# DEPARTMENT OF MANAGED HEALTH CARE

# ADOPTION OF EMERGENCY REGULATIONS

## California Code of Regulations
## Title 28, Article 8, Section 1300.74.73

## Pervasive Developmental Disorder and Autism Coverage

## AUTHORITY

Under the authority established in the Knox-Keene Health Care Service Plan Act of 1975 (Knox-Keene Act),[1] specifically Health and Safety Code Section 1344, the Director of the Department of Managed Health Care (Department) proposes to adopt as an emergency regulation section 1300.74.73, "Pervasive Developmental Disorder and Autism Coverage," located in Title 28 of the California Code of Regulations.

## REFERENCE

This regulation is intended to implement, interpret, and/or make specific Health and Safety Code Sections 1345, 1367, 1374.72, and 1374.73.

## FINDING OF EMERGENCY

The Director of the Department has determined that an emergency exists. This regulation is being adopted on an emergency basis for the immediate preservation of the public health and safety, and general welfare, within the meaning of Government Code Section 11346.1.

Emergency regulations are necessary: (1) because of widespread confusion among health plans and enrollees regarding the coverage requirements for medically necessary mental health services provided by licensed providers, including behavioral health treatment (BHT) services and applied behavior analysis (ABA) therapy, for Healthy Families Program enrollees and CalPERS members pursuant to the state's mental health parity law, Health and Safety Code 1374.72; and, (2) to establish an immediate reporting requirement to ensure health plans can timely and adequately demonstrate they have established and are maintaining an adequate network of qualified autism service providers, including professionals and paraprofessionals.

Therefore, the Department proposes this emergency regulation to ensure uniform and timely application of the Knox-Keene Act related to health plan coverage of medically necessary mental health services, including BHT and ABA, for health plan enrollees with pervasive developmental

[1] California Health and Safety Code Sections 1340 et seq. References herein to "Section" are to sections of the Knox-Keene Act unless otherwise specified.

disorder (PDD) or autism under the mental health parity law and to implement, interpret, and make specific certain provisions of SB 946.

## DESCRIPTION OF SPECIFIC FACTS THAT CONSTITUTE THE EMERGENCY

### A. Background

**Covered Health Care Services Under the Knox-Keene Act**

Under the Knox-Keene Act, a health plan may be obligated to cover a service because it is: (1) a basic health care service as defined in Health and Safety Code Section 1345(b); (2) a specific service mandated by the Legislature; or (3) a service the health plan contractually agreed to provide.

Health and Safety Code Section 1367 sets forth the general requirements that health plans must meet under the Knox-Keene Act, including the requirement that a health plan provide enrollees with medically necessary basic health care services.[2] Section 1345(b) of the Knox-Keene Act defines the broad categories of basic health care services that health plans must offer, which include physician services, both consultation and referral; hospital inpatient services and ambulatory care services; diagnostic laboratory and diagnostic and therapeutic radiologic services; home health services; preventative health services; emergency health care services, ambulance transport services; and hospice care.[3] The Knox-Keene Act, with the exception of specific health benefit mandates, does not attempt to enumerate the specific health care services and treatments that are included in the concept of "basic health care services" under Section 1367(i).[4] As indicated above, in addition to basic health care services, the Legislature enacts specific health benefit mandates that require health plans to include specific services in their health insurance products (plans and policies).[5]

**Mental Health Parity and Behavioral Health Treatment**

In 1999, California passed a mental health parity law in the Knox-Keene Act, AB 88 (Thomson), Chapter 534, Statutes of 1999, Health and Safety Code Section 1374.72, requiring health plans to provide coverage for the diagnosis and medically necessary treatment of specified severe mental illnesses, including PDD and autism, under the same terms and conditions applied to other medical conditions. CalPERS members and Healthy Families enrollees are covered under Section 1374.72; however, Medi-Cal subscribers are exempt under the statute.

The Knox-Keene Act requires health care service plans to furnish services provided by persons or institutions *licensed by the State to deliver or furnish health care services (emphasis added).* [6] The Knox-Keene Act also states that "[p]ersonnel employed or under contract to the plan *shall*

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[2] Health and Safety Code Section 1367(i).
[3] Health and Safety Code Section 1345(b).
[4] For examples of required statutory benefit mandates see the California Health Benefits Review Program, "Appendix 20: Existing Mandates in California Law," (2009) at http://www.chbrp.org/documents/sb1704/ap_20.pdf
[5] *Ibid.*, at p. 6.
[6] Health and Safety Code Section 1345(i).

*be licensed or certified by their respective board or agency, where licensure or certification is required by law (emphasis added)."* [7] Business and Professions Code Section 2052 further provides that only licensed individuals may diagnose or treat a person for any physical or mental condition unless the Legislature provides an exception to the prohibition.

The mental health parity statute does not list the specific services that health plans must cover. Rather, it identifies specific mental health conditions (such as PDD and autism) that are subject to the statute's requirements. The mental health parity statute requires that health plans provide medically necessary treatment for those conditions. As such, BHT is used to treat individuals with both physical and mental health issues and conditions.[8] ABA therapy is a type of BHT.[9] ABA therapy is a recognized treatment used to treat children with PDD or autism.[10] ABA uses modern behavioral learning theory to modify behaviors by focusing on the observable relationship of behavior to the environment. Because ABA comprises many assessment and behavioral changing procedures, ABA can be a medical or non-medical service depending on its application. Since the implementation of mental health parity in 2000, health plans have been required to cover medically necessary treatments for autism, including ABA services, when provided by a licensed individual.[11] SB 946, which relaxed the licensure requirements for administering ABA therapy, did not affect this coverage requirement for Healthy Families and CalPERS enrollees.

Historically, health plans denied claims for BHT, and more particularly, ABA, for children diagnosed with PDD and autism on the grounds that the services were either not medically necessary or were experimental/investigational. Those decisions by the health plans were generally overturned by the Department's external review process known as Independent Medical Review (IMR). However, a few years ago health plans began denying coverage for those services altogether, arguing they have no legal obligation to cover ABA because the services are: (1) not health care services and health plans are only obligated under the Knox-Keene Act to cover health care services; (2) excluded under the terms and conditions of the health plan contract; or (3) educational services. Another frequent health plan argument was that since ABA services could be administered by non-licensed individuals, they could not, as a matter of law, be health care services. This argument, however, ignored the fact that licensed health care providers were authorized to provide BHT, including ABA therapy, as an integral part of a patient's treatment plan.

In the vast majority of cases that come to the Department, the Department finds that the requested ABA is a covered health care service that must be provided by a licensed provider. The determination whether ABA therapy is a covered benefit requires a case-by-case analysis and depends primarily on the licensed treating provider's assessment and evaluation. If the treating provider determines that the requested ABA therapy requires the skill and expertise of a

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[7] Health and Safety Code Section 1367(b).

[8] For example, *see* http://www.healthline.com/galecontent/behavioral-therapy.

[9] See the National Autism Center's National Standards Project, "Findings and Conclusions," (2009). http://www.nationalautismcenter.org/pdf/NAC%20Findings%20&%20Conclusions.pdf

[10] Geraldine Dawson et al, Randomized, Controlled Trial of an Intervention for Toddlers with Autism: The Early Start Denver Model, *Pediatrics*, Vol. 125, No. 1 (Nov. 30, 2009), pgs. e21-22; http://pediatrics.aappublications.org/content/125/1/e17.full.html.

[11] Health and Safety Code Section 1374.72(a).

licensed health care provider, then the services are likely to be considered health care services and, consequently, a covered benefit, subject to exclusions and limitations in the health plan contract. If the individual's condition does not require the skill and expertise of a licensed health care provider, prior to July 1, 2012, the services were not found to be a covered benefit.

While health plan BHT denials have been frequently overturned by the Department's Complaint and Independent Review Processes,[12] health plans have resisted developing adequate networks of licensed providers with the skill and expertise to deliver medically necessary BHT therapy, and particularly ABA. Health plans generally have two reasons for failing to develop adequate networks: 1) a shortage of appropriately licensed providers willing to provide ABA, and 2) their claim that ABA is not a health care service. Currently, when ABA services are deemed medically necessary, many health plans enter into arrangements with a licensed provider with BHT or ABA experience on an individual patient basis. But that provider remains unavailable to other health plan members seeking similar services.

In July 2011, to improve access to ABA therapy, the Department undertook enforcement actions against two of California's largest health plans: Anthem Blue Cross (ABC) and Blue Shield of California (BSC) for their systemic denial of ABA authorizations for individuals with autism, in violation of Section 1374.72, the mental health parity statute. To avoid the prospect of litigation, these two major health plans entered into settlement agreements with the Department to provide coverage for medically necessary ABA services without waiving their coverage and provider licensure defenses. Time restraints impeded the Department's ability to secure similar settlement agreements with the other full-service health plans[13] that are subject to the mental health parity statute.

**SB 946 and the Relaxed Licensure Requirements for Providing Behavioral Health Treatment**

SB 946, which was recently signed into law by Governor Brown, added Section 1374.73 to the Knox-Keene Act in the Health and Safety Code. Section 1374.73 allows health plans to provide medically necessary BHT, including ABA, to individuals with autism and PDD, beginning July 1, 2012, by non-licensed professionals in compliance with detailed criteria set forth in the statute. While Section 1374.73 states that its provisions do not apply to Healthy Families enrollees and CalPERS members, it also specifically states that it does not affect, reduce, or limit the health plans' obligations to cover medically necessary treatment, including BHT, under existing mental health parity law, Section 1374.72. Simply stated, SB 946 did not change the coverage that Healthy Families enrollees and CalPERS members received, and are still entitled to receive, under Section 1374.72.

Unlike the existing mental health parity law, SB 946 directs that health plans establish and maintain adequate networks of non-licensed BHT providers to ensure plan members have timely access to medically necessary services. SB 946 authorizes health plans to contract with qualified autism service providers, who in turn are authorized to supervise and employ qualified autism

[12] Health and Safety Code Sections 1368 (b), 1370.4, and 1374.30 (d)(3).

[13] A full-service health plan is a health plan that offers all basic health care services as required by the Knox-Keene Act.

service professionals or paraprofessionals to deliver medically necessary BHT, including ABA services. SB 946 expands the type of providers plans must pay for the provision of BHT services. For example, unlike mental health parity, some of the listed qualified autism service providers, as well as the professionals and paraprofessionals are not required to be licensed under Section 2052 of the Business and Professions Code, or other provisions of state law. While SB 946 creates an exception to the professional licensure requirements of the Business and Professions Code for all health plan members, except CalPERS members and Healthy Families enrollees, the legislation specifically states that nothing in the legislation "shall be construed to limit the obligation [of health plans] to provide [mental health] services under [Health and Safety Code] Section 1374.72."[14] Simply stated, SB 946 did not change the coverage benefits that Healthy Families members and CalPERS enrollees were entitled to receive, and are still entitled to receive, under Section 1374.72, includes BHT and ABA.

**Health Plan Reaction to the Enactment of SB 946**

On December 11, 2011 and April 26, 2012, BSC and ABC notified the Department that effective June 30, 2012, they would cease providing ABA therapy pursuant to the terms of their respective settlement agreements.[15] BSC further informed the Department the health plan believes that as a result of the enactment of SB 946, health plans have no legal requirement to provide BHT or ABA services to CalPERS members and Healthy Families enrollees as of July 1, 2012, even under existing mental health parity law.[16] ABC verbally communicated the same to the Department. The Department understands that this position is shared by many of the other full-service health plans that provide services to Healthy Families enrollees and CalPERS members. BSC sent a second letter to the Department on February 27, 2012, reiterating its decision to cease providing ABA services under the terms of the health plan's settlement agreement with the Department.[17] The Department is also currently reviewing health plan filings that contain information regarding each health plans implementation of SB 946. All health plans that have Healthy Families enrollees and CalPERS members have provided a written affirmation in their SB 946 filings that state it is their understanding that Healthy Families and CalPERS coverage is exempt from the requirements of SB 946. The revised Evidence of Coverage (EOC) for most of the health plans with CalPERS members or Healthy Families enrollees does not contain information regarding BHT, unlike other EOCs for different types of coverage.

Following the receipt of the health plan communications regarding cessation of ABA services, the Department immediately commenced discussions with the health plans. In June 2012, the

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[14] Health and Safety Code Section 1374.73(e).

[15] *See* Attachment 1, December 7, 2011, Letter from Marcy C. St. John, Associate General Counsel, Blue Shield of California, to Brent Barnhart, Director of the Department of Managed Health Care: "Re: Enforcement Matters 10-560, 10-561, 11-022, 11-038, 11-039, 11-262, Settlement Agreement of July 1, 2011." *See also* April 26, 2012, Letter from Andrew Russell, Associate General Counsel, Anthem Blue Cross, to Brent Barnhart, Director of the Department of Managed Health Care, "Re: Notice Pursuant to Settlement Agreement."

[16] *See* Attachment 1, December 7, 2011, Letter from Marcy C. St. John, Associate General Counsel, Blue Shield of California, to Brent Barnhart, Director of the Department of Managed Health Care: "Re: Enforcement Matters 10-560, 10-561, 11-022, 11-038, 11-039, 11-262, Settlement Agreement of July 1, 2011."

[17] *See* Attachment 2, February 27, 2012, Letter from Marcy C. St. John, Associate General Counsel, Blue Shield of California, to Brent Barnhart, Director of the Department of Managed Health Care: "Re: Enforcement Matters 10-560, 10-561, 11-022, 11-038, 11-039, 11-262, Settlement Agreement of July 1, 2011."

Department entered into limited informal interim agreements with BSC, ABC and Kaiser in which these three major health plans agree to continue covering BHT, including ABA, for Healthy Families enrollees and CalPERS members. BSC agreed to cover ABA through September 30, 2012 for Healthy Families enrollees and CalPERS members and will cover and authorize ABA services on or after June 15, 2012, for a period of three months. ABC agreed to follow the terms of the previous executed settlement agreement and issue 6 month authorizations for Healthy Families enrollees. These agreements are temporary in nature and are not a permanent fix to the coverage disputes amongst the parties. In addition, these settlements do not bind the 25 other health plans that provide services to Healthy Families enrollees. Kaiser agreed to cover medically necessary BHT for both Healthy Families enrollees and CalPERS members diagnosed with PDD or autism for no specific duration.

On June 27, 2012, Kaiser sent the Department a "Petition Requesting Initiation of Formal Rulemaking and Promulgating of Regulations" (Petition) requesting that the Department adopt a regulation under Government Code section 11340.6.[18] The terms of the requested regulation would clarify:

- Whether contracts between health care service plans and the Board of Administration of the California Public Employees Retirement System (CalPERS) and the Healthy Families Program (Healthy Families) administered by the California Managed Risk Medical Insurance Board (collectively referred to herein as the "Public Purchasers") must include coverage of Behavioral Health Treatment (BHT), including applied behavior analysis (ABA) defined in Health & Safety Code § 1374.73 (S.B. 946);

- If DMHC requires coverage of BHT in health care service plan contracts with Public Purchasers, the licensure and certification requirements for individuals who provide BHT;

- The ongoing statutory obligations of the Regional Centers to provide BHT to enrollees of the Public Purchasers pursuant to the Regional Centers' contracts with the State of California for services governed by the Lanterman Act (Cal. Welf. & Instit. Code § 4500 et seq.) and the Intervention Services Act (Cal. Gov't Code § 95000 et seq.) in light of the statutory exemption contained in S.B. 946 for health care service contracts with the Public Purchasers.

The Department has 30 days, until July 27, 2012,[19] to formally respond to the Kaiser Petition.

Therefore, in order to ensure health plans do not interrupt or deny medically necessary ABA services for children with autism, and to timely respond to the Kaiser Petition, it is necessary for the Department to clarify the obligation of health plans to continue to provide medically necessary mental health services, including ABA, to CalPERS members and Healthy Families enrollees pursuant to the existing mental health parity law.

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[18] *See* Attachment 3, June 27, 2012, Letter from Jerry Fleming, Senior Vice President, Kaiser Permanente, to Brent Barnhart, Director of the Department of Managed Health Care: "Re: Petition Requesting Initiation of Formal Rulemaking and Promulgating of Regulation."

[19] Kaiser has granted the Department an extension of time until August 27, 2012 to respond to the Petition.

## B. Imminent, Serious and Irreparable Harm to the Public

### 1. Delays and/or Interruptions in Behavioral Health Treatment Services for Children with PDD and Autism Can Result in Permanently Impaired Development and Increased Potential for Irreparable Disability and/or Substantial Financial Harm

In view of ABC's and BSC's: (1) notification that authorizations and coverage for ABA will no longer be provided to CalPERS members and Healthy Families enrollees at the expiration of their interim settlement agreements; and, (2) Kaiser's interim settlement agreement with no specified duration, the Department must act immediately for the health and welfare of Healthy Families enrollees and CalPERS members. The emergency regulation is necessary because of the general health plan misinterpretation and confusion that there is no legal requirement to provide medically necessary mental health services, including ABA therapy, to other Healthy Families enrollees and CalPERS members after July 1, 2012. The proposed emergency regulation is urgently required to avoid interrupting and/or delaying access to medically necessary BHT, including ABA, to CalPERS and Healthy Families children with PDD and autism. It is generally recognized that significant interruptions or delays in securing medically necessary BHT, including ABA therapy, can result in stunted and permanent impaired developmental outcomes and can cause irreparable disability to children with PDD and autism.[20]

To ensure that health plans understand their obligation under existing mental health parity law to continue to provide medically necessary mental health services, including BHT and ABA therapy, to CalPERS members and Healthy Family enrollees, an emergency regulation is necessary. Section 1374.73(e) maintains the mental health benefit mandates of Section 1374.72, the original mental health parity statute. Therefore, this emergency regulation will clarify that SB 946 did not reduce, limit, or exclude coverage for medically necessary mental health services, including BHT and ABA, provided by licensed providers for Healthy Families enrollees and CalPERS members after the July 1, 2012 implementation date of the legislation.

If CalPERS members and Healthy Families enrollees are denied or lose access to BHT, including ABA services, because of a health plan's incorrect interpretation of SB 946, these children are likely to immediately begin regressing and potentially sustain substantial and permanent harm. The denial or lack of access to BHT can result in stifled improvement, severe impairment, and permanent developmental damage that may not be regained through later treatment. [21] Children with autism can be harmed even from short-term or temporary disruptions or delays in obtaining medically necessary ABA treatment. Providers usually recommend ABA therapy for several hours per week of treatment for 12 - 18 months. Paying for such intensive services is often cost-prohibitive. Healthy Families enrollees and CalPERS members may be forced to incur

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[20] *See* Pringle BA, Colpe LJ, Blumberg SJ, Avila RM, Kogan MD, "Diagnostic history and treatment of school-aged children with autism spectrum disorder and special health care needs," NCHS Data Brief, No. 97. Hyattsville, MD: National Center for Health Statistics, 2012; *See also* Geraldine Dawson et al, Randomized, Controlled Trial of an Intervention for Toddlers with Autism: The Early Start Denver Model, *Pediatrics*, Vol. 125, No. 1 (Nov. 30, 2009), pgs. e21-22; http://pediatrics.aappublications.org/content/125/1/e17.full.html.

[21] http://www.cdc.gov/ncbddd/autism/facts.html#3

significant personal expense to secure and pay for a child's ABA services while they dispute the health plans' denials for ABA services.[22]

**2. Failure to Promptly Evaluate and Verify the Adequacy of Each Health Plan's Network of Behavioral Health Treatment Providers Will Result in Health Plans Being Out of Compliance with the Statutory Mandate and Will Inhibit the Ability of Children with Autism to Timely Access Medically Necessary Autism Services, Including ABA Therapy, Potentially Leading to Permanent Impaired Development and the Increased Potential for Irreparable Disability and/or Substantial Financial Harm**

SB 946 also requires health plans to "maintain an adequate network" of BHT providers and professionals including individuals experienced in providing ABA therapy to ensure that health plan enrollees have timely access to medical necessary services.[23] Even though some licensed occupational, speech and physical therapists may utilize ABA techniques in their practice, to date health plans have not demonstrated the successful development of adequate networks of contracted BHT providers, professionals and paraprofessionals that are appropriately credentialed and experienced in ABA or other BHT therapies. It is unlikely that all health plans have established adequate networks of BHT providers that meet the mental health parity requirements by the SB 946 July 1, 2012, implementation date.

SB 946 becomes inoperative on July 1, 2014, and will be repealed as of January 1, 2015, unless extended by another statute. Given the legislation's short lifespan, the Department must immediately begin collecting and analyzing BHT provider network information from health plans in order to ensure timely evaluation and appropriate review of health plans' compliance with creating and maintaining adequate networks of BHT providers, including professionals or paraprofessionals. While health plans have submitted initial information regarding the development of their BHT provider networks, all health plans are still in the process of building their adequate BHT networks. Additional data is needed from the plans to verify the adequacy of their BHT networks. The Department anticipates that, at a minimum, network development will continue through the end of 2012.

If the Department is unable to verify the adequacy of each health plan's BHT network, children with autism will be subject to potential delays and/or interruptions in accessing BHT, including ABA services, which can result in stifled improvement, severe impairment and permanent developmental damage that may not be regained through later treatment. The network reporting information will allow the Department to determine service areas where provider shortages exist and to identify strategies, in collaboration with the health plans, to ensure that children with autism who live in underserved geographic areas receive timely access to medically necessary BHT services.

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[22] It must be noted again that the per-capita lifetime costs of autism are estimated at $3.2 million, including lost productivity and the need for care as adults. *See* Geraldine Dawson et al, Randomized, Controlled Trial of an Intervention for Toddlers with Autism: The Early Start Denver Model, *Pediatrics*, Vol. 125, No. 1 (Nov. 30, 2009), p. e18; http://pediatrics.aappublications.org/content/125/1/e17.full.html.

[23] Health and Safety Code Section 1374.73(b) and (c).

For the reasons stated above, it is imperative that the Department act immediately to adopt an emergency regulation that implements, interprets and makes specific the requirements of SB 946 and ensure the immediate preservation of public health and safety, and general public welfare.

## C. Detailed Analysis

### 1. An Emergency Regulation is Necessary to Clarify that Health Plans that Provide Services to Healthy Families Enrollees and CalPERS Members Must Continue to Provide Medically Necessary Mental Health Services that Fall Within the Mental Health Parity Act

#### a. The history of the mental health parity law and coverage of medically necessary BHT under the Knox-Keene Act.

In 1999, California passed a mental health parity law requiring health plans to provide coverage for the diagnosis and medically necessary treatment of specified severe mental illnesses, including PDD and autism, under the same terms and conditions applied to other medical conditions.[24] Section 1374.72, originally enacted in 2000 as part of AB 88 (Thompson – Stats. 2000, ch. 534), requires all full-service health plan contracts to "provide coverage for the diagnosis and medically necessary treatment of severe mental illness [SMI] of a person of any age, and of serious emotional disturbances of a child" [SED]. SMI is specifically defined to include PDD and autism.

BHT is used to treat individuals with medical and mental health issues and conditions.[25] ABA therapy is a type of BHT.[26] ABA therapy is an established treatment used to treat children with PDD or autism.[27] ABA therapy is defined as "the design, implementation, and evaluation of systemic instructional and environmental modifications to promote positive social behaviors and reduce or ameliorate behaviors which interfere with learning and social interaction."[28] In California, there is no licensing scheme for behavioral therapists; there is however a private trade association--over which the state has no authority--the Behavior Analysis Certification Board, which certifies its members to provide ABA services. Private certification, however, is not the equivalent of licensure. Section 1374.72 requires health plans to cover the diagnosis and medically necessary treatment of autism, services for which licensure is specifically required under the Business and Professions Code, and consequently the Knox-Keene Act.[29] Therefore, the BHT services that a health plan must cover under Section 1374.72, including ABA, must be provided by professionals, such as psychologists, speech, occupational, marriage and family therapists who are licensed by the State.

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[24] Health and Safety Code Section 1374.72(a).
[25] For example, *see* http://www.healthline.com/galecontent/behavioral-therapy.
[26] See the National Autism Center's National Standards Project, "Findings and Conclusions," (2009). http://www.nationalautismcenter.org/pdf/NAC%20Findings%20&%20Conclusions.pdf
[27] Geraldine Dawson et al, Randomized, Controlled Trial of an Intervention for Toddlers with Autism: The Early Start Denver Model, *Pediatrics*, Vol. 125, No. 1 (Nov. 30, 2009), pgs. e21-22; http://pediatrics.aappublications.org/content/125/1/e17.full.html.
[28] Government Code Section 95021(d)(1).
[29] *People v. Cole*, *supra*, at p. 985.

Since the enactment of California's mental health parity law, health plans regulated by the Department have denied coverage of medically necessary behavioral therapies for enrollees with autism and PDD, and in particular ABA therapy. Health plans initially argued that such services were either not medically necessary or were experimental or investigational. They later shifted their arguments by stating that ABA was excluded under the terms and conditions of the health plan contract, or the requested service is an educational service and not a health care service. While the health plan denials based on medical necessity or coverage are routinely overturned by the Department's Complaint and Independent Review Processes, health plans continue to resist providing BHT services.

Even though the coverage denials are challenged and overturned, families with children with autism often pay for the ABA services out-of-pocket during the appeals process, incurring costs, sometimes thousands of dollars per month, and then have to wait many more months to compel reimbursement from the health plan. Such costs are likely beyond the means of many CalPERS members and virtually all Healthy Families enrollees since the lifetime costs of such services are estimated at $3.2 million.[30]

In July of 2011, prior to the passage of SB 946, the Department entered into separate settlement agreements with ABC and BSC settling administrative enforcement actions against the health plans arising out of their failure to provide ABA services to their enrollees under the provisions of the mental health parity law. In exchange for the Department ceasing ongoing enforcement actions and potential civil litigation, the health plans agreed to provide ABA services performed by either a licensed provider or a person certified by the Behavior Analysis Certification Board who has training and experience in serving children with autism or PDD, as long as there is supervision of that person by a licensed provider.

**b. The law of statutory construction requires harmony between the mental health parity law and SB 946 since they are related statutes.**

Rules of statutory construction support the conclusion that SB 946 did not reduce, limit, or exclude coverage for medically necessary mental health services, including BHT and ABA, provided by licensed providers for Healthy Families enrollees and CalPERS members after the July 1, 2012 implementation date of SB 946. In construing statutes, the California Supreme Court has held that its primary task "is to determine the intent of the Legislature, and we begin by looking to the statutory language." *McCarther v. Pacific Telesis Group* (2010) 48 Cal. 4th 104, 110; *Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142, 1147. A statute "must be given a reasonable and common sense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity." *People v. Zambia* (2011) 51 Cal.4th 965, 972.

[30] *See* Geraldine Dawson et al, Randomized, Controlled Trial of an Intervention for Toddlers with Autism: The Early Start Denver Model, *Pediatrics*, Vol. 125, No. 1 (Nov. 30, 2009), p. e18; http://pediatrics.aappublications.org/content/125/1/e17.full.html.

Other standards of statutory construction require the courts to give meaning to every word, phrase or sentence, and to harmonize related sections when possible. Specifically, the California Supreme Court has stated:

> Pursuant to established principles, our first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according *significance, if possible, to every word, phrase and sentence* in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, ***keeping in mind the statutory purpose,* and statutes or *statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible.*** [Emphasis added.] Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation. Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent. *(Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387; see also *People v. Zambia* (2011) 51 Cal. 4th 965, 977; *McCarther v. Pacific Telesis Group* (2010) 48 Cal. 4th 104, 110; italics added)

On October 9, 2011, the Governor signed into law SB 946 (Steinberg), Chapter 650, Statutes of 2011. In contrast to the mental health parity law that requires mental health services to be provided by a licensed individual, this legislation authorizes health plans to provide and arrange for medically necessary BHT, including ABA, to also be provided by unlicensed professionals and paraprofessionals provided they are nationally certified, properly supervised, and meet other specified criteria. The purpose of SB 946 was to relax the licensure requirement for the delivery of BHT, including ABA, for enrollees with autism and PDD. Put simply, prior to SB 946, the existing mental health parity law required health plans to cover medically necessary ABA services that were performed by licensed providers. Subsequent to the implementation date of SB 946, health plans are authorized by the Legislature to utilize non-licensed professionals and paraprofessionals to deliver ABA therapy so long as certain specified criteria are met. However, as stated above, the relaxed licensure requirements of SB 946 does not apply to Healthy Families enrollees and CalPERS members.

As previously discussed, SB 946 adds Section 1374.73(a)(1) to the Knox-Keene Act, which provides in part:

> Every health care service plan contract that provides hospital, medical, or surgical coverage shall *also provide coverage for behavioral health treatment* for pervasive developmental disorder or autism no later than July 1, 2012. The coverage shall be

> provided in the same manner and *shall be subject to the same requirements as provided in Section 1374.72.*
> (Section 1374.73(a)(1), emphasis added.)

Thus, the statutory language contains the same general mandate for mental health benefits that is contained in the original mental health parity law.[31]

Section 1374.73 defines "behavioral health treatment" to mean professional services and treatment programs, including ABA and evidence-based behavior intervention programs, needed to develop or restore functioning in an individual with PDD or autism and that meets other specified requirements (e.g., treatment plan with measurable goals).[32]

However, Section 1374.73 expressly exempts certain plans and programs from the relaxed licensure standards set forth in SB 946. Specifically, subsection (d) provides that Section 1374.73 does not apply to health plan contracts for: (1) specialized health plans that do not provide mental or behavioral health services, (2) Medi-Cal Managed Care, (3) the Healthy Families Program, and (4) CalPERS.[33] Notwithstanding those exemptions, the very next subdivision says that nothing in the section limits the obligation of any of the listed programs to provide services required by the mental health parity law. Specifically, Section 1374.73(e) emphasizes that, "[n]othing in this section shall be construed to limit the obligation to provide services under *Section 1374.72*." (Emphasis added.)

Section 1374.72 has always required health plans to provide coverage for the treatment of severe mental illnesses, including autism and PDD.[34] The California Appellate Court has held that mental health parity's "mandate obligated health plans to provide coverage (not merely to offer it) for the diagnosis and treatment of mental illness equal to coverage that the plans applied to other medical conditions." *Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App. 4th 471, 491. The *Arce* case further found that mental health parity requires that the treatment for autism and PDD include "medically necessary treatment." *Id.* Based on existing California law, the only reasonable interpretation of Section 1374.73, subsection (e), is to reinforce the pre-existing mental health mandate in Section 1374.72 requiring health plans to provide coverage for all medically necessary treatments for the enumerated mental illnesses, including autism and PDD.

Therefore, if an enrollee with autism or PDD meets the medical necessity requirement for ABA, these medically necessary services must be covered by the health plan under the existing mental health parity law. This was true even before the passage of SB 946. However, under the existing mental health parity law, health plans were only required to reimburse medically necessary ABA services that were administered by licensed health care providers. Under SB 946, health plans may now utilize autism professionals and paraprofessionals to administer ABA therapy for all of their enrollees, except Healthy Families enrollees and CalPERS members. There is nothing in SB 946 that strips away mental health parity benefits, including treatment for

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[31] Health and Safety Code Section 1374.72.
[32] Health and Safety Code Section 1374.73(c)(1).
[33] Health and Safety Code Section 1374.73(d).
[34] Health and Safety Code Section 1374.72(d)(7).

autism, from Healthy Families enrollees and CalPERS members. SB 946's true impact for Healthy Families enrollees and CalPERS members is that a health plan's reimbursement obligation for medically necessary BHT, including ABA, remains limited to services that are administered by licensed health care providers.

Under the rules of statutory construction, harmonizing existing mental health parity law with SB 946 is easily accomplished. The consequence of not harmonizing these two statutes results in depriving CalPERS members and Healthy Families enrollees from medically necessary autism treatments that were previously mandated under the mental health parity law. That result is both unreasonable and absurd.

In addition, the law requires that an administrative agency's interpretation of its own laws must be given great weight and deference. In this regard, the California Supreme Court concluded that, "[t]he Department's interpretation of the Act has presumptive value due to its expertise of related legal and regulatory issues." *Yamaha v. St. Board of Eq.* (1998) 19 Cal. 4th 1, 11. Furthermore, the Appellate Court has held that "[c]onsistent administrative construction of a statute over many years, particularly when it originated with those charged with putting the statutory machinery into effect, is entitled to great weight and will not be overturned unless clearly erroneous." *Sara M. v. Superior Court* (2005), 36 Cal. 4th 998, 1012; See also *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, 568. The Department's consistent interpretation that the mental health parity law requires that health plans provide medically necessary BHT, including ABA, to enrollees is entitled to significant deference.

In sum, it is clear that when BHT, including ABA, is a medically necessary treatment it is a covered benefit under mental health parity. Health plans continue to be required to provide coverage to CalPERS members and Healthy Families enrollees notwithstanding the implementation of SB 946. The purpose of SB 946 was simply to relax the licensure requirement for the delivery of BHT, including ABA, for enrollees with autism and PDD under the Knox-Keene Act. It did not extinguish a health plan's pre-existing obligation to provide medically necessary ABA under Section 1374.72.

### c. Consistent and correct application of the existing mental health parity law and SB 946 is necessary to protect enrollees with autism and PDD

After the passage of SB 946, ABC and BSC informed the Department that as of July 1, 2012, the implementation date of SB 946, they would no longer provide coverage as required under their respective settlement agreements. While the health plans stated they will provide BHT to non-CalPERS and Healthy Families enrollees as required under SB 946, they claimed there was no longer a legal requirement, under SB 946, mental health parity, or otherwise, to provide BHT to CalPERS members or Healthy Families enrollees. The health plans maintained that since SB 946 exempts health plans that contract with the Healthy Families program or CalPERS from having to comply with the requirements of Section 1374.73,[35] Healthy Families enrollees and CalPERS members also were exempt from coverage for BHT under existing mental health parity law. Many other health plans providing services to CalPERS members and Healthy Family

[35] Health and Safety Code Sections 1374.73(d)(3) and 1374.73(d)(4).

enrollees have taken the same position. The Department vigorously asserts that the health plans' position misstates the law for the reasons stated above.

Following the receipt of the health plan communications regarding cessation of ABA services, the Department immediately commenced discussions with the health plans. In June 2012, the Department entered into limited informal interim agreements with BSC, ABC and Kaiser in which these three major health plans agree to continue covering BHT, including ABA, for Healthy Families enrollees and CalPERS members. BSC agreed to cover ABA through September 30, 2012 for Healthy Families enrollees and CalPERS members and will cover and authorize ABA services on or after June 15, 2012, for a period of three months. ABC agreed to follow the terms of the previous executed settlement agreement and issue 6 month authorizations for Healthy Families enrollees. These agreements are temporary in nature and are not a permanent fix to the coverage disputes amongst the parties. In addition, these settlements do not bind the 25 other health plans that provide services to Healthy Families enrollees. Kaiser agreed to cover medically necessary BHT for both Healthy Families enrollees and CalPERS members diagnosed with PDD or autism for no specific duration.

Under the mental health parity law, prior to the enactment of SB 946, health plans were, and continue to be, required to provide coverage for the diagnosis and medically necessary treatment of PDD and autism, including BHT, by licensed providers. As previously discussed, SB 946, Section 1374.73(e), specifically states "nothing in this section shall be construed to limit the obligation to provide services under Section 1374.72," California's mental health parity law.[36] SB 946 thus specifically states that the legislation is not intended to alter nor extinguish the substantive coverage obligation of the mental health parity law. The Department interprets this to mean that health plans must continue to provide medically necessary mental health services, including ABA, to Healthy Families enrollees and CalPERS members under mental health parity.

This emergency regulation is needed immediately to ensure that CalPERS members and Healthy Families enrollees continue to receive medically necessary BHT in a timely manner and without interruption consistent with the existing mental health parity law contained in Section 1374.72 of the Knox-Keene Act regardless of the SB 946 July 1, 2012, implementation date. Without the promulgation of this emergency regulation, Healthy Families enrollees and CalPERS members will experience denials or delays in accessing medically necessary BHT, including ABA therapy, possible permanent disability or impairment resulting from the denials or substantial delays, and potential financial burdens. Consequences of disruptions and substantial delays to such services could include stifled improvement, severe impairment and permanent developmental damage that may not be regained through later treatment as well as substantial financial harm.

**2. An Emergency Regulation is Necessary to Implement the Requirement that Health Plans have an Adequate Network of Autism Providers, Professionals and Paraprofessionals under SB 946**

[36] Health and Safety Code Section 1374.73(e).

Health and Safety Code Section 1367 details the requirements health plans must meet under the Knox-Keene Act, including the requirement that a health plan provide its enrollees with access to an adequate network of providers.

Section 1374.73(b) of SB 946 requires that "[e]very health care service plan subject to this section *shall maintain an adequate network* that includes qualified autism service providers who supervise and employ qualified autism service professionals and qualified autism service paraprofessionals . . ." (Emphasis added.)

The Department is currently reviewing health plan filings that contain information regarding each health plan's network of available qualified autism service providers, professionals, and paraprofessionals to determine network adequacy. The Department anticipates that it may take several more months before the health plans can demonstrate that their BHT networks are adequate as required by SB 946 because of the immense amount of information and data that must be examined and because the adequacy of a health plan's network cannot be truly verified until the health plan begins providing services through its BHT provider network. Therefore, the Department proposes a reporting requirement for health plans to demonstrate the adequacy of their qualified autism service provider networks by December 31, 2012. This proposed reporting requirement allows each health plan sufficient time to develop its network to ensure proper and timely access to medically necessary BHT, including ABA therapy, for enrollees with PDD or autism.

This emergency regulation is necessary to ensure that health plans are aware of the reporting requirement to demonstrate the adequacy of their network of qualified autism service providers, professionals and paraprofessionals to provide medically necessary BHT to enrollees by the SB 946 implementation date.

## INFORMATIVE DIGEST

Autism spectrum disorders (ASD), including PDD, are developmental disabilities that can cause significant social, communication, and behavioral challenges over the span of a person's entire life. These conditions are typically diagnosed in early childhood and are characterized by social and communication impairments, focused interests, and repetitive behaviors. Many children diagnosed with autism are also intellectually disabled.[37] The per-capita lifetime costs of autism are estimated at $3.2 million, including lost productivity and the need for adult care.[38] A recent study by the Centers for Disease Control and Prevention estimates the prevalence of ASD at 1 in 88 children, an increase of 23 percent over two years.[39] The same report noted that the prevalence of ASD in boys is 1 in 54 and the prevalence in girls is 1 in 252.[40] Given the increase in ASD diagnoses and the significant medical and financial implications for this growing

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[37] Geraldine Dawson et al, Randomized, Controlled Trial of an Intervention for Toddlers with Autism: The Early Start Denver Model, *Pediatrics*, Vol. 125, No. 1 (Nov. 30, 2009), p. e18; http://pediatrics.aappublications.org/content/125/1/e17.full.html.

[38] *Ibid.*

[39] Centers for Disease Control and Prevention, Prevalence of Autism Spectrum Disorders — Autism and Developmental Disabilities Monitoring Network, 14 Sites, United States, 2008; Morbidity and Mortality Weekly Report (Mar. 30, 2012); http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6103a1.htm?s_cid=ss6103a1_w.

[40] *Ibid.*

population, uninterrupted behavioral health interventions, such as BHT, including ABA therapy, can substantially improve outcomes for children diagnosed with these conditions. These interventions are critical and should be administered at the earliest possible time.

Research has shown that early and immediate intervention is vital to effective treatment of PDD or autism.[41] If ASD symptoms are apparent before the age of 3 years, treatment for the condition should begin immediately upon diagnosis. However, disputes over whether certain types of treatments are medically necessary or a covered health care service often delay necessary treatment for children with autism.[42] This delay can result in stifled improvement, severe impairment, and permanent developmental damage that may not be regained through later treatment. [43] In addition, when health plans deny or delay coverage for PDD and autism, including ABA therapy, families with children diagnosed with PDD or autism must either pay thousands of dollars out-of-pocket for critical treatment or forgo altogether beneficial and necessary BHT for their children.

The Healthy Families program is California's low-cost insurance program that provides health, dental and vision coverage to children who do not have insurance and do not qualify for no-cost Medi-Cal. As of April, 2012, the Healthy Families program had over 870,000 enrolled children.[44] The Managed Risk Medical Insurance Board administers the Healthy Families program and contracts with health plans to arrange and cover health care services.

The California Public Employees Retirement System (CalPERS) provides comprehensive health benefits to more than 1.3 million California state employees, retirees and their families, and government agency and school employees. CalPERS is the largest purchaser of health benefits in California and the second largest in the country after the federal government. CalPERS offers a choice of coverage between HMO coverage and self-insured products. Two major health plans that contract with CalPERS are regulated under the Knox-Keene Act: Kaiser and Blue Shield of California (BSC).

It is estimated that 1 out of every 88 children has Autism Spectrum Disorder (ASD). [45] This means that it can be estimated that at least 9,886 children in the Healthy Families program have ASD. Using a conservative estimate that 25% of CalPERS members are children under the age of 18, it can be estimated that 3,693 CalPERS members have ASD. With a per-capita lifetime

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[41] A 2009 study compared young children (18-30 months) who received comprehensive early intervention, including applied behavior analysis, for 25 hours per week to children who received intervention from commonly available community providers. Those who received comprehensive early intervention demonstrated improved outcomes, including significant improvements in IQ, adaptive behavior, and diagnostic status compared to the group who only received community interventions. Geraldine Dawson et al, Randomized, Controlled Trial of an Intervention for Toddlers with Autism: The Early Start Denver Model, *Pediatrics,* Vol. 125, No. 1 (Nov. 30, 2009), p. e22.

[42] Since 2010, the Department's Help Center has received 228 grievances involving health plan denials of ABA therapy. In those cases where the ABA issue was resolved exclusively using the Department's standard complaint process, 185, or approximately 81%, of the complaints were resolved in favor of the enrollee. In those cases that involved an IMR, 86% of the IMRs were resolved in favor of the enrollee.

[43] http://www.cdc.gov/ncbddd/autism/facts.html#3

[44] http://www.mrmib.ca.gov/mrmib/HFP/Apr_12/HFPRptSum.pdf

[45] Centers for Disease Control and Prevention, Prevalence of Autism Spectrum Disorders — Autism and Developmental Disabilities Monitoring Network, 14 Sites, United States, 2008; Morbidity and Mortality Weekly Report (Mar. 30, 2012); http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6103a1.htm?s_cid=ss6103a1_w.

cost for autism of $3.2 million for the estimated 13,579 Healthy Families enrollees and CalPERS members, this equals approximately $43,452,800 in lifetime autism care, including health care costs, if services are interrupted.

The three largest health plans with Healthy Families enrollees and CalPERS members are: 1) Kaiser; 2) BSC; and 3) Anthem Blue Cross (ABC). Kaiser has approximately 190,000 Healthy Families enrollees and 530,000 CalPERS members. BSC has approximately 33,000 Healthy Families enrollees[46] and 400,000 CalPERS members. ABC has approximately 197,000 Healthy Families enrollees and no CalPERS members.

Health and Safety Code Section 1367 lays out the general requirements that must be met by health plans under the Knox-Keene Act, including the requirement that a health plan provide enrollees with medically necessary basic health care services and access to an adequate provider network. Health and Safety Code Section 1345 requires health care services to be furnished by professionals, organizations, health facilities, or other persons or institutions licensed by the State to deliver or furnish health care services. Business and Professions Code Section 2052 states that only licensed individuals can diagnose or treat a person for any physical or mental condition unless the Legislature provides an exception to the prohibition.

In 1999, AB 88 (Thompson), Chapter 534, Statutes of 1999, California enacted a mental health parity law, Section 1374.72 of the Knox-Keene Act, which requires health plans to provide coverage for diagnosis and medically necessary treatment of specified mental health conditions, including PDD and autism, under the same terms and conditions that are applied to physical health conditions.[47] Section 1374.72 requires all full-service[48] health plan contracts to "provide coverage for the diagnosis and medically necessary treatment of severe mental illness [SMI] of a person of any age, and of serious emotional disturbances of a child." SMI is specifically defined to include PDD and autism.

SB 946 adds Section 1374.73 to the Knox-Keene Act. The statute provides:

> Every health care service plan contract that provides hospital, medical, or surgical coverage shall *also provide coverage for behavioral health treatment* for pervasive developmental disorder or autism no later than July 1, 2012. The coverage shall be provided in the same manner and shall be subject to the same requirements as provided in Section 1374.72.
> (Section 1374.73(a)(1), emphasis added.)

Section 1374.73 defines BHT to mean professional services and treatment programs, including ABA and evidence-based behavior intervention programs, needed to develop or restore

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[46] BSC will be exiting the Healthy Families program on October 31, 2012.
[47] Health and Safety Code Section 1374.72(a).
[48] A full-service health plan is a health plan that offers all basic health care services as required by the Knox-Keene Act.

functioning in an individual with PDD or autism, and meets criteria requirements such as a treatment plan with measurable goals.[49]

Section 1374.73(b) authorizes health plans to use non-licensed professionals and paraprofessionals to deliver BHT: "[e]very health care service plan subject to this section *shall maintain an adequate network* that includes qualified autism service providers who supervise and employ qualified autism service professionals and qualified autism service paraprofessionals . . ." (Emphasis added.) Once SB 946 created an exception to the licensed provider requirement, the Legislature simply required health plans to maintain an adequate network of qualified autism service providers, professionals or paraprofessionals who provide and administer BHT, including ABA therapy.[50]

Section 1374.73(d) expressly excludes Healthy Families enrollees and CalPERS members from the relaxed provider licensure requirements that apply to health plans under the Knox-Keene Act and the Business and Professions Code. Specifically, 1374.73(d) provides that the SB 946 requirements do not apply to health plan contracts for: (1) specialized health plans that do not provide mental or behavioral health services, (2) Medi-Cal Managed Care, (3) the Healthy Families Program, and (4) CalPERS.[51]

Section 1374.73(d) must be read in conjunction with subsection (e), which emphasizes that, "[n]othing in this section shall be construed to limit a health plan's obligation to provide services under Section 1374.72." As previously discussed, Section 1374.72 of the Knox-Keene Act is the existing mental health parity law, which requires health plans to cover medically necessary treatment for PDD and autism, including BHT and ABA therapies, so long as the service is provided by a licensed professional. After the July 1, 2012, implementation date of SB 946, health plans continued to be required to cover medically necessary services for PDD or autism to Healthy Families and CalPERS enrollees by licensed health care providers as originally contemplated by Section 1374.72. Because of the health plans' demonstrated confusion over the requirements of the mental health parity law and the limited duration of the interim agreements between the Department and BSC, ABC and Kaiser, this regulation is necessary to clarify that health plans must continue to cover medically necessary treatment for autism or PDD, including BHT, for Healthy Families and CalPERS enrollees even after July 1, 2012.

The health plans' stated confusion and misinterpretation regarding whether there is a statutory obligation after July 1, 2012 to provide medically necessary services will lead to denials or delays in authorizing BHT, including ABA, to Healthy Families enrollees and CalPERS members. These denials and delays could cause stifled improvement, severe impairment and permanent developmental damage to impacted enrollees that may not be regained through later treatment as well as substantial financial harm.

This confusion could also lead to negotiation problems with the Managed Risk Medical Insurance Board (MRMIB) and CalPERS as they attempt to negotiate premium rates with health

[49] Health and Safety Code Section 1374.73(c)(1).
[50] Health and Safety Code Section 1374.73(b).
[51] Health and Safety Code Section 1374.73(d).

plans based on the scope of covered services for enrollees, and whether BHT, including ABA, is included.

In addition, this proposed emergency regulation must be implemented so that the Department can ensure that health plans have established and are maintaining an adequate network of qualified autism service providers, professionals and paraprofessionals, as defined in SB 946. If children with autism are denied access to medically necessary PDD or autism treatment due to a health plan's inability to meet the SB 946 network adequacy requirements, enrollees with PDD or autism could suffer severe impairment, developmental harm, or substantial financial harm.

This proposed emergency regulation is necessary to ensure uniform and timely application of the laws related to health plan coverage of medically necessary PDD and autism related services, and to implement, interpret and make specific certain provisions of SB 946 and existing law under the Knox-Keene Act. Specifically, the emergency regulation will:

1) Make specific the continued application of existing mental health parity law for CalPERS members and Healthy Families enrollees, as it applies to coverage for PDD and autism; and,

2) Implement a one-time filing requirement for health plans to allow the Department to properly verify that health plans have created and are maintaining an adequate network of autism professionals.

This emergency regulation is necessary to prevent imminent, serious, and irreparable harm to the public if these issues are left unaddressed.

## SPECIFIC PURPOSE OF THE REGULATION

Subsection (a)(1) of proposed section 1300.74.73 is necessary to clarify that health plans continue to be required to provide coverage for the diagnosis and medically necessary treatment of PDD and autism, including BHT, for Healthy Families enrollees and CalPERS members after July 1, 2012. This proposed subsection is necessary to prevent Healthy Families enrollees and CalPERS members from experiencing disruptions and/or delays in accessing medically necessary mental health services, including ABA therapy, due to health plans' misinterpretation that after July 1, 2012 they were no longer required to provide BHT services to Healthy Families enrollees and CalPERS members under the existing mental health parity law.

Subsection (a)(2) is necessary to implement the requirements of the Knox-Keene Act that health plans establish and maintain an adequate network of qualified autism service providers, professionals and paraprofessionals that are capable of providing medically necessary BHT, including ABA therapy, to health plan enrollees. In order for a health plan to demonstrate that it has created an adequate network, a one-time reporting requirement is contained in this subsection. It requires health plans to compile information about the composition of their network for providing BHT, including ABA services. Subsections (a)(2)(A) and (a)(2)(B) require that health plans submit information that includes data regarding the number and geographical location of their qualified autism service provider organizations or groups, qualified

autism service providers (individual), qualified autism service professionals and qualified autism service paraprofessionals. Subsection (a)(2)(C) requires health plans to report how they determined the adequacy of their network to ensure that enrollees have geographic accessibility and timely access to medically necessary BHT, including ABA therapy. Subsection (a)(2)(D) requires that health plans submit additional information requested by the Director of the Department to determine whether health plan enrollees are receiving timely access to medically necessary BHT, including ABA therapy.

## COST TO LOCAL AGENCIES AND SCHOOL DISTRICTS

The proposed regulation does not impose a mandate on local agencies and school districts. No other direct or indirect costs or savings to local agencies or school districts required to be reimbursed under Part 7 (commencing with section 137500) of Division 4 of the Government Code, or other non-discretionary costs or savings imposed on local agencies are applicable.

## COSTS OR SAVING TO STATE AGENCY

The Department of Developmental Services (DDS) states in the May 2012 Revised Budget that there will be an anticipated savings of $69.4 million to the General Fund resulting from the implementation of SB 946, because health plans are now authorized as a result of this bill to provide medically necessary behavioral health treatments, including applied behavior analysis, through non-licensed professionals and paraprofessionals that meet certain specified criteria. These savings stem from a DDS assumption that certain medically necessary behavioral services that health plans previously refused to cover and pay for because they were provided by non-licensed individuals will now be available (reimbursable) through private health insurance coverage.

## DETERMINATION

The Department has not identified any reasonable alternative nor has any stakeholder brought to the attention of the Department any alternative that would be more effective in carrying out the purpose for which the above action is proposed, or that would be as effective and less burdensome to affected private persons, than the proposed action.

## CONTACT PERSON

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# ATTACHMENT 1

blue of california

Mary C. St. John
Associate General Counsel

December 7, 2011

Brent Barnhart, Director
Department of Managed Health Care
980 Ninth Street, Suite 500
Sacramento, CA 95814

Re: Enforcement Matters 10-560, 10-561, 11-022, 11-038, 11-039, 11-262
Settlement Agreement of July 11, 2011

Dear Mr. Barnhart:

This letter serves to notify the Department of Managed Health Care (the "Department") that the California Legislature has taken action that impacts the Settlement Agreement between the Department and Blue Shield of California (the "Plan") dated July 11, 2011 (the "Agreement"). While the Plan could cease performance under the Agreement, the Plan intends to continue covering ABA services to provide its members continuity. However, in order to transition members to the coverage contemplated by the Legislature, the Plan is proposing to amend the Agreement, as described below.

Pursuant to Paragraph J of Section II of the Agreement, the Plan has the right to cease performance upon 60 days notice to the Department that an act by the California Legislature supports the Plan's contention that ABA is not required to be covered under the Knox-Keene Act. On October 9, 2011, SB 946 (Steinberg, Chapter 650) was enacted into California law. This bill requires health care service plans to provide coverage of behavioral treatment, including Applied Behavior Analysis ("ABA") services, beginning July 1, 2012. The benefit mandate imposed by SB 946 does not apply to CalPERS or Healthy Families members. Additionally, the mandate to provide the coverage is inoperative as of July 1, 2014 and does not require coverage beyond that which is required as an essential benefit under federal regulations (currently undefined).

The Plan contends that SB 946 provides legislative confirmation that health care service plans are under no obligation to cover ABA services prior to July 1, 2012. However, the

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T 415 229 5600 F 415 229 5343

Plan will continue covering ABA while it implements the requirements of SB 946. In order to facilitate a smooth transition from the Settlement Agreement to SB 946, and in recognition of the new law, the Plan proposes amending the Agreement as follows:

1) The Agreement will automatically terminate at midnight June 30, 2012.

2) Authorizations for services made pursuant to the Agreement will be phased out to end July 1, 2012.

3) From January 1, 2012 to March 31, 2012 Blue Shield will cover ABA services for an initial 3 month period and will not dispute the medical necessity of the services or the frequency of which the services are prescribed.

4) Authorizations made pursuant to the Agreement from April 1, 2012 to June 30 will end July 1, 2012. After April 1 and after the plan's SB 946 implementation filing is submitted, the Plan will have the option to cover ABA services pursuant to its SB 946 filing.

5) Healthy Families and CalPERS members will continue to receive coverage until July 1, 2012.

6) Beginning January 1, 2012, once the enrollee has received services for the initial six- or three-month period, ongoing authorizations will be subject to medical necessity review.

7) Amendments to the Agreement will not impact authorizations currently in effect.

Thank you for your prompt attention to this matter. Please feel free to contact me with any questions.

Very truly yours,

Mary C. St. John, Esq.
Associate General Counsel

Anthem
Blue Cross

***Andrew G. Russell***
*Associate General Counsel*
*Legal Department*

April 26, 2012

**VIA EMAIL AND CERTIFIED MAIL**

Mr. Brent Barnhart
Director
Ms. Maureen McKennan
Deputy Director of Plan and Provider Relations
California Department of Managed Health Care
980 Ninth Street, Suite 500
Sacramento, CA 95814

**RE: Notice Pursuant to Settlement Agreement**

Dear Mr. Barnhart and Ms. McKennan:

This letter serves as notice to the Department of Managed Health Care (the "Department") that as of July 1, 2012, the effective date of the ABA coverage mandate in California SB 946, Blue Cross of California dba Anthem Blue Cross ("Anthem Blue Cross") will cease to perform its obligations under the Settlement Agreement that the Department and Anthem Blue Cross entered into on July 15, 2011 (the "Settlement Agreement"), as provided for in the Settlement Agreement.

Paragraph C of the Settlement Agreement states that "BLUE CROSS agrees to arrange for the provision of all medically necessary ABA services for the treatment of PDD or ASD for all current and future Enrollees and the Subject Enrollees, in accordance with the terms of this Agreement, subject to any development or change in law or regulation, as set forth in paragraph I, that clarifies BLUE CROSS' legal obligations with respect to ABA services."

SB 946 is a change in law that clarifies Anthem Blue Cross' legal obligations with respect to ABA services by requiring every health care service plan that provides hospital, surgical or medical coverage to also provide coverage for behavioral health treatment (including ABA services) for pervasive developmental disorder and autism as of July 1, 2012.

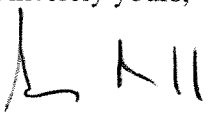
Pursuant to paragraphs C and I of the Settlement Agreement, the enactment of SB 946 relieves Anthem Blue Cross of its responsibility to perform in accordance with any provision of the Settlement Agreement as of July 1, 2012. Consequently, Anthem will change its practices as of that date to comply with SB 946 and cease to perform under the Settlement Agreement as of that date.

21555 Oxnard Street, CAAC01-01B, Woodland Hills, CA 91367 • Telephone: 818.234.2217 • Fax: 818.234.2344

Anthem Blue Cross is willing to work with the Department on a transition plan for enrollees who are receiving coverage for ABA services pursuant to the Settlement Agreement as of July 1, 2012.

Please feel free to call me at (818) 234-2217 if you have any questions about this letter.

Sincerely yours,



Andrew Russell
Associate General Counsel

cc: Tony Manzanetti, Deputy Director, DMHC Office of Enforcement

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# ATTACHMENT 2

blue of california

**Mary C. St. John**
Associate General Counsel

February 27, 2012

Brent Barnhart, Director
Department of Managed Health Care
980 9th Street, Suite 500
Sacramento, California 95814

Re: Enforcement Matters 10-560, 10-561, 11-022, 11-039, 11-262
Notice of Termination of the Settlement Agreement of July 11, 2011 re ABA Services

Dear Mr. Barnhart:

On December 7, 2011, Blue Shield of California (the "Plan") gave notice pursuant to Paragraph J of Section II of the Settlement Agreement of July 11, 2011 (the "Agreement") between the Plan and the Department of Managed Health Care (the "Department") that actions of the California Legislature supported the Plan's position that ABA is not required to be covered under the Knox-Keene Act. Thereafter, the Plan and the Department entered into good faith negotiations to amend the Agreement consistent with the enactment of SB 946 and in anticipation of the July 1, 2012 effective date of Health & Safety Code § 1374.73.

Regrettably, those negotiations have not resulted in an agreement to amend the Agreement. Pursuant to Paragraph J, the Plan hereby gives notice that it considers the Agreement to have terminated, effective February 5, 2012, and will cease performance under the Agreement. To avoid disruption to Plan enrollees, the Plan will continue to authorize ABA services consistent with the Agreement Section II.A. However, all authorizations under the Agreement will end no later than June 30, 2012.

If Department has further questions or believes that additional information is required, please do not hesitate to contact the undersigned.



**Blue Shield of California**
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blueshieldca.com

Sincerely,

Mary C. St. John, Esq.
Associate General Counsel

cc: Maureen McKennan, Deputy Director, Plan and Provider Relations
Anthony Manzanetti, Deputy Director, Office of Enforcement
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# ATTACHMENT 3

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June 27, 2012

Brent Barnhart
Director
Department of Managed Health Care
980 9th Street, Suite 500
Sacramento, CA 95814-2725

Re: **Petition Requesting Initiation of Formal Rulemaking and Promulgating of Regulations**

Dear Director Barnhart:

Pursuant to California Government Code Section 11340.6, Kaiser Foundation Health Plan, Inc. ("Petitioner") petitions the Department of Managed Health Care ("DMHC") to initiate formal rulemaking and to promulgate regulations to clarify:

(1) Whether contracts between health care service plans and the Board of Administration of the California Public Employees Retirement System ("CalPERS") and the Healthy Families Program ("Healthy Families") administered by the California Managed Risk Medical Insurance Board (collectively referred to herein as the "Public Purchasers") must include coverage of Behavioral Health Treatment ("BHT") including Applied Behavioral Analysis ("ABA") defined in Health & Safety Code Section 1374.73 ("S.B. 946");
(2) If DMHC requires coverage of BHT in health care service plan contracts with Public Purchasers, the licensure and certification requirements for individuals who provide BHT;
(3) The ongoing statutory obligations of the Regional Centers to provide BHT to enrollees of the Public Purchasers pursuant to the Regional Centers' contracts with the State of California for services governed by the Lanterman Act (Cal. Welfare & Institutions Code § 4500 et seq.) and the Intervention Services Act (Cal. Government Code § 95000 et seq.) in light of the statutory exemption contained in S.B. 946 for health care service contracts with the Public Purchasers.

S.B. 946 mandates that certain Knox-Keene health care service plans "provide coverage for behavioral health treatment for pervasive developmental disorder or autism no later than July 1, 2012." Cal. Health & Safety Code § 1374.73 (a)(1). However, S.B. 946 contains a provision exempting certain types of plans from its mandates (in relevant part):

(d) This section shall not apply to the following:

...

(2) A health care service plan contract in the Medi-Cal program (Chapter 7 (commencing with Section 14000) of Part 3 of Division 9 of the Welfare and Institutions Code).
(3) A health care service plan contract in the Healthy Families Program (Part 6.2 (commencing with Section 12693) of Division 2 of the Insurance Code).
(4) A health care benefit plan or contract entered into with the Board of Administration of the Public Employees' Retirement System pursuant to the Public Employees' Medical and Hospital Care Act (Part 5 (commencing with Section 22750) of Division 5 of Title 2 of the Government Code).

*Id.*, § 1374.73 (d)(1)-(4).

The plain statutory language, legislative history, and various legislative analyses of S.B. 946 appear to demonstrate the California Legislature's explicit and purposeful exclusion of health care service plan contracts with Medi-Cal, Healthy Families and CalPERS from S.B. 946's coverage mandates. Initial drafts of S.B. 946 required all health care service plan contracts, except for contracts with the Medi-Cal program, to provide coverage for BHT.[1] A report analyzing the initial draft of S.B. 946 determined that the coverage mandates would cost the State more than $50 million annually for Healthy Families and CalPERS enrollees alone.[2] Subsequent drafts of S.B. 946 excluded contracts with Healthy Families and CalPERS from its coverage mandates.[3] A Senate Appropriations Committee analysis found that because S.B. 946 "would exempt health plans and insurers that contract with Medi-Cal, Healthy Families, and CalPERS, there would be minimal costs to the state to pay for these mandated services."[4] The Assembly Appropriations Committee Bill analysis similarly noted that S.B. 946 would create "[m]inor, if any, state health care costs. This bill exempts health plans provided through Medi-Cal, Healthy Families program, and CalPERS from the coverage mandate."[5]

In November 2011, the DMHC informed some health care service plans that despite Section 1374.73(d), it believed that, pursuant to Health and Safety Code Section 1374.72, health care service plans should cover BHT for autism and pervasive developmental disorder for the Public Purchaser enrollees, though not Medi-Cal enrollees. Moreover, in or around March 2012, the DMHC confirmed with the California Association of Health Plans that it had begun an emergency rulemaking process to address its interpretation of S.B. 946 and Section 1374.72. Health care service plans have been awaiting the issuance of these emergency regulations.

It is our further understanding that Public Purchasers interpret Section 1374(d) differently than the DMHC's apparent interpretation. Health care service plans and Public Purchasers negotiate premium rates based on the totality of covered services. Therefore, inclusion or exclusion of a particular set of services will necessarily, and possibly materially, impact the premium. Accordingly, it is essential for health care service plans and Public Purchasers to have a meeting of the minds regarding the scope of contractually covered services. However, the current uncertainty and confusion precludes a

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[1] California State Senate Appropriations Committee Fiscal Summary, September 9, 2011, at p. 2.
[2] California Health Benefit Review Program, Analysis of Senate Bill TBD 1: Health Care Coverage: Autism, at 16, Table 1 (March 20, 2011).
[3] Fiscal Summary, *supra* note 1 ("... in addition to plans and insurers contracting with Medi-Cal, [S.B. 946] would exempt plans and insurers contracting with Healthy Families and CalPERS.").
[4] *Id.* at p. 3.
[5] California State Assembly Appropriations Committee Bill Analysis, September 8, 2011, at p. 2.

meeting of the minds about a sufficient and sustainable premium.

It is our further understanding that several Regional Centers assume that effective July 1, 2012, they will discontinue providing BHT to health care service plan enrollees and refer their clients, including Public Purchaser enrollees, to the health care service plan or insurer with whom a client is enrolled. The Regional Centers' anticipated plans exacerbate the current regulatory and contract uncertainty with respect to Public Purchasers and their enrollees and underscore the urgent need for clarifying regulations.

Based on the forgoing, Petitioner requests that DMHC complete its emergency rulemaking as soon as possible in light of the July 1, 2012 effective date of S.B. 946.

Promulgation of regulations will clarify Public Purchaser enrollees' expectations about their benefits and enable Public Purchaser enrollees to make informed plans and decisions about the needs of their children.

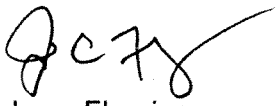
It will establish clear and fair guidance for all health care service plans as they complete their implementation in preparation for the July 1, 2012 effective date of S.B. 946.

It will enable health care service plans and Public Purchasers to agree on the scope of contractual coverage and enable negotiation of premiums appropriately reflecting the scope of coverage.

It will eliminate the uncertainty and confusion that does not serve anyone.

We respectfully await the DMHC's response.

Sincerely,



Jerry Fleming
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