

No. 68726-3-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

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

Plaintiff-Respondent,

v.

PREMERA BLUE CROSS and LIFEWISE OF WASHINGTON,
Washington corporations,

Defendants-Appellants.

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

**PREMERA BLUE CROSS AND LIFEWISE OF WASHINGTON'S
STATEMENT OF ADDITIONAL AUTHORITY IN SUPPORT OF
MOTION FOR DISCRETIONARY REVIEW**

Barbara J. Duffy, WSBA No. 18885
Gwendolyn C. Payton, WSBA No. 26752
Ryan P. McBride, WSBA No. 33280
*Attorneys for Premera Blue Cross and
Lifewise of Washington*

LANE POWELL PC
1420 Fifth Avenue, Suite 4100
Seattle, Washington 98101-2338
Telephone: 206.223.7000
Facsimile: 206.223.7107

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COURT OF APPEALS DIVISION I
STATE OF WASHINGTON

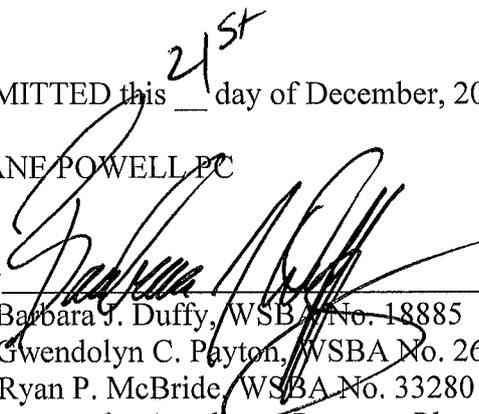
In their Reply in Support of the Motion for Discretionary Review, Appellants Premera Blue Cross and Lifewise of Washington informed the Court that Judge Erlick, in the substantially similar case of *O.S.T. v. Regence BlueShield*, No. 11-2-34187-9-SEA (Wash.Sup.Ct.), ruled that he would certify for interlocutory appeal the same issue that Judge Trickey certified for discretionary review in this case, *i.e.*, whether a blanket exclusion of coverage for neurodevelopmental therapy in an individual health benefit plan violates the Mental Health Parity Act. Reply, pp. 2-3. At the time the Reply Brief was filed, Judge Erlick had not yet entered a formal order to that effect. *Id.*, n. 1.

On December 13, 2012, Judge Erlick entered an Order and Findings of Civil Rule 54(b) and RAP 2.3(b)(4) Certification (the “CR 54(b) Order”), a copy of which is attached hereto as **Exhibit A**. Judge Erlick not only certified the issue for discretionary review pursuant to RAP 2.3(b)(4), he entered partial final judgment pursuant to CR 54(b), which permits Regence BlueShield to appeal the ruling as a matter of right. *See* RAP 2.2(d). Judge Erlick’s CR 54(b) Order also states, in apparent reference to this case, that “similar issues in other cases are now pending before the Court of Appeals and it will advance judicial economy for parties addressing parallel issues of law to be considered by the appellate courts at the same time, if possible.” **Exhibit A**, pg. 2.

On December 20, 2012, Regence BlueShield filed a Notice of Appeal of the summary judgment order subject to the CR 54(b) Order, a copy of which is attached hereto as **Exhibit B**.

RESPECTFULLY SUBMITTED this ^{21st} day of December, 2012.

LANE POWELL PC

By 

Barbara J. Duffy, WSBA No. 18885

Gwendolyn C. Payton, WSBA No. 26752

Ryan P. McBride, WSBA No. 33280

*Attorneys for Appellants Premera Blue Cross
and Lifewise of Washington*

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on December 21, 2012, I caused to be served a copy of the foregoing **Statement Of Additional Authority In Support Of Motion For Discretionary Review** on the following person(s) in the manner indicated at the following addresses:

Richard E. Spoonemore
Eleanor Hamburger
Sirianni Youtz & Spoonemore
999 Third Ave., Suite 3650
Seattle, WA 98104

- by CM/ECF
- by Electronic Mail
- by Facsimile Transmission
- by First Class Mail
- by Hand Delivery
- by Overnight Delivery

DATED this 21 day of December, 2012 at Seattle, Washington


Kathryn Savaria
Kathryn Savaria

EXHIBIT A

FILED
KING COUNTY, WASHINGTON

DEC 13 2012

SUPERIOR COURT CLERK
THERESA GRAHAM
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

O.S.T. et al,

Plaintiffs,

vs.

REGENCE BLUESHIELD, a Washington
corporation,

Defendant.

No. 11-2-34187-9 SEA

ORDER AND FINDINGS ON CIVIL
RULE 54(b) AND RAP 2.3(b)(4)
CERTIFICATION

This Court makes the following Findings with respect to Civil Rule 54 (b) judgment on the Court's granting of plaintiffs' summary judgment motion regarding exclusion of neurodevelopmental therapies:

1. The court has granted summary judgment to plaintiffs that the Mental Health Parity Act prohibits defendant Regence from a blanket exclusion of coverage for neurodevelopmental therapies;
2. The claim that Regence's exclusion of neurodevelopmental therapies violates the Mental Health Parity Act is separate and independent from other claims asserted by Plaintiffs;
3. The need for review will not be mooted by future developments by this Court;
4. An immediate appeal will not delay the trial of adjudicated matters; and

ORDER AND FINDINGS ON CIVIL RULE 54(b) AND RAP2.3(b)(4)
CERTIFICATION - Page 1

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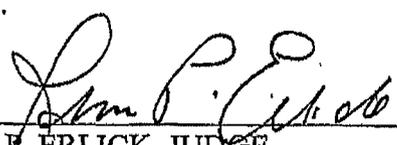
Judge John P. Erlick
King County Superior Court
516 Third Avenue
Seattle, WA 98104
(206) 296-9345

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5. An immediate appeal will likely advance timely and efficient resolution of this case.

This court further finds and therefore certifies under RAP 2.3 (b) (4) that whether the Mental Health Parity Act prohibits a health carrier from excluding neurodevelopmental therapies from coverage is a controlling issue of law as to which there is a substantial ground for difference of opinion and an immediate appellate review will materially advance the ultimate termination of this litigation. Moreover, similar issues in other cases are now pending before the Court of Appeals and it will advance judicial economy for parties addressing parallel issues of law to be considered by the appellate courts at the same time, if possible.

DONE in open court on December 13, 2012.



JOHN P. ERLICK, JUDGE

EXHIBIT B

Honorable John P. Erlick

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF KING

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,

Plaintiff,

v.

REGENCE BLUESHIELD, a Washington
corporation,

Defendant.

No. 11-2-34187-9 SEA

NOTICE OF APPEAL TO THE COURT
OF APPEALS, DIVISION I

Defendant Regence BlueShield seeks review by the Court of Appeals, Division One,
of the order entitled "Order (1) Granting Plaintiff's Motion for Partial Summary Judgment re:
Neuro-Developmental Therapy Exclusion and (2) Denying Defendant's Cross Motion for
Partial Summary Judgment" dated December 12, 2012, and of all other orders and rulings
prejudicially affecting the designated order. This order is appealable under RAP 2.2(d).

A copy of above-referenced order is attached. Also attached is a copy of the order
entitled "Order and Findings on Civil Rule 54(b) and RAP 2.3(b)(4) Certification."

NOTICE OF APPEAL - 1

CARNEY
BADLEY
SPELLMAN

Law Offices
A Professional Service Corporation
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
T (206) 622-8020
F (206) 467-8215

1 DATED this 20 day of December, 2012.

2 CARNEY BADLEY SPELLMAN, P.S.

3 
4 By _____

5 Timothy J. Parker, WSBA No. 8797
6 • Jason W. Anderson, WSBA No. 30512
7 Attorneys for Defendant Regence BlueShield

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26 NOTICE OF APPEAL - 2

CARNEY
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CERTIFICATE OF SERVICE

I, Patti Saiden, certify that I am over the age of 18 years and competent to be a witness herein. On December 20, 2012, I served in the manner indicated a true and correct copy of the foregoing document on counsel of record as follows:

Attorneys for Plaintiff

Eleanor Hamburger / Richard E. Spoonemore

Sirianni Youtz Spoonemore

999 Third Avenue, Suite 3650

Seattle, WA 98104

Fax: 206-223-0246

Email: ehamburger@sylaw.com

r Spoonemore@sylaw.com

VIA U.S. MAIL

I DECLARE UNDER PENALTY OF PERJURY OF THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 20th day of December, 2012.



Patti Saiden, Legal Assistant

HON. JOHN P. ERLICK
Noted for Hearing: November 21, 2012
Without Oral Argument

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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,

v.

REGENCE BLUESHIELD, a Washington
corporation,

Defendant.

NO. 11-2-34187-9 SEA

[PROPOSED]
ORDER:

- (1) GRANTING PLAINTIFF'S
MOTION FOR PARTIAL
SUMMARY JUDGMENT RE:
NEURO-DEVELOPMENTAL
THERAPY EXCLUSION AND
- (2) DENYING DEFENDANT'S CROSS
MOTION FOR PARTIAL
SUMMARY JUDGMENT

THIS MATTER came before the Court based upon Plaintiffs' Motion to for
Partial Summary Judgment re: Neurodevelopmental Therapy Exclusion and
Defendant's Cross Motion for Summary Judgment. The Court heard oral argument on
June 1, 2012, and held a second hearing on October 19, 2012 to render its decision.
Plaintiff was represented by Eleanor Hamburger and Richard E. Spoonemore, SIRIANNI
YOUTZ SPOONEMORE. Defendant was represented by Timothy J. Parker, CARNEY
BADLEY SPELLMAN P.S.

Along with oral argument, the Court reviewed and considered the pleadings
and record herein, including:

- Plaintiff's Motion for Partial Summary Judgment re: Neurodevelopmental
Therapy Exclusion;
- Declaration of G.T. and the exhibits attached thereto;

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ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY
JUDGMENT RE: NEURODEVELOPMENTAL THERAPY
EXCLUSION AND DENYING DEF'S CROSS MOTION - 1

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

- 1 • Declaration of Eleanor Hamburger and the exhibits attached thereto;
- 2 • Declaration of Kathleen Sirianni;
- 3 • Defendant's Opposition and Cross Motion For Partial Summary Judgment;
- 4 • Declaration of Timothy J. Parker and all exhibits attached thereto;
- 5 • Declaration of Rosey Messinger and all exhibits attached thereto;
- 6 • Declaration of Joseph M. Gifford, M.D., and all exhibits attached thereto;
- 7 • Plaintiff's Reply briefing in support of Plaintiff's Motion for Partial Summary
- 8 Judgment;
- 9 • Supplemental Declaration of Eleanor Hamburger and all exhibits attached
- 10 thereto;
- 11 • Declaration of Charles A. Cowan, M.D.;
- 12 • Plaintiff's Supplemental Briefing in Support of Plaintiff's Motion for Partial
- 13 Summary Judgment and in Opposition to Defendant's Motion to Dismiss;
- 14 • Declaration of Kimberly MacDonald
- 15 • Declaration of Patricia Moroney and all exhibits attached thereto;
- 16 • Declaration of Eleanor Hamburger and all exhibits attached thereto;
- 17 • Regence BlueShield's Response to Plaintiff's Supplemental Brief in Standing
- 18 and Justiciability;
- 19 • Declaration of Timothy J. Parker and all exhibits attached thereto;
- 20 • Declaration of Richard Rainey, M.D., and all exhibits attached thereto;
- 21 • Plaintiff's Consolidated Supplemental Reply Brief in Support of Plaintiffs'
- 22 Motion for Partial Summary Judgment and in opposition to Defendant's
- 23 Motions to Dismiss;
- 24 • Declaration of Eleanor Hamburger and all exhibits attached thereto;
- 25 • Supplemental Declaration of Kimberly MacDonald and all exhibits attached
- 26 thereto; and
- Supplemental Declaration of Charles A. Cowan, M.D.

1 Based upon the foregoing, the Court hereby GRANTS Plaintiffs' Motion to for
2 Partial Summary Judgment re: Neurodevelopmental Therapy Exclusion, and DENIES
3 Regence's Cross-Motion for Summary Judgment.

4 1. Given the broad mandate regarding mental health services in the Mental
5 Health Parity Act, RCW 48.44.341, and pursuant to Washington's Declaratory
6 Judgment Act, RCW 7.24, *et seq.*, Plaintiffs O.S.T. and L.H. are entitled to a declaration
7 that Regence's exclusion of neurodevelopmental therapy violates Washington public
8 policy and the Mental Health Parity Act. The Court declares such exclusion void and
9 unenforceable in this case.

10 2. Under the Mental Health Parity Act Regence must provide coverage for
11 all medically necessary "mental health services" to the same extent that it provides
12 such coverage for other medical or surgical services. Neurodevelopmental therapies
13 ~~are~~ include ~~the~~ mental health services designed to treat expressive language disorder, feeding
14 disorders, phonological disorders and autism, disorders which are listed in the DSM-
15 IV. Since neurodevelopmental therapies can be medically necessary to treat all of these
16 conditions, Regence cannot use a blanket exclusion to deny coverage for
17 neurodevelopmental therapies.

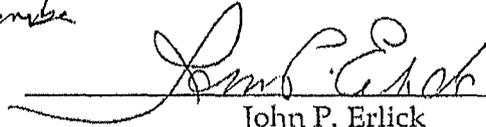
18 3. This Court does not have to supersede or void the provisions of
19 RCW 48.44.450, the Neurodevelopmental Therapy Act, to reach its ruling. Under rules
20 of statutory construction, courts do not interpret statutes in isolation. Courts interpret
21 statutes *in pari materia*, considering all statutes on the same subject, taking into account
22 all that the legislature has said on that subject and attempting to create a unified whole,
23 Hallauer v. Spectrum Properties, Inc., 143 Wn.2d 126 (2001). Both the
24 Neurodevelopmental Therapy Act and the Mental Health Parity Act can be read
25 together and harmonized. The Neurodevelopmental Therapy Act only creates a
26 minimum level of required coverage. Defendant Regence must meet the requirements

1 of both Acts, the Mental Health Parity Act as well as the Neurodevelopmental Therapy
2 Act and, accordingly, must provide coverage for medically necessary
3 neurodevelopmental therapy for DSM-IV-TR diagnosed conditions.

4 It is therefore ORDERED that any provisions contained in Regence policies
5 issued and delivered to Plaintiffs O.S.T. and L.H. on or after January 1, 2008 that
6 exclude coverage of neurodevelopmental therapies regardless of medical necessity are
7 declared invalid, void and unenforceable by Defendant and its agents.

8 DATED this 12th day of ~~November~~, 2012.

9 *December*

10 
11 _____
12 John P. Erlick
Superior Court Judge

13 Presented by:

14 SIRIANNI YOUTZ SPOONEMORE

15 /s/ Richard E. Spoonemore
16 Eleanor Hamburger (WSBA #26478)
17 Richard E. Spoonemore (WSBA #21833)
Attorneys for Plaintiffs

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury and in accordance with the laws of the State of Washington, that on November 13, 2012, I caused a copy of the foregoing document to be served on all counsel of record as indicated below:

Timothy J. Parker	[x]	By First-Class Mail
Jason W. Anderson	[x]	By Email
CARNEY BADLEY SPELLMAN, P.S.		Tel. (206) 622-8020
701 Fifth Avenue, Suite 3600		Fax (206) 467-8215
Seattle, WA 98104		parker@carneylaw.com
<i>Attorneys for Defendant Regence BlueShield</i>		anderson@carneylaw.com
		williams@carneylaw.com

DATED: November 13, 2012, at Seattle, Washington.

/s/ Richard E. Spoonemore
Richard E. Spoonemore (WSBA #21833)

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

O.S.T. et al,

Plaintiffs,

vs.

REGENCE BLUESHIELD, a Washington
corporation,

Defendant.

No. 11-2-34187-9 SEA

ORDER AND FINDINGS ON CIVIL
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1. The court has granted summary judgment to plaintiffs that the Mental Health Parity Act prohibits defendant Regence from a blanket exclusion of coverage for neurodevelopmental therapies;
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3. The need for review will not be mooted by future developments by this Court;
4. An immediate appeal will not delay the trial of adjudicated matters; and

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