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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN DIEGO

Department 66 Hon. Charles R. Hayes, Judge

Case No. GIC860574

PARKSIDE SPECIAL CARE CENTER, )  
INC.; et al., )  
)  
)  
Plaintiffs, )  
)  
vs. )  
)  
SANDRA SHEWRY, DIRECTOR OF THE )  
CALIFORNIA DEPARTMENT OF HEALTH )  
SERVICES; and THE CALIFORNIA )  
DEPARTMENT OF HEALTH SERVICES, )  
)  
Defendants. )  
\_\_\_\_\_ )

REPORTER'S TRANSCRIPT  
MARCH 11, 2008

APPEARANCES: (see next page)

Reported by: Linda Burke, RMR, CRR, CSR No. 4263  
Official Reporter  
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1 APPEARANCES: (Continued)

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1 SAN DIEGO, CALIFORNIA TUESDAY MARCH 11, 2008 2:00 P.M.

2 --oOo--

3 THE COURT: In the Parkside matter.

4 MR. REAGAN: Good afternoon, Your Honor.

5 Mark Reagan for plaintiffs.

6 MS. WONG: Good afternoon, Your Honor.

7 Michele Wong, Deputy Attorney General on behalf of

8 respondents.

9 MR. CARLSON: Eric Carlson for California  
10 Advocates for Nursing Home Reform.

11 THE COURT: Go ahead and have a seat. I've read  
12 and considered the materials that are before the Court.

13 Back in -- We have limited time this afternoon. So I want  
14 to use our time wisely.

15 Back in November, I think it was, Ms. Wong,  
16 you filed a response, and I'm looking at page 2. You said  
17 that the department was making good faith efforts towards  
18 compliance and preparing an official regulation package  
19 submission, for submission to the Office of Administrative  
20 Law. Can you kind of give me an overview of where we are  
21 and what's going on?

22 MS. WONG: Well, they had begun the process, and  
23 I had filed the Return to Writ of Mandate, and that was  
24 the process at that particular point.

25 THE COURT: Where are we now?

26 MS. WONG: The department has held off on any  
27 further action. At the time petitioners had filed this  
28 particular request for OSC, I believe it was

1 September 14th, and I think we had a fairly quick hearing  
2 date, and so we were going to hold off on proceeding  
3 further depending upon the court outcome, and for some  
4 reason or another, this has been sort of six months in  
5 coming. For whatever reason, the hearing date has been  
6 taken off calendar and continued for various reasons. So  
7 I agree there has been a delay, but initially the  
8 department thought this matter would be heard quickly and  
9 we could move on. In the interim, I think for everyone's  
10 benefit, I would suggest that we hold off on sending that  
11 package sort up the chain of command only to have it come  
12 back down.

13 THE COURT: I don't know why it would come back  
14 down. This is a request for order to show cause really re  
15 contempt, in essence. The substantive decisions have been  
16 made. An order was issued. I spent a lot of time working  
17 on it a long time ago. I'd really like to get this thing  
18 going.

19 MS. WONG: At this point we could send it up to  
20 our department, but we had held off waiting for the  
21 results of this particular hearing, which initially we  
22 thought would be quite a bit earlier.

23 THE COURT: Now, what happens next? Give me an  
24 overview of the process. I'm not an expert in the  
25 administrative regulations and that type of thing.

26 MS. WONG: I'm not an expert, but what I believe  
27 happens is they take this particular package. You have  
28 the draft form in the return, and it is sent through the

1 executive branch of the department up to the director for  
2 his review and signature, and then at that point it's sent  
3 over to the Office of Administrative Law, which is a  
4 separate state agency or department than the Department of  
5 Public Health, and that time line and what they have to  
6 publish is all pursuant to the Government Code.

7 THE COURT: Okay. And one of the primary  
8 concerns of the petitioner in the case dealt with  
9 potential liability under the SSA and the flexibility  
10 approach to that. And let's see. The order was to  
11 establish guidelines and timetables for the implementation  
12 of the flexibility program, and I believe the petitioner  
13 took the position that your really one-liner didn't cover  
14 that.

15 Now, I'm not privy to everything you've  
16 done, but I want to make sure that things are done --  
17 people used to say according to Hoyle, in other words,  
18 done right. That's all.

19 MS. WONG: Absolutely, and the department wants  
20 to do that also, and if you take a look -- Within the  
21 original promulgation process, through this litigation,  
22 including all the briefing, everyone's always made  
23 reference to Health and Safety Code Section 1276, and the  
24 Court's order and its writ also makes reference to  
25 Section 1276, which sets forth a process for making a  
26 written request for the alteration of -- in this case the  
27 Standard Admission Agreement, and that is what the  
28 department has done. It has incorporated into the two

1 regulations Health and Safety Code Section 1276, which  
2 sets forth that process, and again, that's what we had  
3 always been talking about, and that's what all the papers  
4 had been talking about, and that's what the Court ordered  
5 and that's what I submit the department has done. That  
6 Health and Safety Code Section is a valid state statute  
7 that was passed by our legislature and signed by our  
8 governor and sets forth an entire process, and by  
9 incorporating that statute into these two regulations, it  
10 set forth the process.

11 THE COURT: Let's hear from the petitioner.

12 MR. REAGAN: Thank you, Your Honor. I couldn't  
13 disagree more with what she said. At the time that we  
14 were involved in the fact-finding before you, we had laid  
15 out a thorough factual record about how the department's  
16 use of program flexibility, which they had specifically  
17 listed in their final statement of reasons, neither  
18 created guidelines nor time frames that comported with the  
19 legislature's directive to the department that it not  
20 implement the Standard Admission Agreement in a way that  
21 would increase liability.

22 They argued, "We've said program  
23 flexibility throughout the statement of reasons. That's  
24 the process. That should be good enough."

25 Well, it wasn't, and the Court found -- In  
26 fact, the Court doesn't refer to 1276 in its original  
27 order. It says what you've done is -- it exposes  
28 facilities to liability; it's arbitrary, capricious, and

1 unreasonable. And what the Court did in the writ was it  
2 said, "Look, the department says it's going to implement  
3 1276." Well, that's fine and good for everything else,  
4 but here the legislature said you had to do this in a way  
5 that did not increase liability to facilities. So you  
6 have to create some guidance about what standard a  
7 facility has to meet to have one of these granted.

8 If you look at 1276(b), there aren't any  
9 guidelines, there aren't any criteria, and then if you  
10 look at 1276(d), it says, "Oh, the department has 60 days  
11 to approve one of these things when it comes in."

12 Well, the context of all of this was that  
13 if you think back as to the factual record, the Standard  
14 Admission Agreement became effective on January 2nd, 2006,  
15 and everything was sent out to long-term care facilities  
16 on December 28th, 2005. Now, the use of program  
17 flexibility and a 60-day window is certainly not going to  
18 help very much when a facility is going to -- if in fact  
19 there is a legal reason why it would be exposed to  
20 liability for contracting under the Standard Admission  
21 Agreement, when it has just a few days to implement and  
22 there's this criteria-less statute out there that requires  
23 or tells the department that it has 60 days to get back to  
24 somebody.

25 Now, what the record in the case showed and  
26 the reason why Your Honor ruled the way he did was that we  
27 had hundreds of unresponded program flexibility requests.  
28 We had the same kinds of facilities making the same

1 requests, and some would be granted and some wouldn't be  
2 granted. None of them were granted before the actual  
3 agreement came into place.

4 So I believe what the Court asked the State  
5 to do was if you're going to use 1276 and you're going to  
6 put that explicitly in the text of the regulations, not  
7 just say it in the statement of reasons, that if you're  
8 going to put that in there, then to be able to protect  
9 facilities as the legislature commanded, to prevent a new  
10 cause of action or exposure to liability, that you build  
11 in guidance and timetables that work for the Standard  
12 Admission Agreement.

13 THE COURT: Now, how would this -- Give me a  
14 scenario how you would envision something like that  
15 playing out.

16 MR. REAGAN: For example, in the final statement  
17 of reasons -- And let me just refer to a portion of our  
18 briefing and portions --

19 THE COURT: Just --

20 MR. REAGAN: For example --

21 THE COURT: Please, please.

22 MR. REAGAN: I'm sorry.

23 THE COURT: Just how would this play out? Give  
24 me a scenario how you'd envision something like this  
25 playing out.

26 MR. REAGAN: Okay.

27 THE COURT: Don't read anything from a brief.  
28 Just tell me.

1 MR. REAGAN: That there be a set of guidelines  
2 or criteria on the subjects that a facility could request  
3 program flexibility on, and that there be sufficient time  
4 prior to the Standard Admission Agreement becoming  
5 implemented that a facility could submit a program  
6 flexibility request for one of those reasons set forth as  
7 guidance and receive a response so it knows whether it can  
8 alter any portion of the Standard Admission Agreement  
9 before it has to use it.

10 THE COURT: This has a striking similarity to  
11 something that we discussed long ago and I thought was  
12 already on the table and pretty well understood, and when  
13 I looked at simply the incorporation of 1276, that didn't  
14 seem to cover the issue that I had in mind quite a while  
15 ago. Maybe I wasn't clear. I thought that's what we  
16 talked about.

17 MS. WONG: And we did talk about --

18 THE COURT: In other words, the SSA takes effect  
19 day one. The facilities have to start working on it and  
20 it's binding on them on day one, and then from that point  
21 up until the time that they either get some type of  
22 dispensation, they're at risk up until the time that  
23 dispensation is concluded, and that's not really what I  
24 had in mind. I thought this was going to be an orderly  
25 implementation with -- I think the words I used in the  
26 writ were guidelines and time frames so we wouldn't have  
27 people acting at risk. So explain that to me.

28 MS. WONG: Absolutely, Your Honor, and we don't

1 want the facilities to operate at risk either, and I think  
2 1276 sets forth a 60-day time line, and when you're  
3 talking about day one when the regulations are in force  
4 and effect, we're talking about this process for any  
5 facility to want to alter the Standard Admission  
6 Agreement, to make that request prior to day one, and I  
7 would disagree with --

8 THE COURT: Hang on a second. We're going to go  
9 through the reg. We're going to have everything comport  
10 with what was found. Now, -- and the time -- it seems  
11 like there's a pretty short period of time last time  
12 around.

13 MS. WONG: That's what I disagree with  
14 Your Honor. In this particular case we're talking  
15 about -- Regulations are promulgated pursuant to the  
16 Government Code, particular Government Code sections, and  
17 there's a particular amount of lead time things have to be  
18 published before they come into full force and effect, and  
19 what Mr. Reagan was talking about when he said there were  
20 just a few days to act I believe is not true. That time  
21 for that December letter from the department to all the  
22 facilities statewide, that was what we refer to as an  
23 all facilities letter. It's a reminder. It's not the  
24 first time these facilities have heard about it, but  
25 rather these regulations, the two we're talking about, I  
26 believe they were published in the summer to go into  
27 effect on January 1st.

28 So there was approximately six months of

1 lead time, and that's what we would envision for this  
2 particular case, that the Standard Admission Agreement  
3 would go through that promulgation process pursuant to the  
4 Government Code Section. It would be published in the  
5 state registry, which I believe is the mechanism, and then  
6 at a later date the regulations would go into force and  
7 effect, and in this lead time that the facilities would  
8 have an opportunity, if they so chose, to submit a written  
9 request for program flexibility.

10 THE COURT: So after you go through the  
11 administrative process, there's a publication date  
12 advising everybody who is interested, "These are going to  
13 be the rules that you must follow. This is the SSA." In  
14 effect, "If you want to have some type of dispensation  
15 because of flexibility concerns, you take steps now." And  
16 then there's a -- That's implicit. I'm not --

17 MS. WONG: Yes. "Here's the regulations.  
18 Here's what you need to comply with. You may ask for  
19 written alterations, and these regulations will be in  
20 effect on X date in the future."

21 THE COURT: So then there's a hiatus of at least  
22 half a year from the date of publication up until the time  
23 of implementation of the SSA?

24 MS. WONG: I know with respect to what happened  
25 in the past, the regulations were published sometime in  
26 the summer, and they went into effect sometime in the  
27 beginning of January. So that's approximately six months.

28 MR. REAGAN: Your Honor, it's entirely up to the

1 department how they choose to promulgate this and whether  
2 there is the timing.

3 THE COURT: To be very candid, this is a very  
4 important issue. I want compliance by the facilities.  
5 They want to comply with the law. Nobody wants to act  
6 contrary to law. But they need some time line. Six  
7 months is not a very long period of time, but I think a  
8 facility who needs some type of modification because of a  
9 particularized need should be able to be on top of it.  
10 It's going to be an issue that's on the table and they're  
11 going to have to be aware of it. If they simply let it --  
12 don't pay attention, then that's their problem, but in  
13 half a year, six months, 180 days, I think that's enough  
14 time to initiate a request and get that processed.

15 Again, I don't know all the details of how  
16 these things are handled, but that sounds like a  
17 reasonable period of time. It sounds like anything less  
18 than a six-month period of time, we're likely to see  
19 counsel back here on an OSC, and I think there may well be  
20 merit if that were the case because we're going to see  
21 people who don't have enough time to make sure they can  
22 comply with the law. If that makes sense. Tell me why  
23 I'm mistaken, if I am. It sounds reasonable.

24 MS. WONG: Certainly some lead time is  
25 reasonable, absolutely.

26 THE COURT: A month? That's never going to  
27 work. Six months? That's enough time so that the  
28 reviewing -- I'll let you finish. Why don't you just talk

1 to her. Don't pass notes. It's important enough that  
2 I'll stop. I really will, and I'm serious about that.  
3 Please. Meet and confer for a second, and I don't want to  
4 talk while you're talking because I'd like you to listen.  
5 So go ahead.

6 MR. CARLSON: I apologize, Your Honor.

7 THE COURT: No. Time out. I don't want you to  
8 apologize. I want you -- This is important. So talk. In  
9 fact, --

10 MS. WONG: Mr. Carlson has a particular view,  
11 and certainly their department, and it sounds like the  
12 Court would like to hear that.

13 THE COURT: The point is, there needs to be  
14 enough time, and I don't want the reviewing whoever to be  
15 rushed to judgment on any type of decision either. I want  
16 everything to be well considered and thought through. I  
17 don't want somebody to rush forward and attempt to file  
18 some type of a request for modification because of a  
19 particular arising need without giving it a lot of  
20 thought, and if somebody participates in the process  
21 through the administrative regulations, we're going to  
22 have a pretty good idea how they are coming down and  
23 should be ready to act immediately. I suspect if you  
24 participate in this process and see what's going on, a  
25 reasonable person is going to have a pretty good idea of  
26 what's happening. It's not going to be a surprise.

27 MR. REAGAN: As long as there's a final rule and  
28 there's a final process and there's guidance for

1 facilities and a standard. Something other than whimsy.  
2 You know what I mean? Something that has some -- where a  
3 facility knows what burden it has to meet, and that's one  
4 of the inherent problems. We had 1276 without more. Six  
5 months is an entirely reasonable period, Your Honor.

6 THE COURT: But time frames and time lines, I  
7 think we're really premature today. I need everybody to  
8 understand what I meant, and I really meant it, that -- I  
9 won't reiterate what I said. I really meant it. It's  
10 important enough to have the issues joined if and when  
11 that modification is dealt with and decided to a  
12 particular facility because of a particular need without  
13 risk on the part of the facility, they want to comply, and  
14 without being required to rush to judgment in a review of  
15 some type of approach and to that particularized need, and  
16 it really needs to be some type of basic guidelines as  
17 to -- Again, I'm going far beyond my expertise in your  
18 area, but if you're going to be required to comply with  
19 something, you need to know essentially what you need to  
20 do. I can't be any more particularized than that, but I  
21 want the State to understand that I meant what I said when  
22 I need -- when everyone needs some type of a framework in  
23 which to act so we don't have any issue of arbitrary and  
24 capricious conduct on the part of somebody, so X facility  
25 gets treated in this fashion and Y facility in a similar  
26 setting is treated differently. I think uniformity is  
27 what we're looking for, and without some type of an  
28 approach, -- I use the word "guidelines." There's always

1 a risk of that taking place. So again, I think today is  
2 good for the purpose of discussion, but I think it's  
3 premature for me to act just yet.

4 Now, if what we're talking about doesn't  
5 come to pass, that is, publication date with things that  
6 are final, that follow a full review and input from all  
7 concerned and after the promulgation of the finalizing of  
8 the issue, there's a very brief period of time that nobody  
9 can really prepare something and no one could really  
10 respond to something in a meaningful fashion. If you  
11 think about it for a second, we have the -- we as lawyers  
12 are sitting here in a courtroom discussing something, but  
13 there are real live people whose lives we're affecting.  
14 People that live in these facilities, they have a right to  
15 expect that their matters are going to be dealt with very  
16 carefully. So anyway, I think I've said enough about  
17 that.

18 There's another issue that I wasn't really  
19 understanding the petitioner's side concerning cognitive  
20 ability. There's an objection to the proposed language of  
21 the decision maker taking somebody for a walk in the park,  
22 someone beyond that.

23 MR. REAGAN: Do you want me to try to address  
24 that, Your Honor?

25 THE COURT: Yes.

26 MR. REAGAN: One of the things that has really  
27 been inexplicable to figure out about this section of the  
28 Standard Admission Agreement is whether it only relates to

1 when somebody makes a decision that they want to actually  
2 no longer reside in the facility, or whether it relates to  
3 their choice to leave the facility on a temporary basis,  
4 and it's never been clear whether it speaks to one or both  
5 of those things, and if it only spoke to -- if it was  
6 clear that it only spoke to when somebody actually wants  
7 to leave the facility and no longer reside there, I think  
8 it's appropriate that somebody with cognitive impairment  
9 would only have the person who has the ability to consent  
10 for them be the one there to say, "We want so and so to  
11 leave the facility permanently."

12 Our concern is that before, if you recall,  
13 the expression was that they could leave whenever they  
14 wanted regardless of what their condition was.

15 THE COURT: It was misleading to the average  
16 bear.

17 MR. REAGAN: And so here the concern that we  
18 expressed is that if there is a therapeutic field trip or  
19 something that would be appropriate to enhance that  
20 resident's quality of life, then having the actual person  
21 who is the only one lawfully required to consent doesn't  
22 seem to make any sense.

23 So this whole discussion starts with a set  
24 of language that I don't think that we -- all of us, with  
25 a common understanding of what its intention were.  
26 Mr. Carlson's proposal, while that's left to rule making,  
27 was to take the section entirely out and not even address  
28 it. I mean it's -- The law says what it says. That might

1 be a way for the department to handle it and deal with the  
2 confusion, but that's really not for us here.

3 MS. WONG: I think that would be premature.  
4 That was something that was going to be dealt with in the  
5 notice period and the public comment period, where there  
6 has been discussion about deleting that particular  
7 sentence. I believe it was, "You are free to leave the  
8 facility at any time." Because many of the drafts  
9 potentially -- Taking a look at petitioner's proposed  
10 language, I would say that perhaps that is unduly  
11 restrictive.

12 If we take a look at the first sentence, it  
13 reads,

14 "Unless you have been involuntarily  
15 committed to the facility or are  
16 suffering from a severe cognitive  
17 impairment, you may leave our facility at  
18 any time without prior notice to us."

19 Well, if you were to read the converse of  
20 that, "Well, if you do have a cognitive impairment, you  
21 can't leave at any time." So it can be read a lot of  
22 different ways and is perhaps confusing. So all the  
23 various proposed language, I think, you know, -- None is  
24 ideal, but that's --

25 MR. REAGAN: It's --

26 THE COURT: Let's not interrupt, please.

27 MS. WONG: But that's something we address  
28 during the public comment period where we receive input

1 not only from Mr. Reagan and the folks he represents but  
2 perhaps from Mr. Carlson and the organization he  
3 represents, or anyone else who cares to participate in the  
4 public comment period.

5 THE COURT: Aren't we looking at achieving  
6 clarity?

7 MS. WONG: Absolutely, Your Honor.

8 THE COURT: The whole point behind an SSA is  
9 clarity.

10 Now, I know we have some high-powered  
11 lawyers in the courtroom who have substantial experience  
12 in the area, but wouldn't it be better to hold off and see  
13 what many other people and organizations -- And there are  
14 smart people beyond the three of you, who have a lot of  
15 input, and wouldn't it best to, again, let it go through  
16 the process, especially in this area? I'm not sure that  
17 what I'm seeing from the return side hits the mark, but  
18 I'd like to hear what other people think would provide  
19 fair information to someone in the position of making a  
20 decision so that they walk away from a facility knowing  
21 where they stand and where the patient stands.

22 So I think it's best not to -- Again, I  
23 think it's premature at this point certainly to say to the  
24 department that they have willfully defied the directions  
25 of this Court. I don't see that there's any evidence of  
26 that. I really don't. There's a difference of opinion,  
27 but that's best fleshed out in this setting, in your  
28 administrative hearing. Now, --

1 MR. CARLSON: Yes, sir. I respectfully suggest  
2 that this actually is a very difficult issue. I know that  
3 all of us have tried to come up with the right language,  
4 and I would suggest that all of us have failed to a  
5 certain extent, and the reason that we failed to a certain  
6 extent is it's very difficult to concisely talk about the  
7 rights of someone who is cognitively impaired. This is an  
8 issue that doesn't have to be addressed in the Standard  
9 Admission Agreement. I agree there needs to be clarity,  
10 but the intent of the agreement was to concisely address  
11 those important matters that can be put out pithily, and  
12 that will help individuals understand rights and  
13 responsibilities in a nursing facility.

14 As we pointed out in our brief, there's  
15 nothing that legally requires a Standard Admission  
16 Agreement to address this particular issue, and we have  
17 suggested that it be deleted. In responsive briefing,  
18 Mr. Reagan's organizations have -- don't have any  
19 objection to that, I think it's fair to say, and my  
20 understanding is that the State may feel a bit constrained  
21 by the writ language here that says that notice to  
22 residents shall be clarified, and it's possible that if  
23 the Court would -- I can't speak for Ms. Wong and the  
24 State, but I think it's possible that if they had a window  
25 to just not address the issue entirely, they might be able  
26 to do that, and the benefits of doing that is that it  
27 might make this process move more quickly. We won't have  
28 to address this issue, because I've tried -- I'm sure

1 Mr. Reagan and his people have tried -- to come up with  
2 something that does it. I would suggest that it's hard to  
3 do that in less than maybe four paragraphs because whether  
4 the person is leaving forever, whether the person is  
5 leaving just for the day, whether it's a medical  
6 appointment, whether the person is under a  
7 conservatorship -- There are lots of possibilities there,  
8 and we could all avoid a great deal of confusion, I think  
9 make the agreement a better document by just not  
10 addressing the issue.

11 THE COURT: The original writ addressed the  
12 specific language, and that language was misleading.

13 Now, to the extent that that language  
14 covering that topic need not be addressed in an SSA,  
15 that's a completely different issue. I'm not the one who  
16 sits across the desk from someone who is reviewing a  
17 document and who is making a decision on behalf of someone  
18 who has cognitive disabilities. I don't know whether that  
19 is an issue that comes up in every setting, in every  
20 discussion between these parties at the time the agreement  
21 is executed. If it's not a topic that comes up every  
22 time, well, why put it in there?

23 Take paragraph 13, metaphorically, redact  
24 it. Take it out. But to extent that it's something that  
25 comes up and it's always on the table, and I think the SSA  
26 was attempting -- the whole purpose behind the SSA was  
27 attempting to address issues that are recurring and have a  
28 uniform approach to it. I don't have enough information

1 right now as to whether it should be completely removed.  
2 I don't want to, by the language in a writ, based upon  
3 assumptions that may have been erroneous, that it's  
4 necessary, require you to do something in the regulatory  
5 venue that drives you to distraction. I just don't know.

6 Now, you're here on the writ. You're  
7 responding to the writ. I mean if you are telling me  
8 that's something that we don't need to address in the  
9 writ, I mean -- excuse me, that's something that need not  
10 be addressed in the SSA, it's going to raise issues that  
11 are not really the subject of problems in the admission  
12 process, that shouldn't be addressed in the SSA, that's  
13 okay. I can live with that. Just fine. I don't have  
14 enough knowledge to really say. I have to rely on you.

15 I was presented with a given, and the given  
16 was really not acceptable. It was a problem, and for  
17 reasons we discussed, and I think we all agreed that  
18 language was a problem. Can that topic be redacted from  
19 the SSA? Is that what I'm hearing from everybody?

20 MR. CARLSON: From our perspective, yes, sir.

21 THE COURT: Well, from the fellow here --

22 MR. REAGAN: That would be fine, Your Honor,  
23 with us, as well.

24 THE COURT: Just redact it from the SSA. Is  
25 there any reason from the department's standpoint?

26 MS. WONG: I wouldn't think there was a reason.  
27 In fact, that was something we discussed.

28 THE COURT: What?

1 MS. WONG: It was something we had discussed, or  
2 I had discussed with the department.

3 THE COURT: I don't remember us discussing it.  
4 I mean within this court.

5 MS. WONG: I don't think we discussed it as an  
6 issue in court, but I think individually we all discussed  
7 it, perhaps separately, and I think some people had  
8 discussed it together, but not me, but there have been  
9 various discussions about deleting that particular  
10 sentence.

11 MR. REAGAN: I think given that we all said what  
12 we said on the record, that if we ever come back here,  
13 then I think we've all sort of represented what our  
14 various stakeholders would say on the subject.

15 THE COURT: So, to recap, the consensus of all  
16 appearing before the Court are that this topic can be  
17 removed from the SSA?

18 MS. WONG: I don't know if I can speak to the  
19 department. All I said was I had discussed that with the  
20 department and made certain suggestions. Now, whether --  
21 I mean I would hope that my suggestions would be  
22 considered. I can't bind them to that, but certainly that  
23 is what -- the direction which we were leading.

24 MR. REAGAN: So if they take that step, it  
25 should be clear from the record that I'm not going to  
26 object to it.

27 THE COURT: It's a nonissue. If it comes to  
28 pass that in your regulatory process you're convinced that

1 it must be addressed, it has to be addressed clearly and  
2 provide clarity to the issue, and as to really what the  
3 issue is, and is it four paragraphs? I'm a believer in  
4 simplicity. If you can one-line it, you're better off.

5 I'll digress. A real property purchase and  
6 sale agreement, 30, 40 years ago if you purchased a home  
7 in California, you would have been presented with a piece  
8 of paper. Now I think you might not be presented with a  
9 piece of paper. I'm not saying it's the fault of lawyers,  
10 I'm not saying it's the fault of judges, but setting that  
11 completely aside, simplicity and clarity I think is  
12 something to be aiming towards, if it can be removed from  
13 the document. Don't -- Do not take the language in the  
14 writ directed to the department to require you to include  
15 it. I will not be at all disappointed if there's no  
16 language that covers that topic.

17 And we're on the record, and I've got a  
18 transcript right here. "Don't take the language in the  
19 writ directed to the department to require you to include  
20 it." Okay?

21 But if it's necessary, discuss it in the  
22 regulatory process and do the best you can with it, but  
23 make it clear, make it simple, and please don't make it  
24 four paragraphs. Be kind to the poor people sitting  
25 across the table: On one side the person who has to sign  
26 the agreement from the patient's side, and from the  
27 facility's side. Okay?

28 Is there anything further? I think we're

1 on the same page with most of these things. I think it's  
2 premature right now. It's a good idea to have a colloquy  
3 concerning this. Go ahead.

4 MR. REAGAN: The only other issue, and there  
5 were three -- the third one has to do with that the  
6 department in their return and the Standard Admission  
7 Agreement still is including posting requirements in  
8 addition to the regulation that this Court pointed to when  
9 it ruled, and all we're asking is that the Standard  
10 Admission Agreement say what the Court said, and that was  
11 that do not impose a posting requirement in addition to  
12 preexisting statutory regulatory requirements. That is,  
13 the most recent state licensing visit, not state  
14 inspection report. You were clear when you ruled in the  
15 case, and for some reason we still have creep in this  
16 document.

17 THE COURT: I really didn't want to change  
18 anything. I wanted, to the extent that there was a  
19 requirement of posting, that that simply be carried forth  
20 and it not be enhanced in any way or changed in any way.

21 MS. WONG: I would agree with you there,  
22 Your Honor, and the issue that was briefed and ruled upon  
23 was whether the worst 25 percent of the facilities or all  
24 of the facilities had to post the most recent state  
25 inspection reports. That has always been the term used,  
26 state inspection reports, because that takes into  
27 consideration both the state statute and federal  
28 regulations.

1                   And even taking a look as far back as  
2 petitioner's amended -- first amended petition for writ of  
3 mandate, they use the term state inspection reports. We  
4 have always used the term state inspection reports because  
5 it incorporates, again, Your Honor, both the state statute  
6 and the federal regulations. I think petitioner's moving  
7 papers herein only refers to the state statute and it  
8 doesn't make any reference to the federal regulations,  
9 which would encompass and envelope the total term state  
10 inspection reports.

11                   MR. REAGAN: I can be very clear on this. The  
12 California Code of Regulations that the Court ruled upon  
13 in its order says everybody must post the most recent  
14 licensing visit report. Okay.

15                   Now, the federal regulation says that you  
16 have to make inspection reports accessible. It doesn't  
17 say how, and then the code as we talked about, 1599.87,  
18 says the 25 percent of the worst facilities essentially in  
19 terms of compliance history must post the state inspection  
20 reports. The return includes language that says state  
21 inspection reports. That's only for the lower 25 percent.  
22 This Court said, "Only require everybody to do what state  
23 law says," and that says most recent licensing visit  
24 report.

25                   THE COURT: You mean what state law requires,  
26 not federal law?

27                   MR. REAGAN: That's right, because there's no  
28 posting requirement under the federal regulations.

1 THE COURT: So we put aside the feds. The state  
2 requires all of the inspection reports be available for  
3 inspection if somebody wants to. That's a given.

4 MR. REAGAN: Yes.

5 THE COURT: The most recent licensing report,  
6 everybody has to post. The licensing visit. The bottom  
7 25 percent, they're not required to post that?

8 MR. REAGAN: Yes, they are, but they're also  
9 required to report -- to post all of the state inspection  
10 reports, which is a broader subset.

11 THE COURT: Okay. I am assuming that that's the  
12 existing law. Is that a fair statement by everybody?  
13 It's pretty close to the mark, as I recall. To the extent  
14 that the writ said you just do what the law requires,  
15 that's all I meant. That doesn't mean that everybody has  
16 to post the most recent inspection report. The bottom 25  
17 have to post whatever they have to post. The latest visit  
18 has to be posted by everybody, as I am understanding it,  
19 and correct me if I'm wrong.

20 MR. REAGAN: From the licensing point of view,  
21 Your Honor, yes.

22 MR. CARLSON: This I think is an issue that can  
23 be sorted out in the promulgation process. I think  
24 discussion is helpful. As we pointed out in our briefing,  
25 the federal law here is relevant, and the writ refers to  
26 statutory and regulatory requirements, which should  
27 include the federal law. And the language that we've  
28 proposed accurately reflects that all facilities must post

1 the -- let me get the terminology right -- the licensing  
2 visit, and that all facilities make available and post the  
3 availability of, under federal law, the most recent survey  
4 result.

5           So I don't think it's fair to say that the  
6 federal law should be disregarded here. I suggest in  
7 looking at this, we not look at the statute that talks  
8 about the lowest 25 percent because that's inappropriate  
9 here because we're coming up with a Standard Admission  
10 Agreement. We should look instead at the regulatory  
11 requirements which are applicable across the board, and  
12 those -- on the state side those requirements require the  
13 licensing visits to be posted and they require the federal  
14 survey results to be available upon request with their  
15 availability posted, and I respectfully suggest that  
16 that's the language that the department can be working  
17 towards, which accurately describes the consumer's access  
18 to information about recent inspection survey visits.

19           THE COURT: So we don't have to worry about the  
20 bottom 25 percent? Is there any problem with that?

21           MR. REAGAN: No. You know, my only complaint  
22 here is that the department didn't follow what the Court  
23 asked it to do in its return. I mean that's why this is  
24 an issue, because it didn't propose what Mr. Carlson  
25 proposed, which is truly something that should be  
26 addressed in -- as part of the rule-making process. What  
27 the State's return said was state inspection reports, and  
28 that is completely at odds with what this Court ruled.

1 MS. WONG: But it's also the term used all  
2 along, including in petitioner's own petition for writ of  
3 mandate, the term state inspection reports.

4 THE COURT: The devil's in the details. There's  
5 no law that requires -- no regulation, no law at least  
6 that's been pointed out to me, that every single facility  
7 has to post the latest inspection report.

8 MS. WONG: Not under state statute.

9 THE COURT: Right, and it's not under federal  
10 statute.

11 MS. WONG: Under federal they have to post the  
12 availability --

13 THE COURT: Right. So just if you fall back to  
14 the proposition that I did not intend to change what the  
15 law required. So to the extent that the return is viewed  
16 as changing that, it really shouldn't, and you should go  
17 into the administrative process with the idea that  
18 existing law concerning posting should be -- to the extent  
19 that it has application to language in an SSA, should be  
20 dealt with, and we don't want to change things. We don't  
21 want to require everybody to post every inspection report  
22 unless the law otherwise required it. I don't want to  
23 change that.

24 Am I not --

25 MS. WONG: Completely, Your Honor, and the  
26 comments that all parties are making today are the  
27 comments that the department has -- when approached by  
28 each party the department has replied, "Please bring those

1 comments forward at the public comment period and we will  
2 address that" --

3 THE COURT: Do more than just address them.  
4 This was an order of the Court. Make sure it's carried  
5 out. I don't want to change the law from a posting  
6 standpoint. That was a part of the -- What we discussed,  
7 it was a part of the litigation in the writ and that's  
8 really what I wanted to have happen. So I think it's  
9 inappropriate.

10 I mean I'll give you -- This is a  
11 hypothetical. It would be wholly inappropriate for the  
12 department to come up with some language that is in the  
13 SSA that says, "Every facility is required to post the  
14 last five years of inspection reports on the kitchen  
15 door." The law doesn't require that. The SSA should deal  
16 with existing law, and it's simple as that. There  
17 shouldn't be really any higher standard that's promulgated  
18 as a proposed result and have people comment upon a higher  
19 standard because I think it's unnecessary. That's what we  
20 talked about in the process of the writ, if I'm not --  
21 Maybe I'm mistaken. Correct me if I'm wrong, but I think  
22 that's what we talked about. A simple SSA, an attempt to  
23 deal with modifications on a particularized need, due  
24 process for all concerned.

25 I don't want to change any law. I'm not in  
26 the legislature. I suppose they could pass a law that  
27 requires all sorts of things, but that's their job. I  
28 don't tell them what to do and they don't tell me what to

1 do in deciding a case.

2 So I think we're on the same page. I trust  
3 the legislative process. I trust the administrative  
4 process. I think it's a terrific process. Everybody has  
5 something to say, and then finally the result is achieved  
6 consistent with the legislature, and in this case  
7 consistent with the order of the Court.

8 So I hope we're all on the same page. Do I  
9 see you shaking your head?

10 MS. WONG: No, I'm nodding my head.

11 THE COURT: I mean -- And don't anybody nod your  
12 head just because you think I want you to nod your head.  
13 If you shake your head and you think I'm wrong, tell me  
14 because I don't want to make the mistake, but I think  
15 that's the way it ought to play out, and it is premature  
16 at this point. It's good to talk about it, and any time  
17 anybody wants to talk about it, I would suggest if it's  
18 something that seems to be inconsistent with the writ that  
19 was issued, there's nothing wrong with you meeting and  
20 conferring about these things, saying, "Hey, you know, I  
21 think you're off track because the Court said he didn't  
22 want that." You know, I don't think you have to have a  
23 formal OSC re contempt or anything. I want it to be -- I  
24 want it to work smoothly. I'm here.

25 MR. REAGAN: Thank you, Your Honor.

26 THE COURT: Okay. And I don't have the  
27 expertise that you do. The only way I can achieve what I  
28 think is a fair result is to listen to you and then decide

1 the best course of action, at least from my standpoint.

2 MS. WONG: And with respect to the department  
3 going forward from this date on, I think the most  
4 expeditious manner is to take this package and send it up  
5 through the department for signature and all the comments  
6 that were made, that had been made or that anyone else  
7 cares to make, that they would be addressed in that public  
8 comment period, but if the department were to rewrite,  
9 again, the Standard Admission Agreement and the two  
10 regulations, I think that would be a delay.

11 THE COURT: Well, you're going to change one  
12 thing, as I'm understanding it, or at least you're going  
13 to recommend to the powers that be that the cognitive  
14 disability area is just removed.

15 MS. WONG: A deletion of that one particular  
16 sentence.

17 THE COURT: So the package is going to be  
18 somewhat dealt with, somewhat modified. So take a look at  
19 it and just make sure it's consistent with what we talked  
20 about today. You'll have no difficulties from the  
21 standpoint of this fellow.

22 MR. REAGAN: The thing --

23 THE COURT: We had a hand over here?

24 MR. REAGAN: I'm sorry.

25 MR. CARLSON: I'd just like to address the third  
26 point briefly. It sounded as though Mr. Reagan had some  
27 level of agreement with what I was saying regarding the  
28 modification of the posting language. I just wanted to

1 explore that on the possibility that that's something we  
2 could come to an agreement upon.

3 MR. REAGAN: It is not required for the  
4 department to include the accessibility of inspection  
5 reports in the Standard Admission Agreement. I would  
6 imagine that that would be a topic that would be part of  
7 the rule-making process.

8 THE COURT: I think so. It may be that the --  
9 in the rule-making process, in the designing of the  
10 document, after hearing everybody, a lot more than what  
11 we've said today and I've said in prior hearings, that  
12 there's a better approach. I can't decide not knowing  
13 what's going to be discussed.

14 MR. REAGAN: Your Honor, just one last point in  
15 response to what Ms. Wong had said before. The  
16 department's going to do whatever it's going to do in  
17 terms of advancing this package forward, and stakeholders,  
18 of which my clients and Mr. Carlson's clients, will  
19 obviously weigh in. I just would encourage the  
20 department, obviously as part of that process, to take  
21 your viewpoint that you have spoken to today, as well as  
22 in the issuance of the writ, and what you've ruled in this  
23 case, and that be part of what they take to heart; that  
24 somehow in that forum, that through Ms. Wong or otherwise,  
25 that your expectations be made clear because there are  
26 issues that have been discussed, and I completely  
27 appreciate the notion that, you know, that in your mind  
28 these may be premature, but these are issues that if we

1 come back here in three months and we're talking about the  
2 same thing, then it would be clear that the process on the  
3 administrative side would have failed because they  
4 wouldn't have heard where you were coming from.

5 THE COURT: Well, it doesn't serve anybody any  
6 laudatory purpose to take the Court's comments and the  
7 writ that was issued and the order that was issued in  
8 response to the petition and ignore it and just go ahead  
9 as you will and then come up with something because it's  
10 simply going to delay things, if those matters are the  
11 subject of discussion and presented in the regulatory  
12 process, because what's ultimately going to happen is if  
13 the SSA is a one-eighty off the Court's order, the Court's  
14 order is what counts and we'll be back here on some type  
15 of motion, whether it's an OSC re contempt, which is --  
16 That's a criminal matter really. It's called  
17 quasi-criminal, but it's really a criminal matter that  
18 doesn't serve a lot of purpose right now. We just want  
19 this to happen, and to the extent that the department  
20 disregards the Court's directive, then the Court steps in  
21 and issues orders for violation of an order, and then we  
22 have the issues joined and we've got an appeal process.

23 I'm not perfect. I make mistakes. You can  
24 always go up on appeal, but you don't want to get to that  
25 point. You want to close this issue. You want to get an  
26 SSA, and the legislature wants an SSA on the table as soon  
27 as possible that comports with what the legislature's  
28 intent was, and I told you what my view was in that

1 regard, and I'd prefer that we not have an appeal because  
2 it simply delays the process.

3 So I think counsel should take to heart the  
4 Court's orders, and let's make it happen and not come back  
5 here, although it's nice as can be having you here and  
6 interesting issues, and I enjoy reading these materials  
7 and getting into an area that I'm not experienced in. I  
8 feel much more comfortable now than I did on day one, but  
9 I'd like to get it closed with no unnecessary delay.

10 So what I wanted to say was, it's been held  
11 in abeyance for a while. Let's take that vehicle out of  
12 park and move it into drive and let's move ahead. Get  
13 that submission going.

14 MS. WONG: That's absolutely what I want to see,  
15 Your Honor.

16 THE COURT: Okay? I think we all understand one  
17 another, and I say we get this thing closed. Okay? I  
18 think that closes our hearing. Thank you.

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1 STATE OF CALIFORNIA)  
: SS.  
2 COUNTY OF SAN DIEGO)

3 I, Linda Burke, Certified Shorthand Reporter,  
4 an official reporter of the Superior Court of the County  
5 of San Diego, State of California do hereby certify:

6 That I reported in shorthand the proceedings  
7 held in the foregoing cause; that my notes were later  
8 transcribed under my direction; and the foregoing pages  
9 contain a correct transcription of the proceedings.

10 Date: January 24, 2011

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