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No. 69724-2-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE

O.S.T., by and through his parents, G.T. and E.S.; and L.H., by and
through his parents, M.S. and K.H., each on his own behalf and on behalf
of all similarly situated individuals,

Plaintiffs/Respondents,

v.

REGENCE BLUESHIELD, a Washington corporation,

Defendant/Appellant.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. John P. Erlick)

**APPELLANT REGENCE BLUESHIELD'S
REPLY BRIEF**

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I. INTRODUCTION

Regence raised justiciability below in its briefing on cross-motions for a declaratory judgment, and the issue is properly before this Court. That the commissioner denied discretionary review of the trial court's ruling on a separate motion on standing does not foreclose Regence from raising justiciability in this appeal from the declaratory judgment. This Court should decline to issue an advisory opinion.

Should this Court nevertheless elect to address whether neurodevelopmental therapies are mental-health services under the Mental Health Parity Act, RCW 48.44.341, it should interpret the Parity Act *in pari materia* with the Insurance Reform Act, RCW 48.43.087. The latter statute addresses the same subject as the Parity Act (mental-health services) and excludes neurodevelopmental-therapy providers from providing mental-health services. As a result, there is no overlap between the neurodevelopmental-therapy statute, RCW 48.44.450, and the Parity Act, as neurodevelopmental therapies cannot be mental-health services.

Even if the neurodevelopmental-therapy statute and Parity Act overlapped as Plaintiffs contend, this Court should decline Plaintiffs' invitation to rely on a federal district court decision that did not consider whether the Parity Act embodies the clear legislative intent necessary to

override the statutory construction rules that (1) expression of one statutory requirement mandates the exclusion of all omitted requirements, (2) specific statutes take precedence over general ones, and (3) implicit repeal is strongly disfavored. Such clear legislative intent is absent where the Parity Act does not specifically address neurodevelopmental therapies. The statutory construction rules all dictate a conclusion that the neurodevelopmental-therapy statute is an exception to the Parity Act—a conclusion confirmed by subsequent legislative history and pre-litigation agency interpretations.

Finally, Plaintiffs cite no evidence or authority that neurodevelopmental therapies can be medically necessary to treat autism, expressive-language disorder, or any other condition. To the extent any of Plaintiffs' citations support such a conclusion, they only serve to confirm the existence of a fact question that would preclude summary judgment in the event this Court were to adopt Plaintiffs' interpretation of the Parity Act as the trial court did.

This Court should reverse the declaratory judgment and declare that neurodevelopmental therapies are not mental-health services under the Parity Act.

II. REPLY ARGUMENT

A. **Justiciability Is Properly Before this Court, and Plaintiffs Silently Concede They Failed to Raise a Justiciable Controversy for a Declaratory Judgment.**

1. **Regence Raised Justiciability Below and Did Not Waive the Issue by Seeking Discretionary Review of a Ruling on a Separate Motion on Standing.**

Regence raised justiciability below in its opposition and cross motion for summary judgment on declaratory relief. CP 155-59. The parties fully briefed the issue. *See id.*; CP 607-15 (*Plaintiffs' Suppl. Brief in Support of Motion for Partial Summary Judgment*); 777-86 (*Regence's Suppl. Brief on Standing & Justiciability*); CP 878-83 (*Plaintiffs' Suppl. Reply*). The trial court considered these briefs and several related declarations in entering the declaratory judgment from which this appeal is taken. *See* CP 1022-23 (listing materials considered). The trial court plainly rejected Regence's justiciability arguments, as it granted a declaratory judgment.¹ CP 1024-25.

That Regence unsuccessfully sought discretionary review of the denial of a separate motion on standing does not foreclose Regence from raising justiciability on appeal, as justiciability was raised and decided in the context of the cross-motions for a declaratory judgment.

¹ More recently, the trial court denied injunctive relief on the basis that neither plaintiff had a claim for such relief when the suit was filed (or anytime thereafter). CP 1052-56.

2. Because Plaintiffs Fail to Respond to Regence's Justiciability Arguments, This Court Should Conclude They Have Conceded the Issue.

Plaintiffs rely entirely on their invalid waiver argument on justiciability and raise no substantive argument on justiciability. Plaintiffs have thus conceded the issue, and this Court need not address the merits of the declaratory judgment. This Court does not render advisory opinions. *See Appellant's Opening Brief* at 10-11. It should vacate the declaratory judgment based on lack of a justiciable issue between the parties.

B. This Court Should Interpret the Parity Act *in Pari Materia* with the Insurance Reform Act, which Excludes Neurodevelopmental-Therapy Providers from Providing Mental-Health Services.

In RCW 48.43.087, the legislature specified the types of providers authorized to deliver outpatient mental-health services. Neurodevelopmental therapists are not included.² *See* RCW 48.43.087(1)(c).

That the definitions in RCW 48.43.087 are designated “[f]or purposes of” that section does not mean this Court may ignore them in interpreting the Parity Act. Chapter 48.43 RCW, known as the Insurance Reform Act, applies to all individual and group health benefit plans. *See* RCW 48.43.005(18) (defining “health carrier”) & (19) (defining “health

² Neurodevelopmental therapists are those authorized to deliver occupational therapy, speech therapy, and physical therapy. RCW 48.44.450(2).

plan”). Moreover, RCW 48.43.087 deals with the same subject as the Parity Act: mental health services. Statutes on the same subject must “be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes.” *Hallauer v. Spectrum Props., Inc.*, 143 Wn.2d 126, 146, 18 P.2d 540 (2001).

Reading RCW 48.43.087 *in pari materia* with the Parity Act leads to the conclusion that the providers of neurodevelopmental therapies are not “mental health care practitioners” and thus do not provide “mental health services.”³ See also CP 176, ¶ 5 (Regence medical director testifying, “Occupational, speech, and physical therapies are not considered mental health practitioners and their services are not directed toward treatment of mental health disorders.”). Neurodevelopmental therapies are thus not “mental health services,” and the Parity Act does not apply to them.⁴

³ That the specific requirements of RCW 48.43.087 apply only to outpatient mental-health services, whereas the Parity Act applies to both inpatient and outpatient mental-health services, discloses no legislative intent to authorize neurodevelopmental-therapy providers to provide certain mental-health services.

⁴ Plaintiffs contend that OIC has rejected this interpretation in promulgating regulations. Regence responds to this contention in section D.4 below.

C. The Neurodevelopmental-Therapy Statute and the Parity Act Do Not Overlap.

Plaintiffs concede that the legislature, in enacting the neurodevelopmental-therapy statute, only mandated coverage in employer-sponsored group contracts and “did not address whether or how neurodevelopmental therapies would be covered in individual policies.” *Respondents’ Brief* at 22. Yet Plaintiffs fail to acknowledge that the legislature’s silence in that regard raises a presumption that the legislature intentionally omitted individual and non-employer sponsored group plans from the mandate, such that health carriers are authorized to exclude neurodevelopmental therapies from coverage in those plans. *See Appellant’s Opening Brief* at 16-17, discussing the rule that “the expression of one statutory requirement mandates the exclusion of all omitted requirements.” *See Gen. Tel. Co. of the N.W. v. Wash. Utils. & Transp. Comm’n*, 104 Wn.2d 460, 470, 706 P.2d 625 (1985).

Plaintiffs cite the federal district court’s conclusion in *Z.D. v. ex rel. J.D. v. Group Health Co-op.*, 829 F. Supp. 2d 1009 (W.D. Wash. 2011), that the neurodevelopmental-therapy statute “establishes a floor, not a ceiling.” *Id.* at 1014. But a federal district court decision is no more binding on this Court than the trial court’s decision from which this appeal arises. *See Humleker v. Gallagher Bassett Svcs., Inc.*, 159 Wn. App. 667,

681, 246 P.3d 249 (2011). Moreover, the *Z.D.* court's conclusion should not be deemed persuasive because the court *did not consider* the rule that expression of one statutory requirement mandates the exclusion of all omitted requirements, or the presumption triggered by that rule.⁵ The *Z.D.* court therefore did not examine whether the Parity Act disclosed a clear legislative intent to modify the neurodevelopmental-therapy mandate, as required under *City of Algona v. Sharp*, 30 Wn. App. 837, 842, 638 P.2d 627 (1982). *See also Mason v. Georgia-Pacific Corp.*, 166 Wn. App. 859, 866, 271 P.3d 381 (2012).

Plaintiffs acknowledge the rule that expression of one statutory requirement mandates the exclusion of all omitted requirements, but ask this Court to apply it only to the Parity Act and not the neurodevelopmental-therapy statute. Plaintiffs ask this Court to consider the legislature's exclusion of certain services from the Parity Act's definition of "mental health services" as evidence that all other services are presumed included in that definition. *Respondent's Brief* at 26, citing *State v. Delgado*, 148 Wn.2d 723, 729, 63 P.3d 792 (2003) ("Under *expressio unius est exclusio alterius*, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other."). But in

⁵ Indeed, those issues were not even briefed to the district court in *Z.D.*

asking that this statutory-construction rule be applied to the Parity Act, Plaintiffs offer no reason why it should not be applied to the neurodevelopmental-therapy statute.

The presumption arising from the legislature's limitation of the mandate in neurodevelopmental-therapy statute may be rebutted only by "clearly contrary legislative intent." *City of Algona*, 30 Wn. App. at 842. Plaintiffs must therefore establish that the legislature, in enacting the Parity Act, demonstrated clear legislative intent to amend or expand the previously enacted neurodevelopmental-therapy statute. The legislature's adoption of a general statute regarding mental-health services does not embody such clear intent, especially where the Parity Act does not mention neurodevelopmental therapies.

D. Even Assuming the Parity Act Overlapped with the Neurodevelopmental-Therapy Statute, This Court Must Give Precedence to the Specific Statute and Avoid Implicit Repeal or Amendment.

1. The General-Specific Rule Requires that the Neurodevelopmental-Therapy Statute Be Given Full Effect.

Plaintiffs contend the Parity Act overlaps with and supersedes the neurodevelopmental-therapy statute. Even the statutes overlapped, which as discussed above they do not, only the neurodevelopmental-therapy statute *specifically* addresses neurodevelopmental therapies. The Parity

Act does not mention neurodevelopmental therapies but instead applies generally to “mental health services.” RCW 48.44.341.

Under the general-specific rule, a specific statute supersedes a general statute when both apply. *Gen Tel. Co.*, 104 Wn.2d at 464. This rule is mandatory. The insurance code itself declares: “Provisions of this code relating...to a particular matter prevail over provisions relating...to such matter in general.” RCW 48.01.150. Where, as here, the general statute was enacted after the specific statute, the original specific statute is construed as an exception to the general statute. *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Eval. Council*, 165 Wn.2d 275, 309, 197 P.3d 1153 (2008). The neurodevelopmental-therapy statute, which was adopted first, should therefore be deemed an exception to the Parity Act.

Plaintiffs’ interpretation of the Parity Act—adopted by the trial court here—*reverses* the effect of the general-specific rule and gives precedence to the general statute. Plaintiffs do not address the general-specific rule. *See Appellant’s Opening Brief* 19-20. Instead, they rely on the *Z.D.* court’s conclusion that the neurodevelopmental-therapy statute “establishes a floor, not a ceiling.” 829 F. Supp. 2d at 1014. The *Z.D.* court acknowledged the general-specific rule but held it did not apply

because it found “no irreconcilable conflict” between the neurodevelopmental-therapy statute and the Parity Act. 829 F. Supp. 2d at 1014. There are only two ways one may find no conflict between the two statutes: (1) by adopting Regence’s position that neurodevelopmental therapies are not mental-health services or (2) by not applying the presumption that the expression of one statutory requirement mandates the exclusion of all omitted requirements. As explained above, the *Z.D.* court followed the latter path.

This Court must begin by recognizing that the neurodevelopmental-therapy statute authorizes health carriers to exclude neurodevelopmental therapies in individual and non-employer sponsored group plans. *See Gen. Tel. Co.*, 104 Wn.2d at 170. If the Parity Act would mandate that carriers cover services they are authorized under the neurodevelopmental-therapy statute to exclude, then the statutes are in conflict, and the general-specific rule must be applied to resolve the conflict. *See id.* at 464.

2. The Presumption against Implicit Repeal or Amendment Requires that the Neurodevelopmental-Therapy Statute Be Given Full Effect.

Plaintiffs do not address either of the two requirements for implicit repeal. *See Appellant’s Opening Brief* at 22, citing *Our Lady of Lourdes*

Hosp. v. Franklin County, 120 Wn.2d 439, 450, 842 P.2d 956 (1993). In response to the problem of implicit repeal, Plaintiffs again cite *Z.D.* and assert that the Parity Act raised the “floor” or minimum level of coverage set by the neurodevelopmental-therapy statute. *Respondents’ Brief* at 23-24, citing *Z.D.*, 829 F. Supp. 2d. at 1014. But the *Z.D.* court did not address implicit repeal. Presumably that is because, again, the court found no conflict between the statutes, as it was not asked to apply the rule that expression of one statutory requirement mandates the exclusion of all omitted requirements, or the presumption triggered by that rule.

Plaintiffs’ suggestion that the Parity Act should be deemed to supersede the neurodevelopmental-therapy because it was adopted more recently is contrary to the presumption against implicit repeal. *Respondents’ Brief* at 34. See *Tollycraft Yachts Corp. v. McCoy*, 122 Wn.2d 426, 439, 858 P.2d 502 (1993). The case Plaintiffs cite, *Connick v. City of Chehalis*, 53 Wn.2d 288, 333 P.2d 647 (1958), does not support finding an implicit repeal, but instead supports giving effect to the earlier adopted, specific statute rather than a more recent one. See *id.* (interpreting and applying a 1919 statute based on its own legislative history even though a more recent statute lended support to the appellant’s position).

3. The Subsequent Legislative History Demonstrates a Belief that the Parity Act in Its Present Form Does Not Apply to Neurodevelopmental Therapies.

Regence may address legislative history without establishing that the statutes are ambiguous. A statute is ambiguous only if it is subject to more than one reasonable interpretation. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 12, 43 P.3d 4 (2002). Plaintiffs' interpretation of the Parity Act is not reasonable because it requires the court to reverse the effect of the general-specific rule and find a partial implicit repeal of the neurodevelopmental-therapy statute. Regence's discussion of legislative history supplements its analysis of the statutory construction rules, in the event this Court deems both parties' interpretations reasonable.

Furthermore, where the question is whether one statute has been implicitly repealed by another, the Washington Supreme Court has considered legislative history without first engaging in a plain meaning analysis. *See, e.g., Hallauer v. Spectrum Props., Inc.*, 143 Wn.2d 126, 146-47, 18 P.3d 540 (2001); *Gilbert v. Sacred Heart Med. Ctr.*, 127 Wn.2d 370, 373-75, 900 P.2d 552 (1995); *Walton v. Absher Constr. Co.*, 101 Wn.2d 238, 242-43, 676 P.2d 1002 (1984).

General statements in the legislative history regarding the breadth of the Parity Act provide no insight into the legislature's intent with

respect to neurodevelopmental therapies specifically. *Respondents' Brief* at 30. Plaintiffs' argument that the legislature's decision not to expand the neurodevelopmental-therapy statute is "irrelevant" to the scope of the Parity Act is based on the mistaken premise that the neurodevelopmental-therapy statute does not permit exclusion of neurodevelopmental-therapies in individual and non-employer sponsored group plans. *Id.* at 29.

The repeated introduction of bills that would expand the neurodevelopmental-therapy mandate demonstrates a belief that the Parity Act in its present form does not mandate coverage of neurodevelopmental therapies. *See Appellant's Opening Brief* at 24-25. Neither the Association of Washington Health Plans (AWHP) nor the Department of Health (DOH) has taken a contrary position. In opposing new autism coverage mandates on the basis that the statutes already mandate coverage of services for autism, AWHP was silent regarding the interplay between the neurodevelopmental-therapy statute and the Parity Act. CP 487. Similarly, the DOH said nothing on that subject, observing only that one or both of the statutes "may" mandate coverage of services for autism. CP 364-65. On the other hand, the DOH's recommendation that the legislature "[e]xpand and/or clarify" the Parity Act to include autism

services suggests a conclusion that the Parity Act in its present form does *not* include neurodevelopmental therapies. CP 365.

4. Pre-Litigation Agency Interpretations Are Consistent with the Subsequent Legislative History.

Not only did the DOH recommend that the legislature “[e]xpand and/or clarify” the Parity Act, it had previously observed that the neurodevelopmental-therapy statute was not a mandate for coverage of mental-health services. *See Appellant’s Opening Brief* at 26, citing CP 139. Plaintiffs have no response to this.

Plaintiffs are incorrect in asserting that the Office of the Insurance Commissioner (OIC) adopted Plaintiffs’ interpretation of the Parity Act in promulgating emergency rules in March 2013. The OIC promulgated the rules not because it concluded independently that Plaintiffs’ interpretation was correct, but only because the trial courts in the cases now before this Court and in *Z.D.* had already adopted Plaintiffs’ interpretation.⁶ In November 2012, an OIC spokesperson told *The Seattle Times* that the OIC was working on a regulation to address the recent court rulings:

Stephanie Marquis, spokeswoman for the insurance commissioner, said: “*We’re working on a regulation that addresses the issues*

⁶ *Z.D. v. Group Health* was decided in November 2011. 829 F. Supp. 2d 1009. Summary judgment was granted in *A.G. v. Premera* in April 2012. Summary judgment was granted in this case orally in October 2012 and by written order in December 2012. RP 34-35; CP 1024-25.

the courts have ruled on so far that will ensure consumers get the coverage they're entitled to and insurers understand what they're required to cover." The draft language should be ready by the end of the year, she said.

Parents Sue to Demand Equal Insurance Coverage for Autism, *The Seattle Times* (Nov. 17, 2012) (emphasis added).⁷ The OIC's independent, pre-litigation interpretation of the Parity Act is disclosed by the standards it followed in reviewing contracts for compliance before commencement of any litigation. *See Appellants' Opening Brief* at 29-30, citing CP 378-90, 392-04.⁸

E. The Scope of the Parity Act in General Has No Relation to Whether Neurodevelopmental Therapies Are Mental-Health Services.

Whether the Parity Act permits health carriers to exclude mental-health services from coverage has no relation to whether neurodevelopmental therapies are mental-health services. In any event, the Parity Act does not foreclose a carrier from limiting or excluding mental-health services from coverage, so long as the same limitation applies to any analogous medical and surgical services. *See* CP 1047-51. Plaintiffs' contention is contrary to the legislature's intent to establish

⁷ Available at http://seattletimes.com/html/localnews/2019705690_autismlimits18m.html.

⁸ Plaintiffs cite no authority for their assertion that only an "interpretive statement" as defined in RCW 34.05.010(8) is accorded judicial deference.

parity rather than preference,⁹ and contrary to the principle that health carriers generally need not cover every service and may limit the scope of coverage, unless a specific mandate applies. *See Appellant's Opening Brief* at 14-16, citing cases. A statute that mandates coverage or restricts limitations on coverage abrogates the common law and therefore must be strictly construed. *See Potter v. Wash. State Patrol*, 164 Wn.2d 67, 77, 196 P.3d 691 (2008); *Carr v. Blue Cross of Wash. & Alaska*, 93 Wn. App. 941, 948, 971 P.2d 102 (1999).

Other jurisdictions' mental-health parity laws shed no light on whether neurodevelopmental therapies are mental-health services under Washington's Parity Act. Plaintiffs point to no authority from any other jurisdiction addressing the statutory construction issue before this Court.

F. Even Assuming the Parity Act Applies to Neurodevelopmental Therapies, Medical Necessity Remains a Question of Fact Precluding Summary Judgment.

Assuming this Court were to adopt Plaintiffs' interpretation of the Parity Act, Plaintiffs fail to point to any expert testimony or other

⁹ The legislature enacted the Parity Act to require parity of coverage, not to require carriers to offer greater coverage for mental-health services than for medical and surgical services. Consistent with the Parity Act's name, the legislature stated in a preamble that its purpose was "to require that insurance coverage be *at parity* for mental health services, which means this coverage be delivered under the same terms and conditions as medical and surgical services." 2005 WASH. LAWS ch. 6 § 1 (emphasis added); *see note following RCW 41.05.600.*

evidence that neurodevelopmental therapies can be medically necessary to treat autism, expressive-language disorder, or any other condition. *See Appellant's Opening Brief* at 12. "Medically necessary" has specific, contractual meaning. CP 175-76, 206. Thus, assuming that providing neurodevelopmental therapies to children with autism is "standard medical practice," that is not the same as "medically necessary." *See Respondent's Brief* at 16, citing CP 503. Likewise, statements in literature that such therapies are "often provided," "appropriate," or "effective" do not establish medical necessity. *See id.* at 17.

Regence's medical director did not contradict himself and "concede" that neurodevelopmental therapies can be medically necessary to treat autism. *Respondent's Brief* at 16-17. Such therapies clearly can be medically necessary to treat certain conditions or they would never be covered. Dr. Gifford testified that Regence covers medically necessary neurodevelopmental therapies to the extent mandated under the neurodevelopmental-therapy statute. CP 175 ¶ 3. Dr. Gifford did not testify that they can be medically necessary to treat autism; indeed, he testified that one cannot actually treat autism, but only improve the patient's behavior. CP 176 ¶ 6. To the extent any of Plaintiffs' citations

contradict Dr. Gifford's testimony, they only serve to confirm the existence of a fact question.

The New Jersey and Illinois decisions Plaintiffs cite did not adjudicate the medical necessity of neurodevelopmental therapies to treat autism. *See Respondents' Brief* at 18. That issue was not before the courts in those cases; instead, it was presumed or uncontested that the treatment could be medically necessary. *See Micheletti v. State Health Benefits Comm'n*, 389 N.J. Super. 510, 913 A.3d 842, 848 (2007) (“[T]he State does not contest that speech therapy and occupational therapy is medically necessary[.]”); *Markiewicz v. State Health Benefits Comm'n*, 390 N.J. Super. 289, 915 A.2d 553, 560-61 (2007); *Bails v. BlueCross/BlueShield of Ill.*, 438 F. Supp. 2d 914, 928 (N.D. Ill. 2006); *Wheeler v. Aetna Life Ins. Co.*, 2003 WL 21789029 at *12 (N.D. Ill. 2003).¹⁰

Thus, even assuming neurodevelopmental therapies are mental-health services under the Parity Act, whether such therapies can be medically necessary to treat particular conditions such as autism or expressive-language disorder would be a question of fact that would preclude the summary entry of a declaratory judgment without a trial.

¹⁰ Unpublished federal court decisions issued before January 1, 2007, may not be cited as authority in the Ninth Circuit. *See* Ninth Circuit Rule 36-3(c).

III. CONCLUSION

This Court should reverse the declaratory judgment and declare that neurodevelopmental therapies are not mental-health services under the Parity Act.

RESPECTFULLY SUBMITTED this 3rd day of June, 2013.

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COURT OF APPEALS
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DIVISION I

O.S.T., by and through his parents,
G.T. and E.S., and L.H., by and
through his parents, M.S. and K.H.,
each on his own behalf of all
similarly situated individuals,

DECLARATION OF SERVICE

Respondents,

vs.

REGENCE BLUESHIELD, a
Washington corporation,

Petitioner.

I certify under penalty of perjury under the laws of the State of Washington that I am over the age of 18 years, not a party hereto and competent to be a witness herein. I certify that on November 2, 2012 I served a copy of *Appellant's Reply Brie; and, Declaration of Service* on counsel of record as follows:

Eleanor Hamburger	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid
Richard E. Spoonemore	<input type="checkbox"/> Messenger
Sirianni Youtz Spoonemore	<input type="checkbox"/> Fax
999 Third Avenue, Suite 3650	<input checked="" type="checkbox"/> Email
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DATED this 3rd day of June, 2013.


Patti Saidu, Legal Assistant