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No. 69821-4
(for consolidation with No. 69724-2)

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/Petitioner.

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

**REGENCE BLUESHIELD'S
MOTION FOR DISCRETIONARY REVIEW**

Timothy J. Parker, WSBA No. 8797
Jason W. Anderson, WSBA No. 30512

Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
(206) 622-8020
parker@carneylaw.com
anderson@carneylaw.com

Attorneys for Defendant/Petitioner
Regence BlueShield

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I. IDENTITY OF PETITIONER

Regence BlueShield, already an appellant as a matter of right in this case (no. 69724-2), asks this Court also to review the decisions designated in section II, below, under RAP 2.3(b).

II. DECISIONS

1. *Order Granting in Part and Denying in Part Defendant's Motion to Dismiss Claims for Lack of Standing* (dated December 12, 2012, and entered December 14, 2012) (Motion Appendix at 18-21), and specifically the decision that Plaintiff L.H. has standing to seek declaratory and injunctive relief.
2. *Order Certifying Neurodevelopmental Class under CR 23(b)(3)* (dated and entered December 13, 2012) (Motion Appendix at 4-6).

III. ISSUES PRESENTED FOR REVIEW

Coverage of neurodevelopmental therapies is mandated by statute up to age six for non-employer sponsored group health plans. In a partial summary judgment certified for immediate appeal under CR 54(b), the superior court ruled that the subsequently adopted Mental Health Parity Act—which does not mention neurodevelopmental therapies—requires health carriers to cover such therapies in all health plans. Regence's appeal from the summary judgment is pending. The following additional issues are presented for discretionary review:

1. Did the superior court err in concluding that Plaintiff L.H. had standing to seek relief and represent a class where no treating provider diagnosed him with any mental health condition within the Parity Act or submitted any therapy claims for him that were denied?
2. Did the superior court abuse its discretion in certifying a class under CR 23(b)(3) for the purpose of seeking individualized damages

where (1) individual issues of diagnosis and medical necessity will predominate over the identified common issue—a legal issue already decided on summary judgment; (2) class treatment is not superior to the administrative appeal process provided by statute to adjudicate individual claims; and (3) the class as defined includes persons who lack standing and is not ascertainable?

Review of these issues is appropriate under RAP 2.3(b)(1) and (2) where (1) Regence already has an appeal pending before this Court; (2) Plaintiff L.H.’s lack of standing means the court lacks jurisdiction to grant declaratory or injunctive relief to him or the class; (3) the decision to certify a class under CR 23(b)(3) is contrary to state and federal law, including a federal district court decision by Judge Lasnik denying (b)(3) certification under analogous facts; and (4) other superior court judges have similar issues pending before them in other cases.

IV. STATEMENT OF FACTS

A. **After Legislative Efforts to Expand the Scope of the Neurodevelopmental Therapy Coverage Mandate Repeatedly Failed, Class-Action Complaints Were Lodged against Regence and Other Health Carriers.**

Most health plans include a rehabilitation benefit that covers occupational, speech, and physical therapies when medically necessary to treat an illness or injury. *See, e.g.*, Motion Appendix (“MA”) at 113-14. In 1989, the legislature addressed whether health carriers must cover such therapies when provided to treat neurodevelopmental disorders, which result from an impairment or delay in development rather than any illness or injury. RCW 48.44.450 (MA 27). The law mandates that employer-

sponsored group plans cover “neurodevelopmental therapies” when medically necessary for pre-school-aged children (ages six and under). RCW 48.44.450(1). It is silent regarding non-employer sponsored individual and group plans. For over 20 years, relying upon this legislative silence, health carriers typically have not included coverage for neurodevelopmental therapies in non-employer sponsored plans.¹

In 2005, the legislature enacted the Mental Health Parity Act. *See* RCW 48.44.341 (MA 29-30).² The purpose of the Parity Act 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 (MA 322).³ The Parity Act’s requirements were phased in over five years, first as to large groups, then as to all plans. RCW 48.44.341. It now requires that all plans provide coverage for “mental health services,” subject to similar limitations and restrictions as other coverage, including that the services be medically necessary as determined by the health carrier’s medical director. RCW 48.44.341(2)(c), (4). Subject to exceptions, “mental health services” are “*medically necessary* outpatient and inpatient services provided to treat

¹ *See* MA 225. *See Queets Band of Indians v. State*, 102 Wn.2d 1, 4-5, 682 P.2d 909 (1984) (holding that, under the maxim *expressio unius est exclusio alterius*, where a statute specifically designates the things upon which it operates, the court must infer that the legislature intended all omissions).

² RCW 48.44.341 applies to health care service contractors. *See also* RCW 41.05.600 (applicable to the State Health Care Authority); RCW 48.20.580 (applicable to disability insurance); RCW 48.21.241 (applicable to group and blanket disability insurance).

mental disorders covered by the diagnostic categories listed in the most current version of the diagnostic and statistical manual of mental disorders[.]” RCW 48.44.341(1) (emphasis added).⁴ The current manual is the DSM-IV-TR (“DSM”).

The neurodevelopmental therapy mandate in RCW 48.44.450 remains in effect. The Parity Act does not mention neurodevelopmental therapies. After the Parity Act became effective, Washington health carriers, including Regence, continued to cover neurodevelopmental therapies to the extent required by RCW 48.44.450, *see* MA 97, 225, and the Washington Office of Insurance Commissioner continued to approve contracts consistent with the limited mandate. *See* MA 234-46, 248-60.

The neurodevelopmental therapy mandate has never been amended since its enactment in 1989. Efforts to expand it have failed several times, including since enactment of the Parity Act in 2005. *See* MA 164-71, 173-78, 180-91, 271-76, 278-85. Efforts to create a separate mandate to cover treatments for autism, a type of neurodevelopmental disorder, have also failed. *See* MA 193-203, 205-14, 262-69.⁵ Despite the legislature’s decision not to expand the mandate, class-action complaints were filed against the

³ *See* note following RCW 41.05.600.

⁴ Consistent with the Parity Act, Regence’s mental-health benefit requires that mental-health services be “medically necessary” as defined in the plan. *See* MA 63 (§ 1.17), 104 (§ 8.6), 111 (§ 8.23.2).

⁵ Such efforts would have been unnecessary if the Parity Act—already in existence—required such coverage.

state, health carriers, and plan administrators alleging, among other things, that the Parity Act mandates coverage of neurodevelopmental therapies in all plans.⁶ This is one such action.

B. The Superior Court Ruled That L.H., a Named Plaintiff, Has Standing Even Though His Providers Have Not Diagnosed Him with Any Mental Health Condition and His Neurodevelopmental Therapy Claims Have Been Paid.

O.S.T., a minor and former Regence member who has autism, sued Regence alleging claims for breach of contract, declaratory and injunctive relief, and violation of the Washington Consumer Protection Act. The superior court dismissed O.S.T.'s claim for injunctive relief on the grounds that only a current enrollee has standing to seek such relief, *see* MA 12, but the court permitted an amendment to add L.H., a current Regence enrollee, as a plaintiff. The court then requested supplemental briefing on standing.

Regence challenged L.H.'s standing, both sides submitted materials outside the pleadings, and the superior court treated the matter as a summary judgment motion. *See* MA 11-12; CR 12(b). Although Plaintiffs alleged L.H. was diagnosed with expressive language disorder, a DSM-listed mental-health condition, the evidence established his treating providers diagnosed him with only medical conditions and no mental-health condition. MA 399, 403-22, 424-25. Because none of the claims submitted by L.H.'s

⁶ Suits were filed against Regence BlueShield, Premera Blue Cross, Group Health Cooperative, and the Washington State Health Care Authority.

providers indicated any DSM (or equivalent ICD-9⁷) condition, his occupational, speech, and physical therapies were not considered neurodevelopmental and were paid under his rehabilitation benefit. *Id.*

In response to this evidence, Plaintiffs did not submit a declaration by one of L.H.'s treating providers. Instead, Plaintiffs submitted a declaration by a speech therapist who had never seen L.H. and had no license to diagnose any health condition or practice medicine. MA 304-05; *see* RCW 18.17.011(1), .021. The speech therapist, Patricia Moroney, testified based on review of medical records that L.H. "is properly diagnosed" with expressive language disorder. MA 305. Regence moved to strike the Moroney declaration. The court accepted Ms. Moroney's "diagnosis" and ruled that L.H. had standing to seek declaratory and injunctive relief even though no claims with any DSM (or ICD-9 equivalent) diagnosis had been submitted or denied. MA 435.⁸

C. The Superior Court Granted Plaintiffs a Partial Summary Judgment on the Merits, and Regence Has an Appeal Pending in This Court.

The parties filed cross motions for partial summary judgment regarding application of the Parity Act. Regence contended the Parity Act does not apply because, among other reasons, (1) the neurodevelopmental therapy mandate, by negative implication, allows exclusion of

⁷ The DSM-IV-TR indicates which of its mental-disorder codes correspond to ICD-9, the code system used in medical billing. *See* MA 342-51.

neurodevelopmental therapies from non-employer sponsored individual and group plans;⁹ (2) there is a presumption against implicit repeal or amendment,¹⁰ and (3) subsequent legislative history¹¹ and agency interpretations¹² confirm the legislature did not implicitly repeal or amend the neurodevelopmental therapy mandate. The superior court ruled that neurodevelopmental therapies are “mental health services” that must be covered under the Parity Act and entered an immediately appealable, final judgment under CR 54(b). MA 20-21, 23-24. Regence filed a notice of appeal. MA 15-16. That pending appeal is linked with one by Premera Blue Cross on discretionary review from a similar ruling by Judge Michael Trickey.¹³ No briefing has been submitted in either case; the designations of clerk’s papers and statements of arrangements are due February 7, 2013.

D. The Superior Court Certified a Neurodevelopmental Therapy Class under Civil Rule 23(b)(3) Where Other Courts Had Refused.

Unlike the other subsections of CR 23(b), subsection (b)(3) includes due process protections that allow a representative plaintiff to seek damages on behalf of the class. *See* CR 23(c)(2) (requiring that members of a subsection (b)(3) class be given the best practicable notice and an

⁸ The court reserved ruling on L.H.’s standing to seek damages. MA 12.

⁹ *See Queets Band of Indians*, 102 Wn.2d at 4-5.

¹⁰ *Tollycraft Yachts Corp. v. McCoy*, 122 Wn.2d 426, 439, 858 P.2d 503 (1993).

¹¹ *See* MA 164-71, 173-78, 180-91, 193-203, 205-14, 262-69, 271-76, 278-85.

¹² *See* MA 234-46, 248-60.

¹³ *A.G. v. Premera Blue Cross*, Court of Appeals No. 68726-3.

opportunity to opt out); *cf. Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 189, 157 P.3d 847 (2007) (observing that any damages sought on behalf of a (b)(2) class must be “incidental to the declaratory relief”). Subsection (b)(3) uniquely requires that “the questions of law or fact common to the members of the class predominate over any questions affecting only individual members” (“predominance”) and “a class action is superior to other available methods for the fair and efficient adjudication of the controversy” (“superiority”).

Before class certification in this case, (b)(3) certification was denied in other actions regarding neurodevelopmental therapy coverage. For example, in *Z.D. v. Group Health Cooperative*, district court Judge Robert Lasnik twice refused to certify a class under Fed. R. Civ. P. 23(b)(3) on the grounds that individualized issues would predominate and pose “severe” management difficulties and that a class action was not the superior means of adjudication where class members had the statutory right to seek review by a certified independent review organization (IRO). 2012 WL 1977962 at *11-13 (MA 369-73) (June 1, 2012); *see also* 2012 WL 5033422 at *13 (MA 396-97) (October 12, 2012) *see* RCW 48.43.535.¹⁴

Here, Plaintiffs moved to certify a class solely under CR 23(b)(3). The superior court entered a certification order one day after entering

¹⁴ Judge Lasnik certified a limited class for injunctive relief under Fed. R. Civ. P. 23(b)(1) and (2). 2012 WL 5033422 at *2-8 (MA 355-65).

partial summary judgment on the merits. MA 4-9. The court found that the threshold legal issues would “predominate over the questions affecting individual class members.” MA 7-8. Without addressing the availability of IRO review, the court found that a class action was “superior and more efficient than other methods of adjudication[.]” MA 8. The court recognized that individual issues may pose management problems but cited its broad discretion and a “wide variety of management options,” citing *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 63 P.3d 198 (2003). MA 8. Although the court did not specify any such options in its order, the court orally mentioned that it could decertify the class after deciding the identified common issue. MA 458. In fact, however, the court decided that issue *before* certifying the class, in the partial summary judgment.

The court’s class definition does not make receipt of neurodevelopmental therapy or submission or denial of a claim a condition of class membership. *See* MA 8. The court defined the class to include *all* members of certain Regence plans who “have required or [now] require neurodevelopmental therapy for the treatment of a qualified mental health condition.” *Id.*

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Superior Court Committed Obvious or Probable Error in Ruling that L.H. Had Standing to Seek Declaratory and Injunctive Relief Where He Lacked a DSM Diagnosis or Any Denied Therapy Claims.

The court may only decide a justiciable controversy, which means an actual, present, and existing dispute as of the filing of the complaint. *Branson v. Port of Seattle*, 152 Wn.2d 862, 877, 101 P.3d 67 (2004); RCW 7.24.020. For three reasons, whether Regence must cover neurodevelopmental therapies provided to treat DSM-listed mental-health conditions is not an actual, present, and existing dispute between L.H. and Regence. First, L.H. lacks a qualified diagnosis of a DSM-listed mental-health condition. MA 399, 403-22, 424-25. Second, no provider has submitted any claim indicating that L.H. has any such condition or its ICD-9 equivalent. *Id.* Third, because the medical codes in L.H.'s claims for occupational, speech, and physical therapies lacked DSM equivalents and thus indicated no mental disorder, Regence has processed and paid the claims under the rehabilitation benefit without applying any exclusion. *Id.*

Because there is no actual, present, and existing dispute between L.H. and Regence, the superior court committed obvious or probable error in ruling that L.H. has standing to seek declaratory and injunctive relief. Even assuming this Court were to uphold the partial summary judgment, it was error to grant such relief to L.H. where he lacked standing. In

addition, L.H. cannot be a class representative. *See Johnston v. Beneficial Management Corp. of Am.*, 85 Wn.2d 637, 645, 538 P.2d 510 (1975) (holding that “[a] party who lacks standing himself cannot represent a class of which he is not a party.”).

The plaintiff’s standing is a requirement for jurisdiction, *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001), which is a common subject for discretionary review.¹⁵ Because L.H. lacks standing, the superior court committed an obvious or probable error, and further proceedings between him and Regence would be useless. Review of the decision to deny Regence’s motion to dismiss L.H.’s claims is warranted under RAP 2.3(b)(1) and (2).

B. The Superior Court Committed Obvious or Probable Error in Certifying a Class to Seek Individual Damages under CR 23(b)(3).

The plaintiff bears the burden of establishing the class certification requirements. *Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 64 P.3d 49 (2003). The court must conduct a “rigorous analysis” of the CR 23 requirements and look beyond the pleadings to the extent necessary to determine whether those requirements are satisfied. *Id.*

Regence does not concede that the threshold requirements of CR 23(a) are satisfied, but chooses to focus on CR 23(b)(3) for purposes of

¹⁵ *See, e.g., Davis v. Wash. State Dep’t of Labor & Indus.*, 159 Wn. App. 437, 245 P.3d 253 (2011); *City of Tacoma v. Mary Kay, Inc.*, 117 Wn. App. 111, 70 P.3d 144 (2003); *State ex rel. J.M.H. v. Hofer*, 86 Wn. App. 497, 942 P.2d 979 (1997).

this motion. The superior court's decision to certify the class was a probable—if not an obvious—error because the predominance and superiority requirements of subsection (b)(3) were not met and because the class includes persons without standing and is not ascertainable.

1. The Predominance and Superiority Requirements Are Not Met.

a. Individual Issues Will Predominate Over the Common Ones.

It is error to certify a class if the fact of damage—and thus liability—depends on proof individual to each class member. *See Schwendeman v. USAA Cas. Ins. Co.*, 116 Wn. App. 9, 20-22, 65 P.3d 1 (2003) (affirming denial of certification where liability depended on individualized proof regarding vehicle repairs). “Where the fact of damage cannot be established for every class member through proof common to the class, the need to establish...liability for individual class members defeats Rule 23(b)(3) predominance.” *Bell Atlantic Corp. v. AT&T Corp.*, 339 F.3d 294, 302-03 (5th Cir. 2003) (affirming denial of certification due to failure of predominance).¹⁶

Where the fact of damage depends on individual diagnosis and medical necessity, those issues will predominate. *See, e.g., Batas v. Prudential Ins. Co. of Am.*, 37 A.D.3d 320, 831 N.Y.S.2d 371 (2007)

¹⁶ Aside from amendments on unrelated issues (residual funds), CR 23 is identical to Fed. R. Civ. P. 23. For this reason, Washington courts frequently seek guidance from cases

(denying certification under (b)(3) equivalent where “the medical necessity issue—unique and complex in each class member’s particular case—would predominate over questions of law or fact common to the class as a whole”); *Tinman v. Blue Cross & Blue Shield of Mich.*, 264 Mich. App. 546, 692 N.W.2d 58, 67-68 (2004) (reversing certification where liability depended on individualized proof of diagnosis and medical necessity, as those inquiries would predominate); *Pecere v. Empire Blue Cross & Blue Shield*, 194 F.R.D. 66, 71 (E.D. N.Y. 2000) (denying certification “because plaintiffs’ claims hinge on whether or not the treatment for each of their individual conditions was ‘medically necessary’”); *Doe I v. Guardian Life Ins. Co. of Am.*, 145 F.R.D. 466, 475-76 (N.D. Ill. 1992) (denying certification because individualized issues, such as whether each plan beneficiary was properly diagnosed with a particular disorder, would predominate over the common issue of whether the disorder was a mental or physical illness under the plan).¹⁷

Each class member must establish he or she is (1) diagnosed with a DSM condition (2) for which neurodevelopmental therapies are medically necessary and (3) claims were denied based on lack of coverage. As in the

applying the federal rule and considers such cases “highly persuasive.” *Schnall v. AT&T Wireless Svcs., Inc.*, 171 Wn.2d 260, 270, 259 P.3d 129 (2011).

¹⁷ See also *Doe v. Blue Cross Blue Shield of Maryland, Inc.*, 173 F. Supp. 2d 398, 406 (D. Md. 2001) (observing that individual health coverage disputes “are so grounded in their particular facts that class action treatment is impractical”); *Paciello v. Unum Life Ins. Co. of Am.*, 188 F.R.D. 201, 204-05 (S.D. N.Y. 1999) (observing that class certification is

above cases, these issues will predominate. The superior court concluded the existence of issues requiring individualized proof did not preclude (b)(3) certification because the court has a “wide variety of management options” to deal with issues affecting individual class members, citing *Sitton*, 116 Wn. App. 245. But *Sitton* is inapposite because, there, the insurer had already determined individual medical necessity, and the liability inquiry was not whether each determination was correct but whether the insurer’s review process had a bad faith purpose. *Id.* at 249-50. That question was answerable based on class-wide proof. *Id.*

Here, in contrast, the individualized determination of medical necessity—without which harm cannot be established—has not been made in the first instance. Moreover, liability depends not on the overarching purpose of the medical-necessity review but the individual outcomes—that is, whether each class member has a diagnosed condition for which neurodevelopmental therapy is medically necessary. No management tool has been suggested that could deal effectively with this problem.

The superior court’s suggestion to decertify the class after determination of the common issue is problematic for three reasons. First, it acknowledges the impossibility of determining the fact of damage class wide. *See Z.D.*, 2012 WL 5033422 at *13 (MA 396) (“Plaintiffs’ attempt

inappropriate where individual questions regarding each class member’s health condition will predominate).

to cure the predominance problem by appointment of a special master only reinforces the Court's prior conclusion that individual questions predominate and that a class action would not be superior to other available methods of resolving the controversy." Second, the identified common issue—interpretation of the Parity Act—was decided *before* certification. Third, this approach would render the predominance and superiority requirements meaningless. The superior court committed an obvious or probable error in concluding the predominance requirement was met. *See* RAP 2.3(b)(1) & (2).

b. The IRO Process Is Superior to a Class Action as a Means of Adjudication.

A class action "must be superior [to], not just as good as, other available methods." *Schnall v. AT&T Wireless Svcs., Inc.*, 171 Wn.2d 260, 275, 259 P.3d 129 (2011), quoting 4 CONTE & NEWBERG, NEWBERG ON CLASS ACTIONS § 13:11, at 406 (4th ed. 2002). "The superiority requirement 'focuses upon a comparison of available alternatives.'" *Id.*, quoting *Sitton*, 116 Wn. App. at 256. In comparing alternatives, the court considers available administrative remedies. *See* NEWBERG, § 4:27 at 245-46; *Patillo v. Schlesinger*, 625 F.2d 262, 265 (9th Cir. 1980). In addition, superiority is not met where the existence of individualized issues or other factors will make the action difficult or unruly to manage. *See Schwendeman*, 116 Wn. App. at 29.

In *Z.D. v. Group Health Co-op.*, Judge Lasnik found (b)(3) class treatment was not superior where plan members could take advantage of the IRO process provided by statute. 2012 WL 1977962 at *12-13 (MA 371-73) (June 1, 2012). Any plan member is entitled to obtain IRO review of a carrier's decision to deny coverage. RCW 48.43.535(2). The IRO is assigned by the insurance commissioner and is composed of independent medical experts qualified to make determinations of medical necessity. RCW 48.43.535(3), (5). IRO decisions are binding on carriers, and carriers are responsible to pay their fees. RCW 48.43.535(7).

The IRO process—which the superior court did not address at all—offers the class members a free, efficient means to seek a binding decision that Regence must cover their therapies, far superior to class litigation in terms of expediency, cost, and privacy. The IRO process is designed to deal with individual claims, such as those involved here, that depend on individualized issues like diagnosis, claim submission and denial, and medical necessity.

Judge Lasnik concluded in *Z.D.* that, even if the individualized issues of diagnosis and medical necessity did not predominate, those issues were “sufficiently distinct and pronounced” that class treatment would not be superior to the IRO process, and the likely difficulties in managing the class action “would appear to be quite severe.” *Id.* at *12 (MA 372). The court further reasoned that, assuming the court resolved

the threshold legal issue by a declaratory order, “the only questions that [would] remain would be unique to individual beneficiaries and thus a poor reason to certify the class.” *Id.* at *13 (MA 372). Furthermore, because the health carrier would be bound by the results of IRO review, it did “not appear that the class framework would add anything to the process.” *Id.* at *12 (MA 372). Judge Lasnik’s reasoning applies with equal force here, as class treatment of myriad health claims will never be superior to IRO review. The superior court committed obvious or probable error in concluding class treatment was superior to other means of adjudication. *See* RAP 2.3(b)(1) & (2).

2. The Class as Defined Includes Persons without Standing and Is Not Ascertainable.

Even assuming the requirements of subsection (b)(3) were met, the class was not certifiable because it included persons without standing and was not ascertainable.

Each class member must have suffered the same type of injury as the representative plaintiffs and thus have standing to seek the same relief. *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977) (“[A] class representative must be part of the class and ‘possess the same interest and suffer the same injury’ as the class members.”). Plaintiffs sought certification under subsection (b)(3) because they intended to seek breach of contract damages. But the

superior court defined the class such that it includes persons without any present claim for breach of contract. MA 8. This was error. *See Batas*, 37 A.D. 3d at 321 (holding class was not certifiable where it included persons who had not been denied medically necessary care and thus had no viable cause of action for breach of contract).¹⁸

In addition, the class membership must be ascertainable. *Rios v. Marshall*, 100 F.R.D. 395, 403 (S.D. N.Y. 1983) (excluding categories of persons from class where identifying them would be impossible). The class here fails in this regard because it is virtually impossible to identify class members who “require” neurodevelopmental therapy, but have never submitted a claim, and provide them the “best notice practicable” under CR 23(c)(2). The trial court has acknowledged this impossibility by ordering Regence to notify therapy providers as a means of potentially reaching some class members. Class members who receive no notice would nevertheless be bound by the result. *See* CR 23(b)(3), (c)(2).

The superior court committed obvious or probable error in certifying a class that includes persons without standing and that is not ascertainable. *See* RAP 2.3(b)(1) & (2).

¹⁸ *See also Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513-14 (7th Cir. 2006) (affirming denial of certification in deceptive advertising case where class membership would have required only purchase of a fountain-dispensed Diet Coke); *Edwards v. McCormick*, 196 F.R.D. 487, 491-92 (S.D. Ohio 2000) (denying certification in Fair Debt Collection Practices Act case where proposed class included persons who received a communication regardless of whether it was unlawful).

3. Discretionary Review Is Appropriate.

Due to the great power of the class representative and counsel and the potential financial consequences, class litigation merits careful review to prevent abuse. *See Darling v. Champion Home Builders Co.*, 96 Wn.2d 701, 706, 638 P.2d 1249 (1982) (observing that court oversight “is appropriate to guard against” abuse). In addition, further superior court proceedings, including notification of thousands of class members, are useless and wasteful where it was error to certify. As a result, review is appropriate under RAP 2.3(b)(1) and (2). *See, e.g., Schnall*, 139 Wn. App. 280, 161 P.3d 395 (2007), *rev'd in part*, 171 Wn.2d 260 (2011); *Nelson*, 129 Wn. App. 927, 121 P.3d 95 (2005), *aff'd*, 160 Wn.2d 173 (2007); *Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 64 P.3d 49 (2003); *Sitton*, 116 Wn. App. 245 (2003) (all discretionary review of class certification).

In addition to the ordinary considerations, granting review here is appropriate because this Court already has pending before it Regence’s appeal from the partial summary judgment on the merits. Consolidated review will thus serve judicial economy by avoiding, rather than promoting, piecemeal appeals. Also, a motion for class certification is pending in *A.G. v. Premera Blue Cross*, which is stayed pending Premera’s appeal. This Court should grant review.

C. In the Alternative, This Court Should Stay the Superior Court Proceedings Pending Regence's Appeal from the Partial Summary Judgment.

Should this Court grant discretionary review, proceedings in the superior court will be stayed automatically under RAP 7.2(a). In the event this Court does not grant discretionary review, Regence requests that this Court stay the superior court proceedings pending final resolution of its appeal from the partial summary judgment. RAP 7.3 authorizes this Court "to perform all acts necessary or appropriate to secure the fair and orderly review of a case." A stay of proceedings will not affect the partial summary judgment but will permit orderly review and spare the court and parties from investing unnecessarily in further motions, class administration, and trial.

VI. CONCLUSION

Regence requests that this Court grant discretionary review of the decisions identified above.

DATED this 25th day of January, 2013.

CARNEY BADLEY SPELLMAN, P.S.

By 

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

Honorable John P. Erlick

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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 FOR DISCRETIONARY
REVIEW TO THE COURT OF
APPEALS, DIVISION ONE

Defendant Regence BlueShield seeks discretionary review by the Court of Appeals,
Division One, of the following orders dated December 12, 2012, and entered December 13,
2012:

1. Order Certifying Neurodevelopmental Class under Rule 23(b)(3) (Dkt. 126A),
dated and entered December 13, 2012; and
2. Order Granting in Part and Denying in Part Defendant's Motion to Dismiss
Plaintiffs' Claims for Lack of Standing (Dkt. 127), dated December 12, 2013, and entered
December 14, 2012.

NOTICE FOR DISCRETIONARY
REVIEW - 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) 467-0254