FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

CAROLA KIEVE, M.D.,

Plaintiff,

v. **No. D 101-CV-2014-00140**

NEW MEXICO DEPARTMENT OF HEALTH AND THE MEDICAL CANNABIS ADVISORY BOARD,

Defendants.

REPLY TO RESPONSE TO MOTION TO DISMISS

COME NOW the Defendants New Mexico Department of Health ("Department") and the Medical Cannabis Advisory Board and submit their Reply to the Response to the Defendants' Motion to Dismiss, stating as follows:

A. No Standing and No Case or Controversy Regarding Alleged Violation of Compassionate Use Act

1. As to the Plaintiff Personally

In order to maintain this action, the Plaintiff must demonstrate standing, as well as the existence of a case or controversy. *Forest Guardians v. Powell*, 2001-NMCA-028, ¶ 16, 130 N.M. 368; NMSA 1978, § 44–6–2. Standing requires, in part, that the Plaintiff establish the existence of an "injury in fact", which is defined as "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Forest Guardians v. Powell*, 2001-NMCA-028, ¶¶ 16, 24, 130 N.M. 368.

To demonstrate the existence of an actual controversy, the Plaintiff must demonstrate a controversy involving rights or other legal relations of the parties seeking declaratory relief; a claim of right or other legal interest asserted against one who has an interest in contesting the

claim; that interests of the parties are real and adverse; and that the issue involved is ripe for judicial determination. *City of Las Cruces v. El Paso Elec. Co.*, 1998-NMSC-006, ¶ 16, 124 N.M. 640. "The mere possibility or even probability that a person may be adversely affected in the future by official acts' fails to satisfy the actual controversy requirement." *Yount v. Millington*, 1993-NMCA-143, ¶ 36, 117 N.M. 95, 103 (internal quotation omitted).

In the Response, the Plaintiff claims that the Plaintiff has suffered injuries as a result of the Department's alleged "failure to approve the applications of Dr. Kieve's patients". Response at 1-2. The Response claims that the Plaintiff is injured by an "invasion of the relationship between herself and her patients"; by "the negative impact of the Department's actions on Dr. Kieve's medical practice and her ability to serve her patients"; and by "the refusal to approve her patient's applications." Response at 2. The Response cites to the Complaint at paragraphs 7 through 13 in support of these contentions. *Id.* However, those paragraphs do not contain these allegations, nor do they describe any injury to the Plaintiff. Rather, they describe the Department's application of its rules.

The Complaint alleges at paragraph 15 that a patient's application was "not approved". The Department has demonstrated that none of the patient applications certified by the Plaintiff were ever denied, and that certain patient applications certified by the Plaintiff remain pending. With respect to those applications, the "applicant" is the individual who seeks to become enrolled as a patient, not a psychiatrist who has certified their diagnosis of PTSD. 7.34.3.7(G) NMAC (defining "applicant"). The Complaint does not describe any injury to the Plaintiff resulting from the alleged "non-approval" of a patient application. Contrary to the allegations of the Response, the Complaint does not allege any impact to the Plaintiff at all. The Complaint describes the Department's application of its rule; the Department's request for medical

documentation; and the Plaintiff's belief that the Department lacks legal authority to do these things. The Complaint does not allege a financial impact to the Plaintiff, or a loss of business, or any other conceivable negative consequence incurring to the Plaintiff as a result of the Department's application of its regulation. Because the Complaint does not demonstrate an invasion of a legally-protected interest of the Plaintiff that is concrete and particularized and actual or imminent, it fails to establish standing, and must be dismissed. Likewise, because the Complaint does not demonstrate the existence of a controversy involving rights of the individual seeking declaratory relief, it fails to demonstrate the existence of a case or controversy, and must be dismissed.

2. <u>As to Third-Party Standing of the Plaintiff</u>

The Response cites to *NARAL et al. v. Johnson*, 1999-NMSC-005, 126 NM 788, and other abortion rights cases in support of the contention that the Plaintiff holds third-party standing to sue on behalf of patients in the medical cannabis program. In the NARAL case, physicians who provided abortion services were deemed to have third-party standing to sue on behalf of Medicaid-eligible women whose rights they sought to assert in court. In reaching this decision, the NM Supreme Court relied upon the decision in *Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868 (1976), holding that privacy concerns and time constraints imposed a hindrance on the ability of Medicaid-eligible women to protect their own interest in obtaining medically-eligible abortions. *Singleton* was a case very similar to *NARAL*, in which abortion providers sued to challenge the constitutionality of a state statute that prevented certain abortions from being funded through Medicaid. The Court in that case emphasized the significant hindrance to the ability of the patients to sue, noting that a woman who seeks to obtain an abortion will

irrevocably lose the right to do so after only a few months due to development of the fetus. *Singleton*, 428 U.S. at 117-18; 96 S.Ct. at 2875-76.

No such concerns are at issue in this case. There is no time constraint that prevents applicants with post-traumatic stress disorder from suing to protect their interests. Moreover, the potential stigma associated with a public dispute over a litigant's right to obtain an abortion is completely dissimilar to an individual's lawful enrollment in or application to a medical cannabis program. Patients in the New Mexico Medical Cannabis Program enjoy unambiguous legal protections under State law from arrest, prosecution and seizures, and the U.S. Attorney General has repeatedly expressed that individuals who comply with state medical cannabis laws will not be arrested or prosecuted by Federal authorities. *See* NMSA 1978, § 26-2b-4 ("Exemption from Criminal and Civil Penalties for the Medical Use of Cannabis "). The Lynn and Erin Compassionate Use Act, NMSA§ 26-2B-1 *et seq.*, was passed in 2007, and in the years before and since its inception, nearly half of all states in the United States have adopted medical cannabis programs (most of them within the last few years), recognizing benefits to be derived from cannabis for various medical conditions. Recently two states (Colorado and Washington) legalized the recreational use of cannabis. The President of the United States recently expressed the opinion that consumption of cannabis is less dangerous than the consumption of alcohol. If ever there was a social stigma that attached to a person's enrollment in a medical cannabis program, it has dissipated. News media routinely report on matters concerning the Program, and regularly interview patients and producers in the Program. The Medical Cannabis Program is a uniquely visible, public program; and persons enrolled in the Program are vocal and active in advocating for their interests. There is no plausible hindrance to the assertion of a legal right by

an applicant or enrollee in the New Mexico Medical Cannabis Program, much less a significant hindrance of the kind described in the cases cited by the Plaintiff.

B. No Standing and No Case or Controversy Regarding Alleged Violation of Governmental Conduct Act

Once again: in order to pursue declaratory judgment, the Plaintiff must establish standing, as well as the existence of a case or controversy. To establish standing, the Plaintiff must demonstrate not only the existence of an injury in fact, but a "causal relationship between the injury and the challenged conduct", and "a likelihood that the injury will be redressed by a favorable decision." *Forest Guardians v. Powell*, 2001-NMCA-028, ¶ 16, 130 N.M. 368. The Complaint claims that Dr. Rosenberg applied rules of the Department that require an attestation that standard treatments had failed to bring adequate relief, and that the hiring of Dr. Steven Rosenberg violated the Governmental Conduct Act. The Complaint, however, does not allege an injury resulting from the hiring of Dr. Rosenberg. Even if the Court were to assume that the Plaintiff was injured in some manner by the application of the Department's rules, the creation and application of the Department's rule did not depend upon the hiring of a Medical Director for the Medical Cannabis Program. Rather, the rule was adopted by the Department Secretary in 2010. There is no causal relationship between the hiring of Dr. Rosenberg and the Department's rule, and no such causal relationship is described in the Complaint.

With respect to the request for declaratory judgment concerning an alleged violation of the Governmental Conduct Act, the Complaint does not identify any one of the three criteria that must be met in order to establish standing. The Complaint does not identify an injury to the Plaintiff; there is no causal relationship between an injury to the Plaintiff and the Department's hiring of Dr. Rosenberg; and there is no likelihood that an injury to the Plaintiff will be redressed by a declaratory judgment that the hiring of Dr. Rosenberg violated the GCA. Moreover, the

Governmental Conduct Act does not independently confer standing to a plaintiff to sue to enforce its terms, but instead identifies a framework for reporting alleged violations to the Secretary of State. NMSA 1978, § 10-16-18. For all of these reasons, the Plaintiff lacks standing to assert this claim, and the claim must be dismissed.

C. Failure to State a Claim Against Medical Cannabis Advisory Board

The Defendants in their Motion to Dismiss have identified the role of the Medical Cannabis Advisory Board under statute and regulation, which is purely advisory in nature and which does not involve review or approval of patient applications. Motion at 6-7. The Defendants have also noted that Dr. Steven Rosenberg is not a member of, nor affiliated with, the Advisory Board. *Id.* The Plaintiff's Response acknowledges that the Medical Cannabis Advisory Board "should not be named as a party in this case." Response at fn. 1. Accordingly, all claims against the Advisory Board should be dismissed with prejudice.

D. Failure to State a Claim Regarding the Lynn and Erin Compassionate Use Act

The Response to the Motion to Dismiss clarifies that the Plaintiff's claim for declaratory judgment regarding the Compassionate Use Act is predicated on a theory that Section 26-2B-7(B) of that Act identifies certain information to be submitted to the Department in support of an enrollment application, and that the statute therefore prevents the Department of Health from either (1) requiring a patient to submit an attestation from a medical practitioner that standard treatments had failed to bring adequate relief, or (2) requesting medical documentation to verify the accuracy of statements made in a patient's application. The Plaintiff's legal theory is faulty, and for the reasons stated in the Defendants' Motion, the claim must be dismissed.

1. <u>The Department's General Authority Under Statute</u>

The Plaintiff's claim regarding the Lynn and Erin Compassionate Use Act turns on whether the Court deems the Department's application of additional criteria to conditions added by the Department to be in harmony with the Department's authority under statute. Pursuant to the Compassionate Use Act at NMSA 1978, § 26-2B-7 at Subsection A, the Department is authorized to promulgate rules to implement the purpose of the Lynn and Erin Compassionate Use Act, and those rules **"shall[] govern the manner in which the department will consider applications for registry identification cards and for the renewal of identification cards for qualified patients and primary caregivers".** Subsection B provides that the Department shall issue registry identification cards to a patient and to the primary caregiver for that patient, if any, who submit a written certification from a medical practitioner and other information, **"in accordance with the department's rules".** (Emphasis added). Subsection C provides that "[t]he department may deny an application only **if the applicant did not provide the information required pursuant to Subsection B of this section or if the department determines that the information provided is false**." (Emphasis added).

These provisions authorize the Department of Health to deny an application for enrollment to the Medical Cannabis Program if the applicant did not provide information required to be submitted pursuant to the Department's rules. Alternatively, if the statute is considered to be not sufficiently specific, the authority of the Department may be fairly implied from the statute. The statute does not include text that would prevent the Department of Health from requiring a PTSD applicant to submit an attestation from a medical practitioner that standard treatments have failed to bring adequate relief. Also, nothing in statute conflicts with the Department's adoption of the rule (at 7.34.3.10(A)(1)(d) NMAC) that provides that "[t]he

department may verify information on each application and accompanying documentation by … contacting the practitioner to obtain further documentation to verify that the applicant's medical diagnosis and medical condition qualify the applicant for enrollment in the medical use cannabis program." These provisions govern the manner in which the Department will consider applications.

2. The Department's Specific Authority as to Medical Conditions Approved by the Department, Including PTSD

In the Response, the Plaintiff contends that although the statute confers to the Department of Health the discretion to add additional debilitating conditions to the list of approved conditions, it does not specifically grant authority to the Department to impose additional application criteria on conditions added by the Department. The Plaintiff implicitly contends that the Department cannot apply additional criteria to the conditions added by the Department, because to do so is not "in harmony with its statutory authority". Response at 10-11, *citing N.M. Bd. of Pharm. v. N.M. Bd. of Osteop. Med. Ex'mrs,* 1981 NMCA 034, 626 P.2d 854 (internal citation omitted), *Jones v. Employment Serv. Div.,* 1980 NMSC 120, 95 NM 97, 99 (1980).

In the *N.M. Board of Pharmacy* case cited in the Response, the Court of Appeals held that the Board of Osteopathic Medical Examiners did not have authority to create a rule that allowed osteopathic physicians to delegate to physicians' assistants the authority to prescribe certain controlled substances, because the Board's authorizing statute provided that "the board shall not adopt any rule or regulation allowing an osteopathic physician's assistant to dispense dangerous drugs…." *N.M. Bd. of Pharmacy*, 1981 NMCA 034, ¶ 8. Similarly, in the *Jones* case cited in the Response, the NM Supreme Court noted that "[a]n agency by regulation cannot overrule a *specific* statute", and stated that the Human Services Department could not foreclose a

right of appeal that was established in statute by including a contrary provision in its regulations. *Jones*, 1980-NMSC-120, ¶3, 95 N.M. 97, 99 (emphasis added).

In contrast to the statutes referenced in the cited cases, the section of the Compassionate Use Act at issue does not contain any prohibition, nor any specific text that would indicate a legislative intent contrary to the rule adopted by the Department of Health. Rather, the relevant passage of the Compassionate Use Act states broadly that **"any other medical condition, medical treatment or disease *as approved by the department*" may be included as a participating condition in the New Mexico Medical Cannabis Program**. NMSA 1978, § 26-2B-3(B)(8) (emphasis added). The expression "as approved by the department" establishes that the Department of Health has the discretion not only to determine what additional medical conditions, treatments or diseases are approved, but to specify the application approval criteria that may apply to each of those Department-approved conditions.

It is undisputed in this case that PTSD was added by the Department of Health pursuant to its lawful authority under this section of the Compassionate Use Act. PTSD was the first, and is (to date) the only mental health diagnosis approved for participation in the New Mexico Medical Cannabis Program. In approving PTSD, the former Cabinet Secretary, Alfredo Vigil, M.D., emphasized the requirement that patients must submit an attestation from a medical practitioner that "standard treatments" had failed to bring adequate relief. Attachment B to Motion. To conclude that the Department of Health is in some way prohibited from applying this standard, or from requesting documentation to confirm its accuracy, would mean disregarding the specific authority conferred by the statute, and also the broader intent of the statute: "to allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments." NMSA

1978, § 26-2B-2. Contrary to the Plaintiff's arguments, the New Mexico Department of Health is not required to "rubber stamp" applications for enrollment under PTSD, without regard for the application criteria adopted by the agency.

The authority to adopt the PTSD application criteria are not only fairly implied from the agency's authority under the statute, but they are consistent with the agency's express statutory authority. *N.M. Mining Ass'n v. N.M. Mining Comm'n*, 1996–NMCA–098, ¶ 15, 122 N.M. 332. Furthermore, because the legal question at issue in this case necessarily implicates the determination of a fundamental policy within the scope of the agency's statutory function, a heightened degree of deference should be conferred to the agency. *Rio Grande Chapter of Sierra Club v. New Mexico Mining Comm'n*, 2003-NMSC-005, ¶ 25, 133 N.M. 97, 106 (internal citation omitted). For each of the reasons stated, this claim must be dismissed.

E. Failure to State a Claim Regarding the Governmental Conduct Act

The Response reasserts the legal contention of the Complaint that the hiring of Dr. Rosenberg violated the GCA, and also states that "Dr. Rosenberg's decisions regarding his competitors' patients' applications" violate the GCA. Response at 11. However, the declaratory judgment claim of the Complaint does not assert a GCA violation related to decisions made by Dr. Rosenberg, but instead addresses the hiring of Dr. Rosenberg by the Defendant Department of Health. *See* Complaint at ¶¶ 56 ("The hiring decision that resulted in the violation of the GCA has concluded."), 57 ("The Court may declare, on purely legal grounds, that the Defendants' hiring decision violates the GCA.").

The Complaint does not include any factual allegation that could form the basis for a holding that the Defendants violated the Governmental Conduct Act. The Complaint asserts that Dr. Rosenberg is "routinely placed in the position of approving and denying applications

submitted by his economic competitors, namely other physicians whose patients did not choose Dr. Rosenberg for certification." Complaint at ¶ 36. This is the only specific factual allegation made in support of this claim that could relate to an alleged violation of the GCA; but even accepted as true, it would not indicate that Dr. Rosenberg has taken any "official act directly affecting [his] financial interest". NMSA 1978, §10-16-4. The Complaint includes the contention (at Paragraph 38)) that "[e]ach time Dr. Rosenberg denies an application submitted by a competitor's patient, he takes an official action that affects his own personal financial interest"; but this represents a legal conclusion, rather than a factual allegation.

Section 10-16-4 of the Governmental Conduct Act prohibits a public officer or employee from engaging in any official act directly affecting that officer or employee's financial interest. The fact that a public officer or employee is "routinely placed in the position" to act in a manner that impacts his or her financial interest is not sufficient to establish a violation of the GCA. The Complaint does not allege that Dr. Rosenberg has denied an application during his employment with the Department of Health in order to acquire that patient's business via his private practice. Barring the possibility of such a direct benefit, the only potential benefit to Dr. Rosenberg that could result from the denial of a patient's application would be the same potential benefit that would incur to *all other certifying medical practitioners*: the potential for additional business. This potential benefit is implicitly alleged in the Complaint, but such a benefit is far too abstract and speculative to satisfy the GCA requirement that the public employee's action "directly affect" the public employee's financial interest. Once again, if this type of decision were deemed violative of the GCA, then many disciplinary actions against individuals' professional licensure would be deemed to violate the GCA, simply because a decision-maker in those circumstances was licensed in the same profession as an affected licensee.

F. Attorney Fees and Costs Are Not Recoverable

The Complaint cites Section 44-6-9 of the Declaratory Judgment Act as a basis for a request for attorney's fees and costs. However, that section of the statute does not authorize recovery of attorney's fees or costs, and it is settled that such costs are generally not recoverable in declaratory judgment actions. *Sec. Pac. Fin. Servs., a Div. of Bank of Am., FSB v. Signfilled Corp.*, 1998-NMCA-046, ¶ 21, 125 N.M. 38, 45 (holding in part that "attorney fees are not recoverable by rule of law or by statute" in declaratory judgment actions). The Complaint also does not allege any facts that might demonstrate that an exception to that general rule (such as fraud, bad faith, etc.) should apply in this case. The Response states that the Plaintiff "agrees that attorney's fees are not recoverable in this case at this time", without presenting any authority regarding why attorney's fees might be recoverable at a later date. For these reasons, the Defendants renew their request that the Plaintiff's request for attorney's fees be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 17th, 2014, I caused the foregoing document to be filed with the Court and served upon the following persons electronically via the Court's electronic filing system:

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