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STATE OF NEW MEXICO
FIRST JUDICIAL DISTRICT COURT
SANTA FE COUNTY

Carola Kieve, M.D.,
Plaintiff

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

New Mexico Department of Health, and
The Medical Cannabis Advisory Board,
Defendants.

Dr. Kieve's Response to Defendants' Motion to Dismiss

COMES NOW Carola Kieve, M.D. to respond to Defendants' Motion to dismiss. Because the Defendants' motion fails to satisfy the requirements for a motion to dismiss under Rule 1-012(B)(6) NMRA, it should be dismissed so that this case may proceed to a declaratory judgment in Dr. Kieve's favor.[1]

Dr. Kieve Has Individual and Third-Party Standing to Bring a Claim Under the Lynn and Erin Compassionate Use Act

Dr. Kieve alleges in her complaint that the Defendants have failed to approve her patients' applications for medical cannabis to treat post-traumatic stress disorder (PTSD)[2]. The complaint further alleges that the Defendants' failure to approve the applications of Dr. Kieve's patients is

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[1] Dr. Kieve agrees that the Medical Cannabis Advisory Board should not be named as a party in this case.

[2] Contrary to the statements in the Defendants' motion, Dr. Kieve has not alleged that her patients' applications have been formally denied; rather she has alleged that the applications have not been approved and will remain unapproved unless she complies with the Defendants' unlawful regulations. The practical effect of this seemingly permanent state of limbo is an effective denial. The Defendants acknowledge that certain of Dr. Kieve's patients' applications remain "pending," apparently for an interminable period.

the result of Dr. Kieve's medical decision not to force her patients to take pharmaceuticals to treat their PTSD or to endure treatments that Dr. Kieve believes would be unhelpful or even harmful. Complaint at ¶¶ 7-13. The injuries to Dr. Kieve are, among others, 1) the invasion of the relationship between herself and her patients by the Defendants' imposition of requirements on her medical practice that are not lawful, 2) the negative impact of the Departments' actions on Dr. Kieve's medical practice and her ability to serve her patients and 3) the refusal to approve her patients' applications. The injury to Dr. Kieve's patients is the effective denial of their applications to receive medical cannabis identification cards, which prevents the patients from receiving the medicine that they need for the treatment of their PTSD.

Courts have long held that physicians have standing to bring claims like the one brought by Dr. Kieve. In *Nova Health Systems v. Grady*, 416 F.3d 1149, (10th Cir. 2005), the Tenth Circuit decided a case brought by an abortion provider challenging the imposition of rules restricting the plaintiff's ability to provide abortion services to minors. In that case, the Court determined that the plaintiff, a reproductive health clinic, had established an injury-in-fact on the showing that the restrictions might reduce the number of patients to whom the clinic could provide services. *Id.* at 1155. The Court found that the risk to the clinic of having to turn away patients was enough to satisfy the injury-in-fact requirement. *Id.* (citing *Singleton v. Wulff*, 428 U.S. 106, 113, (identifying abortion providers' injury as a direct financial impact on their practice); *Doe v. Bolton*, 410 U.S. 179, 188, (1973) (physicians may establish injury in fact when challenging abortion regulations by showing a "sufficiently direct threat of personal detriment"). Like the health care providers in *Nova*, *Singleton* and *Doe*, Dr. Kieve in this case faces – and has already suffered – a direct impact to her practice as a direct result of the Defendants' imposition of unlawful regulations on her practice

of medicine. Not only will the regulations force patients from Dr. Kieve's practice to the practice of a different physician who may be willing to comply with the unlawful regulations, the regulations will invade the patient-physician relationship.

New Mexico's courts have followed a similar approach to the *Nova* court when conducting injury-in-fact determinations. In *NARAL v. Johnson*, 1999-NMSC-0005, the Supreme Court examined in detail whether and under what circumstances a physician can establish an injury-in-fact as the result of a regulation being imposed on her practice. In *NARAL*, the plaintiffs were challenging new state Medicaid regulations that threatened to "restrict funding for medically necessary abortions under the State's Medicaid program." *Id.* at ¶ 1. The plaintiffs had alleged, among other things, that the regulations would limit their ability to provide services to their patients. The State challenged the plaintiffs' standing to bring the claim on the grounds that the physicians were not the injured parties and that only patients could bring a claim for injury. The Court stated that "[i]n order to obtain standing for judicial review in New Mexico, litigants generally must allege that they are directly injured as a result of the action they seek to challenge in court[;]…however, this requirement is met even when the extent of the alleged injury is slight." *Id.* At ¶ 12 (citing *Ramirez v. City of Santa Fe*, 115 N.M. 417, 420, 852 P.2d 690, 693). The Court also noted that our Courts may confer standing "on the basis of the importance of the public issues involved." *Id.* (citing *State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359, 363, 524 P.2d 975, 979 (1974)). Ultimately, the Court concluded that the plaintiffs in that case had both a "direct financial interest" that was impacted by the new regulations as well as a "close relation to the [patients] whose rights they [sought] to assert in court." *Id.* At ¶ 14. Thus, the Supreme Court held that

physicians whose practices may suffer a financial injury as the result of a state regulation have standing to challenge the regulation.

Like the plaintiffs in *NARAL*, Dr. Kieve has alleged that the unlawful regulations imposed by the Defendants have had – and will continue to have – an injurious impact on her ability to serve patients. Just like the plaintiffs in *NARAL* and *Nova*, Dr. Kieve will continue to suffer financial injury if the Defendants continue to enforce their unlawful regulations. Dr. Kieve's complaint alleges that she cannot comply with the Defendants' unlawful regulations because the regulations require information to be produced that does not exist and require Dr. Kieve to make medical decisions that she believes are not in the best interest of her patients. Complaint at ¶ 10-15. The complaint further alleges that the Defendants have refused to grant Dr. Kieve's patient's application because she cannot comply with the Defendants' unlawful regulations and also alleges that the Defendants plan to continue their refusal to approve new patients' applications. Complaint at ¶ 16. Taken together, these allegations clearly show that Dr. Kieve has standing to bring this claim based on the actual injury (and the reasonably anticipated future injury) to her practice's finances as well as the actual injury to the patient-physician relationship she enjoys with her patients.

In addition to Dr. Kieve's individual standing in this case, she also has standing to bring this case on behalf of her patients whose applications are not approved due to the imposition of the Defendants' unlawful regulations. In *Pennsylvania Psychiatric Society v. Green Spring Health Services, Inc.*, 280 F.3d 278 (3rd Cir. 2002), that state's psychiatric society sued "several managed health care organizations on behalf of its member psychiatrists <u>and their patients</u>...[alleging] that the [defendants] impaired the quality of health care provided by psychiatrists to their patients by

refusing to authorize necessary psychiatric treatment, excessively burdening the reimbursement process and impeding other vital care." (Emphasis added). The court repeated the well-known requirements for parties asserting third-party standing: "1) the plaintiff must suffer injury; 2) the plaintiff and the third party must have a "close relationship"; and 3) the third party must face some obstacles that prevent it from pursuing its own claims." *Id.* At 288-89 (citing *Campbell v. Louisiana*, 523 U.S. 392, 397 (1998)).

Regarding the requirement that the plaintiff and the third-party have a close relationship, the court held that "patients' relationships with their psychiatrists fulfills this requirement." *Id.* At 289. The court continued to note that "[p]sychiatrists clearly have the kind of relationship with their patients which lends itself to advancing claims on their behalf. This intimate relationship and the resulting mental health treatment ensures psychiatrists can effectively assert their patients' rights...[and] litigate [] claims for both parties, as their interests are clearly aligned." *Id.* (citing *Amato v. Wilentz*, 952 F.2d 742 (3rd Cir. 1991) (noting doctor-patient relationship provides strong likelihood of effective advocacy by a physician on behalf of his patients.)) The court also found that the "obstacles" requirement was met in that case. In finding that mental health patients face obstacles to bringing their own claims, the court first noted that the requirement "does not require an absolute bar from suit, but 'some hindrance to the third party's ability to protect his or her own interests.'" *Id.* At 290 (citing *Powers v. Ohio*, 499 U.S. 400, 411 (1991)). The court recognized that "[t]he stigma associated with receiving mental health services presents a considerable deterrent to litigation" and that "[b]esides the stigmatization that may blunt mental health patients' incentive to pursue litigation, their impaired condition may prevent them from being able to assert their

claims." *Id.* Thus, the Court found that psychiatrists possess third-party standing to advance claims on their patients' behalf.

Like the psychiatrists in *Pennsylvania Psychiatric Society*, Dr. Kieve has standing to present the claims of her patients who have suffered injury as a result of the Defendants' enforcement of their unlawful regulations. She, as shown above, has suffered an injury herself, she has a "close relationship" with her affected patients, and her patients face precisely the type of obstacles that the patients faced in *Pennsylvania Psychiatric Society*.[3]

For these reasons, the Court should deny the Defendants' motion to dismiss Dr. Kieve's complaint because she has both individual and third-party standing to bring the instant claim.

Dr. Kieve Has Brought to the Court a Controversy that is Ripe for Decision

The Defendants claim in their motion to dismiss that there is no controversy between the parties. As shown above and in her complaint, Dr. Kieve has alleged in her complaint that the Defendants have promulgated rules, that the Defendants' enforcement of the rules have caused her injury, that the Defendants' continued enforcement of the rules will continue to cause her injury, and that the Defendants' enforcement of the rules has caused injury to her patients. Interestingly, the Defendants acknowledge in their motion that Dr. Kieve has alleged an injury as the result of the Defendants' enforcement of their unlawful regulations, which should alone be a sufficient basis on which the Court should deny the Defendants' motion. Motion at 4-5.

[3] Our Supreme Court, in *NARAL*, followed the reasoning of *Pennsylvania Psychiatric Society*, in holding that the plaintiffs in that case could assert the claims of their patients. The Court held that the doctor-patient relationship is a "close relationship" for a third-party standing analysis and that "privacy concerns and time constraints" are enough of an obstacle to prevent patients from asserting their own claims. 1999-NMSA-005 at ¶ 14.

The Defendants' motion briefly argues that Dr. Kieve should have been forced to allow "the administration application process to run its course." Motion at 3. The doctrine of administrative exhaustion has no bearing this case. Under *Neff v. State of New Mexico*, 116 N.M. 240, 244 (Ct. App. 1993), a party is not required to exhaust administrative remedies "where the administrative agency lacks the power to decide the question, or where exhaustion would be vain and futile." (citing *Sandia Savings & Loan Ass'n v. Kleinheim*, 74 N.M. 95, 391 P.2d 324 (1964) and *State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc.*, 85 N.M. 521, 529, 514 P.2d 40, 48 (1973). Both factors are present in this case. First, the Defendants lack the authority to determine whether the rules challenged by Dr. Kieve are unlawful and whether the Defendants exceeded their authority in adopting them. *See*, *Public Serv. Co. of N.M. v. New Mexico Envt'l. Improvement Bd.*, 89 N.M. 223, 226, 549 P.2d 638, 641 (Ct.App.1976) (An administrative body has no common law or inherent powers, and cannot amend or enlarge its statutory authority under the guise of making rules and regulations). Second, the Defendants argue in their motion that the regulations are lawful and well within the scope of authority granted them by the Legislature. Having taken this position (that the rules are valid and enforceable) before the Court, the Defendants cannot argue that they could properly and impartially adjudicate the legality of the challenged rules (because they have already announced to this Court their decision on the matter). In other words, the Defendants' pleadings in this case establish that they have already formed a belief that they were acting lawfully and are thus incapable of making an impartial decision regarding their actions. Thus, any administrative process would be "vain and futile."[4]

[4] It also bears mentioning that, in the case before the Court, the applications that are at issue have been effectively – but not formally – denied, which is to say that they are neither approved nor denied because they Defendants claim that they are waiting for additional information from Dr. Kieve that is demanded unlawfully. This state of effective –

Furthermore, the *Neff* court made clear that in the absence of any mandatory administrative appeal process, exhaustion is not required. *Id.* at 245 ("[exhaustion not required] unless it was mandatory that plaintiff follow the administrative procedures.") (citing *Sandia*, 74 N.M. at 99). The Defendants must be aware that neither the Act nor the regulations require an administrative appeal when a patient's application is denied. The rules are clear that an administrative appeal is only available when a patient's identification card is revoked or suspended or when a patient's renewal is denied. 7.34.3.14 NMAC. Even in the case of the appeals that are allowed, there is no language in the regulations making such hearings mandatory, and there is no provision whatsoever for an administrative appeal of a denial of an identification card denial in the first instance. Thus, because administrative exhaustion would be both vain and futile and because there is no administrative review process for application denials, the Defendants' argument for administrative exhaustion is baseless. For this reason, the Defendants' motion should be denied.

Dr. Kieve Has Stated a Claim Regarding the Lynn and Erin Compassionate Use Act

Defendants' motion argues that Dr. Kieve has failed to state a claim under the Lynn and Erin Compassionate Use Act ("the Act"). Clearly this is not the case; if the Court accepts a true the allegations in Dr. Kieve's complaint, she is entitled to a declaratory judgment that the rule enforced in this case are void as a matter of law. The Defendants' argument is an argument on the

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but not formal – denial, combined with the fact that there is no appeal process on first-time applications for medical cannabis identification cards leaves Dr. Kieve and her patients in a state of permanent limbo.

merits of the case, not an argument that Dr. Kieve failed to state a claim. For this reason alone, the Defendants' motion should be denied.

Should the Court choose to consider the merits of the Defendants' arguments on whether Dr. Kieve has stated a claim, the Court will find that the Defendants' arguments are circular. Dr. Kieve alleged in the complaint that the Defendants are enforcing a rule that is outside the scope of the authority granted to them by the Legislature. Specifically, Dr. Kieve alleges that 7.34.3.8 (B)(7) NMAC is unlawful because it imposes conditions on the issuance of medical cannabis registry cards that are expressly prohibited by the Act.[5] Dr. Kieve points out in her complaint that the Act is extremely clear when it explains the bases on which the Defendants may deny a patient's application. She notes that applicants are required by the Act to submit only four pieces of information to obtain a medical cannabis identification card: 1) a written certification from a physician; 2) the patient's name, address and date of birth; 3) the physician's name, address and phone number; and 4) the name, address and birth date of a patient's primary caregiver, if any. NMSA 1978 § 26-2B-7(B). Dr. Kieve also points out that the Defendants may deny a patient's application only when the information provided is false. NMSA 1978 § 26-2B-7(C). Thus, any patient who presents the four required pieces of information must be granted a license so long as the information is truthful.

The Act contains a limited number of "debilitating conditions" that may be treated with medical cannabis. NMSA 1978 § 26-2B-3. The Act also provides for a means by which additional conditions may be added to the list. NMSA 1978 § 26-2B-3(8). PTSD is a condition that has been added to the list by regulation. NMAC 7.34.3.8(B)(7). Thought the Act allows new debilitating

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[5] Dr. Kieve believes that the Defendants are aware that this is the challenged rule, despite the fact that the rule was erroneously cited as "*Id.*" in her complaint rather than as 7.34.3.8 (B)(7) NMAC.

conditions to be added, the Act does not contain any grant of authority to the Defendants to add additional application criteria to applications that seek to treat PTSD (or other Department-added debilitating conditions), yet this is precisely what the Defendants have done. The Defendants are requiring applicants to submit medical records and other information beyond the four pieces of information required by the Act, and in so doing the Defendants are imposing unlawful conditions on applicants and are denying applications for reasons other than untruthful submissions.

The Defendants, in their motion, state that "the Department has additional authority under [the Act] to impose requirements for qualifying conditions that are approved by the Department, including the qualifying condition at issue in this case [PTSD]." Motion at 8. The Defendants fail to cite the source of the authority in the Act, probably Instead, the Defendants state that the Act "expressly authorized the Department to 'set forth additional medical conditions, medical treatments or diseases to the list of debilitating medical conditions that qualify for the medical use of cannabis as recommended by the advisory board." Motion at 9. The Court will note that the quoted section of the Act allows debilitating medical conditions to be added but it does <u>not</u> allow the Department to add additional bases for denial of a patient's application nor does it allow the Department to demand from applicants information beyond what is required in NMSA 1978 § 26-2B-7(B). The only authority cited by the Defendants in support of their imposition of the challenged rules is the rules themselves.

It is well known that "[a]n administrative agency has no power to create a rule or regulation that is not in harmony with its statutory authority." *New Mexico Bd. Of Pharm. v. N.M. Bd. Of Osteopathic Med. Ex'mrs*, 1981-NMCA-034, 626 P.2d 854 (1981) (citing *Public Service Co. v. N.M.*

Environmental Improvement Board, 89 N.M. 223, 549 P.2d 638 (Ct.App. 1976)). It is also true that "[c]ourts defer to the interpretation of a regulation by the agency to which it is addressed," but such deference is not granted to an agency when the agency's interpretation "is plainly erroneous []." *Envt'l Imp. Div. of NM health & Env't Dept. v. Bloomfield Irr. Dist.*, 1989-NMCA-049, ¶ 12. As shown above, the Defendants have, through rule, added bases for denial of a patient's application that are not found in statute and that are clearly inconsistent with NMSA 1978 § 26-2B-7(C). The Defendants have also, through rule, attempted to force patients to submit information to the Defendants that is beyond the requirements of NMSA 1978 § 26-2B-7(B). The Act could not be clearer: a patient has to submit *only* four pieces of information to obtain a medical cannabis identification card, and the Defendants may deny an application *only* if the supplied information is false. The attempts by the Defendants to enlarge the bases for denial and to enlarge the information required from patients are clearly "not in harmony" with the Act and should not be allowed to stand. *Jones v. Employment Serv. Div.*, 95 N.M. 97, 99, 619 P.2d 542, 544 (1980)(a rule or regulation that exceeds an agency's authority or conflicts with a statute cannot stand and must yield to the statute.). For these reasons, the Court should deny the Defendants' motion.

Dr. Kieve Has Stated a Claim Regarding the New Mexico Governmental Conduct Act

In this case, Dr. Kieve alleges that the hiring of Dr. Rosenberg as the part-time medical director of the medical cannabis program violated the New Mexico Governmental Conduct Act ("the GCA"). Dr. Kieve also alleges that Dr. Rosenberg's decisions regarding his competitors' patients' applications for medical cannabis identification cards are made in violation of the GCA. Additionally, Dr. Kieve alleges that she has suffered an injury in fact as a result of the decisions

made by Dr. Rosenberg in his official capacity. Dr. Kieve seeks a declaration from this Court that the GCA has been violated. In other words, Dr. Kieve does not seek to enforce the GCA; rather, she seeks a declaration from this Court that the GCA has been violated, in the hopes that the enforcement authorities listed in the GCA might take appropriate action upon a finding of a GCA violation or that the Defendants might take a different decision with regard to the medical cannabis program's medical director.

The Declaratory Judgment Act, NMSA 1978 § 44-6-1 *et seq.* states that "the state of New Mexico, or any official thereof, may be sued and declaratory judgment entered when the rights, status or other legal relations of the parties call for a construction of…any of the laws of the state of New Mexico or the United States, or any statute thereof." Dr. Kieve is asking the Court to determine that the actions of the Defendants relating to Dr. Rosenberg's employment and his official decisions violate the GCA. This determination relates directly to the "legal relations of the parties" in this case as it bears directly on whether or not Dr. Rosenberg has an irreparable conflict of interest as to Dr. Kieve or any other physician who does not practice with Dr. Rosenberg.

Dr. Kieve Agrees that Attorney's Fees Are Not Recoverable in this Case At This Time

Dr. Kieve agrees with the Defendants that, at this stage of the case, these is not yet evidence to support the awarding of attorney's fees against the Defendants. Dr. Kieve reserves to the right to amend her demand for damages as case developments warrant.

Conclusion

Because Dr. Kieve has individual and third-party standing to bring her claims regarding the Act and the GCA, because Dr. Kieve has a stated a claim regarding both the Act and the GCA and because the issues before the Court are ripe for decision and represent an actual controversy between the parties, the Court should deny the Defendants' motion to dismiss, except as to Dr. Kieve's claims against the Medical Cannabis Advisory Board and as to her demands for attorney's fees.

Respectfully Submitted,

Egolf + Ferlic + Day, LLC

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Certificate of Service

I certify that I caused a copy of this pleading to be served on all parties entitled to notice by using the Court's online filing system.

Brian Egolf