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Lawsuit Against State's Autism Policy Clears Hurdle

By Evan George
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LOS ANGELES — California regulators may have violated their own statute meant to protect consumers by writing an "underground regulation" that excuses HMOs from covering costly autism treatments.

That was the finding by a Los Angeles County Superior Court judge who last week decided to allow a consumer lawsuit to proceed against the state Department of Managed Health Care.

Showing signs he may invalidate the controversial policy on autism coverage, James C. Chalfant called the regulation "inconsistent" with other state laws and openly challenged their legal interpretation.

It was a big win for the plaintiffs, one of several groups suing health plans and the state over the right for autistic children to receive therapeutic treatments.

The policy at issue in this case, which was outlined in a March memo but not vetted by the public, lets health plans deny some expensive autism therapies without requiring independent reviews of the denials. Those reviews had overwhelmingly overruled health plans in favor of parents seeking treatment.

Chalfant also rejected the state's argument that the agency has sole discretion over implementing its regulations, which legal experts said was a telling sign the state is on shaky legal grounds.

"The department cannot adopt a regulation which exceeds its statutory authority," Chalfant said in the order, released Friday.

The ruling was also a boost to parents who believe HMOs must cover autism treatments under California's mental health parity laws.

The Department of Managed Health Care, headed by Schwarzenegger appointee Cindy Ehnes, has not decided

whether to appeal the judge's order, spokeswoman Lynne Randolph said. Randolph said the department's attorneys did legal analysis and its general counsel vetted the memo.

The department does not plan to withdraw the regulation or reverse its position, said Randolph, who noted the order is not yet a binding decision on the merits.

The department contends treatments, like speech therapy, are required by law, but the regimen of therapies for autistic children called applied behavior analysis, or ABA, are not. The department does not require ABA coverage unless a treating doctor pushes for treatments and they are provided by a licensed physician.

Randolph said the department stands firm on the decision that licensed providers must oversee ABA even though it does not require HMOs to have licensed providers, so few do.

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Fighting to receive autism care from health plans has become a hot-button issue for patients in California. Three class actions, including a discrimination claim against Kaiser Permanente, were filed in the last year over autism coverage.

Autism coverage has become a sticking point because of the high cost. ABA, which aims to correct behavior and teach children how to function despite the disorder, can span several hours a day and cost up to \$70,000 a year.

Health plans assert many of the therapies in question are education services rather than medical care.

As a result of last week's order, a lawsuit against the department by Santa Monica-based Consumer Watchdog can proceed to trial. A writ of mandate, the suit seeks an injunction against the state's dismissal of autism complaints. A hearing is set for Nov. 5.

Brietta Clark, a health law professor at Loyola Law School said the ruling was notable. "I think the judge was definitely disturbed by the department's behavior," she said.

Consumer Watchdog called it the first step to providing more scrutiny to autism coverage denials by HMOs.

"We had two goals, one was to point out how the letter was an underground regulation and we've basically won that," said Consumer Watchdog's founder, Harvey Rosenfeld. "Our goal now is to get the department to enforce the law as opposed to allowing HMOs to violate it."

When health plans disagreed with parents over the necessity of treatments, California for years used independent physicians to settle those cases with binding second opinions based on reviews of the medical files in each case. Until recently, parents had made gains in the type and amount of treatment provided for their autistic children by asking for intervention.

But in the March memo, the department signaled it would no longer send complaints of improper denials to independent phy-

sicians, meaning far fewer would be overturned. The controversial memo was signed not by any of the department's senior attorneys but by a non-lawyer deputy director.

Donnie Roth is one of the parents thwarted by the new policy.

Roth, a real estate appraiser in Oakland, pays \$1,200 out of pocket for health coverage for his 4-year-old daughter, Alexa. But when he asked for ABA and occupational therapy, Kaiser denied the claim.

Last December, the Roths filed a complaint with the Department of Managed Health Care to have an independent medical review to resolve the dispute.

But this was after the department had stopped sending complaints like his for reviews.

The department told the family that in order to get the treatment, they need a doctor's note saying ABA therapy is medically necessary and can be given by a licensed

provider.

"Kaiser would never say that, obviously," Roth said.

He worries the delays will make it even harder to treat the disorder because early intervention is crucial.

"Every week or month or year that goes by without receiving any treatment is time that we can't make back," Roth said.

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