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No. 69724-2-I

COURT OF APPEALS  
OF THE STATE OF WASHINGTON,  
DIVISION ONE

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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 BLUESHELD, a Washington corporation,

*Defendant/Appellant.*

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

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**APPELLANT REGENCE BLUESHIELD'S  
OPENING BRIEF**

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## I. INTRODUCTION

Absent a statutory mandate to provide specific benefits, a health-insurance carrier is permitted to define the scope of coverage in its health plans. The neurodevelopmental-therapy statute, RCW 48.44.450, mandates that plans issued to employer-sponsored groups cover medically necessary occupational, speech, and physical therapies provided to treat neurodevelopmental delay for children age six and under. The expense associated with such coverage caused the legislature not to extend the mandate to individual and non-employer-sponsored group plans.

Plaintiffs O.S.T. and L.H., through their parents, sued Regence alleging that neurodevelopmental therapies can be medically necessary “mental health services” as defined in the subsequently enacted Mental Health Parity Act, which requires that health plans cover most mental-health services “at parity” with medical and surgical services. But neither plaintiff presented a justiciable controversy for a declaratory judgment. O.S.T is not a current Regence member, while L.H.’s providers submitted no claims indicating he was being treated for a mental-health condition, and Regence covered his speech-therapy claims.

Moreover, neurodevelopmental therapies cannot be “mental health services” under the Parity Act because the providers of

neurodevelopmental therapies—occupational, speech, and physical therapists—are not authorized to provide mental-health services. Even if they were, such that the Parity Act and neurodevelopmental-therapy statute could be said to overlap, concluding that neurodevelopmental therapies can be mental-health services would require giving precedence to a general statute over a specific one and finding a partial implicit repeal of the specific statute, contrary to established rules of statutory construction. Yet that is precisely what the trial court did, granting summary judgment to Plaintiffs on their claim for a declaratory judgment and certifying a class to seek injunctive relief and damages.

This Court should reverse the summary judgment, enter summary judgment for Regence, and remand with instructions to decertify the class.

## **II. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL**

### **A. Assignments of Error.**

1. The trial court erred in ruling that O.S.T. presented a justiciable controversy to obtain a declaratory judgment regarding Regence’s future compliance with the Mental Health Parity Act.
2. The trial court erred in ruling that L.H. presented a justiciable controversy to obtain a declaratory judgment regarding Regence’s compliance with the Mental Health Parity Act.
3. The trial court erred in granting summary judgment to Plaintiffs and declaring that neurodevelopmental therapies can be medically necessary “mental health services” as defined in the Mental Health Parity Act.

**B. Statement of Issues.**

1. Did O.S.T. fail to present a justiciable controversy to obtain a declaratory judgment regarding Regence's future compliance with the Mental Health Parity Act where he is not a current Regence member? (assignment of error no. 1)
2. Did L.H. fail to present a justiciable controversy to obtain a declaratory judgment regarding Regence's future compliance with the Mental Health Parity Act where his providers submitted no claims for services to treat a DSM-listed mental-health condition and Regence covered L.H.'s speech-therapy claims? (assignment of error no. 2)
3. Where the providers of neurodevelopmental therapies are not authorized to provide mental-health services, and where concluding that neurodevelopmental therapies can be mental-health services requires giving precedence to a general statute over a specific one and finding a partial implicit repeal of the specific statute, was it error to grant a declaratory judgment and rule that neurodevelopmental therapies can be "mental health services" as defined in the Mental Health Parity Act? (assignment of error no. 3)
4. Where Regence contracts require as a condition of coverage that mental-health services be medical necessary to treat the member's condition, and where Plaintiffs presented no competent evidence that neurodevelopmental therapies can be medically necessary to treat any DSM-listed condition, did this failure of proof preclude summary judgment on Plaintiffs' claim for a declaratory judgment? (assignment of error no. 3)

**III. STATEMENT OF THE CASE**

**A. Legislative Background.**

**1. The Legislature Enacted the Neurodevelopmental-Therapy Statute Over 20 Years Ago, in 1989.**

In 1989, the legislature adopted a limited mandate to cover neurodevelopmental therapies. It applies only to employer-sponsored

group health plans and requires coverage only for preschool-aged children (six and under):

*Each employer-sponsored group contract* for comprehensive health care service which is entered into, or renewed, on or after twelve months after July 23, 1989, shall include coverage for neurodevelopmental therapies for covered individuals six and under.

RCW 48.44.450(1) (emphasis added). Coverage is mandated only where the services are delivered by a provider authorized by law to deliver occupational, speech, or physical therapy (*see* chs. 18.59, 18.35, and 18.74 RCW, respectively) and pursuant to the referral and periodic review of a licensed physician. RCW 48.44.450(2). In addition, the services must be medically necessary as determined by the carrier. RCW 48.44.450(3). A carrier may apply additional requirements such as delivery by a participating provider. RCW 48.44.450(4). Coverage is mandated only for preschool-aged children because public schools offer special-education programs that include neurodevelopmental therapies. CP 175.

**2. The Legislature Enacted the Mental Health Parity Act in 2005 and Extended It to Individual Plans in 2007.**

The purpose of the Mental Health Parity Act, enacted in 2005, was not to accord preferential status to mental-health services but “to require that insurance coverage be *at parity* for mental health services, which means this coverage be delivered under the same terms and conditions as

medical and surgical services.” 2005 WASH. LAWS ch. 6 § 1 (emphasis added).<sup>1</sup> As originally enacted, the Parity Act applied only to plans covering groups of 50 or more members. 2005 WASH. LAWS ch. 6, § 4(2)(a), (b). The legislature amended the law in 2007 to apply to all plans, including individual and small-group contracts. 2007 WASH. LAWS ch. 8. As of 2010, when the law came into full effect, it requires that all plans cover “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 or a designee. RCW 48.44.341(2)(c), (4).<sup>2</sup>

Subject to exceptions not pertinent here, “mental health services” are “medically necessary outpatient and inpatient services provided to treat 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).<sup>3</sup> The current version of the manual is the Diagnostic and Statistical Manual IV, Text Revision (“DSM-IV-TR” or “DSM”).

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<sup>1</sup> See note following RCW 41.05.600.

<sup>2</sup> 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).

<sup>3</sup> Consistent with the Parity Act, Regence’s mental-health benefit requires that mental-health services be “medically necessary” as defined in the plan. See CP 206 (§ 1.17), 247 (§ 8.6), 254 (§ 8.23.2).

The Parity Act does not mention neurodevelopmental therapies or RCW 48.44.450. After the Parity Act became effective, Washington health carriers, including Regence, continued to cover neurodevelopmental therapies to the extent required by the neurodevelopmental-therapy statute, *see* CP 240, 369, and the Washington Office of Insurance Commissioner continued to approve contracts with coverage consistent with that statute's limited mandate. *See* CP 378-90 (no requirement to cover neurodevelopmental therapy in individual plans); CP 401 (limited mandate for employer-sponsored group plans).

**B. After Legislative Efforts to Expand the Scope of the Neurodevelopmental-Therapy Mandate Repeatedly Failed, Class-Action Complaints Were Filed Claiming that Neurodevelopmental Therapies Can Be Mental-Health Services under the Parity Act.**

The neurodevelopmental-therapy statute has never been amended and remains in effect today, nearly 25 years later. The legislature has rejected proposed amendments to expand the mandate at least four times since the Parity Act was enacted—in 2007 (CP 308-15), 2009, (CP 325-35), 2011 (CP 317-22), and 2012 (CP 422-29). Proposals for a separate mandate to cover neurodevelopmental and behavioral therapies for autism, a type of neurodevelopmental disorder, have also failed. *See* CP 337-47, 349-58, 406-13.

Despite the legislature's decision not to expand the neurodevelopmental-therapy mandate and the insurance commissioner's interpretation, class-action complaints were filed against the state health-care authority and private health carriers alleging, among other things, that neurodevelopmental-therapies can be "mental health services" under the Parity Act and therefore must be covered in all plans with no age limitation.<sup>4</sup>

**C. The Superior Court Ruled that the Named Plaintiffs Had Standing to Seek a Declaratory Judgment.**

**1. O.S.T. Is Not a Current Regence Member.**

O.S.T. was originally the sole named plaintiff. A minor and former Regence individual-plan member who has autism, O.S.T. sued Regence through his parents alleging claims for breach of contract, declaratory and injunctive relief, and violation of the Washington Consumer Protection Act. *See* CP 595-605. Although the superior court dismissed O.S.T.'s injunction claim on the basis that only a current member has standing to seek such relief, the Court nevertheless ruled that O.S.T. had standing to seek declaratory relief. RP 12, CP 1019.

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<sup>4</sup> Suits were filed against Regence BlueShield, Premera Blue Cross, Group Health Cooperative, and the Washington State Health Care Authority.

**2. L.H.'s Providers Submitted No Claims for Services to Treat a DSM-Listed Diagnosis, and Regence Covered L.H.'s Speech Therapy Claims.**

The court permitted an amendment to join L.H., a current Regence individual-plan member, also suing through his parents. CP 592-93, 595-605. Although Plaintiffs alleged L.H. was diagnosed with expressive language disorder, CP 599, a DSM-listed mental-health condition, CP 822, none of the claims submitted by his speech-therapy providers identified this or any other DSM-listed condition.<sup>5</sup> CP 849, 853-72, 929-30. Instead, the claims identified medical diagnoses, including muscular dystrophy, hydrocephalus, and glaucoma. CP 849. Regence covered the claims under the rehabilitation-services benefit. CP 849, 853-72.

Attempting to reclassify L.H.'s speech-therapy services to come within the definition of "mental health services," Plaintiffs submitted a declaration by a speech therapist who had never seen L.H. and did not possess the necessary license to diagnose a health condition. CP 688-98. The speech therapist, Patricia Moroney, testified based on review of medical records that L.H. is "properly diagnosed" with expressive language disorder. CP 689. Plaintiffs also submitted a treatment record

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<sup>5</sup> The DSM-IV-TR indicates which of its mental-disorder codes correspond to ICD-9, the code system used in medical billing. *See* CP 815.

(not a claim) by another provider without a license to diagnose, L.H.'s former speech therapist, stating a similar "diagnosis" of expressive language disorder. CP 723.

The trial court found the uncontroverted evidence was that Regence covered L.H.'s speech-therapy claims under the rehabilitative-services benefit. RP 15-16. Nevertheless, the court found that L.H. had "submitted evidence of a diagnosed DSM IV condition for which he needs neurodevelopmental therapies" and on that basis ruled he had standing to seek both declaratory and injunctive relief. RP 12; CP 1019.<sup>6</sup>

**D. The Superior Court Granted Summary Judgment to Plaintiffs on Their Claim for a Declaratory Judgment.**

The parties filed cross motions for partial summary judgment on Plaintiffs' claim for a declaratory judgment on application of the Parity Act to neurodevelopmental therapies. The trial court ruled that neurodevelopmental therapies can be medically necessary "mental health services" under the Parity Act and, therefore, must be covered without any age limitation. RP 34-35; CP 1024-25. The court entered an immediately appealable, final judgment under CR 54(b). CP 1009-10, 1024-25. Regence timely appealed. CP 1027-28.

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<sup>6</sup> The court reserved ruling on L.H.'s standing to seek damages. CP 1019.

At the same time it entered the declaratory judgment, the trial court certified a class of persons who “have required or [now] require neurodevelopmental therapy for the treatment of a qualified mental health condition.” CP 1011-17. A commissioner of this Court denied discretionary review of the class-certification order.

#### IV. ARGUMENT

##### A. Standard of Review.

This is an appeal from a summary judgment order entered on a claim for a declaratory judgment under chapter 7.24 RCW. A declaratory judgment is reviewable as any other judgment. RCW 7.24.070. The granting of summary judgment in a declaratory-judgment action is reviewed de novo. *Internet Comm'ty & Ent'mt Corp. v. Wash. State Gambling Comm'n*, 169 Wn.2d 687, 691, 238 P.3d 1163 (2010). Interpretation of a statute is likewise reviewed de novo. *Id.*

##### B. Neither of the Named Plaintiffs Presented a Justiciable Controversy for a Declaratory Judgment.

The plaintiff in a declaratory-judgment action must present a justiciable controversy, meaning one that is:

(1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical,

abstract or academic, and (4) a judicial determination of which will be final and conclusive.

*Walker v. Munro*, 124 Wn.2d 402, 412, 879 P.2d 920 (1994), quoting *Nollette v. Christianson*, 115 Wn.2d 594, 599, 800 P.2d 359 (1990). The controversy must be based on allegations of harm personal to the plaintiff that are substantial rather than speculative or abstract. *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004), citing *Walker v. Munro*, 124 Wn.2d at 411. The third requirement, of a direct and substantial interest in the dispute, encompasses the doctrine of standing. *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001).

**1. O.S.T. Presented No Justiciable Controversy Because He Is Not a Current Regence Member.**

O.S.T. failed to present a justiciable controversy on application of the Parity Act. A declaratory judgment, like an injunction, is forward-looking relief. Its purpose is to declare the parties' rights and obligations to govern their future conduct. It is not available to remedy a past wrong for which an adequate remedy is available. *King County v. Boeing Co.*, 18 Wn. App. 595, 602, 570 P.2d 713 (1977), citing *Reeder v. King County*, 57 Wn.2d 563, 564, 358 P.2d 810 (1961). An adequate remedy is available where a breach of contract is alleged and the plaintiff may seek

redress in the form of monetary damages. *See Jacobsen v. King County Med. Svc. Corp.*, 23 Wn.2d 324, 327, 160 P.2d 1019 (1945).

In *Jacobsen*, where the plaintiff alleged breach of a health-insurance contract, the Supreme Court held that a declaratory judgment was unavailable because resolution of the breach of contract claim would determine “all questions that could be raised under the provisions of the declaratory judgment statute.” 23 Wn.2d at 327. Here, likewise, money damages are available to remedy the alleged breach of contract, and O.S.T. raises no question for determination by declaratory judgment that will not be determined in adjudicating the breach of contract claim. Declaratory relief is therefore unavailable, and the trial court erred in ruling that O.S.T. presented a justiciable controversy.

**2. L.H. Presented No Justiciable Controversy Because He Never Had any Neurodevelopmental-Therapy Claims Submitted or Denied.**

There is no actual, present, and existing dispute between L.H. and Regence regarding application of the Parity Act to neurodevelopmental therapies, nor does L.H. have a direct and substantial interest in the issue raised. First, no provider submitted any claim indicating L.H. received neurodevelopmental therapy to treat any DSM-listed diagnosis. CP 822, 929; *see also* CP 813-24 (chart indicating DSM codes that correspond to

ICD-9 medical billing codes). Second, the uncontroverted evidence established that Regence did not deny L.H.'s claims but processed and paid them under the rehabilitation services benefit without applying any exclusion. CP 849, 853-72. Third, assuming post-hoc submission of a diagnosis never identified on any claim could establish standing, L.H. failed to submit evidence of a DSM-listed diagnosis by a provider licensed to diagnose conditions. Diagnosis is the practice of medicine, which requires a license not possessed by a speech therapist. RCW 18.71.011(1), .021.<sup>7</sup>

Where L.H. had no claims submitted or denied and presented no evidence of a DSM-listed diagnosis by a provider licensed to diagnose conditions, the predicate for his claim for declaratory relief regarding application of the Parity Act is hypothetical. *See, e.g., Port of Seattle v. Wash. Utils. & Transp. Comm'n*, 92 Wn.2d 789, 806, 597 P.2d 383 (1979) (declaratory judgment was inappropriate where issue of Port's future actions on certain contract rights were founded on a hypothetical

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<sup>7</sup> "A person is practicing medicine if he or she does one or more of the following: (1) Offers or undertakes to diagnose, cure, advise, or prescribe for any human disease, ailment, injury, infirmity deformity, pain or other condition, physical or mental, real or imaginary, by any means or instrumentality[.]" RCW 18.71.011. "No person may practice or represent himself or herself as practicing medicine without first having a valid license to do so." RCW 18.71.021. The initials following the speech therapists' names do not indicate possession of such a license; M.A. denotes a master's degree, while CCC-SLP denotes certification by the American Speech-Language-Hearing Association.

situation); *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 814, 514 P.2d 137 (1973) (matter was “not ripe for declaratory relief” where minor child’s potential tort claim was “an unpredictable contingency”).

Because neither plaintiff presented a justiciable controversy to obtain a declaratory judgment regarding application of the Parity Act, it was error to grant declaratory relief. The declaratory judgment must be reversed, and Plaintiffs’ claims for declaratory relief must be dismissed. In addition, because a plaintiff without standing cannot be a class representative, this Court should direct the trial court to decertify the class on remand. 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.”).<sup>8</sup>

**C. Health Carriers Are Free to Include or Exclude Services from Coverage Except as Mandated by Statute.**

Most private, underwritten health insurance coverage is provided under employer-sponsored group contracts. This action does not involve any employer-sponsored group contracts but pertains only to contracts issued to individuals and non-employer groups such as churches and

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<sup>8</sup> Leave to substitute another as plaintiff is inappropriate where the original named plaintiff never had a live claim for relief. *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1023 (9th Cir. 2003).

associations. *See* CP 601. Regence is one of the few health carriers in Washington that offers health plans for purchase by individuals.

Absent a statutory mandate to provide specific benefits, a health-insurance carrier, as a private contractor, need not cover every health-care service but is permitted to limit the scope of coverage. *Carr v. Blue Cross of Wash. & Alaska*, 93 Wn. App. 941, 948, 971 P.2d 102 (1999); *see also Glaubach v. Regence BlueShield*, 149 Wn.2d 827, 234, 74 P.3d 115 (2003) (health carriers need not cover every service but rather have “general flexibility...to tailor plans to meet different needs and different resources”); *Liljestrand v. State Farm Mut. Auto. Ins. Co.*, 47 Wn. App. 283, 290, 734 P.2d 947 (1987) (carriers may provide greater coverage than mandated, but are not required to do so).

To keep individual contracts affordable, they generally include more basic coverage than group contracts. For the same reason, individual contracts are subject to fewer benefit mandates than group contracts. *See* CP 378-404; *see also* RCW 48.47.005 (citing the “cost ramifications” of benefit mandates and adopting procedures and criteria for proposal and review of mandates). Mandates that apply only to group and not individual contracts include neurodevelopmental therapies,<sup>9</sup> chemical-

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<sup>9</sup> *See* RCW 48.44.450.

dependency treatment,<sup>10</sup> home-health or hospice care,<sup>11</sup> TMJ-disorder treatment,<sup>12</sup> and prenatal diagnosis of congenital disorders.<sup>13</sup> Health carriers may also offer “catastrophic” individual health plans that do not cover maternity services or prescription drugs. RCW 48.43.041.

**D. The Neurodevelopmental-Therapy Statute Allows Exclusion of Neurodevelopmental Therapies in Individual and Non-Employer-Sponsored Group Contracts.**

The neurodevelopmental-therapy statute expressly limits its mandate to employer-sponsored group contracts and is silent regarding individual and non-employer sponsored group contracts. Under the rule *expressio unius est exclusio alterius*, “[t]he expression of one statutory requirement mandates the exclusion of all omitted requirements.” *Gen. Tel. Co. of the N.W. v. Wash. Utils. & Transp. Comm’n*, 104 Wn.2d 460, 470, 706 P.2d 625 (1985); *see also Wash. Natural Gas Co. v. Pub. Utils. Dist. No. 1*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969). This Court must therefore presume, absent “clearly contrary legislative intent,” that the legislature intentionally omitted individual and non-employer-sponsored group plans from the mandate, such that health carriers are authorized to

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<sup>10</sup> See RCW 48.44.240.

<sup>11</sup> See RCW 48.44.320.

<sup>12</sup> See RCW 48.44.460.

<sup>13</sup> See RCW 48.44.344.

exclude neurodevelopmental therapies from coverage in those plans. *City of Algona v. Sharp*, 30 Wn. App. 837, 842, 638 P.2d 627 (1982).

**E. The Parity Act Does Not Apply Because Providers of Neurodevelopmental Therapies Are Not Authorized to Provide Mental-Health Services.**

“Any new provisions of a statute are...deemed adopted in light of and with reference to the earlier act.” *State v. Roth*, 78 Wn.2d 711, 715, 479 P.2d 55 (1971). This Court must therefore presume the legislature was aware of and considered the neurodevelopmental-therapy statute when it adopted the Parity Act and must harmonize the two laws if possible. *See Cascade Floral Prods., Inc. v. Dep’t of Labor & Indus.*, 142 Wn. App. 613, 621, 177 P.3d 124 (2008). In doing so, the court must give effect to all statutory language. *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 560, 14 P.3d 133 (2000).

The Parity Act and the neurodevelopmental-therapy statute are fully consistent and do not conflict because neurodevelopmental therapies are not “mental health services” as defined in the Parity Act. Neurodevelopmental therapies must be delivered by providers authorized to deliver occupational therapy, speech therapy, or physical therapy. RCW 48.44.450(2). A section of the insurance code that predates the Parity Act specifies the types of providers authorized to deliver outpatient

mental-health services, and they do not include occupational, speech, or physical therapists:

Consistent with their lawful scopes of practice, “mental health care practitioners” includes only the following: Any generally recognized medical specialty of practitioners licensed under chapter 18.57 [osteopathy] or 18.71 RCW [physicians] who provide mental health services, advanced practice psychiatric nurses as authorized by the nursing care quality assurance commission under chapter 18.79 RCW, psychologists licensed under chapter 18.83 RCW, and mental health counselors, marriage and family therapists, and social workers licensed under chapter 18.225 RCW.

RCW 48.43.087(1)(c).<sup>14</sup> Because the providers of neurodevelopmental therapies—occupational, speech, and physical therapists—may not provide mental-health services, those therapies cannot be considered mental-health services, and the Parity Act does not apply. This Court should reverse the summary judgment, enter summary judgment for Regence, and direct the trial court to decertify the class.

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<sup>14</sup> Although RCW 48.43.087 is not part of the Parity Act, it preexisted that law and applies to all health carriers. *See* RCW 48.43.087(1)(a). It disallows a contract provision prohibiting a “mental health care practitioner” from contracting with an enrollee for services solely at the enrollee’s expense. RCW 48.43.087(2). *See also* CP 176 (Regence medical director, Joseph Gifford, M.D., testifying that occupational, speech, and physical therapists are not considered mental-health practitioners).

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

Because the neurodevelopmental-therapy statute allows health carriers to exclude neurodevelopmental therapies in individual contracts and limit them to preschool-aged children in non-employer-sponsored group plans, any mandate of greater coverage would require amendment or partial repeal of that statute.

The legislature has never amended the neurodevelopmental-therapy statute. Neither did the legislature repeal that statute when it adopted the Parity Act. To interpret the Parity Act as the trial court did requires giving precedence to a general statute over a specific one and concluding that the legislature implicitly repealed the neurodevelopmental-therapy statute. Such a conclusion is inconsistent with rules of statutory construction, legislative history, and agency interpretations, all of which lead to the conclusion that neurodevelopmental therapies are not mental-health services.

**1. The General-Specific Rule Requires a Conclusion that Neurodevelopmental Therapies Are Not Mental-Health Services.**

The neurodevelopmental-therapy statute and Parity Act neither conflict nor overlap because the providers of neurodevelopmental

therapies are not authorized to provide mental-health services. But even if the statutes overlapped, a court must “construe two statutes dealing with the same subject matter so that the integrity of both will be maintained.” *Gilbert v. Sacred Heart Med. Ctr.*, 127 Wn.2d 370, 375, 900 P.2d 552 (1995). “The specific statute supersedes a general statute when both apply.” *Gen. Tel. Co.*, 104 Wn.2d at 464. “[I]f the general statute was enacted after the specific statute, this court will construe the original specific statute as an exception to the general statute, unless expressly repealed.” *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Eval. Council*, 165 Wn.2d 275, 309, 197 P.3d 1153 (2008); *see also* RCW 48.01.150 (codifying the general-specific rule as to the insurance code).

Contrary to these established rules, the trial court gave precedence to the general statute—the Parity Act—and ruled that its provisions override the limited mandate in the neurodevelopmental-therapy statute and require coverage of neurodevelopmental therapies in all plans, without any age limitation, if provided to treat a DSM-listed condition. Giving precedence to the specific statute over the general one requires a conclusion that the neurodevelopmental-therapy statute is an exception to

the Parity Act, such that neurodevelopmental therapies are not mental-health services.

**2. Applying the Parity Act Requires Implicit Repeal of the Neurodevelopmental-Therapy Statute, Which Must Be Avoided.**

To interpret the Parity Act as the trial court did not only requires giving precedence to a general statute but finding a partial implicit repeal of the specific statute, nullifying the statutory authorization in RCW 48.44.450 to exclude neurodevelopmental therapies from individual health plans and to limit them to age six and under in non-employer-sponsored group plans.

The courts “will not assume that the Legislature intended to effect a significant change in the law by implication.” *Philippides v. Bernard*, 151 Wn.2d 376, 385, 88 P.3d 939 (2004), quoting *Shumacher v. Williams*, 107 Wn. App. 793, 801, 28 P.3d 792 (2001). Implicit repeal or amendment—even in part—is “strongly disfavored.” *Tollycraft Yachts Corp. v. McCoy*, 122 Wn.2d 426, 439, 858 P.2d 503 (1993). The court must attempt to harmonize a new section or amendment with the existing provisions and purposes of a statutory scheme to avoid finding an implicit repeal. *Id.*

Implicit repeal or amendment occurs only when (1) the later act covers the entire subject matter of the earlier legislation and was evidently intended to supersede the earlier legislation, and (2) the two acts are so clearly inconsistent and so repugnant to each other that they cannot be reconciled. *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 450, 842 P.2d 956 (1993). These requirements are not met here.

First, even assuming neurodevelopmental therapies could be mental-health services, the Parity Act does not cover the entire subject matter of the neurodevelopmental-therapy statute. Each law is broader in some ways and narrower in others. The Parity Act is broader in that it applies to all health plans and most mental-health services, without any age limitation, but narrower in that it requires a DSM-listed diagnosis. The neurodevelopmental-therapy statute is narrower in that it only applies to neurodevelopmental therapies and only mandates coverage in certain plans and for certain members (children age six and under). But it is broader in that it does not require a DSM diagnosis, and therefore applies to at least some services not encompassed by the Parity Act.

Second, the two acts are not so clearly inconsistent or repugnant to each other that they cannot be reconciled. They can readily be reconciled by recognizing the specific neurodevelopmental-therapy statute as an

exception to the Parity Act, such that neurodevelopmental therapies are not “mental health services.”

Recognizing that neurodevelopmental therapies are not “mental health services” is consistent with the general-specific rule, the presumption against implicit repeal, RCW 48.43.087, and the rule of *expressio unius est exclusio alterius*. The legislature’s authorization to exclude neurodevelopmental therapies in individual plans and limit them to age six and under in non-employer-sponsored group plans must be enforced absent “clearly contrary legislative intent.” *City of Algona*, 30 Wn. App. at 842; *see also Blue Diamond Group, Inc. v. KB Seattle 1, Inc.*, 163 Wn. App. 449, 455, 266 P.3d 881 (2011) (recognizing that the presumption is mandatory). Such intent is absent here, where the more general Parity Act does not cover the entire subject matter of the specific neurodevelopmental-therapy statute and the legislature has left the neurodevelopmental-therapy statute intact and unchanged for over 20 years.

In addition, recognizing that neurodevelopmental therapies are not “mental health services” is consistent with the purpose of the Parity Act, which is to require that coverage of mental-health and medical and surgical services be “at parity,” without greater coverage for one or the

other. 2005 WASH. LAWS ch. 6 § 1. The trial court's ruling defeats parity because it requires a carrier to cover neurodevelopmental therapy if the member has a DSM-listed mental disorder, but allows the carrier to exclude the service when provided to treat any other health condition.

Excluding neurodevelopmental therapies from the definition of "mental health services" is further consistent with the legislature's reluctance to impose benefit mandates on individual plans and with the neurodevelopmental-therapy statute's age limitation, which is designed to ensure coverage until children are old enough to access services through the public-school system. CP 175. Interpreting the Parity Act to require health carriers to cover what the neurodevelopmental therapy statute authorizes them to exclude would defeat the statutory scheme. To comport with the statutory scheme, the neurodevelopmental-therapy statute and Parity Act can be harmonized only by concluding that neurodevelopmental therapies are not "mental health services."

### **3. Subsequent Legislative History Confirms the Limited Scope of the Parity Act.**

Subsequent legislative history, including failed attempts to amend a statute, may be considered in construing existing laws. *State v. Clark*, 129 Wn.2d 805, 812-13, 920 P.2d 187 (1996) (holding that the legislature's refusal to adopt an amendment that would have been

consistent with a party's interpretation of an existing statute indicated a legislative rejection of that interpretation), citing *Spokane County Health Dist. v. Brockett*, 120 Wn.2d 140, 153, 839 P.2d 324 (1992). Efforts to expand the neurodevelopmental-therapy statute have failed numerous times since its enactment, including four times since the Parity Act was enacted. CP 308-15, 317-22, 324-35, 422-29. In addition, the Senate considered expanding the neurodevelopmental-therapy statute in the same session the mental-health parity bill was adopted, but left the neurodevelopmental-therapy statute unchanged while passing the Parity Act. CP 416-20.

One failed bill would have expressly required plans to cover neurodevelopmental therapy to treat autism—a DSM-listed condition. CP 324-35. Other bills would have required group plans specifically to cover treatments for autism, including “services provided by a speech therapist, occupational therapist or physical therapist”—the same therapies addressed in the neurodevelopmental-therapy statute. CP 337-47, 349-58, 406-13. There would have been no need to introduce any of these bills if the Parity Act, already in existence, required coverage of neurodevelopmental therapies for DSM-listed conditions such as autism.

*See Clark*, 129 Wn.2d at 812-13. It is not the role of this Court to make law that the legislature has declined to adopt.

**4. Agency Interpretations Confirm the Limited Scope of the Parity Act.**

Courts give great weight to agency interpretations of statutes. *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 349, 172 P.3d 688 (2007). Washington administrative agencies have recognized that neurodevelopmental therapies are not “mental health services” under the Parity Act.

*a. Washington State Department of Health.*

In 1998, when the neurodevelopmental therapy statute had existed for nine years but the Parity Act was not yet enacted, the Department of Health observed in its “Mental Health Parity Mandated Benefits Sunrise Review,” “There are currently no state requirements for either providing mental health coverage or specific mandates on the level of coverage, if offered, among the plans that would be covered by this proposal [to require coverage of mental health at the same level as physical health].” CP 139. This shows that the Department recognized that the neurodevelopmental therapy statute was not a mandate for mental-health coverage.

Years later, after enactment of the Parity Act, the Department recognized that the Parity Act does not apply to neurodevelopmental therapies, stating in its January 2009 “Sunrise Review Regarding Treatment of Autism Spectrum Disorders,” “It is unclear at this time how much (if any) ASD treatment should be covered under [the Parity Act].” CP 363. The Department recommended that the legislature “[e]xpand the neurodevelopmental therapy mandate” by increasing its scope and age limit. CP 364. Alternatively, the Department recommended that the legislature “[e]xpand and/or clarify the mental health parity mandate to include treatment for ASD.” CP 365. There would be no need to expand either of these laws if the Parity Act already mandated coverage for neurodevelopmental therapies.

*b. Legislative Task Force.*

The Caring for Washington Individuals with Autism Task Force, created by the legislature with members appointed by the governor, observed in its initial report published in December 2006 that “[m]any private insurance companies cover neurodevelopmental therapies only through the age of six, and ASD is often excluded from coverage because it is considered by the insurance plans to be a non-medical condition that should be handled by the educational system.” CP 369. The Task Force

recognized that neither the neurodevelopmental-therapy statute nor the Parity Act mandated such coverage; it recommended that the legislature enact “legislation that requires health insurance coverage of evidence based interventions and services for individuals with ASD across the lifespan [*i.e.*, all age groups].” CP 369. In its final report, published in December 2007, the Task Force confirmed the lack of an existing mandate and again advocated for amending the neurodevelopmental-therapy statute to increase the coverage available for autism-related services:

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**

*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 the neurodevelopmental therapy benefit including speech-language services, occupational and physical therapy to individuals aged 18 years.***

CP 373-75. Again, there would be no need to extend or expand the neurodevelopmental-therapy mandate if the Parity Act already required such coverage.

*c. Washington Insurance Commissioner.*

Since adoption of these mandates, the Office of the Insurance Commissioner (OIC) has recognized that neurodevelopmental therapies are not subject to the Parity Act. Health plans must be submitted to the OIC to review for compliance with Title 48, the insurance code. RCW 48.44.040 (“No registrant shall...modify any contract, or offer any new contract, until he or she has filed a copy of the...modified contract, or new contract with the insurance commissioner.”); WAC 284-43-920(1)(a) (“Carriers must file with the commissioner every contract form...[b]efore the contract form is offered for sale to the public[.]”). The OIC has authority to disapprove a plan that “contains unreasonable restrictions” or “violates any provision of this chapter [48.44 RCW],” which includes the Parity Act. RCW 48.44.020(2).

None of the Regence health plans at issue could have been sold had they not been approved by the OIC as complying with the Parity Act. RCW 48.44.040. Furthermore, the OIC’s review methodology shows it enforces the requirement that mental-health providers be of the types

recognized in RCW 48.43.087(1)(c), which do not include occupational, speech, or physical therapists. CP 378-90, 392-04.

Because neurodevelopmental therapies are not “mental health services” under the Parity Act, it was error to grant a declaratory judgment to Plaintiffs. This Court should declare that, under the law as presently written, neurodevelopmental therapies are not “mental health services” under the Parity Act. This Court should reverse the summary judgment, enter summary judgment for Regence, and direct the trial court to decertify the class.

**G. Even if the Parity Act Applied to Neurodevelopmental Therapies, Whether Such Therapies Can Be Medically Necessary to Treat Particular Conditions Is a Question of Fact Precluding Summary Judgment.**

Regence health plans require that neurodevelopmental therapies and mental-health services be medically necessary as a condition of coverage.<sup>15</sup> See CP 206 (§ 1.17), 247 (§ 8.6), 254 (§8.23.2). The

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<sup>15</sup> Under Regence contracts, medically-necessary services are defined as follows:

MEDICALLY NECESSARY: Means health care services or supplies that a Physician or other health care provider exercising prudent clinical judgment, would provide to a Member for the purpose of preventing, evaluating, diagnosing or treating an illness, injury, disease or its symptoms and that are:

- 1.17.1 In accordance with generally accepted standards of medical practice;
- 1.17.2 Clinically appropriate, in terms of type, frequency, extent, site and duration, and considered effective for the Member's illness, injury or disease; and
- 1.17.3 Not primarily for the convenience of the Member, Physician or other health care provider, and not more costly than an alternative service

legislature authorized health carriers to determine the medical necessity of mental-health services under the Parity Act. RCW 48.44.341(4).<sup>16</sup> The carrier may determine medical necessity on a claim-by-claim basis or determine that a service can never be medically necessary to treat a particular condition. CP 175.

A declaratory judgment request that involves determination of a fact issue is subject to trial. RCW 7.24.090. On summary judgment, the moving party bears the initial burden of showing the absence of any issue of material fact, and the nonmoving party must then come forward with specific facts showing that a genuine issue of material fact exists for trial. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989), citing CR 56(e). A material fact is one upon which the litigation depends, in whole or in part. *Id.*

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or sequence of services, or supply at least as likely to produce equivalent therapeutic or diagnostic results as to the diagnosis or treatment of the Member's illness, injury or disease.

For these purposes, "generally accepted standards of medical practice" means standards that are based on credible scientific evidence published in peer-reviewed medical literature generally recognized by the relevant medical community, Physician Specialty Society recommendations and the views of Physicians practicing in relevant clinical areas and any other relevant factors.

CP 206.

<sup>16</sup> This delegation of authority was included in the Parity Act over the objection and recommendation of the State Health Coordinating Council. CP 441.

Medical necessity is essential to coverage of mental-health services and is a medical determination not within the understanding of a lay person. *See* CP 175-76. “[E]xpert testimony is required when an essential element in the case is best established by an opinion which is beyond the expertise of a layperson.” *Harris v. Robert C. Groth, M.D., Inc.*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983).

Plaintiffs allege that O.S.T. had autism and L.H. has expressive-language disorder. In moving for summary judgment, Plaintiffs submitted no evidence that neurodevelopmental therapies can be medically necessary to treat autism, expressive-language disorder, or any other condition. Regence presented testimony by medical director Joseph Gifford, M.D., that neurodevelopmental therapies do not “treat” autism and therefore cannot be medically necessary. CP 175-76. Yet the trial court ruled that neurodevelopmental therapies “can be medically necessary” to treat expressive language disorder, feeding disorders, phonological disorders, and autism. CP 1024.

The medical necessity of neurodevelopmental therapies to treat Plaintiffs’ alleged DSM-listed conditions was not established and was a question of fact for trial. It was thus error to grant summary judgment and

rule that neurodevelopmental therapies “can be medically necessary” for particular conditions.

## V. CONCLUSION

Because neither plaintiff presented a justiciable controversy to obtain a declaratory judgment regarding Regence’s future compliance with the Mental Health Parity Act, and because neurodevelopmental therapies are not “mental health services” under the Parity Act, this Court should reverse the summary judgment, enter summary judgment for Regence, and remand with directions to decertify the class.

RESPECTFULLY SUBMITTED this 8th day of April, 2013.

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## V. CONCLUSION

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