, the Court's conclusion that prior to the effective date of SB 946, BACB-certified ABA analysts in California were engaging in the unlicensed practice of psychology — *a criminal act* — is unsupported by the facts and is contrary to the longstanding legal determination of the agency charged with implementing the psychology licensing statutes. Equally significant, the Court's conclusion is contrary to the ***undeniable reality*** that for more than a decade, thousands of *unlicensed* BACB-certified analysts have openly been providing ABA treatments for autism in California in a variety of contexts, *with the full knowledge and approval of the Legislature and the state enforcement agencies*. Indeed, the Court recites a number of these contexts in its opinion: Unlicensed BACB-certified behavior analysts have been providing ABA services through the state's Regional Centers for years, in accordance with Government Code section 95021 and title 17, California Code of Regulations section 54342, subdivisions (a) (8) & (a) (11) - (13); the California Department of Insurance has consistently *required* health insurers within its jurisdiction to provide coverage for unlicensed BACB-certified ABA providers, even taking enforcement actions to compel compliance with this requirement; and DMHC itself entered into settlement agreements with two health plans in which they agreed to provide coverage for ABA administered by unlicensed BACB-certified therapists. (See Slip Opn., p. 36.) Throughout this entire time period, and in all of these different contexts, ***never once was***

***it ever suggested that the provision of ABA by BACB-certified behavior analysts constituted the unlawful, unlicensed practice of psychology.*** For this Court now to suddenly hold otherwise is manifestly unreasonable.

The consequences that might result from the Court's unprecedented and unanticipated ruling are yet to be known, but they are potentially devastating. Because there is currently no licensing scheme for ABA practitioners — as the Court's opinion notes, a bill to provide for state certification of ABA therapists did not advance in this past legislative session (Slip Opn., p. 26) — and because most ABA practitioners would not qualify as a result of their education, training, and scope of practice for any other license in California (including licenses to practice psychology or medicine), if SB 946 were not to be renewed or were to expire in the future, it would be unlawful under the Court's decision for BACB-certified behavior analysts to administer *any ABA services* to autistic children — regardless of whether such services were covered by health insurance or not. Even ABA provided by unlicensed BACB-certified therapists through the state Regional Centers would be unlawful according to the Court's analysis. While Appellants certainly hope that SB 946 is renewed and it never comes to this, the consequences for the state's autistic population would be disastrous.[3]

---

[3]SB 126, which would extend the sunset provision of the SB 946 from July 1, 2014, until January 1, 2017, passed the Legislature earlier this month and is awaiting action by Governor Brown as this Petition is being written.

The implications of the Court's decision for the state's BACB-certified behavior analysts are equally uncertain and deleterious. The Court's decision holds that these therapists were *violating the law* by administering ABA treatments to autistic children prior to July 1, 2012, the effective date of SB 946. Could any of them now face prosecution for criminal offenses supposedly committed only 15 months ago? Could insurance companies, health plans, and individuals now refuse to pay unlicensed ABA therapists for the services they provided during the time period in which this Court's opinion holds they were practicing illegally? Could these therapists face disciplinary action or the denial of licenses in the future due to their prior, criminal violations of the state's licensing laws? And what exactly is the scope of the "implicit authorization" allegedly given to these therapists by SB 946 — if they are deemed to be practicing "psychology" according to the Court's opinion, albeit without a license, are they subject to regulation and discipline by the Board of Psychology? Must they comply with the continuing education and recordkeeping requirements of the Business and Professions Code applicable to psychologists? The Court's decision unnecessarily raises far more questions than it answers — all resulting from the Court's incorrect

---

Even if SB 126 were ultimately signed into law this year, who knows if it would be extended again, beyond January 1, 2017, leaving the legality of ABA administered by BACB-certified analysts in a perpetual state of uncertainty.

premise that ABA as a treatment for autism constitutes the practice of "psychology."

## II. SB 946 DID NOT IMPLICITLY *AUTHORIZE* BACB-CERTIFIED PROVIDERS TO PRACTICE ABA WITHOUT A LICENSE, BUT SIMPLY *CONFIRMED* THAT NO SUCH LICENSE WAS REQUIRED TO BEGIN WITH UNDER EXISTING LAW

Having itself created a "disconnect between the law and reality" (Slip Opn., p. 37) with its newly fashioned and erroneous conclusion that BACB-certified therapists are engaged in the unlicensed practice of psychology, the Court's decision proceeds to attribute to the Legislature the intent to "provisionally resolve[]" this disconnect via the enactment of SB 946, which the Court characterizes as "*implicitly* authorizing BACB-certified providers and those under their supervision to practice ABA, regardless of Business and Professions Code sections 2052 and 2903." (Slip Opn., p. 39 [emphasis in original].) The Court's decision further holds that despite the language in SB 946 expressly limiting the statute's coverage to private health plans and health insurers, "[t]his authorization is not limited to the BACB-certified therapists providing services under plans covered by the ABA statute" because "[s]uch a result would be nonsensical" and would lead to the absurdity that the legality of the ABA therapy provided by a BACB-certified behavior analyst would "be determined by the identity of the health plan covering the patient for whom the act is performed." (*Id.*, pp. 39-40.)

While Appellants certainly agree that it is nonsensical to suggest that the legality of a BACB-certified behavior analyst's administration of ABA should be based upon the identity of an enrollee's health plan and on whether such plan is or is not covered by SB 946, none of the opinion's contortions in this regard would be necessary if the Court had simply properly characterized SB 946 to be what the Legislature always intended it to be — a health care coverage statute that merely *confirms* that no state license was ever required *to begin with* in order for BACB-certified behavior analysts to administer ABA, rather than some sort of post-hoc legislative "approval" or implicit "authorization" for BACB-certified analysts to provide ABA as an "exemption" from the licensure requirements for the practice of medicine or psychology under Business and Professions Code sections 2052 and 2903.

The opinion's characterization of SB 946 as supposedly creating, for the first time, an implicit "authorization" for BACB-certified analysts to practice ABA without a psychology license is completely unsupported by either the language or the legislative history of that statute, and it ascribes to the Legislature an ignorance or disregard of the "law" that is wholly unwarranted. According to the Court's opinion, the Legislature allegedly stood by silently for years as BACB-certified analysts continuously violated Business and Professions Code section 2903 — a statute enacted by the Legislature itself, of course — by administering ABA therapy without a license through the

state's own Regional Centers (pursuant to an explicit authorization that was *also* enacted by the Legislature), under health insurance policies regulated by the Department of Insurance, under the federal TRICARE program, under ERISA-regulated, self-funded health plans, and under private payment arrangements. During this same time period, the Legislature declined on several occasions to enact legislation that would have required ABA practitioners to obtain a certificate or license from the state. Then, without any reference in the text of the bill to the Business and Professions Code's licensing requirements and with nary a mention of the licensing issue anywhere in the bill's legislative history, the Legislature supposedly enacted SB 946 in order to "provisionally resolve[] the then-existing disconnect between the law and reality" by *implicitly* — not explicitly — authorizing the unlicensed practice of psychology by BACB-certified ABA therapists.[4] (Slip Opn., pp. 36-39.)

This is simply not an accurate characterization of what the Legislature intended to do or actually did in enacting SB 946. "As a rule, courts should not presume an intent to legislate by implication." (*Lubner v. City of Los*

---

[4]It should be remembered that the Legislature, although it enacted SB 946 in September 2011, intentionally delayed its effective date until July 1, 2012. What was the supposed purpose of this delay under the Court's interpretation of the statute — to give unlicensed BACB-certified behavior analysts an additional six months to administer ABA *illegally* before implicitly authorizing their services?

*Angeles* (1996) 45 Cal.App.4th 525, 529 [citations omitted].) As noted in Appellants' prior briefing, when the Legislature believes that an act that would otherwise constitute the practice of medicine or psychology should be exempted from the licensure requirements of the Business and Professions Code, it says so *explicitly,* not implicitly. (See, e.g., Educ. Code, § 49414.7, subd. (b) ["Notwithstanding Sections 2052 and 2732 of the Business and Professions Code," a school district or charter school may elect to allow nonmedical employees to volunteer to provide medical assistance to pupils with epilepsy suffering from seizures]; Health & Saf. Code, § 106985, subd. (a) ["Notwithstanding Section 2052 of the Business and Professions Code," a certified radiologic technician may perform venipuncture in an upper extremity under the general supervision of a licensed physician and surgeon].) By contrast, in both SB 946 and Education Code section 56525, the Legislature references the performance of certain practices by BACB-certified behavior analysts without any suggestion that an exemption from the Business and Professions Code is necessary.[5]

---

[5]Education Code section 56525, enacted almost a decade ago in 2004, provides:

> "(a) A person recognized by the national Behavioral Analyst Certification Board as a Board Certified Behavior Analyst qualifies as a behavioral intervention case manager of a district, special education local plan area, or county office and may conduct behavioral assessments and provide behavioral intervention services for individuals with exceptional needs.

Nor is it fair to accuse the Legislature, as the Court's opinion does, of supposedly allowing BACB-certified ABA therapists to violate the law with impunity for years by practicing psychology without a license, before finally taking action in SB 946 to "provisionally resolve" the issue.[6] Rather than presuming that the Legislature "looked the other way" for all of these years and sanctioned the allegedly illegal conduct of BACB-certified ABA therapists in practicing psychology without a license, the Court's opinion should have presumed that the Legislature was aware of the practice and permitted it to continue *because it was not illegal in the first place*. The Legislature should also be presumed to have been aware of — and to have approved of — the longstanding legal opinion of the Department of Consumer Affairs holding that *the practice of ABA did not constitute the illegal practice of psychology without a license*. (See, e.g., *Moore v. State Bd. of Accountancy, supra*, 2 Cal.4th at pp. 1017-1018 ["a presumption that the Legislature is aware of an administrative construction of a statute should be applied if the agency's

---

> "(b) This section does not require a district, special education local plan area, or county office to use a Board Certified Behavior Analyst as a behavioral intervention case manager."

[6]That the Legislature was well aware in enacting SB 946 that *unlicensed* BACB-certified behavior analysts were providing ABA therapy through the state's Regional Centers is clear from the text of the statute itself, which explicitly incorporates the vendor qualifications adopted by the Department of Developmental Services for the regional centers as one of the criteria for a "qualified autism service professional" pursuant to Health and Safety Code section 1374.73, subdivision (c)(4)(D).

interpretation of the statutory provisions is of such longstanding duration that the Legislature may be presumed to know of it" and "[s]uch a presumption should also be applied on a showing that the construction or practice of the agency has been made known to the Legislature"] [citations omitted].)[7]

In sum, SB 946 did not implicitly create a new legislative *authorization* for BACB-certified behavior analysts to provide ABA therapy without

---

[7]The Court's opinion notes that the Legislature typically does not create a licensing scheme for a new health care practice or specialty until hundreds or perhaps thousands of individuals are engaged in that practice and the need for state licensure has been established. (Slip Opn., p. 35, fn. 25.) But the opinion draws the wrong conclusion from these historic events. Occupational therapists and respiratory therapists were not "routinely engaging in the unlicensed practice of medicine before [the Legislature] creat[ed] the legal framework within which those individuals can *legally* practice their specialty," as the Court posits. (*Ibid.* [emphasis in original].) Such reasoning inappropriately attributes to the Legislature a wanton disregard for the rule of law. Rather than reflecting the Legislature's willingness to permit health care specialists to routinely engage in the unlicensed practice of medicine, what these historic episodes reflect is the Legislature's recognition that Business and Professions Code section 2052 does not sweep as broadly as DMHC and the Court's opinion suggest, that not all practitioners who provide health care services are required to be licensed by the state, and that unlicensed allied health professionals like BACB-certified behavior analysts have a long and commendable record of performing critical health care services without being licensed by the state.

Indeed, the Court's conclusion in footnote 25 that thousands of occupational therapists were *illegally* engaged in the unlicensed practice of medicine prior to the Legislature's enactment of AB 1100 in 1997 is *directly refuted* by the Department of Finance's enrolled bill report for AB 1100, which unequivocally states, in reference to the then-applicable law: "Since there are no existing provisions of law governing qualifications for subject providers, *any person, regardless of training, may provide [occupational therapy] services to the public at large.*" (See JA 10:2518.)

obtaining a license to practice psychology under Business and Professions Code section 2903. Instead, the statute merely constituted legislative *confirmation* that the longstanding practice of *unlicensed* BACB-certified therapists providing ABA treatments for autism *was never illegal to begin with.*[8] It follows from this proposition that *both before and after* the effective date of SB 946, there was no legal basis for DMHC to deny coverage for ABA administered by unlicensed BACB-certified practitioners.

## III. REHEARING SHOULD BE GRANTED TO CLARIFY AND CORRECT TWO DISCRETE PORTIONS OF THE COURT'S OPINION THAT DO NOT ACCURATELY DESCRIBE EXISTING LAW

In addition to the grounds set forth above for granting rehearing, the Court's published opinion should be modified in order to clarify and correct two discrete portions of the opinion that misstate existing law.

The first point is a relatively minor one, but which nevertheless should be addressed to avoid sowing confusion. On page 3 of the Slip Opinion, the Court makes a number of references to the fact that ABA can be performed by

---

[8]Similarly, as Senator Steinberg and SB 946's co-author Assemblymember Monning reiterated throughout the Legislature's consideration of the bill, SB 946 did not create a *new mandate* for health care plans to provide coverage for medically necessary ABA treatments for autism; plans were already required to provide such coverage under the Mental Health Parity Act, and SB 946 was enacted only to confirm and to make that mandate explicit. Significantly, both DMHC and the Department of Insurance *agree* that the health care plans and insurers under their jurisdiction are required to provide coverage for medically necessary ABA treatments pursuant to the Mental Health Parity Act, and they have both adopted regulations to that effect.

a licensed physician or psychologist. (See, e.g., Slip Opn., p. 3 ["While ABA can be performed by a licensed physician or psychologist . . ."]; *ibid.* ["The issue raised by this case is whether the Department of Managed Health Care (DMHC) . . . is required, by law, to direct health plans within its jurisdiction to provide coverage for ABA when provided, or certified, by BACB-certified therapists who are not otherwise licensed to practice medicine or psychology."]; *ibid.* ["DMHC contends that it may require plans to cover ABA therapy *only* when it was provided by someone licensed to practice medicine or psychology."]; *id.*, p. 3, fn. 3 ["Some BACB-certified providers are also licensed to practice medicine or psychology . . . . [W]hen we refer to BACB-certified providers, we are referring to those BACB-certified providers who are not otherwise licensed to practice medicine or psychology."].)

These statements are true as far as they go, but they are not completely accurate. In addition to physicians and psychologists, licensed marriage and family therapists, educational psychologists, clinical social workers, professional clinical counselors, and even physical therapists, occupational therapists, speech-language pathologists, and audiologists are also authorized to perform ABA if the services are within the licensee's experience and competence. (See Health & Saf. Code, § 1374.73, subd. (c)(3)(B).) In fact, licensed marriage and family therapists provide ABA in California almost as frequently as licensed psychologists, and far more frequently than physicians

(who almost never provide ABA therapy). (See Brief of Amicus Curiae California Association of Behavior Analysis in Support of Position of Appellants Consumer Watchdog, et al., p. 44.)

As presently written, portions of the Court's opinion may therefore be read to hold that — at least prior to or in the absence SB 946 or a successor statute — *only* licensed physicians or psychologists are permitted to provide ABA. Consequently, the Court should modify the various statements on page 3 of the Slip Opinion cited above to clarify that the issue raised in the case involves BACB-certified therapists who are not otherwise licensed to practice medicine, psychology, *or any of the other healing arts specified in Health and Safety Code section 1374.73, subdivision (c)(3)(B), that allow for the provision of ABA services by a qualified licensee.*

The second portion of the opinion that should be corrected relates to the Court's discussion of the "basic health care services" that must be provided by health plans under the Knox-Keene Act. On the top of page 8, the Court states that those services are defined to include "physician services; hospital inpatient services; diagnostic laboratory services; home health services; and preventive health services." (Slip Opn., p. 8 [citing Health & Saf. Code, § 1345, subd. (b)].) The opinion's list is incomplete. Health and Safety Code section 1345, subdivision (b)(2), defines "basic health care services" to include "hospital inpatient services *and ambulatory care services*." (Emphasis added.)

The omission of "ambulatory care services" from the opinion's list of "basic health care services" takes on greater significance in the discussion set forth on page 17 of the Slip Opinion. There, the Court states that "DMHC's regulation defining basic health care under Knox-Keene states that '[p]hysician services' constitute basic health care services which *must* be covered, but referral to other professionals, including, among others, occupational therapists and physical therapists, *may* be covered under the plan." (Slip Opn., p. 17 [citing Cal. Code Regs., tit. 28, § 1300.67, subd. (a)(1)] [emphasis in Court's opinion].) The opinion then asks: "Setting to one side the licensing issue, *if a health plan has chosen,* ***as it is permitted to do so****, to exclude coverage for occupational and physical therapists under Knox-Keene*, can this exclusion legally be applied to medically necessary treatment for autism under the MHPA?" (Slip Opn., pp. 17-18 [emphasis added].)

*The bolded language above is incorrect.* Occupational and physical therapy are "basic health care services" under Knox-Keene and DMHC's regulations, and a health plan therefore *is not permitted* to exclude coverage for occupational and physical therapists. Occupational and physical therapy — like ABA therapy — are "ambulatory care services" that constitute "basic health care services" under the omitted-from-page-8-of-the-slip-Opinion language of Health and Safety Code section 1345, subdivision (b)(2). And while the Court's opinion on page 17 quotes the definition of "physician

services" from section 1300.67, subdivision (a)(1), of DMHC's regulation defining basic health care under Knox-Keene, the opinion neglects to cite to subdivision (c) of that same regulation, which defines the "[a]mbulatory care services (outpatient hospital services)" that are required to be provided by a health care service plan to its enrollees as including "diagnostic and treatment services, *physical therapy*, speech therapy, *occupational therapy services* as appropriate, and those hospital services which can reasonably be provided on an ambulatory basis." (Cal. Code Regs., tit. 28, § 1300.67, subd. (c) [emphasis added].)

This portion of the Court's published opinion should therefore be deleted or modified in order to avoid erroneously stating that occupational and physical therapy are not "basic health care services" that must be provided by every health care service plan to its enrollees or subscribers under the Knox-Keene Act.

## IV. THE COURT SHOULD NOT CERTIFY FOR PUBLICATION THE PORTION OF ITS OPINION ADDRESSING THE UNTIMELINESS OF DMHC'S CROSS-APPEAL

Finally, Appellants suggest that the Court should not certify for publication the portion of its opinion addressing the untimeliness of DMHC's cross-appeal, contained on pages 41-43 of the Slip Opinion. Although the opinion undoubtedly reaches the correct result based upon the facts and evidentiary record of this case, the opinion may be read to hold that even when

a party can establish that it timely submitted a notice of appeal to Federal Express for transmission to the Superior Court, and that Federal Express nevertheless failed to deliver the notice to the Superior Court the next day as promised, the notice of appeal will be deemed to be untimely and the appeal must be dismissed. This would be a very harsh rule, particularly for those counsel who may be representing a party in litigation in another county, and who have no other realistic means of filing original documents with the court other than to rely upon either the U.S. Postal Service or an overnight delivery service; by the time such a party became aware that Federal Express had failed to deliver the notice of appeal the next day, it would likely be too late for the party to file the notice by any other means.

Whether or not the Court might reach this conclusion in a case that required it to do so, this is not such a case. The Court's opinion states that "it is clear that one of two things occurred. Either: (1) Federal Express erred, and did not timely deliver the shipment; or (2) Federal Express timely delivered the shipment, but employees of the Los Angeles Superior Court failed to timely mark the notice of cross-appeal as received." (Slip Opn., pp. 41-42.) Appellants submit that there is a third possibility, one that is actually more likely than either of the other two — that nobody at DMHC actually submitted the package to Federal Express on the date marked on the airbill, and that the

package instead mistakenly sat on someone's desk or in someone's out-box for several days until the error was belatedly discovered.

In this regard, Appellants note that DMHC's counsel did not provide the declaration of anyone who stated that he or she actually placed the notice of appeal in the Federal Express drop-box on Friday, April 29, 2011, the date it was supposedly submitted to Federal Express for delivery to the Superior Court.[9] Rather, counsel's declaration merely states: "To ensure timely delivery, *standard practice* in my office is to drop off the Federal Express envelope in a Federal Express drop-box or at a retail location well in advance of the last pick-up for the day. *I have no reason to believe that practice was not followed in this instance.*" (Declaration of Drew Brereton in Support of Respondents/Cross-Appellants' Supplemental Brief Pursuant to the Court's March 8, 2013 Order, ¶ 3 [emphasis added].) That is a far cry from submitting a declaration from someone attesting to actually having placed the envelope in the Federal Express drop-off box.

Moreover, counsel's assertion that he attempted to obtain the tracking information for the package from Federal Express, but was informed that such information was only stored for three months and was no longer available (see *id.*, ¶ 9) does not conform with Appellants' counsel's experience. First,

---

[9]The Federal Express airbill is dated April 29, 2011, but that document is created by the sender, and any date can be placed on it.

Federal Express will provide confirmation of delivery by e-mail *on the date that the delivery is made*, which confirmation includes the signature of the person signing for the package. Second, according to its website, Federal Express maintains and can provide a record of the proof of its delivery of a package (with the recipient's signature) for a period of 18 months for FedEx Express and Ground deliveries, and for 2 years for freight shipments. (See <http://www.fedex.com/us/tracking/f_quickhelp.html?link=4&type=1> (last visited 9/24/13).) As a test of this assertion, on September 17, 2013, Appellants' counsel logged onto Federal Express' website and obtained the proof of delivery for a "standard overnight" package delivered on March 7, 2013 — some six months earlier.

In short, Respondents failed to establish by any competent evidence that they actually delivered the notice of appeal to Federal Express in a timely fashion, and that failure should constitute sufficient grounds in and of itself for dismissing their cross-appeal as untimely. The Court should leave to another day, in a case that actually requires such a determination, whether there is no basis for relief for a party who can prove that a notice of appeal was timely submitted to Federal Express for delivery to the Superior Court the next day, and that it was only due to a failure on the part of Federal Express that the notice was not timely received by the Superior Court.

## CONCLUSION

The Court's opinion first creates a "disconnect between the law and reality" by erroneously holding that the administration of ABA therapy by BACB-certified behavior analysts constitutes the unlawful, unlicensed practice of psychology — a conclusion that was not argued for by any party in this action, that finds no support in the record, and that is contrary to the longstanding legal opinion of the agency responsible for implementing and enforcing the state's psychology licensing laws. The Court's opinion then compounds its error by holding that the Legislature "provisionally resolved" this disconnect by enacting SB 946 and *implicitly authorizing* BACB-certified behavioral analysts to administer ABA without a license — a characterization of SB 946 that cannot be squared with its language, with its legislative history, or with fundamental principles of statutory interpretation disfavoring an intent to legislate by implication.

There is a much simpler and more direct explanation: ABA *does not* constitute the practice of psychology, and BACB-certified behavior analysts are not required to be licensed in order to provide ABA treatments for autism — a conclusion that the Legislature's enactment of SB 946 merely *confirmed* by making explicit that *unlicensed* BACB-certified behavior analysts were as qualified as physicians, psychologists, and other state-licensed professionals to administer ABA as a treatment for autism.

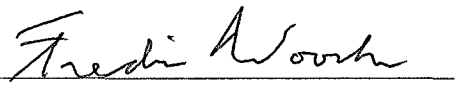
For the reasons and upon the authorities set forth above, Appellants' Petition for Rehearing should be granted and the Court's opinion should be modified to hold, *inter alia*, that even prior to SB 946's July 1, 2012, effective date, BACB-certified behavior analysts were not required to be licensed under the Business and Professions Code, and that DMHC violated its ministerial duty by improperly denying coverage for medically necessary ABA administered or supervised by unlicensed BACB-certified behavior analysts.

Dated: September 25, 2013

Respectfully submitted,

CONSUMER WATCHDOG
Harvey Rosenfield
Pamela Pressley
Jerry Flanagan

STRUMWASSER & WOOCHER LLP
Fredric D. Woocher
Beverly Grossman Palmer

By: 
Fredric D. Woocher

*Attorneys for Petitioners/Plaintiffs, Appellants, and Cross-Respondents*

## CERTIFICATE OF COMPLIANCE WITH RULE 8.204(c)

I certify that, pursuant to Cal. App. Rule 8.204(c), the attached Appellants' Reply Brief is proportionately spaced, has a typeface of 13 points or more and contains 6,110 words, as determined by a computer word processor word count function.

Dated: September 25, 2013

CONSUMER WATCHDOG
Harvey Rosenfield
Pamela Pressley
Jerry Flanagan

STRUMWASSER & WOOCHER LLP
Fredric D. Woocher
Beverly Grossman Palmer

By: _____
Fredric D.Woocher

*Attorneys for Petitioners/Plaintiffs, Appellants, and Cross-Respondents*

# EXHIBIT 1

STATE OF CALIFORNIA—STATE AND CONSUMER SERVICES AGENCY GRAY DAVIS, Governor

Consumer Affairs

LEGAL AFFAIRS
400 R STREET, SUITE 3000
SACRAMENTO, CA 95814-6200

(916) 445-4216

February 11, 2000

CATHY BARANKIN
Sacramento Advocacy
2220 Capitol Advocacy
Sacramento, CA 95816

Re: **Behavioral Analysts**

Dear Ms. Barankin: Cathy

This is in response to your request that I memorialize in writing, a presentation and legal opinion relating to behavioral analysts that I offered at a meeting at the Department of Education in January of 1997. In that presentation I concluded that behavioral analysts, practicing as described, are not required to be licensed as psychologists or marriage, family and child counselors (now marriage and family therapists). LaVonne Powell, who serves as legal counsel to the Board of Behavioral Sciences, and who also attended that meeting, concurred in the opinion. I apologize that the press of business in our office precluded my getting this to you earlier.

The following memorializes the presentation, which included a history of the Department of Consumer Affairs (DCA) involvement in the matter.

DCA's involvement began in the latter part of 1996 when the department was asked to respond to a series of questions relating to implementation of SB 989 (1996) by the Department Education. At that time, Greg Hudson was a Special Project Consultant with the Department of Education and was responsible for formulating the implementing regulations. Mr. Hudson was working with a group of interested parties, called the "SB 989 Work Group," on the regulations.

In early November of 1996, Mr. Hudson met with representatives of DCA and provided information on the context and background of SB 989. Subsequent to that meeting, he provided information to the DCA Legal Office regarding what behavioral analysts actually do, in the form of a training manual from one of the firms which contracted with school districts to provide these services. There were several telephone conversations to clarify certain issues. The initial, preliminary review by the Legal Office indicated that some of the activities of behavioral analysts constituted the practice of psychology, and some activities bordered on the practice of medicine. The training manual described a major component of their activities as behavioral diagnosis, which, in part, included determining that a child's aberrant behavior may be the result of illness or a reaction to medication. We provided Mr. Hudson with a copy of pertinent provisions of the Psychology License law, a summary of an Attorney General's opinion, and a summary of a case entitled Magit v. Board of Medical Examiners.

In early December 1996, a second meeting was then held with Mr. Hudson to discuss the issues.

Based on our discussions at that December meeting, Mr. Hudson sent a letter to the SB 989 Work Group, indicating that the preliminary opinion of the Legal Office, based solely on the information reviewed, was that some of the activities in which behavioral analysts engaged constituted the practice of psychology. The letter also requested any input the behavioral analysts wished to submit, and requested that it be submitted some two weeks prior to Legal Office attorneys Dan Buntjer and LaVonne Powell attending a meeting of the SB 989 Work Group, scheduled for January 30, 1997.

Significant and valuable input was provided by a number of interested parties and the Legal Office attorneys reviewed the information. The thrust of the information and argument was that behavioral analysts were not practicing psychology and, therefore, were not required to be licensed.

In mid-January, on behalf of the behavioral analysts, you requested a meeting with the Legal Office attorneys. On January 27, the undersigned and LaVonne Powell met with you, Greg Wagner, a licensed psychologist and behavioral analyst who works for the Department of Developmental Services, and Mark Levine, a behavioral analyst and co-owner of the Behavioral Counseling and Research Center. Dr. Wagner made it clear he was at the meeting solely in his private capacity and not as a representative of DDS. There was further extensive discussion of the actual practices of behavioral analysts. At this meeting, you indicated that legislation would be introduced to statutorily recognize behavioral analysts.

On January 30, 1997, the undersigned and LaVonne Powell attended a meeting of the SB 989 Work Group. We presented the above-noted chronological history of DCA's involvement in the regulatory process and our legal approach to analyzing the licensing issue that had arisen.

We advised the SB 989 Work Group that after review of all the information submitted, and the clarification of various matters through discussion and input, it was our legal opinion that behavioral analysts, performing as represented to us, were not engaged in the practice of psychology or marriage, family and child counseling (now marriage and family therapy).

The following information and analysis changed our preliminary conclusion.

1. Behavioral analysts do not engage in diagnosing mental disorders or treating mental disorders, but focus on external environmental factors that influence behavior.

2. When Individual Education Plans (IEPs) are developed for children needing special education services, it is common for a licensed mental health professional to be on the evaluation team, providing those services requiring licensure.

3. While behavioral analysts are engaged in behavior modification, it is in a context and methodology different than that of psychologist and marriage, family and child counselors.

4. The term "diagnosis" is not being used in its commonly understood medical or clinical sense. A more accurate term in this context is functional analysis.

5. Most importantly, when the issue is viewed from a strict legal perspective, it would appear extremely difficult to prosecute a behavioral analyst for engaging in the unlicensed practice of psychology or marriage, family and child counseling. Unlicensed practice is a crime. This means that licensing boards would be required to prove beyond a reasonable doubt that the person engaged in unlicensed practice. Given that the Department of Education has, at least implicitly, recognized and authorized the practice of behavioral analysts, and it has been practiced for some 30+ years, successful prosecution for unlicensed practice seems doubtful.

I trust the foregoing is responsive to your request. If you have any questions, or need to further discuss the foregoing, please feel free to contact me at your convenience.

Sincerely,

DON CHANG
Supervising Counsel

Daniel Buntjer

By DANIEL BUNTJER
Senior Staff Counsel

cc: Tom O'Connor, EO, Board of Psychology
Sherry Mehl, EO, Board of Behavioral Sciences
LaVonne Powell, Staff Counsel

**PROOF OF SERVICE**

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Re: *Consumer Watchdog et al. v. California Department of Managed Health Care et al.*, 2nd Civ. No. B232338, (L.A.S.C. Case No. BS121397)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 10940 Wilshire Boulevard, Suite 2000, Los Angeles, California 90024.

On **September 25, 2013,** I served the foregoing document(s) described as **APPELLANTS' PETITION FOR REHEARING** on all appropriate parties in this action, by the method stated on the attached Service List.

☒ If U.S. Mail service is indicated, by placing this date for collection for mailing true copies in sealed envelopes, first-class postage prepaid, addressed to each person as indicated, pursuant to Code of Civil Procedure section 1013a(3). I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing contained in the affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on **September 25, 2013,** at Los Angeles, California.

LaKeitha Oliver

Service List

*Consumer Watchdog et al., v. California Department of Managed Health Care*

2nd Civ. No. B232338

| | |
|---|---|
| Holly Pearson [U. S. Mail]<br>Debra L. Denton<br>Drew A. Brereton<br>California Dept. of Managed Health Care<br>980 Ninth Street, Suite 500<br>Sacramento, CA 95814<br>Tel: (916) 323-0435<br>Fax: (916) 323-0438<br>E-mail: dbrereton@dmhc.ca.gov<br>*Attorneys for Defendants, Respondents and Cross-Appellants* | Kamala D. Harris [U. S. Mail]<br>Julie Weng-Guttierrez<br>Leslie P. McElroy<br>Carmen D. Snuggs<br>Deputy Attorneys General<br>Office of the Attorney General<br>300 S. Spring Street, Suite 1700<br>Los Angeles, CA 90013<br>Tel: (213) 897-2450<br>Fax: (213) 897-2805<br>Email: Carmen.Snuggs@doj.ca.gov<br>*Attorneys for Defendants, Respondents and Cross-Appellants* |
| Harvey Rosenfield [U. S. Mail]<br>Pamela M. Pressley<br>Jerry Flanagan<br>Consumer Watchdog<br>2701 Ocean Park Boulevard, Suite 112<br>Santa Monica, CA 90405<br>Tel: (310) 392-0522<br>Fax: (310) 392-8874 | Robert Barnes [U. S. Mail]<br>Kaye Scholer LLP<br>1999 Avenue of the Stars, Suite 1700<br>Los Angeles, CA 90067<br>Tel: (310) 788-1000<br>Fax: (310) 788-1200<br>Email: rbarnes@kayescholer.com<br>*Attorney for Amicus curiae Autism Deserves Equal Coverage* |
| Daniel R. Unumb [U. S. Mail]<br>Autism Speaks<br>863 Corley Mill Road<br>Lexington, SC 29072<br>Tel: (803) 520-8080<br>Fax: (803) 520-6531<br>Email: daniel.unumb@autismspeaks.org<br>*Attorney for Amicus curiae Autism Deserves Equal Coverage* | Adam Cole [U. S. Mail]<br>Patricia Tenoso Sturdevant<br>Department of Insurance<br>45 Fremont Street, 23rd Floor<br>San Francisco, CA 94105<br>Tel: (415) 538-4010<br>Fax: (415) 904-5889<br>Email: colea@insurance.ca.gov<br>*Attorneys for Amicus curiae Department of Insurance* |
| Una Lee Jost [U. S. Mail]<br>Law Office of Stephen P. Sommers<br>301 North Lake Avenue, 7th Floor<br>Pasadena, CA 91101<br>Tel: (626) 793-3995<br>Fax: (626) 796-0107<br>*Attorneys for Amicus curiae California Association for Behavior Analysis* | California Association [U. S. Mail]<br>of Health Plans<br>1415 L Street, Suite 850<br>Sacramento, CA 95814 |
| Clerk, Department 85 [U. S. Mail]<br>Los Angeles Superior Court<br>111 N. Hill Street<br>Los Angeles, CA 90012 | |