



March 9, 2011

The Honorable Jerry Brown
Governor
State of California
Capitol Building
Sacramento, CA 95814

RE: End Schwarzenegger-era Roadblocks to Medical Treatment for Autistic Children

Dear Governor Brown,

We are writing to urge you to reverse an illegal practice begun under the Schwarzenegger Administration that authorizes insurance companies to delay and deny autistic children coverage for critically needed, medically necessary treatment, irreparably harming these children and forcing the taxpayers to bear costs that should be borne by private insurers.

Californians, including those stricken by autism and their parents and caregivers, expect government regulators to enforce the law, not to side with insurance companies seeking to boost their profits by denying patients the care they need. Consumer Watchdog looks forward to working with you to ensure autistic children get the care they need in a timely manner.

California Law Requires Insurance Companies to Provide Autistic Children with Critically Needed Therapies

California's Mental Health Parity Act, enacted in 1999, requires health insurers to cover all medically necessary treatment for children with autism. One of the most effective treatments for autism is Applied Behavior Analysis ("ABA"). Until about two years ago, the Department of Managed Health Care ("DMHC") routinely required insurers to pay for this treatment, rejecting their argument that it was not medically necessary. Indeed, every independent medical review ("IMR") of ABA denials conducted at the behest of DMHC since 2007 resulted in a decision to overturn the insurer's refusal to pay for such treatments. Moreover, these IMRs, conducted by health professionals, also consistently found ABA to be a "health care service" and ordered coverage of these treatments when *supervised* by licensed professionals, regardless of whether the person providing the treatment is licensed.

Without Required Public Notice or Comment, The Department Reverses Its Position, Allowing Insurers to Deny Autistic Children Critically Needed Treatment

Once the DMHC's independent medical reviewers began to routinely require insurance companies to pay for ABA treatments, insurance companies pressured your predecessor to change the DMHC's policy. The industry's lobbying campaign was widely reported by the news media. On March 9, 2009, two years ago today, the Schwarzenegger Administration issued an informal memorandum to health insurers changing the way that consumer complaints about

insurance company denials of ABA treatments would be processed. The memo, written by DMHC's Deputy Director Richard Martin, announced that DMHC would no longer send complaints from patients concerning insurers' refusal to pay for ABA directly to IMR, but rather would first process them as coverage disputes. Unlike questions regarding whether a treatment is medically necessary, which are sent out for an IMR, grievances concerning coverage are reviewed by DMHC staff.

Moreover, the Schwarzenegger Administration made this policy change without complying with the requirement that an agency follow the Administrative Procedures Act when proposing to change its practices or policies. The DMHC never issued a proposed regulation, never notified the public nor held a single hearing on the changes it unilaterally adopted.

Around the same time, the Schwarzenegger Administration also began to allow insurance companies to refuse to pay for ABA on the grounds that ABA providers do not hold a state license. This too is illegal. California law does not require a health professional to be licensed by the state as a prerequisite for a health care service to be covered under health insurance contracts. Because California has *no system for licensing* ABA specialists, most ABA providers are certified by an independent certification body, the national Behavior Analysis Certification Board ("BACB").* Under the Schwarzenegger-era policy change, the DMHC continues to refuse to order health insurers to cover ABA administered by BACB certified practitioners whose education and training make them the most qualified to provide such therapy. The DMHC maintains this position even when patients are referred and overseen by a licensed healthcare professional – the model endorsed by the IMR panels as consistent with standards of good medical practice. Under the DMHC's current position, health plans must only pay for ABA administered by practitioners who hold a state license, even if they have no specific training in the provision of ABA (e.g., Marriage and Family Therapists).

Impact of DMHC's New Policy on Those With Autism & Taxpayers

The new policy announced in the Schwarzenegger Administration's March 9, 2009 directive continues to this day. It has resulted in months of delay of critically needed care. The impact on the health and safety of autistic children has been devastating. It is well documented in the scientific literature that children who do not receive early ABA treatment have a significantly poorer outcome than those who do receive treatment. Delays of even a few weeks or months in receiving necessary ABA treatments can result in setback and delays in improvement, endangering the autistic child's health and safety. In some cases, such lengthy delays sadly result in a child missing the window for improvement altogether.

* The Behavior Analyst Certification Board, Inc. (BACB) – a national independent, nonprofit credentialing body – was established in 1998. The BACB certification program is accredited by the well-respected and rigorous National Council for Certifying Agencies (NCCA) of the Institute for Credentialing Excellence, which accredits credentialing programs for a wide variety of professions.

For example, one parent's request for an IMR to review Anthem Blue Cross's denial of ABA treatments for her autistic son was instead reviewed through the DMHC's internal grievance process. Unlike the IMR process, which must be completed within thirty days, the grievance review process can drag on for months. In fact, this parent waited seven months for the DMHC to resolve her dispute with Blue Cross. As a result of the delay in care, the child would run into the street impulsively and engaged in dangerous behavior (banging on windows and jumping on and off furniture) and had limited ability to follow instructions, presenting a clear safety risk to himself. Further, because of his untreated autistic behaviors, this child had to be anesthetized in order to undergo routine medical tests and obtain even the most basic dental care—increasing the cost of care and risking dangerous side effects.

The DMHC's position that insurers do not have to pay for ABA therapy unless the treatment is provided by a California-licensed health care professional has also had perverse and irreparable results. Parents often spend months attempting to identify ABA providers that can provide covered services. Even when licensed providers are identified, very often they lack the expertise in providing ABA services compared to providers who have received a BACB credential. Depriving autistic children of medically necessary treatment is a violation of the Mental Health Parity Act.

Finally, the DMHC's current policy forces parents to seek ABA treatment from overstretched public schools and state-funded Regional Centers, or to forgo treatment altogether. By shifting the burden to these taxpayer-funded programs, the DMHC's actions are potentially adding tens of millions of dollars in new taxpayer-funded services.

Consumer Watchdog Lawsuit

On June 30, 2009, Consumer Watchdog and co-counsel Strumwasser & Wocher LLP filed a lawsuit alleging that the DMHC changed the state agency's policy in 2009 to permit insurers to deny coverage for ABA in violation of the Knox Keene and Mental Health Parity Acts.

The trial judge agreed with Consumer Watchdog that the March 2009 policy shift constituted an illegal "underground regulation" because the DMHC changed the process through which consumer complaints about ABA denials are processed by the DMHC without following the required public rulemaking process for such changes. The judge also ***rejected*** the DMHC's argument that state licensure of ABA providers is required by California law. However, the judge ruled that it was within the DMHC's "discretion" to only require health insurers to pay for ABA services provided by state licensed providers. This is an error.

Consumer Watchdog and co-counsel are currently seeking a new trial. Our brief to the court in support of a new trial is attached. Perhaps most disturbing about the judge's decision is that it failed to address—indeed, did not even mention—California's Mental Health Parity Act, which mandates coverage of all medically necessary treatments for autism on the same terms and conditions as treatments for physical injuries.

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However, because the judge held it was within the DMHC's *discretion* to require ABA providers to be licensed, your Administration may lawfully direct the DMHC to exercise its *discretion* to require health insurers to pay for ABA services regardless of whether providers possess a state-issued license.

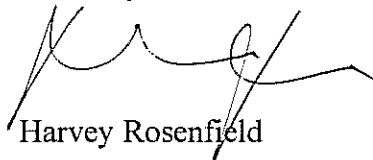
You Should Order the DMHC to Comply With State Law and Reverse Its Illegal Policy

We urge you to direct the new DMHC Director to reverse the Schwarzenegger-era policy of allowing insurers to deny medically necessary care to autistic children. Simply, the DMHC should return to its pre-March 2009 practice and require insurers to cover ABA when it is prescribed as a medically necessary autism treatment by a licensed health care provider and administered or supervised by a licensed *or* BACB-certified professional.

In addition, the DMHC must return to its prior system of referring complaints involving health insurer denials of ABA services to the IMR system. Those reviews appropriately provide for an independent medical panel's decision as to whether the prescribed treatment is "medically necessary" for the particular enrollee's condition.

We would look forward to discussing this issue with you or your staff.

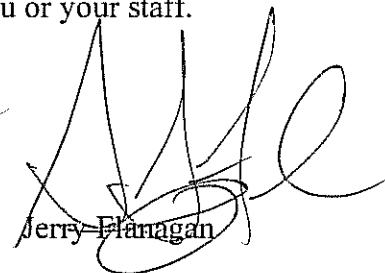
Sincerely,



Harvey Rosenfield



Pam Pressley



Jerry Flanagan