Commonwealth of Massachusetts
Supreme Judicial Court
No.SJC-12242

Michael Langan, M.D. **April 28, 2017**
Plaintiff-Petitioner
v.
Board of Registration in Medicine (BORIM)
Defendant

Motion to Take Judicial Notice of the Establishment Clause to the First Amendment

To assist this Court in coming to a correct and just decision, pro se appellant Michael L. Langan, M.D. respectfully requests judicial notice of the Establishment Clause to the First Amendment and documentation showing that board attorneys were made aware that state employed attorneys engaged in acts barred by the Establishment clause in April 2013 (less than two months after appellant's suspension) but refused to forward documentation of these constitutional deprivations to the board. Appellant requests judicial notice of the following adjudicative facts found in the attached documents and these facts be considered in rendering a decision in this case.

Attachment A: April 8, 2013 Letter from attorney William Burgess notifying the board of the Establishment Clause violation and requesting a written response on how they intend to "remedy:" the constitutional violation.

Attachment B: April 19, 2013 response from board counsel Brenda Beaton (no longer with the board) refusing to directly address the issues presented by attorney Burgess and refusing to provide board members with the letter.

Attachment C: June 24, 20013 letter from PHS to attorney Burgess claiming "Physician Health Services, Inc. (PHS) does, and always has, permitted secular alternatives to faith based peer support group meetings." (Not true then and still not true).

Attachment D: June 6, 2013 letter from attorney Burgess specifically addressing the "independent evaluations" at Hazelden, Marworth and Bradford all of which are "expressly and exclusively 12-step facilities."

Appellant also requests the Court take judicial notice of the fact that this letter was written June 6, 2013 but hand stamped as being "received" by the board in 2012 and also has a computerized date-stamp that reads 2012. This document previously had an illegible date-stamp but this copy was provided by the board in response to a January 2017 Public Records Request for documents with legible date-stamps. In light of

appellants specific request for date-stamped documents and this document being date-stamped twice before it even came into existence the only plausible explanation is this is an inept attempt at altering the date-stamp on the document.

Judicial Notice of Law

The First Amendment states in the "Establishment Clause that "Congress shall make no law respecting an establishment of religion."

Three federal courts have held that coerced participation in 12-step programs violates the First Amendment. In Kerr v. Ferry, 95 F.3d 472 (7th Cir 1996), the Seventh Circuit held that requiring an inmate to attend NA meetings or risk suffering adverse effects for parole eligibility violated the Establishment Clause. The Second Circuit reached a similar conclusion in Warner v. Orange County Department of Probation, 115 F.3d 1068 (2d Cir. 1997), striking a probation condition requiring attendance at AA meetings. In 2007, the Ninth Circuit Court of Appeals ruled that under "uncommonly well-settled" law it is a violation of the First Amendment to the U.S. Constitution when the state coerces an individual to attend a religion-based drug or alcohol treatment program Inouye v. Kemna, 504 F.3d 705, 712, 716 (9th Cir. 2007). In both the Warner and Inouye cases, the courts found the law sufficiently clearly established to abrogate the officer's qualified immunity. Qualified immunity shields government officials from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. (Harlow v. Fitzgerald 4567 U.S.C. 1983)

Warner and Inouye were able to go forward with lawsuits against their officers for damages for violation of their constitutional rights under 42 U.S.C. 1983. Numerous federal and district courts and state supreme courts have reached the same conclusion.

.

In 2013 the Ninth Circuit Court of Appeals stated that: *"Hereinafter, a 12-step program will always refer to a religion-based treatment program."* (*Barry A. Hazle v. Mitch Crofoot, et al.*, No. 11-1524)[1]

Law pertaining to government officials who violate the constitutional rights of persons by coercion into twelve-step programs is well settled. In these cases the courts have found Establishment Cause violations when the government forces someone to attend 12-step meetings but when state actors simply made 12-step participation an option, the courts have not found an Establishment Clause violation. Justice Hines concluded there was no violation of the Establishment Clause because there was no restriction "on attending other support groups" and no objections were made to 12-step attendance prior suspension (SJ-2015-0267, #49, page 12). No documentary evidence exists to support these findings. All documentation, in fact, refute these finding.

The non-negotiability of the LOA is self-evident. In Justice Hine's Memorandum of

Decision she states "the board did not restrict the petitioner from attending other types of support groups" and adds:

"Although not dispositive, I note the timing of petitioner's objection to the twelve-step program; he did not dispute this meeting requirement until after his suspension of February 6, 2013. For nearly a year, petitioner made no objection to the twelve-step program he attended.

A report of non-compliance with 12-step meetings was the direct and sole cause of the February 2013 suspension. No other pretext exists. The documentary evidence shows full compliance with these meetings (SJ-2015-0267, #48, attachment 2). In a letter written April 8, 2013 Attorney William Burgess notified the Board of the legal and factual basis for the constitutional violation and requested in writing what steps were going to be taken to "remedy" it. To this date the factual and legal arguments presented by Attorney Burgess have been patently ignored. Board counsel Brenda A. Beaton dismissed the arguments wholesale in her response, adding it would be "inappropriate" to provide the letter to Board members (Attachment B).

The Board has never acknowledged let alone considered the documents or directly addressed the substantive issues presented therein. State coercion into 12-step attendance under threat of loss of a state license and subsequent fulfillment of that threat based on an alleged failure to do so is an indisputable violation of the Establishment clause. So too is mandating evaluations at facilities solely 12-step in nature as discussed in the 2013 Ninth Circuit Court of Appeals case linked below (*Barry A. Hazle v. Mitch Crofoot, et al.*, No. 11-1524)

http://cdn.ca9.uscourts.gov/datastore/opinions/2013/08/23/11-15354.pdf

The "refusal" to have an immediate evaluation at a 12-step facility was used to justify the LOA mandating 12-step attendance. Therefore both the 2012 Board order extending and modifying the LOA and 2013 Board Order for Suspension were the direct and sole result of Establishment clause violations.

It should be noted the board continues to contract solely with these out of state 12-step program assessment centers and treatment providers and refuses to allow non 12-step evaluations.

The Board's actions exceed 12-step coercion. The "proof of said participation" at meetings to PHS "in a form agreeable to PHS" was a request to provide PHS with the names and phone numbers of fellow attendees at anonymous meetings. Any reasonable person would agree this request is inappropriate but the Board mandated it under threat of loss of licensure. The difficulty and stress associated with this request is directly addressed in Dr. Recupero's 87-page report and evidence of the consequences can be found in the appendix to her report as well as copious emails and other documents provided to this Court (SJC-2014-0437, #1, SJ-2015-0267, #1). These actions can only be interpreted as abuse. "Establishment Clause claims ultimately are not subject to

dismissal under a state statute of limitations." *Tearpock-Martini v. Borough of Shickshinny*, 756 F.3d 232, 235-237 (3d Cir. 2014). *See, e.g., Town of Greece v. Galloway*, 134 S. Ct. 1811, 1816 (2014) (legislative prayer challenged after 9 years of monthly occurrences); *Friedman v. Bd. of Cnty. Comm'rs*, 781 F.2d 777 (10th Cir. 1985) (en banc) (seal challenged after 60 years).

Legally, Alcoholics Anonymous is established as a religious organization. This is well established and as far as United States courts are concerned AA and NA are, beyond a doubt, organizations that engage in religious activities and their meetings qualify as religious services.

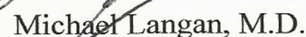
Applying a standard three-part test to determine whether my constitutional rights have been violated.

1. Has the state acted?
2. Was there coercion?
3. Was the object of the coercion religious rather than secular?

Point one is self-evident as the board wrote up the Letter of Agreement and clearly demanded 12-step participation and sponsorship without offering any other options, adding that any attempts at negotiation could be met with immediate license suspension. Point two, coercion, is clearly present by force of law and threat of sanction. Point three is well established. The mandating phone numbers as proof of attendance makes this case particularly egregious as the inappropriate to participate in the religious based program also demands violation of the basic principles of the program (anonymity).

Appellant therefore requests this Court take Judicial notice of these clear Establishment Clause violations not as a matter of opinion but as a matter of fact.

Respectfully submitted,



Michael Langan, M.D.

April 28, 2017

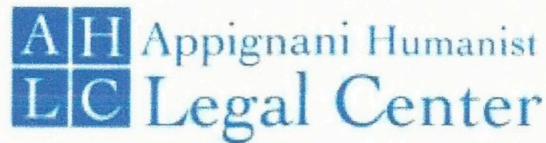
Certificate of Service

Appellant provided AGO Bryan Bertram with a copy of this motion and all attachments both by email and hand delivery on April 28, 2017

Michael Langan, M.D.

April 28, 2017

Attachment (A)



1777 T Street NW Washington DC 20009-7125 | T 800.837.3792 202.238.9088 | F 202.238.9003 | legal@americanhumanist.org | www.humanistlegalcenter.org

April 8, 2013

Executive Office of Health and Human Services
Attn: John Polanowicz, Secretary of Health and Human Services
One Ashburton Place
11th Floor
Boston, MA 02108

Board of Registration in Medicine
Attn: Robert Harvey, Esq.
cc: Kathleen S. Meyer, Candace L. Sloane, Gerald. B. Healy, Marianne E. Felice
200 Harvard Mill Sq., Suite 330
Wakefield, MA 01880

Physician Health Services, Inc.
Attn: Luis Sanchez, Director
cc: Linda Bresnahan, Director of Program Operations,
cc: Debra A. Grossbaum,
860 Winter Street
Waltham, MA 02451

Re: BRM and PHS Must Offer Secular Alternatives to AA/NA in Disciplinary Contracts

Ladies and Gentlemen:

I am writing to alert you to a serious separation of church and state concern. It has recently come to our attention that the State Board of Registration in Medicine ("BRM") required a doctor by the name of Michael Langan to attend 12-step substance abuse treatment programs (Alcoholics Anonymous ("AA") and Narcotics Anonymous ("NA")) as a condition of keeping his medical license. Both AA and NA are inherently religious programs. Mr. Langan was not offered the choice of a secular program. BRM's failure to inform doctors in need treatment of secular alternatives to religious 12-Step programs, in the context of the coercive state power involved, unconstitutional.

The American Humanist Association ("AHA") is a national nonprofit organization with over 10,000 members and 20,000 supporters across the country, including in Massachusetts. Our purpose is to protect one of the most fundamental principles of our democracy: the mandate requiring separation of church and state embodied in the Establishment Clause of the First Amendment.

It is our understanding that in December 2011 BRM entered into a letter of agreement ("LOA"), drafted by Physician Health Services, Inc. ("PHS"), with Langan, ordering him to participate "in a minimum of three 12-step meetings per week" and to develop an "active 12-step sponsor relationship" or lose his medical license. Langan was instructed to report his progress to PHS. In a letter dated December 22, 2011, describing the terms of the LOA, BRM warned that he "shall follow all PHS recommendations within seven (7) days and understands that, should he decline to do so

(which includes an attempt to negotiate and/or dispute PHS' recommendation), his license may be immediately suspended." Langan was never offered secular alternatives. Langan immediately objected to PHS stating that AA is not consistent with his own "beliefs and spirituality" and that admitting he is "powerless over something is the antithesis of my belief system." Langan asked for an alternative to 12-step programming. PHS denied his request. Langan reached out to a doctor who runs a local secular program and she accepted him into the physicians support group. Langan asked PHS if he could attend that program instead of AA but was told no. On November 8, 2012, BRM sent a letter to Langan's attorney indicating that Langan breached his LOA for failing to attend the 12-step meetings. On February 6, 2013, BRM suspended Langan's license for failing to attend the meetings.

The federal courts have made clear that for "the government to coerce someone to participate in religious activities strikes at the core of the Establishment Clause of the First Amendment." *Inouye v. Kemna*, 504 F.3d 705, 712 (9th Cir. 2007). It is "indisputable that the 12 Steps of Alcoholics Anonymous are religious in nature." *Miner v. Goord*, 354 Fed. Appx. 489, 491 (2nd Cir. 2009). The state may only require participation in such religious treatment programs if a "secular alternative . . . is provided." *Id.* at 492 (citing *Griffin*, 88 N.Y.2d at 677). The courts have unanimously concluded that the Establishment Clause is violated when the state conditions a benefit upon attendance of AA/NA without offering secular alternatives.[1]

In *Kerr v. Farrey*, 95 F.3d 472, 474 (7th Cir. 1996) the Seventh Circuit held that requiring an inmate to attend NA meetings for parole eligibility violated the Establishment Clause.[2] In that case, NA was the only program available and the inmate, like Langan and other physicians facing disciplinary charges in Massachusetts, was "subject to significant penalties if he refused to attend the NA meetings." *Id.* at 479.[3] The Second Circuit reached a similar conclusion in *Warner*, 115 F.3d 1068 (2nd Cir. 1997), finding a probation condition requiring attendance at AA meetings violated the Establishment Clause. The court based its decision on the fact that "[n]either the probation recommendation, nor the court's sentence, offered Warner any choice among therapy programs," but "directly recommended A.A. therapy to the sentencing judge, without suggesting that the probationer might have any option to select another therapy program, free of religious content." Id. at 1075.

The state cannot put the anyone in the position of having to ask for the secular alternatives. Rather, the duty is on the State (or its agents) to make the option known and available. See *Bausch v.*

---

[1] See *Inouye*, 504 F.3d at 710 (9th Cir. 2007); *Warner v. Orange County Dep't of Probation*, 115 F.3d 1068, 1074-75 (2nd Cir. 1997) (unconstitutional to impose participation in AA/NA as a probation condition); *affirmed*, 173 F.3d 120, 121 (2nd Cir. N.Y. 1999), *cert. denied sub nom.*, 528 U.S. 1003 (1999); *Kerr v. Farrey*, 95 F.3d 472, 479-80 (7th Cir. 1996); *Alexander v. Schenk*, 118 F. Supp. 2d 298, 301-02 (N.D.N.Y. 2000); *Warburton v. Underwood*, 2 F. Supp. 2d 306, 318 (W.D.N.Y. 1998); *Ross v. Keelings*, 2 F. Supp. 2d 810, 817-18 (E.D. Va. 1998); *Messere v. Dennehy*, 2007 U.S. Dist. LEXIS 65529, *17-18 (D. Mass. Aug. 8, 2007); *Arnold v. Tenn. Board of Paroles*, 956 S.W.2d 478, 484 (Tenn. 1997) (where program is religious and is the only one available, forced participation violates Establishment Clause); *Griffin*, 88 N.Y.2d at 691-92 (same); See also, *Armstrong v. Beauclair*, 2007 U.S. Dist. LEXIS 24008 (slip op.) (D. Idaho 2007) (striking down AA/NA requirement as parole condition where no secular alternatives were offered); *Turner v. Hickman*, 342 F. Supp. 2d 887, 895-97 (E.D. Cal. 2004) (same); *Nusbaum v. Terrangi*, 210 F. Supp. 2d 784, 789-91 (E.D. Va. 2002); *Bausch v. Sumiec*, 139 F. Supp. 2d 1029 (E.D. Wis. 2001); *Rauser v. Horn*, 1999 U.S. Dist. LEXIS 22583, at *19-*20 (W.D. Pa. Nov. 2, 1999) (coerced participation in NA/AA violated Establishment Clause), *rev'd on other grounds*, 241 F.3d 330 (3d Cir. 2001); *Pirtle v. Cal. Bd. of Prison Terms*, 611 F.3d 1015, 1024 (9th Cir. 2010) (noting that requiring prisoner to attend AA as a condition of parole would violate the First Amendment). Cf. *In re Garcia*, 106 Wn. App. 625, 634-635 (Wash. Ct. App. 2001) (agreeing that "mandating attendance at [A.A.] classes" violates the Establishment Clause but finding no violation where "alternative classes without religious-based content were provided").

[2] Like Langan, the inmate regarded NA's "deterministic view of God to be in conflict with his own belief about free will."

[3] Specifically, Langan faced suspension of his medical license and was warned by BRM that disputing or even attempting to negotiate the terms of his contract forcing him to attend such meetings alone could result in immediate suspension.

Sumiec, 139 F. Supp. 2d 1029, 1034 (E.D. Wis. 2001) (ruling that the Establishment Clause was violated when the state presented a 12-step program as a condition of parole, even though plaintiff may not have objected, because the religious program "was presented to plaintiff as the only available and feasible alternative to revocation, he faced the 'force of law' and the 'threat of penalty.'").[4] As the court in *Bausch* noted, an individual cannot "be considered to have a choice when the available options are unknown to him." *Id.* at 1035. Indeed, it is the "government's obligation always to comply with the Constitution, rather than to do so only upon request." *Id.* As is the case here, the court emphasized the unequal bargaining power of the respective parties, noting that a parolee is "in no position to request concessions or to propose alternatives." *Id.*

In light the clear command of law that those who may coerce anyone into substance abuse treatment must inform them of secular alternatives, BRM clearly needs to change its policies and practices to bring them in line with the Constitution. Secular programs must be presented on equal footing with 12-Step ones in every regard, including discussions with doctors and in all BRM materials presented or made available to them.[5]

If you not aware of local secular programs, I can recommend SMART Recovery's group-based program. It is a resource for addiction recovery recognized by the American Academy of Family Physicians, the Center for Health Care Evaluation, the National Institute on Drug Abuse (NIDA), U.S. Department of Health and Human Services, and the American Society of Addiction Medicine.[6] SMART Recovery offers group-based meetings throughout Massachusetts and the greater New England area on a frequent basis.[7]

In the interest of avoiding any potential litigation, please notify me in writing about the steps you are taking to remedy this constitutional violation. Thank you for your time and attention to this matter.

Sincerely,

William J. Burgess, Esq.
Appignani Humanist Legal Center
American Humanist Association

---

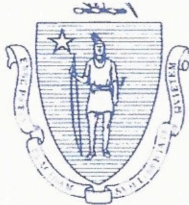
[4] See also *Warner*, 115 F.3d at 1075 (finding it coercive to sentence probationer to AA "without suggesting that the probationer might have any option to select another therapy program, free of religious content"); *Rauser*, 1999 U.S. Dist. LEXIS 22583, at *19 (W.D. Pa. 1999); *Griffin*, 88 N.Y.2d 674; *Arnold*, 956 S.W.2d at 484 (Tenn. 1997).

[5] It is our understanding that none of the programs currently listed on the PHS website are secular. See http://www.massmed.org/Content/NavigationMenu6/HelpingYourselforaColleague/Physician_Peer_Supp.htm. Additionally, the State Health and Human Services website, which provides a list of "substance abuse services," is comprised solely of AA/NA programs and does not list any secular alternatives. See http://www.mass.gov/eohhs/consumer/disability-services/services-by-type/deaf-hh/substance-abuse-services/recovery-support-meetings.html

[6] See http://www.smartrecovery.org/

[7] See http://www.smartne.org/meetings.html

ATTachment (B)



Commonwealth of Massachusetts
Board of Registration in Medicine

200 Harvard Mill Square, Suite 330
Wakefield, Massachusetts 01880
(781) 876-8200

Enforcement Division Fax: (781) 876-8381
Legal Division Fax: (781) 876-8380
Licensing Division Fax: (781) 876-8383

DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LIEUTENANT GOVERNOR

April 19, 2013

William J. Burgess, Esq.
Appignani Humanist Legal Center
American Humanist Association
1777 T Street NW
Washington, D.C. 20009-7125

Dear Attorney Burgess,

I am in receipt of your letter dated April 8, 2013 which was sent to John Polanowicz, Secretary of MA Executive Office of Health and Human Services, Robert Harvey, Counsel with the MA of Board of Registration (Board) and Dr. Luis Sanchez of Physician Health Services, Inc. (PHS). I am responding on behalf of the Board members and Attorney Harvey.

The physician who you named in your letter currently has an open matter with the Board and therefore, it would be inappropriate for the Board members to receive your letter. Additionally, as you are not the attorney of record for the physician, I am unable to comment on the assertions you have made regarding the physician and his interaction with the Board and PHS.

I assure you, however, that the Board adheres strictly to the applicable federal and state laws and regulations in every interaction it has with its licensees. If you have not done so already, you may wish to discuss your concerns with PHS counsel as to its contracts with physicians. Thank you.

Sincerely,

Brenda A. Beaton

Brenda A. Beaton
General Counsel

cc. John Polanowicz
Secretary, EOHHS
Dr. Luis Sanchez
Physician Health Services, Inc.

Attachment (C)

PHYSICIAN HEALTH SERVICES, INC.

A Massachusetts Medical Society corporation
www.physicianhealth.org

STEVEN A. ADELMAN, MD
Director

860 Winter Street
Waltham, MA 02451-1414
(781) 434-7404 • (800) 322-2303
Fax (781) 893-5321

June 24, 2013

William J. Burgess, Esq.
Appignani Humanist Legal Center
1777 T Street, NW
Washington, DC 20009-7125

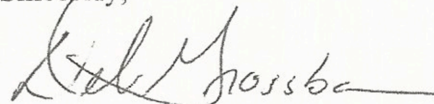
Re: Secular Alternatives to AA/NA

Dear Attorney Burgess:

I received your letter of June 6, 2013. As you are aware, Physician Health Services, Inc. (PHS) does, and always has, permitted secular alternatives to faith based peer support group meetings as part of the PHS support and monitoring programs. As per your suggestion, PHS has taken steps to further clarify this option by specifying in the substance use monitoring contract language that secular support group options are available.

Thank you for your interest in the physicians of Massachusetts.

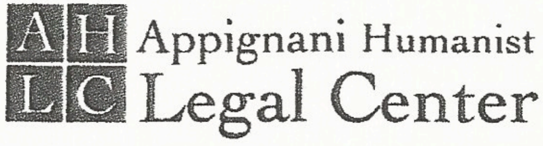
Sincerely,



Debra Grossbaum
PHS General Counsel

cc: Robert Harvey, Esq., Board of Registration in Medicine
John Polanowicz, Secretary of Health and Human Services

ATTachment (D) (1)



RECEIVED

Board of Registration in Medicine

1777 T Street NW, Washington DC 20009 7125 | T 800.837.3792 202.238.9088 | F 202.238.9003 | legal@americanhumanist.org | www.humanistlegalcenter.org

June 6, 2013

Executive Office of Health and Human Services
Attn: John Polanowicz, Secretary of Health and Human Services
One Ashburton Place
11th Floor
Boston, MA 02108

Board of Registration in Medicine
Attn: Robert Harvey, Esq.
cc: Kathleen S. Meyer, Candace L. Sloane, Gerald. B. Healy, Marianne E. Felice
200 Harvard Mill Sq., Suite 330
Wakefield, MA 01880

Physician Health Services, Inc.
Attn: Luis Sanchez, Director
cc: Linda Bresnahan, Director of Program Operations,
cc: Debra A. Grossbaum,
860 Winter Street
Waltham, MA 02451

Re: Request for PHS Policy Change to Explicitly Make Secular Alternatives Known and Available

Ladies and Gentlemen:

In response to our letter to you dated April 8, 2013, a copy of which is attached for your convenience, we received a letter from PHS, dated April 16, 2013, indicating that PHS agrees that it must make secular programs available to those facing disciplinary action by the BRM. We appreciate these efforts to ensure that substance abuse treatment programs for physicians operate in compliance with the Constitution, which requires that no one be coerced into participating in any religious program, such as AA, NA or other 12-Step programs.

In order to improve this system as it operates in Massachusetts, however, this letter proposes a few changes that will bring the system fully in line with best practices. We request that PHS amend its official policy as to this issue to make it more explicitly clear to participants that secular programs, *expressly identified as such*, are available.

According to the PHS letter, it is PHS' policy to include the following provision in PHS Substance Use Monitoring Contracts:

9. SUPPORT GROUPS

I will attend Alcoholics Anonymous, Narcotics Anonymous, or other support

groups throughout the term of this contract. My choice of support group is subject to the approval of the director of PHS.

While the above language does leave open the possibility that one need not attend an AA or NA program, it does not make it clear to someone who is unaware of the nature of those programs that they are indeed inherently religious in nature. It also does not explain that "other support groups" includes specifically non-religious groups. SMART Recovery groups, for example, have already been approved by PHS, but this is not expressly stated in the contract language in the way that AA and NA are.

Given this lack of specificity in the policy's language, especially in light of the unequal bargaining power of the doctor facing suspension and the PHS and the BRM provisions discouraging any sort of negotiating with the PHS, the current policy does not adequately solve the coercion problem discussed in our previous letter. It should be clear to the reader both that AA and NA are religious in nature and that secular alternatives are approved and available.

We feel that the change to the language of the policy shown below in bold red text would solve this problem:

9. SUPPORT GROUPS

I will attend Alcoholics Anonymous, Narcotics Anonymous, **or a secular alternative to these faith-based programs, such as SMART Recovery and Rational Recovery,** or other **approved** support groups throughout the term of this contract. My choice of support group is subject to the approval of the director of PHS.

In addition, the "independent evaluation" list given to physicians should not be limited to Marworth Treatment Center, Hazeldon, and Bradford Health Services, all of which are expressly and exclusively 12 Step facilities. This list should include a facility that operates in a completely secular manner, also explicitly identified as one that does so.

We thank you for your time and attention to this matter. Please inform us of any policy changes you make in response to this letter.

Sincerely,

Monica Miller, Esq.
William J. Burgess, Esq.
Appignani Humanist Legal Center
American Humanist Association