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Federal Court Finds DOD to Be “Arbitrary and Capricious” for Denying TRICARE Coverage for Autism Therapy

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

5.2—Military Service and Child Matters

Berge v. United States, 2012 U.S. Dist. LEXIS 104401 (D.D.C. July 26, 2012).

On July 26, 2012, Judge Reggie Walton of the United States District Court for the District of Columbia overturned as “arbitrary and capricious” the Department of Defense (DOD) decision to deny coverage for Applied Behavioral Analysis (ABA) therapy for autistic children (dependents) under TRICARE Basic while approving reimbursement for this very expensive therapy under the Extended Care Health Option (ECHO). The difference is that ECHO is limited to dependents of active duty military personnel, while TRICARE Basic applies also to dependents of military retirees. Judge Walton did not mention military reservists (not on active duty) in his decision, but this issue also affects reservists participating in TRICARE Reserve Select and TRICARE Retired Reserve.

¹I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 2000 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

²BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General’s Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans’ Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

Kenneth Berge is an Air Force retiree. He and his wife Dawn Berge have a young son (referred to in the decision as “Z.B.”) who has autism. If Kenneth were still on active duty, he would be eligible for up to \$30,000 per year for ABA therapy for Z.B., through ECHO. Since Kenneth is now retired, he is not eligible for ECHO, and DOD denied coverage for ABA therapy under TRICARE Basic.

The Berges sued DOD in the United States District Court for the District of Columbia. They requested and Judge Walton granted class certification. This means that the Berges represent all similarly situated TRICARE Basic beneficiaries who have been denied coverage for ABA therapy.

After extensive discovery, this case was presented to Judge Walton on cross motions for summary judgment. DOD argued that ABA is an educational program and not a form of medical therapy. Judge Walton firmly rejected that argument. He also rejected the DOD argument that that the safety and efficacy of ABA therapy is “unproven.” DOD cannot justify paying for ABA for active duty families under ECHO while denying payment for others under TRICARE Basic, since the same legal standards apply to both programs.

Judge Walton summarized his decision and order as follows: “Because the [TRICARE Management] Agency’s denial of ABA therapy coverage under the Basic Program is arbitrary and capricious, the Agency must therefore be enjoined from denying qualified beneficiaries coverage on the ground that ABA therapy is not a covered benefit under the TRICARE Basic Program. Thus, the Court will remand this case back to the Agency with instructions that ABA therapy coverage be provided to Basic Program beneficiaries who otherwise qualify for reimbursement and such reimbursement be provided in compliance with the applicable TRICARE guidelines for the expenses incurred by qualified beneficiaries to acquire ABA therapy for their children. Accordingly, for the foregoing reasons, the plaintiffs’ motion for summary judgment is granted and the defendants’ cross-motion for summary judgment is denied.”

If it chooses to do so, DOD can appeal Judge Walton’s decision to the United States Court of Appeals for the District of Columbia Circuit. DOD has not yet filed such an appeal, but the deadline for doing so has not yet passed. We will keep the readers apprised of developments in this important case.

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This article is one of 1800-plus “Law Review” articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For

many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

Indeed, ROA is the *only* national military organization that exclusively supports America's Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation's seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve.

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If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Officers Association 1 Constitution Ave. NE Washington, DC 20002

Update – April 2022³

After the court granted final certification to the class preliminary certified during an earlier hearing, the plaintiffs filed a motion to clarify the class certification and relief and the defendants moved to amend the judgment.⁴ Relevant to this article, is the defendants motion. The defendants requested the court to reconsider its decision to issue an injunction requiring the Agency to provide coverage for ABA therapy to Basic Program beneficiaries rather than remanding the matter to the Agency for its reconsideration.⁵ The general rule is that the district court must remand a matter to the agency for further action if the district court has found the agency has made an error.⁶ There is a narrow exception when "there is not the slightest uncertainty as to the outcome of a[n] [agency] proceeding."⁷ The court concluded that the exception did not apply in this case.⁸ Therefore, the court vacated the injunction and remanded the matter to the Agency for further action consistent with the court's opinion.⁹

³Update by Second Lieutenant Lauren Walker, USMC.

⁴*Berge v. U.S.*, 949 F. Supp.2d 36, 38 (D.D.C. 2013).

⁵*Id.* at 42.

⁶*Id.*

⁷*Id.* quoting *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1489 (D.C. Cir. 1995).

⁸*Id.* at 43.

⁹*Id.* at 49–50.

Changes were made to include ABA under Tricare. Beginning on July 25, 2014, ABA began being covered under the TRICARE Comprehensive Autism Care Demonstration.¹⁰ However, on May 1, 2021, TRICARE began adding limitations and restrictions to ABA therapy.¹¹ Specifically, TRICARE will no longer be authorizing school-based services rendered by RBTs.¹²

UPDATE—APRIL 2023

The National Defense Authorization Act for Fiscal Year 2013 contained a provision directing the Secretary of Defense to “conduct a pilot program to provide for the treatment of autism spectrum disorders, including applied behavior analysis [ABA].” This pilot program is currently authorized to run through 12/31/2028. Military dependent children who are participants in any TRICARE program are now provided ABA as treatment for autism spectrum disorders.¹³

Based on this pilot program, Judge Reggie B. Walton of the United States District Court for the District of Columbia vacated his 2012 decision and injunction.¹⁴

¹⁰Autism Care Demonstration, TRICARE, <https://www.tricare.mil/autism> (last updated July 22, 2021).

¹¹What is New with TRICARE for ABA in 2021, MISSING PIECE (Thurs. April 22, 2021)
<https://yourmissingpiece.com/blog/what-is-new-with-tricare-for-aba-in-2021/>.

¹²*Id.*

¹³ See <https://www.tricare.mil/Plans/SpecialPrograms/ACD>.

¹⁴ See *Berge v. United States*, 949 F. Supp. 2d 36 (D.D.C. 2013).