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STATE OF WASHINGTON
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No. 89084-6

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SUPREME COURT
OF THE STATE OF WASHINGTON

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,

Respondents / Plaintiffs,

v.

REGENCE BLUESHIELD,

Petitioner / Defendant.

PETITIONER REGENCE BLUESHIELD'S
REPLY IN SUPPORT OF MOTION FOR
DISCRETIONARY REVIEW OF CLASS CERTIFICATION

Timothy J. Parker, WSBA No. 8797
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I. INTRODUCTION

Regence has demonstrated error by the trial court in certifying the neurodevelopmental class and by the Court of Appeals in denying discretionary review. It was error to certify the class where (1) the issues of individualized diagnosis and medical necessity would necessarily predominate over issues common to the class and (2) the legislature has deemed the independent review organization (IRO) a superior means of adjudicating individual health claim disputes. In addition, it was error to certify a class that is not ascertainable because it (1) includes persons without any breach of contract claim and (2) is defined in terms of a central liability inquiry, medical necessity. This Court should grant review under RAP 13.5(b).¹

II. REPLY ARGUMENT

A. **The Discretionary Review Standard under RAP 2.3(b)(1) and (b)(2) Is a Sliding Scale between Probable and Obvious Error.**

As explained in Regence's motion, this Court may grant review based on a finding of probable or obvious error. Plaintiffs' assertion that review for probable error under RAP 2.3(b)(2) "is only available for orders related to injunctions or similar orders" is directly contrary to the article they cite as authority. *See Answer* at 6, citing G. Crooks, *Discretionary Rev. of Trial Ct. Decisions*, 61 WASH. L. REV. 1548, 1545-

¹ Regence's motion for discretionary review has nothing to do with obtaining a stay of trial court proceedings. The automatic stay provided by RAP 7.2(a) is subject to the appellate court's discretion in any event. The issue of a stay is presently before this Court on a separate motion.

46 (1986). Former Commissioner Crooks stated in his article, “Nothing in subsection (b)(2) limits its applicability to cases involving injunctions and the like.” *See also Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 463 n.6, 232 P.3d 591 (2010), citing Crooks. As explained in Regence’s motion, the essence of the RAP 2.3(b)(1) and (b)(2) criteria is an inverse relationship between the certainty of error and its impact on the proceeding. *Minehart*, 156 Wn. App. at 463 n.6. The same standards are incorporated into RAP 13.5(b) for accepting discretionary review of an interlocutory decision by the Court of Appeals.

B. Class Certification under CR 23(b)(3) Was Error.

Plaintiffs begin with the faulty premise that they must be permitted to seek individualized damages for the class as defined by the trial court, either under subsection (b)(2) or (b)(3) of CR 23. Plaintiffs have the burden to demonstrate that the CR 23 requirements are satisfied. *Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 64 P.3d 49 (2003). As Plaintiffs concede, individualized damages are never appropriate under subsection (b)(2). *See Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 189, 157 P.3d 847 (2007). And, as explained in Regence’s motion, the requirements of subsection (b)(3) were not met as to the class certified by the trial court.²

² Regence does not concede that the requirements of CR 23(a) were met. Rather, Regence has focused on the CR 23(b)(3) requirements for the sake of simplicity in demonstrating error for purposes of the discretionary review criteria.

1. Predominance Is Necessarily Absent Where Liability Depends on Individual Diagnosis and Medical Necessity.

A class may not be certified where the defendant's liability to each class member depends on proof unique to each class member. *Schwendeman v. USAA Cas. Ins. Co.*, 116 Wn. App. 9, 20-22, 65 P.3d 1 (2003); *Bell Atlantic Corp. v. AT&T Corp.*, 339 F.3d 294, 302-03 (5th Cir. 2003). Such is the case where liability depends on individualized medical diagnosis and medical necessity of treatment. Plaintiffs address none of the numerous decisions cited by Regence on this specific issue. *See Motion* at 5-6 & n.2.

The Court of Appeals did not relax the predominance requirement in *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 63 P.3d 198 (2003). *Sitton* involved only *submitted* claims, and the insurer had already determined individual medical necessity for those claims. The liability inquiry had nothing to do with whether particular services were medically necessary but instead was whether the insurer's review process overall had a bad faith purpose. *Id.* at 256. The Court of Appeals observed: "[T]he central allegation is that State Farm's utilization reviews are not for the purpose of determining whether medical treatment is covered, but are a means to wrongfully deny or limit benefits." *Id.* That liability issue was determinable based on class-wide proof.

In contrast, liability cannot be determined class wide here. The central allegation is wrongful denial of benefits (assuming the Mental Health Parity Act applies to neurodevelopmental therapies). Specifically,

Plaintiffs allege that Regence denied covered claims for medically necessary therapies provided to treat class members' DSM-listed mental disorders. Absent proof of individual diagnosis and medical necessity, there can be no entitlement to benefits. Consequently, unlike in *Sitton*, diagnosis and medical necessity are critical to the liability determination.

Schwendeman is a closer case than *Sitton*. The central allegation there was that the insurer failed to provide replacement parts of “like kind and quality” as required under the policy. 116 Wn. App. at 21-22. The Court of Appeals held that certification was properly denied because the liability determination would depend on (1) the relative quality of individual car parts and (2) each car’s pre-accident condition based on factors such as age, mileage, and physical condition. *Id.* These issues are analogous to individual diagnosis and medical necessity, and the *Schwendeman* court’s reasoning is consistent with that of the decisions where certification was denied or reversed because those issues necessarily would predominate over the issues common to the class. *See Motion* at 5-6 & n.2.

Perhaps even more compelling is that Judge Lasnik in *Z.D. v. Group Health Co-op.* found that individualized issues would predominate when he declined to certify a neurodevelopmental therapy class under subsection (b)(3)—a fact Plaintiffs ignore while erroneously citing Judge

Lasnik's analysis of other subsections of Rule 23 not pertinent here.³ 2012 WL 5033422 at *13 (W.D. Wash., Oct. 17, 2012).

The trial court's suggestion that it could decertify the class after deciding the common legal issues does not resolve the predominance problem for at least two reasons. First, it is actually an acknowledgement of the impossibility of determining damages liability class wide. *See Z.D.*, 2012 WL 5033422 at *13 ("Plaintiffs' attempt 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 trial court did *not* decertify the class after deciding the common issues but instead denied Regence's motion to decertify and proceeded to add class representatives and order Regence to process and pay claims. *See Order Appointing Class Representatives & Issuing Perm. Injunctive Relief*, attached to *Suppl. Notice for Discretionary Review*, Appx. 1. This Court should review the appointment of additional class representatives together with the original certification order.

³ Nothing in Washington's decisional law establishes a more flexible standard for predominance than that applied by the federal courts. Washington's subsection (b)(3) is identical to the federal rule, and this Court held in the context of an extensive (b)(3) predominance analysis that, "[b]ecause CR 23 is identical to its federal counterpart, 'cases interpreting the analogous federal provision are highly persuasive.'" *Schnall v. AT&T Wireless Svcs., Inc.*, 171 Wn.2d 260, 271, 259 P.3d 129 (2011), quoting *Schwendeman v. USAA Cas. Ins. Co.*, 116 Wn. App. 9, 19 n.24, 65 P.3d 1 (2003) and citing numerous federal decisions.

It was error to certify a class under CR 23(b)(3) where the issues of individual diagnosis and medical necessity would necessarily predominate over the common issues. As Judge Lasnik observed, “Assuming that the Court resolves the common threshold issues via a declaratory order, the only questions that remain would be unique to individual beneficiaries and thus a poor reason to certify the class.” *Z.D.*, 2012 WL 1977962 at *13 (W.D. Wash., June 1, 2012).

2. The Superiority Requirement Was Not Satisfied.

Regence has never suggested that class members be forced to litigate identical legal issues in individual lawsuits or proceedings. A properly represented and defined class, certified under CR 23(b)(2), could obtain a declaratory judgment that would be binding as between Regence and class members. *See Z.D.*, 2012 WL 19779962 at *12. But Plaintiffs never proposed a properly represented or defined class. Moreover, they never requested certification under subsection (b)(2), only subsection (b)(3).

Regence does not misrepresent Judge Lasnik’s superiority analysis in refusing to certify a class under subsection (b)(3) in *Z.D.* Plaintiffs refer to Judge Lasnik’s discussion of IRO claim review in the context of certifying a class under subsections (b)(1) and (b)(2), *neither of which has a superiority requirement.*⁴ Meanwhile, Plaintiffs ignore Judge Lasnik’s

⁴ The plaintiffs in *Z.D.* proposed two classes: *first*, a class of persons seeking declaratory and injunctive relief under (b)(1) or (b)(2), and *second*, a class of persons seeking monetary damages under (b)(3). 2012 WL 1977962 at *1. In the context of (b)(1) and (b)(2), Group Health argued that the plaintiffs’ decision

superiority analysis under subsection (b)(3) and accuse Regence of misrepresenting his decision.

In the context of (b)(3) certification, where monetary damages would be sought on behalf of the class, Judge Lasnik recognized that liability to individual class members could not be determined class wide and that the IRO is a superior means of adjudicating individual disputed claims because that is what it is designed to do. 2012 WL 1977962 at *12-13; 2012 WL 5033422 at *13.

Class treatment cannot be superior where individual class members' claims depend on proof unique to each class member and a legislatively created forum exists specifically to adjudicate such claims. It was error to conclude (b)(3) class treatment was superior to other means of adjudication where both liability and damages depend on individualized proof. This Court should grant review.

C. The Class Is Not Ascertainable Where It (1) Includes Persons Who, By Definition, Have No Breach of Contract Claim and (2) Requires Individual Determination of the Merits to Ascertain Class Membership.

The class is not ascertainable because it includes persons who, by definition, have no breach of contract claim because they never submitted a claim for neurodevelopmental therapies. Although class certification

to pursue litigation rather than the IRO process raised doubts whether their interests were aligned with those of other proposed class members. *Id.* at *5. The court rejected this argument, observing that the IRO process was not a proper forum to seek declaratory or injunctive relief. *Id.* at *6. The court granted certification under (b)(1) and (b)(2). *Id.* at *6-8.

does not require a threshold showing that each class member was harmed, it does require exclusion of persons who by definition have no breach of contract claim where, as here, such a claim is alleged on behalf of the class. *See Batas v. Prudential Ins. Co. of Am.*, 37 A.D.3d 320, 321, 831 N.Y.S.2d 371 (2007).

Plaintiffs' authorities do not state otherwise. Section 3:7 of the Newberg treatise⁵ relates only to "class actions certified under 23(b)(2)," which does not allow individualized claims for damages. *See Nelson*, 160 Wn.2d at 189. Section 2:3 of the same treatise merely states that passive class members need not affirmatively demonstrate standing, and notes that "[c]lass definition is properly considered a separate topic." In *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 320 (C.D. Cal. 1998), the federal court noted the plaintiffs were not required to *prove* each class member's injury for class definition purposes. Again, that is not the issue here. Plaintiffs omit that the *O'Connor* court then analyzed whether the proposed class was narrowly drawn such that its members could have been affected by contamination the defendants allegedly caused. *Id.* at 320-27. No similar analysis was done here and, as a result, the class includes persons not even potentially damaged by Regence's alleged contract breach or other conduct.

In addition, the class is not ascertainable because it requires inquiry into the merits of each potential class member's claim to

⁵ W. Rubenstein & A. Conte, NEWBERG ON CLASS ACTIONS (5th ed. 2012).

determine class membership. Defining the class as persons who “require” neurodevelopmental therapies incorporates the critical liability inquiry of individual medical necessity. Plaintiffs do not dispute that whether particular health care services are medically necessary to treat a diagnosed condition is an individualized determination. *See Z.D.*, 2012 WL 1977962 at *12 (“[A]s Plaintiffs concede..., the individual questions of ‘medical necessity’ are not susceptible to common resolution.”). Plaintiffs’ assert that no determination of medical necessity will be required for *declaratory relief*. *Answer* at 19. But this ignores their claim for breach of contract damages on behalf of the same class.

It is not administratively feasible for the trial court to identify persons who “require” neurodevelopmental therapy but have never submitted a claim, just as it was impossible in *Rios v. Marshall* to identify farmworkers who were deterred by the defendants’ alleged discrimination from applying for jobs. 100 F.R.D. 395, 403 (S.D. N.Y. 1983). *See also Z.D. v. Group Health Co-op.*, 2012 WL 1977962 at *13 (finding that class treatment was not superior in part due to the difficulty in ascertaining members of the proposed class). Indeed, when the trial court here ordered Regence to notify class members of certification, the only class members who were required to be sent direct notice were those who had submitted neurodevelopmental therapy claims to Regence. *See Order Directing Notice*, Appx. 2. It was not administratively feasible to identify those who did not submit claims.

It was error to certify a class that is not ascertainable because it includes persons who (1) by definition have no breach of contract claim and (2) can never be identified and given notice. This Court should grant review.

III. CONCLUSION

The Court of Appeals erred in denying discretionary review of the class-certification order. This Court should accept review.

DATED this 15th day of August, 2013.

CARNEY BADLEY SPELLMAN, P.S.

By 

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

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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 August 15, 2013, 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

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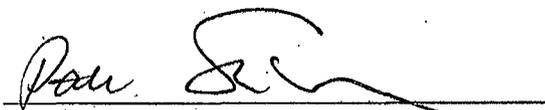
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r Spoonemore@sylaw.com

VIA legal messenger

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

DATED this 15th day of August, 2013.


Patti Saiden, Legal Assistant

APPENDIX

1

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

SUPPLEMENTAL NOTICE FOR
DISCRETIONARY REVIEW

On January 11, 2013, Defendant Regence BlueShield filed a notice for discretionary review in this matter, designating the Order Certifying Neurodevelopmental Class under Rule 23(b)(3) entered by the trial court on December 13, 2012. The matter was assigned no. 69821-4-I in the Court of Appeals. On July 17, 2013, after the Court of Appeals denied discretionary review, Defendant filed a motion for discretionary review in the Washington Supreme Court. That matter was assigned no. 89084-6 and is pending for consideration by a department of the Supreme Court on September 3, 2013. On July 18, 2013, the superior court entered an order entitled "Order Appointing Class Representatives and Issuing Permanent Injunctive Relief." The July 18 order is premised upon and prejudicially affects the Order

SUPPLEMENTAL NOTICE FOR
DISCRETIONARY REVIEW - 1

CARNEY
BADLEY
SPELLMAN

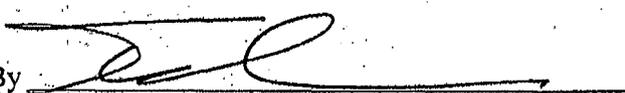
Law Offices
A Professional Service Corporation
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1 Certifying Neurodevelopmental Class under Rule 23(b)(3), including by appointing
2 additional class representatives. The original notice for discretionary review is therefore
3 supplemented to designate the portion of the July 18 order that appoints additional class
4 representatives. Defendant seeks review of that decision by the Washington Supreme Court
5 as part of the pending motion for discretionary review.

6 A copy of above-referenced order is attached.

7 DATED this 15th day of August, 2013.

8 CARNEY BADLEY SPELLMAN, P.S.

9
10 By 

11 Timothy J. Parker, WSBA No. 8797

12 Jason W. Anderson, WSBA No. 30512

13 Attorneys for Defendant Regence BlueShield
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SUPPLEMENTAL NOTICE FOR
DISCRETIONARY REVIEW - 2

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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. I served in the manner indicated a true and correct copy of the foregoing document on counsel of record as follows:

Attorneys for Plaintiff

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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 15th day of August, 2013.



Patti Saiden, Legal Assistant

SUPPLEMENTAL NOTICE FOR DISCRETIONARY REVIEW - 3

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HON. JOHN P. ERLICK
Noted for Hearing: July 12, 2013, at 9:30 a.m.
With Oral Argument

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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

NO. 11-2-34187-9 SEA

[PROPOSED]
ORDER APPOINTING CLASS REPRESENTATIVES AND ISSUING PERMANENT INJUNCTIVE RELIEF

Plaintiffs,

v.

REGENCE BLUESHIELD, a Washington corporation,

Defendant.

THIS MATTER came before the Court based on the Class's Motion for Appointment of K.B. and A.B. as Class Representatives, Partial Summary Judgment on Breach of Contract Claims and Permanent Injunction Pursuant to CR 65(a)(2). The Court heard oral argument on July 12, 2013, at 9:30 a.m. Plaintiffs were represented by Eleanor Hamburger and Richard E. Spoonemore, SIRIANNI YOUTZ SPOONEMORE HAMBURGER. Defendant Regence BlueShield was represented by Timothy J. Parker, CARNEY BADLEY SPELLMAN.

ORIGINAL

ORDER APPOINTING CLASS REPRESENTATIVES AND ISSUING PERMANENT INJUNCTIVE RELIEF - 1

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I. MATERIAL CONSIDERED

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

- Class's Motion for Appointment of K.B. and A.B. as Class Representatives; Partial Summary Judgment on Breach of Contract Claims and Permanent Injunction Pursuant to CR 65 (a)(2);
- Declaration of H.B. and the exhibits attached thereto;
- Declaration of Eleanor Hamburger dated June 14, 2013 and the exhibits attached thereto;
- Defendant's Opposition To Plaintiffs' Motion for (1) Appointment of Class Representatives; (2) Partial Summary Judgment on Breach of Contract Claims and (3) Permanent Injunction Pursuant to CR 65 (a)(2);
- Declaration of Diane Stein, M.D. dated July 1, 2013.
- Declaration of Timothy Parker and all exhibits attached thereto dated July 1, 2013;
- Declaration of Timothy J. Parker dated March 12, 2012;
- Declaration of Timothy J. Parker dated February 8, 2013;
- Declaration of Jason W. Anderson dated February 25, 2013;
- Declaration of Stephen P. Melek, FSA, MAAA, dated March 4, 2013;
- Class's Reply in Support of Class's Motion;
- Declaration of Eleanor Hamburger dated July 8, 2013 and all exhibits attached thereto; and
- Defendant's Surreply to Plaintiffs' Motion for (1) Appointment of Class Representatives; (2) Partial Summary Judgment on Breach of Contract Claims and (3) Permanent Injunction Pursuant to CR 65 (a)(2);

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II. ORDER ON APPOINTMENT OF A.B. AND K.B.
AS CLASS REPRESENTATIVES

The Court hereby GRANTS the Class's Motion for Appointment of K.B. and A.B., by and through their parents H.B. and M.B., as representatives of the class certified by the Court on December 13, 2012. Findings by the Court regarding numerosity, commonality and adequacy of class counsel were presented in the Order dated December 13, 2012, and are incorporated herein by reference.

A. Typicality

K.B. and A.B. have claims that are typical of those of the class, as required by CR 23 (a)(3). They base their claims on the same legal theory as those of the class as a whole, *i.e.*, that the Parity Act requires Regence to provide coverage for medically necessary mental health services, including neurodevelopmental therapies designed to treat qualified DSM mental health conditions. Plaintiffs A.B. and K.B. have made a showing on the record that Regence denied their claims for speech therapy to treat their diagnoses of DSM conditions of expressive/receptive language disorder (DSM 315.39) because of Regence's exclusion of neurodevelopmental therapies in their policy. Regence has not refuted that showing. They are well positioned to represent the interests of other class members.

B. Adequacy of Representation

The Court also finds that plaintiffs A.B. and K.B. are adequate class representatives pursuant to CR 23 (a)(4). The claims advanced by A.B. and K.B. are not in conflict with any interests of the proposed class. In pursuing their claims, the named plaintiffs will necessarily advance the interests of the entire class.

C. Ripeness

The Court also finds that plaintiffs A.B. and K.B. may pursue injunctive relief against Regence to halt the insurer's application of its neurodevelopmental therapy

1 exclusion. A.B. and K.B. are class members because they have made a showing on the
2 record that Regence denied their claims for speech therapy to treat their diagnoses of
3 DSM-IV conditions of expressive/receptive language disorder (DSM 315.39) and
4 Regence did not refute it. A.B. and K.B. contend they continue to need speech therapy
5 and represent that they would obtain the therapy if Regence's neurodevelopmental
6 therapy exclusion is not applied to their claims for services.

7 III. ORDER ON PERMANENT INJUNCTIVE RELIEF

8 The Court hereby GRANTS the Class's Motion for Permanent Injunctive Relief
9 and enters the following conclusions as required by CR 65 (d). *DeLong v. Parmelee*, 157
10 Wn. App. 119, 150-151, 236 P.3d 936 (2010).

11 1. On December 13, 2012, the Court concluded that defendant's exclusion of
12 neurodevelopmental therapies violated Washington public policy and the Mental
13 Health Parity Act. The Court further concluded that "neurodevelopmental therapies"
14 can be "mental health services" designed to treat mental disorders listed in the version
15 of the Diagnostic and Statistical Manual ("DSM") specified in RCW 48.44.341. Regence
16 continued to apply its neurodevelopmental therapy exclusion in class members' plans.

17 2. Now that a class has been certified and class members with a need for
18 injunctive relief have been appointed as representatives, the class has a legal and
19 equitable right to summary judgment on their breach of contract claims, and
20 permanent injunctive relief to require Regence to cease its application of its
21 neurodevelopmental therapy exclusion.

22 3. The class has a well-grounded fear of immediate invasion of that right
23 given that Regence has not changed its health plan language or coverage policies for
24 any insured based upon the Court's December 13, 2012 Order. Regence has denied,
25 and continues to deny coverage of class members' neurodevelopmental therapy under
26

1 the neurodevelopmental therapy exclusion (whether from birth in their individual
2 plans or after age six in their group plans).

3 4. Regence's exclusion has caused class members actual and substantial
4 harm and will continue to do so unless enjoined. With timely services, class members
5 are likely to be less disabled, have fewer long-term care needs, and may avoid costly,
6 complex and risk-laden treatment or procedures. Glass Decl. ¶ 9. Without the
7 services, children with conditions that could have been reversed or treated, end up
8 more impaired, with greater long-term functional disabilities, and at times experience
9 devastating and avoidable consequences. *Id.*, ¶ 8; see, e.g., *LaForest v. Former Clean Air*
10 *Holding Co., Inc.*, 376 F.3d 48, 55 (2d Cir. 2004). Money damages are insufficient to
11 compensate the class for the resulting developmental loss. See *Washington Fed'n of State*
12 *Employees (WSFE), Council 28, AFL-CIO v. State*, 99 Wn. 2d 878, 891, 665 P.2d 1337 (1983)
13 (it is "well nigh irrefutable" that a cancellation of health insurance is an injury that has
14 no remedy at law).

15 5. Under the balancing of the relative interests of the parties and the public,
16 the balance tips in favor of issuing a permanent injunction. *Kucera v. State, Dept. of*
17 *Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000). The loss of medically necessary
18 therapies causes actual and substantial injury. In contrast, Regence suffers no hardship
19 when it is enjoined from enforcing a provision of its contracts that, as this Court has
20 concluded, violates state law and public policy.

21 IV. CONCLUSION

22 It is therefore ORDERED that the Class's Motion for Appointment of K.B. and
23 A.B. as Class Representatives and Permanent Injunction Pursuant to CR 65(a)(2) is
24 GRANTED.

25 It is further ORDERED that:

26 ORDER APPOINTING CLASS REPRESENTATIVES AND
ISSUING PERMANENT INJUNCTIVE RELIEF - 5

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

1 (1) The Court appoints named plaintiffs K.B. and A.B., by and through their
2 parents H.B. and M.B., as additional class representatives.

3 (2) The provisions contained in class members' health plans that exclude
4 coverage of neurodevelopmental therapies to treat DSM conditions covered by the
5 Mental Health Parity Act are declared invalid, void and unenforceable by defendant
6 Regence and its agents.

7 (3) Defendant shall not apply the neurodevelopmental therapy exclusion in
8 class members' health plans (whether at birth in the defendant's individual plans or
9 after age six in defendant's group plans) to their requests for coverage of
10 neurodevelopmental therapy services. Defendant shall review class members' claims
11 for neurodevelopmental therapies without application of the invalid
12 neurodevelopmental therapy exclusion. Claims for neurodevelopmental therapies
13 shall be subject to all other contract terms and conditions, including benefit limits
14 applicable to speech therapy, occupational therapy, and physical therapy when
15 provided to treat medical conditions.

16 (4) Class counsel shall draft and submit for Court approval a form of notice
17 within fourteen days after entry of this Court's Order. The proposed form of notice
18 shall inform class members and contracted neurodevelopmental therapy providers of
19 the Court's Order regarding classwide injunctive relief. Class counsel shall, at the
20 same time, file a notice plan for review and approval by the Court.

21 DATED this 18th day of July, 2013.

22
23 
24 John P. Erlick
Superior Court Judge

1 Presented by:

2 SIRIANNI YOUTZ
3 SPOONEMORE HAMBURGER

4 /s/ Eleanor Hamburger
5 Eleanor Hamburger (WSBA #26478)
6 Richard E. Spoonemore (WSBA #21833)
7 Attorneys for Plaintiffs

8 Agreed as to form:
9 CARNEY BADLEY SPELLMAN, P.S.

10
11 /s/ Jason W. Anderson (via email authorization)
12 Timothy J. Parker (WSBA #8797)
13 Jason W. Anderson (WSBA #30512)
14 Attorneys for Defendant Regence BlueShield

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ORDER APPOINTING CLASS REPRESENTATIVES AND
ISSUING PERMANENT INJUNCTIVE RELIEF - 7

SIRIANNI YOUTZ
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TEL. (206) 223-0303, FAX (206) 223-0246

CERTIFICATE OF SERVICE

I certify, under penalty of perjury and in accordance with the laws of the State of Washington, that on July 8, 2013, I caused a copy of the foregoing document to be served on all counsel of record as indicated below:

Timothy J. Parker
Jason W. Anderson
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104
Attorneys for Defendant Regence BlueShield

By First-Class Mail
 By Email
Tel. (206) 622-8020
Fax (206) 467-8215
parker@carneylaw.com
anderson@carneylaw.com
williams@carneylaw.com
salden@carneylaw.com

DATED: July 8, 2013, at Seattle, Washington.

/s/ Eleanor Hamburger
Eleanor Hamburger (WSBA #26478)

APPENDIX

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HON. JOHN P. ERLICK
Noted for Hearing: January 11, 2013
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

[AMENDED PROPOSED]
ORDER APPROVING FORM OF
NOTICE, DIRECTING NOTICE TO
CLASS MEMBERS AND PROVIDERS,
AND ESTABLISHING OPT-OUT
PROCEDURE AND SCHEDULE

THIS MATTER came before the Court based upon the Class's Motion for Approval of
Notice and Notice Plan. Plaintiffs were represented by Eleanor Hamburger and Richard E.
Spoonemore, SIRIANNI YOUTZ SPOONEMORE. Defendant was represented by Timothy J. Parker
and Jason W. Anderson, CARNEY BADLEY SPELLMAN.

The Court reviewed and considered the pleadings and record herein, including:

- Class's Motion for Approval of Notice and Notice Plan, and *Appendix A* and *Appendix B* attached thereto;
- Declaration of Richard E. Spoonemore, and the exhibits attached thereto;
- Defendant's Response;
- Declaration of Jason W. Anderson in Support of Regence BlueShield's Response; and
- The Class's Reply.

ORIGINAL

1 Based upon the foregoing, the Court hereby ORDERS as follows:

2 1. The Court APPROVES the amended form of notice to class members attached as
3 *Appendix A* to the Class's Reply. The Court concludes that the form of notice meets the
4 requirements of Civil Rule 23(c)(2) and due process.

5 2. The Court APPROVES the form of informational notice to providers attached as
6 *Appendix B* to the Class's Motion.

7 3. Regence is directed to identify class members on its insured individual plans
8 from January 1, 2008 to the present, and on its insured non-ERISA group plans from January 1,
9 2006 to the present, by using the 46 ICD-9 codes it used to screen neurodevelopmental claims as
10 part of its claims process. Regence shall provide this list of class members along with the list of
11 46 ICD-9 codes to Class Counsel, and shall mail class notices to all individuals identified
12 through this process within 30 days of this order. Regence shall bear the cost of such notice
13 given that the Court has already entered partial summary judgment in favor of the Class on one
14 of the key legal issues in the case. See *Hunt v. Imperial Merch. Services, Inc.*, 560 F.3d 1137,
15 1143-44 (9th Cir. 2009).

16 4. Regence is directed to prominently display a link to the class notice on its
17 webpage within 30 days of this order.

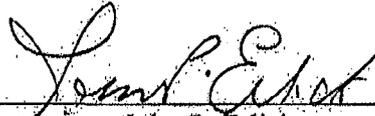
18 5. Regence is directed to distribute the informational notice to all speech,
19 occupational and physical therapists in the State of Washington which it can reasonably identify
20 through its system ~~or other material~~ within 30 days of this order. Regence shall also bear the
21 cost of such notice.

22 6. Class members who wish to opt-out of the class must mail an opt-out form to a
23 post office box established by Class Counsel for this purpose within 60 days of the date of this
24 order. Class Counsel is directed, within 10 days of the close of the opt-out period, to provide
25 Regence with a copy of all opt-outs received. Class Counsel shall also file a report with the
26 Court regarding the number of opt-outs received.

1 7. Nothing in this order precludes the Class from seeking additional notice in the
2 event the process ordered herein appears insufficient to adequately reach class members.

3 It is so ORDERED.

4 DATED this 25th day of January, 2013.

5
6 

7 John P. Erlick
8 Superior Court Judge

9 Presented by:

10 SIRIANNI YOUTZ SPOONEMORE

11 /s/ Richard E. Spoonemore

12 Richard E. Spoonemore (WSBA #21833)

13 Eleanor Hamburger (WSBA #26478)

14 Attorneys for Plaintiffs

15 Agreed as to form:

16 CARNEY BADLEY SPELLMAN, P.S.

17 Timothy J. Parker (WSBA #8797)

18 Jason W. Anderson (WSBA #30512)

19 Attorneys for Defendant

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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 January 10, 2013, I caused a copy of the foregoing document to be served on all counsel of record as indicated below:

Timothy J. Parker
Jason W. Anderson
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104
Attorneys for Defendant, Regence BlueShield

By First-Class Mail
 By Email
Tel. (206) 622-8020
Fax (206) 467-8215
parker@carneylaw.com
anderson@carneylaw.com
williams@carneylaw.com
saiden@carneylaw.com

DATED: January 10, 2013, at Seattle, Washington.

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

FREQUENTLY ASKED QUESTIONS

1. Why did I get this notice?

Regence's records show that you or your minor child or dependent is or was enrolled in either an individual health benefit plan insured by Regence, or a group health plan insured by Regence which was not covered by a federal law known as "ERISA."

Regence's records also show that you or your minor child or dependent *may* be a class member. You or your minor child or dependant is a class member if one of you meets the following class definition:

All individuals who:

(1) are, or have been covered under a non-ERISA group "health plan" as that term is defined by RCW 48.43.005(19), that has been or will be delivered, issued for delivery, or renewed on or after January 1, 2006 by Regence BlueShield, a Washington corporation, or and individual "health plan" as that term is defined by RCW 48.43.005(19), that has been or will be delivered, issued for delivery, or renewed on or after January 1, 2008 by Regence BlueShield, a Washington corporation, and

(2) have required or require neurodevelopmental therapy for the treatment of a *qualified mental health condition*.

A "qualified mental health conditions" is defined as any condition listed in the current Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV-TR"), other than substance related disorders and life transition problems ("V" codes) and diagnostic codes 302 through 302.9.

If you are a class member, then this notice explains that the Court has allowed or "certified" a class action lawsuit that may affect you. You have legal rights and options that you may exercise before the Court holds a trial.

If you are unsure whether you are included, you can get free help by calling or writing the Class's lawyers in this case:

Eleanor Hamburger
Richard E. Spoonemore
SIRIANNI YOUTZ SPOONEMORE & HAMBURGER
999 Third Avenue, Suite 3650
Seattle, WA 98104
(206) 223-0303
www.syslaw.com
ehamburger@syslaw.com

2. What are the allegations against Regence?

In this lawsuit, Plaintiffs allege that Regence illegally excluded and/or limited coverage of medically necessary neurodevelopmental therapy to treat individuals diagnosed certain neurodevelopmental conditions (specifically, conditions identified in the DSM-IV-TR). Plaintiffs allege that Regence's exclusions and limitations violated the Mental Health Parity Act, breached their health benefit plans and violated Washington's Consumer Protection Act.

3. What is a class action and who is involved?

In a class action lawsuit, one or more people called "Class Representatives" (in this case, O.S.T. and L.H., both minor children diagnosed with neurodevelopmental conditions) sue on behalf of other people who have similar claims. The people together are a "Class" or "Class Members." All of the Class Members are called the Plaintiffs. Regence BlueShield is called the Defendant. One court resolves the issues for everyone in the Class, except for those people who choose to exclude themselves from the Class.

4. Why is the lawsuit a class action?

The Court decided that this lawsuit can be a class action because it meets the requirements of Civil Rule 23, which governs class actions in Washington State.

5. How Did Regence respond?

Regence denies that its exclusion and limitation of coverage for neurodevelopmental therapy violated any statute, breached its health benefit plans, or violated Washington's Consumer Protection Act. Regence denies that the Class is entitled to any of the relief it seeks.

6. Has the Court decided who is right?

The Court has ruled that Regence's exclusion of neurodevelopmental therapy violates Washington public policy and the Mental Health Parity Act. The Court declared that under the Mental Health Parity Act, Regence was, and is, required to cover medically necessary neurodevelopmental therapy.

The Court has not yet ruled on whether Regence is required to pay damages related to its exclusion or limitation of neurodevelopmental therapy coverage. The Class must prove their damage claims at trial.

The trial is scheduled to begin on August 5, 2013.

7. What are the Plaintiffs asking for?

The Class is asking the Court to eliminate Regence's exclusionary practices that prevent coverage of medically necessary neurodevelopmental therapy in its individual and non-ERISA group health benefit plans.

The Class also wants Regence to reimburse class members for all payments for medically necessary therapy made while Regence's exclusionary practices were in place.

The Class further seeks damages under the Washington Consumer Protection Act.

The Class also seeks its attorneys' fees and costs.

8. Is there any money available now?

No money is available now because the case has not gone to trial and the two sides have not settled the case. There is no guarantee that money ever will be obtained. If money is obtained, you will be notified how to ask for a share.

9. What happens if I do nothing at all?

By doing nothing, you stay in the Class. If you stay in and the Class is awarded money as a result of settlement, you will be notified about how to apply for a share.

If you do nothing, however, you will not be able to sue Regence about the same legal claims that are the subject of this lawsuit. Your claims will be decided by the Orders the Court issues and judgments the Court makes in this class action.

10. Why would I ask to be excluded?

You may ask to be excluded from the lawsuit for any reason. You can ask to be excluded if you do not want to be part of a lawsuit against Regence.

If you already have your own lawsuit against Regence for the same claims and want to continue with it, you need to ask to be excluded from the Class.

If you exclude yourself from the Class—which also means to remove yourself from the Class, and is sometimes called “opting out” of the Class—you will not get any money or benefits from this lawsuit even if the Plaintiffs obtain them as a result of the trial or from any settlement that may or may not be reached between Regence and the Plaintiffs. However, you may then be able to sue or continue to sue Regence for those same claims. In other words, if you exclude yourself from the Class, you will not be legally bound by the Court’s decisions in this class action.

If you start your own lawsuit against Regence after you exclude yourself, you will have to hire your own lawyer for that lawsuit, and you’ll have to prove your claims. If you exclude yourself so you can start or continue your own lawsuit against Regence, you should talk to your own lawyer soon, because your claims may be subject to a statute of limitations.

11. How do I ask the Court to exclude me from the Class?

To ask to be excluded, you must send an “Exclusion or ‘Opt-Out’ Form” by mail, stating that you want to be excluded from *O.S.T. et al., v. Regence BlueShield*. Be sure to include your name and address and sign the letter. An opt out form is attached to this notice at page 6. You must mail your Exclusion Request postmarked by _____ 2013, to:

O.S.T. Exclusion Request
P.O. Box _____
Seattle, WA 98104

12. Do I have a lawyer in this case?

The Court decided that the law firm of Sirianni Youtz Spoonemore & Hamburger is qualified to represent you and all Class Members. The law firm is called the “Class Counsel.” It is experienced in handling class action lawsuits. More information about the law firm, its practice, and its lawyers’ experience is available at www.symslaw.com.

13. Should I get my own lawyer?

You do not need to hire your own lawyer because Class Counsel is working on your behalf. You may hire your own lawyer and ask him or her to appear in Court for you, if you want someone other than Class Counsel to speak for you. If you do, you will have to pay that lawyer.

14. How will the lawyers be paid?

If Class Counsel get money or benefits for the Class, it may ask the Court for fees and expenses. *You will not have to pay these fees and expenses.* If the Court grants Class Counsel’s request, the fees and expenses would either be deducted from any money obtained for the Class in this case or paid separately by Regence.

15. How and when will the Court decide who is right?

As long as the case is not resolved by a settlement or otherwise, Class Counsel will have to prove the Class’s claims at a trial. The trial date in this case is currently scheduled for August 5, 2013.

16. Do I have to come to trial?

Class Counsel will present the case for the Class, and Regence will present its defenses. You and/or your own lawyer are welcome to come to the trial at your own expense.

17. Will I get money after the trial?

If the Plaintiffs obtain money as a result of the trial or a settlement, you will be notified about how to participate. We do not know how long this will take.

18. Are more details available?

You may visit the website www.syslaw.com, where you will find the Court's Order Certifying the Class, the Complaint that the Plaintiffs submitted, Regence's Answer to the Complaint, and an Exclusion Request form (hard copy also included at page 6). You may also speak to one of the lawyers by calling (206) 223-0303 or by writing to:

SIRIANNI YOUTZ SPOONEMORE & HAMBURGER
999 Third Avenue, Suite 3650
Seattle, WA 98104

OFFICE RECEPTIONIST, CLERK

To: Saiden, Patti
Subject: RE: 89084-6, Regence v. O.S.T., et al.

Rec'd 8/15/13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Saiden, Patti [<mailto:saiden@carneylaw.com>]
Sent: Thursday, August 15, 2013 4:33 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Parker, Tim; Anderson, Jason; Williams, Christine; 'Rick Spoonemore'; 'Ele Hamburger'
Subject: 89084-6, Regence v. O.S.T., et al.

Dear Clerk:

Attached for filing is *Petitioner Regence Blueshield's Reply in Support of Motion for Discretionary Review of Class Certification*.

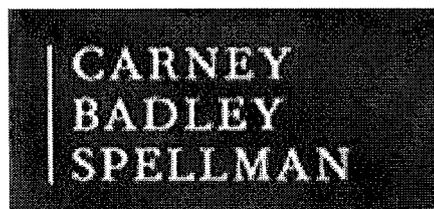
Case Name: O.S.T. v. Regence Blueshield

Cause #: 89084-6

Filing Attorney:

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Carney Badley Spellman
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Thank you.



Patti Saiden
Legal Assistant
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