

No. 68726-3-I

DIVISION I, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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A.G., by and through his parents, J.G. and K.G.,

Respondent,

v.

PREMERA BLUE CROSS and LIFEWISE OF WASHINGTON,  
Washington corporations,

Appellants.

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ON DISCRETIONARY REVIEW FROM  
KING COUNTY SUPERIOR COURT  
(Hon. Michael Trickey)

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**REPLY BRIEF**

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## I. INTRODUCTION

Since 1989, health carriers and insurers have relied on the Neurodevelopmental Therapy (“NDT”) Mandate, RCW 48.44.450, to offer basic and affordable health benefit plans to individuals that excluded NDT benefits. When the legislature applied the Mental Health Parity Act (“Parity Act”), RCW 48.44.341, to individual health plans in 2008, no one believed the Parity Act raised the “floor” on mandated NDT benefits. Not the legislature (who did not mention NDT once in the text or legislative history of the Parity Act); not health carriers and insurers (who continued to offer health plans that excluded NDT coverage); not the Office of Insurance Commissioner (who continued to approve those plans); not the Department of Health (who recommended amending the NDT Mandate to increase NDT coverage to treat autism); and not legislators and mental health advocates (who proposed legislation that would have required health carriers and insurers to cover NDT as a treatment for autism).

It was a federal district court judge who first concluded—despite all indicia to the contrary—that the legislature intended the Parity Act to supersede the NDT Mandate when NDT is prescribed to treat autism or other mental health conditions. Two state court judges followed suit. If permitted to stand, these judicial decisions will radically alter Washington law to achieve a result the legislature did not intend when it enacted the

Parity Act, and has refused to approve ever since. Health carriers and insurers will be forced to cover (and pay damages for) NDT benefits that plan members did not expect to receive and for which they did not pay.

Certainly, there are reasonable public policy arguments both for and against mandating health carriers and insurers to provide greater coverage for NDT as a treatment for autism. That debate should take place in the legislature, not the courts. The NDT Mandate and Parity Act conflict, and the courts must resolve that conflict through settled rules of statutory construction and other evidence of legislative intent. Here, those rules and that evidence reveal that the legislature did not intend the generic terms of the Parity Act to trump the specific terms of the NDT Mandate; NDT is not a “mental health service” within the meaning of the Parity Act.

## II. ARGUMENT

### A. **The Interplay Between The NDT Mandate And Parity Act Is An Issue Of Washington State Law; This Court Owes No Deference To A Federal District Court’s Erroneous Ruling.**

A.G. repeatedly cites to and quotes from an order in *Z.D. v. Group Health*, 829 F. Supp.2d 1009 (W.D.Wash. 2011), and invites this Court to follow Judge Lasnik’s interpretation of the NDT Mandate and Parity Act. Resp. Br. at 1-3, 5, 13-15, 21, 25-26. But, of course, a decision of a federal district court (or any federal court) on an issue of state law is not binding on this Court, nor is it particularly persuasive. *Bain v. Metro.*

*Mortg. Group, Inc.*, 175 Wn.2d 83, 109, 285 P.3d 34 (2012).<sup>1</sup> Indeed, the decision of this Court and the Washington Supreme Court will bind the federal courts, including the Ninth Circuit in the pending *Z.D. v. Group Health* appeal. *Nelson v. City of Irvine*, 143 F.3d 1196, 1206 (9th Cir. 1998). For the reasons set forth in the opening brief and below, this Court should analyze the issue independently, reject Judge Lasnik’s erroneous understanding of Washington law, and reverse the decision below.

**B. The NDT Mandate And Parity Act Conflict In Situations Where NDT May Be Medically Necessary To Treat A DSM-IV Condition; The Specific Terms Of The NDT Mandate Control Over The General Terms Of The Parity Act.**

A.G. argues that NDT may be medically necessary to treat autism or other DSM-IV conditions and, thus, NDT must be considered a “mental health service” within the meaning of the Parity Act. Resp. Br. at 15-20. One premise does not necessarily follow the other. Premera assumes for purposes of appeal that health care providers can and do prescribe NDT as a medically necessary treatment for certain DSM-IV conditions. It is that very possibility that brings the NDT Mandate and the Parity Act into

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<sup>1</sup> A.G. also suggests that Judge Lasnik’s decision was just the latest in a long line of consistent state and federal rulings on the interplay between the NDT Mandate and Parity Act. Resp. Br. at 2, 22. Actually, only two other courts have decided the issue: Judge Trickey in this case and Judge Erlick in the linked appeal, *Regence v. O.S.T.*, Case No. 69821-4-I. Both trial courts reached the issue *after* Judge Lasnik’s ruling in *Z.D.* and, at the encouragement of A.G.’s counsel, both *followed* Judge Lasnik.

conflict.<sup>2</sup> The issue on appeal is not whether NDT is medically necessary to treat autism, but whether the NDT Mandate precludes NDT from being deemed a “mental health service”—even where, as here, it is provided to an individual with a DSM-IV condition.<sup>3</sup>

Under well-established rules of statutory interpretation, NDT is not a “mental health service” under the Parity Act. A.G. concedes that, as a matter of statutory interpretation and insurance law, where two conflicting statutes address the same subject matter, the specific statute controls over the general. *In re Estate of Kerr*, 134 Wn.2d 328, 343, 949 P.2d 810 (1998); RCW 48.01.150. Nor does A.G. dispute that, as it relates to mandated insurance coverage for NDT benefits, the NDT Mandate is far more specific than the Parity Act and, indeed, only the Mandate addresses NDT expressly. In contrast, not only is the text of the Parity Act silent

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<sup>2</sup> Citing to the declaration of Premera’s medical director, Chelle Moat, A.G. further suggests it is Premera’s position that NDT is *never* medically necessary to treat autism because it is considered “educational.” *Id.* at 17-18. Not quite. Dr. Moat testified that it is not “uniformly accepted within the medical community” that NDT treats an individual’s autism, and that, in A.G.’s case, A.G.’s providers billed for their services using a particular CPT code that is “educational in nature” and, thus, not processed as medically necessary. CP 495 (Moat Decl.), ¶ 7.

<sup>3</sup> A.G.’s reference to the Federal Mental Health Parity Act and the California Parity Act is equally misguided. Resp. Br. at 14 & nn. 3, 4. Not only do both statutes have markedly different language than the Parity Act, there is no analogue to the NDT Mandate in federal or California law. For this reason too, only Washington law can answer whether the Parity Act supersedes the NDT Mandate in cases like this one.

regarding NDT, so is the legislative history leading up to its enactment. Notwithstanding his argument that the legislature believed “it was passing a broad mandate,” Resp. Br. at 32-34, A.G. cannot point to a single reference to NDT or the NDT Mandate in any sunrise review, bill report, budget analysis, committee hearing, bill file or other aspect of the Parity Act’s legislative history. There is no such reference.<sup>4</sup>

Rather, A.G. argues that the general-specific rule does not apply because the two statutes can be harmonized. Resp. Br. at 22-26. Not so. The NDT Mandate cannot be passed off, as A.G. suggests, as some “floor” that does not express “legislative intent with respect to coverage of [NDT] above the established minimum.” *Id.* at 24. When the legislature enacted the NDT Mandate in 1989, it carefully considered the costs-and-benefits, and rejected a broad mandate. In limiting the scope of the mandate as it

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<sup>4</sup> A.G. suggests the legislature intended the Parity Act to cover NDT by negative implication because it “knew how to exempt specific services” and it did not exempt NDT. Resp. Br. at 28. This argument can be rejected out of hand. The Act does not exempt any particular type of service or therapy from the definition of “mental health services”; it only exempts certain DSM-IV conditions and long-term/custodial care. See RCW 48.44.341(1) (exempting “substance related disorders,” “life transition problems,” and “skilled nursing facility services, home health care, residential treatment, and custodial care”). Because no other services or therapies are expressly excluded, the lack of any reference to NDT does not create an inference of inclusion. See *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 571, 980 P.2d 1234 (1999) (maxim of *expressio unius est exclusio alterius* applies only where a statute specifically designates the classes of things upon which it operates).

did, the legislature necessarily expressed its clear intent that individual health plans could exclude NDT benefits entirely and group plans could exclude benefits for children beyond the age of six. In other words, while the NDT Mandate may have established a “floor” for NDT benefits generally, it also established a “ceiling” on *mandated* NDT benefits.

To be sure, Premera and all other health carriers have relied on that clear expression of legislative intent to offer and price affordable individual and group health plans that cover NDT benefits up to that ceiling, but not beyond it. The Parity Act conflicts with the NDT Mandate because—if NDT is a “mental health service” within the meaning of the Act—the Act creates a new and incompatible ceiling on mandated NDT benefits. The ruling below highlights the conflict: NDT exclusions and age limits that are valid under the NDT Mandate are invalid under the Parity Act. Two statutes cannot be harmonized where giving effect to one (the Parity Act) would negate the effect of the other (the NDT Mandate). Without irony, A.G. chides Premera for wanting “to choose which state mandate it wants to follow while ignoring the other,” Resp. Br. at 26, but, of course, that is exactly what A.G. wants too.

Neither party gets to choose, and neither do the courts. Where the legislature enacts two statutes that not only overlap in subject matter, but also patently conflict, as here, the general-specific rule solves the conflict.

The earlier-enacted, more specific, NDT Mandate must be construed as an intended exception to the later-enacted, more general, Parity Act. *See Residents Opposed to Kittitas Turbines v. State Energy Facility Site*, 165 Wn.2d 275, 309, 197 P.3d 1153 (2008) (citing *Wark v. Wash. Nat'l Guard*, 87 Wn.2d 864, 557 P.2d 844 (1976)). In other words, the legislature did not intend NDT to be considered a “mental health service” even when prescribed to treat a DSM-IV condition. This interpretation harmonizes the two statutes, and gives effect to both, without effectively nullifying the NDT Mandate. The trial court’s erroneous conclusion to the contrary can and should be reversed for this reason alone.

**C. This Court Can Consider Legislative History And Agency Interpretation To Confirm That NDT Is Not A “Mental Health Service” Within The Meaning Of The Parity Act.**

A.G. erroneously argues that the Court cannot consider legislative history or agency action to ascertain legislative intent or, specifically, whether the general-specific rule properly resolves the conflict between the NDT Mandate and Parity Act. He first points out that courts must try to derive intent from the statutory language. Resp. Br. at 13. True, but this rule does not help here. The “plain meaning” of neither statute reveals how the legislature intended to resolve the conflict between the NDT Mandate and Parity Act where, as here, NDT is prescribed to treat a DSM-IV condition. It is therefore entirely proper for the Court to consider

legislative history and agency interpretation. *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 211, 118 P.3d 311 (2005) (“in interpreting conflicting statutory language, a court may ascertain legislative intent by examining ... legislative history”); *Marquis v. City of Spokane*, 130 Wn.2d 97, 111, 922 P.2d 43 (1996) (“[a] court must give great weight to the statute’s interpretation by the agency which is charged with its administration”).

A.G. next argues that the repeated, yet unsuccessful, efforts to expand mandated NDT coverage *after* passage of the Parity Act has no relevance to intended scope of the Act. Resp. Br. at 29-32. Wrong. In *Impecoven v. Dep’t of Revenue*, 120 Wn.2d 357, 841 P.2d 752 (1992), the Supreme Court construed RCW 82.04.255 to determine whether it applied to both real estate and insurance agents. The Court observed:

***To the contrary, the legislative history supports treating insurance agents differently from real estate agents.*** The Legislature limited the application of RCW 82.04.255 to real estate agents and has not enacted legislation allowing a similar deduction for insurance agents. ***Rather, legislation seeking similar partial exemptions for insurance agents for amounts paid to other agents has failed.*** See Senate Bill 5078, 51st Legislature (1989) (died in Senate Ways and Means Committee; see 1 Legislative Digest (1989–90), at 40); House Bill 1063, 51st Legislature (1989) (died in House Revenue Committee; see 2 Legislative Digest (1989–90), at 33–34); Senate Bill 5210, 52d Legislature (1991) (died in Senate Ways and Means Committee; see 1 Legislative Digest (1991–92), at 99–100). ...

*Id.* at 362 (emphasis added). As in *Impecoven*, that the legislature considered and rejected bills that would have required health carriers to

cover NDT for autism, a DSM-IV condition, is relevant “legislative history” that confirms the Parity Act does not cover NDT. *See* Op. Br. at 18-19 (citing CP 452-62 (SB 5203 (2009)); CP 464-73 (SB 5059 (2011))). Simply put, why would legislators, the DOH and mental health advocates have to propose legislation that would compel health carriers to cover NDT as a treatment for autism if, as A.G. argues and the trial court concluded, the Parity Act already required such coverage? They wouldn’t.

The reports prepared by the DOH and the Caring for Washington Individuals with Autism Task Force, which sparked this failed legislation, also confirm the NDT Mandate’s supremacy over the Parity Act where, as here, NDT is prescribed to treat a DSM-IV condition.<sup>5</sup> As Premera explained, these reports found that existing law provided only partial coverage for the treatment of autism, and they recommended expansion of both the NDT Mandate and Parity Act to require greater coverage. Op. Br. at 19-20. These experts would not have recommended amendment of

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<sup>5</sup> A.G. argues that the Task Force is not an “agency” and, thus, the Court should not consider its conclusions. Resp. Br. at 30. Washington courts frequently refer to the findings and recommendations of task forces and commissions created by the executive and legislature to consider legislative change. *See, e.g., Skagit Surveyors & Eng’rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 958 P.2d 962 (1998); *Dioxin / Organochlorine Center v. Pollution Control Hearings Bd.*, 131 Wn.2d 345, 932 P.2d 158 (1997); *Town of Woodway v. Snohomish County*, 172 Wn. App. 643, 291 P.3d 278 (2013); *Matter of Mahrle*, 88 Wn. App. 410, 945 P.2d 1142 (1997). This Court can as well.

the NDT Mandate (to cover individual health plans and plan members up to age 18) if the Parity Act already covered NDT. They recognized, however, that expansion of the Parity Act would not achieve the goal of greater NDT coverage because the Parity Act did not apply to NDT. In other words, when it came to NDT as a treatment for autism, the DOH understood that the NDT Mandate was not just a “floor,” but the “ceiling.” The legislature has repeatedly refused to raise that ceiling.

This Court should also reject A.G.’s efforts to avoid the obvious implication of OIC review. A.G. does not dispute that Premera submitted the health plan at issue to OIC for review, and OIC—who is charged with enforcing the Parity Act—never invalidated the NDT exclusion that the trial court struck down. Op. Br. at 21-22. A.G. claims that OIC’s review is irrelevant because “inaction” is not an agency interpretation. But this is not inaction; it is *approval*. No authority supports A.G.’s argument that only formal “interpretive statements” are entitled to deference. Resp. Br. at 34. Nor does RCW 48.18.510 say anything about the deference this Court should give OIC’s long-standing approval of Premera’s plans. *Id.* at 35. That statute states only that a non-compliant term will not invalidate an entire insurance contract, and that the contract must be enforced as if it complied with the law. *Seattle-First Nat. Bank v. Wash. Ins. Guar. Ass’n*, 94 Wn. App. 744, 753, 972 P.2d 1282 (1999). Here, OIC’s approval of

Premiera's individual health plan confirms that its NDT exclusion complies with existing law, and may be enforced exactly as written.

Finally, A.G.'s suggestion that recent OIC rule-making supports his interpretation is not only wrong, it is disingenuous. Resp. Br. at 35-36. There are no rules. As A.G. concedes, OIC has announced its intent to promulgate rules regarding the Parity Act because no rules currently exist. WSR 12-22-070 (Nov. 7, 2012). No proposed rules have been published. *Id.* With respect to the emergency rules OIC has promulgated, they relate to the "essential health benefits" health carriers must include in plans *beginning in 2014* in order to comply with *federal* health care reform. WSR 13-07-022 (Mar. 12, 2013); RCW 48.43.715 (to comply with federal law, OIC shall create benchmark plan containing essential health benefits). Those rules—which define standards required by federal law for health plans that have not been issued—do not enforce or interpret the Parity Act, do not apply to existing health plans and, by definition, reveal nothing about the legislature's intent when it enacted the Act nearly a decade ago. In short, nothing OIC has done remotely suggests that it believes that the Parity Act raised the "floor" on mandated NDT benefits. It didn't.

### III. CONCLUSION

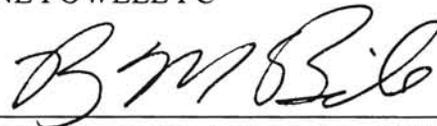
The NDT Mandate exclusively governs mandated insurance coverage for NDT benefits, regardless of diagnosis. It is a ceiling that the

legislature has refused to raise, not a floor that the Parity Act built upon. Until and unless the legislature elects to repeal the NDT Mandate or otherwise bring NDT benefits within the ambit of the Parity Act, health carriers and insurers may continue to exclude NDT from their individual health benefit plans. The decision of the trial court must be reversed.

RESPECTFULLY SUBMITTED this 3rd day of June, 2013.

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**CERTIFICATE OF SERVICE**

I hereby certify under penalty of perjury under the laws of the State of Washington that on June 3, 2013, I caused to be served a copy of the foregoing **Reply Brief** on the following person(s) in the manner indicated at the following addresses:

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DATED this 3rd day of June, 2013 at Seattle, Washington

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Kathryn Savaria

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