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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.,

Respondent,

v.

PREMERA BLUE CROSS and LIFEWISE OF WASHINGTON,
Washington corporations,

Appellants.

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

BRIEF OF APPELLANTS

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I. INTRODUCTION

The case raises an issue of first impression that will affect the entire insurance industry. For more than twenty years, health insurers have relied on a state insurance mandate to define the level of neurodevelopmental therapy (“NDT”) benefits they must cover in their health benefit plans. That mandate requires group health plans to cover NDT benefits to children through the age of six, but permits individual health plans to exclude those benefits altogether. NDT can be very expensive and, like other mandates, the legislature chose not to impose the NDT mandate on individual plans in an effort to keep those plans more affordable for typical Washington families. Respondent A.G.’s parents purchased such an individual health plan from Appellants Premera Blue Cross and LifeWise Health Plan of Washington (collectively, “Premera”). Consistent with the mandate, the plan expressly excluded NDT benefits.

A few years later A.G. was diagnosed with autism and his doctors thought he might benefit from NDT. When A.G.’s providers sought reimbursement, Premera denied the claims based on the plain language of the plan’s NDT exclusion and the plain meaning of the NDT mandate. A.G. filed suit against Premera claiming that its denial of NDT benefits violated a separate and later enacted mandate called the Mental Health Parity Act. Around the same time, A.G.’s lawyers filed identical lawsuits

against other Washington insurers who, like Premera, relied on the NDT mandate to limit NDT benefits. On cross-motions, the trial court ruled that Premera's NDT exclusion violated the Parity Act. The court certified its ruling for discretionary review, which this Court accepted.

When NDT is prescribed to treat a mental health condition, the NDT mandate and Parity Act conflict: the NDT mandate permits what the Parity Act forbids—a blanket exclusion of NDT benefits. This conflict must be resolved in favor of the NDT mandate. Under settled rules of construction, the specific terms of the NDT mandate prevail over the general terms of the Parity Act. Indeed, nothing in its text or history suggests that the legislature intended the Parity Act to override the NDT mandate. On the contrary, subsequent legislative initiatives and agency interpretation confirm that the Parity Act does not apply to NDT benefits. Critically, the Office of Insurance Commissioner has repeatedly approved Premera's individual health benefit plans that include an NDT exclusion.

The legislature has recognized that insurance mandates provide “improved access to ... health care services,” but also raise serious “cost ramifications” that must be weighed. RCW 48.47.005. Because mandates involve a complex balance of policy, health and fiscal considerations, only the legislature can authorize them. RCW 48.47.020(4). The narrow scope of the NDT mandate reflects this careful balancing. There is no evidence

the legislature intended to undo this balancing years later when it passed the Parity Act. Yet, if the trial court is affirmed, Premera and all other insurers in Washington may have to pay millions of dollars in past claims for benefits neither party believed were covered and for which no premiums were ever paid. Insurers will also be required to cover NDT benefits going forward, resulting in increased expenses and risking higher premiums for individual health plans in the future. The ramifications are significant, and should be the result of clear legislative deliberation—not judicial interpretation. The trial court’s ruling that the NDT exclusion violates the Parity Act must be reversed, and A.G.’s claims dismissed.

II. ASSIGNMENT OF ERROR

The trial court erred when it entered its April 17, 2012 Order (1) Granting Plaintiff’s Motion for Partial Summary Judgment; (2) Denying Defendants’ Motion to Dismiss; and (3) Issuing Preliminary Injunction (the “Order”), which incorporated the court’s prior March 27, 2012 letter ruling. CP 543-44 (letter ruling); CP 545-52 (Order).

III. ISSUE PRESENTED

The Neurodevelopmental Therapy Mandate, RCW 48.44.450 (the “NDT Mandate”), permits individual health benefit plans to exclude NDT benefits. The Mental Health Parity Act, RCW 48.44.341 (the “Parity Act”), requires individual health benefit plans to cover services that are

medically necessary to treat mental health conditions. Did the legislature intend the Parity Act to implicitly repeal, supersede or abrogate the NDT Mandate so that individual plans can no longer exclude NDT benefits when the NDT is prescribed to treat a mental health condition? **No.**

IV. STATEMENT OF THE CASE

A. Factual Background

A.G. is thirteen years old, and is a beneficiary of an individual health benefit plan A.G.'s parents purchased from Premera in 2004. CP 187 (J.G. Decl.), ¶ 2. In October 2006, A.G. was diagnosed with autism and mixed expressive-receptive language disorder. *Id.*, ¶ 3. A.G. submitted no medical records or medical opinion to the trial court, but, according to A.G.'s father, A.G.'s pediatrician recommended A.G. visit a clinic to determine if he would benefit from NDT. CP 188, ¶ 4. According to A.G.'s father, two therapists recommended that A.G. receive weekly speech and occupational therapy. *Id.*, ¶ 5. A.G. began receiving speech and occupational therapy in 2007. CP 189, ¶ 9.

A.G.'s individual health benefit plan contains an express exclusion for NDT benefits (the "NDT Exclusion"). CP 374-75 (Duffy Decl., Exh. A). As discussed below, although the NDT Mandate, RCW 48.44.450, requires *group* health plans to provide NDT benefits to individuals under the age of seven, the legislature has refused to expand the mandate to

individual health plans. Individual plans are more expensive than group plans and, to keep them affordable, they generally provide only basic coverage. CP 498 (Tedford Decl.), ¶ 3. The legislature understands this, and has not imposed various insurance mandates on individual health plans to keep those plans affordable for more insureds. *Id.*, ¶¶ 3-4.¹

Notwithstanding the express NDT Exclusion in A.G.’s plan, when A.G.’s therapists sought payment for NDT services, Premera initially paid the claims up to twenty visits per year. CP 189 (J.G. Decl.), ¶ 9. This happened because A.G.’s therapists submitted the claims using Current Procedural Terminology (“CPT”) codes not commonly associated with NDT. Premera’s automated claims software processed and automatically paid—or “auto adjudicated”—those claims as routine rehabilitation benefits, which are covered under A.G.’s policy for up to twenty visits per year. CP 499-501 (Moore Decl.), ¶¶ 2-5, 7-8; CP 493 (Moat Decl.), ¶ 3; CP 369-70 (Duffy Decl., Exh. A). As a consequence, none of those auto adjudicated claims were reviewed by Premera for “medical necessity.” CP 499-502 (Moore Decl.), ¶¶ 2, 3, 7 & 10.

¹ The legislature has imposed various insurance mandates on group plans that it has chosen not to impose on individual plans. *See, e.g.*, RCW 48.44.240 (chemical dependency); RCW 48.44.320 (home health and hospice care); RCW 48.44.344 (prenatal diagnosis and congenital disorders); RCW 48.44.460 (TMJ).

Beginning in 2009, A.G.'s therapists submitted some claims using a CPT code associated with NDT benefits. Premera denied those claims, but continued to automatically pay claims submitted using CPT codes associated with rehabilitation benefits. CP 500-01 (Moore Decl.), ¶¶ 7-8; CP 493-94 (Moat Decl.), ¶ 4. During a claims review, however, Premera discovered that certain speech and occupational therapy claims previously paid as a rehabilitation benefit by Premera's automated claims software were actually claims for NDT. CP 501 (Moore Decl.), ¶ 9. Under A.G.'s plan, rehabilitation therapy does not include NDT. CP 370 (Duffy Decl., Exh. A). Premera notified A.G.'s parents that all such claims submitted after January 1, 2010 were denied pursuant to the NDT Exclusion. CP 501 (Moore Decl.), ¶ 9; CP 189 (J.G. Decl.), ¶¶ 10, 13.

Premera's processing of A.G.'s claims was entirely consistent with its view that NDT is not a service mandated by the Parity Act, RCW 48.44.341. Beginning in 2006, the Parity Act has required health plans to cover services that are "medically necessary" to treat most mental health conditions, but allows plan medical directors to determine medical necessity. RCW 48.44.341(4). Whether a service, therapy or treatment is medically necessary is a complex determination made by physicians and health care professionals, and includes an assessment of accepted standards of medical care, clinical appropriateness, efficacy and credible

scientific data published in peer-reviewed literature, generally recognized by the medical community. CP 494-95 (Moat Decl.), ¶ 6.

The premise that NDT is medically necessary to treat autism or other mental health conditions is not uniformly accepted in the medical community; services provided by speech, occupational and physical therapists are not generally considered behavioral health, psychiatric or psychological care, nor is the practice of these therapists directed towards treatment of mental health disorders. CP 495 (Moat Decl.), ¶ 7. For these reasons, Premera (and every other insurer and health plan in Washington) believed the legislature did not intend NDT to be a covered mental health service within the meaning of the Parity Act.

B. Procedural Background

In September 2011, A.G., by and through his parents, filed a class action against Premera for breach of contract, declaratory relief, violation of the Consumer Protection Act and injunctive relief. CP 1-11. A.G.'s attorneys would later amend the complaint to add two additional named plaintiffs, K.N. and T.N. CP 567-78. A.G. claimed that Premera violated the Parity Act when it denied his claims for NDT to treat his autism, and that the plan's NDT Exclusion is void. *Id.*, ¶¶ 27, 29, 31 & 35. Around the same time that A.G. filed suit against Premera, A.G.'s attorneys filed suits against Regence BlueShield and Group Health Cooperative, in both

state and federal court, challenging similar NDT exclusions. *See Z.D. v. Group Health Coop.*, No. C11-01119 RSL (W.D.Wash.); *O.S.T. v. Regence BlueShield*, No. 11-2-34187-9 SEA (King Cty. Sup. Ct.).²

Premera moved to dismiss, arguing that the earlier-enacted and more specific NDT Mandate allowed Premera to exclude NDT benefits from A.G.'s individual health plan, and that the later-enacted and more general Parity Act did not repeal or supersede the Mandate as it may relate to NDT. CP 12-21. A.G. cross-moved for partial summary judgment and a preliminary injunction. CP 156-74. A.G. sought a declaration that the NDT Exclusion violated the Parity Act and an order enjoining Premera from applying the exclusion to deny A.G.'s claims for NDT. *Id.*

The trial court heard argument on March 2, 2012. Tr. (3/2/12) at 3-42; CP 342. In a letter ruling dated March 27, 2012, the court denied Premera's motion to dismiss, and granted A.G.'s motion for partial summary judgment and preliminary injunction. CP 543-44. The court entered a formal Order on April 17, 2012. CP 545-53. As it relates to the enforceability of the plan's NDT Exclusion, the Order stated:

² A.G.'s attorneys have more recently filed nearly identical lawsuits against Premera and Regence BlueShield in federal court. *See J.T. v. Regence BlueShield*, No. 2:12-cv-00090 RAJ (W.D.Wash.); *R.H. v. Premera*, No. 13-cv-00097 RAJ (W.D.Wash.).

1. Given the broad mandate regarding mental health services in the Mental Health Parity Act, RCW 48.44.341, and pursuant to Washington's Declaratory Judgment Act, RCW 7.24, *et seq.*, Plaintiff A.G. is entitled to a declaration that the exclusion in Defendants' policies for "[s]ervices, therapy and supplies related to the treatment of ... developmental delay or neurodevelopmental disabilities" violates Washington public policy and the Mental Health Parity Act. The Court declares the exclusion void and unenforceable in this case.

2. Under the Mental Health Parity Act, Defendants must provide coverage for all medically necessary "mental health services" to the same extent as they provide coverage for other medical and surgical services. Neurodevelopmental therapies are "mental health services" designed to treat autism, a mental disorder listed in the DSM-IV. Since neurodevelopmental therapies may be medically necessary to treat autism, Defendants cannot use a blanket exclusion to deny coverage for those therapies.

3. The Court does not have to invalidate RCW 48.44.450, the Neurodevelopmental Therapy Act, to reach this result. RCW 48.44.450 only creates a minimum level of required coverage. Both the Neurodevelopmental Therapy Act and the Mental Health Parity Act can be read together and harmonized. Defendants must meet the requirements of both Acts.

CP 547-48. The court also entered findings and conclusions to support a preliminary injunction in favor of A.G. CP 548-552.³ The court declared the NDT Exclusion in A.G.'s plan void and ordered Premera to process

³ The trial court also erred in granting A.G. a preliminary injunction. Premera, however, did not separately seek review of that ruling because it is premised entirely on the court's conclusion that the NDT Exclusion violated the Parity Act. Reversal of that core issue will necessarily result in vacation of the injunction and dismissal of the case.

A.G.'s future claims for NDT as a mental health benefit. CP 552. Premera timely filed a notice for discretionary review. CP 556-66.

Premera moved the trial court to certify the Order for discretionary review under RAP 2.3(b)(4). The court granted the motion on the grounds that the Order “involves a controlling question of law as to which there is a substantial ground for a difference of opinion ...” CP 554-55. Commissioner Neel granted Premera’s motion for discretionary review; she noted that “this is a recurring issue, and other insurers and insureds will benefit from an appellate decision on this issue.” CP 595-98.

V. ARGUMENT

A. Standard of Review

This Court reviews summary judgment *de novo*, engaging in the same inquiry as the trial court and viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 501, 115 P.3d 262 (2005). Summary judgment is proper if the pleadings, depositions, answers to interrogatories, admissions, and affidavits show that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c); *Hearst*, 154 Wn.2d at 501.

B. Premera's NDT Exclusion Does Not Violate The Parity Act.

The trial court concluded that the NDT Exclusion violated the Parity Act. CP 552. That conclusion was erroneous. This Court reviews issues of statutory interpretation *de novo*. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The objective in statutory interpretation is to give effect to the legislature's intent. *Id.* If a statute's meaning is plain, then the plain meaning is deemed the best expression of legislative intent. *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 242, 88 P.3d 375 (2004). Courts strive to consider and harmonize statutory provisions in relation to each other and interpret a statute to give effect to all its language. *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 560, 14 P.3d 133 (2000). If a statute is susceptible to more than one reasonable interpretation, then the statute is ambiguous and courts resort to additional canons of statutory construction or legislative history. *Campbell & Gwinn*, 146 Wn.2d at 12.

The trial court ignored the plain meaning of the NDT Mandate, accepted rules of statutory construction, legislative history and agency opinion when it concluded the legislature intended NDT to be a covered mental health service within the meaning of the Parity Act. Simply put, the NDT Exclusion does not violate the Parity Act because NDT is not governed by the Parity Act. Rather, NDT is exclusively and specifically

governed by a separate insurance mandate—the NDT Mandate—and that mandate permits individual health plans, like A.G.’s, to exclude NDT benefits. Any other result would effectively negate the NDT Mandate in the majority of cases where it otherwise would apply. This Court should reverse the Order and instruct the trial court to dismiss A.G.’s claims.

1. The NDT Mandate Permits Individual Health Plans To Exclude NDT Benefits.

In 1989, the Washington legislature enacted an insurance mandate requiring some health plans to cover “neurodevelopmental therapies.” Laws of 1989, ch. 345 § 1. The NDT Mandate has three key aspects: (1) it covers “neurodevelopmental therapies,” which it defines as “occupational therapy, speech therapy, and physical therapy”; (2) it applies only to group plans; and (3) it requires those group plans to cover NDT only through the age of six. RCW 48.44.450. Critically, the NDT Mandate does not apply to individual health plans. *Id.* In reliance on and in compliance with this mandate, Premera and other insurers offer (and price) individual health plans that expressly exclude NDT benefits and offer group plans that cover NDT only through the age of six.

The individual health plan that A.G.’s parents purchased was one such plan. A.G. has been a beneficiary of his parents’ health plan since 2004, several years before he was diagnosed with autism and began

receiving NDT. CP 187-88 (J.G. Decl.), ¶¶ 2-6. From the beginning, and for the entire relevant period, A.G.'s health plan provided as follows:

EXCLUSIONS

This section of the contract lists those services, supplies or drugs [that] are not covered under this plan.

* * *

Learning Disorders and Neurodevelopmental Therapy

Services, therapy and supplies related to the treatment of learning disorders, cognitive handicaps, dyslexia, developmental delays or neurodevelopmental disabilities.

CP 374-75 (Duffy Decl., Exh. A).⁴ Although A.G.'s individual health plan was amended in 2008 and 2010 to comply with the Parity Act, this NDT Exclusion was not deleted from the plan nor revised. CP 390-401 (*id.*, Exhs. B & C). There is no dispute that this provision, unless stricken by this Court, allows Premera to deny A.G. the NDT benefits he seeks.

There is likewise no dispute that the plain meaning of the NDT Mandate allows Premera to apply the NDT Exclusion in A.G.'s case. A.G. seeks coverage for "speech and occupational therapy." CP 188-89 (J.G. Decl.), ¶¶ 5, 9-12. Both are "neurodevelopmental therapies" as defined by the NDT Mandate. RCW 48.44.450(2). As noted, the legislature refused to require individual plans to cover NDT benefits.

⁴ The health plan's rehabilitation therapy benefit provision likewise specified that it did not cover "[n]eurodevelopmental therapy or treatment of neurodevelopmental disabilities." CP 370 (Duffy Decl., Exh. A).

While Premera can offer health plans that provide coverage greater than what is mandated, they are not required to do so. *Hodge v. Raab*, 151 Wn.2d 351, 356-58, 88 P.3d 959 (2004); *Liljestrand v. State Farm Mut. Auto Ins. Co.*, 47 Wn. App. 283, 290, 734 P.2d 945 (1987). Like any non-mandated benefit, Premera may exclude NDT benefits in its individual plans, and A.G.'s parents were free to choose a different plan if they wanted more coverage. In short, the NDT Exclusion does not violate Washington law because it is expressly permitted by NDT Mandate.

2. The Parity Act Does Not Apply To NDT Benefits.

The subsequent enactment of Parity Act does not change the result. The Act was passed in 2005, but did not apply to individual health plans until 2008. Laws of 2007, ch. 8, § 3. The Act requires plans that cover medical and surgical services to also cover “mental health services.” RCW 48.44.341(1). The term “mental health services” is not defined as any particular type of service, but only as “medically necessary outpatient and inpatient services provided to treat mental disorders” listed in the DSM-IV. *Id.* The trial court concluded that, when prescribed to treat a DSM-IV condition, NDT is or at least may be a “mental health service” within the meaning of the Parity Act. CP 546-47. This interpretation should be rejected because it creates an irreconcilable conflict between the Parity Act and the NDT Mandate that the legislature did not intend.

a. The Specific Terms Of The NDT Mandate Control Over The General Terms Of The Parity Act.

The trial court concluded that the two statutes can be “harmonized” on the theory that the NDT Mandate “only creates a minimum level of required coverage” that the Parity Act expands upon in certain cases. CP 548. Not so. Two statutes cannot be harmonized when giving effect to one (the Parity Act) nullifies the effect of the other (the NDT Mandate). In defining what coverage an insurer must provide, the NDT Mandate also statutorily defines what coverage the insurer may lawfully exclude. *Hodge*, 151 Wn.2d at 356-58. As a result, when NDT is prescribed to treat a DSM-IV condition, as in A.G.’s case, the NDT Mandate and the Parity Act collide: the NDT Mandate permits what the Parity Act forbids. Specifically, if NDT is considered a medical benefit, the NDT Mandate allows an individual health plan *to exclude* NDT benefits; if NDT is considered a mental health benefit, the Parity Act requires the same individual health plan *to cover* the same NDT benefits.

The trial court tried to resolve the conflict by construing the Parity Act to impliedly supersede the NDT Mandate where, as here, NDT is prescribed to treat a DSM-IV condition. That was error. “[A]uthority is legion that implied repeals of statutes are disfavored and courts have a duty to interpret statutes so as to give them effect.” *Bellevue Sch. Dist. No. 405 v. Brazier Constr. Co.*, 103 Wn.2d 111, 122, 691 P.2d 178 (1984).

There is no reason to believe the legislature intended the Parity Act to nullify NDT Mandate in cases like this one. “The legislature is presumed to enact laws with full knowledge of existing laws.” *Thurston County v. Gorton*, 85 Wn.2d 133, 138, 530 P.2d 309 (1975). Yet there is no reference to NDT or the NDT Mandate in the Parity Act or its legislative history. Laws of 2005 ch. 6, § 4; Laws of 2007 ch. 8, § 3; CP 403-21 (Duffy Decl., Exh. D) (bill reports). It is implausible to believe the legislature intended to override a long-standing and carefully balanced mandate without specifically saying so.

The more plausible explanation—one that avoids conflict between the statutes—is that the legislature did not intend NDT to be considered a “mental health service” within the meaning of the Parity Act. Not only is this interpretation entirely consistent Act’s subsequent legislative history and agency opinion, discussed below, it is compelled by established rules of statutory construction. When two statutes pertain to the same subject matter and a conflict cannot be harmonized, the more specific statute controls over the general statute. *In re Estate of Kerr*, 134 Wn.2d 328, 343, 949 P.2d 810 (1998). Indeed, the Insurance Code itself expressly provides that provisions relating to a particular kind of insurance prevail over provisions relating to insurance in general. *See* RCW 48.01.150. This is equally even where, as here, the more specific statute is passed

before the more general statute. *Wark v. Wash. Nat'l Guard*, 87 Wn.2d 864, 867, 557 P.2d 844 (1976) (if “passed before the general statute, the special statute will be construed as ... an exception to its terms”).

This rule applies here. Where NDT is prescribed to treat a DSM-IV condition, both the NDT Mandate and the Parity Act relate to the same subject matter, *i.e.*, mandated insurance coverage for NDT benefits. The NDT Mandate is specific in scope; it expressly addresses NDT. The Parity Act is general in scope; it addresses “mental health services,” which it does not define. Because the two statutes cannot be harmonized, the specific terms of the NDT Mandate control over the general terms of the Parity Act, and the Mandate must be construed as an exception to the Act. When NDT benefits are involved, insurers may look exclusively to the NDT Mandate—not the Parity Act—to understand their obligations. This construction, not the trial court’s, gives meaning to both statutes and is entirely consistent with the prevailing understanding among insurers in Washington that NDT is a medical benefit, not a mental health service.

b. Legislative History And Agency Analysis Confirm The Limited Scope Of The Parity Act.

The conclusion that the NDT Mandate controls over the Parity Act is more than mere application of the rules of statutory construction. Subsequent legislative history confirms that the legislature did not intend NDT to be considered a “mental health service” under the Parity Act.

“[I]n interpreting conflicting statutory language, a court may ascertain legislative intent by examining the legislative history of particular enactments.” *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 211, 118 P.3d 311 (2005). Thus, courts can consider subsequent amendments and bills, even those that fail, as a tool to ascertain legislative intent. *Costanich v. Dep’t of Soc. and Health Servs.*, 164 Wn.2d 925, 932, 194 P.3d 988 (2008); *Impecoven v. Dep’t of Revenue*, 120 Wn.2d 357, 362, 841 P.2d 752 (1992). If the Parity Act truly applied to NDT benefits, as the trial court concluded, further legislation requiring insurers to cover NDT as a treatment for DSM-IV conditions would be unnecessary.

Yet, *after* enactment of the Parity Act in 2005, there have been repeated efforts to expand coverage for NDT benefits. One bill would have required plans to cover NDT up to age eighteen, including NDT prescribed to treat autism. CP 439-50 (HB 1412 (2009)). Other bills would have required plans to specifically cover treatments for autism, including “services provided by a speech therapist, occupational therapist or physical therapist”—the same NDT covered by the NDT Mandate. CP 452-62 (SB 5203 (2009)); CP 464-73 (SB 5059 (2011)). Of course, there would be no need for any of this legislation if the Parity Act actually mandated such coverage in the first place. It didn’t. The proponents of these bills correctly recognized that the Parity Act did not cover NDT,

even when prescribed to treat DSM-IV conditions like autism, and they wanted the legislature to fill this perceived “gap” in mandated coverage. The legislature so far has refused; none of the bills passed.

Washington agencies and blue ribbon committees also recognize that the Parity Act does not mandate NDT as a treatment for DSM-IV conditions. *Anfinson v. FedEx Ground Package System, Inc.*, 159 Wn. App. 35, 41, 244 P.3d 32 (2010) (courts may defer to agency interpretation of a statute). In a December 2007 report, the Caring for Washington Individuals with Autism Task Force recognized that neither the NDT Mandate nor the Parity Act mandated such coverage.⁵ The Task Force recommended that the legislature amend the NDT Mandate to require health plans to cover NDT benefits as a treatment for autism:

Children with autism commonly have a range of medical conditions for which they need treatment. Nationally, 22 states have successfully mandated insurance coverage for evidence based intervention services that benefit children with autism. There is no mandate for insurance coverage within Washington State.

* * *

Implementation Plan

⁵ The legislature created the Task Force in 2005 to “study and make recommendations to the legislature regarding the growing incidence of autism and ways to improve the delivery and coordination of autism services in the state.” Laws of 2005, ch. 259, § 2. Of the Task Force’s 14 members, four were members of the legislature, one was a representative of the DOH and one was a member of the Department of Social and Health Services. See <http://www.doh.wa.gov/cfh/autism/ATF/default.htm>.

Objective 1: Improve Insurance Coverage for Individuals with ASD

1. Extend insurance benefits to cover interventions for individuals with ASD.
* * *
3. Support policies that ensure neurodevelopmental therapy insurance benefits.
 - a. Extend neurodevelopmental therapy benefit including speech-language services, occupational and physical therapy to individuals aged 18 years. ...

CP 481-83 (underline added). Obviously, there would be no need to extend the NDT Mandate if, as the trial court concluded, the legislature intended the already-enacted Parity Act to achieve the same result.

In its January 2009 Sunrise Review regarding “Treatment of Autism Spectrum Disorders,” a DSM-IV condition, the Department of Health (DOH) came to the same conclusion. In reference to the Parity Act, the DOH stated poignantly: “It is unclear at this time how much (if any) ASD treatment should be covered under this mandate.” CP 489. In addressing this perceived “gap” in coverage, like the Task Force, the DOH recommended the legislature “[e]xpand the neurodevelopmental therapy mandate” and “[e]xpand and/or clarify the mental health parity mandate to include treatment for ASD.” CP 490-91. Thus, the DOH understood that, without amending existing law, the Parity Act did not require health plans to cover NDT beyond the limits of the NDT Mandate. As noted above, the legislature has refused to act on those recommendations.

c. The Office Of Insurance Commissioner Has Never Disapproved The NDT Exclusion.

Finally, and consistent with the DOH's understanding of the law, the Office of Insurance Commissioner (OIC) has repeatedly approved health plans that exclude NDT benefits. Washington law requires health care service contractors like Premera to submit contract forms to the OIC for review before they are offered for sale. RCW 48.44.020; RCW 48.44.040; WAC 284-43-920(1)(a). This would include, of course, the standard individual health plan purchased by A.G.'s parents that contained the NDT Exclusion, as well as the 2008 and 2010 addenda that provided additional coverage for mental health benefits but otherwise did not eliminate or amend the exclusion. CP 343-401 (Duffy Decl., Exhs. A-C). By law, the OIC may reject any plan provision that "contains unreasonable restrictions on the treatment of patients" or "violates any provision of this chapter"—including the Parity Act. RCW 48.44.020(2).

The OIC has never disapproved Premera's inclusion of a blanket NDT Exclusion in its individual health plans. And not just Premera. The parallel lawsuits filed against Group Health Cooperative and Regence BlueShield also challenge plan provisions that exclude NDT benefits; like Premera's plans, those plans would not and could not be marketed without OIC approval. The OIC's approval of such provisions provides additional interpretive guidance confirming the legislature did not intend the Parity

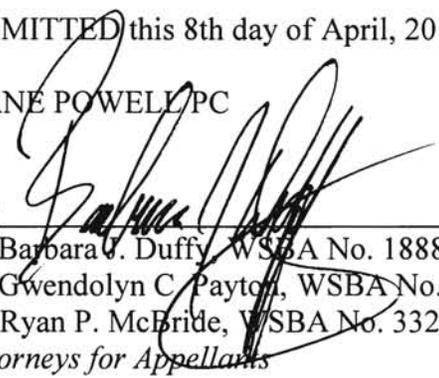
Act to supersede the NDT Mandate when it comes to NDT benefits. *Cf. Leingang v. Pierce County Medical Bureau, Inc.*, 131 Wn.2d 133, 153-54, 930 P.2d 288 (1997) (policy provision was not unfair and deceptive where OIC reviewed and did not disapprove challenged provision). For this reason too, the Court should conclude that Premera's NDT Exclusion is valid, and that NDT is not a "mental health service" under the Parity Act.

VI. CONCLUSION

Insurance mandates involve a complex mix of public policy, health and economic factors. The legislature is best suited to weigh those considerations. In 1989, the legislature did that with respect to NDT, and it concluded that the cost of requiring individual health plans to cover NDT outweighed the benefit. There is no reason to believe the legislature thought differently when it passed the Parity Act sixteen years later. Until or unless the legislature amends the law—which it has repeatedly refused to do—the specific provisions of the NDT Mandate must control over the general provisions of the Parity Act. The ruling below must be reversed.

RESPECTFULLY SUBMITTED this 8th day of April, 2013.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on April 8, 2013, I caused to be served a copy of the foregoing **Brief of Appellant** on the following person(s) in the manner indicated at the following addresses:

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DATED this 8th day of April, 2013 at Seattle, Washington

Kathryn Savaria

Kathryn Savaria

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