

**TESTIMONY OF INSURANCE COMMISSIONER DAVE JONES
BEFORE THE SENATE SELECT COMMITTEE ON AUTISM**

**Wednesday, July 13th, 10:00 to 12:30 p.m.
The Capitol Building; Room 3191**

Commissioner: Senate president pro tem Steinberg, minority leader Dutton,

Good morning, Senator Steinberg and Members. I appreciate the opportunity to appear before you on this extremely important health care issue.

It's a real privilege to get to join you today and Senator Steinberg thank you for your ongoing leadership on this critical issue which goes back to your time on the Sacramento city council and before then, you have been someone whose been a champion, authored incredibly important legislation, but also been at the forefront of the founding of the MIND institute here in Sacramento one of the nation's foremost centers for learning and clinical work on the subject.

It is a pleasure to appear here before you My comments today will be limited to those matters within the jurisdiction of the California Department of Insurance, as the senators know well we have a bifurcated regulatory scheme here in California, I oversee health insurance, our sister agency at the department of managed health care from who you'll hear later in this panel oversees HMOs.

My comments will also focus on the preventive measures the Department of Insurance has taken to systemically address the barriers faced by families attempting to obtain behavioral therapy and ABA and increase their access to these transformative therapies.

The Department has embarked on a course of action of identify those barriers and create a strategic plan for surmounting them. The Departments purpose and goal is to ensure that insurance companies are in full compliance with California's mental health parity law and other laws in the insurance code.

I think it's important to note at this point that it's the California Department of insurances view that that ABA coverage is required under the Mental Health Parity Act as it relates to the insurance code.

To this end, that is to the end of removing barriers, and seeking to systematically address the challenges faced by those with autism and their families. We've taken three major steps to date to address the issue of coverage for ABA therapy.

First Notice to Insurers.

Our first step was to inform insurers of the status of our Independent Medical Review decisions and remind them of their legal obligations pursuant to those decisions. On May 17th, The California Department of Insurance sent a Notice to all admitted insurers in the state of California, reminding them that the California Department of Insurance is committed to enforcing the provisions of the Insurance Code governing Independent Medical Review of disputed health care services to ensure the full protection under law of policy holders under our regulatory authority. The Notice also pointed out that the Insurance Commissioner's written decisions adopting the determinations made by Independent medical review are binding on the insurer.

The notice specifically asked insurers to take note of 9 separate instances in 2010 in which insurers denials of ABA were overturned in the California Department of Insurance's Independent medical review, and specified in addition that in 2 of those instances the insurers denials based on a contention that the therapy was experimental or investigational were overturned because such treatment is now recognized as the standard of care for autism. The department's notice further stated that in another 7 cases the independent medical reviewers overturned the insurer's denials finding the treatment was medically necessary for the insured. So our first step was putting insurers on notice regarding these binding decisions of independent medical review.

The second step deals with Network Adequacy.

The California Department of Insurance initiated a comprehensive review and assessment of the adequacy of insurers' provider networks for ABA therapy.

The Department's regulations establish provider network access requirements for mental health care services required by the Mental Health Parity Act in the definition of basic health services. Those regulations require insurers, in arranging for provider network services to ensure that, and I quote "there are mental health professionals with skills appropriate to care for the mental health needs of covered persons and with sufficient capacity to accept covered persons within 30 minutes or 15 miles of a covered person's residence or workplace."

The Department sent a Request for Geographical Access Report and Provider Network Listing of Behavioral Intervention Therapies to all 106 health insurers with covered lives in California. We refer to this as a data call , and this data call was issued under the Provider Network Access Standards for Health Insurance Policies and Agreements. The purpose of this Data Call is to enable the department to evaluate adequacy and accessibility of ABA therapy for the autistic insured population covered by each health insurer in California.

Under this Data Call insurers must submit reports to the department showing the geographic distribution of Behavioral Intervention Therapists in each insurer's network in relation to its members, identifying all in network providers and the number of individuals within an organizational provider who are available under the provider network contract.

The Department is requiring insurers to submit separate reports for Individual, Small Group and Large Group policies, organized by county or geographic service areas. The only network providers to be included in the reports are Behavioral Intervention Therapists, who may be mental health professionals, who are trained to provide behavioral intervention therapy. The insurer must also document that anyone listed is capable of providing medically necessary behavioral intervention therapy and has sufficient practice capacity to do so.

We are beginning to get responses from insurers to this request, we have not received all the responses, we are going through them. Those insurance companies that have responded are asserting arguments that you heard earlier made by the California association of health plans on behalf of HMOs, and those arguments fall into basically three categories

First the insurers are arguing that ABA therapy is not provided for at all in the applicable insurance contract so the mental health parity act does not require that it be covered for severe mental illness, insurers are analogizing to outpatient prescription drugs claiming that a policy does not cover any outpatient prescription drugs and thus is not obligated to cover those drugs when medically necessary to treat a mental illness.

A second category of responses we have received so far is ABA is not listed as a covered service under the insurer's policy because there is no comparable service that is required for medical conditions.

And the third general category we received is that ABA is almost always provided by individuals who are not licensed or certified by the State of California's health care providers and since it is a crime for someone to engage in the delivery of services to diagnose or treat a medical condition unless they are licensed to do so ABA cannot be considered a health care or medical service.

Suffice it to say that it is the California Department of Insurances view that we disagree with these responses made by the insurers today, and as I set forth earlier we believe that in fact ABA is a required covered service under the mental health parity act. And that it is not necessary under our codes, this is the insurance code now, that individuals be licensed in order to be a part of a provider network to meet network adequacy standards of the insurance code for the provisions of this service.

The third category of actions by the department is Enforcement actions.

The Department has filed and served an administrative enforcement action against a health insurer who until very recently declined to follow 2 IMR decisions overturning that health insurers denial of ABA treatment for a policy holder, in these 2 particular cases.

Notwithstanding the IMR decisions which is a binding decision on insurers, this insurance company continued, until recently, to decline to provide coverage. Having said that, I want to note that we believe that this is a practice prevalent across the industry and we are looking at the other insurers as well, both in terms of their responses to our data call and the responses to IMR decisions.

The department is concerned that there is a significant barrier to access to consumers who are forced repeatedly to go through the IMR process, when the broad weight of the IMR decisions indicates that ABA is medically necessary treatment, not experimental, and covered under the mental health parity act.

With me today is my special council and deputy commissioner for policy and planning Pat Sturdevant, who I have tasked with the responsibility for coordinating the department's response as it relates to autistic disorders, as well as Tony Cignareli who is my deputy commissioner for the consumer services branch which is the front line element of the department receiving complaints and oversees the IMR process We received specific written questions from the committee, that they are prepared to answer in more detail if the chair is so interested, on this panel as well as the next panel.

Senator Steinberg: So here is a lay persons confusion here that maybe we can clarify or maybe you folks can clarify, but I understand that the IMR process and the medical necessity process is certainly fact based and case by case determinations are made, I get that, The insurance industry testifies that as a whole they don't believe that ABA is covered to even get to that determination whether there is

medical necessity and yet a number of cases are getting to the medical necessity question. If the industry position is that it is not covered, how are so many cases getting through the coverage threshold to get to medical necessity, isn't that an admission against interests?

Commissioner: Senator, just to elaborate further, it's the department of insurance's view that ABA is a medical service and under the department's administration of the IMR process, any dispute about a medical service is eligible for IMR, and so we don't end up with a query where the insurers do it at the question of coverage. We believe it's a medical service, therefore, if there is a dispute about that medical service, a policy holder has a right under the insurance code to IMR in such a dispute.

In addition, it is the department's view that the mental health parity act requires this particular coverage as well, and so as a result, the department of insurance, when there are disputes, when there are denials of coverage and those are brought to our attention, has afforded the IMR process. And in the vast majority of cases, and I will note in the most recent year or so, the weight of those decisions has increasingly been decided on behalf of the policy holder, not the insurer. As there is more medical evidence and increasing findings in the academic literature and elsewhere with regard to the medical necessity of this particular coverage, but the vast weight of the IMR decisions, which are binding on insurers, is that this is a medically necessary treatment and the insurers' denials have been overturned.

Senator Steinberg: I get that, I don't want to digress too much, but there are numerous instances I assume where the insurers do not dispute the coverage determination, but dispute the medical necessity determination, and if what I just said is true, maybe

Mr., Bacchi, from the insurance industry can come back and answer this.

Commissioner: There is no question that there is a disagreement between the department of insurance and the regulated agencies.

Senator Steinberg: Before I congratulate you (*DMHC regarding settlement agreement*) because it sounds very very positive, I'd like to hear from commissioner Jones, if you've had a chance to read it, if you haven't, I obviously won't put you on the spot, but your opinion, you know, on the breadth of this or maybe your staff I just think would be helpful to our understanding.

Commissioner: Certainly I can start by providing the departments initial views, we were only provided with the settlement agreement yesterday and as you've heard in the testimony today, there are some variances in views between the two departments with regard to the application of certain laws, in our initial review, and we've reached out to DMHC and indicated that it's our desire, and we've gotten a positive response from DMHC, to talk to them further about the proposed settlement agreements as it relates to other plans that there may be some differences in views with regard to some of the provisions in the settlement agreement.

As you heard earlier, as the departments personnel testified, it's the departments view that licensed providers are not required, it appears that there may be a difference of view in that term of the settlement agreement

Senator Steinberg: I heard her say that they were talking about licensed providers overseeing, even if it is provided by an unlicensed.

Commissioner: As I said we only just got the settlement agreement from an insurer yesterday so there may be some, in our view, some ambiguity on this point so I would be happy to talk to DMHC further about that, but the department does have a view vis a vis licensed providers and the utilization of unlicensed providers as you heard earlier, and that's an issue we want to have a conversation about.

Senator Steinberg: OK to be clarified.

Commissioner: Second, again this is initial views of the settlement agreement indeed we've indicated to DMHC once we got it yesterday that were happy to talk to them further about it and they've indicated a positive response to having that conversation our understanding of the settlement agreement is that it provides the right to this benefit for a six month period, so we have some concerns, which again we are happy to talk about with DMHC about the limitation of the coverage requirement to a six month period, so were concerned about that, in addition.

Senator Steinberg: what I heard though, I want to clarify that there will be a medical necessity determination every six months not a coverage determination.

Commissioner: I think the question that it poses is for us, and again this is a conversation we want to have with DMHC, is in the department of insurances view is a limitation like that comparable to how one treats other mental health benefits or not, and so thats the conversation we would like to have with the department. And so these are some of the issues, again we've just looked at it yesterday, and I think that it is important to note as well that again the department has initiated an enforcement action against an insurer on these issues and regardless of whether the HMO arm of that insurer settled in this fashion the department will be independently assessing

the conduct of the insurance arm of that company under the insurance code as we described earlier

Commissioner: *(In response to a comment regarding settlement agreements)* The department of insurance has asked and DMHC has responded in the affirmative that our senior staff have an opportunity to meet with theirs before they execute another settlement agreement, and so we would like the opportunity, I appreciate DMHC's testimony with regard to road testing the Blue Shield settlement agreement but we've respectfully asked and I think they've responded in the affirmative that our two departments have an opportunity to meet at the senior level to discuss the issues that have been raised and potentially competing views to see if there might be some resolution relating thereto before another settlement agreement is entered there into . Certainly that is a call for the Department of Managed Health Care, It's up to them, our understanding is that they're amenable to having that meeting, we'd appreciate the chance to do so, to see if before another one is entered into we can resolve any disagreements, and there may not be a resolution but our desire is to see if there might be an opportunity to resolve disagreements that currently exist potentially vis a vis the departments different views.

Senator Steinberg: Sooner rather than later please.

Commissioner: we've communicated once we saw the settlement agreement yesterday, we immediately communicated our desire to sit down, and our understanding is that the department is predisposed to that

Senator Steinberg: Thank You Commissioner Jones

Commissioner: Thank you for your leadership, you were far too modest a moment ago in describing where the credit lies with the progress that has been made to date, It lies with you and your colleagues on the committee who held the incredibly important hearing a year ago and who held this hearing. I know both departments want to thank you for your tremendous leadership and your responsiveness to all of the concerns associated with this issue. Thank you very much senator.