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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO

UNION OF AMERICAN PHYSICIANS AND)
DENTISTS, a California nonprofit corporation;)
CALIFORNIA PSYCHIATRIC ASSOCIATION,)
a Delaware nonprofit corporation; and)
MICHAEL LISIAK, M.D., an individual;)

Plaintiffs,

vs.

WILLIAM GAUSEWITZ, Director, Office of)
Administrative Law, State of California;)
OFFICE OF ADMINISTRATIVE LAW, STATE)
OF CALIFORNIA; SANDRA SHEWRY,)
Director, Department of Health Services, State of)
California; DEPARTMENT OF HEALTH)
SERVICES, STATE OF CALIFORNIA; and)
DOES 1 through 30;)

Defendants.

Case No: 05CS00655

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF PETITION
FOR WRIT OF MANDATE AND TO
INVALIDATE APPROVAL OF
REGULATIONS BY THE OFFICE OF
ADMINISTRATIVE LAW**

Date: February 17, 2006

Time: 10:00 a.m.

Department: 16

Judge: The Honorable Judy Holzer Hersher

Date Action Filed: May 6, 2005

PLEADINGS BEING FILED IN SUPPORT OF PETITION FOR WRIT OF MANDATE AND TO INVALIDATE APPROVAL OF REGULATIONS BY THE OFFICE OF ADMINISTRATIVE LAW.

1. Memorandum Of Points And Authorities In Support Of Petition For Writ Of Mandate And To Invalidate Approval Of Regulations By The Office Of Administrative Law.
2. Administrative Record For: 1) First Amended Petition To Invalidate Office Of Administrative Law Approval Of Regulations (Government Code § 11340.5(d); and 2) Petition For Writ Of Mandate (C.C.P. § 1085).
3. Request For Judicial Notice.
4. Declaration of Michael Lisiak, M.D. In Support Of Petition For Writ Of Mandate And To Invalidate Approval Of Regulations By The Office Of Administrative Law.
5. Declaration Of Daniel H. Willick In Support Of Petition And In Compliance With The Court’s Meet And Confer Requirement.

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California League of Senior Citizens, Inc. v. Brian (1973) 35 Cal.App.3d 443..... 10, 12, 18

California Optometric Assn. v. Lackner (1976) 60 Cal.App.3d 500 4, 11

Common Cause of California v. Board of Supervisors (1989) 49 Cal.3d 432 5, 11, 18

County of Sacramento v. Hickman (1967) 66 Cal.2d 841 12, 18

Freedom Newspapers, Inc. v. Orange County Employees Retirement System (1993) 6 Cal.4th 821..... 20

Metcalf v. County of Los Angeles (1944) 24 Cal.2d 267 5, 19

Ogo Associates v. City of Torrance (1974) 37 Cal.App.3d 830 5, 12, 19

Protect the Historic Amador Waterways v. Amador Water Agency (2004) 116 Cal.App.4th 1099..... 10

State of California ex. rel. State Lands Com. v. Superior Court (1995) 11 Cal.4th 50 20

Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal.4th 557 5

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7 59 Opinions of the California Attorney General 112 (1976)..... 14, 21
8 66 Opinions of the California Attorney General 302 (1983)..... 13, 20
9 85 Opinions of the California Attorney General 247 (2002)..... 20
10 April 8, 2005 California Regulatory Notice Register, Register 2005, No. 14-2..... 19

11 **Articles and Books**

12 Adler & Griffith, *Concurrent Medical Illness in the Schizophrenic Patient*, 4 Schizophr. Res., 91 - 106 (Mar. -
13 Apr. 1991)..... 23
14 Bremmer, et al., *Functional Brain Imaging Alterations In Acne Patients Treated With Isotretinoin*, 162 Am. J.
15 Psych. 983 (May, 2005)..... 24
16 Bridges & Goldberg, *Somatic Presentations of DSM III Psychiatric Disorders in Primary Care*, 29 J.
17 Psychosom.Res. 563 (1985) 24
18 Giannini, A.J., et al., *Psychiatric, Psychogenic and Somatopsychic Disorders Handbook* 35-36 (1978)..... 23, 24
19 Goldberg & Bridges, *Somatic Presentations of Psychiatric Illness in Primary Care Setting*, 32 J. Psychosom, Res.
20 137 (1988) 24
21 Hall & Beresford, *Psychiatric Manifestations of Physical Illness*..... 24
22 Hall, et al., *Physical Illness Manifesting as Psychiatric Disease*, 37 Arch.Gen.Psychiat. 989 (1980)..... 23, 24
23 Jones, et al., *Prevalence, Severity and Co-occurrence of Chronic Physical Health Problems of Persons With*
24 *Serious Mental Illness*, 55 Psych. Services No. 11 (Nov., 2004) 23
25 Kaplan & Sadock, *Synopsis of Psychiatry*, (8th ed. 1998)..... 24
26 Koran, Sox, et al., *Medical Evaluation of Psychiatric Patients*, 46 Arch. Gen. Psychiat, 733 (1989)..... 23
27 Koranyi, *Morbidity and Rate of Undiagnosed Physical Illness in a Psychiatric Clinic Population*, 36 Arch. Gen.
28

1 Psychiat. 414 (1979)..... 23

2 Proctor, et al., *Comorbid Medical Conditions Among Depressed Elderly Patients Discharged Home After Acute*

3 *Psychiatric Care*, 11 Am. J. Geriatr. Psychiatry 329 (May-June, 2003)..... 23

4 Reeves, et al., *Unrecognized Medical Emergencies Admitted To Psychiatric Units*, 18 Am. J. Emerg. Med. 390

5 (July, 2000)..... 23

6 Saari, et al., *A 4-Fold of Metabolic Syndrome in Patients With Schizophrenia: The Northern Finland 1966 Birth*

7 *Cohort Study*, 66 J. Clin. Psychiat. 559 (May, 2005) 23

8 Salsberry, et al., *Use of General Medical Services Among Medicaid Patients With Severe and Persistent Mental*

9 *Illness*, 56 Psych. Services 459 (April, 2005)..... 23

10 Sanders, M.D., Lisa, •*Facial tic•Weight loss•Delusion*, New York Times Magazine 23 (May 29, 2005)..... 21, 22

11 Sbordone & Rudd, *Can Psychologists Recognize Neurological Disorders in Their Patients?*, 8 Journal of Clinical

12 and Experimental Neuropsychology 285, 286 (1986)..... 21

13 Simon, et al., *An International Study of the Relation Between Somatic Symptoms and Depression*, 341 New Eng.

14 J. of Medicine 1329 (1999)..... 23

15 Sternberg, *Testing for Physical Illness in Psychiatric Patients*, 47 J. Clin. Psychiat. 1 (Supp. 1986) 23

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1 **I. INTRODUCTION.**

2 This petition for a writ of mandate (Code of Civil Procedure § 1085) and first amended
3 petition to invalidate approval of regulations by the Office of Administrative Law (Government Code §
4 11340.5, subd. (d)) (hereinafter collectively referred to as the “First Amended Petition”) is directed
5 against the adoption by the California Department of Health Services (“DHS”) of amendments to the
6 following regulations (hereinafter “the Subject Regulations”):¹

- 7 A. Cal. Code Regs., tit. 22, § 70577, subds. (e), (j)(2);
- 8 B. Cal. Code Regs., tit. 22, § 70717, subds. (c), (f)(2);
- 9 C. Cal. Code Regs., tit. 22, § 71203, subd. (a)(3)(B);
- 10 D. Cal. Code Regs., tit. 22, § 71517, subds. (b), (e); and
- 11 E. Cal. Code Regs., tit. 22, § 71545, subd. (b).

12 The Subject Regulations are invalid for the following reasons, each of which standing
13 alone is sufficient to require that this First Amended Petition must be granted:

14 1. The Subject Regulations were adopted without public notice or an opportunity for
15 public comment in violation of the Administrative Procedure Act (the “APA”; Government Code §§
16 11340, et seq., 11346.2, 11346.4, 11346.5, 11346.8, Cal. Code Regs., tit. 1, § 86) and in violation of Cal.
17 Code Regs., tit. 1, § 100;

18 2. The Subject Regulations violate applicable statutes and regulations:

19 (a) Cal. Code Regs., tit. 22, §§ 70577, subd. (e), 70717, subd. (c), 71203,
20 subd. (a)(3)(B) and 71517, subd. (b) each authorize a clinical psychologist to admit a patient to the
21 hospital without requiring that the patient must be examined by or under the supervision of a physician.
22 This violates provisions of federal law (42 U.S.C. §§ 1395dd(a), (e)(1), 42 C.F.R. § 489.24) and
23 provisions of California law (Health & Safety Code §§ 1317, 1317.1, subd. (a)(2)(A)) which require that
24 when a patient presents himself or herself at a hospital emergency department for possible hospital
25 admission with a psychiatric disturbance, there must be an appropriate medical screening examination
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27 _____
28 ¹ The precise language of the amendments is set forth in the Administrative Record, pp. 000006-000015 and in Exhibit 2 to the First Amended Petition.

1 which, under California law, must be conducted or supervised by a physician to determine if the patient
2 has an emergency medical condition.

3 (b) Cal. Code Regs., tit. §§ 70717, subd. (f)(2), and 71517, subd. (e) each
4 authorize a clinical psychologist to transfer or to discharge a hospital patient without any evaluation of
5 the patient's medical condition and without any evaluation of the patient by a physician. This violates
6 provisions of federal law (42 U.S.C. § 1395dd(c)(1)(A)) and provisions of California law (Health &
7 Safety Code § 1317.2, subd. (a)) which prohibit transfer or discharge without a physician's examination
8 or evaluation of a hospital patient admitted with an emergency medical condition. This also violates
9 California law (Health & Safety Code § 1262; Welfare & Institutions Code §§ 5622, 5768.5) which
10 requires that a mental health patient being discharged from a hospital must be provided with an aftercare
11 plan which includes information on medications prescribed for aftercare. Since a clinical psychologist is
12 not authorized to practice medicine (Business & Professions Code §§ 2900, et seq.) and may not
13 prescribe medication (Business & Professions Code § 2904), he or she is not authorized to provide such
14 an aftercare plan for patients on medications prescribed for aftercare.

15 (c) Cal. Code Regs., tit. 22, §§ 70717, subd. (c); and 71517, subds. (b), (e)
16 each authorize a clinical psychologist to admit, diagnose, transfer or discharge a Medicaid (i.e.,
17 MediCal) or a Medicare patient hospitalized for a psychiatric condition without the involvement of a
18 physician. This violates federal law (42 U.S.C. § 1396a(a)(44), 42 C.F.R. § 424.1(b)(1)) which requires
19 that such patients must be treated pursuant to a plan established and periodically reviewed and evaluated
20 by a physician.

21 (d) Cal. Code Regs., tit. 22, §§ 70577, subd. (j)(2), and 71545, subd. (b) each
22 authorize a clinical psychologist to place a patient in restraint without the involvement of a physician.
23 This violates Health & Safety Code § 1180.4, subds. (d), (e), which require evaluation of such a
24 patient's medical condition (Health & Safety Code § 1180.4, subd. (d)) and of the patient's medical
25 risks, such as heart disease, respiratory condition or pregnancy (Health & Safety Code § 1180.4, subd.
26 (e)) before placing a patient in restraint and prohibit such restraint if it would endanger the patient. The
27 limited license of a clinical psychologist (Business & Professions Code § 2900-2905) does not authorize
28 him or her to evaluate such medical conditions or medical risks.

1 Particularly striking about this matter is that the Office of Administrative Law (“OAL”)
2 has twice before (on December 24, 2004 and March 19, 2001) rejected the adoption of the amendments
3 embodied in the Subject Regulations (First Amended Petition Exhibits 4 and 5; Request For Judicial
4 Notice, Attachments 3 and 4) for failure to comply with the APA. Nevertheless, without any
5 explanation the OAL reversed its position and approved the Subject Regulations as not requiring
6 compliance with the APA’s public notice and public comment requirements purportedly because the
7 Subject Regulations were regulations “without regulatory effect” (Cal. Code Regs., tit. 1, § 100).²

8 The Administrative Record provided by defendant DHS, and which is being filed
9 herewith, hints at the basis for defendant OAL’s improper about face, without public notice or an
10 opportunity for public comment. The DHS in its submission to the OAL (Administrative Record, p.
11 000018) contended that the Subject Regulations “meet the criteria specified in [Cal. Code Regs., tit. 1]
12 section 100(a)(3) as changes in response to a judgment that has become final, entered by a California
13 Court, declaring a regulatory provision invalid.” The court decision referred to is the 15 year old
14 decision in *California Association of Psychology Providers v. Rank* (1990) 51 Cal.3d 1 (“*CAPP v.*
15 *Rank*”). That decision did not declare as invalid any of the regulatory language amended by the Subject
16 Regulations. *CAPP v. Rank* (*supra*, 51 Cal.3d at pp. 6, 7, fn.1) affirmed a trial court summary judgment
17 order declaring invalid the portions of regulatory provisions at Cal. Code Regs., tit. 22, §§ 70577, subd.
18 (d)(1), 71203, subd. (a)(1)(A) which stated “A psychiatrist shall be responsible for the diagnostic
19 formulation of the individual patient’s treatment plan.” (Request For Judicial Notice, Attachment 1, pp.
20 3-4; Los Angeles County Superior Court January 17, 1986, Order By Court Under CCP § 437c [for
21 summary judgment]). Indeed, 20 years ago DHS deleted the invalid regulatory language and “adopted
22 the regulations as directed by the [trial] court”. (*CAPP v. Rank, supra*, 51 Cal.3d at p. 8.) The
23 regulatory provisions declared invalid in *CAPP v. Rank* were long ago deleted and amended in
24 compliance with the trial court’s summary judgment ruling in that case. Hence there never was any
25 basis for the OAL to approve or for DHS to adopt the Subject Regulations as being exempt from the
26 APA’s public notice and opportunity for public comment requirements. This is because the Subject
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² Administrative Record, pp. 000004-000005; First Amended Petition, Exb. 3.
UAPD_P - Memorandum of Points and Authorities.DOC -3-

1 Regulations are not authorized by Cal. Code Regs., tit. 1, § 100, subd. (a)(3) as enforcement of a final
2 judgment declaring invalid the regulatory provisions which the Subject Regulations amend.

3 Exhibit 1 hereto is a summary of the Subject Regulations and their deficiencies which
4 require that the First Amended Petition must be granted.

5 **II. IMPLEMENTATION OF THE SUBJECT REGULATIONS IS APPROPRIATELY**
6 **PROHIBITED BY ISSUANCE OF A WRIT OF MANDATE IF THEY WERE ADOPTED**
7 **IN VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT (“APA”).**

8 **A. Introduction.**

9 When a California State agency adopts a regulation in violation of the APA, the
10 appropriate remedy is to obtain issuance of a writ of mandate pursuant to Code of Civil Procedure §
11 1085 invalidating the adoption of the regulation (*Union of American Physicians & Dentists v. Kizer*
12 (1990) 223 Cal.App.3d 490, 494-495). This is a remedy being sought in this matter.

13 **B. The Court Must Broadly Construe The APA And Exercise Its Independent**
14 **Judgment In This Matter.**

15 Well established rules govern consideration of a petition for a writ of mandate to
16 challenge the adoption of regulations in violation of the APA. The APA was enacted to provide
17 transparency and public participation in the State’s adoption of regulations. It assures the two goals of
18 “meaningful public participation in the adoption of administrative regulations by state agencies” and
19 “creation of an administrative record assuring effective judicial review.” (*California Optometric Assn.*
20 *v. Lackner* (1976) 60 Cal.App.3d 500, 506; *California Assn. of Nursing Homes, etc., Inc. v. Williams*
21 (1970) 4 Cal.App.3d 800, 810-812.) Consistent with these goals, the APA broadly interprets the
22 definition of what constitutes a regulation (*Armistead v. State Personnel Board* (1978) 22 Cal.3d 198,
23 202-203) and requires public notice (Government Code §§ 11346.2, 11346.4, subd.(a), 11346.5) and an
24 opportunity for public comment (Government Code § 11346.8, subd. (a)) before a regulation is adopted
25 or amended. Exceptions to the general requirement of compliance with the APA’s goal of public
26 participation in administrative rulemaking are narrowly construed. (*California Optometric Assn. v.*
27 *Lackner, supra*, 60 Cal.App.3d at 510 [“assurances of public participation ‘cannot be fulfilled by
28 recorded hearings which are paralleled by substantial “off record” investigations.’ (Citation omitted.)”])

1 Where there is no dispute as to the facts, court review of whether there has been adoption or amendment
2 of a regulation in compliance with the APA, including Court review of determinations made by the
3 OAL, is a question of law for the court’s independent determination with consideration of the OAL’s
4 regulatory determinations and without impairing substantive rights granted by underlying law, which
5 rights continue to exist even if the OAL’s regulatory determinations are invalid. (*Tidewater Marine*
6 *Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 576-577.)³

7 **C. The Standards For Granting A Writ Of Mandate.**

8 A writ of mandate will be issued pursuant to Code of Civil Procedure § 1085 if the
9 following requirements are met:

- 10 1. The writ will issue to “compel the performance of an act which the law
11 specifically enjoins as a duty resulting from an office, trust or station”. (C.C.P. § 1085.)
- 12 2. The writ requires that “there is not a plain, speedy, and adequate remedy, in the
13 ordinary course of law. . . .” (C.C.P. § 1086.)
- 14 3. The writ requires “the verified petition of the party beneficially interested” in the
15 matter (*id.*) or that there is a public right at stake and the petition for a writ seeks to enforce a public duty
16 (*Common Cause of California v. Board of Supervisors* (1989) 49 Cal.3d 432, 439).
- 17 4. The petitioner must have exhausted available administrative remedies (*Metcalf v.*
18 *County of Los Angeles* (1944) 24 Cal.2d 267, 269) or it would be futile to seek to do so (*Ogo Associates*
19 *v. City of Torrance* (1974) 37 Cal.App.3d 830, 834-835).

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27 ³ While exercising its independent judgment, the Court should consider the interpretations by the OAL. As discussed
28 herein (I. Introduction at fn. 2, *supra*, Exhibit 1 hereto, and III.A.2., 3, *infra*) the OAL has issued conflicting interpretations
about the Subject Regulations and underlying substantive law is violated by OAL’s approval of the Subject Regulations (I,
supra, IV, V, VII, *infra*).

1 **III. A WRIT OF MANDATE SHOULD BE GRANTED BECAUSE THE SUBJECT**
2 **REGULATIONS WERE ADOPTED IN VIOLATION OF THE APA.**

3 **A. The Facts.**

4 **1. 20 years ago, there was full compliance by DHS with the *CAPP v. Rank***
5 **ruling invalidating regulatory provisions.**

6 This matter arises out of defendants' contention that adoption of the Subject Regulations
7 in 2005 without public notice or an opportunity for public comment was justified under Cal. Code Regs.,
8 tit. 1, § 100, subd. (a)(3)⁴ which permits deletion of "a regulatory provision held invalid in a judgment
9 that has become final, entered by a California court of competent jurisdiction. . . ." The judgment
10 referenced by defendants is the January 17, 1986 summary judgment order of the Los Angeles County
11 Superior Court⁵ which was affirmed by the 1990 California Supreme Court decision in *CAPP v. Rank*,
12 (*supra*, 51 Cal. at pp. 6-7, fn. 1, pp. 21-22) insofar as it required deletion from DHS regulations (Cal.
13 Code Regs., tit. 22, §§ 70577, subd. (d)(1), 71203, subd. (a)(1)(A)) of language stating: "A psychiatrist
14 shall be responsible for the diagnostic formulation of the individual patient's treatment plan." The
15 Superior Court order in *CAPP v. Rank* also states:

16 "8. The Department of Health Services is ordered to amend Title 22 Cal.
17 Admin. Code [now Cal. Code Regs.] §§ 70577(d)(1) and 71203(a)(1)(A)
18 to provide as follows: 'Psychiatrists or clinical psychologists within the
19 scope of their licensure and subject to the rules of the facility shall be
20 responsible for the diagnostic formulation for their patients and the
21 development and implementation of each patient's treatment plan.'"⁶

22 In compliance with the Superior Court order, the objectionable language was deleted in
23 amendments adopted by DHS as emergency regulations "about a month after the [Superior Court's] oral
24 statement of decision (and before the filing of the written judgment). . . ." (*CAPP v. Rank, supra*, 51
25 Cal.3d at p. 8.)

26 ⁴ Administrative Record, pp. 000006, 000018.

27 ⁵ Request For Judicial Notice, Attachment 1 at p. 3.

28 ⁶ Request For Judicial Notice, Attachment 1 at p. 4, para. 8. Although the California Supreme Court required deletion of the offending language "A psychiatrist shall be responsible for the diagnostic formulation of the individual patient's treatment plan" it did not require the adoption of the precise language required by the Superior Court. (*CAPP v. Rank, supra*, 51 Cal.3d at p. 8, fn.4.) Nevertheless, that was the language adopted by DHS over 15 years ago.

1 **2. DHS adoption in 1994 of underground regulations identical to certain of the**
2 **Subject Regulations (Cal. Code Regs., tit. 22, §§ 70577, subd. (j)(2), 71545,**
3 **subd. (b)) was declared invalid by OAL in 2001.**

4 On April 27, 1994, without public notice or an opportunity for public comment, DHS
5 adopted underground regulations which specifically stated that clinical psychologists could order
6 restraint of hospitalized patients. (Request For Judicial Notice, Attachment 2.) Two of those regulations
7 (Cal. Code Regs., tit. 22, §§ 70577, subd. (j)(2), 71545, subd. (b)) were identical to the same provisions
8 of the Subject Regulations. The OAL declared all of the 1994 DHS underground regulations to be
9 invalid in 2001 OAL Determination No. 2⁷ which rules:

10 (i) “We conclude, therefore, that amendments to existing regulations
11 permitting clinical psychologists at licensed health care facilities to order
12 patients to be placed in physical restraints or seclusion constitute
13 ‘regulations’ as defined in Government Code § 11342.600 and are
14 required to be adopted and codified pursuant to the rulemaking procedures
15 of the APA.” (*Id.* at p. 10.)

16 (ii) “Because these particular . . . amendments were not addressed by the
17 Rank court [CAPP v. Rank] . . .the . . . amendments . . . cannot be made as
18 a ‘change without regulatory effect’ pursuant to section 100 of Title 1 of
19 the CCR.” (*Id.* at p. 4, fn. 3.)

20 The administrative record provided by DHS omits the 1994 DHS underground
21 regulations which are repeated in the Subject Regulations and omits the 2001 OAL Determination No. 2
22 which rejects the attempt by DHS to adopt those regulations without public notice or an opportunity for
23 public comment.

24 **3. DHS proposed adoption in 2004, without public notice or an opportunity for**
25 **public comment, of regulations identical or equivalent to the Subject**
26 **Regulations was declared improper by OAL in December, 2004.**

27 Each of the Subject Regulations or its equivalent was included in regulations proposed by
28 DHS in 2004 (Administrative Record, pp. 000037-00078) and each was rejected by OAL’s December
24, 2004 Decision Of Disapproval Of Proposed Changes Without Regulatory Effect (Administrative

⁷ First Amended Petition, Exhibit 4; Request For Judicial Notice, Attachment 3.
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1 Record, pp. 000034-000036; Request For Judicial Notice, Attachment 4; First Amended Petition,
2 Exhibit 5).

3 The following regulations were proposed by DHS in 2004 with wording identical to the
4 same provisions of the Subject Regulations: Cal. Code Regs., tit. 22, §§ 70577, subd. (e), 70717, subd.
5 (c), 71203, subd. (a)(3)(B), 71517, subd. (b). The following regulations were proposed by DHS in 2004
6 with wording identical to the same provisions of the Subject Regulations except that where the Subject
7 Regulations state “clinical psychologist” the 2004 proposed regulations state a “licensed health care
8 practitioner”: Cal. Code Regs., tit. 22, §§ 70577, subd. (j)(2), 70717, subd. (f)(2), 71517, subd. (e),
9 71545, subd. (b). However, these differences in wording did not change the substance or purpose of
10 these regulations of being, in the OAL’s words, about “restrictions on psychologists’ scope of practice”
11 (Administrative Record, p. 000037).

12 The OAL’s December 24, 2004 Decision Of Disapproval Of Proposed Regulations
13 Without Regulatory Effect (Request For Judicial Notice, Attachment 4, p. 2; First Amended Petition,
14 Exb. 5, p. 2) disapproved of each of the regulations proposed by DHS, including those with identical
15 language or effect as each of the Subject Regulations, because “[t]he proposed changes [in regulations]
16 deal with the restraint and seclusion of patients, transfer of patients, admittance and discharge of patients
17 . . . [and] go beyond the regulatory provisions addressed by, and the holding of” *CAPP v. Rank*. The
18 OAL decision goes on to state that the DHS “proposed changes do not fall within the requirements of
19 title 1, CCR, section 100, subdivision (a), and therefore, are not changes without regulatory effect.”
20 (*Id.*) The OAL then ruled there must be compliance with the APA’s provisions for “notice and public
21 participation”. (*Id.*)

22 **4. The Subject Regulations were approved by OAL and adopted by DHS on**
23 **March 24, 2005 without explanation of why OAL’s prior rejections of the**
24 **same provisions were no longer valid.**

25 On March 24, 2005, after resubmission to OAL without public notice or any opportunity
26 for public comment, the Subject Regulations were approved by OAL and adopted by DHS
27 (Administrative Record, pp. 00004-00022; First Amended Petition, Exbs. 1, 2, 3) as being authorized by
28 Cal. Code Regs., tit. 1, § 100 as being without regulatory effect. OAL gave no explanation for this

1 reversal of its prior published rejections of such proposed regulations. DHS in its February 17, 2005
2 resubmission to OAL again made the previously rejected assertion that the “proposed changes to the
3 regulations meet the criteria specified in [Cal. Code Regs., tit. 1] section 100(a)(3) as changes in
4 response to a judgment [CAPP v. Rank] that has become final, entered by a California Court, declaring
5 a regulatory provision invalid.” (Administrative Record, p. 000018.) Why this assertion was now
6 deemed appropriate by OAL was never disclosed. We believe the reason was that the OAL and the
7 DHS knew that OAL’s reversal of its prior decisions was utterly without merit.

8 **B. The Subject Regulations Were Adopted In Violation Of The APA.**

9 The APA requires public notice and an opportunity for public comment (Government
10 Code §§ 11340, et seq., 11346.2, 11346.4, 11346.5, 11346.8, Cal. Code Regs., tit. 1, § 86) before there
11 can be adoption of a regulation. A regulation is defined by Government Code § 11342.600 as “. . . .
12 every rule, regulation, order, or standard of general application or the amendment, supplement, or
13 revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret,
14 or make specific the law enforced or administered by it, or to govern its procedure.” The Subject
15 Regulations are regulations because they amend (revise) DHS regulations which “implement, interpret,
16 or make specific the law enforced or administered by” DHS regarding the diagnosis and provision of
17 care to the mentally ill in hospitals. As explained in 2001 OAL Determination No. 2 (Request for
18 Judicial Notice, Attachment 3, pp. 2-8; First Amended Petition, Exb. 4, pp. 2-8) and in December 24,
19 2004 OAL Decision Of Disapproval Of Proposed Changes Without Regulatory Effect (Request For
20 Judicial Notice, Attachment 4; First Amended Petition, Exb. 5) the Subject Regulations are regulations
21 subject to the APA and not exempt from the APA under Cal. Code Regs., tit. 1, § 100. (See III.A.1.,
22 *supra*.) They were adopted in violation of the APA without public notice or an opportunity for public
23 comment. Indeed, the Administrative Record at p. 000016 establishes that proponents of the Subject
24 Regulations had ex parte communications with DHS at the very time it was considering the Subject
25 Regulations without public notice.⁸

26 _____
27 ⁸ A February 18, 2005 memorandum to Defendant Gausewitz of the OAL from DHS states that the Subject
28 Regulations were drafted “in response to . . . a meeting with representatives of the Psychology Shield professional
organization.” (Administrative Record, p. 000016.)

1 **C. The Standards For Granting A Writ Of Mandate Are Met.**

2 Each of the elements required for issuance of a writ of mandate (II.C., *supra*) has been
3 met because defendants DHS and OAL have not complied with the APA.

4 **1. A writ of mandate must be issued to compel defendants to withdraw the**
5 **Subject Regulations because they were adopted in violation of the APA**
6 **without public notice or an opportunity for public comment.**

7 The APA requires that new regulations or the amendment of existing regulations may not
8 occur without public notice and an opportunity for public comment. (II., *supra*.) The Subject
9 Regulations are regulations the adoption or amendment of which must comply with the APA. (*Id.*,
10 III.B., *supra*.) If defendants have proceeded to adopt or amend the regulations other than in the manner
11 required by law, a writ of mandate must issue. (*Protect the Historic Amador Waterways v. Amador*
12 *Water Agency* (2004) 116 Cal.App.4th 1099, 1105; also see III., *supra*.) The Subject Regulations were
13 adopted in violation of the APA by defendants DHS and Shewry with the approval of defendants OAL
14 and Gausewitz.² (III.A., B., *supra*.) Hence, it is proper to issue a writ of mandate invalidating the
15 Subject Regulations and compelling defendants to withdraw the Subject Regulations.

16 **2. A writ of mandate must issue because there is no plain, speedy and adequate**
17 **remedy in the ordinary course of law.**

18 A second requirement for issuance of a writ of mandate is that “there is not a plain,
19 speedy, and adequate remedy in the ordinary course of law. . . .” (C.C.P. § 1086, II.C., *supra*.)

20 When the issue presented by the petition for a writ of mandate is a matter of public
21 interest, the public welfare requires the prompt resolution of the issue that a writ of mandate provides
22 and a remedy in the ordinary course of law is not adequate. (*Brown v. Superior Court* (1971) 5 Cal.3d
23 509, 515; *California League of Senior Citizens, Inc. v. Brian* (1973) 35 Cal.App.3d 443, 457.)

24 The Subject Regulations are a matter of public interest because they apply to the
25 treatment of all patients hospitalized for the treatment of mental illness as well as to the admission,
26

27 ² Alternatively, a writ of mandate should issue because defendants’ determinations regarding the Subject Regulations
28 are not supported by substantial evidence. (*Protect the Historic Amador Waterways v. Amador Water Agency, supra*, 116
Cal.App.4th at p. 1105.)

1 discharge and use of physical restraint to control such patients. The treatment of hundreds, if not
2 thousands, of such hospitalized patients is a matter of public interest and no party to this case has ever
3 argued otherwise. (See, e.g., Welfare & Institutions Code §§ 5001, subd. (a), 5325.1, subd. (a) the goals
4 of the Lanterman Petris Short Act are to “end the inappropriate, indefinite, and involuntary detainment
5 of mentally disordered persons” and to provide hospital treatment “least restrictive of the personal
6 liberty of the individual” patient.)

7 **3. The writ petition is verified by a person beneficially interested in the matter**
8 **and seeks to protect a public right by enforcing a public duty.**

9 A petition for a writ of mandate requires that there is a public right at stake and the
10 petition must seek to enforce that right by enforcing a public duty. (*Common Cause of California v.*
11 *Board of Supervisors, supra*, 49 Cal.3d at p. 439.) Alternatively, the petition must be verified by a party
12 beneficially interested in the matter. (C.C.P. § 1086.) The petition in this matter meets both of these
13 requirements.

14 First, the writ petition seeks to enforce a public right to require compliance with the APA.
15 Defendants’ duty to comply with the APA is not trivial. Indeed, the APA was enacted to protect
16 “meaningful public participation in the adoption of administrative regulations by state agencies”.
17 (*California Optometric Assn. v.Lackner, supra*, 60 Cal.App.3d at p. 506.) Defendants have violated
18 their duty to comply with the APA in the adoption of the Subject Regulations. This standing alone is
19 sufficient to convey standing on plaintiffs to bring this writ petition.

20 Second, the writ petition was verified by Dr. Michael Lisiak, a person beneficially
21 interested in this matter. (C.C.P. § 1086.) Dr. Lisiak is the chief of staff (president of the Medical Staff)
22 at Atascadero State Hospital and a vice president of plaintiff the Union of American Physicians and
23 Dentists. As documented in Dr. Lisiak’s declaration filed herewith, he is involved in the care for
24 hundreds of patients hospitalized for the treatment of mental illness at Atascadero State Hospital and the
25 care of those patients is the focus of the Subject Regulations. Hence, he is beneficially interested in the
26 Subject Regulations. Also, the UAPD membership practices in California State Hospitals and are
27 involved in the care of patients hospitalized for the treatment of mental illness whose care is impacted
28 by the Subject Regulations. The CPA with numerous members who provide care for patients

1 hospitalized for the treatment of mental illness has the same beneficial interest in the Subject
2 Regulations. (Declaration of Daniel H. Willick.) These circumstances alone establish each plaintiff's
3 standing to prosecute this petition for a writ of mandate.

4 **4. Plaintiffs have no administrative remedies since the Subject Regulations**
5 **were adopted without public notice or an opportunity for public comment.**

6 An element to obtain a writ of mandate is that the plaintiff has exhausted available
7 administrative remedies or that it would be futile to do so. (*Ogo Associates v. City of Torrance, supra*,
8 37 Cal.App.3d at pp. 834-835.)

9 As documented above (III, A., B., *supra*), the Subject Regulations were adopted without
10 any public notice or opportunity for public comment and are now in force. Hence, there was never any
11 opportunity to exhaust administrative remedies. The doctrine of futility applies. Indeed, defendants'
12 failure to give public notice and failure to permit public comment constitutes a lack of compliance with
13 the APA which is at the core of plaintiffs' First Amended Petition.

14 **IV. IMPLEMENTATION OF THE SUBJECT REGULATIONS IS APPROPRIATELY**
15 **PROHIBITED BY ISSUANCE OF A WRIT OF MANDATE IF THEY VIOLATE THE**
16 **LAW REGARDING PATIENT CARE.**

17 **A. Introduction.**

18 A writ of mandate is an appropriate remedy to prohibit a State agency from implementing
19 regulations which conflict with the law. (*California League of Senior Citizens, Inc. v. Brian, supra*, 35
20 Cal.App.3d at p. 448; *County of Sacramento v. Hickman* (1967) 66 Cal.2d 841, 845.)

21 **B. The Subject Regulations Violate The Law.**

22 Each of the Subject Regulations violates California law or federal law regarding patient
23 care. Most violate both California and federal law. Under the authority cited above, this requires
24 granting a writ of mandate invalidating and prohibiting implementation of each of the Subject
25 Regulations which violates the law.

26 **1. The Subject Regulations violate federal and State law regarding hospital**
27 **admission of patients.**

28 Federal and State law require that each patient who arrives at a hospital emergency room

1 for possible hospital emergency admission for a psychiatric disturbance must be given an appropriate
2 medical screening examination. 42 U.S.C. § 1395dd(a) provides that “if any individual . . . comes to the
3 emergency department and a request is made on the individual’s behalf for examination or treatment for
4 a medical condition, the hospital must provide for an appropriate medical screening examination within
5 the capability of the hospital’s emergency department . . . to determine whether or not an emergency
6 medical condition . . . exists.” (Also see, 42 C.F.R. § 489.24(a)(1).) 42 U.S.C. § 1395dd(e)(1) defines
7 an “emergency medical condition” as “manifesting itself by acute symptoms of sufficient severity . . .
8 such that the absence of immediate medical attention could reasonably be expected to result in – (i)
9 placing the health of the individual . . . in serious jeopardy, (ii) serious impairment of bodily functions,
10 or (iii) serious dysfunction of any bodily organ or part; . . .” (Also see, 42 C.F.R. § 489.24(b).) Federal
11 regulations define “psychiatric disturbances” as medical conditions which may be an emergency medical
12 condition. (42 C.F.R. § 489.24(b).) Hence, the federal law cited above applies to persons suffering
13 from psychiatric disturbances who appear at a hospital emergency room seeking assistance and requires
14 appropriate medical screening examinations of such persons.

15 California law is consistent with the cited federal law and requires that emergency
16 services and care “shall be provided to any person requesting the services or care, or for whom services
17 or care is requested, for any condition in which the person is in danger of loss of life, or serious injury or
18 illness, at any . . . [hospital] that maintains and operates an emergency department. . . .” (Health &
19 Safety Code § 1317, subd. (a).) Such emergency services and care always require screening “by a
20 physician” or “under the supervision of a physician. . . .” (Health & Safety Code § 1317.1, subd. (a)(1).)
21 “‘Emergency services and care’ also means additional screening” for whether a “psychiatric emergency
22 medical condition exists. . . .” (Health & Safety Code § 1317.1, subd. (a)(2)(A).) (While the “additional
23 screening” for “a psychiatric emergency medical condition” may be performed “by a physician, or other
24 personnel to the extent permitted by applicable law and within the scope of their licensure and clinical
25 privileges” (*id.*), it does not remove the requirement of a physician directed medical screening
26 examination (Health & Safety Code § 1317.1, subd. (a)(1)).

27 Clinical psychologists possess a limited license and are not authorized to practice
28 medicine or to conduct a “medical screening examination”. (Business & Professions Code § 2900-2908;

1 66 Ops.Cal.Atty.Gen. 302, 308-309, fn. 10 (1983) [psychologists may not diagnose or treat “physical or
2 organic disorders” only “a physician . . . has the wherewithal . . . to diagnose the problem and to plan a
3 course of treatment accordingly.”].) Indeed, psychologists may not even order routine medical
4 diagnostic tests which involve piercing of a patient’s skin. (59 Ops.Cal.Atty.Gen. 112, 115 (1976);
5 Business & Professions Code § 2903.1.) Notwithstanding these prohibitions, Subject Regulations, Cal.
6 Code Regs., tit. 22 §§ 70577, subd. (e), 70717, subd. (c), 71203, subd. (a)(3)(B), and 71517, subd. (b),
7 each authorize a clinical psychologist to admit a patient to the hospital without requiring a medical
8 screening examination by or under the supervision of a physician. (Cal. Code Regs., tit. 22, §§ 70717,
9 subd. (c), 71517, subd. (b) achieve this result by deleting the requirement that the medical staff member
10 admitting a patient must be authorized to prescribe medications.) The rationale offered by DHS for
11 these regulations is to eliminate regulations “which restrict patient admissions by clinical psychologists
12 by making the admissions conditional on the availability of staff physicians. . . .” (Administrative
13 Record, p. 000018.) These amendments are provisions which are part of the Subject Regulations and
14 authorize violations of the federal law and State law, cited above, requiring all emergency room
15 evaluations and admissions of patients, including those suffering from mental illness, to include a
16 medical evaluation which is conducted by or under the supervision of a physician.

17 **2. The Subject Regulations violate federal and State law regarding transfer and**
18 **discharge of hospital patients.**

19 Federal and State law require that a patient who is hospitalized for an emergency medical
20 condition, which is psychiatric,¹⁰ may not be discharged or transferred from the hospital unless there is a
21 physician’s examination or evaluation of the patient.

22 Federal law (42 U.S.C. § 1395dd(c)(1)(A), 42 C.F.R. § 489.24(e)(1)) requires that a
23 patient hospitalized for an emergency medical condition, including a psychiatric condition,¹¹ that has
24 not been stabilized may not be transferred unless the transfer is authorized as follows:

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26
27 ¹⁰ Federal law (42 C.F.R. § 489.24(b)) defines “psychiatric disturbances” as possible emergency medical conditions.
State law also recognizes psychiatric emergency medical conditions. (Health & Safety Code § 1317.1, subd. (a)(2)(A).)

28 ¹¹ See footnote 10.

1 a. The patient or a legally responsible person acting for the patient provides
2 informed consent, or

3 b. A physician, or a qualified medical person acting with the signed authorization of
4 a physician, certifies in writing that a transfer is appropriate.

5 State law (Health & Safety Code § 1317.2, subd. (a)) contains more stringent provisions
6 prohibiting transfer of a person needing emergency psychiatric¹² services unless, among other things,
7 the patient “is examined and evaluated by a physician and surgeon, including, if necessary, consultation,
8 prior to transfer.”

9 California law (Health & Safety Code § 1262, subd. (a)) also provides that when “a
10 mental health patient is being discharged from . . . [a hospital he or she] shall be given a written
11 aftercare plan prior to . . . discharge” which identifies the patient’s “[m]edications including side effects
12 and dosage schedules.” Identical requirements apply to mental health patients being discharged from
13 inpatient facilities operated by a county or pursuant to a county contract (Welfare & Institutions Code §
14 5622, subd. (a)); to mental health patients being discharged from inpatient care under the Lanterman-
15 Petris-Short Act (Welfare & Institutions Code § 5622, subd. (b)); and to MediCal patients being
16 discharged from inpatient mental health care (Welfare & Institutions Code § 5768.5, subd. (a)).

17 A clinical psychologist is not a physician and is not licensed to prescribe medication
18 (Business & Professions Code § 2904). Under the above federal and State law, he or she may not
19 legally transfer patients being treated for emergency psychiatric medical conditions and may not transfer
20 or release mental health patients who are being treated with medication. This means the Subject
21 Regulations (Cal. Code Regs., tit. 22, §§ 70717, subd. (f)(2) and 71517, subd. (e)), are in violation of
22 federal and State law because they authorize a clinical psychologist to transfer or to discharge a hospital
23 patient without any evaluation of the patient’s medical condition and/or of the patient’s medications by a
24 physician or under the direction of a physician.

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28 ¹² See footnote 10.

1 **3. The Subject Regulations violate federal law regarding the hospital**
2 **admission, diagnosis, transfer and discharge of Medicaid or Medicare**
3 **hospital patients.**

4 Federal law requires that the treatment plan for each hospitalized Medicare and Medicaid
5 (MediCal) patient must be established, and periodically reviewed and evaluated by a physician. 42
6 U.S.C. § 1396a(a)(44) provides that for each such Medicaid hospitalized patient, a physician must
7 certify that the inpatient hospital services, including mental hospital services, “were required to be given
8 on an inpatient basis because the individual needs or needed such services, and . . . such services were
9 furnished under a plan established and periodically reviewed and evaluated by a physician. . . .”
10 Medicare regulations require that for each Medicare patient “the need for services be certified and that a
11 physician establish a plan of treatment”. (42 C.F.R. § 424.1(b)(1).) 42 C.F.R. § 424.10(a) provides in
12 pertinent part:

13 “§424.10 Purpose and scope.

14 “(a) *Purpose.* The physician has a major role in determining
15 utilization of health services furnished by providers. The physician
16 decides upon admissions, orders tests, drugs, and treatments, and
17 determines the length of stay. Accordingly, sections 1814(a)(2) and
18 1835(a)(2) of the Act establish as a condition for Medicare payment that a
19 physician certify the necessity of the services and, in some instances,
20 recertify the continued need for those services.”

21 The Subject Regulations (Cal. Code Regs., tit. 22, §§ 70717, subs. (c), (f)(2), 71517,
22 subs. (b), (e)) violate the above-referenced federal law by authorizing clinical psychologists to provide
23 hospital admission, diagnosis, transfer and discharge of a Medicaid or a Medicare patient, hospitalized
24 for a psychiatric condition, without the involvement of a physician or evaluation of whether there would
25 be a medical hazard. (Declaration of Michael Lisiak, M.D. at paragraph 5 establishes that Medicare and
26 Medicaid patients are hospitalized for mental illness.)

27 **4. The Subject Regulations violate State law by authorizing a clinical**
28 **psychologist to place a patient in restraint without a physician’s involvement.**

 State law requires evaluation of a patient’s medical condition before he or she may be
placed in restraint. Health & Safety Code § 1180.4, subd. (d) states a hospital “may not use physical or

1 mechanical restraint or containment on a person who has a known medical or physical condition, and
2 where there is a reason to believe that the use would endanger the person’s life or seriously exacerbate
3 the person’s medical condition.” (Emphasis added.) If the restraint proposed is prone restraint a number
4 of specific medical conditions including heart disease, pregnancy and respiratory conditions, must be
5 evaluated. (Health & Safety Code § 1180.4, subd. (e).) A clinical psychologist is not licensed to make
6 any medical evaluations, including those required before a patient is placed in restraint. (Business &
7 Professions Code §§ 2900-2908.) Hence, the Subject Regulations (Cal. Code Regs., tit. 22, §§ 70577,
8 subd. (j)(2), 71203, 71545, subd. (b)) which authorize a clinical psychologist to place a patient in
9 restraint without a medical evaluation by a physician, or by any other person with an appropriate
10 medical license, violate State law.

11 **C. CAPP v. Rank Requires The Subject Regulations To Comply With Applicable Law**
12 **And Just The Opposite Has Occurred. They Violate The Law.**

13 The justification given by defendants for the adoption of the Subject Regulations is that
14 they are changes required by a final court judgment in *CAPP v. Rank, supra*, declaring regulatory
15 provisions invalid (I., *supra*). As demonstrated above (I., III.A., *supra*) this justification fails.
16 Furthermore, the California Supreme Court’s decision in *CAPP v. Rank (supra, 51 Cal.3d at p. 22, fn.*
17 *14)* requires that all acts to comply with the decision must “be exercised consistent with all other statutes
18 when they apply in a given circumstance”. The discussion above (IV.B., *supra*) establishes just the
19 opposite – that the Subject Regulations, which were purportedly adopted to comply with *CAPP v. Rank*,
20 violate that court decision by violating applicable federal and State law.¹³

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27 ¹³ Many provisions of the law violated by the Subject Regulations were adopted or amended after the 1990 decision in
28 *CAPP v. Rank*. See, e.g., H&S Code § 1180.4 (added Stats. 2003, c. 750); H&S Code § 1262 (added Stats. 1997, c. 512);
W&I Code § 5768.5 (added Stats. 1997, c. 512); 42 C.F.R. § 489.24 (adopted June 24, 1994, 59 Fed. Register 32120); 42
C.F.R. § 424.10 (adopted July 26, 1995, 60 Fed. Register 38271).

1 **V. A WRIT OF MANDATE SHOULD BE GRANTED BECAUSE THE SUBJECT**
2 **REGULATIONS VIOLATE THE LAW. THE STANDARDS FOR GRANTING A WRIT**
3 **OF MANDATE ARE MET.**

4 Each of the elements required for issuance of a writ of mandate pursuant to Code of Civil
5 Procedure § 1085 (II.C., *supra*) has been met because the Subject Regulations violate both federal law
6 and State law regarding patient care.

7 **A. A Writ Of Mandate Must Be Issued To Compel Defendants To Comply With State**
8 **Law And With Federal Law Regarding Patient Care.**

9 Code of Civil Procedure § 1085 provides a writ of mandate will issue to “compel the
10 performance of an act which the law specifically enjoins as a duty resulting from an office, trust or
11 station.” As discussed above (IV.A., *supra*) issuance of a writ of mandate is an appropriate remedy to
12 prohibit a State agency from implementing regulations which violate the law. (*California League of*
13 *Senior Citizens, Inc. v. Brian, supra*, 35 Cal.App.3d at p. 448; *County of Sacramento v. Hickman, supra*,
14 66 Cal.2d at p. 845.) Since it has been established (IV.B., *supra*) that the Subject Regulations violate
15 State and federal law, the granting of a writ of mandate is appropriate.

16 **B. A Writ Of Mandate Must Issue Because There Is Not A Plain, Speedy, And**
17 **Adequate Remedy, In The Ordinary Course Of Law.**

18 Code of Civil Procedure § 1086 requires that if “there is not a plain, speedy, and adequate
19 remedy in the ordinary course of law” a writ of mandate should issue. As discussed above (III.C.2.,
20 *supra*) there is no plain, speedy and adequate remedy in the ordinary course of law concerning the
21 Subject Regulations.

22 **C. The Writ Petition Is Verified By A Person Beneficially Interested In The Matter**
23 **And Seeks To Protect A Public Right By Enforcing A Public Duty.**

24 A third element required to issue a writ of mandate is that the writ petition is verified by a
25 party beneficially interested in the matter (C.C.P. § 1086) or that there is a public right at stake and the
26 petition seeks to enforce that right by enforcing a public duty. (*Common Cause of California v. Board*
27 *of Supervisors, supra*, 49 Cal.3d at p. 439.) As explained above, both of these requirements are met
28 (III.C.3., *supra*). The writ petition seeks to stop the violations of law by State agencies described above

1 (IV.B., *supra*). Also, the writ petition is verified by a party beneficially interested in the matter (III.C.3.,
2 *supra*).

3 **D. Plaintiffs Have No Administrative Remedies To Exhaust.**

4 The final requirement for a writ of mandate is that petitioners have exhausted
5 administrative remedies (*Metcalf v. County of Los Angeles, supra*, 24 Cal.2d at p. 269) or it would be
6 futile to seek to do so (*Ogo Associates v. City of Torrance, supra*, 37 Cal.App.3d at pp. 834-835). As
7 explained above (III.C.4., *supra*), these requirements have been met since the Subject Regulations were
8 adopted by defendants without public notice or an opportunity for public comment.

9 **VI. THE PETITION TO INVALIDATE THE OAL'S APPROVAL OF THE SUBJECT**
10 **REGULATIONS SHOULD BE GRANTED.**

11 Plaintiffs are petitioning pursuant to Government Code § 11340.5, subd. (d) to set aside
12 the OAL's approval of the Subject Regulations and thereby set aside those regulations. Government
13 Code § 11340.5, subd. (d) states:

14 “(d) Any interested person may obtain judicial review of a given
15 determination by filing a written petition requesting that the determination
16 of the office be modified or set aside. A petition shall be filed with the
17 court within 30 days of the date the determination is published.”

18 The First Amended Petition seeks the relief permitted by this statute and meets the
19 requirements for such relief:

20 A. The petition seeks to set aside the OAL's determination that the Subject
21 Regulations may be adopted without compliance with the APA.

22 B. It is brought by interested persons, as demonstrated above (III.C.3. and V.C.,
23 *supra*). Plaintiffs and patients they serve are directly affected by the Subject Regulations.

24 C. The petition was filed on May 6, 2005 within thirty days after the April 8, 2005
25 first publication on April 8, 2005 of the OAL's approval of the Subject Regulations.¹⁴

26
27 ¹⁴ April 8, 2005 California Regulatory Notice Register, Register 2005, No. 14-2. Request for Judicial Notice,
28 Attachment 5. First Amended Petition, Exhibit 1. Since Plaintiffs did not learn of the OAL's action without public notice
until after the adoption of the Subject Regulations occurred, they had to file their petition in court within thirty days and had
no viable administrative remedy or a futile administrative remedy at best.

1 D. As demonstrated above (III., *supra*), the OAL’s approval of adoption of the
2 Subject Regulations without compliance with the APA’s requirements of public notice and an
3 opportunity for public comment is an abuse of discretion for each of the following independent reasons:

4 1. The OAL’s own prior decisions rejecting the previous attempts of DHS to
5 adopt the Subject Regulations and equivalent regulations without public notice or an opportunity for
6 public comment cogently explain why no exception to the APA applies. (III., *supra*; First Amended
7 Petition, Exhs. 4 and 5.)

8 2. The Subject Regulations violate both State law and federal law. (IV., V.,
9 *supra*.)

10 3. The Subject Regulations violate the ruling in *CAPP v. Rank*. (I, III.A.,
11 IV.C., *supra*.)

12 Each of the above points independently requires granting the petition against the OAL
13 pursuant to Government Code § 11340.5.

14 **VII. THE SUBJECT REGULATIONS ENDANGER PATIENTS BECAUSE THEY**
15 **AUTHORIZE CLINICAL PSYCHOLOGISTS TO ACT BEYOND THE SCOPE OF**
16 **THEIR LICENSURE.**

17 Under California law, psychologists are not permitted by their license to:

18 A. Diagnose or treat a medical illness or condition which is not psychological
19 in nature (Business & Professions Code § 2903).¹⁵

20 B. Prescribe medication (Business & Professions Code § 2904);¹⁶

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22
23
24 ¹⁵ Also, see 66 Ops.Cal. Atty. Gen. 302, 308-309, fn. 10 (1983) [The Legislature never “intended the practice of
25 licensed psychology to include the diagnosis and treatment of. . . physical or organic disorders” and only “a physician. . . has
26 the wherewithal. . . to diagnose the problem and to plan a course of treatment accordingly.”] Opinions of the California
27 Attorney General, while not binding, are entitled to great weight. (*State of California ex. rel. State Lands Com. v. Superior*
28 *Court* (1995) 11 Cal.4th 50, 71; *Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th
821, 829.)

¹⁶ 85 Ops.Cal.Atty.Gen. 247, 253 (2002) clearly establishes that this prohibition of psychologist prescribing is proper
because psychologists are not trained to prescribe and lack the particular expertise and training in prescribing possessed by
psychiatrists.

1 C. Write seclusion and restrain orders in hospitals (Health & Safety Code §§
2 1180.4, subd. (d), (e); 2001 OAL Determination No. 2, p. 10; OAL December 24, 2004 Decision Of
3 Disapproval Of Proposed Regulations Without Regulatory Effect, p. 2);

4 D. Order or interpret tests which involve piercing of a patient's skin (59
5 Ops.Cal.Atty.Gen. 112, 115 (1976); Business & Professions Code § 2903.1).

6 These limitations in the license of a psychologist flow from the limited education
7 required to be granted such a license. A psychologist requires little education in biologic science and
8 receives no medical training, needs to possess a doctorate degree in psychology or an "equivalent"
9 doctorate and to have at least two years of supervision by a licensed psychologist.¹⁷ A psychologist must
10 also have "two years clinical experience in a multidisciplinary facility" which is not necessarily a
11 hospital.¹⁸ Psychologists are encouraged to take coursework in pharmacology, but are not required to do
12 so.¹⁹ Nevertheless, psychologists may not assume responsibility for medical diagnosis and treatment.²⁰

13 Lacking training in medicine or neurology, it is not surprising that psychologists who
14 authored one study recognize diagnostic shortcomings of psychologists:

15 "Doctoral programs in psychology generally do not include training in the
16 recognition of neurological disorders. Thus psychologists would most
17 likely fail to recognize underlying neurological disorders in patients
18 seeking psychotherapeutic treatment." (Sbordone & Rudd, Can
19 Psychologists Recognize Neurological Disorders in Their Patients?, 8
20 Journal of Clinical and Experimental Neuropsychology 285, 286 (1986).)

21 The importance of medical training in diagnosing a patient presenting with symptoms of
22 mental illness is dramatically illustrated by recent article from the New York Times Magazine (May 29,
23 2005, pp. 23-24 "•Facial tic•Weight loss•Delusion" by Lisa Sanders, M.D., a true copy of which is
24 attached hereto as Exhibit "2". The article discusses the diagnosis and successful treatment of a 38 year
25 old manic male patient suffering from back pain who was delusional claiming to be a famous singer. the

26 ¹⁷ Business and Professions Code Section 2914.

27 ¹⁸ Health and Safety Code section 1316.5.

28 ¹⁹ Business and Professions Code Sections 2914.1, 2914.2, 2914.3.

²⁰ See footnote 15, *supra*.

1 patient said “he rarely drank and he had never used drugs.” (*Id.* at p. 23.) The physicians examining the
2 patient “would not be able to make a diagnosis based on . . . history alone. They needed to examine the
3 patient; they needed blood for tests.” (*Id.* at p. 24.) Medical knowledge and tests were necessary to
4 diagnose and treat this patient.

5 “The man was clearly manic. His energy was frantic; he couldn’t eat or
6 sleep. Words poured out of his mouth like water from a high-pressure
7 hose. But what was causing it? Drugs – crack or methamphetamines –
8 were probably the most common cause of such mania, but the patient
9 denied any drug use. Abnormalities in his body chemistry – too much
10 thyroid hormone, too little sodium – can also change the way the brain
11 works. Or was this really a psychiatric disease? Could it be the first
12 manifestation of bipolar disease – the manic phase of manic-depression?
13 He was a little too old for that. Bipolar disease and schizophrenia
14 typically appear in late adolescence or early adulthood and often run in
15 families. Or was it a disease of the brain? Organic brain disease can
16 mimic mental illness but often reveals itself in characteristic findings on
17 physical examination.” (*Id.*)

18 The article graphically illustrates the need for medical training and tests to diagnose and
19 treat patients who present with symptoms of mental illness. Ultimately, a blood test confirmed a
20 diagnosis of Huntington’s disease – a hereditary illness. The patient was treated with “antipsychotic
21 drugs, and soon the paranoia and delusions began to subside.” (*Id.*) The patient was discharged from
22 the hospital.²¹ This case vividly shows the need for medical psychiatric expertise to diagnose and treat
23 patients hospitalized for mental illness using medical techniques, medical tests and drugs, all of which
24 are beyond the license of a clinical psychologist.

25 In light of these deficiencies in education and training, it is understandable that the
26 existing law limits the scope of practice of psychologists in diagnosing and treating hospitalized patients
27 suffering from serious mental illness in ways which require the invalidation of the Subject Regulations.

28 Nevertheless, the Subject Regulations authorize and require psychologists to act beyond
the limits of their licensure if they are to act in a competent manner to exercise their authority under the
Subject Regulations. Several examples prove this point.

²¹ Unfortunately after discharge, the patient stopped taking his medications “as if he preferred his delusions to the
reality of living with Huntington’s disease” and became delusional again. (*Id.*)

1 1. How can a psychologist who is not licensed to diagnose or treat
2 nonpsychological medical illness, exercise the authority granted by the Subject Regulations to diagnose
3 and decide whether to admit or discharge patients from a hospital when well documented scientific
4 research establishes that nonpsychological medical illness which is beyond a psychologists' licensure is
5 often interwoven with apparent psychological illness? Repeated scientific studies establish that:

6 a. Nonpsychological medical illnesses are often associated with
7 mental illness.²²

8 b. Well over half of the patients with serious mental illness also
9 suffer from nonpsychological illness and such illness is often undiagnosed.²³

11 ²² Saari, et al., A 4-Fold of Metabolic Syndrome in Patients With Schizophrenia: The Northern Finland 1966 Birth Cohort Study, 66 J. Clin. Psychiat. 559 (May, 2005) [Schizophrenia is associated with a shortened life expectancy and increased somatic comorbidity, including cardiovascular disorders]; Salsberry, et al., Use of General Medical Services Among Medicaid Patients With Severe and Persistent Mental Illness. 56 Psych. Services 459 (April, 2005) [Persons with severe mental illness use general medical services at high rates when compared with the populations at large and underuse screening tests for medical illness]; Jones, et al., Prevalence, Severity and Co-occurrence of Chronic Physical Health Problems of Persons With Serious Mental Illness. 55 Psych. Services No. 11 (Nov., 2004) [74% of the study sample of patients with serious mental illness are diagnosed with at least one chronic health problem and 50% are diagnosed with two or more chronic health problems]; Simon, et al., An International Study of the Relation Between Somatic Symptoms and Depression, 341 New Eng. J. of Medicine 1329 (1999); Sternberg, Testing for Physical Illness in Psychiatric Patients, 47 J. Clin. Psychiat. 1 (Supp. 1986) [Lists the following as physical causes frequently associated with depression - hyperthyroidism, hypothyroidism, Addison's disease, Cushing's disease, diabetes, hyperparathyroidism, hypoglycemia, influenza, hepatitis, viral pneumonia, carcinoma of the head and pancreas, Parkinson's disease, cerebral arteriosclerosis, senile dementia, normal pressure hydrocephalus, focal lesions of the nondominant lobe, subarachnoid hemorrhage, postsurgical procedures, and metal intoxications with thallium and mercury]; Adler & Griffith, Concurrent Medical Illness in the Schizophrenic Patient, 4 Schizophr. Res., 91 - 106 (Mar. - Apr. 1991); Koran, Sox, et al., Medical Evaluation of Psychiatric Patients, 46 Arch. Gen. Psychiat, 733 - 740 (1989); A.J. Giannini, et al., Psychiatric, Psychogenic and Somatopsychic Disorders Handbook 35-36 (1978), [Lists 91 different physical illnesses that may present as depression]; Hall, et al., Physical Illness Manifesting as Psychiatric Disease, 37 Arch.Gen.Psychiat. 414 989, 992 (1980) [Symptoms in schizophrenic patients, such as delusions or hallucinations, may be caused by physical illnesses, including folic acid deficiency, hepatitis, Wilson's disease, hypoglycemia, hyperthyroidism, hypothyroidism, severe anemia, syphilis, cardiac arrhythmia, diabetes mellitus, epilepsy, essential hypertension, Pick's disease, Addison's disease, arsenic poisoning, anemia and malnutrition.]

12 ²³ Jones, et al., *supra*, 55 Psych. Services No. 11 [74% of the study sample of patients with serious mental illness are diagnosed with at least one chronic health problem and 50% are diagnosed with two or more chronic health problems]; Proctor, et al., Comorbid Medical Conditions Among Depressed Elderly Patients Discharged Home After Acute Psychiatric Care, 11 Am. J. Geriatr. Psychiatry 329 (May-June, 2003) [Study of 195 older patients discharged home after hospital treatment for depression finds almost 75% of patients had at least one comorbid medical condition requiring treatment, nearly 50% had two such conditions and 25% had three or more such conditions]; Reeves, et al., Unrecognized Medical Emergencies Admitted To Psychiatric Units, 18 Am. J. Emerg. Med. 390 (July, 2000) [Review of 64 patients with unrecognized nonpsychiatric medical emergencies who were admitted to psychiatric units]; Hall, et al., *supra*, 37 Arch. Gen. Psychiat. 989, 991 [In this study 80% of psychiatric patients suffered from previously undetected physical illnesses requiring medical intervention, and 46% of the patients had unrecognized medical illnesses that caused or exacerbated their psychiatric symptoms]; Koranyi, Morbidity and Rate of Undiagnosed Physical Illness in a Psychiatric Clinic Population, 36 Arch. Gen. Psychiat. 414, 415 (1979) [In a study of 2,090 psychiatric clinic patients, 43% suffered from major medical illnesses, and close to half of these medical illnesses were undiagnosed by the referring sources; 69% of the medical illnesses contributed

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1 c. Nonpsychological medical illnesses often manifest themselves as
2 psychological disease or symptoms and go untreated if not diagnosed.²⁴

3 d. Sometimes psychological illness exhibits itself as symptoms of
4 other medical illness.²⁵

5 e. Sometimes a medication a patient is taking for a nonpsychological
6 medical illness causes or amplifies symptoms of mental illness.²⁶

7 2. The nonpsychological medical complexities described above limit the
8 competency of psychologists, since they lack medical training, and justify the limitations in their
9 licensure.

10 **VIII. PLAINTIFFS SHOULD BE AWARDED ATTORNEYS' FEES IF THEY ARE**
11 **SUCCESSFUL ON THE MERITS.**

12 Plaintiffs should be awarded attorneys' fees pursuant to Code of Civil Procedure § 1021.5
13 if they are successful on the merits of the First Amended Petition. Code of Civil Procedure § 1021.5
14 authorizes an award of attorneys' fees if five elements are met:

- 15 A. Plaintiffs are the "successful party."
16 B. The action results in the enforcement of "an important right affecting the public
17 interest."
18 C. The action confers a "significant benefit" on the general public or "a large class of
19 persons."

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21
22 considerably to the patient's psychiatric condition].

23 ²⁴ Kaplan & Sadock, *Synopsis of Psychiatry*, (8th ed. 1998) ch.7 at p. 256 ["Thyroid disease and other endocrinopathies
24 may appear as mood disorder; cancer or infectious disease, as depression; infection and connective tissue diseases, as short-
25 term changes in mental status."]; A.J. Giannini, et al., *supra*, 35-36; Hall, et al., *supra*, 36 Arch. Gen. Psychiat. 414, 415; Hall
& Beresford, *Psychiatric Manifestations of Physical Illness* in 2 *Psychiatry*, ch.88, pp. 2-4 (R. Michels, et al., eds., rev. ed.
1988).

26 ²⁵ Goldberg & Bridges, *Somatic Presentations of Psychiatric Illness in Primary Care Setting*, 32 J. Psychosom. Res.
137 (1988); Bridges & Goldberg, *Somatic Presentations of DSM III Psychiatric Disorders in Primary Care*, 29 J.
Psychosom.Res. 563 (1985).

27 ²⁶ Bremner, et al., *Functional Brain Imaging Alterations In Acne Patients Treated With Isotretinoin*, 162 Am. J. Psych.
983 (May, 2005) [4 month treatment trial with isotretinoin for acne was associated with a decrease in brain function in the
28 brain region implicated in depression and reinforces case reports of depression developing in conjunction with isotretinoin
treatment and resolving on discontinuation of the medication.]

1 D. The necessity and financial burden of private enforcement makes an award
2 appropriate.

3 E. The fees, in the interests of justice, will not be paid out of any recovery in the
4 lawsuit.

5 If plaintiffs prevail on the merits they will meet the criteria necessary for an award of
6 attorneys' fees:

7 1. They will be the successful party.

8 2. Plaintiffs will have obtained enforcement of the requirement that State
9 agencies must comply with the APA in the adoption and amendment of regulations. The requirement is
10 needed to protect an important right affecting the public interest. That right is compliance with the APA
11 by State government to provide transparency and public participation in the State's adoption of
12 regulations. (See, II.B., *supra*.) Furthermore, plaintiffs will have protected the right of patients
13 suffering from mental illness to receive proper hospital care in compliance with the law. These are also
14 important rights affecting the public interest.

15 3. Plaintiffs will have significantly benefited that large class of persons who
16 are receiving or will receive hospital treatment for mental illness by requiring compliance with various
17 laws enacted to protect those patients. Also, they will have significantly benefited the general public,
18 which has an interest in such treatment and has an interest in the transparency and public participation
19 which compliance with the APA requires.

20 4. It goes without saying that the prosecution of this petition, seeking private
21 enforcement of important public rights, has required a substantial financial burden on plaintiffs. (If this
22 request for attorneys' fees is granted, plaintiffs, with leave of Court, will present documentation of their
23 financial burden in prosecuting this matter.)

24 5. Finally, the last element for recovery of attorneys' fees under Code of
25 Civil Procedure § 1021.5 does not apply since plaintiffs do not seek any monetary recovery other than
26 attorneys' fees. (That last element is that attorneys' fees should not be paid out of any recovery.)

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3 **IX. CONCLUSION.**

4 For the foregoing reasons the Court is respectfully requested to grant the relief sought in
5 the First Amended Petition. If the Court grants this relief, Plaintiffs request a hearing and a briefing
6 schedule on the issue of the amount of their entitlement to attorneys' fees.

7
8 Dated: December 23, 2005

NOSSAMAN, GUTHNER, KNOX & ELLIOTT, LLP
ROBERT J. SULLIVAN
DANIEL H. WILLICK

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By: _____
DANIEL H. WILLICK
Attorneys for Plaintiffs

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of , State of California. I am over the age of 18 and am not a party to the within action; my business address is Nossaman, Guthner, Knox & Elliott, LLP 445 S. Figueroa Street, 31st Floor Los Angeles, California 90071-1602.

On **December 23, 2005**, I served the foregoing document(s) described as **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE AND TO INVALIDATE APPROVAL OF REGULATIONS BY THE OFFICE OF ADMINISTRATIVE LAW** on interested parties in this action by placing () the original (X) a true copy thereof enclosed in a sealed envelope as follows:

Julie Weng-Gutierrez, Esq.
Deputy Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

(X) **(By U.S. Mail)** I am readily familiar with my employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter is more than one day after date of deposit for mailing in affidavit. I deposited such envelope(s) with postage thereon fully prepaid to be placed in the United States Mail at Los Angeles, California.

() **(By Overnight Express)** I served a true and correct copy by Overnight Express or other overnight delivery service, for delivery on the next business day. A true and correct copy of the Overnight Express or other overnight delivery service airbill is attached hereto.

(X) **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

() **(FEDERAL)** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on **December 23, 2005**, at Los Angeles, California.

Mitchi Shibata