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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

DOCTORS MEDICAL CENTER OF MODESTO, INC., Plaintiff and Appellant, v. DEPARTMENT OF HEALTH CARE SERVICES et al., Defendants and Respondents.	C062480 (Super. Ct. No. 34200880000093CUWMGDS)

Since Merced County resident R.W. received severe head injuries from a motor vehicle accident in September 2006, Doctors Medical Center of Modesto, Inc. (Doctors Medical), has incurred more than $2 million in largely unreimbursed costs for his care at its hospital. Although Doctors Medical was able to provide initial acute care to R.W., it is not designed to be a long-term care facility for a patient with injury-induced dementia and violent tendencies. Although R.W. has had a conservator appointed by the Merced County Superior Court since August 2007, the conservator has not made arrangements for R.W. to be moved to a secure, long-term facility or for payment of

the actual costs of the constant nursing and security precautions that Doctors Medical provides.

Seeking to have R.W. removed from its neurosurgical floor and to be reimbursed for its mounting costs of care, Doctors Medical filed a petition for writ of mandate under Code of Civil Procedure section 1085 in the Sacramento County Superior Court. Respondents Department of Health Care Services (DHCS), Department of Mental Health (DMH), and the County of Merced demurred on grounds that the trial court lacked jurisdiction to adjudicate the action and that Doctors Medical had no statutory or regulatory right to reimbursement of its actual costs. The trial court sustained the demurrers without leave to amend and dismissed the petition.

On appeal, Doctors Medical argues that the trial court erred in concluding that (1) DHCS, DMH, and the County of Merced have no ministerial duty to pay for R.W.'s placement in a secure, long-term care facility, and (2) Doctors Medical failed to exhaust its administrative remedies prior to seeking reimbursement for its costs of care by petition for writ of mandate. We affirm the judgment of dismissal.

FACTUAL AND PROCEDURAL HISTORY

In January 2009, Doctors Medical filed an amended petition for writ of mandate in Sacramento County Superior Court against DHCS, DMH, and the County of Merced. The petition did not name R.W. or his court-appointed conservator as parties.

Allegations of the Petition

In its petition, Doctors Medical alleged the following: On September 23, 2006, Merced County resident R.W. suffered a severe traumatic brain injury when he was hit by a motor vehicle in Merced County. He was transported by ambulance to the nearest trauma center, Doctors Medical, which is located in Stanislaus County. R.W. has remained a patient in Doctors Medical's hospital since that time.

R.W. is medically stable but unable to communicate. He requires one-on-one nursing and poses a risk of harm to himself and others. He is often violent and aggressive toward hospital staff and the security guards hired by Doctors Medical to watch him 24 hours a day. R.W. has been diagnosed with severe dementia and behavioral problems resulting from a traumatic brain injury.

On August 10, 2007, the Merced County Superior Court appointed the Merced County Public Conservator to serve as conservator of R.W.'s person and estate under Welfare and Institutions Code sections 5358 to 5368, the Lanterman-Petris-Short (LPS) Act. The appointment gave the conservator "the power to detain the Conservatee in the intensive treatment facility or to place the Conservatee for treatment in one of the treatment facilities set out in Welfare and Institutions Code Section 5358."[1] The court also found that "the least restrictive

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[1] Welfare and Institutions Code section 5358 provides in pertinent part: "(a)(1) When ordered by the court after the

and most appropriate available facility to be Doctor's [*sic*] Medical Center . . . ."

On August 23, 2007, the conservator filed an amended letter of conservatorship for R.W. for authority to seek placement under Probate Code section 2356.5, subdivision (b).[2] In March 2008, the Merced County Superior Court authorized the conservator to place R.W. in a secured residential facility or a secure nursing facility specializing in the care of patients with dementia. Doctors Medical is not designed or equipped to

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hearing required by this section, a conservator appointed pursuant to this chapter shall place his or her conservatee as follows: [¶] (A) For a conservatee who is gravely disabled . . . in the least restrictive alternative placement, as designated by the court. [¶] . . . [¶] (2) The placement may include a medical, psychiatric, nursing, or other state-licensed facility, or a state hospital, county hospital, hospital operated by the Regents of the University of California, a United States government hospital, or other nonmedical facility approved by the State Department of Mental Health or an agency accredited by the State Department of Mental Health, or in addition to any of the foregoing, in cases of chronic alcoholism, to a county alcoholic treatment center."

[2] Probate Code section 2356.5, subdivision (b), provides: "(b) Notwithstanding any other provision of law, a conservator may authorize the placement of a conservatee in . . . a locked and secured nursing facility which specializes in the care and treatment of people with dementia . . . upon a court's finding, by clear and convincing evidence, of all of the following: [¶] (1) The conservatee has dementia, as defined in the last published edition of the 'Diagnostic and Statistical Manual of Mental Disorders.' [¶] (2) The conservatee lacks the capacity to give informed consent to this placement . . . . [¶] (3) The conservatee needs or would benefit from a restricted and secure environment . . . . [¶] (4) The court finds that the proposed placement in a locked facility is the least restrictive placement appropriate to the needs of the conservatee."

provide long-term care for patients with dementia as a result of a traumatic brain injury.

In September 2008, Doctors Medical sent a letter to R.W.'s conservator to request that an LPS conservatorship be established so that R.W. could be transferred to a secure facility designed to care for his special needs. The conservator did not file a petition for an LPS conservatorship or identify any appropriate facility to which to transfer R.W.

Doctors Medical engaged in its own intensive, national search for an appropriate long-term care facility for R.W. and was able to locate only a single facility – in Oakland, California – that expressed a willingness to accept R.W. However, the Oakland facility requires payment of Medi-Cal funds as well as an additional $170 per day in "patch" funds.

DHCS is the California agency responsible for administering the federal program known as Medicaid. (42 U.S.C. § 1396a, subd. (a)(5).) As administered in California, the program is referred to as Medi-Cal. (Welf. & Inst. Code, § 10740.)

DHCS has delegated responsibility for administering California's mental health services program for Medi-Cal patients to DMH. (Welf. & Inst. Code, § 5750, subd. (a).) DMH, in turn, has delegated some oversight of mental health services to individual counties. (Welf. & Inst. Code, § 5650, subd. (a).)

R.W. is eligible to receive Medi-Cal benefits. Doctors Medical is being reimbursed with Medi-Cal funds at the "administrative day rate" of $220 per day. However, the actual

cost to care for R.W. exceeds $1,500 per day. Since September 2008, Doctors Medical has incurred more than $2 million in costs for R.W.'s care.

Doctors Medical alleges that DHCS refuses to pay for R.W. to be placed in a facility that can properly provide long-term care for him. Doctors Medical further alleges that DHCS refuses to direct its delegee, DMH, to provide the "patch" funds necessary to transfer R.W. to the Oakland facility.

Relief Sought in the Petition

The petition for writ of mandate filed by Doctors Medical requested that the Sacramento County Superior Court issue an order:

(1) "requiring the conservator appointed by the Superior Court of Merced to find a placement that will provide appropriate treatment for R.W. pursuant to her power as authorized by the Merced County court order of August 10, 2007 providing placement in an intensive treatment facility . . . . and for the conservator to facilitate R.W.'s discharge from Doctors to such facility forthwith";

(2) "requiring DHCS . . . to pay the actual reasonable costs of R.W.'s treatment and care at the appropriate and necessary level";

(3) "requiring DHCS to compel its delegee, DMH, to provide mental health funding as may be required for the costs of R.W.'s placement and treatment";

(4) "requiring DMH to provide funding as may be required for R.W.'s placement and treatment as set forth in the Short-

Doyle Act as a patient with a serious mental disorder and as authorized and required by Welfare and Institutions Code § 5600.3(b)[3] and/or the [LPS] Act (Welfare & Institutions Code § 5344)";[4] (Underlining omitted.)

(5) "finding that it is an abuse of the conservator's discretion to fail to file for an order clarifying R.W.'s eligibility for an LPS conservatorship as was ordered by the Merced County Superior Court on August 10, 2007 or filing a new petition for an LPS conservatorship for R.W., thus insuring

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[3] Welfare and Institutions Code section 5600.3 provides in pertinent part: "*To the extent resources are available*, the primary *goal* of the use of funds deposited in the mental health account of the local health and welfare trust fund should be to serve the target populations identified in the following categories, which shall not be construed as establishing an order of priority: [¶] (a)(1) Seriously emotionally disturbed children or adolescents. [¶] . . . [¶] (b)(1) Adults and older adults who have a serious mental disorder." (§ 5600.3, italics added.)

[4] Welfare and Institutions Code section 5344 provides: "Any expenditure for the custody, evaluation, treatment, or other procedures for services rendered a person pursuant to this article shall be considered an expenditure made under the provisions of Part 2 (commencing with Section 5600) of this division, and shall be paid as are other expenditures pursuant to that part. No person shall be admitted to a state hospital for care and treatment of his or her use of controlled substances prior to screening and referral by an agency designated in the county Short-Doyle plan to provide the services."

Section 5344 is found within an article of the Welfare and Institutions Code that addresses persons addicted to controlled substances. As section 5340 makes clear, "It is the intention of the Legislature by enacting this article to provide legal procedures for the custody, evaluation, and treatment *of users of controlled substances*." (Italics added.)

funding for his care and treatment as provided by the Short-Doyle-Act";

(6) "requiring DHCS to reimburse Doctors for the actual and reasonable costs of R.W.'s care and treatment of $1,500 per day which Doctors has been required to expand [*sic*] for R.W. for 2-1/2 years";

(7) attorneys fees and costs.

The Demurrers

DHCS, DMH, and the County of Merced each demurred to the petition. After a hearing, the trial court sustained the demurrers without leave to amend and entered a judgment of dismissal.

As to the County of Merced, the court concluded that "this court lacks jurisdiction to issue a writ of mandate requiring the Merced County Public Conservator, appointed by the Superior Court for the County of Merced as the probate conservator of R.W., to pursue a conservatorship of R.W. under the [LPS] Act. The Superior Court for the County of Merced has sole jurisdiction to direct the actions to be taken by the Merced County Public Conservator on behalf of R.W."

As to DHCS and DMH, the court explained that "the petition fails to state facts sufficient to constitute a cause of action against either State Department for the funding of a residential care facility for R.W. Neither the State Department of Health Care Services nor the State Department of Mental Health have a legal duty to fund a residential care facility for an individual like R.W. whose eligibility for funded placement in a

residential care facility has not been assessed by appropriate county personnel pursuant to an application by R.W. (through his legally authorized representative, the Merced County Public Conservator) and approved either by such county personnel or by an administrative agency or court deciding an appeal by R.W. from a denial of his eligibility by the county personnel. R.W., not petitioner, has standing to pursue his eligibility for funded placement in a residential care facility in administrative and judicial proceedings, and he is an indispensible party to any judicial proceeding involving the determination of his eligibility. No evidence presented indicates that R.W. has pursued and exhausted administrative and judicial proceedings to determine his eligibility, and he has not been joined as a party herein."

From the judgment of dismissal, Doctors Medical timely filed a notice of appeal.

DISCUSSION

I

Claimed Ministerial Duty to Fund R.W.'s Placement in an Appropriate Long-Term Care Facility

Doctors Medical argues that the Short-Doyle Act and Short-Doyle Medi-Cal regulations impose a ministerial duty on DHCS, DHM, and the County to fund R.W.'s placement in a long-term care facility. (Welf. & Inst. Code, § 5600 et seq.; Cal. Code Regs., tit. 22, § 50000 et seq.) We reject the argument.

A

A demurrer is properly sustained when a party has failed to allege facts sufficient to warrant the granting of legal relief. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 42 (*Rakestraw*).) "On appeal from a dismissal entered after an order sustaining a demurrer, we review the order de novo, exercising our independent judgment about whether the petition states a cause of action as a matter of law. (See *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125, cert. den. 499 U.S. 936 [113 L.Ed.2d 444]; *Desai v. Farmers Ins. Exchange* (1996) 47 Cal.App.4th 1110, 1115.) We give the petition a reasonable interpretation, reading it as a whole and viewing its parts in context. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; see *Aubry v. Tri-City Hospital Dist*. (1992) 2 Cal.4th 962, 966-967.) We deem to be true all material facts that were properly pled. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591.) We must also accept as true those facts that may be implied or inferred from those expressly alleged. (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.) We may also consider matters that may be judicially noticed, but do not accept contentions, deductions or conclusions of fact or law. (*Serrano v. Priest, supra*, 5 Cal.3d at p. 591.)

"If the petitioner has stated a cause of action under any possible legal theory, we will order that the demurrer be overruled. (See *Aubry v. Tri-City Hospital Dist., supra*, 2 Cal.4th at pp. 966-967.) However, if no liability exists as a matter of law, we affirm the trial court's order sustaining the

demurrer. (See *Baughman v. State of California* (1995) 38 Cal.App.4th 182, 187.)" (*City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 Cal.App.4th 861, 869-870.) The petitioner has the burden of proving that an amendment would cure the defect. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

To secure legal relief by petition for writ of mandate under Code of Civil Procedure section 1085, the petitioner must show: "'(1) A clear, present and usually ministerial duty upon the part of the respondent; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty. (*Shamsian v. Department of Conservation* (2006) 136 Cal.App.4th 621, 640.) 'However, the writ will not lie to control discretion conferred upon a public officer or agency. [Citations.]' (*Ibid.*)" (*Hulings v. State Dept. of Health Care Services* (2008) 159 Cal.App.4th 1114, 1120.)

For purposes of writ relief, "[a] ministerial act is one that a public functionary '"'is required to perform in a prescribed manner in obedience to the mandate of legal authority,'"' without regard to his or her own judgment or opinion concerning the propriety of such act. (*Ridgecrest Charter School v. Sierra Sands Unified School Dist.* (2005) 130 Cal.App.4th 986, 1002.)" (*Coachella Valley Unified School Dist. v. State of California* (2009) 176 Cal.App.4th 93, 113.)

B

In this case, R.W.'s conservator was initially appointed by the Merced County Superior Court under the LPS Act.[5] (Welf. & Inst. Code, § 5358 et seq.) However, only two weeks after appointment, the conservator filed an amended letter of conservatorship under the Probate Code. The trial court subsequently granted the conservator authority to seek placement for R.W. under Probate Code section 2356.5.

A probate conservatorship requires the conservator to "'select the least restrictive appropriate residence . . . that is available and necessary to meet the needs of the conservatee, and that is in the best interests of the conservatee.' (Prob. Code, § 2352, subd. (b).) In addition, unlike the situation with an LPS conservatorship, a probate conservatee cannot be placed in a mental health treatment facility against his or her will. (Prob. Code, § 2356, subd. (a).) 'The primary difference between a Probate Code conservator and an LPS conservator is the LPS conservator's power to place the conservatee in a locked facility, an action that a Probate Code conservator cannot take.' [Citation.] Nonetheless, the Probate Code contains provisions dealing specifically with persons with dementia; a probate conservator may authorize the placement of a conservatee who suffers from dementia in a 'locked and secured nursing

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[5] We grant the County of Merced's request for judicial notice of orders showing that the Merced County Superior Court appointed a conservator for R.W. and has retained jurisdiction over the conservatorship.

facility which specializes in the care and treatment of people with dementia' if certain requirements are met. (Prob. Code, § 2356.5, subd. (b).) Because '[t]he deprivation of liberty and stigma which attaches under a probate conservatorship is not as great as under an LPS conservatorship' the inability to care for one's personal needs need be established by only clear and convincing evidence. (*Conservatorship of Sanderson* (1980) 106 Cal.App.3d 611, 620; Prob. Code § 1801, subd. (e).)" (*People v. Karriker* (2007) 149 Cal.App.4th 763, 780.)

Both LPS and probate conservatorships grant conservators broad discretion in determining the most suitable placement for their conservatees – especially with respect to the level of security imposed on patients at the facility. (Welf. & Inst. Code, §§ 5354 [instructing that "[t]he officer providing conservatorship investigation shall investigate all available alternatives to conservatorship and shall recommend conservatorship to the court only if no suitable alternatives are available"]; 5351 [allowing counties to designate their public conservators to act as LPS conservatorship investigators]; Prob. Code, § 2352, subd. (b) [conservator's duty to determine the "least restrictive appropriate residence" for a probate conservatee].)

Determining the appropriate long-term care facility for R.W. is the prerogative of his court-appointed conservator. (Prob. Code, § 2352, subd. (b).) However, according to the allegations of the petition filed by Doctors Medical, R.W.'s conservator has not yet indentified an appropriate placement for

the conservatee other than in Doctors Medical's hospital. In the absence of the conservator's determination of an alternate placement, respondents have no ministerial duty to fund R.W.'s placement in any particular facility such as the Oakland facility identified by Doctors Medical.

The trial court properly ruled that the conservator's integral role in determining the appropriate placement for R.W. rendered R.W. and his conservator indispensible parties to Doctors Medical's action. "A person is an indispensable party to litigation '"if his or her rights must necessarily be affected by the judgment."'" (*Washington Mut. Bank v. Blechman* (2007) 157 Cal.App.4th 662, 667, quoting *Save Our Bay, Inc. v. San Diego Unified Port Dist.* (1996) 42 Cal.App.4th 686, 692.) R.W., through this court-appointed conservator, has a right to determine the most appropriate placement for him. (Prob. Code, § 2352, subd. (b).)

Doctors Medical cannot substitute its desire to transfer R.W. to another facility for a proper determination of R.W.'s placement by his conservator. The specific placement most appropriate for R.W. remains too speculative to warrant writ relief to enforce a ministerial duty of respondents to fund the placement. (*County of San Diego v. State* (2008) 164 Cal.App.4th 580, 597 [improper to grant writ relief on speculation regarding future events].)

Even if R.W.'s conservator had identified an alternate placement in a facility such as that located in Oakland, Doctors Medical's petition would nonetheless have failed to establish a

ministerial duty to fund the placement. As Doctors Medical acknowledges, "Welfare and Institutions Code section 14081 et seq., grants DHCS *discretion* in arranging for the provision of long-term care services . . . ." (Italics changed.) Indeed, DHCS does have discretion to accept or reject a particular skilled nursing facility that has been proposed for a Medi-Cal beneficiary. To this end, the California Code of Regulations provides that "[t]he Medi-Cal consultant shall deny an authorization request or reauthorization request or shall cancel any authorization or reauthorization in effect when services or placement are not appropriate to the needs of the patient (beneficiary)." (Cal. Code Regs., tit. 22, § 51335, subd. (d).)

Contrary to Doctors Medical's argument, DHCS, DMH, and the County do not have a ministerial duty to provide funds for placement of a Medi-Cal beneficiary with trauma-induced brain damage in any particular long-term care facility. Respondents' discretion in providing funding is announced in Welfare and Institutions Code section 4353, where it states:

"The Legislature finds and declares all of the following: [¶] (a) There is a large population of persons who have suffered traumatic head injuries resulting in significant functional impairment. [¶] (b) Approximately 80 percent of these injuries have occurred as a direct result of motor vehicle accidents. [¶] (c) There is a lack of awareness of the problems associated with head injury resulting in a significant lack of services for persons with head injuries . . . . [¶] (d) Although there are currently a number of different programs

attempting to meet the needs of the persons with head injuries, there is no clearly defined ultimate responsibility vested in any single state agency. *Nothing in this section shall be construed to mandate services for persons with acquired traumatic injury through county and city programs*." (Italics added.)

Doctors Medical's frustration with R.W.'s costly and continued residence in the neurological surgery section of its hospital is palpable. So, too, Doctors Medical's displeasure with the conservator's failure to find a different placement for R.W. is abundantly clear. However, Doctors Medical is not without an avenue for seeking relief. Doctors Medical has the right to petition the Merced County Superior Court to compel the conservator to pursue another, more appropriate long-term care placement for R.W. (Prob. Code, §§ 2102 [providing that conservators are "subject to the regulation and control of the court in the performance of the duties of the office"]; 2359, subd. (a) ["Upon petition of the guardian or conservator or ward or conservatee *or other interested person*, the court may authorize and instruct the guardian or conservator or approve and confirm the acts of the guardian or conservator"], italics added; see also *Sego v. Santa Monica Rent Control Bd.* (1997) 57 Cal.App.4th 250, 255 ["While mandamus will not lie to compel governmental officials to exercise their discretionary powers in a particular manner, it will lie to compel them to exercise them in some manner"].)

The venue for an action seeking to compel R.W.'s conservator to identify and pursue an alternate placement is in the Merced County Superior Court – the court that established R.W.'s probate conservatorship. (*In re Gandolfo* (1984) 36 Cal.3d 889, 896 [Superior Court of the county in which the conservator was appointed has exclusive jurisdiction to review challenges to conservatee's placement]; *Browne v. Superior Court* (1940) 16 Cal.2d 593, 597, 599 [same principle articulated in guardianship proceeding]; cf. also Prob. Code, § 2203 [first court to exercise jurisdiction over conservatorship acquires exclusive jurisdiction over conservatorship].) Accordingly, the Sacramento County Superior Court lacked jurisdiction to grant writ relief that would have impinged upon the Merced County Superior Court's sole jurisdiction over R.W.'s conservatorship.

Even if Doctors Medical were able to establish that R.W. has a ministerial right to have respondents fund his long-term care at a new facility, the petition to enforce such a duty is premature until the conservator identifies *which* new facility it should be. Although Doctors Medical may seek judicial relief for a dereliction of duties by R.W.'s conservator, such an action must be filed in the Merced County Superior Court. (*In re Gandolfo*, *supra*, 36 Cal.3d at p. 896.) Doctors Medical cannot amend the petition to secure mandate relief for a discretionary determination yet to be made by a conservator subject to challenge only in Merced County. Accordingly, the Sacramento County Superior Court did not err in sustaining respondents' demurrers without leave to amend.

II

Claimed Ministerial Duty of DHCS to Reimburse Doctors Medical for the Actual Cost of R.W.'s care

Doctors Medical contends DHCS[6] has a ministerial duty to reimburse the actual costs of R.W.'s care that exceed the $220 per day rate of reimbursement provided by Medi-Cal. DHCS counters that Doctors Medical has failed to exhaust its administrative remedies. We agree with DHCS.

Exhaustion of administrative remedies is a jurisdictional requirement. (*Yamaha Motor Corp. v. Superior Court* (1987) 195 Cal.App.3d 652, 657.) "Whether or not the administrative remedy is permissive and whether or not it may afford complete relief, the complainant must exhaust it before seeking judicial assistance. The reasons for the rule are to lighten the burden on courts by providing the benefit of the agency's expertise in preparing a full record and sifting the evidence. (*Yamaha* [*Motor Corp. v. Superior Court* (1986)] 185 Cal.App.3d [1232,] 1240, citing *Morton v. Superior Court* (1970) 9 Cal.App.3d 977, 982; *Karlin v. Zalta* (1984) 154 Cal.App.3d 953, 980.) Many cases support this proposition; 'this legislatively mandated policy promoting the resolution of disputes by specialized boards and fostering judicial economy has been well explained. . . .' (*Robinson v. Department of Fair Employment & Housing* (1987) 192 Cal.App.3d 1414, 1417; see also cases cited at pp. 1416-1417.)" (*Ibid.*)

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[6] The argument raised on appeal by Doctors Medical pertains only to DHCS, not to DMH or the County of Merced.

Although Doctors Medical has two administrative remedies available to challenge underpayment of R.W.'s costs of care, Doctors Medical has not availed itself of either.

The first requires Doctors Medical to submit a treatment authorization request (TAR). A Medi-Cal provider of services must submit and receive authorization to provide services in order to secure entitlement to reimbursement of costs for the care of a Medi-Cal beneficiary. (Cal. Code Regs., tit. 22, § 51003.)[7] Doctors Medical must submit a TAR in order to pursue any claim for payment of its claimed costs for R.W.'s care. (*Ibid.*)

If Doctors Medical is unsatisfied by the denial or partial denial of its TAR for R.W., it may pursue an administrative appeal. (Cal. Code Regs., tit. 22, § 51003.1.) To this end, section 51003.1 provides in pertinent part: "(a) A provider of services may appeal the decision of a Medi-Cal consultant regarding a TAR, as follows: [¶] (1) The provider shall submit a written appeal to the Medi-Cal Operations Division Headquarters in Sacramento within 180 calendar days from the date on the TAR, which is the date a decision on the TAR is made

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[7] Section 51003 of title 22 of the California Code of Regulations provides in pertinent part: "(a) 'Prior authorization,' or 'authorization' means authorization [to pay Medi-Cal funds] granted by a designated Medi-Cal consultant or by a Primary Care Case Management (PCCM) plan and is obtained through submission and approval of a TAR. . . . [¶] (b) A TAR received by the Department from a Fee-For-Service Medi-Cal provider shall be reviewed for medical necessity only."

by the Medi-Cal consultant. [¶] . . . [¶] (b) The Department shall review the provider appeal and send a written decision, and the basis for that decision, to the provider . . . ."

If Doctors Medical remains unsatisfied with the outcome of the administrative appeal process, it may seek a judicial remedy by filing a petition for writ of mandate to review the outcome of the administrative process. On this point, the California Code of Regulations provides that "[i]f a provider is not satisfied with the appeal decision, the provider may seek a judicial remedy pursuant to Section 1085 of the Code of Civil Procedure." (Cal. Code Regs., tit. 22, § 51003.1, subd. (c).)

Doctors Medical asserts that it has submitted a TAR without successfully securing the reimbursement it desires. However, Doctors refers us to no part of the record where it asserted or demonstrated to the trial court that this administrative remedy was exhausted. Our review of the first amended petition reveals no mention by Doctors Medical of any submission of a TAR or appeal of its denial.

The second administrative remedy available to Doctors Medical involves filing an administrative appeal to challenge any failure or refusal to provide Medi-Cal funds to pay a bill for R.W.'s care. Section 51015 of title 22 of the California Code of Regulations specifies the mandatory grievance procedure that must be followed in order to contest nonpayment or underpayment of a bill for services covered by Medi-Cal. Section 51015 provides in pertinent part:

"When a provider of services has a grievance or complaint concerning the processing or payment of his claims for services provided under the Medical Assistance Program the following procedures must be met: [¶] (a) The provider shall initiate an appeal, by submitting a grievance or complaint in writing, within 90 days of the action precipitating the grievance or complaint, to the appropriate fiscal intermediary identifying the claims involved and specifically describing the disputed action or inaction regarding such claims. [¶] . . . [¶] (c) The fiscal intermediary shall determine whether or not the grievance or complaint shall be referred to professional peer review. [¶] (1) When the grievance or complaint is not referred to professional peer review, the fiscal intermediary shall review the merits of the grievance or complaint and send a written decision of its conclusion and reasons therefor to the provider within 30 days of the acknowledgment of the receipt of the grievance or complaint. [¶] (2) When the grievance or complaint is referred to professional peer review: [¶] . . . [¶] (B) The professional peer review shall make its evaluation and submit its findings and recommendations to the fiscal intermediary and the provider within 30 days of the referral from the fiscal intermediary. [¶] (C) The fiscal intermediary, after taking into consideration the findings and recommendations of the professional peer review, shall send a written decision to the provider. [¶] (d) *After these procedures have been followed, a provider who is not satisfied with the appeal decision by the fiscal intermediary, may seek appropriate*

judicial remedies in compliance with Section 14104.5 of the Welfare and Institutions Code, no later than one year after receiving notice of the decision." (Italics added.)

Welfare and Institutions Code section 14104.5 facilitates judicial review of the administrative appeal process by instructing: "Notwithstanding any other provision of law, the director shall by regulation adopt such procedures as are necessary for the review of a grievance or complaint concerning the processing or payment of money alleged by a provider of services to be payable by reason of any of the provisions of this chapter. After complying with these procedures, if the provider is not satisfied with the director's decision on his or her claim, he or she may not later than one year after receiving notice of the decision, file a petition for writ of mandate pursuant to Section 1085 of the Code of Civil Procedure in the superior court. *This section shall be the exclusive remedy available to the provider of services for moneys alleged to be payable by reason of this chapter*." (Italics added.)

Despite the mandatory language of Welfare and Institutions Code section 14104.5, Doctors Medical did not allege that it exhausted this administrative remedy before filing its petition for writ of mandate. The first amended petition does not mention any facts showing that Doctors Medical requested payment of DHCS, provided relevant information to DHCS in order to support the claim, gave DHCS an opportunity to consider a properly tendered request for payment, or pursued an administrative appeal.

Doctors Medical argues it should be excused from the exhaustion requirement because resort to the administrative appeal process would have been futile. It is true that "even where there is an administrative remedy to exhaust, the exhaustion requirement is excused where its pursuit would be futile, idle or useless. (*Jacobs v. State Bd. of Optometry* (1978) 81 Cal.App.3d 1022, 1030.) However, the futility exception is very narrow and will not apply unless the petitioner can positively state that the administrative agency has declared what its ruling will be in a particular case. (*Sea & Sage Audubon Society, Inc. v. Planning Com*. (1983) 34 Cal.3d 412, 418.)" (*Bollengier v. Doctors Medical Center* (1990) 222 Cal.App.3d 1115, 1126.)

Doctors Medical asserts that DHCS's stated refusals, in its legal briefing, to pay for R.W.'s long-term care in an appropriate facility demonstrates the futility of the exhaustion requirement. Not so. The issue of whether DHCS has an obligation to provide funds for R.W.'s long-term care in a particular long-term care facility is different than the question of whether Doctors Medical is entitled to full reimbursement for its costs exceeding the acute administrative day rate upon proper submission of a claim. DHCS's duty to provide "patch" funds for R.W.'s future placement does not resolve whether the Department has a duty to reimburse for past services provided by Doctors Medical. Doctors Medical has not pleaded facts showing the futility of exhausting its administrative remedies.

Amendment of the petition could not have cured Doctors Medical's failure to exhaust its administrative remedies prior to seeking Medi-Cal reimbursement. Accordingly, the trial court properly sustained DHCS's demurrer without leave to amend.

DISPOSITION

The judgment of dismissal is affirmed. Respondents shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

SIMS, Acting P. J.

We concur:

RAYE, J.

ROBIE, J.