

NO. 69821-4-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

REGENCE BLUESHIELD,

Petitioners-Defendants,

v.

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.

**APPENDIX TO RESPONDENTS' OPPOSITION TO
PETITIONERS' MOTION FOR DISCRETIONARY REVIEW**

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ORIGINAL

**APPENDIX TO RESPONDENT'S OPPOSITION TO
PETITIONERS' MOTION FOR DISCRETIONARY REVIEW**

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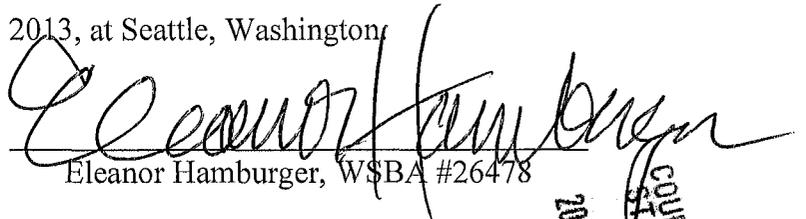
CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on February 4, 2013, a true copy of the foregoing APPENDIX TO RESPONDENTS' OPPOSITION TO PETITIONERS' MOTION FOR DISCRETIONARY REVIEW was served upon counsel as indicated below:

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Exhibit 1

R.A. 000001

HON. JOHN P. ERLICK
Noted for Hearing: March 23, 2012 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., 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

PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT RE:
DEFENDANT'S EXCLUSION OF
NEURODEVELOPMENTAL
THERAPIES

I. INTRODUCTION

O.S.T.'s health benefit plan, like others issued by defendant Regence Blue Shield ("Regence"), excludes coverage of neurodevelopmental therapies even when medically necessary to treat DSM-IV mental conditions like O.S.T.'s feeding disorder and autism.¹ This exclusion violates Washington's Mental Health Parity Act, RCW 48.44.341.² As a matter of law, neurodevelopmental therapies to treat covered DSM-IV conditions are "mental health services" under the Parity Act and cannot be excluded.

¹ Regence's individual policies wholly exclude neurodevelopmental therapies. *See, e.g.*, Hamburger Decl., *Exh. A*, p. 34; Sirianni Decl., ¶ 4. Regence's non-ERISA group policies also exclude coverage of neurodevelopmental therapies to persons over the age of six. Sirianni Decl., ¶ 4; Hamburger Decl., *Exh. B*.

² The Mental Health Parity Act is actually four separate statutes. *See* RCW 48.44.341 (covering health care service contractors like Regence); RCW 48.46.241 (covering HMOs like Group Health Cooperative); RCW 41.05.600 (covering public employees' health benefit plans); and RCW 70.47.200 (covering the Basic Health Plan).

1 This exact issue was recently adjudicated by Judge Robert Lasnik in
2 similar litigation against Group Health Cooperative.³ See *Z.D., ex rel. J.D. v. Group*
3 *Health Coop.*, ___ F. Supp. 2d ___, 2011 WL 5299592 (W.D. Wash. Nov. 4, 2011)
4 (Appendix A). Judge Lasnik determined that the Mental Health Parity Act requires
5 coverage of medically necessary neurodevelopmental therapies *even when the explicit*
6 *terms of the health benefit plan exclude that coverage.* That is because the Mental
7 Health Parity Act is incorporated into the terms and conditions of the contract:

8 It is true that the literal terms of the Plan, as written, do not
9 require coverage for the mental health treatment of
10 individuals over the age of six. *The problem for Defendants*
11 *lies in the fact that Washington law governs the Plan.* And,
12 as alleged by Plaintiffs, Washington law, specifically RCW
13 48.46.291(2)[the Mental Health Parity Act as applied to
14 HMOs], requires Defendants to provide coverage for the
15 mental health services at issue in this case.

16 *Id.*, p. *3 (internal citations omitted, emphasis added). Judge Lasnik concluded that the
17 Parity Act expanded coverage of neurodevelopmental therapies beyond what was
18 required under the Neurodevelopmental Therapy Act, RCW 48.44.450. *Id.*, p. *4.

19 By its plain terms, RCW 48.44.450 evidences legislative intent
20 to establish a minimum mandatory level of "coverage for
21 neurodevelopmental therapies for covered individuals age
22 six and under." Equally plain, however, is that RCW
23 48.44.450 does not preclude providers from extending that
24 same coverage to individuals older than six. *The statute*
25 *establishes a floor, not a ceiling.*

26 When it enacted [the Mental Health Parity Act], Washington
raised the minimum standard by *further* requiring that
mental health coverage "be delivered under the same terms
and conditions as medical and surgical services."

³ All major health carriers in Washington use the same or similar exclusions in their health benefit plans. See, e.g., *Z.D. v. Group Health Cooperative*, No. 2:11-cv-01119 (W.D. Wash. J. Lasnik); *A.G. v. Premera Blue Cross et al.*, No. 11-2-30233-4 SEA (King Cty. Sup. Ct., J. Trickey).

1 *Id.* (emphasis added).

2 This Court should similarly conclude that Regence's exclusion of
3 medically necessary neurodevelopmental therapies violates the Mental Health Parity
4 Act. Regence's exclusionary clause is exactly the kind of discrimination in health
5 insurance that the Parity Act was designed to end.

6 **II. RELIEF REQUESTED**

7 Plaintiff seeks a declaration that Regence's blanket exclusion of
8 neurodevelopmental therapies in its non-ERISA contracts is void and unenforceable
9 because the exclusion violates the requirements of the Parity Act.⁴

10 **III. EVIDENCE RELIED UPON**

11 Plaintiffs rely upon the Declarations of G.T., Eleanor Hamburger and
12 Kathleen Sirianni and all attached exhibits and the records, pleadings and files in this
13 case.

14 **IV. FACTS**

15 **A. Identity of Plaintiff.**

16 O.S.T. is the six-year-old son of G.T. and E.S. G.T. Declaration, ¶ 2.
17 O.S.T. has been diagnosed with a feeding disorder and autism. *Id.*, ¶¶ 4-5. O.S.T. has
18 received neurodevelopmental therapies (speech, occupational and physical therapy) to
19 treat his feeding disorder and autism. *Id.*, ¶¶ 6-9. O.S.T.'s neurodevelopmental
20 therapies were denied by Regence under the neurodevelopmental therapy exclusion in
21 his Regence contract. *Id.*, ¶¶ 7, 9.

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26 ⁴ This Motion does not address Regence's exclusion of ABA therapy for persons with autism. Such a motion will be brought later in this litigation after additional discovery is obtained.

1 **B. Identity of Defendants.**

2 Regence Blue Cross is a licensed health care service contractor in
3 Washington state, also known as a "health carrier." *Id.*; see RCW 48.43.005(23);
4 Regence's Answer, ¶ 2. O.S.T. was insured under an individual policy issued by
5 Regence from January 2006 to October 2010. G.T. Decl., ¶ 3.

6 **C. Neurodevelopmental Therapies Can Be Medically Necessary to
7 Treat Persons with Autism.**

8 The Washington Department of Health describes Autism and Autism
9 Spectrum Disorders (ASDs) as follows:

10 Autism spectrum disorders (ASD) are pervasive develop-
11 mental disorders characterized by impairments or delays in
12 social interaction, communication and language, as well as by
13 repetitive routines and behaviors. They are called spectrum
14 disorders because of the wide range and severity of
15 symptoms. Children diagnosed with ASD suffer from
16 problems with sensory integration, speech, and basic
17 functions like toilet training, getting dressed, eating meals,
18 brushing teeth, or sitting still during classes. Many medical
19 conditions can accompany autism spectrum disorders. These
20 include digestive problems, severe allergies, inability to
21 detoxify, very high rate of infection, and vision problems.
22 Some children with ASD display violent or self-harmful
23 behaviors. IQs in children with this disorder range from
24 superior to severely mentally retarded.

25 Hamburger Decl., *Exh. C*, Department of Health Sunrise Review of Autism Services
26 Mandate legislation, p. 5 (2009). Treatment of individuals, particularly children, is
critical. As the United States Surgeon General notes:

 Because autism is a severe, chronic developmental disorder,
which results in significant lifelong disability, the goal of
treatment is to promote the child's social and language
development and minimize behaviors that interfere with the
child's functioning and learning.

Id., *Exh. D* (excerpt from DHS, *Mental Health: A Report of the Surgeon General*, p. 163
(1999)).

1 ASD has no known cure. However, it can effectively be treated. In
2 particular, speech therapy and occupational therapy are often essential therapies to
3 improve functioning in children with autism. These therapies are so critical that
4 coverage of speech, occupational and physical therapies was among the top priorities
5 for the State's Autism Task Force. *Id.*, *Exh. E* p. 9. The Washington Department of
6 Health further concluded that neurodevelopmental therapies, including speech,
7 occupational and physical therapies, are essential components of effective, early
8 intervention for children with autism. *Id.*, *Exh. C*, p. 15 ("Neurodevelopmental
9 therapies are effective in treating ASD [Autism Spectrum Disorders]"). So did the
10 American Academy of Pediatrics and the U.S. Surgeon General. *Id.*, *Exh. F*, pp. 1165-
11 1166 ("People with ASDs have deficits in social communication and treatment by a
12 speech-language pathologist usually is appropriate"; "traditional occupational therapy
13 is often provided to promote development of self-care skills..."); *Exh. D*, p. 163 ("The
14 goal of treatment is to promote the child's social and language development and
15 minimize behaviors that interfere with the child's functioning and learning"). Courts
16 around the country have also concluded that neurodevelopmental therapy can be
17 medically necessary for treating children with autism, overriding insurer exclusions
18 and denials of the therapies. See, e.g., *Markiewicz v. State Health Benefits Comm'n*, 915
19 A.2d 553, 561 (App. Div. 2007) ("[A]n exclusion from coverage for claims based upon
20 occupational, speech and physical therapy offered to developmentally disabled
21 children would render meaningless the specific inclusion of PDD and autism within
22 those [] mental illnesses subject to the parity statute"); *Micheletti v. State Health Benefits*
23 *Comm'n*, 913 A.2d 842, 851 (App. Div. 2007) (same); *Bails v. Blue Cross/Blue Shield of*
24 *Illinois*, 438 F. Supp. 2d 914, 929 (N.D. Ill. 2006); *Wheeler v. Aetna Life Ins. Co.*, 2003 WL
25 21789029 (N.D. Ill. 2003).

26

1 D. **O.S.T. Needed and Received Neurodevelopmental Therapies
2 to Treat His Feeding Disorder and Autism.**

3 O.S.T. was first diagnosed with a feeding disorder when he was one year
4 old. G.T. Decl., ¶ 4; *see also* Hamburger Decl., *Exhs. G, H* (O.S.T. was diagnosed with a
5 DSM-IV condition, coded as 307.59 "Feeding Disorder of Infancy and Early
6 Childhood"). In 2009, he was diagnosed with autism, although his therapists had
7 concluded that he was autistic long before the formal diagnosis. G.T. Decl., *Exhs. A, B.*

8 From 2006 to 2008, O.S.T. received his neurodevelopmental therapy
9 services from Boyer Children's Clinic. *Id.*, ¶ 6. Claims for at least some of these
10 therapies were denied by Regence due to its neurodevelopmental therapy exclusion.
11 *See, e.g.,* Hamburger Decl., *Exh. K.*⁵

12 O.S.T. transitioned from Boyer's program when he turned three years old.
13 At that time, the Boyer therapists recommended that he receive ongoing
14 neurodevelopmental therapy services. G.T. Decl., *Exh. B.* Despite their
15 recommendations, Regence did not pay for any of O.S.T.'s neurodevelopmental
16 therapy services from the fall of 2008 until his Regence coverage was terminated in
17 October 2010. *Id.*, ¶ 9. Regence denied all of those claims due to its exclusion of
18 neurodevelopmental therapy services in O.S.T.'s policy.⁶ O.S.T.'s parents paid for the
19 therapy services instead. *Id.*; *see, e.g.,* Hamburger Decl., *Exh. L.*

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22 ⁵ O.S.T.'s parents did not pay for the services provided by Boyer Children's Clinic that were not
23 covered by Regence. Boyer had other funding sources to pay for the therapy when O.S.T.'s Regence
24 insurance denied coverage. G.T. Decl., ¶ 6.

25 ⁶ O.S.T. had no obligation to exhaust administrative remedies as there is no exhaustion requirement
26 in either Washington law or his Regence contract. *See* RCW 48.44.530; .535 (no exhaustion requirement
in statute); Hamburger Decl., *Exh. A*, Section 5.9, pp. 24-26 (no contractual requirement to exhaust
administrative remedies before filing litigation). Moreover, where, as here, Regence's policy is
"unequivocally clear," any administrative appeal was futile and no exhaustion is required. *Young v.*
Regence BlueShield, 2008 WL 4163112, *3 (W.D. Wash. 2008).

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V. LAW AND ARGUMENT

A. The Parity Act Requires Coverage of Medically Necessary Neurodevelopmental Therapies to Treat Covered DSM-IV Conditions.

The Parity Act requires that *all* health benefit plans issued by health carriers shall comply with its mandate:

All health service contracts providing health benefit plans that provide coverage for medical and surgical services shall provide:

(a) ...coverage for:

(i) Mental Health Services

RCW 48.44.341(2) (emphasis added). The term “mental health services” is defined as treatment necessary to treat mental disorders identified in the DSM-IV-TR (with four exceptions, which do not apply here):

“[M]ental health services” means 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*, published by the American psychiatric association, on July 24, 2005, or such subsequent date as may be provided by the insurance commissioner by rule, consistent with the purposes of chapter 6, Laws of 2005

RCW 48.44.341(1) (emphasis added).⁷ The Parity Act allows health plans to determine whether particular mental health services are “medically necessary” so long as a “comparable requirement is applicable to medical and surgical services.” RCW 48.44.341(4).

The Parity Act’s two requirements—coverage and comparable treatment limitations—are designed to end the historic discrimination by health insurers experienced by persons with mental disorders. As the U.S. Surgeon General noted:

⁷ The version of the DSM published on July 24, 2005 is the *Diagnostic and Statistical Manual of Mental Disorders*, 4th Ed. Text Revision (DSM-IV-TR). There has been no update, and the Insurance Commissioner has not, by rule, adopted a different version of the DSM.

1 Stigmatization of people with mental disorders has persisted
2 through history It deters the public from seeking, and
3 wanting to pay for care. In its most overt and egregious
4 form, stigma results in outright discrimination.

5 Hamburger Decl., *Exh. D*, Preface, p. 6. Passage of the Parity Act was intended to wipe
6 out such discrimination. The Legislature intended that the Parity Act would require
7 insurance coverage to be provided to treat mental disorders in just the same way that
8 other physical conditions are covered:

9 The legislature finds that the potential benefits of improved
10 access to mental health services are significant. Additionally,
11 the legislature declares that it is not cost-effective to treat
12 persons with mental disorders differently than persons with
13 medical and surgical disorders.

14 *Therefore, the legislature intends to require that insurance
15 coverage be at parity for mental health services, which
16 means this coverage be delivered under the same terms and
17 conditions as medical and surgical services.*

18 *Id.*, *Exh. M*, pp. 1-2 (emphasis added); see also *id.*, *Exh. N*, p. 7 (“[T]hat physical and
19 mental illnesses should be treated the same in insurance coverage, as a matter of
20 fairness, has ethical appeal that goes beyond the sunset criteria”).

21 The Parity Act renders Regence’s contractual exclusion of
22 neurodevelopmental therapies void. As plaintiff shows below, (1) Regence is covered
23 by the Parity Act because it is a health care service contractor that issues health benefit
24 plans for the benefit of insured enrollees such as the plaintiff; (2) O.S.T.’s autism and
25 feeding disorder are DSM-IV mental conditions, also covered by the Act; and
26 (3) neurodevelopmental therapies, such as the speech, occupational and physical
therapies provided to O.S.T., can be medically necessary therapies to treat autism,
feeding disorders and other DSM-IV conditions. Indeed, neurodevelopmental therapy
services were medically necessary for O.S.T. Under the Parity Act, Regence’s contract

1 exclusion of those therapies, even when medically necessary to treat DSM-IV
2 conditions, is prohibited.

3 **1. Regence Is a "Health Carrier" that Issues "Health Plans"**
4 **Under the Parity Act.**

5 Regence is licensed health care service contractor. Regence Answer, ¶ 2;
6 RCW 48.44.010(9). Health care service contractors are "health carriers." RCW
7 48.43.005(23). As a "health carrier," Regence issues "health plans" or "health benefit
8 plans." RCW 48.43.005(24) ("Health plan' or "health benefit plan' means any policy,
9 contract, or agreement offered by a health carrier to provide, arrange, reimburse or pay
10 for health care services ..."). Thus, health plans issued by Regence, including O.S.T.'s,
11 must comply with the Parity Act.

12 **2. Autism and ASD Are DSM-IV Conditions.**

13 O.S.T. is diagnosed with a feeding disorder and autism, both specific
14 mental conditions in the DSM-IV. G.T. Decl., *Exh. A*, p. 4 (O.S.T. is diagnosed with
15 autism); Hamburger Decl., *Exh. C*, p. 9 ("Autism spectrum disorder is a disorder
16 included in the DSM"); *Exhs. G, H* (O.S.T. is diagnosed with 307.59 DSM-IV Feeding
17 Disorder). As such, under the Parity Act, O.S.T. was entitled to coverage for medically
18 necessary treatment to address his feeding disorder and autism. RCW 48.44.341(2).

19 **3. Neurodevelopmental Therapies Can Be Medically**
20 **Necessary to Treat Autism and Feeding Disorders.**

21 Neurodevelopmental therapies are key forms of intervention when
22 treating autism and feeding disorders. *See* Sect. IV. C; Hamburger Decl., *Exh. J* (in 2006,
23 Regence covered O.S.T.'s evaluation and some therapy by a speech therapist related to
24 his feeding disorder, but only as an alternative to hospitalization). O.S.T.'s providers
25 determined that his neurodevelopmental therapy services were medically necessary.
26 G.T. Decl., *Exh. B* (Boyer Children's Clinic recommended ongoing speech therapy to
increase O.S.T.'s initiation of communication; feeding therapy to assist with reducing

1 behavioral responses related to feeding; occupational therapy to assist with building
2 strength to avoid falls and injuries and improve his ability to use tools (scissors,
3 utensils, pens), and physical therapy to assist with improving his ability to walk up
4 and down stairs independently, among other recommendations).

5 Regence has never denied O.S.T.'s neurodevelopmental therapies on the
6 basis of medical necessity. Regence denied coverage based upon its contract exclusion
7 of neurodevelopmental therapies. G.T. Decl., ¶ 11; *see, e.g.*, Hamburger Decl., *Exhs. K, L*.

8 **B. Regence's Exclusion of Neurodevelopmental Therapies Is Void**
9 **and Unenforceable.**

10 **1. The Terms of a Health Plan Include State Mandates.**

11 There is no dispute that the literal written terms of O.S.T.'s policy exclude
12 neurodevelopmental therapy services. Hamburger Decl., *Exh. A*, p. 34, Sect. 6.5.37
13 (under "LIMITATIONS AND EXCLUSIONS," O.S.T.'s Regence contract lists
14 "Treatment for neurodevelopmental therapy"). The "terms of" a health plan, however,
15 must include all statutorily mandated benefits, whether or not the health carrier
16 properly codifies those terms in the plan.

17 It is fundamental insurance law that the "terms of" insurance policies
18 include requirements or restrictions imposed by state law. Russ, Lee R., Segalla,
19 Thomas F., *COUCH ON INSURANCE 3D, Statutory law as part of contract*, § 19:1 (2011). In
20 the event of a conflict between the written words of a policy and the requirements of
21 state law, state law will supersede the literal written terms of the contract:

22 As a general rule, stipulations in a contract of insurance in
23 conflict with, or repugnant to, statutory provisions which are
24 applicable to the contract are invalid since contracts cannot
25 change existing statutory laws. *If the terms of an insurance*
26 *policy do not comport with the statutory requirements, the*
statutory requirements supersede the conflicting policy
provisions and become part of the insurance policy itself.

1 *Id.*, § 19:3 (footnotes omitted) (emphasis added). *See also Brown v. Snohomish County*
2 *Physicians Corp.*, 120 Wn.2d 747, 753, 845 P.2d 334 (1993). In *Brown*, the Washington
3 Supreme Court considered whether certain contract limitations in health insurance
4 contracts were enforceable, or void. The court concluded that “limitations in insurance
5 contracts which are contrary to public policy and statute will not be enforced.” *Id.* In
6 that case, the health plans at issue were reformed, eliminating the contract limitation
7 that prevented full coverage to the insured. *Id.* at 759.

8 Courts in other jurisdictions, when faced with insurance policies that
9 violate mandatory coverage requirements, have read those requirements into the
10 policy. *Aetna Cas. & Sur. Co. v. McMichael*, 906 P.2d 92, 101 (Colo. 1995); *Wetzel v. Lou*
11 *Ehlers Cadillac Group Long Term Disability Ins. Program*, 222 F.3d 643, 648 n. 4 (9th Cir.
12 2000); *Plumb v. Fluid Pump Service, Inc.*, 124 F.3d 849, 861 (7th Cir. 1997) (“[E]xisting and
13 valid statutory provisions enter into and form a part of all contracts of insurance to
14 which they are applicable, and, together with settled judicial construction thereof,
15 become part of the contract as much as if they were actually incorporated therein”).

16 Not only is the Parity Act incorporated as “terms of” the plan as a matter
17 of state law, it is expressly incorporated into O.S.T.’s policy as a matter of contract law.
18 Regence’s contract with O.S.T. expressly incorporates state law:

19 SECTION 5.14 STATE LAW. This Contract is entered into
20 and delivered in the State of Washington. To the extent state
21 law is applicable, *Washington law will cover the interpretation of this Contract.*

22 *Hamburger Decl., Exh. A*, p. 27 (emphasis added). Here, as in the Group Health case,
23 “[t]he problem for Defendants lies in the fact that Washington law governs the Plan. ...
24 Washington law, specifically [the Mental Health Parity Act, RCW 48.44.341(2)],
25 requires Defendants to provide coverage for the mental health services at issue in this
26 case.” *Z.D.*, 2011 WL 5299592, *3 (internal citations omitted).

1 C. **The Mental Health Parity Act Is in Complete Harmony With the**
2 **Neurodevelopmental Mandate.**

3 The Parity Act is not limited by the separate Neurodevelopmental
4 Therapy Act, RCW 48.44.450. Indeed, the two Acts work hand in hand. Where statutes
5 overlap, “effect will be given to both to the extent possible” and “efforts will be made
6 to harmonize statutes.” *Walker v. Wenatchee Valley Truck and Auto Outlet, Inc.*, 155 Wn.
7 App. 199, 208, 229 P.3d 871 (2010). When simultaneous compliance is possible there
8 simply is no statutory conflict—both statutes will be enforced as written:

9 Where two legislative enactments relate to the same subject
10 matter and are not actually in conflict, they should be
11 interpreted to give meaning and effect to both. Such
12 construction gives significance to both acts of the legislature.

13 *Davis v. King County*, 77 Wn.2d 930, 933, 468 P.2d 679 (1970); *see Z.D.*, *4, *citing to same*
14 *cases; Mortell v. State*, 118 Wn. App. 846, 849, 78 P.3d 197, 198 (2003) (“Statutes relating
15 to the same subject matter will be read as complimentary”).

16 In 1985, Washington passed a Neurodevelopmental Therapy Act which
17 required employer-sponsored group plans in Washington to provide some minimal
18 coverage of neurodevelopmental therapies to children under the age of seven. RCW
19 48.44.450. The statute did not address whether or how neurodevelopmental therapies
20 would be covered in individual policies, such as O.S.T.’s. *Id.* Regence (and the other
21 major health carriers) chose to provide the barest minimum, excluding
22 neurodevelopmental therapy coverage entirely in its individual market plans, and for
23 persons over the age of six in its group plans. *See Sirianni Decl.*, ¶ 4; *see, e.g.*,
24 *Hamburger Decl., Exh. A*, p. 34; *Exh. B*, p. 12.

25 After the Mental Health Parity Act took effect, health carriers were
26 required to reconsider their provision of neurodevelopmental therapies, in light of the
27 minimum requirements mandated by the Parity Act. Thus, health carriers could no
28 longer exclude medically necessary neurodevelopmental therapies for individuals with

1 DSM-IV conditions. In essence, the Parity Act raised the "floor" to expand coverage.

2 As Judge Lasnik explained:

3 Defendant can readily comply with both statutes simply by
4 comporting with the parity requirements of [RCW 48.44.341]
5 for all covered individuals, keeping in mind that RCW
6 48.44.450 confers a more specific and more onerous require-
7 ment upon Defendants to provide neurodevelopmental
8 therapies for covered individuals age six and under, without
9 regard for parity.

8 *Z.D.*, 2011 WL 5299592, p. *4. This is not a close question. Denying Group Health's
9 request that this issue be certified to the Washington Supreme Court, Judge Lasnik
10 determined:

11 ... [T]he Court sees no justification for certifying. As the
12 Court concluded in its previous Order, this is not a close
13 question. *Applying common and well-accepted principles of*
14 *statutory construction, the Court readily concluded that no*
15 *conflict exists between the Neurodevelopmental Therapy*
16 *Mandate, RCW 48.44.450, and the Mental Health Parity Act,*
17 *RCW 48.46.291.*

16 *Z.D. v. Group Health Cooperative*, No. 2:11-cv-01119-RSL, Dkt. No. 36, Order dated
17 12/20/11, Appendix B (emphasis added).

18 VI. CONCLUSION

19 Regence does not get to choose which state mandate it wants to follow
20 while ignoring the other. It is required to follow both. Here, providing mental health
21 services required by the Parity Act does not in any way jeopardize Regence's
22 compliance with the neurodevelopmental mandate. Nor does complying with the
23 neurodevelopmental mandate jeopardize compliance with the Parity Act. The statutes
24 are complimentary, and both can—and should—be enforced as written. *Z.D.*, 2011 WL
25 5299592, p. *4. The Court should find that Regence's neurodevelopmental therapy
26 exclusion violates the Mental Health Parity Act.

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DATED: February 24, 2012.

SIRIANNI YOUTZ SPOONEMORE

/s/ Eleanor Hamburger
Eleanor Hamburger (WSBA #26478)
Richard E. Spoonemore (WSBA #21833)
Attorneys for Plaintiff

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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 February 24, 2012, I caused a copy of the foregoing document to be served on all counsel of record as indicated below:

Timothy J. Parker	<input checked="" type="checkbox"/>	By First-Class Mail
CARNEY BADLEY SPELLMAN, P.S.	<input checked="" type="checkbox"/>	By Email
701 Fifth Avenue, Suite 3600		Tel. (206) 622-8020
Seattle, WA 98104		Fax (206) 467-8215
<i>Attorneys for Defendant Regence BlueShield</i>		<u>parker@carneylaw.com</u>

DATED: February 24, 2012, at Seattle, Washington.

/s/ Eleanor Hamburger

Exhibit 2

R.A. 000017

HON. JOHN P. ERLICK
Noted for Consideration: April 20, 2012
Without Oral Argument

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IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

O.S.T., by and through his parents, G.T. and
E.S., 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

PLAINTIFF'S MOTION FOR
CLASS CERTIFICATION OF
NEURODEVELOPMENTAL
THERAPY CLASS

I. INTRODUCTION

Regence Blueshield ("Regence") has a uniform policy of excluding neurodevelopmental therapies in its individual and non-ERISA group policies. For Regence's insureds with DSM-IV mental conditions, like O.S.T., Regence's contract exclusions violate Washington's Mental Health Parity Act. *See* RCW 48.44.341.

It is true that the literal terms of the Plan, as written, do not require coverage for the mental health treatment of individuals over the age of six. The problem for Defendants lies in the fact that Washington law governs the Plan. And, as alleged by Plaintiffs, Washington law, specifically RCW 48.46.291(2), requires Defendants to provide coverage for the mental health services at issue in this case.

Z.D., ex rel. J.D. v. Group Health Coop., ___ F. Supp. 2d ___, 2011 WL 5299592, *3 (W.D. Wash. Nov. 4, 2011).

1 Class actions were specifically designed to address, in one proceeding,
2 this type of uniform and systematic violation of the law. Here, Regence has adopted
3 and applied an exclusion in violation of law which affected thousands of individuals.
4 Those harmed by the illegal exclusion of benefits are entitled to seek remedies, both
5 declaratory and monetary. Specifically, a class of past and present beneficiaries should
6 be certified to seek declaratory and monetary relief resulting from Regence's illegal
7 exclusion of benefits.

8 II. CLASS DEFINITION

9 Plaintiff seeks to be appointed as class representative, and his counsel as
10 class counsel, for a class certified under Civil Rule 23(b)(3) to be called the
11 Neurodevelopmental Therapy Subclass.¹ The class is defined as all individuals who:

12 (1) are, or have been covered under a non-ERISA
13 governed "health plan" as that term is defined by
14 RCW 48.43.005 (19), that has been or will be delivered,
15 issued for delivery, or renewed on or after January 1, 2006
16 by Regence; and

17 (2) have required, require or are expected to require
18 neurodevelopmental therapy for the treatment of a qualified
19 mental health condition.

20 Definitions: For purposes of both subclasses:

21 (1) the term "Regence" shall mean (a) Regence Blueshield
22 (b) any affiliate of defendant; (c) predecessors or successors
23 in interest of any of the foregoing; and (d) all subsidiaries or
24 parent entities of any of the foregoing; and

25 (2) the term "qualified mental health condition" shall
26 mean a condition listed in the DSM-IV-TR other than

¹ After additional discovery is completed, plaintiff will also seek to certify a second class of Regence past and present insureds with Autism Spectrum Disorders (ASDs) who need Applied Behavior Analysis (ABA) therapy, an evidence-based behavioral therapy used to treat ASDs, which is also routinely excluded by Regence in violation of the Mental Health Parity Act.

1 (a) substance related disorders and (b) life transition
2 problems, currently referred to as "V" codes, and diagnostic
3 codes 302 through 302.9 as found in the Diagnostic and
4 Statistical Manual of Mental Disorders, Fourth Edition,
5 published by the American Psychiatric Association, where
6 the service received, required, or expected to be required is
7 not properly classified as skilled nursing facility services,
8 home health care, residential treatment, custodial care or
9 non-medically necessary court-ordered treatment.

10 III. STATEMENT OF FACTS

11 A. Regence Has an Official Position of Excluding Neurodevelopmental 12 Therapy to All Insureds With Individual Policies and to Insureds Older 13 Than Six in Its Non-ERISA Group Policies.

14 Regence completely excludes coverage of neurodevelopmental therapies,
15 generally classified as speech, occupational and physical therapies, in its individual
16 health plans. Sirianni Decl. ¶ 4; *see, e.g.*, Hamburger Decl. *Exh. A*, p. 30. Regence
17 excludes all neurodevelopmental therapies for all insureds age seven and older in its
18 non-ERISA group health plan. Sirianni Decl. ¶ 4; *see, e.g.*, Hamburger Decl. *Exh. B*,
19 p. 12.

20 B. The Plaintiff.

21 O.S.T. is the six-year-old son and dependent of G.T. and E.S. Complaint
22 ¶ 1; Answer ¶ 1. From January 1, 2006, to October 2010, O.S.T. was insured under a
23 health insurance plan issued, delivered, administered and insured by Regence. *Id.*
24 O.S.T.'s coverage was through an individual policy purchased by his parents. *Id.*

25 O.S.T. was diagnosed with at least two DSM-IV conditions during the
26 time he had Regence coverage. He was first diagnosed with a feeding disorder. G.T.
Decl. ¶ 4; Hamburger Decl., *Exhs. G, H*. Later, O.S.T. was diagnosed with autism. G.T.
Decl. ¶¶ 12, 14, *Exh. A*. During this time period, O.S.T. received neurodevelopmental
therapies to treat his autism and feeding disorder. *Id.* ¶¶ 8-14. He received these
therapies from Boyer Children's Clinic, Seattle Children's Hospital, and other

1 neurodevelopmental therapy providers. *Id.*; see also Hamburger Decl. Exhs. K, L.
2 Regence denied these claims under its standard neurodevelopmental therapy
3 exclusion. *Id.*

4 **C. The Claims.**

5 Plaintiff and the putative class seek to enforce the requirements of the
6 Parity Act as it is applied to individuals with DSM-identified developmental
7 conditions.

8 *First*, plaintiff and the putative neurodevelopmental therapy class seek
9 injunctive and declaratory relief under the Washington Consumer Protection Act
10 (“CPA”), the Uniform Declaratory Judgment Act, and under common law to invalidate
11 Regence’s explicit exclusion for neurodevelopmental therapies in its individual and
12 non-ERISA group health plans. Complaint ¶¶ 26-34.

13 *Second*, plaintiff and a putative ABA therapy class (to be certified at a
14 later date) seek injunctive and declaratory relief under the Washington CPA, the
15 Uniform Declaratory Judgment Act, and under common law to invalidate Regence’s
16 internal policies and procedures that result in a complete exclusion for ABA therapy
17 services to individuals with ASD. Complaint ¶¶ 26-34.

18 *Third*, plaintiff and class members of both putative classes seek monetary
19 and equitable damages as a result of Regence’s failure to comply with the Parity Act,
20 its breach of contract, and the Washington CPA. Complaint ¶¶ 24-25, 28-31.

21 **IV. STATEMENT OF ISSUE**

22 Should the neurodevelopmental therapy class be certified with plaintiff
23 O.S.T. named as class representative and Sirianni Youtz Spoonemore as class counsel?

24 **V. EVIDENCE RELIED UPON**

25 Plaintiffs rely upon the Declarations of G.T., Frank Fox, Ph.D., Richard E.
26 Spoonemore, Eleanor Hamburger, and Kathleen Sirianni, and all exhibits, as well as the

1 filings and pleadings previously filed in this case.

2
3 VI. AUTHORITY

4 As reaffirmed in December, class actions are favored in Washington, and
5 any doubt should be resolved in favor of certification:

6 CR 23 is liberally interpreted because the “rule avoids
7 multiplicity of litigation, “saves members of the class the
8 cost and trouble of filing individual suits[,] and ... also frees
9 the defendant from the harassment of identical future
10 litigation.” [citation omitted] A class is always subject to
11 later modification or decertification by the trial court, and
12 hence the trial court should err in favor of certifying the
13 class.

14 *Moeller v. Farmers Ins.*, __ Wn.2d. __, 2011 WL 6778518, *7 (Dec. 22, 2011); *see also Smith*
15 *v. Behr Process Corp.*, 113 Wn. App. 306, 318, 54 P.3d 665 (2002). *Moeller*, the first
16 decision on class certification by the Washington Supreme Court since *Wal-Mart Stores,*
17 *Inc. v. Dukes*, __ U.S. __, 131 S. Ct. 2541 (2011), affirms Washington’s liberal approach to
18 class certification.

19 Motions for class certification are governed by Civil Rule 23. The moving
20 party must show that the prerequisites of CR 23(a) are satisfied and that at least *one* of
21 the three subsections of CR 23(b) is met. *Washington Educ. Ass’n v. Shelton Sch. Dist.*, 93
22 Wn.2d 783, 789, 613 P.2d 769 (1980). Under controlling Washington law, unlike federal
23 law, the Court does not examine the merits of the case in order to determine if
24 certification is appropriate, and the Court must accept plaintiff’s factual allegations as
25 true for purposes of the certification motion. *Id.* at 790 (“the certification of a class is to
26 be undertaken with no consideration of the merits of the plaintiffs’ claims”). As shown
below, plaintiff’s allegations satisfy each of the requirements of CR 23(a), in addition to
CR 23(b)(3).

1 **A. The Requirements for Class Certification Under CR 23(a) Are Met.**

2 **1. Numerosity.**

3 CR 23(a)(1) requires that the class be so numerous that joinder of all class
4 members is impracticable. *Washington Educ. Ass'n*, 93 Wn.2d at 783; *Zimmer v. The City*
5 *of Seattle*, 19 Wn. App. 864, 868, 578 P.2d 548 (1978). It is generally not necessary to
6 know the exact size of the class, just that the size is large enough that joinder is
7 impracticable. *Bower v. Bunker Hill Co.*, 114 F.R.D. 587, 592 (E.D. Wash. 1986) (plaintiff
8 need not show exact size of class; numerosity met where "general knowledge and
9 common sense indicate that it is large"). Classes exceeding 40 members typically
10 satisfy the numerosity requirement. *Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 821,
11 64 P.3d 49, 53 (2003) ("As a general rule, where a class contains at least 40 members,
12 federal courts have recognized a rebuttable presumption that joinder is
13 impracticable.").

14 Plaintiff's proposed neurodevelopmental therapy class is projected to
15 number in the thousands. Fox Decl. ¶ 9. Numerosity under CR 23(a)(1) is plainly met.

16 **2. Commonality.**

17 CR 23(a)(2) requires plaintiffs to show that questions of law or fact are
18 common to each member of the proposed class. The existence of shared legal issues
19 establishes commonality:

20 Indeed, Rule 23(a)(2) has been construed permissively. All
21 questions of fact and law need not be common to satisfy the
22 rule. The existence of shared legal issues with divergent
23 factual predicates is sufficient, as is a common core of salient
facts coupled with disparate legal remedies within the class.

24 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). See also *Smith*, 113 Wn. App.
25 at 320 ("there is a low threshold to satisfy this [commonality] test").

1 CR 23(a)(2) requires that there be at least one question of law or fact
2 common to members of the class. *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001);
3 *Blackie v. Barrack*, 524 F.2d 891, 904 (9th Cir. 1975); *Smith*, 113 Wn. App. at 320 (“there
4 need only be a single issue common to all members of the class”) (*quoting* NEWBERG ON
5 CLASS ACTIONS § 3:10 (3^d ed. 1992)). Commonality does not require that plaintiff’s
6 injuries be identical to those of other class members, only that the injuries be similar
7 and that they result from the same course of conduct. *King v. Riveland*, 125 Wn.2d 500,
8 519, 886 P.2d 160 (1994) (certification appropriate when defendant engaged in common
9 course of conduct, even if conduct affected prospective class members differently).
10 Ultimately, the test looks to whether the *answers* to the shared legal issue or issues will
11 result in class-wide adjudication:

12 What matters to class certification ... is ... the capacity of
13 a classwide proceeding to generate common *answers* apt to
drive the resolution of the litigation.

14 *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541, 2551 (2011) (*quoting* Nagareda,
15 *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

16 In this case there is a single overarching question of law that affects every
17 proposed class member: Does Regence’s neurodevelopmental therapy exclusion,
18 which excludes coverage even when medically necessary to treat qualified mental
19 health conditions, violate the Parity Act? The Parity Act requires Regence’s health
20 plans to cover “mental health services,” defined as any medically necessary outpatient
21 and inpatient service provided to treat a mental disorder covered by the diagnostic
22 categories in the DSM-IV-TR. See RCW 48.44.341(1). The law renders void and
23 unenforceable all health plan provisions that automatically exclude coverage or
24 establish treatment limitations different than those for medical and surgical services. A
25 determination of this issue will in turn determine whether plaintiff and the class are
26 entitled to declaratory and injunctive relief prohibiting the improper conduct, and

1 damages for breach of contract and violations of the CPA. The requirements of
2 CR 23(a)(2) are met.

3 **3. O.S.T.'s Claims Are Typical of the Neurodevelopmental**
4 **Therapy Class.**

5 The requirement of CR 23(a)(3) is met where "the claims or defenses of
6 the representative parties are typical of the claims or defenses of the class."
7 CR 23(a)(3). Where there is such an alignment of interests, a named plaintiff who
8 vigorously pursues his or her own interests will necessarily advance the interests of the
9 class.

10 The test of typicality is whether (1) other members have the same or
11 similar injury, (2) the action is based on conduct which is not unique to the named
12 plaintiff, and (3) other class members have been injured by the same course of conduct.
13 *Hansen v. Ticket Track, Inc.*, 213 F.R.D. 412, 415 (W.D. Wash. 2003). "Where the same
14 unlawful conduct is alleged to have affected both the named plaintiffs and the class
15 members, varying fact patterns in the individual claims will not defeat the typicality
16 requirement." *Smith*, 113 Wn. App. at 320. All that is required is that class members
17 have injuries similar to the representative and that those injuries result from the same
18 course of conduct. NEWBERG ON CLASS ACTIONS § 3:15 (4th ed. 2011).

19 Here, plaintiff bases his claims on the same legal theory as those of the
20 class as a whole: that the Parity Act requires defendants to provide coverage for
21 medically necessary mental health services (including neurodevelopmental therapies)
22 designed to treat DSM-IV conditions. O.S.T. has been denied coverage for medically
23 necessary treatments to treat his DSM-IV conditions of feeding disorder and autism
24 because of Regence's blanket exclusion of neurodevelopmental therapies in his policy.
25 He is well positioned to represent the interests of other individuals with DSM-IV
26

1 conditions who have required or require neurodevelopmental therapies. This action
2 meets the requirements of CR 23(a)(3).

3 **4. Adequate Representation.**

4 The requirement of adequate representation set forth in CR 23(a)(4) has
5 two components: “(1) do the named plaintiffs and their counsel have any conflicts of
6 interest with other class members and (2) will the named plaintiffs and their counsel
7 prosecute the action vigorously on behalf of the class?” *Hanlon v. Chrysler Corp.*, 150
8 F.3d 1011, 1020 (9th Cir. 1998). Where there are no conflicts between the class
9 representative and other class members, the focus is “primarily on class counsel, not on
10 the plaintiff, to determine if there will be vigorous prosecution of the class action.”
11 NEWBERG ON CLASS ACTIONS § 3:24 (4th ed. 2011).

12 The claims and interests of O.S.T. are not in conflict with any interests of
13 the proposed class. G.T. Decl. ¶ 21. As discussed above, his claims mirror the claims
14 and interests of the class. By advancing those interests, O.S.T. will necessarily advance
15 the interests of the proposed class members.

16 The declarations of counsel who represent O.S.T. establish that they are
17 well qualified and have and will commit adequate resources to conduct the litigation.
18 See Spoonemore Decl. ¶¶ 2-7; Hamburger Decl. ¶¶ 2-9. Counsel for O.S.T. have
19 extensive experience in class actions. See Spoonemore Decl. ¶¶ 3-5; Hamburger Decl.
20 ¶ 7. See, e.g., *McCluskey v. Trustees of Red Dot Corp.*, 268 F.R.D. 670, 678 (W.D. Wash.
21 2010) (noting Mr. Spoonemore’s extensive experience in class actions, and stating that
22 the court was “confident” in Mr. Spoonemore’s ability to fairly and adequately
23 represent the class); *Stanford v. Foamex*, 263 F.R.D. 156, 171 (E.D. Penn. 2009) (on
24 Mr. Spoonemore as class counsel: “[T]he court finds ... that plaintiff’s attorneys are
25 qualified, experienced, and able to pursue the legal interest of the entire proposed
26 class. Plaintiff’s counsel have ample experience and have enjoyed considerable success

1 in ERISA litigation [and] class action litigation"). Counsel has also undertaken
2 significant steps to identify and investigate potential claims. Hamburger Decl. ¶ 9.
3 The requirements of CR 23(a)(4) are satisfied.

4 **B. Certification of the Neurodevelopmental Therapy Class Is Proper**
5 **Under CR 23(b)(3).**

6 CR 23(b)(3) permits a class action when questions of law or fact common
7 to the class members predominate over questions affecting individual members, and
8 such an action is superior to other available methods of adjudicating the controversy.
9 *Sitton v. State Farm Mut. Auto Ins. Co.*, 116 Wn. App. 245, 253-55, 63 P.3d 198, 204-205
10 (2003). The rule "encompasses those cases in which a class action would achieve
11 economies of time, effort and expense, and would promote uniformity of decision as to
12 persons similarly situated without sacrificing procedural fairness or bringing about
13 other undesirable results." Rules Advisory Committee Notes to 1966 Amendments to
14 FRCP 23.

15 The focus of the common questions inquiry is on "whether a class suit for
16 the unitary adjudication of common issues is economical and efficient in the context of
17 all the issues in the suit." NEWBERG ON CLASS ACTIONS § 4:25 (4th ed. 2011). An action
18 will satisfy the test where a common issue is the "central or overriding question," or
19 where "there is an essential common link among class members and the defendant for
20 which the court provides a remedy." *Id.* Put otherwise, common issues are said to
21 predominate where there is a common nucleus of operative facts relevant to the
22 dispute, and those common questions represent a significant aspect of the case that can
23 be resolved for all members of the class in a single adjudication:

24 The predominance requirement is not a demand that
25 common issues be dispositive, or even determinative; it is
26 not a comparison of court time needed to adjudicate
common issues versus individual issues; nor is it a balancing
of the number of issues suitable for either common or

1 individual treatment. Rather, "[a] single common issue may
2 be the overriding one in the litigation, despite the fact that
3 the suit also entails numerous remaining individual
4 questions." The presence of individual issues may pose
5 management problems for the judge, but as the chief
6 commentator has observed, courts have a variety of
7 procedural options to reduce the burden of resolving
8 individual damage issues, including bifurcated trials, use of
9 subclasses or masters, pilot or test cases with selected class
10 members, or even class decertification after liability is
11 determined.

12 *Sitton*, 116 Wn. App. at 254-55.

13 In *Sitton*, for example, the court found that certification of a class under
14 CR 23(b)(3) was proper where the key question was whether State Farm was correctly
15 processing requests for medical treatment under its policies:

16 Here, the central allegation is that State Farm's utilization
17 reviews are not for the purpose of determining whether
18 medical treatment is covered, but are a means to wrongfully
19 deny or limit benefits. A common nucleus of operative facts
20 appears to exist on this issue, and that satisfies the
21 predominance standard of CR 23(b)(3).

22 *Id.* at 256.

23 This action is no different. As noted above, common factual and legal
24 issues concerning how Regence is implementing - or not implementing - the Parity Act
25 predominate the action. See Section VI, A, 2, *above*. The only difference between class
26 members is the amount and type of neurodevelopmental therapy needed. As in *Sitton*,
this type of individual question poses no bar to certification. *Id.*, 116 Wn. App. at
256-57. Nor does the difference in potential damages to which class members are
entitled affect certification because "[i]t is settled law that individual proof of damages
does not preclude certification of a class under Rule 23(b)(3) where common issues of
liability predominate." *Kromnick v. State Farm Ins. Co.*, 112 F.R.D. 124, 129 (E.D. Penn.

1 1986); *Sitton*, 116 Wn. App. at 256 (“individual issues such as causation and harm” pose
2 no bar to certification under CR 23(b)(3)).

3
4 **VII. CONCLUSION**

5 This Court should certify the Neurodevelopmental Therapy Class under
6 Civil Rule 23(b)(3) with plaintiff O.S.T. as the class representative and plaintiff’s
7 counsel as class counsel. As set forth in the proposed order, plaintiff should be
8 directed to draft notice and opt-out forms for members of the Neurodevelopmental
9 Therapy Class for the Court’s review and approval, and the defendants should be
10 directed to cooperate with plaintiff to provide him with the information necessary to
11 send notices to the class.

12 DATED: March 9, 2012.

13 SIRIANNI YOUTZ SPOONEMORE

14 /s/ Eleanor Hamburger

15 Eleanor Hamburger (WSBA #26478)

16 Richard E. Spoonemore (WSBA #21833)

17 Attorneys for Plaintiff

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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 March 9, 2012, I caused a copy of the foregoing document to be served on all counsel of record as indicated below:

Timothy J. Parker	<input checked="" type="checkbox"/>	By First-Class Mail
CARNEY BADLEY SPELLMAN, P.S.	<input checked="" type="checkbox"/>	By Email
701 Fifth Avenue, Suite 3600		Tel. (206) 622-8020
Seattle, WA 98104		Fax (206) 467-8215
<i>Attorneys for Defendant Regence BlueShield</i>		<u>parker@carneylaw.com</u>

DATED: March 9, 2012, at Seattle, Washington.

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

Exhibit 3

R.A. 000031

HON. JOHN P. ERLICK
Noted for Consideration: April 20, 2012
Without Oral Argument

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

O.S.T., by and through his parents, G.T. and
E.S., 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

DECLARATION OF KATHLEEN
SIRIANNI IN SUPPORT OF
PLAINTIFF'S MOTION FOR
CLASS CERTIFICATION OF
NEURODEVELOPMENTAL
THERAPY CLASS

I, Kathleen Sirianni, declare under penalty of perjury and in accordance
with the laws of the State of Washington that:

1. I am over the age of 18, not a party in the case, and competent to
testify to all matters stated herein. All statements are made upon my personal
knowledge.

2. I am a legal intern at the law firm of Sirianni Youtz Spoonemore. I
am also a second-year law student at Seattle University School of Law.

3. I reviewed the discovery produced by defendant Regence
BlueShield in response to Plaintiff's First Interrogatories and Requests for Production
of Documents.

4. Specifically, I reviewed each exemplar or specimen copy of
defendant's individual health plans and its non-ERISA Group Plans, also known as
church health plans, and governmental entity health plans, produced by defendant in

1 response to Plaintiff's Requests for Production Nos. 1 and 2, labeled by defendant as
2 RBS 000068 to RBS 003972. Each health plan I reviewed contained an exclusion for
3 neurodevelopmental therapies. All of the individual health plans contained complete
4 exclusions for neurodevelopmental therapies. All of the church and governmental
5 entity health plans excluded neurodevelopmental therapies provided to persons over
6 the age of six.

7 5. Attached as *Exhibit A* is a true and correct copy of an excerpt from
8 Regence BlueShield's Answers to Plaintiff's First Interrogatories and Requests for
9 Production of Documents, Requests for Production Nos. 1 and 2.

10 DATED: February 24, 2012, at Seattle, Washington.

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Kathleen Sirianni

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Seattle, WA 98104		Fax (206) 467-8215
<i>Attorneys for Defendant Regence BlueShield</i>		<u>parker@carneylaw.com</u>

DATED: March 9, 2012, at Seattle, Washington.

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

Exhibit 4

R.A. 000035

RECEIVED

MAR 12 2012

LAW OFFICE OF
SIRIANNI YOUTZ
SPOONEMORE

Honorable John P. Erlick

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

O.S.T., by and through his parents, G.T.
and E.S., 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

DECLARATION OF JOSEPH M.
GIFFORD, M.D.

I, Joseph M. Gifford, M.D., declare as follows:

1. I am the Executive Medical Director of Healthcare Services at Regence Blue Shield ("Regence"), a not-for-profit health carrier that is the defendant in this action. I attended University of California at Berkeley and obtained a degree in biochemistry. Thereafter, I completed medical school in 1980 at University of California at San Diego. I completed a residency in internal medicine at the University of Washington, and I have worked as an Emergency Department physician at Northwest Hospital, Swedish Hospital and others over the course of twenty years.

DECLARATION OF JOSEPH M.
GIFFORD M.D. - 1

CARNEY
BADLEY
SPELLMAN

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1 2. As Executive Medical Director for Regence I am involved in determining
2 whether services are medically necessary on an individualized basis as well as a larger policy
3 basis.

4 3. Regence covers neurodevelopmental therapy in health plans subject to the
5 statutory mandate enacted in 1989. That mandate requires group health plans to cover
6 medically necessary neurodevelopmental therapy (which is defined as occupational, speech,
7 or physical therapy) for pre-school children age 6 and under. Once children reach age 7,
8 they are in the school system and have access to special education programs which provide
9 these neurodevelopmental therapies. The neurodevelopmental therapy statute does not apply
10 to individual health policies.

11 4. I understand that the plaintiff is seeking to have the court determine that
12 neurodevelopmental therapy is a "mental health service" under the Washington Mental
13 Health Parity Act ("MHPA"). The MHPA defines "mental health services" as medically
14 necessary outpatient and inpatient services provided to treat mental disorders covered by the
15 diagnostic categories in the current version of the Diagnostic and Statistical Manual (DSM-
16 IV-TR). "Medical necessity" is a health-insurance industry term of art with a meaning
17 beyond a strict literal reading. It is defined in O.S.T.'s contract as follows:

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

21 1.17.1 In accordance with generally accepted standards of medical practice;

22 1.17.2 Clinically appropriate, in terms of type, frequency, extent, site and
23 duration, and considered effective for the Member's illness, injury or
24 disease; and

25 1.17.3 Not primarily for the convenience of the Member, Physician or other
26 health care provider, and not more costly than an alternative service or
sequence of services, or supply at least as likely to produce equivalent

DECLARATION OF JOSEPH M.
GIFFORD M.D. - 2

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R.A. 000037

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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.

The term "medical necessity" in the context of health plan benefit coverage has a much broader meaning than whether a physician ordered or recommended the service or that a specific individual derived benefit from it.

5. The premise that neurodevelopmental therapy "treats" autism spectrum disorder (ASD) and thus is a "mental health service" is a broad generalization and not uniformly accepted within the medical community. To the contrary, ASD is a complex disorder, the exact cause of which is unknown. Most services are focused on improving physical, social, and functional problems that impact the functional status of the individual. In reality, neurodevelopmental therapy (physical therapy, speech therapy, and occupational therapy) does not actually "treat" ASD. In accordance with generally accepted standards of medicine, services for occupational, speech, and physical therapy are not considered mental health services. Occupational, speech, and physical therapists are not considered mental health practitioners and their services are not directed toward treatment of mental health disorders.

6. For example, occupational therapy services use purposeful activity to maximize independence, prevent disability, and maintain health. The records in the present case reflect that occupational therapy services provided to O.S.T. in 2010 were focused on improving the functional ability of O.S.T. in specified areas and designed to educate him. These services were also provided to him through his school and the Boyer Clinic, which I understand is a primarily government-funded program. Regence does not view educational services as medically necessary. Further, O.S.T.'s health plan has an exclusion for services

DECLARATION OF JOSEPH M.
GIFFORD M.D. - 3

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1 that are covered or would be covered in the absence of a Regence plan, by a federal, state or
2 government program. This exclusion applies regardless of whether the diagnosis is medical,
3 surgical or mental.

4 7. My review reveals no effort by O.S.T.'s providers to demonstrate medical
5 necessity for occupational therapy services and such services were not billed under a DSM IV
6 diagnosis but instead under the diagnosis codes of 783.4 and 783.3, both medical diagnosis
7 codes. O.S.T. submitted no claims for speech therapy to Regence billed under a DSM-IV
8 diagnosis which were denied at any time after the MHPA became effective for individual
9 plans (January 1, 2008). I see no indication that he has required physical therapy or that a
10 claim for physical therapy was submitted to Regence.

11 8. Regence contracts issued in the state of Washington cover mental health
12 services for the treatment of mental health conditions. It is appropriate and consistent with
13 the purpose and intent of the MHPA and the health contracts not to include physical therapy,
14 occupational therapy and speech therapy in mental health coverage.

15 9. I understand that O.S.T.'s father has stated that in 2008, O.S.T.'s therapists
16 recommended that O.S.T. receive speech, occupational and physical therapies. I understand
17 his desire for those services, but there is a difference between services that may improve
18 O.S.T.'s functional abilities and "mental health services" that are medically necessary to treat
19 ASD. Moreover, a recommendation about services in 2008 would not equate with medical
20 necessity to support a service in 2010.

21 10. To the best of my knowledge all Regence health plans subject to the statute
22 comply with the neurodevelopmental therapy statute.
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DECLARATION OF JOSEPH M.
GIFFORD M.D. - 4

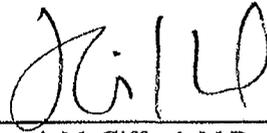
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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

DATED this 12th day of March, 2012, at Los Angeles, California.



Joseph M. Gifford, M.D.

DECLARATION OF JOSEPH M.
GIFFORD M.D. - 5

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Honorable John P. Erlick

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

O.S.T., by and through his parents, G.T.
and E.S., 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

DECLARATION OF ELECTRONIC
SIGNATURE ON DOCUMENT

I, Jason W. Anderson, under penalty of perjury under the laws of the State of Washington declare: I have personally examined the foregoing document consisting of 5 pages; the signature of Joseph M. Gifford, M.D. on the foregoing document is a complete and legible image; and it was received by me via email at the following address: anderson@carneylaw.com.

DATED this 12th day of March, 2012.

CARNEY BADLEY SPELLMAN, P.S.

By 
Jason W. Anderson, WSBA No. 30512
Attorney for Defendant

DECLARATION OF ELECTRONIC
SIGNATURE ON DOCUMENT - 1

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Exhibit 5

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HON. JOHN P. ERLICK
Noted for Hearing: June 1, 2012 at 9:00 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., 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

PLAINTIFF'S REPLY IN SUPPORT OF
MOTION FOR CLASS CERTIFICATION
OF NEURODEVELOPMENTAL
THERAPY CLASS

PLAINTIFF'S REPLY RE: CLASS CERT.

SIRIANNI YOUTZ SPOONEMORE
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R.A. 000043

I. INTRODUCTION¹

1 Like most defendants opposing class certification, Regence “is attempting to make this
2 case more complicated than it need be.” *King v. Riveland*, 125 Wn.2d 500, 519, 886 P.2d 160
3 (1994). In an effort to defeat a straightforward certification motion, Regence does two things.

4 *First*, it advances a host of merits-based arguments, ultimately suggesting that
5 certification is improper because O.S.T. will lose on the merits and therefore has no “standing.”²
6 Regence, however, ignores controlling authority which rejects the position that the court must
7 consider the merits before adjudicating the issue of certification. *Washington Educ. Ass’n v.*
8 *Shelton School Dist.*, 93 Wn.2d 783, 790, 613 P.2d 769 (1980) (“[T]he certification of a class is
9 to be undertaken with no consideration of the merits of the plaintiffs’ claims.”).

10 *Second*, Regence magnifies the individual differences between class members to
11 support its claim that those issues predominate such that class adjudication is impossible.
12 *Sitton*, however, disposes of Regence’s argument. *Sitton v. State Farm*, 116 Wn. App. 245, 63
13 P.3d 198 (2003). In that case, the single overriding question of whether an insurer had
14 improperly denied medical claims predominated over the individual questions of diagnoses,
15 treatments, proximate cause and damages. As in *Sitton*, there is a single predominate question
16 here: *Whether Regence’s contract exclusion and official practice of excluding all coverage of*
17 *neurodevelopmental therapies violates Washington’s Mental Health Parity Act*. That is why
18 every court to consider challenges under the Mental Health Parity Act has certified the litigation
19 for classwide relief. See Hamburger Decl. (5/25/12), *Exh. A*, Order Granting Class Certification
20 in *D.F. v. Washington State Health Care Authority*, No. 10-2-29400-7 SEA; *Exh. B*, Oral Ruling
21 Granting Class Certification in *D.M. v. Group Health Cooperative*, No. 10-2-28618-7 SEA.

22
23 ¹ Regence’s 22-page opposition brief was 10 pages over length. See LCR 7(b)(5)(B)(vi). Rather than moving
to strike – or seeking additional pages to respond – plaintiff kept this brief to five pages (with lengthy footnotes).

24 ² Plaintiff has moved to add L.H. as an additional class representative. See Motion to Amend (5/11/12);
NEWBERG ON CLASS ACTIONS § 7:47, 24:71 (4th ed. 2011) (in class actions, courts and parties may add or remove
25 parties or claims, given that “[t]he interests of the putative class often crystallize further during the course of actual
litigation”). L.H. is a current Regence insured with a DSM-IV condition who requires neurodevelopmental
26 therapies which Regence expressly excludes. See M.B.S. Decl. ¶¶ 3, 5. As a current insured, he has a vested
interest in ensuring that prospective relief is awarded and can assert those claims on behalf of a class.

II. AUTHORITY

A. Whether Certification is Proper is Separate from the Merits of the Claims

1
2 Regence argues that O.S.T. has no “standing” and cannot be an adequate class
3 representative because: (1) Regence excludes neurodevelopmental therapies for DSM-IV and
4 non-DSM-IV conditions “equally”³ (Regence Opp., pp. 4, 13); (2) the Parity Act does not apply
5 to O.S.T.’s claims because his providers sometimes billed under ICD-9 codes⁴ (*Id.*, p. 5); (3) the
6 Parity Act does not apply to O.S.T.’s therapies prior to December 2009⁵ (*Id.*, pp. 5, 10); and
7 (4) O.S.T.’s neurodevelopmental therapies from 2009 - 2010 to treat his autism and feeding
8 disorder do not matter because they were never submitted to Regence.⁶ *Id.*

9 Each of these arguments goes to the merits, is hotly contested, and has no place in a class
10 certification proceeding. *Washington Educ. Ass’n*, 93 Wn.2d at 790. In *Washington Educ.*
11 *Ass’n*, the question presented was “[d]id the trial court err under the facts of this case in
12

13 ³ Regence misconstrues the Parity Act. First and foremost, the Parity Act requires *coverage*.
14 Regence may not exclude *any* medically necessary mental health service, including neurodevelopmental
15 therapy, if it covers medical and surgical services. RCW 48.44.341(2) (“All health service contracts ...
16 that provide coverage for medical and surgical services *shall* provide ... *coverage* for ... *mental health*
17 *services*.”). Under the Parity Act, the comparator is not a single corresponding service like
18 neurodevelopmental therapies for non-DSM conditions, but “coverage for medical and surgical
19 services” generally. The same is true under the federal Mental Health Parity Act which requires that any
20 exclusions imposed on a mental health service be applied to “substantially all” medical and surgical
21 benefits. See 29 U.S.C. § 1185a (a)(3); 26 U.S.C. § 9812(a)(3). See also *Interim Final Rules Under the Paul*
22 *Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008*, 75 FR 5410-01, p. 5413
23 (“[A]ny treatment limitations applied to mental health or substance use disorder benefits may be no
24 more restrictive than the *predominant treatment limitations applied to substantially all*
25 *medical/surgical benefits*.”)

26 ⁴ The Parity Act does not permit Regence to exclude medically necessary mental health services
because the provider billed using ICD-9 not DSM-IV codes on a claim form. Indeed, the Parity Act only
permits insurers to exclude coverage based upon an individualized determination of “medical
necessity.” Where, as here, Regence would automatically deny coverage of claims submitted with the
DSM-IV code for feeding disorder, it is unsurprising that providers billed using other equivalent codes.

⁵ Regence’s claim that there is “no evidence in the record” that Regence knew of O.S.T.’s feeding
disorder is flat wrong. See Regence Opp., pp. 5, 10. Since 2008 O.S.T. had a DSM-IV diagnosis of feeding
disorder, and Regence knew it - *the diagnosis appears in Regence’s own internal documents*. See
Hamburger Decl. (2/24/12), Exhs. G, H, I, J.

⁶ O.S.T. was not required to continue to submit claims in 2009-2010, after his earlier claims had been
excluded and the contract language purported to exclude coverage. The law does not require plaintiffs
to engage in such “vain and useless acts.” *Orion Corp. v. State*, 103 Wn.2d 441, 458, 693 P.2d 1369 (1985).

1 considering questions of standing and venue before determining whether plaintiff or defendant
2 classes should be certified?" *Id.* at 788. Finding an abuse of discretion in denying certification,
3 the court held that *certification must be viewed through the lens of the plaintiffs' allegations*;
4 e.g., if plaintiffs' theory was proven, then defendants would be liable to the class members:

5 [C]lass certification and determination of the merits of the plaintiffs' claims are
6 entitled to independent consideration ... [w]e simply note once again [plaintiffs]
7 have a right to have the substantive validity of their claims considered
8 independently from these procedural determinations.

9 *Id.* at 792. See also *Tegland*, 14 WASH. PRAC., CIVIL PROCEDURE §11:65 (August 2011) ("The
10 party seeking class certification need not demonstrate the likelihood of ultimately prevailing.");
11 *Moeller v. Farmers Ins.*, 173 Wn.2d. 264, 279, 267 P.2d 998 (2011) (plaintiff is not "require[d]
12 ... to prove ... liability as to every member of the class" prior to certification).⁷

13 **B. Certification is Proper If A Single Liability Question Predominates**

14 Regence argues that differences in class members' diagnoses, treatment and damages
15 defeat certification. That, of course, was the exact argument State Farm advanced – and lost – in
16 *Sitton*.⁸ In *Sitton*, Division I affirmed the certification of a class of individuals with distinct
17 differences because the single common question in the action – whether State Farm's standard
18 practices improperly excluded the payment of medical expenses – predominated:

19 The predominance requirement is not a demand that common issues be
20 dispositive, or even determinative; it is not a comparison of court time needed to
21 adjudicate common issues versus individual issues; nor is it a balancing of the
22 number of issues suitable for either common or individual treatment. *Rather*, "[a]

23 ⁷ *Moeller*, the first decision from the Washington Supreme Court addressing class certification since *Wal-Mart*,
24 rejected any attempt to tighten Washington's CR 23 requirements. *Moeller*, 173 Wn.2d at 278 (In Washington
25 "CR 23 is liberally interpreted" and "the trial court should err in favor of certifying the class.").

26 ⁸ State Farm opposed class certification under CR 23(b)(3) because of these same "differences":

State Farm contends that claims of each class member will necessarily require litigation
regarding the facts of each accident, the medical condition of each insured, the specific action
taken by each review panel, individual causation, and individual damages. In essence, State Farm
contends that the presence of individual issues regarding causation, reliance, or damages precludes
certification.

Sitton, 116 Wn. App at 254.

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single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions.”

* * *

Here, the 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. A common nucleus of operative facts appears to exist on this issue, and that satisfies the predominance standard of CR 23(b)(3).

Id. at 254, 256 (footnotes omitted, emphasis added).⁹ Courts routinely certify class actions under health insurance policies despite individual differences related to proximate cause and damages:

⁹ Division I acknowledged that factual differences within the class may create court management issues. However, complexity does not justify a denial of certification:

The presence of individual issues may pose management problems for the judge, but as the chief commentator has observed, courts have a variety of procedural options to reduce the burden of resolving individual damage issues, including bifurcated trials, use of subclasses or masters, pilot or test cases with selected class members, or even class decertification after liability is determined. Division II applied this analysis in its recent decision in *Behr*:

In deciding whether common issues predominate over individual ones, the court is engaged in a “‘pragmatic’ inquiry into whether there is a ‘common nucleus of operative facts’ to each class member's claim.” *That class members may eventually have to make an individual showing of damages does not preclude class certification.*

Id. at 254-55 (quoting *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 54 P.3d 665 (2002)) (emphasis added). As in *Sitton*, the issue of medical necessity will be addressed as part of the plaintiff's damage claim. There are a variety of ways to try damages after liability has been established:

State Farm also argues that individual determinations of causation and damages in the second phase of a bifurcated proceeding would be unmanageable because “there would be thousands of juries spread throughout the state, entirely outside the control of the Phase I judge.” This argument is essentially the same as State Farm's superiority argument. It is true that management of any complex class action with significant individual issues is likely to be a challenge. As described above, however, the trial court has a variety of tools available to deal with these challenges.

Id. at 259-60 (footnotes omitted). Here, there is an easy process for adjudicating the medical necessity of any given treatment. Regence should be required to reprocess all the denied claims, and to accept for processing claims that were not submitted due to the illegal exclusion. See *Selby v. Principal Mut. Life Ins. Co.*, 197 F.R.D. 48, 59 (S.D.N.Y. 2000). If Regence denies any claims due to medical necessity, then the class member may appeal the denial under RCW 48.43.535, the independent review process, for a final adjudication on medical necessity. See *K.F. v. Regence BlueShield*, 2008 WL 4330901, *1 (W.D. Wash. 2008) (“Washington has created an external appeal procedure for participants who disagree with the administrator's denial of benefits: the statute compels insurers to implement the independent review organization's determination.”).

1 The shared legal question in this case is whether Principal's practice of
2 eliminating and disregarding the diagnoses in an insured's claim during on-line
3 review violates [ERISA]. *This question predominates over the particular issues*
4 *associated with each plaintiff's claim, namely: the specifics of the insured's*
5 *policy, the illnesses his claims concerned, the potential amount of benefits each*
6 *insured is due, and any defense of fraud that might be raised against a class*
7 *member.*

8 *Selby*, 197 F.R.D. at 59 (emphasis added).

9 Regence's attempt to distinguish *Sitton* by claiming that "the fact of damage was
10 susceptible to class-wide proof" ignores both the facts and holding of that case. Regence Opp'n,
11 p. 21. While the question of whether State Farm had improperly adopted an illegal external
12 review process was susceptible to class-wide proof, the question of whether that practice had
13 damaged any specific class member was individualized. *Sitton*, 116 Wn. App. at 259
14 ("[W]hether State Farm created and implemented a program for the purpose of wrongfully
15 denying, limiting, or terminating PIP benefits is an issue separate and distinct from individual
16 determinations of whether such a program caused harm, and if so, how much."). *Sitton*
17 therefore mirrors and controls this case: the question of whether Regence has been illegally
18 excluding care can be established on a class-wide basis even if individual questions of whether
19 that conduct proximately caused damage to an individual class member may require additional
20 adjudication. *Id.* Denying certification in this situation does not serve the goals of class
21 litigation where there is a central dispute between a defendant and a group because "forcing
22 numerous plaintiffs to litigate the alleged pattern or practice of bad faith in repeated individual
23 trials runs counter to the very purpose of a class action...." *Id.* at 256-57.¹⁰

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¹⁰ *Schwendeman v. USAA Cas. Ins. Co.*, 116 Wn. App. 9, 20, 65 P.3d 1 (2003) is not contrary to *Sitton* and is
easily distinguished. See Regence Opp., pp. 19-20. The issue in *Schwendeman* was whether non-OEM parts to
repair vehicles violated a contract which promised repair of "like kind and quality." Because a non-OEM part
could be of "like kind and quality" the claims of the class could only be proven by looking at each part in each car
of every class member. *Id.* at 7-8 ("The determination of whether the use of a non-OEM crash part in a particular
instance complied with USAA's obligation under its policy and with state law requirements regarding the use of
non-OEM crash parts requires individualized proof with respect to each vehicle repaired."). The court contrasted
its situation to a case where the defendant had a "mandatory and uniform policy to use non-OEM replacement parts
and that all of the non-OEM replacement parts specified by State Farm were inferior to OEM parts." *Id.* at 8. In
that situation, "there were common issues relating to the class claims of breach of contract and consumer fraud...."
Id. Our case, like *Sitton*, presents a common question of the legality of excluding certain medical treatments based
on a uniform exclusion or practice. This question does not turn on each class member's individual situation.

DATED: May 25, 2012.

SIRIANNI YOUTZ SPOONEMORE

/s/Richard E. Spoonemore

Richard E. Spoonemore (WSBA #21833)

Eleanor Hamburger (WSBA #26478)

Attorneys for Plaintiff

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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 May 25, 2012, I caused a copy of the foregoing document to be served on all counsel of record as indicated below:

Timothy J. Parker	<input checked="" type="checkbox"/>	By First-Class Mail
Cindy G. Flynn	<input type="checkbox"/>	By Hand-Delivery
Jason W. Anderson	<input type="checkbox"/>	By Facsimile
CARNEY BADLEY SPELLMAN, P.S.	<input checked="" type="checkbox"/>	By Email
701 Fifth Avenue, Suite 3600		Tel. (206) 622-8020
Seattle, WA 98104		Fax (206) 467-8215
<i>Attorneys for Defendant Regence BlueShield</i>		<u>parker@carneylaw.com</u>
		<u>flynn@carneylaw.com</u>
		<u>anderson@carneylaw.com</u>
		<u>williams@carneylaw.com</u>
		<u>saiden@carneylaw.com</u>

DATED: May 25, 2012, at Seattle, Washington.

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

Exhibit 6

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HON. JOHN P. ERLICK
Noted for Hearing: June 1, 2012 at 9:00 am
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., 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

DECLARATION OF M
B S

I, M B S, declare under penalty of perjury and in
accordance with the laws of the State of Washington that:

1. I am over the age of 18, not a party in the case and competent to
testify to all matters stated herein. All statements are made upon my personal
knowledge.

2. K L H and I are the parents of L H L is
two years old.

3. L is diagnosed with myotubular myopathy, profound
hypotonia and severe hydrocephalus. He has also been diagnosed with Expressive
Language disorder (315.31).

4. My family and I recently moved back to Seattle, Washington from
Washington D.C. where we were covered by Carefirst Blue Cross Blue Shield insurance
through my employment. We had problems obtaining coverage for all of L s

Exhibit 7

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HON. JOHN P. ERLICK
Noted for Hearing: June 1, 2012 at 9:00 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., 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

DECLARATION OF ELEANOR HAMBURGER IN SUPPORT OF PLAINTIFF'S MOTION FOR CLASS CERTIFICATION OF NEURODEVELOPMENTAL CLASS

I, Eleanor Hamburger, declare under penalty of perjury and in accordance with the laws of the State of Washington that:

1. I am a partner at Sirianni Youtz Spoonemore and am one of the attorneys for plaintiff in this action.

2. Attached are true and correct copies of the following documents, with underlining where appropriate for the Court's convenience:

Exhibit	Description
A	Order Granting Class Certification in <i>D.F. v. Washington State Health Care Authority</i> , No. 10-2-29400-7 SEA
B	Verbatim Transcription of Oral Ruling Granting Class Certification in <i>D.M. v. Group Health Cooperative</i> , No. 10-2-28618-7 SEA

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DATED: May 25, 2012, at Seattle, Washington.

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

CERTIFICATE OF SERVICE

I certify, under penalty of perjury and in accordance with the laws of the State of Washington, that on May 25, 2012 , I caused a copy of the foregoing document to be served on all counsel of record as indicated below:

Timothy J. Parker
Cindy G. Flynn
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 Hand-Delivery
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Tel. (206) 622-8020
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parker@carneylaw.com
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williams@carneylaw.com
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DATED: May 25, 2012, at Seattle, Washington.

/s/ Eleanor Hamburger

Eleanor Hamburger (WSBA #26478)

Exhibit A

R.A. 000059

HON. SUSAN J. CRAIGHEAD
Noted: September 12, 2011
Without Oral Argument

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IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

D.F. and S.F., by and through their parents,
A.F. and R.F.; S.M.-O., by and through his
parents, S.M. and D.O.; A.H., by and
through her mother, L.H., each on their own
behalf and on behalf of all similarly situated
individuals,

Plaintiffs,

v.

WASHINGTON STATE HEALTH CARE
AUTHORITY; PUBLIC EMPLOYEES
BENEFITS BOARD; DOUG PORTER,
Administrator of the Washington State
Health Care Authority and Chairman of the
Public Employees Benefits Board, in his
official capacity;

Defendants.

NO. 10-2-29400-7 SEA

~~REVISED PROPOSED~~
ORDER GRANTING PLAINTIFFS'
MOTION FOR CLASS
CERTIFICATION, APPOINTING
CLASS REPRESENTATIVES AND
CLASS COUNSEL, AND DIRECTING
NOTICE TO CLASS

THIS MATTER came before the Court upon Plaintiffs' Renewed Motion
for Class Certification of a Class of Autism Spectrum Disorder Insureds Under
CR 23(b)(3). Plaintiffs are represented by Eleanor Hamburger and Richard E.
Spoonemore, SIRIANNI YOUTZ SPOONEMORE. Defendants are represented by Melissa A.
Burke-Cain and Kristen K. Culbert, OFFICE OF THE ATTORNEY GENERAL.

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

ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION, APPOINTING CLASS REPRESENTATIVES AND
CLASS COUNSEL, AND DIRECTING NOTICE TO CLASS - 1

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

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- Plaintiffs' Renewed Motion for Class Certification of a Class of Autism Spectrum Disorder Insureds Under CR 23(b)(3);
- Defendants' Response to Plaintiffs' Renewed Motion for Class Certification of a Class of Autism Spectrum Disorder Insureds Under CR 23(b)(3);
- Declaration of Janie Hanson;
- Plaintiffs' Reply in Support of Renewed Motion for Class Certification;
- Declaration of Richard E. Spoonemore Re: Renewed Motion for Class Certification and attached exhibit;
- Plaintiffs' Motion for Class Certification filed on April 13, 2011;
- the Declaration of Richard E. Spoonemore and the exhibit attached thereto filed on April 13, 2011;
- the Declaration Eleanor Hamburger filed on April 13, 2011;
- Defendants' Response to Motion for Class Certification filed on June 3, 2011;
- the Declaration of Janie Hanson and all exhibits attached thereto filed on June 3, 2011;
- the Declaration of Jeff Hesse and all exhibits attached thereto filed on June 3, 2011;
- Plaintiffs' Reply in Support of Their Motion for Class Certification filed on June 6, 2011;
- The Supplemental Declaration of Eleanor Hamburger and all exhibits attached thereto filed on June 6, 2011
- Plaintiffs' Memorandum Re: Certification under CR 23(b)(2) and (b)(3) filed on June 23, 2011; and
- Defendants' Post-Hearing Memorandum Re: Class Certification Under CR 23(b)(2) and/or (b)(3).

1 Based upon the foregoing, the Court hereby finds that all of the
2 requirements of CR 23 are met and GRANTS plaintiffs' Motion for Class Certification.
3 The Court further appoints class counsel and class representatives, and directs notice
4 as set forth below.

5 **A. Class Certification Under CR 23**

6 With respect to CR 23(a)(1), the Court finds that the class is so numerous
7 that joinder is impracticable. The prevalence rate for ASD is close to 1 percent, and the
8 defendants' plans cover some 300,000 individuals. As a result, the interests of
9 numerous individuals are implicated. In addition, the defendants themselves have
10 estimated that well over forty insureds per year would access ABA under the policies
11 at issue in this case.

12 The commonality requirement under CR 23(a)(2) is also met, as there are
13 common questions of law and fact that affect all members of the class. Specifically, the
14 question of whether the defendants have properly designed and implemented health
15 care coverage in conformity with the requirements of RCW 41.05.600 (the Mental
16 Health Parity Act) for individuals diagnosed with autism spectrum disorder impacts
17 all class members. Indeed, the Court has previously ruled that the defendants'
18 exclusion of ABA therapy, even when medically necessary and performed by licensed
19 health providers, does not comply with Washington's Mental Health Parity Act. *See*
20 Order dated June 7, 2011, p. 4. As the order states, "under the Mental Health Parity Act
21 defendants are required to cover medically necessary Applied Behavioral Analysis
22 therapy, as determined on an individualized basis, when provided by licensed
23 providers." *Id.* This key liability issue directly impacts all class members.

24 The claims of the plaintiffs D.F., S.F. and S.M.-O. are typical of those of
25 the class as required by CR 23(a)(3). In pursuing their claims, the named plaintiffs will
26 necessarily advance the interests of the entire class.

1 The Court also finds that the named plaintiffs are adequate class
2 representatives who have chosen counsel experienced in class actions of this nature.
3 The named plaintiffs and their counsel meet the requirement of adequate
4 representation under CR 23(a)(4).

5 Finally, the Court finds that certification under CR 23(b)(3) is appropriate.
6 Common questions of law or fact predominate over the questions affecting individual
7 class members. Resolving this dispute within the context of a class action is superior
8 and more efficient than other methods of adjudications, and class-wide resolution
9 would promote uniformity. The plaintiffs have raised a common issue — defendants'
10 compliance with the Mental Health Parity Act — which is central to the claims of all
11 class members.

12 Accordingly, the Court hereby CERTIFIES the following class under
13 CR 23(b)(3):

14 All individuals covered under HCA's self-funded
15 health benefits plan(s) administered by PEBB, HCA and/or
16 Porter (or his successor) that have been or will be offered,
17 established, renewed, or otherwise effective on or after
18 January 1, 2006 who have an autism spectrum disorder and,
19 while covered under the health benefit plan, have received, ^{or}
20 require, ~~or are expected to require~~ behavioral interventions
21 that use applied behavioral analysis therapy.

22 **B. Appointment of Class Counsel and Class Representatives**

23 The Court further appoints Sirianni Youtz Spoonemore, Eleanor
24 Hamburger and Richard Spoonemore, as class counsel, and names plaintiffs D.F. and
25 S.F. (by and through their parents, A.F. and R.F.) and S.M.-O. (by and through his
26 parents, S.M. and D.O.) as the class representatives.

C. Notice

Class counsel shall draft and submit for Court approval a form of notice
within 21 days of this Order. The proposed form of notice shall comply with the

ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION, APPOINTING CLASS REPRESENTATIVES AND
CLASS COUNSEL, AND DIRECTING NOTICE TO CLASS - 4

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R.A. 000063

1 requirements of CR 23(c)(2), including the right to opt-out of the action. Defendants
2 are directed to work with plaintiffs to identify class members and ensure that notice is
3 provided to likely class members.

4 It is so ORDERED this 28th day of September, 2011.

5
6 Susan J. Craighead
7 Susan J. Craighead
8 Superior Court Judge

9 Presented by:
10 SIRIANNI YOUTZ SPOONEMORE
11 /s/ Richard E. Spoonemore
12 Eleanor Hamburger (WSBA #26478)
13 Richard E. Spoonemore (WSBA #21833)
14 Attorneys for Plaintiffs
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ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION, APPOINTING CLASS REPRESENTATIVES AND
CLASS COUNSEL, AND DIRECTING NOTICE TO CLASS -5

SIRIANNI YOUTZ SPOONEMORE
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Exhibit B

R.A. 000065

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HON. JOHN P. ERLICK

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

O.S.T., by and through his parents, G.T. and E.S., 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

DECLARATION OF THERESA REDFERN RE: VERBATIM TRANSCRIPT OF RULING IN *D.M. V. GROUP HEALTH COOPERATIVE*

I, Theresa Redfern, declare under penalty of perjury and in accordance with the laws of the State of Washington that:

1. I am over the age of 18, not a party in the case, and competent to testify to all matters stated herein. All statements are made upon my personal knowledge.

2. I ordered and received the King County Audio File of the September 30, 2011 oral argument and ruling on class certification before Judge Beth Andrus in *D.M. v. Group Health Cooperative*, No. 10-2-28618-7 SEA.

3. On May 23, 2012, I transcribed the Court's bench ruling on class certification which appears below:

* * * * *

THE COURT: I am going to grant the motion for class certification in part and deny the motion for class certification in part. I am going to grant a CR 23(b)(2) class for injunctive and declaratory relief only. I am not going to certify a CR 23(b)(3) class because I do not believe that the numerosity requirement has been

1 demonstrated. With regard to the (b)(2) class, I think it is important
2 to narrowly define it as I have indicated to be individuals who have
3 an ASD diagnosis and who has received, is receiving or wishes to
4 receive ABA therapy. And the remedy would be limited to, if the
5 plaintiffs prevail on that class, that individualized assessment of
6 medical necessity, without having to run the gauntlet of the 2007
7 policy. And I am using that as shorthand for the, it's primarily
8 educational in nature because it does not bring someone back to the
9 baseline level of functioning. So I think, if we narrowly tailor it in
10 that fashion, then we meet all of the elements of numerosity,
11 commonality, typicality, there is no dispute on adequacy of
12 representation, and we meet the elements of (b)(2).

13 MR. SPOONEMORE: One questions?

14 THE COURT: Yes. And we have to have the time limitation. The
15 one thing we did not discuss, with the time limitation, you had from
16 January 1 of 2006 forward. I did not see anything in the GHC
17 responsive materials as to, do we need a back-end limit, or do we
18 go -- it is through the point of time of trial, right? It is going to be
19 January 1, 2006, to the point of trial.

20 MR. WRIGHT: That makes sense. I would not want the Court to
21 have to preside over an open-ended injunction for the end of time.

22 THE COURT: Right. So through the date of trial.

23 All right. You had some questions, Mr. Spoonemore.

24 MR. SPOONEMORE: One question, Your Honor. With respect to
25 the (b)(3) class, is that without prejudice? If we resubmitted a
26 motion with evidence of numerosity, would the Court reconsider
that?

THE COURT: I am not going to say with or without prejudice.
What I am going to say is that I am denying it because the evidence
of numerosity has not been demonstrated [gap between audio files]
road, that you are entitled for me to reconsider that issue because
you think you can prove it, you will have to file a motion then and
let GHC respond as to whether it is or is not an appropriate motion
at that point. At this point, you have not established numerosity to
the Court's satisfaction.

All right. Can the parties prepare an appropriate order and
submit it?

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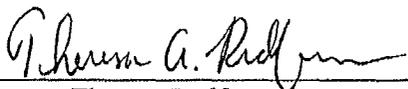
MR. WRIGHT: I am confident that we can work together and do that, Your Honor.

MR. SPOONEMORE: Yes.

THE COURT: And then if, in fact, the parties want to talk about trial planning and what are the issues that are going to be addressed in the trial on the injunction, declaratory relief, if there are disputes about what factual issues need to be tried in that portion, as opposed to D.M.'s damage claim portion of the case, then let me know, and we can schedule a status conference, and we can work through some of those issues.

Thank you very much, counsel. I appreciate it very, very much. The briefing was outstanding, the argument as well, and we are [at recess].

DATED: May 25, 2012, at Seattle, Washington.



Theresa Redfern

CERTIFICATE OF SERVICE

I certify, under penalty of perjury and in accordance with the laws of the State of Washington, that on May 25, 2012 , I caused a copy of the foregoing document to be served on all counsel of record as indicated below:

Timothy J. Parker	<input checked="" type="checkbox"/>	By First-Class Mail
Cindy G. Flynn	<input type="checkbox"/>	By Hand-Delivery
Jason W. Anderson	<input type="checkbox"/>	By Facsimile
CARNEY BADLEY SPELLMAN, P.S.	<input checked="" type="checkbox"/>	By Email
701 Fifth Avenue, Suite 3600		Tel. (206) 622-8020
Seattle, WA 98104		Fax (206) 467-8215
<i>Attorneys for Defendant Regence BlueShield</i>		<u><i>parker@carneylaw.com</i></u>
		<u><i>flynn@carneylaw.com</i></u>
		<u><i>anderson@carneylaw.com</i></u>
		<u><i>williams@carneylaw.com</i></u>
		<u><i>saiden@carneylaw.com</i></u>

DATED: May 25, 2012, at Seattle, Washington.

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

Exhibit 8

R.A. 000070

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HON. JOHN P. ERLICK
Noted for Consideration: June 1, 2012 @ 9:00 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., 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

PLAINTIFFS' SUPPLEMENTAL BRIEF
ON CLASS CERTIFICATION

PLAINTIFFS' SUPPLEMENTAL BRIEF
ON CLASS CERTIFICATION

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R.A. 000071

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I. LAW AND ARGUMENT

A. Merits are Not Adjudicated in a Class Certification Motion.

Regence once again suggests that the court should first adjudicate the merits of this dispute before determining whether L.H. should be a class representative. Controlling authority holds otherwise. *Washington Educ. Ass'n v. Shelton School Dist.*, 93 Wn.2d 783, 790, 613 P.2d 769 (1980). While a trial court “may look past the pleadings to understand the claims, defenses, relevant facts, and applicable substantive law ‘to make a meaningful determination of the certification issues,’” see *Weston v. Emerald City Pizza LLC*, 137 Wn. App. 164, 168-69, 151 P.3d 1090, 1092-93 (2007), this is *not* the same as adjudicating the underlying merits of the case as part of the certification analysis. *Washington Educ. Ass'n*, 93 Wn.2d at 790. See also *Moeller v. Farmers Ins.*, 173 Wn.2d. 264, 279, 267 P.2d 998 (2011) (rejecting defendant’s claim that plaintiff was “require[d] ... to prove ... liability as to every member of the class” prior to certification).

Here, L.H. has alleged claims which, if proven, will bar Regence from excluding medically necessary neurodevelopmental therapies to treat DSM-IV mental conditions. Rather than forcing every single insured individual to seek invalidation of this exclusion, L.H. seeks to resolve this issue once and for all. This is consistent with the purpose of class litigation. *Moeller*, 173 Wn.2d at 278 (“CR 23 is liberally interpreted because the “rule avoids multiplicity of litigation, “saves members of the class the cost and trouble of filing individual suits [,] and ... also frees the defendant from the harassment of identical future litigation.””).

B. L.H. Has Standing to Seek Prospective Relief.

Standing is determined by examining the complaint’s allegations to determine if the plaintiff has a dispute which can be adjudicated: “[T]he standing inquiry requires careful judicial examination of *a complaint's allegations* to ascertain whether the particular plaintiff *is entitled to an adjudication of the particular claims asserted.*” *Allen v. Wright*, 468 U.S. 737, 752, 104 S. Ct. 3315, 3325 (1984) (emphasis added). This is a far different analysis from the

1 question of whether the plaintiff will ultimately win. *Maya v. Centex Corp.*, 658 F.3d 1060,
2 1068 (9th Cir. 2011) (“But the threshold question of whether plaintiff has standing ... is distinct
3 from the merits of his claim. Rather, ‘[t]he jurisdictional question of standing precedes, and
4 does not require, analysis of the merits.’”).

5 The “complaint’s allegations” here demonstrate that L.H. “is entitled to an adjudication
6 of [his] claims.” *Allen*, 468 U.S. at 752. L.H. has alleged that he requires neurodevelopmental
7 therapies to treat his DSM-IV mental health condition. Second Amended Complaint, ¶14. He
8 has actually received these therapies since becoming insured by Regence. M.B.S. Decl. (filed
9 5/25/12), ¶6. Regence’s contract, on its face, excludes these treatments. *Id.*, ¶5. *See also*
10 *Hamburger Decl.* (filed 2/24/12), *Exh. A*, p. 34 (excluding “[t]reatment for neurodevelopmental
11 therapy.”). Not only that, Regence has publicly stated that it has no obligation to cover
12 neurodevelopment therapies. Regence Opp. and Cross-Mot. (filed 3/13/12), pp. 1, 7-16. This is
13 not a “speculative” dispute —L.H. certainly has a “well-grounded fear of immediate invasion”
14 of his contractual and statutory right to coverage for mental health services given that he has
15 received, and continues to require, services that Regence explicitly purports to exclude by
16 contact.

17 Just as an insurer has the right to file a declaratory judgment action to have a court
18 determine whether an exclusion applies to an insured¹ – which is a common occurrence – an
19 insured has the right to file a declaratory judgment action against an insurer when faced with an
20 exclusion that would operate to exclude coverage. *See Safeco Ins. Co. v. Dairyland Mut. Ins.*
21 *Co.*, 74 Wn.2d 669, 671 (1968) (In action by driver and his insurer against another insurer over
22 meaning of policy, driver permitted to seek declaratory judgment against insurer because “[w]e
23 think the issue of coverage and the interests dependent on an answer to the issue create a case
24

25 ¹ *National Indemn. Co. v. Smith-Gandy*, 50 Wn.2d 124, 128 (1957) (“In cases involving liability insurance, the
26 insurance company’s right to a judicial declaration under the declaratory judgment law, of liability or nonliability
upon the happening of an accident, has been fully recognized by the courts, and the courts have the power to
determine questions of fact when necessary of incidental to the declaration of legal relations.”).

1 that falls squarely within the purposes of our Declaratory Judgments Act and that the plaintiffs
2 were entitled to be heard.”); RCW 7.24.020 (“A person interested under a ... *written contract*
3 ... or whose rights, status or other legal relations *are affected by a statute ... [or] contract ...*
4 may have determined *any question of construction or validity arising under the ... statute, ...*
5 *contract ... and obtain a declaration of rights, status or other legal relations thereunder.”*);
6 RCW 7.24.010 (“Courts of record ... shall have the power to *declare rights, status and other*
7 *legal relations whether or not further relief is or could be claimed.... The declaration may be*
8 *either affirmative or negative in form and effect....*) (emphasis added).

9 **C. L.H. May Seek Prospective Relief on Behalf of a Class and O.S.T. May**
10 **Seek Retrospective Relief on Behalf of a Class.**

11 **1. Prospective Relief Does Not Require that the Identity of Each Class**
12 **Member be Known.**

13 Regence argues that individuals, such as L.H., who never submitted claims cannot be
14 members of the class. It also argues that including such persons in the proposed class renders it
15 unascertainable. Regence is wrong on both points.

16 Given the exclusion in the policy and Regence’s announced coverage position,
17 submitting claims would have been futile.² *Zylstra v. Piva*, 85 Wn.2d 743, 745, 539 P.2d 823
18 (1975); *Furniture Workers Union Local 1007 v. United Bhd. of Carpenters & Joiners of Am.*, 6
19 Wn.2d 654, 663-64, 108 P.2d 651 (1940). Futility exists when a health insurer has made its
20 position “unequivocally clear.” *Young v. Regence BlueShield*, 2008 WL 4163112, *3 (W.D.
21 Wash. 2008). In *Young*, the named plaintiff filed a class action against Regence BlueShield for
22 misrepresenting to its insureds that they would be charged only the negotiated rates for services
23 they received from Regence providers when those services were not covered by the Regence

24
25 ² In fact, Regence’s statements of no coverage are anticipatory breaches of the contract which permit
26 immediate access to courts. *Wallace Real Estate v. Groves*, 124 Wn.2d 881, 898 (1994) (anticipatory breach exists
when there is a “positive statement or action by the promisor indicating distinctly and unequivocally that he either
will not or cannot substantially perform....”). L.H. is not required to send in claims to obtain standing when
Regence has made its position perfectly clear.

1 insurance. *Id.* at *1. The named plaintiff had been charged a higher non-negotiated rate for
2 services twice—first in 2001 and later in 2006. *Id.* Young only appealed the charge in 2006.
3 *Id.* She appealed to the state-mandated independent review and won. Young then filed a class
4 action based upon Regence’s 2001 denial. The Court found Young was not required to go
5 through Regence’s claims and appeal process. *Id.* Regence “has made its position on this issue
6 unequivocally clear.” *Id.* at *3. “There is no evidence that Ms. Young would have obtained a
7 different result if she had appealed the 2001 charges.” *Id.*

8 The request for prospective relief for Regence insureds who may need the therapy in the
9 future does not render the class unascertainable. Prospective relief is, in fact, a well-recognized
10 component of class action litigation. Certification is not dependent upon establishing that each
11 class member has been harmed, and classes often include persons who, in the future, would be
12 subject to the challenged conduct. *See, e.g., O’Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311,
13 320 (C.D. Cal. 1998) (“Plaintiffs need not prove that class members have been injured for
14 purposes of defining the Class”); NEWBERG, *Prospective Injunctive Relief and Future Class*
15 *Members*, § 3:7 (“A special consideration applies to actions seeking declaratory or injunctive
16 relief against conduct that is likely to cause future injuries similar to those suffered at the time of
17 suit. In these cases, persons who might be injured in the future may be included in the
18 class....”) (hereafter “NEWBERG”). The fact that you cannot, at the outset of the case,
19 specifically identify each and every class member poses no barrier to certification. NEWBERG
20 § 2:3 (“It is now settled law that amorphous, vague, and indeterminate classes are implicitly
21 authorized under new Rule 23. For every case holding that a class must be denied certification
22 because it is amorphous or otherwise indeterminate, several other cases having similar
23 circumstances have demonstrated that a class may be upheld despite these characteristics.”)³

24
25 ³ A class definition is imprecise only if it is based on subjective standards – such as the class member’s state of
26 mind – but is sufficiently definite if it “includes objective characteristics that would permit a consumer to identify
themselves as a member of the propose class.” *Zeisel v. Diamond Foods, Inc.*, 2011 WL 2221113, *6 (N.D. Cal.
2011). This is not a high bar. NEWBERG § 2:3.

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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 May 31, 2012, I caused a copy of the foregoing document to be served on all counsel of record as indicated below:

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

DATED: May 31, 2012, at Seattle, Washington.

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

Exhibit 9

R.A. 000078

HON. JOHN P. ERLICK
Noted for Consideration: August 10, 2012
Without Oral Argument

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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

Plaintiffs,

v.

REGENCE BLUESHIELD, a Washington
corporation,

Defendant.

NO. 11-2-34187-9 SEA

SUPPLEMENTAL BRIEFING IN
SUPPORT OF PLAINTIFFS' MOTION
FOR PARTIAL SUMMARY
JUDGMENT AND IN OPPOSITION
TO DEFENDANT'S MOTIONS TO
DISMISS

I. INTRODUCTION

Consistent with the Court's oral rulings on June 1, 2012, plaintiffs submit supplemental evidence and briefing related to L.H.'s standing to pursue injunctive and declaratory relief and the justiciability of his claims. L.H. has a diagnosed DSM-IV condition for which he needs neurodevelopmental therapies. He is diagnosed with an Expressive Language Disorder, DSM-IV code 315.31, and needs speech therapy to treat his condition. Declaration of Patricia A. Moroney, ¶4. His Regence policy expressly excludes coverage of these therapies. Hamburger Decl. (7/13/12), *Exh. C*, p. 27. He has standing to seek declaratory and injunctive relief. The Court should grant Plaintiffs' Motion for Partial Summary Judgment and deny Defendant's various Motions to Dismiss and Cross Motion for Summary Judgment.

SUPPLEMENTAL BRIEFING IN SUPPORT OF PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN
OPPOSITION TO DEFENDANT'S MOTIONS TO DISMISS - 1

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

R.A. 000079

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II. FACTS

A. L.H. Is Diagnosed with a Non-Excluded DSM-IV Mental Condition.

L.H. is diagnosed with the DSM-IV-TR condition of Expressive Language Disorder, 315.31, by Patricia Moroney, M.A., CCC-SLP. See Moroney Decl. ¶4; *Exh. B*, p. 2. Ms. Moroney reviewed L.H.'s medical records, including recent testing conducted by Boyer Children's Clinic. The evaluations show that L.H. has an Expressive Language Disorder, as demonstrated by "limited amount of speech, a markedly limited vocabulary, and difficulty producing sentences of developmentally appropriate length and complexity, despite average nonverbal intelligence and receptive language." *Id.* Ms. Moroney further opines that in addition to the Boyer evaluation, L.H.'s history is consistent with a neurodevelopmental delay in expressive language. *Id.*; see also Hamburger Decl. (7/13/12), *Exh. B* (Progress Note dated 2/21/12 from Lauren Bonifant, M.S., CCC-SLP, identifying L.H. as having an Expressive Language Disorder for which speech therapy services were provided).

Taken together, L.H.'s test results and medical history "clearly document [L.H.'s] need for intensive ongoing speech language therapy from a skilled clinician." *Id.* Ms. Moroney concludes, "It is my professional opinion that [L.H.] demonstrates an Expressive Language Disorder under the DSM-IV criteria and needs speech therapy to treat this condition." Indeed, Ms. Moroney opines that without adequate speech language therapy, L.H. is at "a high risk for psychiatric disorders as well as social, behavioral and emotional difficulties and delays." *Id.*

B. L.H.'s Regence Policy Expressly Excludes Neurodevelopmental Therapies.

L.H. became enrolled with Regence BlueShield as of April 1, 2012, months after this lawsuit was filed. See M.B.S. Decl. (5/25/12), ¶5. Regence issued L.H. a policy describing his medical benefits. See Hamburger Decl. (7/13/12), *Exh. C*. L.H.'s

1 Regence policy expressly excludes coverage of speech, occupational and physical
2 therapies when those therapies treat “neurodevelopmental delays:”

3 **Neurodevelopmental Therapy**

4 *We do not cover neurodevelopmental therapy, including*
5 *physical therapy, occupational therapy and speech therapy*
6 *and maintenance service, to restore and improve function*
7 *for an Insured with neurodevelopmental delay. By*
8 *“neurodevelopmental delay” We mean a delay in normal*
9 *development that is not related to any documented illness*
10 *or Injury.*

11 *Id.* p. 27 (emphasis added). “Illness” and “Injury” are defined terms in L.H.’s policy:

12 Illness means a congenital malformation that causes
13 functional impairment; a condition, disease, ailment or
14 bodily disorder other than an Injury; and pregnancy. *Illness*
15 *does not include any state of mental health or mental*
16 *disorder (which is otherwise defined in this Policy).*

17 Injury means physical damage to the body inflicted by a
18 foreign object, force, temperature or other corrosive chemical
19 or that is the direct result of an accident, independent of
20 Illness or any other cause. An Injury does not mean bodily
21 Injury caused by routine or normal body movements such as
22 stooping, twisting, bending or chewing and does not include
23 any condition related to pregnancy.

24 *Id.*, p. 55 (emphasis in original and added). A “Mental Health” condition is defined as
25 a DSM-IV condition, just as in the Mental Health Parity Act:

26 Mental Health Conditions means Mental Disorders in the
most recent edition of the Diagnostic and Statistical Manual
of Mental Disorders published by the American Psychiatric
Association except as otherwise excluded under this Policy.

Id. p. 11 (emphasis in original). Thus, L.H.’s neurodevelopmental therapies, needed to
treat a DSM-IV mental disorder, are expressly excluded under his Regence policy.
Moreover, L.H.’s therapies cannot be covered under Regence’s rehabilitation benefit.
That benefit is limited to only the provision of therapies to treat injury or illness (as
defined by the Regence policy):

1 We cover inpatient and outpatient rehabilitation services
2 (physical, occupational and speech therapy services only)
3 and accommodations as appropriate and necessary to restore
4 or improve lost function caused by Injury or Illness.

5 *Id.* p. 13. Thus, the rehabilitation benefit also expressly excludes coverage of
6 rehabilitative therapies to treat DSM-IV mental conditions. Under the explicit terms of
7 the Regence contract, L.H.'s neurodevelopmental therapies to treat his DSM-IV
8 condition are not covered.

9 III. ANALYSIS

10 A. L.H. Has Standing to Pursue Injunctive and Declaratory Relief.

11 Standing is determined by examining the complaint's allegations to
12 determine if the plaintiff has a dispute which can be adjudicated: "[T]he standing
13 inquiry requires careful judicial examination of *a complaint's allegations* to ascertain
14 whether the particular plaintiff *is entitled to an adjudication of the particular claims*
15 *asserted.*" *Allen v. Wright*, 468 U.S. 737, 752, 104 S. Ct. 3315, 3325 (1984) (emphasis
16 added).

17 Here, the Amended Complaint's allegations demonstrate that L.H. "is
18 entitled to an adjudication of [his] claims." *Allen*, 468 U.S. at 752. L.H. alleges that he
19 requires neurodevelopmental therapies to treat his DSM-IV mental health condition.
20 Second Amended Complaint, ¶14. He has actually received these therapies since
21 becoming insured by Regence. M.B.S. Decl. (5/25/12), ¶6. Regence's contract, on its
22 face, excludes these treatments. *Id.*, ¶5.

23 Although L.H.'s allegations are sufficient to withstand Regence's CR 12
24 (b)(6) motion, he now submits additional evidence of standing. L.H. is diagnosed with
25 a DSM-IV condition which requires speech therapy for treatment. Moroney Decl. ¶4,
26 *Exh. B.* L.H.'s Regence contract expressly excludes all coverage for neurodevelop-
mental therapies. Hamburger Decl. (7/13/12), *Exh. C*, p. 27 (excluding "[t]reatment for
neurodevelopmental therapy"). Regence has stated in its briefing and at oral argument

1 that it has no obligation to cover neurodevelopment therapies. Regence Opp. and
2 Cross-Mot. (filed 3/13/12), pp. 1, 7-16; Hamburger Decl., *Exh. A*, p. 39 (“Is there a
3 neurodevelopmental benefit? ... *No*. Okay...”).

4 L.H. certainly has a well-grounded fear of imminent invasion of his
5 contractual and statutory right to coverage for mental health services given that he has
6 received, and continues to require, the neurodevelopmental therapy services that
7 Regence explicitly excludes by contract. *Friends of the Earth, Inc., v. Laidlaw Envtl. Servs.,*
8 *Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693 (2000); *Maya v. Centex Corp.*, 658 F.3d 1060, 1067
9 (9th Cir. 2011). As the Court concluded, once L.H. demonstrates that he has a DSM-IV
10 condition which requires treatment with neurodevelopmental therapies excluded by
11 his Regence contract, he has standing to seek the important, but narrow, injunctive and
12 declaratory relief sought in Plaintiff’s Second Amended Complaint and Motion for
13 Partial Summary Judgment:

14 Because I think Regence has taken the position that the
15 neurodevelopmental exclusion is valid, and therefore, both
16 declaratory and injunctive relief under those circumstances
17 would be appropriate as to that very narrow issue, even if
18 there has been no submission or denial of claim, that L.H.
19 would have standing under those circumstances.

Hamburger Decl. (7/13/12), *Exh. A*, p. 23.

20 **B. L.H. and O.S.T. Have Justiciable Claims.**

21 For purposes of declaratory relief, a justiciable controversy is

22 “(1) ... an actual, present and existing dispute, or the mature
23 seeds of one, as distinguished from a possible, dormant,
24 hypothetical, speculative, or moot disagreement, (2) between
25 parties having genuine and opposing interests, (3) which
26 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.”

1 *Washington State Coal. for the Homeless v. Dep't of Soc. & Health Services*, 133 Wn. 2d 894,
2 917, 949 P.2d 1291 (1997).

3 Here, all the grounds for declaratory relief are met.

4 *First*, L.H., O.S.T. and the proposed class have an actual dispute
5 regarding whether Regence's express neurodevelopmental exclusion violates the
6 Mental Health Parity Act.

7 *Second*, plaintiffs and the putative class have a genuine and opposing
8 interest from that of Regence.

9 *Third*, those interests are actual and imminent. They are not theoretical.
10 O.S.T. had claims for neurodevelopmental therapies to treat his diagnosed DSM-IV
11 conditions denied by Regence as "not covered under the Plan" or "not covered by
12 contract." *See, e.g.*, MacDonald Decl., ¶12; Hamburger Decl. (dated 7/13/12), *Exhs. D*
13 *and E* (claims, EOBs and service notes for O.S.T.'s 2008 therapy services to treat his
14 DSM-IV condition of phonological disorder, DSM-IV 315.39, denied by Regence as
15 excluded by the plan contract). As described above, L.H. will undoubtedly have his
16 similar claims denied if and when his clinicians submit them.

17 L.H. and O.S.T. have actual justiciable claims even if their health care
18 providers billed in the past or currently bill Regence using ICD-9 codes. As Kimberly
19 MacDonald, plaintiffs' certified coding expert, explains, *Regence and every other payor*
20 *require all providers to bill using ICD-9 codes, even when billing for DSM-IV mental*
21 *conditions.* *See* MacDonald Decl. ¶¶7-10; Hamburger Decl. (7/13/12), *Exh. F*
22 (Regence's Reimbursement Policy excludes DSM-IV codes from billing). The use of
23 ICD-9 codes is a "universal standard," and the coding system "does not allow a
24 provider to enter a DSM code into the bill submitted to the carrier, only ICD-9 codes."
25 MacDonald Decl., ¶10. The federal Health Insurance Portability and Accountability
26 Act (HIPAA) requires billing using ICD-9 codes. *Id.*; *see* Hamburger Decl. (7/13/12),

1 *Exh. H* (Center for Medicaid and Medicare Services FAQ: “The DSM-IV is not a HIPAA
2 adopted code set and may not be used in HIPAA standard transactions.”).

3 Thus, Regence’s argument that plaintiffs do not have standing if claims
4 are submitted without DSM-IV diagnoses is disingenuous. See *Hamburger Decl.*,
5 *Exh. A*, p. 18 (“I would like someone – and then I’ll sit down and be quiet, and we can
6 let the jury decide – show me a claim that was submitted to Regence with a DSM
7 diagnosis that was denied”); *Gifford Decl.* (3/12/12), ¶7 (“O.S.T. submitted no claims
8 for speech therapy to Regence billed under a DSM-IV diagnosis which were denied at
9 any time after the MHPA became effective for individual plans (January 1, 2008)”). *No*
10 *claims were submitted with DSM-IV diagnoses because Regence and federal HIPAA*
11 *law directs providers not to do so.* *MacDonald Decl.*, ¶8. Regence cannot require
12 claims for mental health treatments to be submitted using ICD-9 coding, and then
13 argue that the claims were properly denied because they were not billed under a
14 DSM-IV code.

15 Nonetheless, “nearly every DSM-IV condition has an ICD-9 equivalent.”
16 *Id.*, ¶10. O.S.T. has claims for neurodevelopmental therapies that were billed using the
17 ICD-9 equivalent of his DSM diagnosis that Regence denied as excluded under his
18 plan. *Id.*, ¶12; *Hamburger Decl.* (7/13/12), *Exhs. C*, and *D*. Regence’s testimony about
19 O.S.T.’s claims coyly avoids consideration of those claims. See *Messinger Decl.*, ¶2
20 (only reviewing the five claims submitted by Seattle Children’s Hospital after
21 December 28, 2009 autism diagnosis, ignoring O.S.T.’s earlier phonological disorder
22 diagnosis); *MacDonald Decl.*, ¶12. In light of this testimony, Regence’s entire ICD-9 vs.
23 DSM-IV coding argument fails.

24 *Fourth*, a judicial determination as to Regence’s obligation to cover
25 neurodevelopmental therapies to treat DSM-IV conditions will be final and conclusive.
26 It would clarify plaintiffs’ rights under the Regence contracts, ensuring that L.H. and

1 other putative class members are not vulnerable to Regence's undisclosed claims
2 processing vagaries or at risk of clawbacks for covered therapies that Regence later
3 decides were improperly paid.¹

4 For that very reason, Judge Robert Lasnik issued an immediate,
5 permanent injunction in *Z.D. v. Group Health Cooperative*, No. C11-1119 RSL (W.D.
6 Wash.). See Hamburger Decl., *Exh. G*. Group Health, like Regence here, contended
7 that despite its official policy, sometimes it covered neurodevelopmental therapies to
8 treat DSM-IV conditions. See *id.*, p. 23 ("The crux of Defendants' position is, again, that
9 regardless of Group Health's actual policies, they may in fact pay future claims."); see
10 Giffords Decl. (5/12/12), ¶¶5-6 (claims for certain unidentified DSM-IV conditions are
11 processed under the rehabilitation benefit, despite Regence's express exclusion of
12 rehabilitation benefits to treat mental disorders identified in the DSM-IV). Judge
13 Lasnik rejected those arguments as "patently deficient." Hamburger Decl., *Exh. G*,
14 p. 23. "[I]t is no excuse for Defendants to represent that the Plan precludes the
15 coverage sought and yet simultaneously argue that ... its practice has changed in
16 Plaintiffs' favor, suggesting a strong likelihood of future coverage." *Id.* p. 23 (internal
17 quotations omitted). Judge Lasnik concluded that "[t]he Court will not leave Plaintiffs
18 at the mercy of [the insurer's] plainly arbitrary application of its own Plan terms or its
19 ever-evolving understanding of Plaintiffs' entitlement to coverage." *Id.*

21 ¹ Dr. Gifford's second declaration indicates that Regence sometimes covers DSM-IV
22 conditions, despite Regence's express neurodevelopmental exclusion and Dr. Gifford's earlier
23 testimony that such services are not medically necessary. Compare Gifford Decl. (3/13/12)
24 ¶¶5-6, 9, to Gifford Decl. (5/11/12), ¶¶5-6. Regence's apparent payments for
25 neurodevelopmental therapy services despite the express policy provisions puts its insureds at
26 risk for the kind of unexpected, massive clawback that the plaintiffs in *A.G. v. Premera*
experienced. See Hamburger Decl. (5/11/12), *Exh. A*, p. 5, ¶¶5-7. (Plaintiff A.G. had his
neurodevelopmental therapy claims retrospectively reviewed by Premera which determined
that nearly \$24,000 in neurodevelopmental therapies had been paid in error. The cost of those
services then became his parents' financial responsibility.)

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IV. CONCLUSION

The Court should not leave L.H. and current Regence enrollees “at the mercy” of Regence’s “ever-evolving understanding” of plaintiffs’ right to coverage of neurodevelopmental therapies. The Court should find that Regence’s express neurodevelopmental exclusion—its official policy—violates the Mental Health Parity Act. The Court should grant Plaintiffs’ Motion for Partial Summary Judgment and deny Defendants’ Motion for CR 12 (b)(6) Dismissal of Injunctive and Declaratory Relief Claims, Motion for Summary Judgment Dismissal of Damages Claims and Cross Motion for Summary Judgment.

DATED: July 13, 2012.

SIRIANNI YOUTZ SPOONEMORE

/s/ Eleanor Hamburger

Eleanor Hamburger (WSBA #26478)
Richard E. Spoonemore (WSBA #21833)
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

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

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

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

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

Exhibit 10

R.A. 000089

HON. JOHN P. ERLICK
Noted for Consideration: August 10, 2012

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

DECLARATION OF KIMBERLY M.
MACDONALD

I, Kimberly M. MacDonald, declare under penalty of perjury and in
accordance with the laws of the State of Washington that:

1. I am over the age of 18, and am competent to testify. I have
personal and expert knowledge of the matters set forth herein.

2. I am a Coding and Compliance Specialist at the Coopersmith
Health Law Group ("CHLG"). CHLG, among other services, regularly represents
physicians and hospitals in negotiating provider contracts, assists medical practices
and hospitals in coding, billing, compliance, and helps clients in their dealings with
insurance carriers and regulators. In addition to me, the group includes a former Chief
Counsel and Director of Enforcement of the Washington State Office of the Insurance
Commissioner, the former top insurance attorney at the Attorney General's office, the
former head in provider contracting at Regence BlueShield and Premera Blue Cross,

DECLARATION OF KIMBERLY M. MACDONALD - 1

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R.A. 000090

1 and has a certified coding expert who has worked at five of the region's hospitals for
2 over twenty years in compliance and clinical documentation.

3 3. I have completed an Associate Degree in Business from the
4 University of Maryland. I maintain the American Academy of Professional Coder
5 ("AAPC") credentials as a Certified Professional Coder ("CPC"). The AAPC is the
6 primary credentialing body for coders working with physician and other medical
7 professional coding. All my credentials require continuing education units to ensure I
8 maintain the most current knowledge of coding and compliance issues. I have over
9 twenty-five years of experience coding in the medical profession.

10 4. Before joining CHLG, I was the auditor in the compliance division
11 for the Department of Labor and Industries (L&I). I performed a critical function in
12 reviewing services provided by healthcare providers to ensure their compliance with
13 Title 51 and Department's rules and fees. I conducted numerous audits identifying and
14 obtaining recoupment of overpayments to providers for inappropriate billing. My
15 experience includes working with the Attorney General's Office and expert witnesses
16 with successful outcomes for the L&I, radiology reporting requirements policy for use
17 in Medical Aide Reimbursement Fee Schedule, identification of issues related to
18 inappropriate billing by multiple providers of specific codes, recovery of inappropriate
19 payments to providers due to MTA error resulting in L&I cost containment and
20 suspension of payment to providers due to abuse and identified health risks, safety
21 concerns, and possible liability issues, including reporting of quality of care issues to
22 reduce medical safety risks to injured workers.

23 5. Before working for the Department of Labor and Industries, I was
24 the Clinical Coordinator and MRI Center Director for Olympia Orthopedic Associates
25 with responsibility for the management of all clinical operations for a nine-provider
26 orthopedic clinic and MRI center which supported the orthopedic groups' eighteen

1 providers. My experience includes development and implementation of an
2 organizational auditing program with compliance activities, and responsibility for all
3 clinical and surgical billing utilizing CPT and ICD-9 coding.

4 6. My findings are based on a limited review of certain bills
5 submitted to Regence Blue Shield ("Regence") for the care of O.S.T. I did not evaluate
6 the medical necessity or quality of care provided to O.S.T, nor do I have the
7 competence to conduct such an evaluation.

8 7. Use of ICD-9 codes when billing public and commercial insurance
9 carriers is the universal standard. Billing with ICD-9 codes is required by the Health
10 Insurance Portability and Accountability Act, popularly known as HIPAA. This
11 provision of the Act was effective 2003. Medicare and Medicaid required that providers
12 use ICD-9 codes when billing for services long before HIPAA's enactment.

13 8. Like every other commercial health insurer, Regence requires that
14 providers use ICD-9 codes when billing for services. The company's billing
15 instructions, in their entirety, direct providers to:

16
17 **Diagnosis or Nature of illness or Injury**

18 Identify the patient's condition(s) by entering up to four ICD-
19 9-CM codes in order of relevance. Codes must be carried out
20 to the highest possible (4th or 5th) digit. Non-specific
diagnoses, such as 780, may result in denials.

21 (emphasis in the original). There is no mention of DSM codes in the Regence billing
22 instructions.

23 9. Every carrier uses a standard form to bill for care, known as a CMS
24 (Center for Medicare and Medicaid Services) 1500, and on that form there is only one
25 place where a diagnostic code can be placed, known as Box 21. It is in Box 21 where the
26 ICD-9 codes are entered, and there is no space for DSM codes. Most claims are

1 submitted electronically: the electronic medical record system known as Epic, used by
 2 Providence, Swedish, the University of Washington Medical Center, MultiCare, and
 3 Virginia Mason, does not allow a provider to enter a DSM code into the bill submitted
 4 to the carrier, only ICD-9 codes.

5 10. DSM codes serve as guides for providers and coding staff to help
 6 select the proper ICD-9 code to submit when billing, as nearly every DSM code has an
 7 ICD-9 equivalent. But DSM codes themselves are not used to code or bill a claim to a
 8 health insurance carrier.

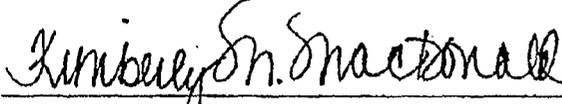
9 11. O.S.T.'s providers appropriately used ICD-9 codes, rather than
 10 DSM codes, when billing for mental health services rendered to O.S.T. in 2008 - 2009.

11 12. Of the limited claims I was able to review, for example, I found
 12 that speech therapist Shana Kelly was denied claims from Regence for care provided to
 13 OST for phonological (or developmental speech language) disorder on multiple dates
 14 of service, including: 10/10/08, 10/17/08, and 11/07/08. Regence's basis for the denial
 15 for the first two dates of service was N01, "not covered by contract." Regence denied
 16 the third date of service on the basis that it was N22, "this service for this condition is
 17 not covered by your plan." The provider appropriately used the 315.39 ICD-9 code.

18 13. The diagnostic code ICD-9 315.39, phonological disorder, appears
 19 under the identical code number in the DSM-IV.

20 14. The diagnosis of mental health disorders are generally covered
 21 under ICD-9 codes 290 - 319.

22 DATED: July 12, 2012, at Seattle, Washington.

23 
 24 _____
 25 Kimberly M. MacDonald
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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 July 13, 2012, I caused a copy of the foregoing document to be served on all counsel of record as indicated below:

Timothy J. Parker	<input checked="" type="checkbox"/>	By First-Class Mail
Jason W. Anderson	<input checked="" type="checkbox"/>	By Email
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701 Fifth Avenue, Suite 3600		Fax (206) 467-8215
Seattle, WA 98104		<u>parker@carneylaw.com</u>
<i>Attorneys for Defendant Regence BlueShield</i>		<u>anderson@carneylaw.com</u>
		<u>williams@carneylaw.com</u>

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

Eleanor Hamburger
Eleanor Hamburger (WSBA # 26478)

Exhibit 11

R.A. 000095

HON. JOHN P. ERLICK
Noted for Consideration: August 10, 2012
Without Oral Argument

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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

Plaintiffs,

v.

REGENCE BLUESHIELD, a Washington
corporation,

Defendant.

NO. 11-2-34187-9 SEA

DECLARATION OF PATRICIA A.
MORONEY, M.A., CCC-SLP

[REDACTED]

I, Patricia A. Moroney, M.A., CCC-SLP, declare under penalty of perjury
and in accordance with the laws of the State of Washington that:

1. I am the Director of Northwest Language and Learning Services. I
am responsible for directing professional staff in a speech-language pathology practice
focused on children and young adults with communication disorders resulting from
neurodevelopmental or traumatic causes. I received my Masters of Arts in Speech
Pathology and Audiology from Western Washington University, and my Bachelor of
Arts in Speech Pathology and Audiology from San Diego State University. I have a
Certificate of Clinical Competence in Speech Language Pathology from the American
Speech-Language-Hearing Association. I have practiced as a speech pathologist for
thirty years in various clinical settings. Attached as *Exh. A* to this declaration is a true
and correct copy of my curriculum vitae.

DECLARATION OF PATRICIA A.
MORONEY, M.A., CCC-SLP - 1

SIRIANNI YOUTZ SPOONEMORE
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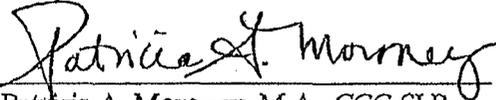
R.A. 000096

1 2. I have been retained by Plaintiffs to conduct an evaluation of
 2 I ██████ H ██████ to determine (1) whether he is properly diagnosed with a condition
 3 listed in the *Diagnostic and Statistical Manual of Mental Disorders*, 4th Ed. Text Revision
 4 (DSM-IV-TR) and (2) whether he requires neurodevelopmental therapy services, such
 5 as speech, occupational and physical therapy services to treat any identified DSM-IV-
 6 TR listed conditions. As my expertise is in speech language pathology, my opinion is
 7 confined to only whether I ██████ has any communication disorder listed in the DSM-IV,
 8 and his need for speech therapy services. My opinion does not consider whether I ██████
 9 has additional DSM-IV-TR listed conditions that relate to his need for occupational and
 10 physical therapy services.

11 3. In conjunction with my evaluation, I reviewed I ██████'s medical
 12 records from Boyer Children's Clinic and Seattle Children's Hospital, as well as the Eat
 13 Speak Play Clinic, Brown Bear Therapies, and Children's National Medical Center in
 14 Washington D.C. I also spoke with I ██████'s current speech therapist at the Boyer
 15 Clinic, Trudi Picciano.

16 4. Based upon my review of I ██████'s records and my conversation
 17 with his current speech therapists, I conclude that I ██████ is properly diagnosed with a
 18 severe communication disorder described in the DSM-IV-TR as Expressive Language
 19 Disorder (315.31) and that he requires speech therapy to treat this disorder. Attached
 20 as *Exh. B* to my declaration is a true and correct copy of my report in this matter which
 21 describes how I determined that I ██████ meets the criteria for the DSM-IV condition of
 22 Expressive Language Disorder and his need for ongoing speech therapy.

23 DATED: July 12, 2012, at Seattle, Washington.

24 
 25 Patricia A. Moroney, M.A., CCC-SLP
 26

DECLARATION OF PATRICIA A.
 MORONEY, M.A., CCC-SLP - 2

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701 Fifth Avenue, Suite 3600		Fax (206) 467-8215
Seattle, WA 98104		parker@carneylaw.com
<i>Attorneys for Defendant Regence BlueShield</i>		anderson@carneylaw.com
		williams@carneylaw.com

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

Eleanor Hamburger
Eleanor Hamburger (WSBA # 26478)

Exhibit A

Patricia A. Moroney, M.A., CCC-SLP
Director, Northwest Language and Learning Services
Speech and Language Pathologist
Language Learning Disabilities Specialist

1808 East Union Street, Suite G
 Seattle, WA 98122

Phone: (206) 568-2080

Fax: (206) 709-7940

E-mail: pattimoroney@nwlls.net

Education: 1988-1994 Doctoral Program – University of Washington
 Speech and Hearing Sciences Department

Research Interest: Reacquisition of Reading, Writing and Discourse
 Abilities in Children following Traumatic Brain
 injury. Effects of impaired memory and story
 grammar organization on reading and writing.

Auditory Processing / Phonemic Analysis/
 Language Learning Disabilities

1980-1983 Master of Arts – Western Washington University Speech
 Pathology and Audiology

Recipient: Women of Western Scholarship, 1982

1974-1979 Bachelor of Arts – San Diego State University
 Graduation with Honors, 1979
 Major: Speech Pathology and Audiology
 Minors: Psychology and French

Professional Experience:

September 1999 -Present: **Director: Northwest Language and Learning Services**, Seattle and
 Renton, WA. Responsible for directing professional staff in speech-language pathology practice
 focused on children and young adults with ongoing language, reading, memory, or written language
 difficulties resulting from neurochemical, neurobiological, or traumatic causes. Provide school based
 evaluation and therapy at New Horizon School for students with learning disabilities.

March 1992 – September 1999: **Director: Northwest Language and Learning Services Inc.**
Clinical Practice, Nordstrom Medical Tower and Mercer Island Offices. Clinical Director/Speech and
 Language Pathologist; Specializing in evaluation and treatment of children and adults with language
 and learning disabilities resulting from neurological differences or trauma. In clinical practice with
 Brien Vlcek, M.D., Pediatric Neurologist and Stephen Glass, M.D., Pediatric Neurologist.

June 1987 - June 1992: **Program Manager, Speech Pathologist, Language Learning Disabilities**
Specialist - Children's Hospital and Medical Center. Caseload consisted of assessment and
 intervention for children with neurological impairments, neurologically based language learning
 disabilities, and emotional or psychiatric disturbances. Management and supervision responsibilities
 included quality assurance monitoring of Speech Pathology program, staff education in language
 learning disabilities, general administration, hiring, budget, and supervision of staff from August 1988
 until January 1991. Contact Nola Marriner.

Professional Experience (con't):

August 1986 - June 1987: **Speech Pathologist – Speech, Language and Learning Services; Group Health**. Fifty percent of caseload treating children between two and eleven years of age with disorders of language, articulation and cognition. Extensive experience testing and providing therapy for children with learning disabilities. Fifty percent of caseload involved with adult rehabilitation resulting from stroke, disease, or trauma. Contact Steve Thomas, Elinor Kriegsman or Kathy Scott.

July 1985 - August 1986: Traveled across USA, Florida Keys, East Coast of North America, and Europe and North Africa.

September 1984 - June 1985: **Communication Disorders Specialist, Evergreen School District**. Diagnosis and therapy primarily for the hearing impaired program. Created consistent lines of communication between classroom teachers and SLPs so expectations for desired articulation and language goals remained consistent. Provided in-services on ways to incorporate speech therapy into daily activities and in-services regarding language development. Gave quarterly presentations on communication disorders related to children and language learning disabilities. Contact Sue Ballard.

June 1983 - September 1984: **Speech-Language Pathologist, Group Health**. Highly varied caseload. One-third of caseload involved with diagnosis and therapy for communication disordered children and adolescents, ages two to eighteen with disorders of articulation, fluency, cognition, language, English as a second language, and voice. Remaining two-thirds of caseload at a Progressive Care Facility (PCF) for adult speech and language disorders resulting from CVA, disease, and trauma. Initiated, organized and ran two highly successful communication groups focusing on social discourse skills for adults following stroke and trauma. Diagnosis and treatment of communication disorders resulting from language, memory, and perceptual disorders.

September 1982 - June 1983: **Communication Disorders Specialist, Battleground School District**. Diagnostics and therapy for special education and communication disordered. Contact Dr. Gary Snow, Director of Special Services.

Summer 1982: **Speech-Language Pathologist; American Lake Veterans Administration Hospital**. Caseload consisted of adults with neurological diseases, closed and open head injury. Organized and directed two communication groups for men and women following stroke.

Spring 1982: **Master's Externship in Seattle Public School District**. Majority of caseload spent at Lowell Elementary for orthopedically handicapped, cerebral palsied and learning disabled children. Contact Clara LaMantilla, C.D.S.; currently with Bellevue School District.

September 1978 - June 1979: **Primary Researcher, Lindamood Auditory Conceptualization Therapist**, grant program funded through San Diego City Schools. Planning and implementation of the Auditory Discrimination in Depth Program (A.D.D.) for children and adolescents ages seven to eighteen with learning disabilities, mental retardation, emotional disturbances, and severe auditory processing deficits. Curriculum included language development, auditory discrimination and analysis skills, reading and spelling. Specific emphasis was placed on the Auditory Discrimination in Depth Program. Contact Marian Grant, Director, Asetline School.

Presentations:

"When and Who to Refer for Speech/Language and Neuropsychological Testing". Presentation for Resource Room Teachers in King County Parochial Schools, March 2010.

"The Role of Auditory Processing Disorders in Children, Adolescents, and Adults with Attention Deficit Disorder". Children and Adults with Attention Deficit/Hyperactivity Disorder (CHADD) Local Chapter Meeting Presentation, November 2001.

"Language and Nonverbal Learning Disabilities in Children and Adolescents with Socio-emotional Difficulties". Social Workers Presentation, Casey Family Foundation, September 2000.

"The Effects of Auditory Processing Deficits Upon Language Acquisition & Literacy". Teacher Presentation/Workshop, University Preparatory School, February 1999.

"Phonemic Awareness & Auditory Discrimination in Depth Workshop". Workshop for Speech-Language Pathologists, Resource Room Teachers and School Psychologists. Port Angeles School District, March 1997.

"Auditory Discrimination in Depth Workshop". Presentation to Special Educators at New Horizon School, January 1996.

"Auditory Processing and Language Learning Disabilities". One day Workshop Presentation to Speech/Language Pathologists and Special Educators in Kitsap School District, October 1995.

"Pediatric Brain Injury: Effects on Language and Learning". University of Washington Seminar Presentation in Cognition and Brain Injury, June 1991.

"Language Learning and Attention Deficits in Children with Sensory Integration Dysfunction". Staff Presentation, June 1991.

"Language Learning Disabilities Assessment". Presentation to Psychiatry Residents in Seminar on Assessment at Children's Hospital and Medical Center, April 1991.

"Assessment and Intervention of Language Deficits in Children Following Traumatic Brain Injury". Invited Presentation, Pediatric Rehabilitation Conference, Salishan, OR, April 1990.

"Maximizing Treatment Effectiveness in Children with Attention Deficit Disorders". Presentation to Occupational/Physical Therapy Department, Children's Hospital and Medical Center, May 1990.

"Communicative and Cognitive Impairments in Children with Traumatic Brain Injury". WSHA Presentation, October 1990.

"Linguistic and Cognitive Impairments in Children with Traumatic Brain Injury". Coming Home Conference, Seattle, WA, April 1989.

"Assessment and Intervention of Language Based Learning Disabilities". Children's Hospital and Medical Center Staff In-service one-day workshop, September 1988.

"Disorders of Communication and Cognition Associated with Right and Left CVA, Swallowing Disorders and Dementia in Elderly Patients". Nursing Education four presentations to staff, 1984.

Professional Memberships:

American Speech Language and Hearing Association, ASHA Certificate of Clinical Competence (#01066174)

Washington Speech and Hearing Association (WSHA)

Licensure State of Washington: Speech and Language Pathology (#LL00001544)

Member, International Dyslexia Association

Associate Member, Pacific Northwest Neuropsychological Society

References available upon request

Exhibit B

Northwest Language and Learning Services

Patricia Moroney, M.A., CCC-SLP and Associates
Speech - Language Pathologists

1808 E. Union, Suite C
Seattle, WA 98122
Phone (206) 568-2080
Fax (206) 709-7940

CONFIDENTIAL

July 11, 2012

Eleanor Hamburger, Esq.
Sirianni Youtz Spoonemore
999 Third Avenue, Suite 3650
Seattle, WA 98104
By facsimile: (206) 223-0246

Re: I [REDACTED] H [REDACTED] - OST vs. Regence

Dear Ms. Hamburger:

You requested that I review the medical records regarding I [REDACTED] H [REDACTED] and render an expert witness statement regarding his need for speech-language services. I have offered my professional opinion in this letter on a more probable than not basis.

I have reviewed the records you provided.

I [REDACTED] H [REDACTED] is a 34-month-old boy with myotubular myopathy. I [REDACTED] was born at 32 weeks gestation via a vaginal delivery at Washington Hospital Center in Washington D.C. He sustained an intraventricular hemorrhage and was transferred to Children's National Medical Center where he stayed for three months. At the time, I [REDACTED] was severely hypotonic and ventilator dependent. He was diagnosed in February 2010 with myotubular myopathy, hydrocephalus, and macrocephaly.

The recent problem list outlined by Seattle Children's Hospital includes:

1. X linked myotubular myopathy with severe muscle weakness resulting in restrictive lung disease.
2. Born at 32 weeks gestation.
3. Hydrocephalus due to intraventricular hemorrhage, without VP shunt.
4. Restrictive lung disease secondary to neuromuscular weakness requiring 24-hour mechanical ventilation via tracheostomy tube.
5. Severe oral and pharyngeal phase dysphagia, currently receiving all nutrition by G-tube.
6. Constipation.
7. Vitamin D deficiency.
8. Vesicoureteral reflux.

He continues to be ventilator dependent and is fed by G-tube. He is followed by pulmonary and otolaryngology clinics at Seattle Children's Hospital. Additionally, I [REDACTED] had ear tubes placed in 2010 due to chronic otitis media with effusion and tympanic membrane dysfunction which was impacting the development of receptive and expressive language. At his most recent appointment, it was apparent that both ear tubes had fallen out; however, tympanic membranes look normal and there are no concerns regarding hearing presently.

CONFIDENTIAL

H [REDACTED] - OST vs. Regence, Page 2 of 2

I [REDACTED] language therapy needs were well documented by the Eat, Speak, Play Clinic in Washington, D.C. At almost two years of age, he was unable to produce CV sounds (ba, me, da, etc.). He was not able to independently close his lips impacting the development of the earliest speech sounds (i.e., b, m, p), nor lateralize his tongue. He was unable to combine those sounds with any vowels other than /a/. He appeared to understand much more than he could express. At the time, he used a limited number of signs to indicate his wants and needs and to answer questions. I [REDACTED] was clearly diagnosed with an Expressive Language Disorder as well as an Oral-Motor disorder due to his severe limitations in expressive communication and language.

I [REDACTED] is currently seen at the Boyer Children's Clinic for weekly home-based physical, occupational and speech therapies. I [REDACTED] language therapy needs were well documented in the Boyer Children's Clinic Report at the age of 34 months. Standardized test results indicated cognitive skills within the normal range with an age equivalent of 34 months on the Developmental Assessment of Young Children (DAY-C). Likewise, the Receptive-Expressive Emergent Language Scale revealed receptive language skills at the 36-month level. Although I [REDACTED] performed at the 32-month level in expressive language skills, his ability to communicate and demonstrate his language was severely impacted by his oral motor difficulties. Furthermore, upon administration of the Clinical Assessment of Articulation and Phonology to obtain standardized information about his speech development, he received a standard score of 57 (average is 100 +/- 15 points). His score is greater than 2.33 standard deviations below the mean indicating a severe communication disorder. I [REDACTED] satisfies criteria under the DSM-IV system for an Expressive Language Disorder (315.31). These criteria include limited amount of speech, a markedly limited vocabulary, and difficulty producing sentences of developmentally appropriate length and complexity despite average nonverbal intelligence and receptive language. He also demonstrates a speech-motor disorder, which should be coded under Axis III. Furthermore, his parents note that communication is difficult and frustrating. Treatment plans were written to address these issues with speech-language therapy.

I [REDACTED] history and recent evaluation results are consistent with a neurodevelopmental delay in expressive language that clearly impacts the development of communication and language-based academic subjects, which depend upon a solid foundation of expressive language in order to demonstrate knowledge. Children with untreated expressive language delays are a high risk for psychiatric disorders, as well as social, behavioral, and emotional difficulties and delays.

These records clearly document I [REDACTED] need for intensive ongoing speech and language therapy from a skilled clinician. It is my professional opinion that I [REDACTED] demonstrates an Expressive Language Disorder under the DSM-IV criteria and needs speech therapy to treat this condition.

If you have any questions regarding this letter, please contact me at (206) 568-2080.

Sincerely,



Patricia A. Moroney, M.A., CCC-SLP
Speech and Language Pathologist
Director, Northwest Language and Learning Services

Exhibit 12

R.A. 000107

HON. JOHN P. ERLICK
Noted for Consideration: August 10, 2012
Without Oral Argument

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

O.S.T., by and through his parents, G.T. and
E.S., 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

DECLARATION OF ELEANOR
HAMBURGER IN SUPPORT OF
PLAINTIFFS' SUPPLEMENTAL
BRIEFING

I, Eleanor Hamburger, declare under penalty of perjury and in
accordance with the laws of the State of Washington that:

1. I am a partner at Sirianni Youtz Spoonemore and am one of the
attorneys for Plaintiffs in this action.

2. Attached are true and correct copies of the following documents,
with underlining where appropriate for the Court's convenience:

Exhibit	Description
A	Transcript of Oral Argument at Summary Judgment Hearing (6/1/12) Transcribed from the King County Superior Court Official Audio Files by staff at Sirianni Youtz Spoonemore.
B	Progress Note by Lauren Bonifant, MS, CCC-SLP re: L.H. (2/21/12)
C	Regence Evolve Plus (Comprehensive) Policy, Group No. 30000404 - Medical Benefits Provided to L.H. by Regence BlueShield.

DECLARATION OF ELEANOR HAMBURGER - 1

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

R.A. 000108

Exhibit	Description
D	Regence BlueShield Explanation of Benefits, RBS 004416; (claim received 1/18/08, paid 12/3/08); Microfilm Claim, RBS 004787; and Progress Notes of Abby Sudbery, M.A., CCC-SLP, O.S.T. 02026-27.
E	Regence BlueShield Explanation of Benefits, RBS 00441 ; Microfilm Claim RBS 004788; Progress Notes of Abby Sudbery, M.A., CCC-SLP, O.S.T. 02025.
F	Regence Reimbursement Policy (printed 7/12/12 from www.regence.com/provider/library/policies/reimbursementPolicy/administrative/adm01.html).
G	Order Granting Plaintiffs' Motions for Summary Judgment in <i>Z.D., et al. v. Group Health Cooperative, et al.</i> , U.S. District Court for the Western District of Washington at Seattle, No. C11-1119 RSL (6/1/12)
H	Centers for Medicare & Medicaid Services, Frequently Asked Questions, re: DSM-IV diagnostic criteria (printed 7/13/12 from https://questions.cms.gov/)

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

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

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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 July 13, 2012, I caused a copy of the foregoing document to be served on all counsel of record as indicated below:

Timothy J. Parker	<input checked="" type="checkbox"/>	By First-Class Mail
CARNEY BADLEY SPELLMAN, P.S.	<input checked="" type="checkbox"/>	By Email
701 Fifth Avenue, Suite 3600		Tel. (206) 622-8020
Seattle, WA 98104		Fax (206) 467-8215
<i>Attorneys for Defendant Regence BlueShield</i>		<u>parker@carneylaw.com</u>

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

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

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HON. JOHN P. ERLICK
Noted for Consideration: August 10, 2012
Without Oral Argument

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

O.S.T., by and through his parents, G.T. and
E.S., 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

EXHIBITS A-H TO

DECLARATION OF ELEANOR
HAMBURGER IN SUPPORT OF
PLAINTIFFS' SUPPLEMENTAL
BRIEFING

[REDACTED]

Exhibit A

EXHIBITS A-H (Redacted) TO
DECLARATION OF ELEANOR HAMBURGER - 4

R.A. 000112

ORAL ARGUMENT - SUMMARY JUDGMENT HEARING

June 1, 2012

O.S.T. v. Regence BlueShield, et al.

No. 11-2-34187-9 SEA

RS = *Richard Spoonemore*

EH = *Eleanor Hamburger*

TP = *Tim Parker*

JE = *Judge Erlick*

BAILIFF??: ... is now in session; the Honorable John Erlick presiding.

JE: Good morning.

RS: Good morning.

JE: Please be seated. We are on the record in the matter of *O.S.T. v. Regence BlueShield*. This is King County Cause No. 11-2-34187-9 SEA, and we have a plethora of motions before the Court this morning. And what I would like to do to get started is simply to have counsel identify themselves for the record. Let's start on my right with plaintiffs' counsel, please.

RS: Good morning, Your Honor. I'm Rick Spoonemore with my partner, Ele Hamburger.

JE: Thank you, counsel.

TP: Good morning, Your Honor. Tim Parker and with me is Lisa Holman, attorney from Regence BlueShield, and my partner, Jason Anderson from Carney Badley.

JE: Thank you, counsel. Counsel, I do not recall if I made this disclosure previously or not. Mr. Parker — I had a UIM claim in 1995. Mr. Parker — it did not go to trial. We had an arbitration if I recall. Maybe we settled it. I think we settled it. I don't recall what happened with it. Mr. Parker represented Pemco. There's nothing about that case that's going to influence anyway whatsoever. I assume that if Mr. Parker had concerns about my hearing this case, he would have brought it to my attention. Counsel, are there any issues involving that?

RS: Not at all, Your Honor.

JE: All right, very good. All right, counsel, let me tell you what I've reviewed — what I understand the issues and motions are this morning. I just want to make sure we're all on the same page.

JE: I have reviewed all of your memoranda and read those in some detail. I have looked at most of the supporting documentation. When I say look at, that means I've read

JE: Okay, counsel. Please. The DSM was— we looked at it earlier. It was feeding disorder. All right, Ms. Hamburger, do you want—

EH: Exhibit G.

JE: Exhibit G, which is 30759.

EH: Right, and then, if you look at Exhibit I—

TP: _____ [inaudible] Exhibit G.

EH: This is Exhibit G.

TP: Is one of these Exhibit G?

EH: That is Exhibit G. And then Exhibit I is the denial of that claim. It says on RBS5005, provider – the amount paid is 0. Next page, it's not paid because – does not meet the rehab criteria because it is not a result of a specific injury, illness or congenital anomaly.

JE: And then if you go to—

EH: And then the appeal—

JE: Okay, counsel, yeah, one person really needs to talk at a time. Mr. Parker—

TP: Is there a DSM diagnosis on any of that?

JE: I believe there is. If you go back to Exhibit G. It's 30759.

TP: Is that ICD or DSM?

JE: I can't answer that.

TP: I'm at a disadvantage because I don't know if we're looking at the same thing.

JE: I was under the understanding that 30759 was a DSM.

TP: Well, it's further complicated because this is an ICD number, not a DSM number. At least on the document I'm looking at. I would like someone – and then I'll sit down, and be quiet, and we can let the jury decide – show me a claim that was submitted to Regence with a DSM diagnosis that was denied. Now keep in mind, we're looking at something that was years before this statute goes into effect—

JE: I understand, I understand.

TP: And I'll tell you another thing that's important. There are— and I'll stand on that question— until someone can show me that Regence denied a claim for a DSM diagnosis, I think that's the first _____, and Alpha and then the Omega. And I'm not

JE: Is the parent qualified?

EH: He is qualified to say what his son is diagnosed with. You are right, he is not a medical expert.

JE: Why don't we have a diagnosis?

EH: Your Honor, we just got the case. We certainly can produce a diagnosis, if Your Honor would like it. They just moved here at the beginning of April and enrolled in Regence. They have started at Boyer Children's Clinic, where they have speech PT and OT presently. That is what the father declares. And they have a Regence policy that excludes coverage of neurodevelopmental therapies. Nothing more is needed for injunctive relief.

JE: Well, let me state this on injunctive relief. O.S.T. does not have a claim. On L.H., the record is insufficient, in my opinion, for L.H. to obtain injunctive relief. That said, I am going to continue the motion to dismiss injunctive relief for supplementation of the record, because L.H. has just been added as a plaintiff. Now, I think that what we would need is a diagnosis of a DSM covered under the Parity Act, as well as an opinion that L.H. requires neurodevelopmental therapy services which would otherwise be excluded under the Regence policy. Because I think Regence has taken the position that the neurodevelopmental exclusion is valid, and therefore, both declaratory and injunctive relief under those circumstances would be appropriate as to that very narrow issue, even if there has been no submission or denial of claim, that L.H. would have standing under those circumstances. Now, he does not right now.

As far as O.S.T. goes, I think the O.S.T. declaratory issues are pretty much identical to the damages issues in terms of evidence. The reason he would be entitled to declaratory relief is because if this court finds there is a factual issue on whether Regence had notice of a DSM condition and denied coverage based upon a neurodevelopmental therapy, that that issue is moot if I agree with Regence that its exclusion is valid, and therefore, O.S.T. does have standing to get that determination. Because there is no sense in submitting this to the jury if, as a matter of law, Regence is correct on its interpretation of its policy. So, on declaratory relief, I am actually going to deny it.

Motion to Dismiss for Declaratory Relief is DENIED as to O.S.T. only. It is continued as to L.H., and on injunctive relief, as to L.H. only.

We will have to have a briefing schedule on this. We might as do this now, before I forget. We do not have a trial date; is that correct? Or it is way out. That is what I thought. Okay. Ms. Hamburger, we are at the first of June. So again, I don't know that we are going to have argument, but at least I want the record supplemented. Am I clear on what I think I need?

EH: Yes, Your Honor. I think we need enough time to work with the neurodevelopmental therapy providers.

JE: Okay. Give me a date.

EH: I think at least July 13.

JE: Really. Okay. All right. Mr. Parker. Obviously, you will not be supplementing the record, per se, I assume, but I would at least give you the opportunity to respond from a legal standpoint to the submissions.

TP: *[Inaudible]*. We are talking the motion to dismiss the injunctive relief, and you are essentially continuing that motion --

JE: That is correct.

TP: -- and requesting that the record be supplemented?

JE: That is correct.

TP: The plaintiff has until July 13 to do so?

JE: Correct.

TP: And now you are asking me when I can respond to whatever comes in on July 13th?

JE: That is correct.

TP: I may want to do some *[inaudible]*.

JE: Twenty-one days after that?

TP: Yes.

JE: All right. If we go into August, I have to go on the computer. Let's see. It would probably be the 1st, 2nd, 3rd -- August 3.

TP: What did you do on the motion?

JE: Under advisement.

TP: *[Inaudible]*

JE: That is not true. I denied your motion for declaratory relief. I told you I was not going to make a lot of decisions this morning.

TP: Denied as to both?

JE: No. Denied as to O.S.T., continued as to L.H.

TP: *[Inaudible]*

JE: Not yet. Let's see. All right. Do you need to reply to that, the response?

EH: Yes, but we probably don't need that much time.

JE: So August 3 is Friday. Do you want a week? Two weeks?

EH: A week is fine.

JE: August 10.

TP: Will you let us know whether you want oral argument or not?

JE: Yes, I will. I mean, our other arguments might moot this out. I do not know what is going to happen with that. All right. I think we are going to get into the, I think the next one is actually the cross-motions. Okay. I am going to start with plaintiff.

EH: Thank you, Your Honor. Your summary of the issues followed right on target, and I want to just -- our three main arguments are the diagnosis of DSM-IV conditions, neurodevelopmental therapies, mental health services under the Act when they are used to treat DSM-IV conditions, and medically necessary. You, as I recall, raised a question about what that meant; what does it mean when we say they can be medically necessary.

JE: Right. In other words, I read that as you are suggesting that that might be an issue of fact.

EH: As to each individual person, again, that goes to damages, it is an issue of fact. But as to eliminating --

JE: Under a class cert.

EH: Right.

JE: Okay.

EH: As to eliminating -- what that means is you cannot have a blanket exclusion for a mental health services in the contract. That is what the Parity Act was designed to eliminate. The Parity Act guaranties two things. It is not just about parity. It mandates coverage. That is the bedrock upon which mental health parity sits. It says health plans are no longer permitted to wholly exclude mental health services so long as the mental health service can be medically necessary. So, for instance, they can't say, we are only going to cover treatments for certain conditions, or, we are never going to cover this particular treatment, unless they can show it is never medically necessary. And that is what Regence can't do here. Neurodevelopmental therapies can be medically necessary to treat a whole range of DSM-IV conditions. Even Regence's medical director admits that. He says, in some plans, we cover it. And in

jurisdictions, is exactly the point that you and Dr. Giffords are making. In other words, sometimes you do and sometimes you don't provide coverage, and it just depends on the individual case. And as I infer from the plaintiff's argument here, is that all they're asking for is an individualized determination on medical necessity. In other words, don't rely upon this exclusion to deny coverage, but do exactly what Dr. Giffords is suggesting is done in practice, in some respects, which is on an individualized basis, we have to look at it anyway to see if it falls within the Rehab model. And we cover most of these.

TP: The exhibit that counsel went through, where we -- a review of a claim where it says no neurodevelopmental benefit doesn't qualify under the Rehab benefit --

JE: Right.

TP: That demonstrates precisely what Regence does. Number 1: Is there a neurodevelopmental benefit? Regardless of whether it's a broken leg or a mental disorder.

JE: Right.

TP: No. Okay. Do they qualify under the Rehab benefit? That exhibit shows --

JE: Right.

TP: In that instance they determine no, I don't know why. Maybe they did -- maybe it was right, maybe it was wrong -- but it demonstrates what the coverage under this contract is. And the difference is when they go through that analysis, the vast majority of DSM diagnoses are covered. You have to acknowledge that the neurodevelopmental provision in the contract and the Mental Health Parity coverage and Rehab creates an ambiguity. It is not crystal clear. You cannot sit down and read exactly what's covered, mainly because you could never write that up. You never could, I think even if you had a 1000-page contract, state that this condition and this diagnosis and this service is going to be covered, because there's always an issue.

JE: I absolutely agree with you.

TP: That's why they have medical doctors and RNs doing these reviews, not claims adjudicators.

JE: Absolutely agree with you.

TP: Okay. And that's why Regence is not in violation of the Parity Act, because they are doing the same thing for physical and the same thing for mental. And it's covered most often.

JE: But in reality, you know, we have -- I know I didn't want you to argue analogies, but you know, there's the issue of -- you know, in a discrimination case you have

Exhibit B

EXHIBITS A-H (Redacted) TO
DECLARATION OF ELEANOR HAMBURGER - 11

R.A. 000119

Progress Note

Patient: [REDACTED]	Treatment Dx: Expressive Language Disorder; Oral Motor Disorder
Date of Tx: February 21, 2012	Medical Dx: Myotubular myopathy

Goal	Status
3. [REDACTED] will tolerate oral motor stimulation to cheeks, lips, and tongue on 80% of trials with minimal assistance.	Ongoing
5. [REDACTED] will use his Maestro to request wants and needs on 80% of trials with minimal assistance.	Ongoing
6. [REDACTED] will navigate his Maestro to find an appropriate word in a category on 80% of trials with minimal assistance.	Ongoing
7. [REDACTED] will use his Maestro to comment on 80% of trials given moderate assistance.	Ongoing
8. [REDACTED] will imitate target sounds (/o/, /b/, and /m/) on 80% of trials given minimal assistance.	Ongoing
9. [REDACTED] will request his wants and needs with greater than or equal to 3 words in 80% of opportunities.	Ongoing

Pt tolerated oral motor exercises to his cheeks, lips and tip of his tongue via gloved finger without distress. Pt able to bring his own hand to his lips and assist with lip closure x 2. He was able to achieve complete lip closure when asked to "blow kisses" x 2. Pt required min-mod tactile cues to produce /m/, /o/ and /b/ sounds in 100% of opportunities. He benefited from the prompt of "bring your lips together" or "blow kisses".

Pt able to request items with verbalizations and signs. He was able to expand his utterance length from 1 word utterances to 4-5 word short sentences with an initial visual and verbal model. He benefited from counting on his hand with each finger representing a word in the short sentence and as the session progressed, was able to respond to the visual cue only. Pt able to produce sentences such as "I want turtle penguin book", "I want more book please", and "I want my computer please".

Pt required maximum visual cues and HOH assistance to utilize his Maestro to request his wants and needs. He was provided multiple models of progression of symbols to utilize "I want ____". When able to independently activate the Maestro, he demonstrated repetitive activation of symbols with no clear intent noted throughout.

Treating therapist: Lauren Bonfant, MS, CCC-SLP Date: February 21, 2012

Exhibit C

EXHIBITS A-H (Redacted) TO
DECLARATION OF ELEANOR HAMBURGER - 13

R.A. 000121

Regence Evolve PlusSM (Comprehensive) Policy

Group Number: 30000404

Medical Benefits



Regence BlueShield is an Independent Licensee
of the Blue Cross and Blue Shield Association

Regence BlueShield

EXHIBITS A-H (Redacted) TO
DECLARATION OF ELEANOR HAMBURGER - 14

R.A. 000122

Medical Benefits

In this section, You will learn about Your Policy's benefits and how Your coverage pays for Covered Services. There are no referrals required before You can use any of the benefits of this coverage, including women's health care services. For Your ease in finding the information regarding benefits most important to You, We have listed these benefits alphabetically, with the exception of the Upfront, preventive care (including immunizations) and Professional Services benefits.

All covered benefits are subject to the limitations, exclusions and provisions of this Policy. To be covered, medical services and supplies must be Medically Necessary for the treatment of an illness or injury (except for any covered preventive care). Also, a Provider practicing within the scope of his or her license must render the service. Please see the Definitions Section in the back of this Policy for descriptions of Medically Necessary and of the kinds of Providers who deliver Covered Services.

A Health Intervention may be medically indicated or otherwise be Medically Necessary, yet not be a Covered Service under this Policy.

If benefits under this Policy change while You are in the Hospital (or any other facility as an inpatient), coverage will be provided based upon the benefit in effect when the stay began.

ANNUAL MAXIMUM BENEFIT

Per Insured: \$2,000,000 per Calendar Year

CALENDAR YEAR MAXIMUM COINSURANCE

Per Insured: \$5,500

Per Family: \$16,500

COPAYMENTS AND COINSURANCE

Copayments and Coinsurance are listed in the tables for Covered Services for each applicable benefit.

CALENDAR YEAR DEDUCTIBLES

The Calendar Year Deductible amount for this Policy is specified on a rider included in the beginning of this Policy.

UPFRONT BENEFITS

We cover Upfront Benefits for office visits for treatment of illness or injury. These services are provided as outlined below. For Upfront Benefits for office visits, You will not be responsible for any Coinsurance, however, the office visit Copayment applies. See Limit below for additional information. You have multiple ways of tracking Your benefits, including access to www.myRegence.com, and calling Our Customer Service department if You have questions about Your accruals and/or reaching Your Upfront Benefit limits.

PROSTHETIC DEVICES

Category: 1	Category: 2	Category: 3
Provider: Preferred	Provider: Participating	Provider: Nonparticipating
Payment: After Deductible, We pay 80% and You pay 20% of the Allowed Amount. Your 20% payment will be applied toward the Maximum Coinsurance.	Payment: After Deductible, We pay 50% and You pay 50% of the Allowed Amount. Your 50% payment will be applied toward the Maximum Coinsurance.	Payment: After Deductible, We pay 50% of the Allowed Amount and You pay balance of billed charges. Your 50% payment of the Allowed Amount will be applied toward the Maximum Coinsurance.

We cover prosthetic devices for functional reasons to replace a missing body part, including artificial limbs, external or internal breast prostheses following a mastectomy and maxillofacial prostheses. Prosthetic devices or appliances that are surgically inserted into the body are otherwise covered under the appropriate facility provision (Hospital inpatient care or Hospital outpatient and Ambulatory Service Facility care) in this Medical Benefits Section. We will cover repair or replacement of a prosthetic device due to normal use or growth of a child.

REHABILITATION SERVICES

Category: 1	Category: 2	Category: 3
Provider: Preferred	Provider: Participating	Provider: Nonparticipating
Payment: After Deductible, We pay 80% and You pay 20% of the Allowed Amount. Your 20% payment will be applied toward the Maximum Coinsurance.	Payment: After Deductible, We pay 50% and You pay 50% of the Allowed Amount. Your 50% payment will be applied toward the Maximum Coinsurance.	Payment: After Deductible, We pay 50% of the Allowed Amount and You pay balance of billed charges. Your 50% payment of the Allowed Amount will be applied toward the Maximum Coinsurance.
Inpatient limit: ten days per Insured per Calendar Year Outpatient limit: 25 visits per Insured per Calendar Year		

We cover inpatient and outpatient rehabilitation services (physical, occupational and speech therapy services only) and accommodations as appropriate and necessary to restore or improve lost function caused by Injury or Illness.

SKILLED NURSING FACILITY (SNF) CARE

Category: 1	Category: 2	Category: 3
Provider: Preferred	Provider: Participating	Provider: Nonparticipating
Payment: After Deductible, We pay 80% and You pay 20% of the Allowed Amount. Your 20% payment will be applied toward the Maximum Coinsurance.	Payment: After Deductible, We pay 50% and You pay 50% of the Allowed Amount. Your 50% payment will be applied toward the Maximum Coinsurance.	Payment: After Deductible, We pay 50% of the Allowed Amount and You pay balance of billed charges. Your 50% payment of the Allowed Amount will be applied toward the Maximum Coinsurance.
Limit: 30 inpatient days per Insured per Calendar Year		

We cover the inpatient services and supplies of a Skilled Nursing Facility for Illness, Injury or physical disability. Room and board is limited to the Skilled Nursing Facility's average semiprivate room rate, except where a private room is determined to be necessary. Days for these services that are applied toward the Deductible will be applied against the Maximum Benefit limit on these services.

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EXHIBITS A-H (Redacted) TO

DECLARATION OF ELEANOR HAMBURGER - 16

R.A. 000124

eligible as defined by 2741(b) of the federal Health Insurance Portability And Accountability Act of 1996 (42U.S.C. 300gg-41(b)). A HIPAA-eligible individual is defined as someone:

- Who has at least 18 months of prior creditable coverage;
- Whose prior creditable coverage was not interrupted by more than 63 days at any one time starting with the most recent period of creditable coverage;
- Whose most recent prior creditable coverage was under a group health plan, governmental health plan, or church plan and was not terminated for fraud or nonpayment of Premium;
- Who is not eligible for coverage under a group plan, Medicare A or B, or Medicaid and does not have other health coverage; and
- Who elected and exhausted any COBRA continuation or similar state extension of coverage that he or she was offered.

Creditable coverage means any of the following: group coverage (including self-funded plans); individual insurance coverage; S-CHIP; Medicaid; Medicare; CHAMPUS/Tricare; Indian Health Service or tribal organization coverage; state high-risk pool coverage; Federal Employee Health Benefit Plan coverage; and public health plans (including foreign government and US government plans).

Creditable coverage is determined separately for each Insured.

You have the right to demonstrate the existence of creditable coverage by providing Us with one or more certificates of creditable coverage from a prior group or individual plan or with other documentation. You may obtain a certificate of creditable coverage from a prior group health plan or insurer by requesting it within 24 months of coverage termination. We can help You obtain a certificate from a prior plan or insurer or suggest other documents that will serve as alternatives to a certificate of creditable coverage as provided by federal law.

SPECIFIC EXCLUSIONS

We will not provide benefits for any of the following conditions, treatments, services, supplies or accommodations, **including any direct complications or consequences that arise from them**. However, these exclusions will not apply with regard to an otherwise Covered Service for preventive service as specified under the Preventive Care and Immunizations benefit in the Medical Benefits Section or in the Prescription Medication Benefits provision.

Chemical Dependency Conditions

Care or treatment for chemical dependency. By "chemical dependency," We mean a substance-related disorder included in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association. Chemical dependency is an addictive relationship with any drug or alcohol characterized by a physical or psychological relationship, or both, that interferes on a recurring basis with an individual's social, psychological, or physical adjustment to common problems. Chemical dependency does not include addiction to or dependency on tobacco, tobacco products, or foods.

Conditions Caused By Active Participation In a War or Insurrection

The treatment of any condition caused by or arising out of an Insured's active participation in a war or insurrection.

Conditions Incurred In or Aggravated During Performances In the Uniformed Services

The treatment of any Insured's condition that the Secretary of Veterans Affairs determines to have been incurred in, or aggravated during, performance of service in the uniformed services of the United States.

Cosmetic/Reconstructive Services and Supplies

Cosmetic and/or reconstructive services and supplies, except in the treatment of the following:

- to treat a congenital anomaly;

Hearing Care

Routine hearing examinations, programs or treatment for hearing loss, including, but not limited to, hearing aids (externally worn or surgically implanted) and the surgery and services necessary to implant them. This exclusion does not apply to cochlear implants.

Infertility

Treatment of infertility, except to the extent Covered Services are required to diagnose such condition. Non-covered treatment includes, but is not limited to, all assisted reproductive technologies (for example, in vitro fertilization, artificial insemination, embryo transfer or other artificial means of conception) and fertility drugs and medications.

Investigational Services

Investigational treatments or procedures (Health Interventions) and services, supplies and accommodations provided in connection with Investigational treatments or procedures (Health Interventions). We also exclude any services or supplies provided under an Investigational protocol. Refer to the expanded definition in the Definitions Section of this Policy.

Medications and Dietary Substances

Prescription Medications (as defined under the Prescription Benefits Section of this Policy) or any other drugs, medications, biologicals, vitamins, minerals, special formulas, food supplements, or special diets, except as specifically provided under the Medical Foods benefit or the Prescription Medication Benefits Section of this Policy, or unless they either are dispensed during a confinement in a Hospital, Skilled Nursing Facility, nursing home or other health care institution for which benefits are available or cannot be safely administered outside of a medically supervised setting (such as a Hospital, Physician office or clinic).

Mental Health Treatment For Certain Conditions

We will not cover Mental Health Conditions for diagnostic codes 302 through 302.9 found in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV TR) for all ages. Additionally, We will not cover any "V code" diagnoses except the following when Medically Necessary: parent-child relational problems for children five years of age or younger, neglect or abuse of a child for children five years of age or younger and bereavement for children five years of age or younger. By "V code," We mean codes for additional conditions that may be a focus of clinical attention as described in the most recent edition of the Diagnostic DSM-IV TR that describes Relational Problems, Problems Related To Abuse Or Neglect or other issues that may be the focus of assessment or treatment. This would include, but is not limited to, such issues as occupational or academic problems.

Motor Vehicle No-Fault Coverage

Expenses for services and supplies that have been covered or have been accepted for coverage under any automobile medical personal injury protection ("PIP") no-fault coverage. If Your expenses for services and supplies have been covered or have been accepted for coverage by an automobile medical personal injury protection ("PIP") carrier, We will provide benefits according to this Policy once Your claims are no longer covered by that carrier.

Neurodevelopmental Therapy

We do not cover neurodevelopmental therapy, including physical therapy, occupational therapy and speech therapy and maintenance service, to restore and improve function for an Insured with neurodevelopmental delay. By "neurodevelopmental delay," We mean a delay in normal development that is not related to any documented illness or injury.

Non-Direct Patient Care

Services that are not direct patient care, including:

- appointments scheduled and not kept ("missed appointments");
- charges for preparing or duplicating medical reports and chart notes;
- itemized bills or claim forms (even at Our request); and

MATERNITY CARE

Category: 1	Category: 2	Category: 3
Provider: Preferred	Provider: Participating	Provider: Nonparticipating
Payment: After Deductible, We pay 80% and You pay 20% of the Allowed Amount. Your 20% payment will be applied toward the Maximum Coinsurance.	Payment: After Deductible, We pay 50% and You pay 50% of the Allowed Amount. Your 50% payment will be applied toward the Maximum Coinsurance.	Payment: After Deductible, We pay 50% of the Allowed Amount and You pay balance of billed charges. Your 50% payment of the Allowed Amount will be applied toward the Maximum Coinsurance.

We cover prenatal and postnatal maternity (pregnancy) care, childbirth (vaginal or cesarean), complications of pregnancy and related conditions for all female Insureds. Benefits for prenatal care are not subject to the Exclusion Period for Preexisting Conditions requirements of this Policy; all other benefits specified in this Maternity Care benefit are subject to the Exclusion Period for Preexisting Conditions requirements. For the purposes of this provision, prenatal care means the initial and subsequent exams, periodic visits and prenatal testing up to, but not including, delivery, termination or postnatal care. There is no limit for the mother's length of inpatient stay. Where the mother is attended by a Provider, the attending Provider will determine an appropriate discharge time, in consultation with the mother. See the Newborn Care benefit in this Medical Benefits Section to see how the care of Your newborn is covered.

MEDICAL FOODS (PKU)

Category: 1	Category: 2	Category: 3
Provider: Preferred	Provider: Participating	Provider: Nonparticipating
Payment: After Deductible, We pay 80% and You pay 20% of the Allowed Amount. Your 20% payment will be applied toward the Maximum Coinsurance.	Payment: After Deductible, We pay 50% and You pay 50% of the Allowed Amount. Your 50% payment will be applied toward the Maximum Coinsurance.	Payment: After Deductible, We pay 50% of the Allowed Amount and You pay balance of billed charges. Your 50% payment of the Allowed Amount will be applied toward the Maximum Coinsurance.

We cover medical foods for inborn errors of metabolism including, but not limited to, formulas for Phenylketonuria (PKU).

MENTAL HEALTH SERVICES

Category: 1	Category: 2	Category: 3
Provider: Preferred	Provider: Participating	Provider: Nonparticipating
Payment: After Deductible, We pay 80% and You pay 20% of the Allowed Amount. Your 20% payment will be applied toward the Maximum Coinsurance.	Payment: After Deductible, We pay 50% and You pay 50% of the Allowed Amount. Your 50% payment will be applied toward the Maximum Coinsurance.	Payment: After Deductible, We pay 50% of the Allowed Amount and You pay balance of billed charges. Your 50% payment of the Allowed Amount will be applied toward the Maximum Coinsurance.

We cover Mental Health Services for treatment of Mental Health Conditions.

Definitions

In addition to the definitions in the Definitions Section, the following definitions apply to this Mental Health Services section:

Mental Health Conditions means Mental Disorders in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association except as otherwise excluded under this Policy. Mental Disorders that accompany an excluded diagnosis are covered.

Mental Health Services means Medically Necessary outpatient services, Residential Care, partial Hospital program or inpatient services provided by a licensed facility or licensed individuals with the exception of Skilled Nursing Facility services (unless the services are provided by a licensed behavioral health Provider for a covered diagnosis), home health services and court ordered treatment (unless the treatment is determined by Us to be Medically Necessary).

Residential Care means care received in an organized program which is provided by a residential facility, Hospital, or other facility licensed, for the particular level of care for which reimbursement is being sought, by the state in which the treatment is provided.

NEWBORN CARE

Category: 1	Category: 2	Category: 3
Provider: Preferred	Provider: Participating	Provider: Nonparticipating
Payment: After Deductible, We pay 80% and You pay 20% of the Allowed Amount. Your 20% payment will be applied toward the Maximum Coinsurance.	Payment: After Deductible, We pay 50% and You pay 50% of the Allowed Amount. Your 50% payment will be applied toward the Maximum Coinsurance.	Payment: After Deductible, We pay 50% of the Allowed Amount and You pay balance of billed charges. Your 50% payment of the Allowed Amount will be applied toward the Maximum Coinsurance.

We cover services and supplies, under the newborn's own coverage, in connection with nursery care for the natural newborn or newly adoptive child of the Policyholder or Policyholder's spouse. The newborn child will not be eligible for this benefit if they are not added as a dependent within 60 days of birth or placement. There is no limit for the newborn's length of inpatient stay. For the purpose of this provision, "newborn care" means the medical services provided to a newborn child following birth including well-baby Hospital nursery charges, the initial physical examination and a PKU test. NOTE: This benefit will be provided for a newborn child of any female Insured for up to 21 days following the birth when the delivery of the child is covered under this Policy, as specified in the Newly Eligible Dependents provision.

ORTHOTIC DEVICES

Category: 1	Category: 2	Category: 3
Provider: Preferred	Provider: Participating	Provider: Nonparticipating
Payment: After Deductible, We pay 80% and You pay 20% of the Allowed Amount. Your 20% payment will be applied toward the Maximum Coinsurance.	Payment: After Deductible, We pay 50% and You pay 50% of the Allowed Amount. Your 50% payment will be applied toward the Maximum Coinsurance.	Payment: After Deductible, We pay 50% of the Allowed Amount and You pay balance of billed charges. Your 50% payment of the Allowed Amount will be applied toward the Maximum Coinsurance.

We cover benefits for the purchase of braces, splints, orthopedic appliances and orthotic supplies or apparatuses used to support, align or correct deformities or to improve the function of moving parts of the body. We may elect to provide benefits for a less costly alternative item. We do not cover off-the-shelf shoe inserts and orthopedic shoes.

Definitions

The following are definitions of important terms used in this Policy. Other terms are defined where they are first used.

Allowed Amount means:

- For preferred and participating Providers (see definitions of "Category 1" and "Category 2" below), the amount that they have contractually agreed to accept as payment in full for a service or supply.
- For nonparticipating Providers (see definition of "Category 3" below) who are not accessed through the BlueCard Program, the amount We have determined to be reasonable charges for Covered Services or supplies. The Allowed Amount may be based upon the billed charges for some services, as determined by Us or as otherwise required by law.
- For nonparticipating Providers (see definition of "Category 3" below) accessed through the BlueCard Program, the lower of the Provider's billed charges and the amount that the Host Blue identifies to Us as the amount on which it would base a payment to that Provider.

Charges in excess of the Allowed Amount are not considered reasonable charges and are not reimbursable. For questions regarding the basis for determination of the Allowed Amount, please contact Us.

Affiliate means a company with which We have a relationship that allows access to Providers in the state in which the Affiliate serves and includes the following companies: Regence BlueShield of Idaho in the state of Idaho, Regence BlueCross BlueShield of Oregon in the state of Oregon and Regence BlueCross BlueShield of Utah in the state of Utah.

Ambulatory Service Facility means a facility, licensed by the state in which it is located, that is equipped and operated mainly to do surgeries or obstetrical deliveries that allow patients to leave the facility the same day the surgery or delivery occurs.

Calendar Year means the period from January 1 through December 31 of the same year; however, the first Calendar Year begins on the Insured's Effective Date.

Category 1 means the benefit reimbursement level for services that are received from a Provider who has an effective participating contract and an effective preferred addendum or agreement with Us or one of Our Affiliates which designates him, her or it as a preferred Provider to provide services and supplies to Insureds in accordance with the provisions of this coverage.

Category 1 also means Providers outside the area that We or one of Our Affiliates serves, but who have contracted with another Blue Cross and/or Blue Shield organization in the BlueCard Program (designated as a Provider in the "Preferred Provider Organization ("PPO") Network") to provide services and supplies to Insureds in accordance with the provisions of this coverage.

Category 1 reimbursement is generally at the highest payment level and You will not be charged for balances beyond any Deductible, Copayment and/or Coinsurance for Covered Services.

Category 2 means the benefit reimbursement level for services that are received from a Provider who has an effective participating contract with Us or one of Our Affiliates which designates him, her or it as a participating Provider as well as Providers outside the area that We or one of Our Affiliates serves, but who have contracted with another Blue Cross and/or Blue Shield organization in the BlueCard Program (designated as a Provider in the "Participating Network") to provide services and supplies to Insureds in accordance with the provisions of this coverage. Category 2 reimbursement is generally a lower payment level than Category 1, but You will not be charged for balances beyond any Deductible, Copayment and/or Coinsurance for Covered Services.

Category 3 means the benefit reimbursement level for services that are received from a Provider who does not have an effective participating contract with Us or one of Our Affiliates to provide services and supplies to Insureds. Category 3 reimbursement is generally the lowest payment level of all categories, and You may be billed for balances beyond any Deductible, Copayment and/or Coinsurance for Covered Services.

Covered Service means a service, supply, treatment or accommodation that is listed in the benefits sections of this Policy.

Custodial Care means care that is for the purpose of watching and protecting a patient, rather than being a Health Intervention. Custodial Care includes care that helps the patient conduct activities of daily living that can be provided by a person without medical or paramedical skills and/or is primarily for the purpose of separating the patient from others or preventing self-harm.

Dental Services means services or supplies (including medications) provided to prevent, diagnose, or treat diseases or conditions of the teeth and adjacent supporting soft tissues, including treatment that restores the function of teeth.

Effective Date means the first day of coverage for You and/or Your dependents, following Our receipt and acceptance of the application.

Emergency Medical Condition means a medical condition that manifests itself by acute symptoms of sufficient severity (including severe pain) so that a prudent layperson who has an average knowledge of medicine and health would reasonably expect the absence of immediate medical attention at a Hospital emergency room to result in any one of the following:

- placing the Insured's health, or with respect to a pregnant Insured, her health or the health of her unborn child, in serious jeopardy;
- serious impairment to bodily functions; or
- serious dysfunction of any bodily organ or part.

Enrolled Dependent means a Policyholder's eligible dependent who is listed on the Policyholder's completed application and who has been accepted for coverage under the terms of this Policy by Us.

Essential Benefits are determined by the U.S. Department of Health and Human Services ("HHS") and is subject to change, but currently includes at least the following general categories and the items and services covered within the categories: ambulatory patient services, emergency services, hospitalization, maternity and newborn care, mental health and substance use disorder services, including behavioral health treatment, prescription drugs, rehabilitative and habilitative services and devices, laboratory services, preventive and wellness services and chronic disease management, and pediatric services including oral and vision care.

Family means a Policyholder and his or her Enrolled Dependents.

Health Intervention is a medication, service or supply provided to prevent, diagnose, detect, treat or palliate the following: disease, illness, injury, genetic or congenital anomaly, pregnancy or biological or psychological condition that lies outside the range of normal, age-appropriate human variation; or to maintain or restore functional ability. A Health Intervention is defined not only by the intervention itself, but also by the medical condition and patient indications for which it is being applied. A Health Intervention is considered to be new if it is not yet in widespread use for the medical condition and the patient indications being considered.

Health Outcome means an outcome that affects health status as measured by the length or quality of a person's life. The Health Intervention's overall beneficial effects on health must outweigh the overall harmful effects on health.

Hospital means a facility that is licensed as a general acute or specialty Hospital by the state in which the Hospital is located. A Hospital provides continuous 24-hour nursing services by

registered nurses. A Hospital has an attending medical staff consisting of one or more Physicians. A Hospital under this definition is not, other than incidentally, a place for rest, a nursing home or a facility for convalescence.

Illness means a congenital malformation that causes functional impairment; a condition, disease, ailment or bodily disorder, other than an Injury; and pregnancy. Illness does not include any state of mental health or mental disorder (which is otherwise defined in this Policy).

Injury means physical damage to the body inflicted by a foreign object, force, temperature or corrosive chemical or that is the direct result of an accident, independent of Illness or any other cause. An Injury does not mean bodily Injury caused by routine or normal body movements such as stooping, twisting, bending or chewing and does not include any condition related to pregnancy.

Insured means any person who satisfies the eligibility qualifications and is enrolled for coverage under this Policy.

Investigational means a Health Intervention that We have classified as Investigational. We will review Scientific Evidence from well-designed clinical studies found in Peer-Reviewed Medical Literature, if available, and information obtained from the treating Physician or Practitioner regarding the Health Intervention to determine if it is Investigational. A Health Intervention not meeting all of the following criteria, is, in Our judgment, Investigational:

- If a medication or device, the Health Intervention must have final approval from the United States Food and Drug Administration as being safe and efficacious for general marketing. However, if a medication is prescribed for other than its FDA-approved use and is recognized as "effective" for the use for which it is being prescribed, benefits for that use will not be excluded. To be considered "effective" for other than its FDA-approved use, a medication must be so recognized in one of the standard reference compendia or, if not, then in a majority of relevant Peer-Reviewed Medical Literature; or by the United States Secretary of Health and Human Services. The following additional definitions apply to this provision:
 - Peer-Reviewed Medical Literature is scientific studies printed in journals or other publications in which original manuscripts are published only after having been critically reviewed for scientific accuracy, validity and reliability by unbiased independent experts. Peer-Reviewed Medical Literature does not include in-house publications of pharmaceutical manufacturing companies.
 - Standard Reference Compendia is one of the following: the American Hospital Formulary Service-Drug Information, the United States Pharmacopoeia-Drug Information or other authoritative compendia as identified from time to time by the federal Secretary of Health and Human Services or the Washington State Insurance Commissioner.
- The Scientific Evidence must permit conclusions concerning the effect of the Health Intervention on Health Outcomes, which include the disease process, Injury or Illness, length of life, ability to function and quality of life.
- The Health Intervention must improve net Health Outcome.
- The Scientific Evidence must show that the Health Intervention is as beneficial as any established alternatives.
- The improvement must be attainable outside the laboratory or clinical research setting.

Upon receipt of a fully documented claim or request for preauthorization related to a possible Investigational Health Intervention, a decision will be made and communicated to You within 20 working days. Please contact Us by calling Our Customer Service department at 1 (888) 344-6347 or by visiting Our Web site at www.myRegence.com for details on the information needed to satisfy the fully documented claim or request requirement. You may also have the right to an expedited Appeal. Refer to the Appeal Process Section for additional information on the Appeal process.

Lifetime means the entire length of time an Insured is covered under this Policy (which may include more than one coverage) with Us.

Maintenance Therapy means a Health Intervention after the patient has reached maximum rehabilitation potential or functional level and has shown no significant improvement for one to two weeks, and instruction in the maintenance program has been completed. This is particularly applicable to patients with chronic, stable conditions where skilled supervision/intervention is no longer required and further clinical improvement cannot reasonably be expected from continuous ongoing care. This includes but is not limited to:

- a general exercise program to promote overall fitness;
- ongoing treatment solely to improve endurance and fitness;
- passive exercise to maintain range of motion that can be carried out by non-skilled persons;
- programs to provide diversion or general motivation;
- therapy that is intended to maintain a gradual process of healing or to prevent deterioration or relapse of a chronic condition; or
- therapy that is supportive rather than corrective in nature.

Medically Necessary or Medical Necessity means health care services or supplies that a Physician or other health care Provider, exercising prudent clinical judgment, would provide to a patient for the purpose of preventing, evaluating, diagnosing or treating an illness, injury, disease or its symptoms, and that are:

- in accordance with generally accepted standards of medical practice;
- clinically appropriate, in terms of type, frequency, extent, site and duration, and considered effective for the patient's illness, injury or disease; and
- not primarily for the convenience of the patient, Physician or other health care Provider, and not more costly than an alternative service or sequence of services or supply at least as likely to produce equivalent therapeutic or diagnostic results as to the diagnosis or treatment of that patient'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 and other health care Providers practicing in relevant clinical areas and any other relevant factors.

Physician means an individual who is duly licensed as a doctor of medicine (M.D.), doctor of osteopathy (D.O.) or doctor of naturopathic medicine (N.D.) who is a Provider covered under this Policy.

Policy is the description of the benefits for this coverage. This Policy is also the agreement between You and Us for a health benefit plan.

Practitioner means an individual who is duly licensed to provide medical or surgical services which are similar to those provided by Physicians. Practitioners include podiatrists, chiropractors, psychologists, certified nurse midwives, certified registered nurse anesthetists, dentists (doctor of medical dentistry or doctor of dental surgery, or a dentist) and other professionals practicing within the scope of his or her respective licenses.

Provider means a Hospital, Skilled Nursing Facility, ambulatory services facility, Physician, Practitioner or other individual or organization which is duly licensed to provide medical or surgical services.

Rehabilitation Facility means a facility or distinct part of a facility that is licensed as a Rehabilitation Facility by the state in which it is located and that provides an intensive, multidisciplinary approach to rehabilitation services under the direction and supervision of a Physician.

Scientific Evidence means scientific studies published in or accepted for publication by medical Journals that meet nationally recognized requirements for scientific manuscripts and that submit most of their published articles for review by experts who are not part of the editorial staff; or findings, studies or research conducted by or under the auspices of federal government agencies and nationally recognized federal research institutes. However, Scientific Evidence shall not include published peer-reviewed literature sponsored to a significant extent by a pharmaceutical manufacturing company or medical device manufacturer or a single study without other supportable studies.

Service Area means Washington counties of Clallam, Columbia, Cowlitz, Grays Harbor, Island, Jefferson, King, Kitsap, Klickitat, Lewis, Mason, Pacific, Pierce, San Juan, Skagit, Skamania, Snohomish, Thurston, Yakima, Wahkiakum, Walla Walla, Whatcom; and any other areas designated by Us. Please check Our Web site at www.myRegence.com for up-to-date information.

Skilled Nursing Facility means a facility or distinct part of a facility which is licensed by the state in which it is located as a nursing care facility and which provides skilled nursing services by or under the direction and supervision of a registered nurse.

Upfront Benefit means those Covered Services designated as "Upfront" which are usually accessible to the Insured without first having to satisfy any Deductible amount. Generally, there will also be no Coinsurance amount required for an Upfront Benefit, however, a Copayment may apply for each visit or access to an Upfront Benefit. Once an Upfront Benefit dollar or visit maximum has been reached, additional coverage is available subject to a Deductible, Copayment and/or Coinsurance. Refer to the Upfront Benefit provisions in the Medical Benefits Section to determine coverage.

Exhibit D

EXHIBITS A-H (Redacted) TO
DECLARATION OF ELEANOR HAMBURGER - 26

R.A. 000134

0005122 POS03F

11/29/08

Selections[®]



Regence BlueShield

An Independent Licensee of the Blue Cross and Blue Shield Association
1800 Ninth Avenue • P.O. Box 21267
Seattle, Washington 98111-9267

EXPLANATION OF BENEFITS

SEATTLE, WA 981

1. PAYMENT SUMMARY	
THIS IS NOT A BILL	
Total charges:	\$ 720.00
Regence paid your provider:	\$.00
Your total responsibility:	\$ 720.00
See below for additional information about patient responsibility, if any.	

Subscriber's Name/Membership Number: [REDACTED] / CONFIDENTIAL
Subscriber's Group Name/Number: INDIVIDUAL SERVICES / 099980

Date Paid: 12/03/2008

2. CLAIM DETAILS

Claim #: 0832431874200 Patient: [REDACTED] / Dependent: 02 Claim Received: 1/18/2008
Provider/Tax ID: KELLY SHANA L / 204367673 Patient Acct #: [REDACTED]
Mailing address: 2366 EASTLAKE AVE E STE 335 SEATTLE WA 98102-3399
Place of Service: PATIENTS HOME, PROVIDERS OFFICE

SERVICES RECEIVED	SERVICE DATE(S)	CHARGE(S)	ALLOWED AMOUNT	DEDUCT AND/OR COPAY	BENEFIT %	PAID AMOUNT	MESSAGES
2 MEDICAL CARE	Oct 10, 2008	\$ 120.00	\$.00		\$	.00	N01
2 MEDICAL CARE	Oct 15, 2008	\$ 120.00	\$.00		\$	.00	N01
2 MEDICAL CARE	Oct 17, 2008	\$ 120.00	\$.00		\$	.00	N01
2 MEDICAL CARE	Oct 22, 2008	\$ 120.00	\$.00		\$	.00	N01
2 MEDICAL CARE	Oct 29, 2008	\$ 120.00	\$.00		\$	.00	N01
2 MEDICAL CARE	Oct 31, 2008	\$ 120.00	\$.00		\$	.00	N01
TOTALS		\$ 720.00	\$.00		\$	.00	

3. EXPLANATION OF MESSAGE CODES *****

N01 NOT COVERED BY CONTRACT.

4. PATIENT RESPONSIBILITY INFORMATION *****

The amount was not covered by the contract: \$ 720.00
Total Patient Responsibility: \$ 720.00

IMPORTANT: If you have questions about this notice, call Regence BlueShield at 1-800-458-3523 or see us at 1800 - 9th AVE, Seattle, Washington. Have this notice handy if you contact us. See the end of your Benefit Summary for appeal information.

EP005A 01/02

MICROFILM CLAIM

NDEX ELECTRONIC CLAIMS CLEARING HOUSE
REGENCE BLUESHIELD

CLAIM NUMBER 93200-0832431874200

PATIENT AND INSURED (SUBSCRIBER) INFORMATION

1. Patient's Name and Address 1616 SUMMIT AVE 202 SEATTLE WA 98111		2. Patient Date of Birth 2005 12/19/1968	3. Patient's Sex MALE	4. Insured's I.D. Number ZLA992990979	5. Patient's I.D. Number 000000000
4. Telephone Number 8. Other Health Insurance		6. Patient's Sex MALE	7. Relationship DEPENDENT	8. Insured's Group Number for Group Member 099980A	9. Other Plan? N
10. Condition related to EMERGENCY		11. Insured's Address SEATTLE WA 981		12. I authorize the release of any medical information necessary to process the claim and request payments of Medicare benefits other than to myself or to the party who accepts assignment below.	
Signed (Patient or authorized person)		Date		Signed (Insured or authorized person)	

PHYSICIAN OR SUPPLIER INFORMATION

14. Onset of illness/injury date 00/00/00	15. Date first occurred for this condition 00/00/00	16. Same or similar symptoms	17. Date patient able to return to work 00/00/00										
18. Dates of total disability 00/00/00 - 00/00/00	19. Dates of partial disability 00/00/00 - 00/00/00	20. Name of referring physician or other source (e.g. public health agency)											
20. For services related to hospitalization 00/00/00 - 00/00/00		21. Name and address of facility where services were rendered (if other than home or office) (1) 31539											
22. Laboratory work performed outside your office		23a. Diagnosis or nature of illness or injury. Relate diagnosis to procedure in column H by reference numbers 1, 2, 3, etc. of ICD Code. (1) 31539											
23b. EPBDT Family Planning 23c. Prior Authorization Number													
A Date of Service	B Reference Number	C Place of Service	D TOS	E Procedure	F MOD	G MOD 2	H Diagnosis	I Charges	J Units	K ASA Minutes	L Outside Lab	M SSO	N Allowed
10/10/08	9750979	11		92507			1	120.00	2	0			
10/15/08	9760979	12		92507			1	120.00	2	0			
10/17/08	9770979	11		92507			1	120.00	2	0			
10/22/08	9780979	12		92507			1	120.00	2	0			
10/29/08	9790979	12		92507			1	120.00	2	0			
10/31/08	9800979	11		92507			1	120.00	2	0			
26. Attending/Performing Physician's Name & ID Number SHANA KELLY		27. Total Charge 720.00	28. Paid Health Ins. 0.00	29. Paid patient 0.00	30. Balance Due 0.00								
204367673		30. Physician/Supplier Social Security Number 204367673		31. Physician or Supplier Name, address, ZIP Code and telephone number KELLY SHANA L 2366 EASTLAKE AVE E 335 SEATTLE WA 98102									
32. Patient Account Number 0979		33. Physician/Supplier Employer I.D. Number 204367673											

1600KA 12/04

RECEIPT DATE 2008/11/19 SUBMITTER ONEHP

SUBM SEQ 01235 BATCH 0582 CLAIM 00001

EXHIBITS A-H (Redacted) TO
DECLARATION OF ELEANOR HAMBURGER - 28

RBS 004787

R.A. 000136

CLIENT: [REDACTED]
CLINICIAN: Abby Sudbery, M.A. CCC-SLP
CLINIC: Children's Communication Corner, Inc.

PROGRESS NOTES

10/10/08 -

③ 45 min. came w/ mom & dad.

⑤ Targeted ↑ rec. & exp. lang. & explore building.
C [REDACTED] entered tx office crying & holding tightly on to mom. He entered tx room w/ mom & dad. P. clinician showed him trucks. C [REDACTED] followed simple 1-step commands from parents & clinician. C [REDACTED] < 20% accur. stating, "No!". w/ comp. vs. behavior. C [REDACTED] used 1-2 word utt. spans 2x, 3x & parent/clin. model. He used mainly meaning/telling sound throughout session.

Ⓐ May need to address behavior to ↑ compliance to tx.

Ⓟ Cont. as per POC. _____ J. J. Maccos

10/15/08 -

③ 45 min - Home visit

⑤ Targeted ↑ rec./exp. lang. Client eating snack when clinician entered home. Comm. needs/wants w/ mom by yelling in protest & taking her to what he wanted. Pt refused to engage in play & clinician & continued to follow his desire to play alone.

Ⓐ Clear boundaries btwn. clinician & client must be established.

Ⓟ Cont. as per POC. _____ J. J. Maccos

10/17/08 -

③ 45 min.

⑤ Targeted ↑ rec. & exp. lang. Client entered room w/ mom & dad. He used gestures to comm. wants/needs during session & max Ⓐ. He was unable to follow 1-step commands.

Ⓐ C [REDACTED] inability to follow 1-step command was likely behavior (defiance) vs. difficulty comprehending commands.

Ⓟ Cont. as per POC. _____ J. J. Maccos

see next page

CLIENT: [REDACTED]
CLINICIAN: Abby Sudbery, M.A. CCC-SLP
CLINIC: Children's Communication Corner, Inc.

PROGRESS NOTES

10/22/08 -

⑤ 30 min - Home visit

① Targeted ↑ rec./exp. lang. Clinician entered home, client playing in room. Clinician created comm. temptations. [REDACTED] did not respond to temptation, began playing another toy. Client non-compliant.

② Home environment not best suited for client's progress. Established rules/routines do not promote progress.

③ Discuss ↓ freq. to 1x/wk. in office.

[Signature] M.A. CCC-SLP

10/24/08 - Client Cx - No transportation.

10/29/08 -

⑤ 30 min - Home visit

① Targeted ↑ rec./exp. lang. Client refused to follow 1-step commands re: toys. He did not respond to comm. temptations, instead moving to play another toy. Pt non-compliant throughout session.

② Established behaviors & routines interfere w/ progress.

③ Talk w/ dad re: sessions @ clinic.

[Signature] M.A. CCC-SLP

10/31/08 -

⑤ 45 min.

① Targeted ↑ rec./exp. lang. Client followed 1-step commands on multiple repetitions & hand-over-hand in 40% of cases. After 5-10 minutes non-comp. Client used 1 word utter. P model to comment req. & protest. Discussed home visit w/ dad, stating office visits more positive 2° to creating new routine & expectations w/ clin. Decided to ↓ to 1x/wk in office.

② [REDACTED] ↑ compliance most likely 2° to clinician's ability to establish new routines/expectations in clinic.

③ Cont. as per POC.

[Signature] M.A. CCC-SLP

Exhibit E

EXHIBITS A-H (Redacted) TO
DECLARATION OF ELEANOR HAMBURGER - 31

R.A. 000139

0007334 POS03F 12/20/08
Selections®

 **Regence BlueShield**
An Independent Member of the Blue Cross and Blue Shield Association
1600 Ninth Avenue • P.O. Box 21267
Seattle, Washington 98111-3267

SEATTLE, WA 98

EXPLANATION OF BENEFITS

1. PAYMENT SUMMARY	
THIS IS <u>NOT</u> A BILL	
Total charges:	\$ 240.00
Regence paid your provider:	\$.00
Your total responsibility:	\$ 240.00
See below for additional information about patient responsibility, if any.	

Subscriber's Name/Memberhip Number: [REDACTED] / CONFIDENTIAL Date Paid: 12/24/2008
Subscriber's Group Name/Number: INDIVIDUAL SERVICES / 099980

2. CLAIM DETAILS

Claim #: 0834332777300 Patient: [REDACTED] / Dependent: 02 Claim Received: 2/07/2008
Provider/Tax ID: KELLY SHANA L / 204367673 Patient Acct #: [REDACTED]
Mailing address: 2366 EASTLAKE AVE R STE 335 SEATTLE WA 98102-3399
Place of Service: PROVIDERS OFFICE

SERVICES RECEIVED	SERVICE DATE(S)	CHARGE(S)	ALLOWED AMOUNT	DEDUCT AND/OR COPAY	BENEFIT %	PAID AMOUNT	MESSAGES
2 MEDICAL CARE	Nov 7, 2008	\$ 120.00	\$.00			\$.00	N22
2 MEDICAL CARE	Nov 21, 2008	\$ 120.00	\$.00			\$.00	N22
TOTALS		\$ 240.00	\$.00			\$.00	

3. EXPLANATION OF MESSAGE CODES *****

N22 THIS SERVICE FOR THIS CONDITION IS NOT COVERED BY YOUR PLAN.

4. PATIENT RESPONSIBILITY INFORMATION *****

The amount was not covered by the contract: \$ 240.00
Total Patient Responsibility: \$ 240.00

IMPORTANT: If you have questions about this notice, call Regence BlueShield at 1-800-458-3523 or see us at 1800 - 9th AVE, Seattle, Washington. Have this notice handy - if you contact us, see the end of your Benefit Summary for appeal information. R/PSA 9/02

RBS 004417

EXHIBITS A-H (Redacted) TO
DECLARATION OF ELEANOR HAMBURGER - 32

R.A. 000140

MICROFILM CLAIM

NDEX ELECTRONIC CLAIMS CLEARING HOUSE
REGENCE BLUESHIELD

CLAIM NUMBER 93200-083433277300

PATIENT AND INSURED (SUBSCRIBER) INFORMATION

1. Patient's Name and Address SEATTLE WA 981		2. Patient Date of Birth 2005 12/19/1968	3. Insured's Name E
4. Patient's Sex MALE		5. Insured's Sex FEMALE	6a. Insured's ID Number ZLA992990979
7. Relationship DEPENDENT		8. Insured's Group Number (or Group Name) 099980A	6b. Patient's ID Number 00000000
9. Other Health Insurance		10. Condition related to EMERGENCY	11. Insured's Address SEATTLE WA 981
12. I authorize the release of any medical information necessary to process the claim and request payments of Medicare benefits either to myself or to the party who accepts assignment below.		13. I authorize payment of medical benefits to underlined physician or supplier for service described below.	

PHYSICIAN OR SUPPLIER INFORMATION

14. Date of illness/injury date 00/00/00	15. Date last consulted for this condition 00/00/00	16. Name or written symptoms	17. Date patient able to return to work 00/00/00										
18. Dates of total disability 00/00/00 - 00/00/00		19. Name of referring physician or other source (e.g. public health agency)	19. Name of referring physician or other source (e.g. public health agency)										
20. For services related to hospitalization 00/00/00* 00/00/00		21. Name and address of facility where services were rendered (if other than home or office)											
22. Laboratory work performed outside your office		23. Diagnosis or nature of illness or injury, Health diagnosis to procedure in column 11 by Termino numbers 1, 2, 3, etc. or DX Code: (1) 31539											
23b. EPSCY Family Planning													
23c. Prior Authorization Number													
A	B	C	D	E	F	G	H	I	J	K	L	M	N
Date of Service	Reference Number	Place of Service	TOS	Procedure	MO	ICD 9	Diagnosis	Charges	Units	Y ASA Minutes	X Outside Lab	SSD	AKWED
11/07/08	1820979	11		92507			1	120.00	2	0			
11/21/08	1830979	11		92507			1	120.00	2	0			
24. Attending/Performing Physician's Name & ID Number SHANA KELLY		25a. Account Assignment	25b. Rebill	25c. Diagnosis Submitted	27. Total Charge 240.00	28. Paid Health Ins. 0.00	28a. Paid patient 0.00	28. Balance Due 0.00					
29. Patient Account Number 0979		30. Physician/Supplier Social Security Number 204367673			31. Physician or Supplier Name, address, ZIP Code and telephone number KELLY SHANA L 2366 EASTLAKE AVE E 335 SEATTLE WA 98102								
32. Patient Account Number 0979		33. Physician/Supplier Employer ID Number 204367673											

1500KA 12/04

RECEIPT DATE 2008/12/08 SUBMITTER ONEHP

SUBM SEQ 01771 BATCH 0802 CLAIM 00001

RBS 004788

EXHIBITS A-H (Redacted) TO
DECLARATION OF ELEANOR HAMBURGER - 33

R.A. 000141

CLIENT: ██████████ - ██████████
CLINICIAN: Abby Sudbery, M.A. CCC-SLP
CLINIC: Children's Communication Corner, Inc.

PROGRESS NOTES

11/7/08 =

④ 45 min.

- ① Targeted ↑ rec/exp. lang. Client was able to follow 1-step commands & hand-over-hand, & 50% accur. (██████████ used 1-word utterances to request desired obj. p. clinician model in 40% approx. spoon. Utterances, client demon. reduplicated babbling & no apparent comm. intent. Dad reports ██████████ didn't eat much this am.
- ② ██████████'s weight gain may ex next session. 2° to procedure @ Children's Hospital.
- ③ Cont. as per POC. J. MacCossup

11/14/08 - Clin. Cx -

11/21/08 =

④ 45 min.

- ① Targeted ↑ rec/exp. lang. ██████████ was able to follow 1-step commands & hand-over-hand (A) & 50% accur. He used 1-2 word utter. & mod (A) to req. desired obj. in spoon. Utter. x3 during session. Parents report ↑ nutritional intake ↑ lang. & cog. @ home this wk.
- ② Great session. Much more engaged! Smiling & laughing throughout.
- ③ Cont. as per POC. This wk 2° to holiday. J. MacCossup

11/28/08 - Cx 2° to holiday.

12/5/08 =

④ 45 min.

- ① Targeted ↑ rec/exp. lang. ██████████ was able to follow 1-step commands & hand-over-hand (A) & 60% accur. He used 1-2 word utter. & max (A) to req. desired obj. Parents report ██████████'s tolerance to food ↑ & cognition & lang. has ↑ @ home.
- ② ██████████ smiling & laughing throughout session.
- ③ Cont. as per POC. J. MacCossup

OST 02025

CONFIDENTIAL

Exhibit F

EXHIBITS A-H (Redacted) TO
DECLARATION OF ELEANOR HAMBURGER - 35

R.A. 000143



- [Admin. Simplification »](#)
- [BlueCard Program »](#)
- [Care Management »](#)
- [Claims & Billing »](#)
- [Contact Us »](#)
- [Contracts/Credentialing »](#)
- [Cost & Quality »](#)
- [Educational Tools »](#)
- [Provider Center »](#)
- [Products »](#)
- [Provider Search »](#)
- [Provider Library](#)
 - » [Forms](#)
 - » [Manuals](#)
 - » [Newsletters](#)
 - » [Policies](#)
 - » [What's New](#)
- [RegenceRx Pharmacy »](#)
- [TriWest »](#)
- [Uniform Glossary of Terms »](#)

For Physicians, Other Health Care Professionals and Facilities

Reimbursement Policy
Administrative | Anesthesia | Medicine | Modifiers | Surgery

Reimbursement Policy Overview

Topic: Reimbursement Policy Overview	Date of Origin: July 2004
Section: Administrative	Policy No: 01
Last Reviewed Date: January 2006	Last Revised Date: January 2006

Definitions

The Regence Reimbursement Policy Manual documents payment methodology for medical and surgical services and supplies, applies the definitions and clinical rationale of approved, nationally published clinical coding applications, and addresses coding and edits for claims payment.

The Regence Reimbursement Policy Manual includes policies that document the principles used to make reimbursement policy, as well as policies documenting specific issues.

Policy Statement

The following nationally recognized clinical coding applications are accepted by Regence BlueShield for use in claims processing. These are all HIPAA (Health Insurance Portability and Accountability Act) compliant code sets.

1. CPT (Current Procedural Terminology), published by the American Medical Association.
2. HCPCS (Healthcare Common Procedure Coding System).
3. ICD-9-CM (International Classification of Diseases, 9th Revision, Clinical Modification).

The following nationally recognized sources are consulted in the development of Regence Reimbursement Policy.

1. Centers for Medicare and Medicaid Services (CMS) written policy.
2. CMS Ambulatory Surgical Center (ASC) group categories.
3. CMS Diagnosis Related Groups (DRG).
4. CMS Federal Register.
5. CMS Resource Based Relative Value Units and recommendations.
6. CPT Assistant.
7. CPT Manual, including code definitions and associated text.
8. HCPCS Manual, including code definitions and associated text.
9. International Classification of Diseases, 9th Revision, Clinical Modification (ICD-9-CM) official guidelines for coding and reporting.
10. Medicare local carriers.
11. National Correct Coding Policy Manual for Part B Medicare Carriers (NCCI).
12. National Physician Fee Schedule Relative Value File.
13. Uniform Hospital Discharge Data Set (UHDDS).

Specialty Society positions may be considered in the development of Regence Reimbursement Policy.

EXHIBITS A-H (Redacted) TO
 DECLARATION OF ELEANOR HAMBURGER - 36

References

None

Cross References

None

Your use of this Reimbursement Policy constitutes your agreement to be bound by and comply with the terms and conditions of the [Reimbursement Policy Disclaimer](#).

Back to Administrative Section 





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[Regence Ethics](#) [Privacy Policy](#) [Fraud and Abuse](#) [Site Feedback](#)

EXHIBITS A-H (Redacted) TO

DECLARATION OF ELEANOR HAMBURGER - 37

<http://www.wa.regence.com/provider/library/policies/reimbursementPolicy/administrative/...> 7/11/2012
R.A. 000145

Exhibit G

EXHIBITS A-H (Redacted) TO
DECLARATION OF ELEANOR HAMBURGER - 38

R.A. 000146

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Z.D., by and through her parents and guardians, J.D. and T.D., individually, on behalf of THE TECHNOLOGY ACCESS FOUNDATION HEALTH BENEFIT PLAN, and on behalf of similarly situated individuals,

Plaintiffs,

v.

GROUP HEALTH COOPERATIVE, *et al.*,

Defendants.

No. C11-1119RSL

ORDER GRANTING
PLAINTIFFS' MOTIONS FOR
SUMMARY JUDGMENT

This matter comes before the Court on Plaintiffs' "Motion for Summary Judgment re: Exhaustion of Administrative Remedies" (Dkt. # 43) and "Motion for Partial Summary Judgment re: Clarification of Rights to Benefits and Injunctive Relief under ERISA" (Dkt. # 44). Plaintiffs ask the Court to find as a matter of law that they exhausted their administrative remedies or that those remedies would be futile and to enter a permanent injunction requiring Defendants to comply with the requirements of Washington's Mental Health Parity Act, RCW 48.46.291, which the Court previously found to apply. The Court finds that Plaintiffs have exhausted their administrative remedies. It further finds that Plaintiffs are entitled to a permanent injunction requiring Defendants to adhere to the plain requirements of Washington's Mental Health Parity Act. Accordingly, the Court GRANTS both motions.

ORDER GRANTING PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT - 1

1 **I. BACKGROUND**

2 This case concerns a dispute over healthcare benefits. Plaintiff Z.D. is the
3 twelve-year-old daughter and dependant of Plaintiffs J.D. (her mother) and T.D. (her
4 father). See Dkt. # 45 at ¶ 2. She is a beneficiary of “The Technology Access
5 Foundation Health Benefit Plan” (the “Plan”), an ERISA “employee welfare benefit
6 plan,” 29 U.S.C. § 1002(1), underwritten and administered by Defendant Group Health
7 Options, Inc.—a wholly owned subsidiary of Defendant Group Health Cooperative.
8 Amended Complaint (Dkt. # 3) at ¶¶ 1–5.

9 In 2006, Defendant Group Health diagnosed Z.D. with two DSM-IV-TR mental
10 health conditions: a “moderate-severe receptive language disorder” and “other specific
11 developmental learning disabilities.” Dkt. # 45 at ¶ 4; see also Dkt. # 49-1 (Exhibit B).¹
12 At the time of her diagnoses, Z.D. was already a beneficiary of the Plan and began
13 receiving covered non-“restorative”² speech therapy treatment for her conditions.
14 Circumstances changed, however, shortly before Z.D.’s seventh birthday. Plaintiff was
15 told that, per the Plan, non-restorative speech therapy treatments were not covered for
16 individuals over the age of six and thus her treatments would no longer be covered once
17 she turned seven. Dkt. # 45 at ¶ 5. As a result, Z.D. stopped going to outpatient
18 therapy, though she did receive some limited treatment services through her public
19 elementary school. Id. at ¶ 6; Dkt. # 49-1 at 21.

20 Unfortunately, this limited therapy did not seem to be enough. Six months after
21 Z.D.’s seventh birthday, her mother complained to Z.D.’s doctor that Z.D. was

22 ¹ The Court notes that this exhibit is sealed and, because it prefers that the present
23 Order be accessible by the public, has not disclosed any information not otherwise available
24 from the parties’ public filings. Nevertheless, throughout this Order the Court will cite to
sealed documents that it considered but is not publicly disclosing in order to build a more
thorough record in the event of an appeal.

25 ² The Plan distinguishes between “restorative” treatment, which is intended to restore
26 function and is covered regardless of age, and “non-restorative” treatment, which is intended to
improve function and is not covered for individuals older than seven. E.g., Dkt. # 56-1 at 28.

1 continuing to experience problems at school. In October 2007, Z.D. was evaluated
2 extensively at the University of Washington's LEARN Clinic, which confirmed Group
3 Health's earlier diagnosis. Dkt. # 45 at ¶ 6; see Dkt. # 49-1 at 19–37. Group Health
4 covered this evaluation. Dkt. # 57 at ¶ 4; Dkt. # 57-1 at 2.

5 On November 28, 2007, J.D. phoned Group Health to ask if Group Health would
6 cover speech therapy for Z.D. Dkt. # 50-1 at 83; Opp. (Dkt. # 54) at 8. According to
7 Group Health's records, it told her that Z.D.'s therapy would not be covered because she
8 was over the age of six. Dkt. # 50-1 at 83.

9 In 2008, Z.D.'s parents began paying for her to receive treatment at Bellevue
10 Mosaic in 2008. Dkt. # 45 at ¶ 7. In late 2008, Bellevue Mosaic recommended that
11 Z.D. seek a higher level of treatment than it could provide. Id. at ¶ 8. Her parents took
12 her to Northwest Language and Learning Center in September 2008. Id. Shortly after,
13 J.D. emailed Group Health about coverage. Dkt. # 45-1 at 6–7. After she provided
14 some extra information requested by Group Health, id. at 8, she received a formal denial
15 of coverage on December 18, 2008. Group Health explained that “neurodevelopmental
16 speech therapy is not covered beyond the age of 6” and that Northwest Learning and
17 Language was not a provider within the Group Health system.”³ Id. at 11. Z.D.'s
18 parents sent her to the center anyway, paying for her treatment out of pocket beginning
19 in January 2009. Dkt. # 45 at ¶ 11.

20 On September 15, 2010, Z.D. received an evaluation from Dr. Deborah Hill. Id.
21 at ¶ 12. On October 15, J.D. sent Group Health another letter informing them of its
22 prior age-based denials of her requests for treatment for Z.D. and asking it to reconsider
23 its position. Dkt. # 45-1 at 18. She explained that she intended to enroll Z.D. at the
24 Northwest Language and Learning Center and added: “Please consider this letter to be
25 an appeal of Group Health's denial of my requests for speech therapy and

25 ³ This rationale is somewhat curious given that Group Health covered Z.D.'s
26 September and October sessions at Northwest. Dkt. # 57-1 at 4.

1 neurodevelopmental evaluation for my daughter.” Id. She also included a claim for
2 reimbursement for the September 15 evaluation. Id. at 19–21.

3 Group Health responded in a letter dated November 1, 2010. Id. at 23. It stated
4 that it did not have any record of having denied coverage for the September evaluation
5 and would forward her claim to the claims department. Id.

6 J.D. responded via a certified letter dated December 9, 2010. Id. at 25. She
7 wrote that she had not heard anything further from Group Health in regard to either her
8 general request for coverage or her specific claim for the September evaluation. Id. She
9 explained that because she had not received any explanation of benefits in regard to her
10 request for coverage, she considered Group Health’s inaction to be a denial and wished
11 to appeal that denial. Id. Group Health states that it never received that letter. Opp.
12 (Dkt. # 54) at 11. It did eventually “cover” the September 15 claim, though. Compare
13 Dkt. # 45 at ¶ 17 (stating that Group Health paid the claim), with Dkt. # 57 at ¶ 6
14 (stating that Group Health denied coverage because Plaintiffs had used the maximum
15 number of mental health evaluations to which they were entitled, but that Plaintiffs still
16 received the benefit of Group Health’s lower rate).

17 In any case, Plaintiffs continued to send Z.D. to Northwest, paying for her
18 therapy themselves. Dkt. # 45 at ¶ 17. On July 6, 2011, they filed the instant suit
19 against Defendants, alleging that Washington’s Mental Health Parity Act, RCW
20 48.46.291, requires Defendants to cover Z.D.’s mental health therapy sessions.
21 Complaint (Dkt. # 1). They seek to recover the “benefits due them due to the improper
22 exclusion and/or limitations of behavioral and neurodevelopmental therapy.” Amended
23 Complaint (Dkt. # 3) at ¶¶ 36–38 (relying on 29 U.S.C. § 1132(a)(1)(B)). And they seek
24 the recovery of all losses to the Plan for Defendants’ alleged failure “to act in
25 accordance with the documents and instruments governing the Plan.” Id. at ¶¶ 28–35
26 (relying on 29 U.S.C. § 1132(a)(2) (“breach of fiduciary duty”). Finally, they ask the

ORDER GRANTING PLAINTIFFS’ MOTIONS FOR SUMMARY JUDGMENT - 4

1 Court to enjoin Defendants from continuing to process and pay claims in a manner
2 inconsistent with RCW 48.46.291. *Id.* at ¶¶ 39–41 (relying on 29 U.S.C. § 1132(a)(3)).

3 After filing suit, Plaintiffs filed a claim for each of Z.D.’s 2011 sessions at
4 Northwest. Dkt. # 45 at ¶ 17. Group Health tendered a check in payment of these
5 claims on November 17, 2011. *Id.* In a subsequent deposition, however, Group Health
6 stated that it had erroneously tendered that payment. Dkt. # 48-1 at 60–61 (“[I]t should
7 not have been paid.”).

8 II. DISCUSSION

9 In the present motions, Plaintiffs argue first that they are entitled to a legal
10 finding that they exhausted their administrative remedies or that those remedies would
11 have been futile. Dkt. # 43. Moreover, they ask the Court to enter a permanent
12 injunction against Defendants, enjoining “Group Health from denying coverage for
13 medically necessary neurodevelopmental therapy to treat insureds with DSM-IV-TR
14 mental health conditions simply because the insured is over six years old.” Dkt. # 44.

15 Notably, the Court may grant Plaintiffs’ motions only if it is satisfied that there is
16 no genuine issue of material fact and that judgment is appropriate as a matter of law.
17 Fed. R. Civ. P. 56(c). As the moving party, Plaintiffs bear the initial burden of
18 informing the Court of the basis for summary judgment. *Celotex Corp. v. Catrett*, 477
19 U.S. 317, 323 (1986). They must prove each and every element of their claims or
20 defenses such that no reasonable jury could find otherwise. *Anderson v. Liberty Lobby, Inc.*,
21 477 U.S. 242, 248 (1986). In doing so, they are entitled to rely on nothing more
22 than the pleading themselves. *Celotex*, 477 U.S. at 322–24. Only once they make their
23 initial showing does the burden shift to the Defendants to show by affidavits,
24 depositions, answers to interrogatories, admissions, or other evidence that summary
25 judgment is not warranted because a genuine issue of material fact exists. *Id.* at 324.

26 To be material, the fact must be one that bears on the outcome of the case. A
genuine issue exists only if the evidence is such that a reasonable trier of fact could

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1 resolve the dispute in favor of the nonmoving party. Anderson, 477 U.S. at 249. “If the
2 evidence is merely colorable . . . or is not significantly probative . . . summary judgment
3 may be granted.” Id. at 249–50. In reviewing the evidence “the court must draw all
4 reasonable inferences in favor of the nonmoving party, and it may not make credibility
5 determinations or weigh the evidence.” Reeves v. Sanderson Plumbing Prods. Inc., 530
6 U.S. 133, 150 (2000).

7 **A. Exhaustion**

8 “Section 502 of ERISA entitles a participant or beneficiary of an
9 ERISA-regulated plan to bring a civil action ‘to recover benefits due to him under the
10 terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights
11 to future benefits under the terms of the plan.’” Chappel v. Lab. Corp. of Am., 232 F.3d
12 719, 724 (9th Cir. 2000) (quoting 29 U.S.C. § 1132(a)(1)(B)). Before a beneficiary may
13 bring such a claim, though, “exhaustion, at least to the level of the trustees, is ordinarily
14 required where an action seeks a declaration of the parties’ rights and duties under the
15 [ERISA] plan.” Graphic Commc’ns Union, Dist. Council No. 2, AFL-CIO v.
16 GCIU-Emp’r Ret. Benefit Plan, 917 F.2d 1184, 1187 (9th Cir. 1990) (emphasis in
17 original) (citations and internal quotation marks omitted). Suits raising unexhausted
18 claims are barred absent a showing that the relevant unexhausted plan provision is either
19 unenforceable or invalid. Chappel, 232 F.3d at 724.

20 Plaintiffs’ argument in favor of exhaustion in this case is confined to three
21 occasions: specifically, that “Group Health failed to (1) timely process and respond to
22 Z.D.’s October 25, 2010 pre[-]service request for coverage of speech therapy; (2)
23 institute any appeal or consideration of a pre-service speech therapy claim in response to
24 Z.D.’s December 9, 2010 request to do so; and (3) timely respond to Z.D.’s September
25 12, 2011 post-service claim for speech therapy benefits.”⁴

26 ⁴ Accordingly, the Court does not address Defendants’ arguments as to other dates.

1 In response, Defendants raise three arguments. First, they contend that Plaintiff's
2 "pre-service" requests were not true "pre-service" requests at all and that Group Health
3 therefore had no obligation to respond. Second, they contend that Group Health did
4 timely respond to the 2011 claim and that, even if it did not, it has since tendered
5 payment, mooted any claim. Finally, it argues that Plaintiffs' administrative remedies
6 would not have been be futile. The Court disagrees with each of Defendants' positions
7 and finds that Plaintiffs are entitled to judgment as a matter of law. It thus GRANTS the
8 motion (Dkt. # 43).

9 1. Exhaustion of 2010 "Pre-Service" Claims

10 The facts relevant to Plaintiffs' 2010 "pre-service" requests are straightforward
11 and undisputed: On October 15, 2010, J.D. sent Group Health a letter that recounted its
12 prior age-based denials of her requests for treatment for Z.D. and immediately added,
13 "Please consider this letter to be an appeal of Group Health's denial of my requests for
14 speech therapy and neurodevelopmental evaluation for my daughter." Dkt. # 45-1 at 18
15 (emphasis in original).

16 She further noted that she had recently had her daughter evaluated again and had
17 been told that she needed to "receive additional medically necessary speech therapy."
18 Id. (emphasis omitted). She explained that she intended "to enroll Z.D. at Northwest
19 Language and Learning for the recommended speech therapy" and stated: "I request
20 that Group Health reconsider its exclusion of neurodevelopmental therapy coverage for
21 my daughter and provide her with coverage for neuropsychological evaluation and
22 speech therapy services. Both neurodevelopmental evaluation and speech therapy are
23 medically necessary services to treat my daughter's developmental disabilities and
24 communication disorder." Id. (emphasis in original).

25 In its response, Group Health did not address J.D.'s request for speech therapy,
26 stating only that it had no record of having denied any claims arising from a distinct
evaluation not at issue here. Id. at 23. J.D. was not dissuaded. She wrote back in a

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1 certified letter dated December 9, 2010, stating bluntly that she considered Group
2 Health's non-response to her request for coverage to be a de facto denial of coverage.
3 Id. at 25. She then immediately stated again: "Please consider this letter to be an appeal
4 of Group Health's denial of my requests for speech therapy and neurodevelopmental
5 evaluation for my daughter." Id. (emphasis in original).

6 Moreover, eliminating any reasonable objective potential for ambiguity,⁵ she
7 went on to explain that she had "enrolled Z.D. at Northwest Language and Learning for
8 the recommended speech therapy" and then immediately stated again: "I request that
9 Group Health reconsider its exclusion of neurodevelopmental therapy coverage for my
10 daughter and provide her with coverage for neuropsychological evaluation and speech
11 therapy services. Both neurodevelopmental evaluation and speech therapy are
12 medically necessary services to treat my daughter's developmental disabilities and
13 communication disorder." Id. (emphasis in original).

14 In the face of these plain requests for coverage and notices of appeal, Defendants
15 argue simply that no response was required because Plaintiffs' requests were not valid
16 "pre-service" claims, as defined under ERISA. See Opp. (Dkt. # 54) at 15-18. They
17 contend that ERISA places procedural requirements only on a "claim for a benefit under
18 a group health plan with respect to which the terms of the plan condition receipt of the
19 benefit, in whole or in part, on approval of the benefit in advance of obtaining medical
20 care," 29 C.F.R. § 2560.503-1(m)(2), and that, because the Plan does not require pre-
21 approval of outpatient speech therapy like Z.D. was requesting, her requests did not
22 constitute pre-service requests. Opp. (Dkt. # 54) at 15-18. Technically speaking, the
23 Court agrees. J.D.'s letters would not appear to fall within the technical definition of
24 "Pre-service claims" set forth in the regulation.

25 ⁵ To be clear, the Court sees absolutely no factual basis from which to conclude that
26 reasonable minds could disagree as to the import of J.D.'s correspondences. Her letters make it
clear beyond any possibility for fairminded disagreement that she was requesting both coverage
for future expected treatment at Northwest and reconsideration of prior denials.

1 Notably, however, that does not mean that the regulation contemplates that
2 Defendants could merely sit on their hands in the face of her requests. Apart from the
3 specific obligations attached to “pre-service claims,” the regulation precludes claim
4 procedures from being “administered in a way, that unduly inhibits or hampers the
5 initiation or processing of claims for benefits.” § 2560.503-1(b)(3). It goes on to
6 specifically provide “that, in the case of a failure by a claimant or an authorized
7 representative of a claimant to follow the plan’s procedures for filing a pre-service
8 claim, within the meaning of paragraph (m)(2) of this section, the claimant or
9 representative shall be notified of the failure and the proper procedures to be followed in
10 filing a claim for benefits.” § 2560.503-1(c)(1)(i) (emphasis added). Compare
11 § 2560.503-1(c)(1)(ii) (noting requirements), with Dkt. # 45-1 at 18 (naming “a specific
12 claimant; a specific medical condition or symptom; and a specific treatment . . . for
13 which approval is requested”).

14 As explained by the Department of Labor, which promulgated the regulation, “a
15 group health plan that requires the submission of pre-service claims, such as requests for
16 preauthorization, is not entirely free to ignore pre-service inquiries where there is a basis
17 for concluding that the inquirer is attempting to file or further a claim for benefits,
18 although not acting in compliance with the plan’s claim filing procedures.” U.S.
19 Department of Labor FAQs About the Benefits Claim Procedure Regulations (“DOL
20 FAQs”), available at http://www.dol.gov/ebsa/faqs/faq_claims_proc_reg.html, at A-5
21 (emphasis added). Rather, “the regulation requires the plan to inform the individual of
22 his or her failure to file a claim and the proper procedures to be followed.” Id.; see
23 Barboza v. Cal. Ass’n of Prof’l Firefighters, 651 F.3d 1073, 1079 (9th Cir. 2011)
24 (deferring to the Secretary of Labor’s interpretation of § 2650.503-1 because “[w]hen
25 evaluating conflicting interpretations of an administrative regulation, we are required to
26 give ‘substantial deference’ to the agency’s interpretation of its own regulations”).

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1 Thus, even assuming that J.D.'s letter was an inappropriate pre-service claim, the
2 Court finds it beyond any possibility for fairminded disagreement that Group Health had
3 "a basis" for concluding that J.D. was "attempting to file or further a claim for benefits."
4 Compare Dkt. # 45-1 at 18, with DOL FAQs, at A-5. Group Health therefore had an
5 obligation to inform her of the shortcoming of her request—that, as Defendants now
6 contend, it was not an appropriate pre-service claim—and of the proper procedure for
7 filing a claim, i.e., either concurrently or post-service.⁶ Compare § 2560.503-1(c)(1)(i),
8 with Dkt. # 48-1 at 80 (noting that Group Health recognizes pre-service, concurrent, and
9 post-service claims). Because it failed to do either, Plaintiffs' claims are deemed
10 exhausted. § 2560.503-1(l) ("In the case of the failure of a plan to establish or follow
11 claims procedures consistent with the requirements of this section, a claimant shall be
12 deemed to have exhausted the administrative remedies available under the plan and shall
13 be entitled to pursue any available remedies under section 502(a) of the Act on the basis
14 that the plan has failed to provide a reasonable claims procedure that would yield a
15 decision on the merits of the claim.").

16 Moreover, the fact that the Plaintiffs may not have filed a claim contemplated by
17 § 2560.503-1(m)(2) does not mean that it was not a valid claim under the terms of the
18 Plan itself. As § 2560.503-1(a) states, it "sets forth minimum requirements for employee
19 benefit plan procedures pertaining to claims for benefits by participants and
20 beneficiaries." Id. (emphasis added). It does not preclude a Plan from providing greater
21 protections. See Chappel, 232 F.3d at 724 (noting the distinction between rights and
22 benefits accorded "by the statutory provisions of ERISA itself" and rights and benefits
23 provided "by the contractual terms of the benefits plan"). And in this case, the Plan does

24 ⁶ As Plaintiffs point out, Group Health is a fiduciary. The law does not permit it to
25 simply sit on its hands while a beneficiary unsuccessfully attempts to "navigate the byzantine
26 bureaucracy of a health carrier." Mot. (Dkt. # 43) at 15. It had a duty to aid J.D. in her
attempts to present a claim. See § 2560.503-1(c)(1)(i).

1 not expressly incorporate § 2560.503-1(m)(2)'s definition of or otherwise define "pre-
2 service claim." It simply states:

3 D. Claims

4 Claims for benefits may be made before or after services are
5 obtained. To make a claim for benefits under the Agreement, a
6 Member (or the Member's authorized representative) must contact
7 GHO Customer Service, or submit a claim for reimbursement as
8 described below. Other inquiries, such as asking a health care
9 provider about care or coverage, or submitting a prescription to a
10 pharmacy, will not be considered a claim for benefits.

11 * * *

12 GHO will generally process claims for benefits within the
13 following timeframes after GHO receives the claims:

14 § Pre-service claims – within fifteen (15) days.

15 § Claims involving urgently needed care – within seventy-two
16 (72) hours.

17 § Concurrent care claims – within twenty-four (24) hours.

18 § Post-service claims – within thirty (30) days.

19 Timeframes for pre-service and post-service claims can be
20 extended by GHO for up to an additional fifteen (15) days.

21 Members will be notified in writing of such extension prior to the
22 expiration of the initial timeframe.

23 Dkt. # 56-2 at 6 (2010 Plan Benefit Booklet)⁷; accord Dkt. # 56-2 at 59 (2011 Plan
24 Benefit Booklet); see also Dkt. # 56 at ¶ 4 (stating that the 2010 Contract was effective
25 March 1, 2010, and the 2011 Contract was effective March 1, 2011).

26 Undoubtedly recognizing the lack of textual support for its litigation position,
Defendants argue that Group Health nonetheless applies the ERISA definition of "pre-

⁷ The Court recognizes that the Supreme Court has distinguished between summary documents and Plan terms. CIGNA Corp. v. Amara, 131 S. Ct. 1866, 1878 (2011) ("[S]ummary documents, important as they are, provide communication with beneficiaries about the plan, . . . their statements do not themselves constitute the terms of the plan for purposes of § 502(a)(1)(B)." (emphasis omitted)). Noting that the "GHO Booklets" relied upon by the parties themselves state they are "not the contract itself," e.g., Dkt. # 56-2 at 2, 51, the Court directed the parties to file the actual contracts. Dkt. # 69. The parties subsequently filed those documents, pointing out, however, that the contracts themselves do not provide specific terms. Instead, they incorporate as Plan terms the provisions set forth in the GHO Booklets. E.g., Dkt. # 70 at 34 ¶ 1. The Court therefore treats the Booklet terms as the Plan terms.

1 service” claim. In support, they offer only the deposition testimony of Carroll Candace,
2 one of their Rule 30(b)(6) deponents, arguing that she testified that “such claims need to
3 be ‘contractually contingent’ on Group Health’s advance approval.” Opp. (Dkt. # 54) at
4 18 (citing Dkt. # 48-1 at 80). The Court finds no support for that assertion.

5 The entirety of the relevant exchange between Ms. Carroll and Plaintiffs’ counsel
6 was as follows:

7 Q: Do you also deal with situations where there is a pre-
8 service request for authorization?

9 A: Yes.

10 Q: And that’s a situation where somebody is asking Group
11 Health under the contract to approve benefits before the service has
12 been provided, right?

13 A: Exactly.

14 Q: And that would then be sort of contractually contingent
15 upon Group Health saying, yes, we bless this for payment in
16 advance?”

17 A: Yes

18 Q: I tend to call those pre-service claims. Is that what Group
19 Health calls them as well?

20 A: We call them – yes, I technically call them that, but Group
21 Health doesn’t necessarily do that. That’s a health care reform term.
22 So yes, I do use the word claim because ERISA uses the word claim.

23 * * *

24 A: It’s a claim against benefit pre-service versus a claim to
25 pay.

26 * * *

Q: How does Group Health determine whether an individual
is making a request for a pre-service claim?

A: The request comes in prior to the delivery of care.

19 Dkt. # 48-1 at 80 (emphasis added). As the whole conversation makes clear, Ms. Carroll
20 not only fails to ever condition her understanding of the Plan term on the need for pre-
21 approval, she expressly distinguishes Group Health’s understanding of its terms from the
22 statutory definitions. Id. Furthermore, when asked point blank to identify how Group
23 Health determines if “an individual is making a request for a pre-service claim,” she
24 relies on only one condition: the timing of the claim. Id. Accordingly, the Court finds
25 that Defendants have failed to offer any evidence sufficient to give rise to a genuine issue

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1 as to the import of Group Health's terms. Anderson, 477 U.S. at 249–50 (“If the
2 evidence is merely colorable . . . or is not significantly probative . . . summary judgment
3 may be granted.”). The October 25 letter served as “a claim for benefits under the
4 Agreement” to which Group Health was obligated to respond.

5 And, of course, Group Health did respond. Moreover, it did so within the 15-day
6 period set forth by the Plan for “processing” pre-service claims rather than the 30-day
7 post-service review period, further reinforcing its understanding of its own terms'
8 requirements. Dkt. # 45-1 at 23. It informed J.D. that it had no record of a denial and
9 advised her that it had “forwarded her information to the claims department for
10 processing.” Id. Dissatisfied with Group Health's response, J.D. again wrote to appeal
11 Group Health's apparent de facto denial, wisely mailing her letter via certified mail.
12 Group Health concedes it never responded to that letter, claiming that it never even
13 received it. Opp. (Dkt. # 54) at 11. That claim is ultimately insufficient to overcome
14 Plaintiffs' exhaustion contention, however. Plaintiffs have presented evidence of both
15 their mailing and Group Health's receipt of their December 9, 2010 letter. Dkt. # 45-1 at
16 25, 27–28. In response, Defendants merely assert non-receipt. And it is settled law that
17 “[m]erely stating that the document isn't in the addressee's files or records . . . is
18 insufficient to defeat the presumption of receipt.” Huizar v. Carey, 273 F.3d 1220, 1223
19 n.3 (9th Cir. 2001).

20 Thus, in sum, the Court finds that, in addition to being able to claim the benefit of
21 the automatic exhaustion provision of § 2560.503-1(l), Plaintiffs fulfilled their
22 exhaustion obligations under the Plan itself. They both presented their 2010 claims to
23 Group Health as the Plan terms required and subsequently appealed Group Health's de
24 facto denial. Accordingly, under either theory, the Court finds that Plaintiffs 2010 claims
25 are exhausted. See Barboza, 651 F.3d at 1076 (“[T]he ‘applicability *vel non*’ of
26 exhaustion principles is a question of law’ that ‘we consider . . . de novo.’”).

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1 **2. Exhaustion of the 2011 Claim**

2 Next, the Court whether Plaintiffs exhausted their 2011 post-service claim.

3 Notably, Group Health tendered a check in partial payment of these claims on
4 November 12, 2011—60 days after the claim was filed. See Dkt. # 57-2 at 4 (noting that
5 Group Health paid \$609.00 of the \$810.00 claimed). The only amount it declined to pay
6 was Plaintiffs' Plan-designated co-pay amount. Accordingly, Defendants assert that
7 there is no adverse benefit determination to appeal. Plaintiffs disagree. They assert that
8 Group Health's decision not to pay the entirety of the claim constituted an "adverse
9 benefit determination." Dkt. # 62 at 10–11. And, because Group Health did not provide
10 them with notice of that adverse decision within 30 days of its receipt of their claim as
11 required by § 560.503-1(f)(2)(iii)(B), the automatic exhaustion provisions of
12 § 2560.503-1(l) were triggered.⁸ The Court agrees.

13 While Defendants are correct in their assertion that "the regulation does not
14 address the periods within which payments that have been granted must be actually paid
15 or services that have been approved must be actually rendered," DOL FAQs, at A-10,
16 that is not the crux of Plaintiffs' claim. To the contrary, Plaintiffs note that the regulation
17 defines "adverse benefit determination" as any "failure to provide or make payment (in
18 whole or in part)." § 2560.503-1(m)(4) (emphasis added). They argue that this includes
19 even denials based on the imposition of co-pays, pointing out that this is the official
20 position of the Department of Labor. DOL FAQs, at C-12 (answering the question, "If a
21 claimant submits medical bills to a plan for reimbursement or payment, and the plan,
22 applying the plan's limits on co-payment, deductibles, etc., pays less than 100% of the
23 medical bills, must the plan treat its decision as an adverse benefit determination?" in the

24 ⁸ Plaintiffs also complain that Group Health has since indicated that it should not have
25 paid any of the claim. See Dkt. # 48-1 at 50–61 (statement by one of Defendants' Rule
26 30(b)(6) deponents, Dean Solis, the acting associate of "Western Washington Health Plan
Operations," that Group Health should not have paid the claim). As a result, Plaintiffs rightly
fear that Group Health could seek to clawback those funds at any time.

1 affirmative because “[i]n any instance where the plan pays less than the total amount of
2 expenses submitted with regard to a claim, while the plan is paying out the benefits to
3 which the claimant is entitled under its terms, the claimant is nonetheless receiving less
4 than full reimbursement of the submitted expenses.”). The Court sees no reason not to
5 defer to this interpretation. See Barboza, 651 F.3d at 1079.

6 Thus, the undisputed fact that Group Health did not pay the entirety of the claim
7 constituted a partial denial of benefits and thus an adverse benefits determination.
8 § 2560.503-1(m)(4). Accordingly, Group Health was required to inform Plaintiffs of this
9 partial denial within 30 days of receiving the claim. § 560.503-1(f)(2)(iii)(B). Plaintiffs
10 assert that it failed to do so, and, in response, Defendants essentially concede the point.
11 Accordingly, the Court finds that Plaintiffs’ 2011-based claim is exhausted.

12 3. Futility

13 Because the Court finds that Plaintiffs exhausted both of the claims that are the
14 subject of this motion, it does not reach the issue of futility.

15 Notably, though, the Court wishes to point out that Defendants’ position on
16 futility—that administrative remedies may not have been futile because, despite the fact
17 that the Plan does not permit coverage of non-restorative mental health therapies for
18 individuals over the age of six,⁹ Group Health sometimes paid them anyway—is
19 troubling. As Plaintiffs point out, ERISA fiduciaries are not permitted to process claims
20 on a whim. Rather, they are required to do precisely the opposite: “a fiduciary shall
21 discharge his duties with respect to a plan solely in the interest of the participants and
22 beneficiaries and . . . in accordance with the documents and instruments governing the

23 ⁹ To be clear, the Court agrees with Plaintiffs that Defendants’ official position
24 throughout this litigation has been that the Plan “required Group Health to deny
25 neurodevelopmental therapy benefits for claimants over six years old,” Dkt. # 19 at 7, and that
26 the record is replete with examples of Defendants asserting Group Health’s official position.
See, e.g., Mot. (Dkt. # 43) at 21–27 (summarizing the many instances in which Group Health
asserted its official position); Reply (Dkt. # 62) at 5–8 (same). Certainly, Defendants filed two
motions premised on that position. Dkt. ## 7, 31. It is the entire reason this case exists.

1 plan insofar as such documents and instruments are consistent with the provisions of
2 [ERISA].” 29 U.S.C. § 1104(a)(1)(D). Moreover,

3 The claims procedures for a plan will be deemed to be reasonable
4 only if . . . [t]he claims procedures contain administrative processes
5 and safeguards designed to ensure and to verify that benefit claim
6 determinations are made in accordance with governing plan
7 documents and that, where appropriate, the plan provisions have
8 been applied consistently with respect to similarly situated claimants.

9 29 C.F.R. § 2560.503-1(b)(5).

10 Thus, in attempting to win the exhaustion battle, Defendants essentially concede
11 the war by representing to this Court that Group Health deviates from the Plan’s terms to
12 pay claims not permitted under the Plan contract. E.g., Opp. (Dkt. # 54) at 23

13 (“Notwithstanding Group Health’s policy limiting speech benefits to children under 7,
14 the record shows that in Z.D.’s case Group Health paid speech therapy claims when she
15 submitted them. . . . But even though those payments may have been ‘error’ in the sense
16 that they were inconsistent with the TAF Contract, that ‘error’ has benefitted Plaintiffs
17 every time . . .”). The Court has no choice but to treat this representation as a
18 concession that Group Health is administering the Plan in an arbitrary and capricious
19 fashion, i.e., that it is wholly failing to act as a fiduciary.

20 **B. Injunctive Relief**

21 The Court next considers Plaintiffs’ motion for “an order and judgment under
22 ERISA clarifying that neurodevelopmental therapy to treat insureds with DSM-IV-TR
23 mental health conditions may not be denied simply because the insured is over the age of
24 six” and “enjoin[ing] Group Health from denying coverage for medically necessary
25 neurodevelopmental therapy to treat insureds with DSM-IV-TR mental health conditions
26 simply because the insured is over six years old.” Mot. (Dkt. # 44) at 7.

In opposition, Defendants raise three arguments: First, that “Group Health treats
all neurodevelopmental disorders the same”; second, that “Plaintiffs’ own experience
demonstrates the lack of an actual or imminent injury”; and third, that “the

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1 Neurodevelopmental Therapies Mandate specifically permits terminating speech therapy
2 at age 7.” Opp. (Dkt. # 53) at 15. The Court finds none persuasive. Rather, it finds that
3 no genuine issue of material fact exists and that Plaintiffs are entitled to judgment as a
4 matter of law under 29 U.S.C. § 1132(a)(1)(B) and (a)(3). It thus GRANTS Plaintiffs’
5 motion (Dkt. # 44).

6 **1. Revisiting the Neurodevelopmental Therapies Mandate Issue**

7 The Court thinks it prudent to start with Defendant’s third argument: their third
8 attempt to convince this Court that “the Neurodevelopmental Therapies Mandate
9 specifically permits terminating speech therapy at age 7” and that the Mental Health
10 Parity Act must therefore be interpreted in such a fashion that it does not require
11 neurodevelopmental therapy coverage. Opp. (Dkt. # 53) at 15. As the Court stated in its
12 prior resolution of this same argument,¹⁰ the issue is not whether the Mandate requires
13 coverage. Plainly it does not. Neither is there any dispute as to whether the Mental
14 Health Parity Act repealed the Mandate. Again, plainly it did not. The only issue is
15 whether the two statutes conflict, and as the Court has found on two separate occasions,
16 they do not. Order (Dkt. # 30) at 8; Order (Dkt. # 36) at 2–3.

17 The previously enacted Mandate required “coverage for neurodevelopmental
18 therapies for covered individuals age six and under.” RCW 48.44.450(1). It established
19 a coverage floor, not a ceiling. Thus, the subsequently enacted Mental Health Parity Act
20 merely imposed an additional, distinct requirement that mental health coverage “be
21 delivered under the same terms and conditions as medical and surgical services.” H.B.
22 1154, 59th Leg., Reg. Sess., ¶ 1 (Wash. 2005); see, e.g., Order (Dkt. # 30); Order (Dkt. #
23 36). There does not exist even a close question as to whether there is a conflict between

24 ¹⁰ The Court disagrees with Defendants’ representations regarding the “newness” of
25 their argument. As before, Defendants contend that the Neurodevelopmental Therapies
26 Mandate does not require coverage after an individual turns seven. As before, they argue that
the Mental Health Parity Act did not repeal the Neurodevelopmental Therapies Mandate. And,
as before, they contend that the two statutes conflict and that the Mandate trumps the Parity
Act. There is nothing materially new about Defendants’ argument.

1 the statutes under established Washington law.¹¹

2 In any case, as it appears that the message has yet to be received, the Court wishes
3 to be clear: The coverage at issue in this case is the product of RCW 48.46.291, not the
4 Neurodevelopmental Therapies Mandate. The Mandate continues to apply, requiring
5 “coverage for neurodevelopmental therapies for covered individuals age six and under.”
6 RCW 48.44.450(1). And while the Mandate no longer applies after a child turns seven,
7 RCW 48.46.291 does. By its plain terms, it requires health maintenance organizations
8 like Group Health to provide coverage for “mental health services” at increasing levels
9 of parity with the coverage such entities provide for medical and surgical services. See
10 RCW 48.46.291(2)(a)–(c).

11 **2. Statutory Treatment Requirements**

12 The Court next considers Defendants’ contention that, since January 2011, they
13 have brought their policies in conformity with the Mental Health Parity Act and that an
14 injunction is therefore unnecessary.¹² Opp. (Dkt. # 53) at 17. The Court disagrees.

15 The Court notes at the outset that Defendants paint a much rosier picture of their
16 policies in their briefs than they apply in practice. For example, Defendants argue that
17 they are in compliance with RCW 48.46.291(2)(c) because Group Health applies the
18 same treatment limitations to mental health therapy services that it applies to all therapies
19 services. Opp. (Dkt. # 53) at 16 (“Group Health imposes a treatment limit (age seven) on
20 a limited set of therapies (speech therapy, physical therapy and occupational therapy)
21 that treat medical and mental conditions alike.”). In actuality, however, Group Health
22 does not apply an age-based treatment limitation across the board to all therapies related

22 ¹¹ A litany of Washington state courts have held the same. See, e.g., D.F. v. Wash.
23 State Health Care Auth., No. 10-2-294007 SEA; Dkt. ## 74, 74-1 (listing decisions).

24 ¹² The Court notes that Defendants mischaracterize Plaintiffs’ request. To be clear,
25 Plaintiffs do not request that the Court find that an age limit is never appropriate under any
26 circumstance. Opp. (Dkt. # 53) at 15–16. They assert only that Group Health cannot impose
an age-based treatment limitation on neurodevelopmental therapies unless it generally imposes
that same limit on “medical and surgical services.”

1 to medical and surgical services. See Dkt. # 56-2 at 82 (2011 terms).¹³ It applies an age-

2

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¹³ The Plan states:

4

G. Rehabilitation Services.

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1. Rehabilitation services are covered as set forth in this section, limited to the following: physical therapy; occupational therapy; massage therapy; and speech therapy to restore function following illness, injury or surgery. Services are subject to all terms, conditions and limitations of the Agreement including the following:

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a. All services require a prescription from either a MHCN or community physician and must be provided by a MHCN-approved or Community Provider rehabilitation team that may include medical, nursing, physical therapy, occupational therapy, massage therapy and speech therapy providers.

b. Under the Community Provider option, inpatient rehabilitation services must be authorized in advance by GHO.

c. Services are limited to those necessary to restore or improve functional abilities when physical, sensori-perceptual and/or communication impairment exists due to injury, illness or surgery. Such services are provided only when significant, measurable improvement to the Member's condition can be expected within a sixty (60) day period as a consequence of intervention by covered therapy services described in paragraph a., above.

d. Coverage for inpatient and outpatient services is limited to the Allowance set forth in the Allowances Schedule.

Excluded: inpatient Residential Treatment services; specialty rehabilitation programs; long-term rehabilitation programs; physical therapy, occupational therapy and speech therapy services when such services are available (whether application is made or not) through programs offered by public school districts; therapy for degenerative or static conditions when the expected outcome is primarily to maintain the Member's level of functioning (except as set forth in subsection 2. below); recreational, life-enhancing, relaxation or palliative therapy; implementation of home maintenance programs; programs for treatment of learning problems; any services not specifically included as covered in this section; and any services that are excluded under Section V.

2. Neurodevelopmental Therapies for Children Age Six (6) and

ORDER GRANTING PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT - 19

1 based limitation only to a narrow subcategory of medical and surgical services, namely,
2 non-rehabilitative therapies—“therapy for degenerative or static conditions when the
3 expected outcome is primarily to maintain the Member’s level of functioning,” as
4 opposed to “restore function following illness, injury or surgery.” *Id.* (emphasis added).
5 Thus, in reality, Group Health applies its age-based limitation to only a sub-category of a
6 sub-category of its covered services: non-rehabilitative, therapy services.

7 In any case, the end result of Group Health’s actions is simple. As Defendants
8 concede, “Group Health’s ‘official policy’” remains to terminate “neurodevelopmental
9 therapies at age seven.” *Opp.* (Dkt. # 53) at 16 (“The plain language of the TAF
10 Contract makes this equal treatment clear: the Neurodevelopmental Therapies benefit
11 does not distinguish between types of conditions, but simply grants coverage for
12 neurodevelopmentally disabled children (regardless of whether the neurodevelopmental
13 disability is “mental” or “physical”), subject to common treatment limitations (e.g., no
14 coverage after age six).”). They defend this practice by pointing to a single line of RCW
15 48.46.291(2)(c): “Treatment limitations or any other financial requirements on coverage

Under. Physical therapy, occupational therapy and speech therapy services for the restoration and improvement of function for neurodevelopmentally disabled children age six (6) and under shall be covered. Coverage includes maintenance of a covered Member in cases where significant deterioration in the Member’s condition would result without the services. Coverage for inpatient and outpatient services is limited to the Allowances set forth in the Allowances Schedule.

Excluded: inpatient Residential Treatment services; specialty rehabilitation programs; long-term rehabilitation programs; physical therapy, occupational therapy and speech therapy services when such services are available (whether application is made or not) through programs offered by public school districts; recreational, life-enhancing, relaxation or palliative therapy, implementation of home maintenance programs; programs for treatment of learning problems; any services not specifically included as covered in this section; and any services that are excluded under Section V.

25 Dkt. # 56-2 at 82 (some emphasis omitted).

26 ORDER GRANTING PLAINTIFFS’ MOTIONS FOR SUMMARY JUDGMENT - 20

1 for mental health services are only allowed if the same limitations or requirements are
2 imposed on coverage for medical and surgical services” They contend that because
3 Group Health essentially excludes all non-restorative “rehabilitative therapies related to
4 medical and surgical services,” it may similarly exclude all coverage for similar non-
5 restorative mental health or neurodevelopmental disorders. See Opp. (Dkt. # 53) at 17.

6 The Court finds two problems with this interpretation. First, Defendant’s
7 interpretation ignores the full text of RCW 48.46.291. Even the subsection containing
8 the clause relied upon by Defendants states plainly:

9 (2) All health benefit plans offered by health maintenance
10 organizations that provide coverage for medical and surgical services
11 shall provide:

12 (c) For all health benefit plans delivered, issued for delivery, or
13 renewed on or after July 1, 2010, coverage for:

14 (i) Mental health services. The copayment or coinsurance for
15 mental health services may be no more than the copayment or
16 coinsurance for medical and surgical services otherwise
17 provided under the health benefit plan. Wellness and
18 preventive services that are provided or reimbursed at a lesser
19 copayment, coinsurance, or other cost sharing than other
20 medical and surgical services are excluded from this
21 comparison. If the health benefit plan imposes a maximum
out-of-pocket limit or stop loss, it shall be a single limit or
stop loss for medical, surgical, and mental health services. If
the health benefit plan imposes any deductible, mental health
services shall be included with medical and surgical services
for the purpose of meeting the deductible requirement.
Treatment limitations or any other financial requirements on
coverage for mental health services are only allowed if the
same limitations or requirements are imposed on coverage for
medical and surgical services

22 RCW 48.46.291(2)(c)(i) (emphasis added). And the statute defines “mental health
23 services” as “medically necessary outpatient and inpatient services provided to treat
24 mental disorders covered by the diagnostic categories listed in the most current version
25 of the diagnostic and statistical manual of mental disorders, published by the American

26 ORDER GRANTING PLAINTIFFS’ MOTIONS FOR SUMMARY JUDGMENT - 21

1 psychiatric association,” with exceptions not at issue here. RCW 48.46.291(1). Thus,
2 the Act plainly imposes a baseline coverage requirement requiring Group Health
3 “provide . . . coverage for” Z.D.’s “medically necessary” treatment for her DSM-IV-TR
4 mental health conditions without any regard for whether that treatment is restorative or
5 non-restorative. RCW 48.46.291(2)(c)(i); see RCW 48.46.291(2)(a)(i), (b)(i).¹⁴

6 Second, Defendants’ focus on the final clause of subsection (c)(i) ignores the
7 history and structure of the statute. As enacted, the statute is meant to impose
8 increasingly stringent requirements on entities like Group Health every two years. RCW
9 48.46.291(2)(a)–(c). Thus, the addition of the treatment limitation is not meant to
10 weaken or supplant the baseline coverage requirement; it is meant to bolster it by further
11 limiting the conditions an entity like Group Health can impose on its coverage of mental
12 health conditions like Z.D.’s. Id. In short, the clause precludes Group Health from
13 imposing precisely the sort of tailored limitations at issue here—limitations that would
14 defeat the very purpose of the statute: providing coverage.

15 In sum then, the Court finds that RCW 48.46.291(2)(c)(i) requires Group Health
16 to provide coverage for “medically necessary outpatient and inpatient services provided
17 to treat mental disorders covered by the diagnostic categories listed in the most current
18 version of the diagnostic and statistical manual of mental disorders, published by the
19 American psychiatric association,” with those limited exceptions set forth in the statute,
20 RCW 48.46.291(1). And it finds that the final clause of subsection (c)(i) only further
21 precludes Group Health from imposing treatment limitations it does not generally
22 “impose[] on coverage for medical and surgical services.” RCW 48.46.291(2)(c)(i).
Accordingly, because Group Health does not exclude individuals over the age of six

23 ¹⁴ This interpretation is also supported by the Washington Senate Bill Report for the
24 Parity Act, which states: “**Background:** Current Washington law does not require health
25 carriers to include mental health coverage in any benefit plan. . . . **Summary of Bill:**
Beginning January 1, 2006[,] a health benefit plan that provides coverage for medical and
26 surgical services must provide coverage for mental health services and prescription drugs to
treat mental disorders.” Dkt. # 9 at 40–41.

1 from coverage for medical and surgical services or even impose an age-based limitation
2 on its therapy coverage in general, it may not impose that limitation on non-restorative
3 mental health therapy coverage.¹⁵

4 3. Actual or Imminent Injury

5 Finally, the Court turns to Defendants' contention that Plaintiffs cannot show a
6 likelihood of irreparable injury.

7 The crux of Defendants' position is, again, that regardless of Group Health's
8 actual policies, they may in fact pay future claims.¹⁶ As Defendants state: "Apart from
9 Group Health's policies, Plaintiffs' actual experience with Group Health's claims
10 practice belies their claim that Group Health 'systematic[ally] violates . . . plan terms' or
11 will do so in the future." See Opp. (Dkt. # 53) at 17.

12 First and foremost, this contention is patently deficient as a matter of law. As
13 stated, ERISA requires "a fiduciary [to] discharge his duties with respect to a plan solely
14 . . . in accordance with the documents and instruments governing the plan." 29 U.S.C.
15 § 1104(a)(1)(D). Accordingly, it is no excuse for Defendants to represent that the Plan
16 precludes the coverage sought, and yet simultaneously argue that, "[w]hile there may be
17 some discrepancy between Group Health's practice and its official policy toward
18 neurodevelopmental therapies, . . . its practice has changed in Plaintiffs' favor,
19 suggesting a strong likelihood of future coverage." Opp. (Dkt. # 53) at 20. The Court
20 will not leave Plaintiffs at the mercy of Group Health's plainly arbitrary application of its
21 own Plan terms or its ever-evolving understanding of Plaintiffs' entitlement to coverage.

22 ¹⁵ Accordingly, it would also seem that Group Health cannot condition coverage on the
23 availability of treatment through "programs offered by public school districts." Cf. Dkt. # 56-2
24 at 82 (2011 terms).

25 ¹⁶ Defendants also contend that Plaintiffs conceded that they have no plans to start
26 speech therapy again. Opp. (Dkt. # 53) at 19. As they concede, though, that is no longer the
case. Id. Moreover, as the entirety of the record in this case makes clear, every doctor who has
evaluated Z.D. has recommended that she get treatment. And her parents' desire to follow
doctor's recommendations is the impetus for this case.

1 Moreover, Group Health's boots on the ground clearly do not share the same
2 impression as its lawyers as to Plaintiffs' likelihood of future coverage. As one of its
3 regional managers, Tomi McVay, testified in her role as Rule 30(b)(6) deponent:

4 Q: So if a person comes to you who is age seven, has a
5 neurodevelopmental problem, disorder—let's go even further and
say that they have diagnosed DSM-IV-TR diagnoses as well.

* * *

6 The person then comes to you and says, "I understand that I'm not
7 covered under the neurodevelopmental benefit because I'm age
seven, am I covered under the rehab benefit?"

8 And the first thing you do [is] determine whether they are
trying to improve their function or restore function? Is that what
9 goes on clinically?

A: I do an evaluation and I send it to clinical review.

10 Q: And if the evaluation concludes that they're seeking
11 speech therapy to not just restore previous function but to improve
function, your expectation is that Group Health would determine that
to be not medically necessary?

* * *

12 A: Typically, yes.

13 Q: And that's your current understanding up to today, is that
14 correct?

A: Yes. . . .

15 Dkt. # 64 at 27. Furthermore, she goes on to note that there have been "[l]ess than
16 seven" cases in which treatment has continued to be covered after the individual turned
17 seven. *Id.* It thus appears that both Defendants' policies and its practices do not favor
18 Plaintiffs' chances of obtaining the coverage to which she is entitled absent an injunctive
19 order—acutely demonstrating the need for the Court "to clarify [Plaintiffs'] rights to
20 future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B).

* * *

21
22 In sum, the Court finds (1) that RCW 48.46.291 is effective against Group Health,
23 (2) that neither Group Health's policies nor its practices adhere to the statute's mandates,
24 and (3) that Plaintiffs have more than demonstrated a substantial likelihood of harm
25 absent injunctive relief. Accordingly, the Court GRANTS Plaintiffs' motion for
26 declaratory and injunctive relief under § 1132(a)(1)(B) and (a)(3). The Court ORDERS

ORDER GRANTING PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT - 24

1 Defendants to cease denying coverage for medically necessary neurodevelopmental
2 therapy to treat insureds with DSM-IV-TR mental health conditions simply because the
3 insured is over six years old. Moreover, the Court ORDERS Defendants to cease their
4 application of any treatment limitations that are not generally “imposed on coverage for
5 medical and surgical services.” RCW 48.46.291(2)(c)(i). The Court will not look kindly
6 on failures to immediately implement its directive.

7 III. CONCLUSION

8 For all of the foregoing reasons, the Court GRANTS Plaintiffs’ “Motion for
9 Summary Judgment re: Exhaustion of Administrative Remedies” (Dkt. # 43) and
10 “Motion for Partial Summary Judgment re: Clarification of Rights to Benefits and
11 Injunctive Relief under ERISA” (Dkt. # 44).

12 Plaintiffs exhausted their 2010 and 2011 claims and have demonstrated as a
13 matter of law that Group Health’s policies and its actions fail to comport with the plain
14 requirements of Washington’s Mental Health Parity Act. Accordingly, they are entitled
15 to declaratory relief. Moreover, because they have demonstrated a strong likelihood of
16 future irreparable injury absent injunctive relief, the Court ORDERS Defendants to
17 immediately cease denying coverage for medically necessary neurodevelopmental
18 therapy to treat insureds with DSM-IV-TR mental health conditions simply because an
19 insured is over six years old. Defendants must immediately cease their application of
20 any treatment limitations that are not generally “imposed on coverage for medical and
21 surgical services.” RCW 48.46.291(2)(c)(i).

22 DATED this 1st day of June, 2012.

23 
24 Robert S. Lasnik
25 United States District Judge

26 ORDER GRANTING PLAINTIFFS’ MOTIONS FOR SUMMARY JUDGMENT - 25

Exhibit H

EXHIBITS A-H (Redacted) TO
DECLARATION OF ELEANOR HAMBURGER - 64

R.A. 000172



Centers for Medicare & Medicaid Services

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Medicare Demonstration Projects & Eval Reports
Medicare Fee-for-Service Part B Drugs
Medicare Fee-for-Service Payment
Medicare Learning Network
MLN Preventive Services
Monitoring Programs
Prescription Drug Coverage
Provider Enrollment & Certification
Quality Initiatives/Patient Assessment Instruments
Other

In current practice by the mental health field, many clinicians use the DSM-IV in diagnosing mental disorders. Can these clinicians continue current practice and use the DSM-IV diagnostic criteria?

Yes. The Introduction to the DSM-IV indicates that the DSM-IV is "fully compatible" with the ICD-9-CM. The reason for this compatibility is that each diagnosis listed in the DSM-IV is "crosswalked" to the appropriate ICD-9-CM code. The DSM-IV is not a HIPAA adopted code set and may not be used in HIPAA standard transactions. It is expected that clinicians may continue to base their diagnostic decisions on the DSM-IV criteria, and, if so, to crosswalk those decisions to the appropriate ICD-9-CM codes. In addition, it is still perfectly permissible for providers and others to use the DSM-IV codes, descriptors and diagnostic criteria for other purposes, including medical records, quality assessment, medical review, consultation and patient communications. (FAQ1817) [less](#)

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Was this answer helpful? Yes No

HHAs, and consultants to HHAs, are looking for guidance as to how to handle patients whose episodes fall into the outlier category. HHAs currently have wound care patients and diabetic patients who are unable (severely disabled) to self inject their insulin and fall under outliers. HHAs are concerned with access to care for high resource patients that currently result as outlier episodes. What are HHAs to do with such patients?

As stated in the final rule, CMS is sensitive to the concerns voiced by the industry with regards to insulin dependent d... [more](#)

EXHIBITS A-H (Redacted) TO
DECLARATION OF ELEANOR HAMBURGER - 65

Exhibit 13

R.A. 000174

HON. JOHN P. ERLICK
Noted for Consideration: August 10, 2012
Without Oral Argument

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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

Plaintiffs,

v.

REGENCE BLUESHIELD, a Washington
corporation,

Defendant.

NO. 11-2-34187-9 SEA

SUPPLEMENTAL DECLARATION OF
KIMBERLY M. MACDONALD

I, Kimberly M. MacDonald, declare under penalty of perjury and in
accordance with the laws of the State of Washington that:

1. I am over the age of 18, and am competent to testify. I have
personal and expert knowledge of the matters set forth herein.

2. I am a Coding and Compliance Specialist at the Coopersmith
Health Law Group ("CHLG"). CHLG, among other services, regularly represents
physicians and hospitals in negotiating provider contracts, assists medical practices
and hospitals in coding, billing, compliance, and helps clients in their dealings with
insurance carriers and regulators. In addition to me, the group includes a former Chief
Counsel and Director of Enforcement of the Washington State Office of the Insurance
Commissioner, the former top insurance attorney at the Attorney General's office, the
former head in provider contracting at Regence BlueShield and Premera Blue Cross,

SUPPLEMENTAL DECLARATION OF KIMBERLY M.
MACDONALD - 1

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

R.A. 000175

1 and has a certified coding expert who has worked at five of the region's hospitals for
2 over twenty years in compliance and clinical documentation.

3 3. I have completed an Associate Degree in Business from the
4 University of Maryland. I maintain the American Academy of Professional Coder
5 ("AAPC") credentials as a Certified Professional Coder ("CPC"). The AAPC is the
6 primary credentialing body for coders working with physician and other medical
7 professional coding. All my credentials require continuing education units to ensure I
8 maintain the most current knowledge of coding and compliance issues. I have over
9 twenty-five years of experience coding in the medical profession.

10 4. I have reviewed the statement made in Regence BlueShield's
11 "Response to Plaintiffs' Supplemental Brief on Standing and Justiciability," where
12 Regence's counsel asserts that:

13 the DSM-IV-TR lists a diagnosis of "phonological disorder"
14 with the code number 315.39, but this is not one of the
15 diagnosis indicated as equivalent to the ICD-9 diagnosis
bearing the same code number.

16 p. 8, lines 11-14.

17 5. In fact, the opposite is true: code 315.39 appears in both the DSM-
18 IV-TR and the ICD-9, both now and under the coding protocols in place at the time that
19 O.S.T. was treated and the claims were submitted for his care.

20 6. Attached are true and correct copies of the appropriate coding
21 manuals that I reviewed for purposes of preparing this declaration: *Exhibit A*, ICD-9-
22 CM classification, FY 2009, found at: <http://www.cdc.gov/nchs/icd/icd9cm.htm#ftp>,
23 by clicking on ftp://ftp.cdc.gov/pub/Health_Statistics/NCHS/Publications/ICD9-
24 <CM/2008/>, and downloading Dtab09.zip; *Exhibit B*, ICD-9-CM Professional for
25 Physicians, Volumes 1 & 2, 2009, Anita Hart, Sep 30, 2008.

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DATED: August 8, 2012, at Seattle, Washington.



Kimberly M. MacDonald

SUPPLEMENTAL DECLARATION OF KIMBERLY M.
MACDONALD - 3

SIRIANNI YOUTZ SPOONEMORE
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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 August 10, 2012, I caused a copy of the foregoing document to be served on all counsel of record as indicated below:

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

DATED: August 10, 2012, at Seattle, Washington.

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

Exhibit A

R.A. 000179

CLASSIFICATION OF DISEASES AND INJURIES

II. INFECTIOUS AND PARASITIC DISEASES (001-139)

Note: Categories for "late effects" of infectious and parasitic diseases are to be found at 137-139.

Includes: diseases generally recognized as communicable or transmissible as well as a few diseases of unknown but possibly infectious origin

Excludes: acute respiratory infections (460-466)
carrier or suspected carrier of infectious organism (V02.0-V02.9)
certain localized infections
influenza (487.0-487.8, 488)

INTESTINAL INFECTIOUS DISEASES (001-009)

Excludes: helminthiases (120.0-129)

001 Cholera

- 001.0 Due to *Vibrio cholerae*
- 001.1 Due to *Vibrio cholerae* el tor
- 001.9 Cholera, unspecified

002 Typhoid and paratyphoid fevers

- 002.0 Typhoid fever
Typhoid (fever) (infection) [any site]
- 002.1 Paratyphoid fever A
- 002.2 Paratyphoid fever B
- 002.3 Paratyphoid fever C
- 002.9 Paratyphoid fever, unspecified

003 Other salmonella infections

Includes: infection or food poisoning by *Salmonella* [any serotype]

- 003.0 *Salmonella* gastroenteritis
Salmonellosis
- 003.1 *Salmonella* septicemia
- 003.2 Localized salmonella infections
 - 003.20 Localized salmonella infection, unspecified
 - 003.21 *Salmonella* meningitis
 - 003.22 *Salmonella* pneumonia

ICD-9-CM Tabular List of Diseases (FY09)

- 315.1 Mathematics disorder
Dyscalculia
- 315.2 Other specific learning difficulties
Disorder of written expression
Excludes: specific arithmetical disorder (315.1)
specific reading disorder (315.00-315.09)
- 315.3 Developmental speech or language disorder
 - 315.31 Expressive language disorder
Developmental aphasia
Word deafness
Excludes: acquired aphasia (784.3)
elective mutism (309.83, 313.0, 313.23)
 - 315.32 Mixed receptive-expressive language disorder
Central auditory processing disorder
Excludes: acquired auditory processing disorder (388.45)
 - 315.34 Speech and language developmental delay due to hearing loss
 - 315.39 Other
 - Developmental articulation disorder
 - Dyslalia
 - Phonological disorder
 - Excludes: lisping and lalling (307.9)
stammering and stuttering (307.0)
- 315.4 Developmental coordination disorder
Clumsiness syndrome
Dyspraxia syndrome
Specific motor development disorder
- 315.5 Mixed development disorder
- 315.8 Other specified delays in development
- 315.9 Unspecified delay in development
Developmental disorder NOS
Learning disorder NOS

316 **Psychic factors associated with diseases classified elsewhere**

Psychologic factors in physical conditions classified elsewhere

Use additional code to identify the associated physical condition, as:

psychogenic:

- asthma (493.9)
- dermatitis (692.9)
- duodenal ulcer (532.0-532.9)
- eczema (691.8, 692.9)
- gastric ulcer (531.0-531.9)
- mucous colitis (564.9)
- paroxysmal tachycardia (427.2)
- ulcerative colitis (558)
- urticaria (708.0-708.9)
- psychosocial dwarfism (259.4)

Excludes: physical symptoms and physiological malfunctions, not involving tissue damage, of mental origin (306.0-306.9)

Exhibit B

R.A. 000182

315.31
childhood
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- 315.32 Mixed receptive-expressive language disorder
Central auditory processing disorder
Excludes *acquired auditory processing disorder (388.45)*
- 315.34 Speech and language developmental delay due to hearing loss
Use additional code to identify type of hearing loss (389.00-389.9)
- 315.39 Other
~~Developmental articulation disorder
Dyslalia
Phonological disorder~~
Excludes *lisping and lalling (307.9)
stammering and stuttering (307.0)*
- 315.4 Developmental coordination disorder
Clumsiness syndrome
Dyspraxia syndrome
Specific motor development disorder
- 315.5 Mixed development disorder
- 315.8 Other specified delays in development
- 315.9 Unspecified delay in development
Developmental disorder NOS
Learning disorder NOS
- 316 Psychic factors associated with diseases classified elsewhere
Psychologic factors in physical conditions classified elsewhere
Use additional code to identify the associated physical condition, as:
psychogenic:
asthma (493.9)
dermatitis (692.9)
duodenal ulcer (532.0-532.9)
eczema (691.8, 692.9)
gastric ulcer (531.0-531.9)
mucous colitis (564.9)
paroxysmal tachycardia (427.2)
ulcerative colitis (556)
urticaria (708.0-708.9)
psychosocial dwarfism (259.4)
Excludes *physical symptoms and physiological malfunctions, not involving tissue damage, of mental origin (306.0-306.9)*

MENTAL RETARDATION (317-319)

- Use additional code(s) to identify any associated psychiatric or physical condition(s)*
- 317 Mild mental retardation
High-grade defect
IQ 50-70
Mild mental subnormality
- 318 Other specified mental retardation
318.0 Moderate mental retardation
IQ 35-49
Moderate mental subnormality
318.1 Severe mental retardation
IQ 20-34
Severe mental subnormality
318.2 Profound mental retardation
IQ under 20
Profound mental subnormality
- 319 Unspecified mental retardation
Mental deficiency NOS
Mental subnormality NOS

MENTAL DISORDERS (290-319)

Exhibit 14

R.A. 000184

HON. JOHN P. ERLICK
Noted for Consideration: August 10, 2012
Without Oral Argument

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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

Plaintiffs,

v.

REGENCE BLUESHIELD, a Washington
corporation,

Defendant.

NO. 11-2-34187-9 SEA

SUPPLEMENTAL DECLARATION OF
CHARLES A. COWAN, M.D.

I, Charles Cowan, M.D., declare under penalty of perjury and in
accordance with the laws of the State of Washington that:

1. I am the Medical Director of Seattle Children's Hospital Autism
Center and a Clinical Professor in Pediatrics and Psychiatry at the University of
Washington School of Medicine. I am also a pediatrician in the Seattle Children's
Neurodevelopmental Program. I am licensed in Washington State, and I am Board
Certified in Pediatrics. I have been on staff at Seattle Children's Hospital for more than
thirty-four years.

2. I attended the Rosalind Franklin University of Medicine and
Science - Chicago Medical School, in Chicago, Illinois. I was a pediatric resident at the
University of Colorado, Colorado Medical Center, in Denver, Colorado, and at the
Albert Einstein College of Medicine of Yeshiva University, in Bronx, New York. A true

SUPPLEMENTAL DECLARATION OF CHARLES COWAN,
M.D. - 1

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

R.A. 000185

1 and correct copy of my curriculum vitae was attached as *Exh. A* to my March 16, 2012
2 declaration.

3 3. I have reviewed the declarations submitted in this matter by Joseph
4 Gifford, M.D., as well as excerpts of Dr. Gifford's deposition testimony.

5 4. Dr. Gifford's claim that neurodevelopmental therapies do not
6 actually "treat" autism or autism spectrum disorder (ASD) is without any basis in the
7 medical literature or general medical practice. His testimony reveals that he is using
8 the word "treat" as a term of art designed to limit coverage of therapies for conditions
9 that are not illnesses or injuries. He testified that his definition of "treatment" is based
10 on his historical understanding of insurance companies' efforts to limit their financial
11 liability, not any medical studies, scientific reports, or a consensus statement of any
12 medical specialty. *See* Gifford Dep. p. 33:2-38:10. I do not know of a single study,
13 report, or consensus statement which concludes that neurodevelopmental therapies do
14 not treat ASD.

15 5. To the contrary, the medical community has embraced the
16 conclusion that neurodevelopmental therapies treat ASD as well as many other
17 developmental disorders. Like insulin therapy for diabetics, neurodevelopmental
18 therapies address the fundamental symptoms of the conditions and can dramatically
19 improve those symptoms. The purpose of neurodevelopmental therapies (and
20 Applied Behavior Analysis therapy) is to attempt to restore a child's functional
21 capacity to develop in a manner more consistent with the normal pattern of human
22 development. With these therapeutic interventions, a child with ASD may be restored
23 to the normal curve of developmental milestones, or as near normal as possible.
24 Autism spectrum disorders are neurobiologic disorders with strong genetic causes that
25 result in impaired brain-mediated functions of social communication and
26 flexibility/adaptation to change. These developmental deficits are amenable to

1 therapies similar to therapies that are part of the rehabilitation occurring after such
2 injuries as stroke or traumatic brain injury. These therapies rely on the capacity of the
3 human brain to learn skills even though their biologic disorder makes it harder to learn
4 these skills. To deny the validity of therapies that attempt to improve function in some
5 one who has a brain disorder because the therapy is not curative would have to mean
6 that health plans should deny palliative/comfort care for cancer, physical therapy after
7 a stroke and numerous other examples. These services are considered essential to the
8 treatment of autism. That's why the American Academy of Pediatrics has
9 recommended that pediatricians refer children newly diagnosed with autism for
10 evaluation and treatment by speech language pathologists. See Hamburger Decl.,
11 (2/24/12) *Exh. F*, pp. 1165-1166 ("People with ASDs have deficits in social
12 communication and treatment by a speech-language pathologist usually is
13 appropriate.").

14 7. I also reviewed Regence's Motion to Strike the Declaration of
15 Patricia Moroney and Dr. Moroney's declaration and report regarding L.H.'s diagnosis.
16 I know Ms. Moroney well. She is an experienced speech language pathologist (SLP)
17 and is highly regarded.

18 8. SLPs often diagnose their patients with communication-related
19 disorders, both for assessment and evaluation purposes and so that they can properly
20 bill for the treatment that they provide. As a pediatrician, I do not conduct such
21 specialized evaluations, but instead refer patients to SLPs to determine whether a child
22 has a communication disorder and the appropriate treatment for any such disorder.
23 Seattle Children's Autism Center employs SLPs for this very purpose. Dr. Moroney's
24 diagnosis of L.H. with a communication disorder and recommendation that L.H.
25 continue to receive neurodevelopmental therapies to treat his communication disorder
26

1 is consistent with the ordinary practice here at Seattle Children's Autism Center and
2 elsewhere in Washington state.

3 DATED: August 9, 2012, at Seattle, Washington.

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6 Charles A. Cowan, M.D.

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SUPPLEMENTAL DECLARATION OF CHARLES COWAN,
M.D. - 4

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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 August 10, 2012, I caused a copy of the foregoing document to be served on all counsel of record as indicated below:

Timothy J. Parker	<input checked="" type="checkbox"/>	By First-Class Mail
Jason W. Anderson	<input checked="" type="checkbox"/>	By Email
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Seattle, WA 98104		<u>parker@carneylaw.com</u>
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		<u>williams@carneylaw.com</u>

DATED: August 10, 2012, at Seattle, Washington.

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

Exhibit 15

R.A. 000190

HON. JOHN P. ERLICK
Noted for Consideration: August 10, 2012
Without Oral Argument

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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

Plaintiffs,

v.

REGENCE BLUESHIELD, a Washington
corporation,

Defendant.

NO. 11-2-34187-9 SEA

DECLARATION OF
ELEANOR HAMBURGER

I, Eleanor Hamburger, declare under penalty of perjury and in
accordance with the laws of the State of Washington that:

1. I am a partner at Sirianni Youtz Spoonemore and am one of the
attorneys for Plaintiffs in this action.

2. Attached are true and correct copies of the following documents,
with underlining where appropriate for the Court's convenience:

Exhibit	Description
A	Excerpts of transcript of Deposition Upon Oral Examination of Erin You taken August 7, 2012.
B	Excerpts of transcript of Deposition Upon Oral Examination of Richard Rainey, M.D., taken August 7, 2012.
C	Senate Bill Report SHB 1154, March 3, 2005.

DECLARATION OF ELEANOR HAMBURGER - 1

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R.A. 000191

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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 August 10, 2012, I caused a copy of the foregoing document to be served on all counsel of record as indicated below:

Timothy J. Parker	<input checked="" type="checkbox"/>	By First-Class Mail
Jason W. Anderson	<input checked="" type="checkbox"/>	By Email
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701 Fifth Avenue, Suite 3600		Fax (206) 467-8215
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<i>Attorneys for Defendant Regence BlueShield</i>		<u>anderson@carneylaw.com</u>
		<u>williams@carneylaw.com</u>

DATED: August 10, 2012, at Seattle, Washington.

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

Exhibit A

R.A. 000194

Page 1

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

O.S.T., by and through his)
 parents, G.T. and E.S., each on)
 his own behalf and on behalf of)
 all similarly situated)
 individuals,)
 Plaintiffs,)

vs.)NO. 11-2-34187-9 SEA

REGENCE BLUESHIELD, a Washington)
 corporation,)
 Defendants.)

UNITED STATES DISTRICT COURT
 WESTERN DISTRICT OF WASHINGTON AT SEATTLE

J.T., by and through his parents)
 and guardians, K.T. and R.T.,)
 et al.,)
 Plaintiffs,)

vs.)NO. 2:12-cv-00090-RAJ

REGENCE BLUESHIELD; CAMBIA)
 HEALTH SOLUTIONS, INC., f/k/a)
 THE REGENCE GROUP,)
 Defendants.)

Page 3

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Page 2

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6 DEPOSITION UPON ORAL EXAMINATION

7 OF

8 ERIN YOU

9

10

11 9:35 a.m.

12 August 7, 2012

13 999 Third Avenue, Suite 3650

14 Seattle, Washington

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23 Leslie Post, CCR 2378

24 Court Reporter

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Page 4

1 EXAMINATION

2 ATTORNEY PAGE

3 BY MR. SPOONEMORE: 4

4 BY MS. MARISSEAU: 48

5

6 EXHIBIT INDEX

7 9 Second Amended Notice of Rule 30(b)(6) 7

8 Deposition Of Regence BlueShield.

9 10 Second Amended Notice of FRCP 30(b)(6) 7

10 Deposition of Regence BlueShield.

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1 (Pages 1 to 4)

Page 17

1 benefits that are allowed under the contract?
 2 MS. MARISSEAU: Object to the form, calls
 3 for speculation.
 4 Q. (By Mr. Spoonemore) Is that what the purpose
 5 of the system is?
 6 A. The purpose of the system is to apply the
 7 benefits of the member's contract.
 8 Q. So if the contract said something is
 9 excluded, the purpose of the auto-adjudication system
 10 would then be to exclude those types of benefits?
 11 MS. MARISSEAU: Object to the form.
 12 A. It would process according to what the
 13 contract benefits are.
 14 Q. (By Mr. Spoonemore) In terms of
 15 neurodevelopmental therapy coverage, do you have an
 16 understanding of how Regence approaches coverage for
 17 neurodevelopmental therapies in ERISA and non-ERISA
 18 plans?
 19 MS. MARISSEAU: Object to the form, vague.
 20 A. Can I -- I'd like to clarify. When you say
 21 "ERISA," do you mean individual plans, is that
 22 specifically what you're talking about, versus a group
 23 plan that's more than 20?
 24 Q. (By Mr. Spoonemore) Let me rephrase it this
 25 way; you're familiar with Washington State's

Page 18

1 neurodevelopmental therapy mandate?
 2 A. Western states?
 3 Q. No. Washington State.
 4 A. What's a western state -- I'm sorry. The
 5 mental health parity mandate, yes.
 6 Q. I'm talking about a separate mandate, a
 7 neurodevelopmental therapy mandate for speech,
 8 occupational and physical therapy. Are you familiar
 9 with that mandate?
 10 A. No, I'm not.
 11 Q. Are you familiar that there are certain
 12 types of Regence plans that cover speech, occupational
 13 and physical therapy to cover through age six?
 14 A. Yes.
 15 Q. Are you familiar that there are some Regence
 16 plans that exclude outright all neurodevelopmental
 17 therapy benefits irrespective of the age of the
 18 insured?
 19 A. Yes.
 20 Q. What's your understanding of the distinction
 21 on why some Regence policies cover through age six and
 22 why other policies exclude those therapies altogether?
 23 A. As far as I know, it's just the contract
 24 benefit.
 25 Q. So in terms of the auto-adjudication system,

Page 19

1 if I have one of the contracts that provides neuro
 2 therapy benefits through age six and a claim goes in,
 3 the idea is to try to look at my age to see whether I
 4 would qualify for that benefit or not, is that
 5 correct?
 6 MS. MARISSEAU: Object to the form.
 7 A. If the criteria was met to be considered a
 8 neurodevelopmental claim, then it would look at -- one
 9 of the items would be the member's age, the patient's
 10 age, the diagnosis that was on the claim, the services
 11 that were on the claim and the member's contract.
 12 Q. (By Mr. Spoonemore) I'm looking specifically
 13 at topic one now. Look at the A sub-point -- let me
 14 step back.
 15 You mentioned in terms when I asked you what
 16 you did to prepare, you said you looked at claims.
 17 Let me just make sure what else you did.
 18 Is there anything else you did to prepare
 19 for today's deposition other than looking at claims in
 20 the system?
 21 A. I just reviewed the diagnoses that are on
 22 our neurodevelopment list, just to make sure that I
 23 was aware of generally what they were.
 24 Q. Anything else?
 25 A. I looked at a couple members' contracts so

Page 20

1 that I could look at an individual contract and then a
 2 group contract, just to verify how they both read so
 3 that I understand them.
 4 Q. Were you looking specifically for what the
 5 neurodevelopmental therapy benefit was on those
 6 contracts?
 7 A. Yes.
 8 Q. Is that where you saw a distinction between
 9 coverage through age six --
 10 A. And not covered at all.
 11 Q. Is it your understanding that that's
 12 standard across Regence's line of business?
 13 MS. MARISSEAU: Object to the form, beyond
 14 the scope of the 30(b)(6).
 15 You can answer from your own personal
 16 knowledge, if you know.
 17 A. I think that there's contracts in all of our
 18 different states that have allowed individuals --
 19 individual contracts that don't allow the
 20 neurodevelopmental therapy benefits and group
 21 contracts that do allow it.
 22 Q. (By Mr. Spoonemore) Have you ever seen with
 23 respect to a policy out of Washington State, a policy
 24 that -- let me step back.
 25 In Washington State you understand you've

Page 21

1 seen two types of policies, one that excludes
 2 neurodevelopmental therapies altogether, correct?
 3 A. Yes.
 4 Q. One that provides coverage for neuro therapy
 5 benefits through age six, correct?
 6 A. Yes.
 7 Q. Have you seen any other Washington policy
 8 that has any other type of coverage other than those
 9 two types?
 10 A. No.
 11 Q. Okay.
 12 A. Not that I'm aware of.
 13 Q. In terms of when you said you reviewed
 14 diagnoses on the neurodevelopmental list, what is that
 15 referring to?
 16 A. Neurodevelopmental therapy has a grid of
 17 diagnoses that are used to -- configured into the
 18 system to make sure that the claims received are
 19 processed according to the right benefit.
 20 Q. So for example, like is autism on that grid?
 21 A. Do you have a -- I don't know specifically,
 22 but I believe autism is on the list. What's the
 23 diagnosis number, do you know?
 24 Q. I don't know off the top of my head.
 25 A. I don't particularly know the names. I was

Page 22

1 paying attention more to the diagnosis, like a 299.01
 2 or whatever.
 3 Q. How many of those diagnosis codes are on the
 4 list or the grid?
 5 MS. MARISSEAU: Object to the form.
 6 Counsel, just to clarify, when you say "those
 7 diagnosis codes," you mean like autism or just any
 8 diagnosis?
 9 MR. SPOONEMORE: I'll clarify.
 10 Q. (By Mr. Spoonemore) You indicated that you
 11 looked at a number of diagnoses by code. 299.01 is an
 12 example you used.
 13 A. I looked at the grid which happened to have
 14 299.01 on it.
 15 Q. If I were to look at the grid, would I see a
 16 series of these numbers?
 17 A. Yes.
 18 Q. How many of those numbers would I see if I
 19 counted them up?
 20 A. Forty-six.
 21 Q. How were those 46 numbers originally
 22 developed, if you know?
 23 A. I do not know that. I'm sorry.
 24 Q. Those 46 numbers, what's the intent behind
 25 listing those numbers on the grid?

Page 23

1 A. I do not know that either. I'm sorry.
 2 Q. Let me ask you this; what's the function
 3 that they are defined to serve? Are they designed to
 4 try to identify all the neuro therapy conditions that
 5 exist?
 6 A. They are to identify the neurodevelopmental
 7 diagnoses that would bucket or go towards the
 8 benefit for neurodevelopmental therapy.
 9 Q. So are they then diagnoses that either
 10 speech, occupational or physical therapy could be used
 11 to treat?
 12 MS. MARISSEAU: Object to the form.
 13 A. Neurodevelopmental therapy is considered
 14 speech, occupational or physical therapies, so the
 15 diagnoses that would be on the list would be ones
 16 that would be treatable.
 17 Q. (By Mr. Spoonemore) When you say
 18 "treatable," you mean treatable with either speech,
 19 occupational or physical therapy?
 20 MS. MARISSEAU: Object to the form, beyond
 21 the 30(b)(6).
 22 A. We could also receive an office call in for
 23 that same diagnosis. That wouldn't make it a
 24 neurodevelopmental therapy. The combination, as I had
 25 said, of the member's contract, the diagnosis, the age

Page 24

1 of the member and the procedure HCPCS or revenue code
 2 is what would make the determination of whether it was
 3 a neurodevelopmental therapy benefit. If it met that
 4 criteria to be neurodevelopmental therapy, then it
 5 would apply to that benefit. If it didn't, it would
 6 apply to whatever other benefit it would apply to.
 7 Q. (By Mr. Spoonemore) In terms of what the
 8 purpose or function of this list is, it's an attempt
 9 to identify diagnoses that are neurodevelopmental in
 10 nature where a neurodevelopmental therapy could be
 11 used to address that condition?
 12 MS. MARISSEAU: Object to the form.
 13 A. Where physical, speech or occupational
 14 therapy could be used to treat.
 15 Q. (By Mr. Spoonemore) Are these 46 codes, are
 16 they part of the auto-adjudication system?
 17 A. Yes.
 18 Q. So if a neurodevelopmental therapy claim
 19 comes in to the system, the system will look at the
 20 claim and say is there a diagnosis code that lines up
 21 with one of these 46; is that one thing it does?
 22 A. It's one of the criterias that would be
 23 looked at, yes.
 24 Q. If it says, "Aha, this is," is it then sort
 25 of treated or flagged as a neurodevelopmental therapy

Exhibit B

R.A. 000198

Page 1

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

O.S.T., by and through his)
 parents, G.T. and E.S., each on)
 his own behalf and on behalf of)
 all similarly situated)
 individuals,)
 Plaintiffs,)
 vs.)NO. 11-2-34187-9 SEA
 REGENCE BLUESHILD, a Washington)
 corporation,)
 Defendants.)

UNITED STATES DISTRICT COURT
 WESTERN DISTRICT OF WASHINGTON AT SEATTLE

J.T., by and through his parents)
 and guardians, K.T. and R.T.,)
 et al.,)
 Plaintiffs,)
 vs.)NO. 2:12-cv-00090-RAJ
 REGENCE BLUESHIELD; CAMBIA)
 HEALTH SOLUTIONS, INC., f/k/a)
 THE REGENCE GROUP,)
 Defendants.)

Page 3

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6 DEPOSITION UPON ORAL EXAMINATION
7 OF
8 RICHARD RAINEY, M.D.
9

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11 11:15 a.m.
12 August 7, 2012
13 999 Third Avenue, Suite 3650
14 Seattle, Washington
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23 Leslie Post, CCR 2378
24 Court Reporter
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Page 4

E X A M I N A T I O N

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2 ATTORNEY PAGE
3 BY MR. SPOONEMORE: 5
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6 E X H I B I T I N D E X
7 11 Regence BlueShield Preferred Plan 16
8 benefits; J.T. 00070 - 00114.
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1 which specific topic listed you got information on,
 2 you can just to the best you recall tell me what
 3 information in general you received externally, if
 4 that's helpful.
 5 A. So I did review email responses on number
 6 two and number three. I reviewed multiple contract
 7 languages to answer number four for myself. I
 8 reviewed claims information for number five. I
 9 reviewed email descriptions of the process for number
 10 six. I reviewed an email answer for number seven. I
 11 specifically requested an appeals data pool in answer
 12 to number eight. Number nine is on the basis of the
 13 mandate itself and our contract language. Same is
 14 true for number ten. Number eleven, there were some
 15 email answers and telephone answers. Number twelve is
 16 the same as number eleven. Number 13 is the contract.
 17 Number 14 is the contract and then a response from the
 18 customer service area. Number 15 was an email
 19 response as well.
 20 Q. Let me have you turn to topic number two,
 21 which reads as follows, "Regence's policies,
 22 procedures, coverage approach, and criteria with
 23 respect to neurodevelopmental therapies for its
 24 insureds."
 25 Did I read that correctly?

Page 14

1 A. Pardon?
 2 Q. Did I read that correctly?
 3 A. Yes.
 4 Q. Can you describe to me what Regence's policy
 5 is with respect to coverage for neurodevelopmental
 6 therapies?
 7 A. The -- there's a specific neurodevelopmental
 8 therapy benefit that is written to be consistent with
 9 the mandate and includes all of the material phrases
 10 from the mandate. That's true for group coverage
 11 where it's required. With respect to individual
 12 coverage, it's not required, and neurodevelopmental
 13 therapies are excluded.
 14 Q. When you say "the mandate," you're referring
 15 to the neurodevelopmental therapy mandate, not the
 16 parity act, correct?
 17 A. That's correct.
 18 Q. With respect to the group coverage, it is
 19 Regence's policy to exclude coverage for
 20 neurodevelopmental therapies after an insured reaches
 21 the age of seven, correct?
 22 A. That's correct.
 23 Q. And on individual policies, Regence's policy
 24 is to exclude all neurodevelopmental therapy coverage?
 25 A. That's correct.

Page 15

1 Q. Those policies are reflected in the
 2 certificates of coverage to the insureds, correct?
 3 A. And the contracts I reviewed, yes, in the
 4 contracts.
 5 Q. Have you seen any contracts where coverage
 6 for -- let me break it down -- on an individual plan
 7 where coverage is permitted for neurodevelopmental
 8 therapy treatments?
 9 A. I do not recall seeing any Washington
 10 individual contracts where there was coverage for
 11 neurodevelopmental therapy.
 12 Q. In addition to not seeing any, have you
 13 heard about or been told about any contracts that
 14 provide such coverage?
 15 A. Is your question with regard to
 16 individual --
 17 Q. Individual plans in Washington.
 18 A. I have not heard that there are individual
 19 Washington contracts with neurodevelopmental therapy
 20 coverage.
 21 Q. With respect to group coverage within the
 22 state of Washington, have you seen any group contracts
 23 where neurodevelopmental therapy treatments are
 24 provided to insureds after the age of six?
 25 A. The -- is your question -- "groups" also

Page 16

1 include ASO groups that may or may not be subject to
 2 the Washington mandate. So is your question with
 3 regard to commercial group business that's covered by
 4 the Washington mandate?
 5 Q. Good clarification. I'm talking about
 6 insured plans, not plans where Regence is acting as
 7 the party administrator.
 8 A. So my understanding is that all Washington
 9 group commercial plans that are subject to the
 10 Washington mandate cover the neurodevelopmental as per
 11 the mandate and does not cover for the older children.
 12 Q. For "older children" are you referring to
 13 individuals that are age seven or older, correct?
 14 A. I need to look at the language again, but
 15 I'm pretty sure it's six and under is covered and
 16 older than six is not covered, but I would need to
 17 look at the contract language.
 18 (Marked Deposition Exhibit No. 11.)
 19 Q. (By Mr. Spoonmore) You've been handed
 20 what's been marked as Exhibit 11. Let me have you
 21 turn to, it's at the bottom, Bates stamp J.T. 84.
 22 Let me ask you, first of all, can you
 23 identify this as a Regence policy, Exhibit 11?
 24 A. Upper right-hand corner it says "Regence
 25 BlueShield," that would identify it as a policy. The

Page 17

1 second page has "Regence BlueShield" on it, so this
 2 appears to be a Regence BlueShield policy.
 3 MS. MARISSEAU: Before we ask questions, the
 4 J.T. plan, which is Puget Sound Energy, became ASO in
 5 2010, so can you confirm what date this policy is?
 6 MR. SPOONEMORE: I'm not sure what date it
 7 is, but I'm not using it for that purpose. You can
 8 clarify on redirect if you want.
 9 MS. MARISSEAU: You don't know if this was
 10 an ASO policy?
 11 MR. SPOONEMORE: I think this is the one
 12 that was in effect prior, but it doesn't really
 13 matter.
 14 Q. (By Mr. Spoonemore) You see the language,
 15 "Neurodevelopmental Therapy"? My question is whether
 16 that section helps refresh your recollection as to
 17 whether on group plans generally what the age cutoff
 18 is?
 19 A. It says six and under, so seven and above
 20 would be excluded.
 21 Q. Again, are you aware of any exceptions to
 22 that policy language in insured group plans?
 23 A. At this time, not in insured group plans in
 24 Washington.
 25 Q. In terms of Regence's criteria with respect

Page 18

1 to coverage for neurodevelopmental therapies, is it
 2 accurate to say that on individual plans, Regence,
 3 consistent with its policy language, in fact excludes
 4 coverage for neurodevelopmental therapies altogether?
 5 A. Yes.
 6 Q. With respect to group plans, again referring
 7 to Regence's actual application of its plan, is it
 8 also fair to say that it follows its contract language
 9 and excludes care for individuals that are over the
 10 age of six for neurodevelopmental therapies?
 11 A. That is correct.
 12 Q. Let me have you turn now to topic three, if
 13 you would. Topic three says, "The origination,
 14 creation, drafting, intent and application of the
 15 neurodevelopmental therapy exclusion in Regence's
 16 Policies."
 17 I believe I just asked you those two
 18 questions. As I understand it, Regence's application
 19 of the therapy benefit is consistent with its policy
 20 language in all cases, correct?
 21 MS. MARISSEAU: Object to the form.
 22 A. Regence has worked to have its claims
 23 processing system have claims that come in for
 24 neurodevelopmental therapies be identified and paid
 25 when they come in with a diagnosis that is associated

Page 19

1 with a neurodevelopmental therapy for a condition.
 2 Q. (By Mr. Spoonemore) Is it also fair to say
 3 that Regence has denied its system with the intent of
 4 also denying neuro therapy benefits for individuals on
 5 individual policies?
 6 MS. MARISSEAU: Object to the form.
 7 A. Can you repeat the question?
 8 Q. (By Mr. Spoonemore) Sure. Speaking now in
 9 terms of individual policies in the state of
 10 Washington with reference to Regence's process of
 11 processing claims, is it fair to say that Regence has
 12 designed its process in a manner that is designed to,
 13 whether it's 100 percent effective or not, I'll leave
 14 that aside, but the purpose of Regence's system is to
 15 deny claims for neuro therapy benefits for insureds on
 16 individual plans?
 17 A. So the system has been configured to
 18 identify claims when they come in with diagnoses that
 19 are used or diagnoses for conditions for which
 20 neurodevelopmental therapy is used. When those claims
 21 come in, they -- if there is a benefit and the
 22 benefits are available under a commercial group plan,
 23 then it's paid. If it's an individual plan and
 24 there's not benefits available, then it would be
 25 excluded.

Page 20

1 Q. I heard from the last witness about this
 2 list of 46 codes that Regence uses to identify claims
 3 that are neurodevelopmental in nature.
 4 Is that what you're referring to as well?
 5 A. That is the list of the diagnostic codes for
 6 conditions for which neurodevelopmental therapies are
 7 used or services are provided.
 8 Q. She gave me the number 46 specific codes in
 9 that list. Can you verify that?
 10 A. I have looked over the list and done the
 11 count myself and I agree with the count of 46.
 12 Q. Were you involved in any capacity in
 13 arriving at what codes were included or excluded from
 14 that list?
 15 A. No.
 16 Q. Do you know who was?
 17 A. My understanding is there were two different
 18 physicians who previously were employed by Regence
 19 that were involved in the list. They've been
 20 identified as being the clinical consultants for
 21 developing that list of diagnoses.
 22 Q. Can you identify them by name?
 23 A. Dr. Robert Heske and Dr. Diane Stein.
 24 Q. Are either of them employed by Regence or an
 25 affiliated entity?

Exhibit C

R.A. 000202

SENATE BILL REPORT

SHB 1154

As Passed Senate, March 3, 2005

Title: An act relating to mental health parity.

Brief Description: Requiring that insurance coverage for mental health services be at parity with medical and surgical services.

Sponsors: House Committee on Financial Institutions & Insurance (originally sponsored by Representatives Schual-Berke, Campbell, Kirby, Jarrett, Green, Kessler, Simpson, Clibborn, Hasegawa, Appleton, Moeller, Kagi, Ormsby, Chase, McCoy, Kilmer, Williams, O'Brien, P. Sullivan, Tom, Morrell, Fromhold, Dunshee, Lantz, McIntire, Sells, Murray, Kenney, Haigh, Darneille, McDermott, Dickerson, Santos and Linville).

Brief History: Passed House: 1/28/05, 67-25.

Committee Activity: Health & Long-Term Care: 2/21/05, 2/24/05 [DP, w/oRec, DNP].

Passed Senate: 3/3/05, 40-9.

SENATE COMMITTEE ON HEALTH & LONG-TERM CARE

Majority Report: Do pass.

Signed by Senators Keiser, Chair; Thibaudeau, Vice Chair; Deccio, Ranking Minority Member; Brandland, Franklin, Kastama, Kline and Poulsen.

Minority Report: That it be referred without recommendation.

Signed by Senators Johnson and Parlette.

Minority Report: Do not pass. Signed by Senator Benson.

Staff: Jonathan Seib (786-7427)

Background: Current Washington law does not require health carriers to include mental health coverage in any benefit plan. If a carrier nonetheless chooses to include such coverage, the law does not mandate a specific benefit level. The law does require that carriers providing group coverage to employers offer coverage for mental health, but the coverage can be waived by the employer. Where provided, most plans generally limit inpatient mental health coverage to a specified number of days, and outpatient coverage to a specified number of visits. These limitations are not imposed on most other treatment.

The federal Mental Health Parity Act (MHPA) took effect on January 1, 1998, and will sunset on December 31, 2005. Under the MHPA, businesses with more than 50 employees that choose to offer mental health benefits may not impose annual or lifetime dollar limits on those benefits that are lower than the limits set for the medical and surgical benefits that they provide. Cost sharing requirements, and limits on the number of visits or days of coverage, may still vary from other coverage. The requirements of the MHPA do not apply where they would increase costs to a business by more than one percent.

The Basic Health Plan (BHP) is authorized to offer mental health services under as long as those services, along with chemical dependency and organ transplant services, do not increase the actuarial value of BHP benefits by more than 5 percent. Currently, inpatient care requires a 20 percent co-pay (up to \$300 per admittance) for coverage up to 10 days per calendar year, and outpatient care requires a \$15 co-pay for up to 12 visits per year.

The Public Employee Benefits Board (PEBB) provides health coverage to state employees through both fully-insured managed care plans and the self-insured Uniform Medical Plan (UMP). For all (PEBB) plans, inpatient mental health care requires a \$200 per day co-pay (up to \$600) for coverage up to 10 days per year. Outpatient services require either a 10 percent (UMP) or 10 dollar (managed care) per visit co-pay for up to 20 visits per year.

Reflecting concerns that health insurance generally fails to cover mental health services to the same extent as other health care services, state legislation was introduced in 1998 calling for coverage parity. The legislation was referred to the Department of Health for review under the mandated health benefits sunrise review process set forth in statute. The Department of Health issued its final report in November 1998. The report analyzed the efficacy of the mandate, and its social and financial impact, and recommended that the legislation be enacted.

Summary of Bill: Beginning January 1, 2006 a health benefit plan that provides coverage for medical and surgical services must provide coverage for mental health services and prescription drugs to treat mental disorders. The co-pay or coinsurance for mental health services may be no more than the co-pay or coinsurance for medical and surgical services otherwise provided under the plan. Mental health drugs must be covered to the same extent, and under the same terms and conditions, as other prescription drugs covered by the plan.

Beginning January 1, 2008, if the plan imposes a maximum out-of-pocket limit or stop loss, it must be a single limit or stop loss for medical, surgical and mental health services.

Beginning July 1, 2010: (1) if the plan imposes any deductible, mental health services must be included with medical and surgical services for purposes of meeting the deductible requirement; and (2) treatment limitations or any other financial requirements on coverage for mental health services are only allowed if the same limitations or requirements are imposed on coverage for medical and surgical services.

"Mental health services" is defined to include medically necessary services to treat any disorders listed in the current version of the diagnostic and statistical manual of mental disorders, except: (1) substance related disorders; (2) life transition problems; (3) nursing home, home health, residential treatment, and custodial care services; and (4) court ordered care that is not medically necessary.

The act applies to the Basic Health Plan, public employee plans issued by the Health Care Authority, and state regulated commercial plans for groups greater than 50.

Current laws mandating the offering of supplemental mental health coverage by carriers are amended to reflect the new requirements of the act.

The Insurance Commissioner and the administrator of the Health Care Authority are authorized to adopt rules implementing the act.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: It is time for the distinction to end between mental and physical health. Better mental health coverage will reduce the need for other costly medical treatment. Any cost of the bill will also be more than offset by reduced employee absenteeism and increased productivity. At least 34 other states have enacted mental health parity laws, and none have been repealed. Many of those states have studied the impact of the law and determined that it resulted in only a minor impact on overall health care premiums. Mental illness has a devastating impact on individuals and families that is only made worse when treatment costs are not covered. Untreated mental illness also significantly impacts the criminal justice system. It is important that mental health be covered at similar levels by all carriers to avoid the risk of adverse selection.

Testimony Against: Mandating benefits does not help those who lose their coverage because of the increased cost of coverage. Mandates cannot be viewed in a vacuum, because their cumulative impact is what matters. Washington has one of the highest levels of mandates and regulations placed on health insurance in the country. Mandates are supposed to improve health coverage, but the actual effect is that they reduce the ability to provide coverage by increasing its costs. Others estimate the cost of this legislation to be much higher than the proponents, and comparisons to costs in other states are not accurate. Even a small percentage increase in cost means a lot in actual dollars. Mental illnesses are not like other illnesses. More mental health treatment does not lead to better mental health.

Who Testified: PRO: Representative Schual-Berke, prime sponsor; Randy Revelle, Washington Coalition for Insurance Parity; Ronald Bachman, Price Waterhouse Coopers; Greg Simon, M.D., Pam McEwan, Group Health; Chelene Alkire; Beth Berner; John Rothwell; Joanne Wilson; Colleen McManus; Terri Webster, Ben Bridge Jewelers; Peter Lukevich, Washington Partners in Crisis.

CON: Carolyn Logue, National Federation of Independent Business; Gary Smith, Independent Business Association; Sydney Smith Zvara, Association of Washington Healthcare Plans; Mellani Hughes McAleenan, Association of Washington Business; Richard Warner, Citizens Commission on Human Rights; Mel Sorenson, America's Health Insurance Plans, Washington Association of Health Underwriters.

Exhibit D

R.A. 000206

<p style="text-align: right;">Page 1</p> <p style="text-align: center;">IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF KING</p> <p>-----</p> <p>O.S.T., by and through his) parents, G.T. and E.S., on his) own behalf and on behalf of all) similarly situated individuals,) Plaintiffs,)</p> <p>vs.) NO. 11-2-34187-9SEA REGENCE BLUESHIELD, a Washington) corporation,) Defendants.)</p> <p>-----</p> <p style="text-align: center;">DEPOSITION UPON ORAL EXAMINATION OF JOSEPH M. GIFFORD, M.D.</p> <p>-----</p> <p style="text-align: center;">1:30 p.m. July 26, 2012 999 Third Avenue, Suite 3650 Seattle, Washington</p> <p>Pat Lessard Court Reporter, CSR 2014</p>	<p style="text-align: right;">Page 3</p> <p style="text-align: center;">EXAMINATION</p> <p>ATTORNEY PAGE BY MS. HAMBURGER: 4</p> <p style="text-align: center;">EXHIBIT INDEX</p> <table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: left;">EX#</th> <th style="text-align: left;">DESCRIPTION</th> <th style="text-align: right;">PAGE</th> </tr> </thead> <tbody> <tr> <td>1</td> <td>Second Declaration of Joseph M. Gifford, M.D.</td> <td style="text-align: right;">18</td> </tr> <tr> <td>2</td> <td>Declaration of Joseph M. Gifford, M.D.</td> <td style="text-align: right;">18</td> </tr> <tr> <td>3</td> <td>Regence Evolve Plus (Comprehensive) Policy.</td> <td style="text-align: right;">23</td> </tr> <tr> <td>4</td> <td>12/9/2000 Physical/Occupational Document authored by Karen Quinn-Shea.</td> <td style="text-align: right;">43</td> </tr> <tr> <td>5</td> <td>Declaration of Kimberly M. MacDonald.</td> <td style="text-align: right;">48</td> </tr> <tr> <td>6</td> <td>Regence BlueShield EOB and Claim Form.</td> <td style="text-align: right;">51</td> </tr> <tr> <td>7</td> <td>8/31/2010 Regence Behavioral Health Policy and Procedure.</td> <td style="text-align: right;">74</td> </tr> <tr> <td>8</td> <td>8/5/2011 Regence Health Care Services Policy and Procedure re Applied Behavioral Analysis.</td> <td style="text-align: right;">77</td> </tr> </tbody> </table>	EX#	DESCRIPTION	PAGE	1	Second Declaration of Joseph M. Gifford, M.D.	18	2	Declaration of Joseph M. Gifford, M.D.	18	3	Regence Evolve Plus (Comprehensive) Policy.	23	4	12/9/2000 Physical/Occupational Document authored by Karen Quinn-Shea.	43	5	Declaration of Kimberly M. MacDonald.	48	6	Regence BlueShield EOB and Claim Form.	51	7	8/31/2010 Regence Behavioral Health Policy and Procedure.	74	8	8/5/2011 Regence Health Care Services Policy and Procedure re Applied Behavioral Analysis.	77
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<p style="text-align: right;">Page 2</p> <p style="text-align: center;">A P P E A R A N C E S</p> <p>FOR THE PLAINTIFF: MS. ELEANOR HAMBURGER</p> <p>Sirianni Youtz Spoonemore 999 Third Avenue, Suite 3650 Seattle, Washington 98104 206.223.0303 ehamburger@sylaw.com</p> <p>FOR DEFENDANT: MR. TIMOTHY PARKER</p> <p>Carney Badley Spellman 701 Fifth Avenue, Suite 2200 Seattle, Wa. 98104-710 206.607.4153 Parker@carneylaw.com</p> <p>FOR DEFENDANTS: Ms. Medora Marisseau</p> <p>Karr Tuttle Campbell 1201 Third Avenue, Suite 2900 Seattle, Washington 98101 206.223.3313 mmarisseau@karrtuttle.com</p> <p>ALSO PRESENT: MS. LISA OMAN</p>	<p style="text-align: right;">Page 4</p> <p>JOSEPH M. GIFFORD, M.D., being duly sworn, testified upon oath, as follows:</p> <p style="text-align: center;">EXAMINATION</p> <p>BY MS. HAMBURGER:</p> <p>Q. Good morning, Dr. Gifford. I'm Eleanor Hamburger, one of the plaintiffs' counsel in this case.</p> <p>A. Good afternoon.</p> <p>Q. It's good to meet you.</p> <p>Can you state your name and spell it for the record.</p> <p>A. Joseph Gifford, J O S E P H, G I F F O R D.</p> <p>Q. And your address?</p> <p>A. 3850 50th Avenue Northeast, Seattle, 98105.</p> <p>Q. And did you just move to Seattle?</p> <p>A. No.</p> <p>Q. And have you been deposed before?</p> <p>A. Yes.</p> <p>Q. Okay. A lot of times?</p> <p>A. I think so.</p> <p>Q. What kind of cases?</p> <p>A. Well, typically, in my career as a practicing physician, when various issues would arise in depositions.</p> <p>But I've been in business for 15 years now,</p>																											

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1 neurodevelopmental therapies is a reimbursement not a
 2 medical policy or medical necessity issue, is that
 3 what you're saying?
 4 A. Yes. I believe that to be the case. I
 5 believe that to be the case, but I don't have an
 6 encyclopedic knowledge of every policy of ours, so I
 7 don't want to claim certainty about that.
 8 And I'm sorry, I would like to add -- I'm
 9 getting more sure about my answer --
 10 neurodevelopmental therapies are handled in expressed
 11 benefit language, which in our industry is a way of
 12 simplifying medical necessity determination and
 13 practice. Things are put into benefit policies.
 14 And as you know, historically benefit
 15 policies have tended to exclude neurodevelopmental
 16 therapy, and then there was a mandate which included
 17 it for group therapy. So that landscape made the
 18 auto-adjudication logic very straightforward.
 19 So I'm now pretty certain of my answer
 20 there's no underlying policy around medical necessity
 21 of neurodevelopmental therapy. So yes.
 22 Q. So it's in the contract, the certificate of
 23 coverage. So when you say in the benefit policy,
 24 that's what we've --
 25 A. Yes.

Page 22

1 Q. -- agreed certificate of coverage?
 2 A. Yes.
 3 Q. That's where you find that information?
 4 A. Yes.
 5 Q. Okay. I want to turn to paragraph three in
 6 that same exhibit. It talks about how Regence covers
 7 neurodevelopmental therapy.
 8 Do you see that?
 9 A. Yes.
 10 Q. And is that an accurate summary of how
 11 Regence covers neurodevelopmental therapy?
 12 A. I believe the second sentence is not well
 13 phrased.
 14 Q. And how would you change that?
 15 A. I would amend that to say requires group
 16 health plans to cover medically necessary
 17 neurodevelopmental therapy -- to cover
 18 neurodevelopmental therapy which is defined as
 19 occupational, speech, or physical therapy not for an
 20 illness -- not due to illness or injury.
 21 Q. I want to make sure I understand. I always
 22 read that sentence in your declaration as referencing
 23 the mandate, not the Regence contract.
 24 But let's kind of back away from what's
 25 written here and just talk about --

Page 23

1 A. It's very specific.
 2 Q. Yeah.
 3 A. Very specifically, I want to edit what
 4 really is a mistake here, which is that medically
 5 necessary neurodevelopmental therapy --
 6 neurodevelopmental therapy is not just -- I'm sorry,
 7 I'm okay with it. Sorry.
 8 It is neurodevelopmental therapy, it says
 9 defined here as OT, ST or PT for a certain condition.
 10 Q. So it's an incomplete?
 11 A. There you go.
 12 Q. That's right. I agree.
 13 A. Okay.
 14 Q. We'll get to that. You're way ahead of me.
 15 So let's just talk about the -- let's agree
 16 on the definition of neurodevelopmental therapy that
 17 Regence operates under.
 18 A. Sure.
 19 Q. Would that be helpful?
 20 A. Yes.
 21 Q. In fact, I'm going to give you a contract
 22 and we'll just walk through it, and that way we'll
 23 talk about the same terms.
 24 (Marked Deposition Exhibit No. 3.)
 25 MR. PARKER: Ele, is this just a single

Page 24

1 contract?
 2 Q. (By Ms. Hamburger) Exhibit 3, I'll
 3 represent to you, is LH's contract.
 4 And I just want to say, does it look to you
 5 like a Regence contract? I understand you don't know
 6 where it came from.
 7 A. It has the Regence logo on the front page.
 8 Q. And if you look on page 27 of the contract,
 9 and the numbers are on top, the second to the last
 10 defined term on the bottom. Do you see that?
 11 A. Yes.
 12 Q. And it has a listing "Neurodevelopmental
 13 Therapy."
 14 Do you see that?
 15 A. I do.
 16 Q. "We do not cover neurodevelopmental therapy,
 17 including physical therapy, occupational therapy and
 18 speech therapy and maintenance service, to restore and
 19 improve function for an insured with a developmental
 20 delay."
 21 A. Yes.
 22 Q. In the individual plans for Regence,
 23 Blueshield here in Washington, does that accurately
 24 describe the neurodevelopmental therapy exclusion?
 25 A. Yes, it does.

Page 25

1 MR. PARKER: Wait a minute. I'm confused.
 2 This is a group contract. What have we got
 3 here?
 4 MS. HAMBURGER: This is what they were
 5 provided.
 6 THE WITNESS: May I jump in?
 7 I believe, Tim -- I had that concern, too.
 8 This is an individual product, as you see. But I
 9 think group number is simply an internal thing that
 10 batches that the so-called group is the individual.
 11 That's my guess.
 12 MR. PARKER: Okay.
 13 A. But this is clearly an individual contract,
 14 and this paragraph is in here, and this is the right
 15 paragraph. And this is a statement of our
 16 neurodevelopmental exclusion.
 17 Q. (By Ms. Hamburger) Okay. And then the
 18 second sentence there it says, "By neurodevelopmental
 19 delay we mean delay in normal development that is not
 20 related to any documented illness or injury."
 21 Do you see that?
 22 A. Yes.
 23 Q. And when you were talking a little earlier
 24 about illness or injury, this is what you were
 25 referring to?

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1 A. Correct.
 2 Q. And then on page 55 -- the numbers again are
 3 on the top -- it's like connecting all the dots.
 4 Do you see that? It defines illness and
 5 injury. Do you see that?
 6 A. I do.
 7 Q. And the definition of illness expressly
 8 excludes any state of mental health or mental disorder
 9 which is otherwise defined in this policy, is that
 10 correct?
 11 A. That's correct. Or I'll just say that is
 12 what it says.
 13 Q. Okay. And injury says, "Physical damage to
 14 the body inflicted by a foreign object, force,
 15 temperature... or the direct result of an accident
 16 independent of illness or any other cause."
 17 Do you see that?
 18 A. Yes.
 19 Q. And would you agree that autism would not be
 20 included under injury?
 21 A. I do.
 22 Q. So then the last thing to jump around to
 23 here is mental health which is defined on page eleven.
 24 Do you see that?
 25 A. Yes.

Page 27

1 Q. And it's defined as mental disorders listed
 2 in the DSM-IV except as otherwise excluded under the
 3 policy.
 4 Do you see that?
 5 A. I do.
 6 Q. That's largely consistent with the Mental
 7 Health Parity Act definition, is that right?
 8 A. I don't know that.
 9 Q. So autism is a mental disorder listed in the
 10 DSM-IV, isn't that right?
 11 A. I don't know that.
 12 Q. You don't know whether autism is listed in
 13 the DSM-IV?
 14 A. Yes, it's listed in the DSM-IV.
 15 Q. And so it's a mental health condition under
 16 the terms of the contract, is that right?
 17 A. Yes.
 18 Q. And so autism is therefore not an illness as
 19 defined under the contract?
 20 A. Where are we now?
 21 Q. Page 55.
 22 A. That statement appears to fit the language
 23 of this document.
 24 Q. So autism is not an illness under the terms
 25 of the contract, you'll agree?

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1 A. Again, all I can say is the statement you
 2 made appears to be consistent with the text that
 3 you've shown me.
 4 Q. And then going back to 27, the exclusion
 5 about neurodevelopmental therapy, you would agree that
 6 autism is a delay in normal development?
 7 A. Would you restate your first sentence?
 8 Q. Sure. I'm on page 27. I'm sorry to jump
 9 around; it's just the way the contract is.
 10 Looking at the neurodevelopmental therapy
 11 exclusion.
 12 A. And finally, your question?
 13 Q. Would you agree that autism is a delay in
 14 normal development?
 15 A. Yes.
 16 Q. So under this definition, it is a
 17 neurodevelopmental delay?
 18 A. Correct.
 19 Q. And therefore, under the Regence contract,
 20 neurodevelopmental therapy to treat autism is
 21 excluded?
 22 A. Correct.
 23 Q. And the same would be for other DSM-IV
 24 conditions, isn't that right?
 25 MR. PARKER: Object to the form.

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1 A. "The same"? Please elaborate.
 2 Q. (By Ms. Hamburger) Sure.
 3 A. The same what?
 4 Q. Other DSM-IV conditions would similarly not
 5 be due to illness or injury, because they would be
 6 excluded from the definitions of illness or injury?
 7 A. I'm sorry. So ask it again, I think I'm --
 8 Q. Could you agree other DSM-IV conditions are
 9 also excluded from the definition of illness or
 10 injury?
 11 MR. PARKER: Object to the form.
 12 A. I would agree that appears to be the
 13 conclusion based on the text on page 55.
 14 Q. (By Ms. Hamburger) Okay. And therefore,
 15 the neurodevelopmental therapy exclusion would apply
 16 to other DSM-IV conditions that represent a delay in
 17 normal development?
 18 A. That's correct.
 19 MR. PARKER: Object to the form.
 20 Q. (By Ms. Hamburger) And in group contracts
 21 this same neurodevelopmental therapy exclusion applies
 22 once the insured is age seven or older, is that
 23 correct?
 24 A. I don't have the language in front of me,
 25 but that is the general concept, yes.

Page 30

1 Q. So I want to go back to your Exhibit No. 2,
 2 your first declaration for a minute.
 3 You have a discussion about medical
 4 necessity in paragraph four. Do you see that?
 5 A. Uh-huh.
 6 Q. And you state that medical necessity is a
 7 health insurance term of art with a meaning beyond a
 8 strict literal reading.
 9 Do you see that?
 10 A. Yes, I do.
 11 Q. And then you go on to include the medical
 12 necessity definition from O.S.T.'s contract?
 13 A. Correct.
 14 Q. Is that the Regence standard medical
 15 necessity definition?
 16 MR. PARKER: Object to the form.
 17 A. I can't answer that about standard. I will
 18 say it appears typical to me.
 19 Q. (By Ms. Hamburger) Okay. I just want to
 20 refer you in Exhibit 3 to page 56, if you'll just take
 21 a minute to look at that.
 22 Do you see the definition of medically
 23 necessary or medical necessity there?
 24 A. I do.
 25 Q. And is that the same or similar to the one

Page 31

1 that was referenced in your declaration?
 2 A. Well, let me review it. Yes.
 3 Q. And when you said that medical necessity has
 4 a meaning beyond a strict literal meaning, did you
 5 mean that -- you didn't mean to say that the specific
 6 definition of the Regence contract is somehow not to
 7 be applied, that people apply something else beyond
 8 the strict literal meaning of medical necessity in the
 9 Regence contract?
 10 MR. PARKER: Object to the form.
 11 Q. (By Ms. Hamburger) Well, let me rephrase
 12 that.
 13 Why don't you tell me what you meant by
 14 saying that it had a meaning beyond a strict literal
 15 reading.
 16 A. What I meant is that it is a term of art
 17 that has come to mean -- has a great deal of
 18 historical meaning in forming it within our industry.
 19 And we in the industry who apply the phrase
 20 have a collective understanding of the complexity of
 21 the concept.
 22 And by the way, here's a contractual --
 23 here's contractual language that attempts to codify
 24 that.
 25 Q. But whatever the kind of complex

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1 understanding or meaning that people in the insurance
 2 industry have about medical necessity, when you're
 3 actually called upon to do a review, you review
 4 medical necessity in a manner that's consistent with
 5 the terms of the contract, is that right?
 6 A. Yes.
 7 Q. Okay. So let's look at paragraph five, and
 8 I want to draw your attention to the first sentence
 9 where you say "The premise that neurodevelopmental
 10 therapy treats Autism Spectrum Disorder and thus is a
 11 mental health service is a broad generalization and
 12 not uniformly accepted within the medical community."
 13 Can you explain what you meant by that?
 14 A. Well, I think it speaks for itself. I stand
 15 behind it.
 16 Do you have a specific question?
 17 Q. Yeah. It seems to me it says a bunch of
 18 different things and I'm not sure exactly if I'm
 19 reading it all correctly.
 20 So what I'm not sure is are you taking issue
 21 with the concept that neurodevelopmental therapy
 22 treats autism? Are you taking issue with the concept
 23 that neurodevelopmental therapy is a mental health
 24 service? And which or both of those do you believe
 25 are not uniformly accepted within the medical

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1 community?

2 A. I think the focus of the concept in the
 3 sentence is around the word "treat," and that that
 4 also is a term of art in our industry,
 5 And treatment -- historically, health
 6 insurance began with accident insurance in the
 7 railroads in the 1800s, in which it was insurance that
 8 would allow treatment of an injury. Simple.
 9 Then in the early 2000s, health insurance or
 10 hospital insurance was started at Blue Cross and all
 11 that, which was to allow treatment if you were sick
 12 enough to be hospitalized. And that's what treatment
 13 was.
 14 Over time, there is pressure to expand those
 15 narrow definitions to mean coverage for any condition
 16 and improvement or benefit in anyone's life, to
 17 improve the welfare of a person's life, which is quite
 18 an expansion from original injury treatment and
 19 hospital treatment.
 20 So the word "treatment" has become important
 21 in our industry, in that a gym membership might make a
 22 person's life benefit -- might benefit a person, but
 23 it doesn't treat an illness or injury.
 24 And in order to limit the exposure of
 25 liability in our contracts historically -- I'm

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1 speaking for the industry here -- we've had to have
 2 some constructs that create some limit, so that we're
 3 not covering gym memberships and nicer kitchens.
 4 Q. But that's not what we're talking about
 5 here.
 6 MR. PARKER: Wait a minute. Were you done
 7 with your answer?
 8 THE WITNESS: No, I'm not done with my
 9 answer.
 10 MR. PARKER: Finish.
 11 A. And so those constructs that work to limit
 12 liability have focused on treatment, the meaning of
 13 the word "treatment," and have focused on illness or
 14 injury. And treatment implies an activity which gets
 15 into the illness or injury, and deep within that
 16 illness or injury makes it better, as opposed to a
 17 service that improves the function or happiness of the
 18 beneficiary.
 19 And we understand that this is all gray
 20 area, and there's a lot of art in this, but that's the
 21 idea under which treatment has a fairly narrow concept
 22 here.
 23 Drug therapy, insulin therapy, treats
 24 diabetes, because it gets in and fixes the lack of
 25 insulin in the metabolism of glucose.

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1 The 25th massage treatment for chronically
 2 sore shoulders may make that person feel better or
 3 function better, but does not treat an illness or
 4 injury.
 5 So that's a little background around this
 6 term of art "treat."
 7 In that context, this statement is correct
 8 in that generally in the medical, and especially in
 9 the medical insurance community, these rehabilitative
 10 services we're discussing -- speech therapy, OT and
 11 PT -- do not treat autism.
 12 Q. (By Ms. Hamburger) So in your mind, what
 13 you're saying here is that neurodevelopmental therapy
 14 doesn't treat autism because, in the end, the person
 15 is always going to have autism, they're not going to
 16 be cured. Is that right?
 17 A. No. The way you state it, treatment for
 18 diabetes wouldn't be a treatment. So no, I don't
 19 think that's correct.
 20 It doesn't treat autism because it isn't
 21 getting in and changing anything or making anything
 22 deeply better about the autism. It's simply managing
 23 the life of a person with autism.
 24 Q. And so you believe that speech therapy
 25 doesn't get in and make things better for a child with

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1 autism?
 2 A. Again, these are terms of art with certain
 3 controversy and gray areas. But the word "treatment"
 4 there means as I've said in my discussion.
 5 Q. The word "treatment" isn't defined as a term
 6 of art in the Regence contract, is it?
 7 A. I don't know the answer to that.
 8 Q. Do you want to take a look at Exhibit 3, and
 9 the definitions are all back there in the 50s, 56, 57.
 10 A. I'll accept your -- no, it is not in there.
 11 Q. And is your understanding about what the
 12 word "treatment" means in the medical community --
 13 let's take the medical insurance community out of
 14 this, and I want to talk about the medical
 15 community -- is it based on any studies?
 16 A. Well, we're discussing the common use of a
 17 term, so it's not the sort of thing that science
 18 addresses itself to. So I'm not sure of the way to
 19 answer that, except -- yeah. It is based on the
 20 entire body of scientific knowledge related to autism
 21 and its response to any proposed attempted treatment.
 22 Q. That speech therapy, for example, doesn't
 23 treat autism?
 24 MR. PARKER: What's the question?
 25 A. What's the question there?

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1 Q. (By Ms. Hamburger) I just want to
 2 understand the premise here, that it's your belief,
 3 just based on the general body of knowledge, without
 4 citing any studies or reports or med analyses, that
 5 speech therapy doesn't treat autism because it doesn't
 6 improve the root causes of their condition?
 7 MR. PARKER: Object to the form.
 8 A. I think in addition to the heuristic that I
 9 just discussed around the word "treatment" -- I
 10 understand where you're going there -- is that
 11 "treatment" also points to illness or injury.
 12 That speech therapy treats people with a
 13 stroke is commonly -- is often used colloquially, but
 14 it doesn't treat the stroke.
 15 Just so, speech therapy can treat the
 16 situation of autism and make it better for better
 17 benefit, better welfare, but it doesn't treat the
 18 autism.
 19 Q. (By Ms. Hamburger) Hmm. So I'm just trying
 20 to -- I'm just pressing you because I really want to
 21 make sure I understand what you're saying.
 22 Is what you're saying here is that
 23 neurodevelopmental therapies treat the symptoms of
 24 autism, not the underlying neurological disorder
 25 itself?

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1 A. I would rephrase that -- these are all
 2 difficult semantic questions that we're debating here,
 3 but I would rephrase that as speech therapy improves
 4 the symptoms of autism, or allows management of or
 5 maintenance of the functions of autism.
 6 Q. Speech therapy improves, allows management
 7 or maintenance of the symptoms of autism --
 8 A. The functions --
 9 Q. The functions.
 10 A. -- of autism.
 11 MR. PARKER: Ele, when it's convenient, can
 12 we take a break?
 13 MS. HAMBURGER: Yes. This is fine. We can
 14 take a break now.
 15 (Recess.)
 16 Q. (By Ms. Hamburger) Your perspective on
 17 whether neurodevelopmental therapy treats autism, is
 18 that consistent with Regence's approach to coverage of
 19 neurodevelopmental therapy for autism?
 20 A. Yes.
 21 Q. Now, when Regence covers neurodevelopmental
 22 therapies in its group plans, does it cover
 23 neurodevelopmental therapies when provided to
 24 enrollees with autism?
 25 A. Yes. Up until the age of seven.

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1 Q. And that's consistent with the
 2 neurodevelopmental therapy mandate, is that right?
 3 A. Correct.
 4 Q. And Regence makes medical necessity
 5 determinations about claims submitted for kids in
 6 those contracts, certificates of coverage, who are
 7 under the age of seven who seek neurodevelopmental
 8 therapy, is that right?
 9 MR. PARKER: Object to the form.
 10 A. Would you restate the question in there?
 11 Q. (By Ms. Hamburger) In those plans where
 12 Regence covers neurodevelopmental therapy up to the
 13 age of seven, Regence only covers those services when
 14 medically necessary, is that right?
 15 A. Not precisely, or let me elaborate on the
 16 difficult nuance in that question.
 17 The term of art "medical necessity" which
 18 we've discussed has meaning, historically, from the
 19 history of health insurance that I've gone through.
 20 And according to that history and that
 21 generally accepted meaning of that term,
 22 neurodevelopmental therapies are not medically
 23 necessary.
 24 Q. But --
 25 MR. PARKER: Excuse me. Were you done with

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1 your answer?
 2 THE WITNESS: Yes.
 3 Q. (By Ms. Hamburger) But forget the whole
 4 historical context of medical necessity. When I'm
 5 talking about it here, I'm talking about it in terms
 6 of Regence's defined term medical necessity or
 7 medically necessary.
 8 Fair enough?
 9 A. What's the question there?
 10 Q. I'm just saying, when I'm referring to
 11 medical necessity, I'm not talking about the
 12 historical context. I'm talking about the defined
 13 term, as referenced in your declaration and in
 14 Exhibit 3, that term, "medical necessity"?
 15 A. No. Neurodevelopmental therapy is not
 16 medically necessary, according to the terms listed
 17 here.
 18 Q. And so are you saying that Regence covers
 19 neurodevelopmental therapies when they're not
 20 medically necessary?
 21 A. Regence complies with the law. The law
 22 mandates that neurodevelopmental therapies be covered,
 23 and the law specifies -- has language in it around
 24 that, and it uses the term "medically necessary"
 25 within that language.

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1 MR. PARKER: You were making a statement.
 2 I'll object to the form of the question,
 3 how's that?
 4 A. Sorry. Would you restate the question?
 5 Q. (By Ms. Hamburger) Yes. Do you have
 6 knowledge whether 31539 is an ICD-9 code that is a
 7 mapped DSM-IV code as you were describing earlier?
 8 A. I don't have that knowledge, actually. I
 9 mean I see that asserted in her testimony. I don't
 10 have that knowledge myself.
 11 Q. Do you see how she says on paragraph 14 that
 12 ICD-9 codes 290 to 319 are generally covered in the
 13 DSM-IV?
 14 A. I do.
 15 Q. Is that your understanding, too?
 16 MR. PARKER: Object to the form.
 17 A. I don't have that specific knowledge, but
 18 the general framework -- I don't have any objection to
 19 that. I don't have any reason to doubt that that's
 20 true, but I don't know that to be a fact, so I'll just
 21 say I don't know that to be a fact without the books
 22 of codes in front of me.
 23 Q. (By Ms. Hamburger) Okay. And then those
 24 claims were all denied, is that right?
 25 A. Yes. The documents that you've shown me is

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1 a document of denied claims.
 2 Q. And it's denied NO1, not covered by
 3 contract?
 4 A. That's correct.
 5 Q. And is that what you would expect to see
 6 when a claim is denied based upon the
 7 neurodevelopmental therapy exclusion?
 8 A. I'll say that sounds appropriate to me,
 9 without having very specific knowledge of what codes
 10 are used. But I don't think it's worth arguing that
 11 point.
 12 (Telephonic interruption.)
 13 Q. (By Ms. Hamburger) So to go back to the
 14 first sentence in paragraph seven, and one of the
 15 things you identify is that the OT services at Seattle
 16 Children's were billed under 783.4 and 783.3, which
 17 were medical diagnostic codes, is that right?
 18 A. That's right.
 19 Q. But it was after O.S.T. had been diagnosed
 20 with autism, is that correct?
 21 A. I don't know that.
 22 Q. Did you review the evaluation from
 23 Dr. Charles Cowan at Seattle Children's Hospital of
 24 O.S.T.?
 25 A. Isn't that the exhibit you just passed me?

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1 Q. No. It was attached to your declaration.
 2 Well, that's okay. We'll move on.
 3 So you object in your declaration to the use
 4 of those diagnostic codes and you identify them as
 5 medical diagnosis codes, is that right?
 6 MR. PARKER: Object to the form.
 7 A. So the neurodevelopmental bucket, if you
 8 will, contains physical codes, medical codes, as well
 9 as behavioral health codes. O.S.T. had some physical
 10 codes that were denied and had some mental health
 11 codes that were denied.
 12 They're treated the same. Physical code,
 13 mental health code, they're treated equally. If they
 14 fall into the neurodevelopmental bucket, they're
 15 treated similarly.
 16 Q. (By Ms. Hamburger) So someone had evaluated
 17 those codes and determined that those codes are used
 18 to treat neurodevelopmental delays?
 19 A. Approximately correct. It's actually
 20 evaluated historically through our company and
 21 maintained in a computer programming.
 22 Q. But somebody had to make the decision at
 23 some point?
 24 A. Yes. Correct.
 25 Q. And so there was some determination that

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1 those two codes -- let me back up.
 2 When you say they're medical diagnosis
 3 codes, you mean they're ICD-9 codes?
 4 A. No.
 5 Q. No?
 6 A. They're all ICD-9 codes, but some ICD-9
 7 codes refer to physical illnesses, medical illnesses,
 8 and other ICD-9 codes refer to mental health, many of
 9 which map to DSM. Medical diagnoses, mental health
 10 diagnoses.
 11 The neurodevelopmental bucket contains both,
 12 and within that bucket they're treated equally.
 13 Q. So within that bucket there's been a
 14 determination made that those particular codes are
 15 associated with treatment for neurodevelopmental
 16 delays?
 17 A. Correct.
 18 Q. And so it's quite possible that services
 19 that are coded with those medical diagnoses -- let me
 20 rephrase that.
 21 It's quite possible that services that are
 22 coded for billing purposes with those medical codes
 23 are in actuality being used to treat developmental
 24 disabilities?
 25 MR. PARKER: Object to the form.

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1 A. I'm not sure I'm --
 2 Q. (By Ms. Hamburger) Well, O.S.T. had autism,
 3 is that right?
 4 A. Yes.
 5 Q. And it's quite possible, even though the
 6 billing came in with those medical codes, that the
 7 therapy service he was receiving was for purposes of
 8 treating his autism?
 9 A. It sounds like your question is could there
 10 have been incorrect or false billing codes, is the way
 11 it sounds like you're asking the question.
 12 For that, I have no knowledge. But I will
 13 say that within the neurodevelopmental bucket,
 14 services that are provided for delays in growth and
 15 development are services that are both -- that are
 16 services that apply to diagnoses that can be medical
 17 such as encephalopathy, or mental health such as
 18 autism.
 19 There are services provided for medical
 20 diagnoses and medical health diagnoses, and they're
 21 treated equally and the same.
 22 Q. For those developmental disabilities for
 23 which providers send in medical codes, it's quite
 24 possible they have both a medical and a mental health
 25 diagnosis, isn't that right?

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1 A. Some people could, certainly.
 2 Q. Have you reviewed the declaration of
 3 Kimberly MacDonald in detail?
 4 MS. HAMBURGER: I apologize. You know, I
 5 printed up the one that doesn't have her signature,
 6 but I can substitute it.
 7 MR. PARKER: We'll trust you, Ele.
 8 A. I've reviewed this.
 9 Q. (By Ms. Hamburger) Is there any statement
 10 in here that you disagree with?
 11 MR. PARKER: I'll object to the form.
 12 A. I have not -- I prefer not to answer that as
 13 I haven't read it carefully enough and tried to verify
 14 assertions in here based on coding books and the like.
 15 So nothing jumped out at me, but I certainly didn't
 16 review it with sufficient precision to answer that.
 17 Q. (By Ms. Hamburger) So you're not a coding
 18 expert, is that right?
 19 A. Coding experts are people who have
 20 professional certifications in coding, and I'm not one
 21 of those.
 22 But as a lifetime of work in the healthcare
 23 system, including seven years as a provider who did my
 24 own billing, I have a very good functional
 25 understanding of coding.

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1 Q. Well, let's skip her background and start at
 2 paragraph seven. And I just want you to take your
 3 time and tell me if you have any disagreements....
 4 A. Paragraph seven.
 5 Q. Starting from paragraph seven to 14?
 6 A. Seven is certainly correct.
 7 Eight is correct.
 8 Nine is correct.
 9 Ten is correct.
 10 Do you want me to keep going?
 11 Q. Uh-huh.
 12 A. Eleven is correct.
 13 Twelve, I believe to be correct, based upon
 14 what you've shown me from the claim system. So I
 15 won't dispute it, but it contains details that I'm not
 16 a hundred percent sure of. But I'm 99 percent in
 17 agreement with twelve.
 18 Number 13, I don't know that, so I can't
 19 agree or disagree, but I have no reason to disagree.
 20 And I have no reason to disagree with 14.
 21 Again, I can't verify that without text.
 22 Q. All right. We're done with that
 23 declaration.
 24 Let's turn to Exhibit No. 1, declaration
 25 number two.

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1 So on page two of Exhibit 1, would you say
 2 the same thing in paragraph three that you would
 3 qualify that statement that neurodevelopmental
 4 therapies are speech, occupational and physical
 5 therapies by adding when used to treat
 6 neurodevelopmental delays?
 7 A. Yes.
 8 Q. And then paragraph five, you testified
 9 earlier and you testified here about Regence's claim
 10 system and how it's set up. And the basis for this
 11 knowledge is from programmers or others at Regence?
 12 A. This is an understanding I've developed from
 13 my support team who has helped me period.
 14 Q. Do you have a list of these eleven DSM-IV TR
 15 disorders and 39 non DSM-IV diagnoses?
 16 A. Such a list exists. I don't have it with
 17 me.
 18 Q. Is autism included within the eleven of
 19 those DSM-IV TR disorders that are considered
 20 neurodevelopmental in nature?
 21 A. I believe it is. Certainly the peripheral
 22 sorts of diagnoses around autism definitely are. I
 23 believe autism itself is.
 24 Q. Is mental retardation?
 25 A. I don't know that.

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1 Q. Is that list public?
 2 A. I don't know that. Oh, I can be sure it's
 3 not posted on a website, if by that you mean public.
 4 Would we consider it confidential, I don't know that,
 5 either.
 6 Q. Could consumers find it?
 7 A. I don't know that. I doubt that it would be
 8 easy to find.
 9 Q. It's not listed in any medical policy that
 10 you know of?
 11 A. It is part of a reimbursement policy, but it
 12 is not a medical policy. Medical policies are public.
 13 Q. Okay. And the reimbursement policies are
 14 not?
 15 A. I'm not sure exactly the answer to that nor
 16 the exact meaning of the word "public."
 17 Providers have access to this information.
 18 They're not on our consumer website. So I'll have to
 19 defer to the precise meaning of this question.
 20 Q. Do you know if that reimbursement policy
 21 that you're referring to lists the disorders that are
 22 included in the neurodevelopmental bucket, as you
 23 describe it?
 24 A. I'm not sure I'm understanding you. We are
 25 discussing the composition of the neurodevelopmental

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1 bucket.
 2 Q. Yes. Is it in that reimbursement policy
 3 that you're referencing? Does it list those eleven
 4 DSM-IV disorders and 39 non-DSM-IV codes?
 5 A. Maybe we should back up. There is a
 6 document which creates a grid for -- let me back up
 7 even further.
 8 What we do is we pay claims. When we have
 9 to ask a question about whether a claim is payable, we
 10 have to see what service it is, for what diagnosis,
 11 for what age and other criteria. We have a grid which
 12 maps services to diagnoses, to ages, and creates an
 13 algorithmic "Yes" or "No" on whether this is
 14 neurodevelopmental. That grid exists.
 15 Q. Okay. And so it may not be in a
 16 reimbursement policy, that grid?
 17 A. I don't know what to call it. It's a grid.
 18 MS. HAMBURGER: If I request the grid in
 19 discovery, you'll know what to look up, Tim?
 20 MR. PARKER: I believe I will know what
 21 you're referring to.
 22 Q. (By Ms. Hamburger) So let's go to the rehab
 23 benefit issue. You say in paragraph six that claims
 24 for occupational speech and physical therapy to treat
 25 enrollees who have a primary DSM-IV TR condition,

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1 other than the eleven disorders processed under
 2 neurodevelopmental therapy, that those are processed
 3 under the rehab benefit.
 4 Do you see that?
 5 A. I do see that.
 6 Q. Is that correct?
 7 A. I think I need to put an edit in this. So
 8 the edit would be "are processed, if payable, under
 9 the Rehabilitation Act."
 10 This sentence does not mean to imply that
 11 all claims for these things for anybody, dah dah dah,
 12 gets paid. If they're paid, they're paid under what
 13 we call the rehabilitation benefit.
 14 Q. So am I correct that what you're trying to
 15 say there is our computer system will automatically
 16 consider those claims under the rehabilitation benefit
 17 if they don't fall into the preprogramed
 18 neurodevelopmental bucket, correct?
 19 A. Correct.
 20 MR. PARKER: Were you done with your answer?
 21 THE WITNESS: No.
 22 MR. PARKER: Go ahead and finish.
 23 A. In other words, claims for these services
 24 will come to an algorithmic branch by applying the
 25 grid. And the grid will give a simple yes, no, on

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1 neurodevelopmental therapy.
 2 If the grid says yes, that's
 3 neurodevelopmental, the logic goes from there. If the
 4 grid says not neurodevelopmental, does not fall into
 5 that bucket, the branch goes off here into the
 6 rehabilitation benefit logic.
 7 Q. So we've branched off into the
 8 rehabilitation benefit logic. That logic -- has it
 9 been programmed to include the exclusion of
 10 rehabilitation therapy for DSM-IV conditions as
 11 described in the contract we looked at in Exhibit 3?
 12 MR. PARKER: Object to the form.
 13 A. No. It treats DSM-IV condition exactly the
 14 same as it treats non-DSM-IV medical conditions.
 15 Q. (By Ms. Hamburger) But you said earlier you
 16 agreed with me that the contract definition of
 17 rehabilitation services excludes rehabilitation
 18 services for DSM-IV conditions, isn't that right?
 19 A. I don't think I said that.
 20 MR. PARKER: Object to the form. I don't
 21 recall that.
 22 Q. (By Ms. Hamburger) Well, let's go back.
 23 In Exhibit 3 on page 13, do you see that
 24 the rehabilitation services?
 25 A. I do.

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1 Q. Under the little box there it says, "We
 2 cover inpatient and outpatient rehabilitation
 3 services, physical, occupational and speech therapy
 4 services only, and accommodations as appropriate and
 5 necessary to restore or improve lost function caused
 6 by injury or illness."
 7 A. Correct.
 8 Q. Do you see that?
 9 A. I do see that.
 10 Q. And previously you agreed that DSM-IV
 11 conditions are excluded from the definitions of either
 12 injury or illness. Those are back on page 55, if you
 13 want to take a look. Is that correct?
 14 A. Your last clause was correct.
 15 Q. So that follows that under the reading of
 16 the contract that DSM-IV conditions are ineligible for
 17 coverage of rehabilitation services, is that right?
 18 A. I understand your logic but that's not
 19 correct.
 20 Q. So are you saying that the claims processing
 21 is inconsistent with the terms of the contract?
 22 A. Those are your terms. I will say that
 23 rehabilitation services are frequently provided for
 24 behavioral health or mental health problems.
 25 Q. Are you saying that rehabilitation services

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1 are frequently provided for DSM-IV conditions?
 2 A. I'm not sure of that.
 3 Q. So I don't understand how you were sure it's
 4 provided for mental health services but not sure
 5 that -- you can't say whether they're provided for
 6 DSM-IV conditions.
 7 MR. PARKER: Is there a question?
 8 MS. HAMBURGER: I'm asking for
 9 clarification.
 10 MR. PARKER: I'll object to the form.
 11 A. I would need to review the factual
 12 conditions here by reviewing DSM -- by what's paid,
 13 what's -- let me phrase it this way.
 14 Again, we pay claims services for
 15 conditions, and before I answer categorically, I would
 16 need to see what service was being requested and what
 17 the underlying diagnosis is in order to specifically
 18 answer whether it would be covered or not.
 19 And I can't on the spot make up a
 20 generalization about that.
 21 Q. (By Ms. Hamburger) But you would agree,
 22 would you not, that under the terms of the contract it
 23 would appear that DSM-IV conditions are excluded from
 24 the rehabilitation benefit, is that right?
 25 A. You're asking me to follow and agree or

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1 disagree with a legal argument, so I'll just make my
 2 own, you know, objection to that. But I will review
 3 this and try my best.
 4 Q. Well, I'm sorry, I think we just walked
 5 through it. Let me just go again.
 6 Under the rehab benefit which is on page --
 7 A. No, I do follow your -- sorry. I follow
 8 your logic. I understand you're pointing to the
 9 paragraph on page 55 about illness, that says that
 10 illness does not include a mental disorder which is
 11 otherwise defined in this policy, and I'm looking for
 12 the other definition in order to further discuss this.
 13 Q. Okay. 55 is illness and injury, mental
 14 health services is on eleven, and rehabilitation is on
 15 13.
 16 A. Well, again, I don't have any legal
 17 training, but I follow your logic.
 18 Q. I'm not asking you for legal advice here.
 19 You interpret the contract and apply it to make
 20 benefit determinations, and you discuss it in your
 21 declaration, but I think it's fair to ask you not just
 22 whether you follow my logic but if that is really what
 23 you understand the contract to say.
 24 A. I believe -- so my understanding of the
 25 practice is to say that rehabilitation services are

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1 provided, if medically necessary, for lost function
 2 caused by injury or illness, or as medically necessary
 3 for mental health conditions.
 4 That does not say that in this contract.
 5 Q. So there's a disconnect between the contract
 6 and the practice, is that what you're saying?
 7 MR. PARKER: Were you finished with your
 8 earlier answer?
 9 THE WITNESS: No.
 10 MR. PARKER: Finish your first answer and
 11 then deal with the second. She interrupted you.
 12 A. So I understand I am, like an attorney which
 13 I have no training to do, looking at contracts and
 14 trying to tie definitions to clauses and the like.
 15 I'm way over my head in such.
 16 But it is a bit foreign to me that illness
 17 has been defined as not including a mental disorder.
 18 In practice, we treat mental disorders as illnesses
 19 and pay claims all the time. Always have.
 20 And if you do write mental health out of
 21 illness, then it doesn't sound like consistent with
 22 what we do to say that rehab services don't restore
 23 or improve lost function caused by illness or injury.
 24 And if I knew that the illness was exactly
 25 that, then I would also add injury or illness or

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1 mental health as medically necessary.
 2 Q. (By Ms. Hamburger) Thank you.
 3 Let me ask you about restore or improve lost
 4 function, how you interpret that in the rehab benefit.
 5 This goes back to your explanation of what
 6 treatment means when it comes to neurodevelopmental
 7 therapies, that because neurodevelopmental therapies
 8 can't be treated in a way that restores lost
 9 functions, insurance companies have historically
 10 excluded that kind of coverage?
 11 A. That's correct.
 12 Q. Now, earlier you said that when Regence auto
 13 adjudicates claims, that's not the final word, that
 14 later on it can go back and look, make decisions
 15 whether it paid claims properly or didn't pay claims
 16 properly, is that right?
 17 A. Correct.
 18 Q. And how long after payment can Regence go
 19 back and do that?
 20 A. I don't know of any practical limitation on
 21 that.
 22 Q. So it could be a year or two years later?
 23 A. I'm over my head, again, about our -- the
 24 legal environment, our company policy, but I've seen
 25 pretty long -- I've seen over a year, in practice, in

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1 which such takebacks or givebacks occur.
 2 Q. So if Regence decided that its practice of
 3 covering mental disorders under the rehab benefit
 4 wasn't following the contract, it could go back and
 5 claw back those payments, couldn't it?
 6 MR. PARKER: Object to the form.
 7 A. That's a legal question. I have no answer
 8 to that.
 9 Q. (By Ms. Hamburger) Well, when Regence goes
 10 back and reevaluate past claims that have been paid,
 11 if they find that they have been paid in a way that's
 12 inconsistent with the contract, can they ask for the
 13 provider to return the money?
 14 MR. PARKER: Same objection.
 15 A. Let me restate what I think you asked. You
 16 asked that if Regence determines that a claim has been
 17 paid incorrectly to a provider, can it go back and
 18 claw back money from a provider? Yes, it can.
 19 Q. (By Ms. Hamburger) Okay. Are you familiar
 20 with the -- switch gears now completely.
 21 Are you familiar with applied behavioral
 22 analysis therapy?
 23 A. In passing, yes, I am.
 24 Q. Do you know what it is?
 25 A. I do.

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1 Q. In your mind, what is applied behavioral
 2 analysis therapy?
 3 A. To greatly oversimplify, it's therapy of,
 4 typically autism, to use training techniques,
 5 educational techniques, with feedback loops that could
 6 best be called training, to train more functional
 7 behaviors in kids with autism.
 8 Q. And in your opinion, would ABA therapy not
 9 be considered a treatment in the same way you were
 10 describing earlier that neurodevelopmental therapies
 11 are not a treatment?
 12 A. Yes.
 13 Q. So in your opinion, ABA therapy is never
 14 medically necessary, because it's not going to get
 15 inside the condition and make it substantially better?
 16 A. Correct.
 17 Q. Have you reviewed any of the studies related
 18 to the effectiveness of ABA therapy?
 19 A. Not deeply. I've had it described to me at
 20 a very high level.
 21 Q. But you haven't read them.
 22 A. No.
 23 Q. Does Regence cover applied behavior analysis
 24 therapy for children with autism?
 25 A. The general answer to that is no. However,

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1 we do administer the state's benefits, which is
 2 subject to a finding of the health technology
 3 assessment group in which certain sorts of coverage
 4 criteria are used.
 5 Q. So --
 6 A. But I think I'll give you the general answer
 7 of no.
 8 Q. And when you're talking about the state
 9 plan, we're talking about the Uniform Medical Plan, is
 10 that right?
 11 A. Correct.
 12 Q. Okay. So let's take the Uniform Medical
 13 Plan out of the universe --
 14 A. Sure.
 15 Q. -- for now because I'm going to ask you
 16 about it, and just talk about all the rest of
 17 Regence's business --
 18 A. Sure.
 19 Q. -- doesn't cover -- Regence does not cover
 20 applied behavior analysis therapy?
 21 A. Correct. Excuse me. I would like to say
 22 has not covered. There's a lot of active debate
 23 because of all the legal activity, so I want to be
 24 careful and say has not covered it.
 25 Q. Appreciate it. We would love to hear that

Exhibit E

R.A. 000218



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Comments or questions? [Submit an Inquiry](#)

Exhibit 16

R.A. 000220

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HON. JOHN P. ERLICK
Noted for Hearing: November 2, 2012 at 1:30 p.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., and L.H., by and through his parents,
M.B.S. and K.H., both on their own behalf
and on behalf of all similarly situated
individuals

Plaintiffs,

v.
REGENCE BLUESHIELD, a Washington
corporation,

Defendant.

NO. 11-2-34187-9 SEA

DECLARATION OF M
B S

REDACTED

I, M B S , declare under penalty of perjury and in
accordance with the laws of the State of Washington that:

1. I am over the age of 18, not a party in the case and competent to
testify to all matters stated herein. All statements are made upon my personal
knowledge.
2. K L H and I are the parents of L H L is
three years old.
3. Since we moved to Washington State in April 2012, L has
received neurodevelopmental therapies (speech, occupational and physical therapy)
through Boyer Children's Clinic.
4. For a few months, L 's neurodevelopmental therapies were
submitted to and covered by Regence, apparently under L s rehabilitation benefit.

DECLARATION OF
M B S

SIRIANNI YOUTZ SPOONEMORE
999THIRD AVE, SUITE 3650
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246
R.A. 000221

1 5. L 's out-patient rehabilitation benefit is limited to only 25 visits
2 per calendar year of speech, occupational and physical therapies, *combined*. In
3 contrast, there is no visit limit imposed on L 's outpatient mental health benefit.
4 Attached as *Exh. A* is a true and correct copy of the Rehabilitation benefit listed in
5 L 's Regence Medical Benefits Policy.

6 6. We have received Explanations of Benefits (EOBs) from Regence
7 that starting in July, L 's neurodevelopmental therapies would no longer be
8 covered because he had exhausted his "maximum benefit limit." Attached as *Exh. B* is
9 a true and correct copy of the EOBs we received from Regence regarding L 's
10 neurodevelopmental therapies in July and August.

11 7. On October 22, 2012, I called Regence. The Regence customer
12 service representative with whom I spoke confirmed that L 's therapies were
13 denied because he exhausted the combined annual visit limit of 25 therapy sessions
14 under his rehabilitation benefit.

15 8. L 's speech, occupational and physical therapies are the
16 essential health interventions that he needs. Regence, by considering these therapies
17 under the rehabilitation benefit, rather than the mental health benefit, imposed a
18 combined visit limit that resulted in depletion of coverage in a matter of weeks. As a
19 result, L no longer has coverage for medically necessary neurodevelopmental
20 therapies to treat his DSM-IV condition, despite the Court's determination that these
21 therapies should be covered as "mental health services."

22 9. L needs these therapies so he can develop the ability to
23 communicate, improve his strength and motor skills, hold his head up, interact with
24 other people, etc. In essence, L 's neurodevelopmental therapies are critical to
25 ensuring that he can function as normally as possible. Without these therapies, L
26 would fail to thrive, experience pain and isolation, and see his disability worsen rather

1 than improve. In the past, many children with L 's disorder did not survive to
2 adulthood. With his current combination of medical and neurodevelopmental
3 interventions, L: 's prognosis is good.

4 10. I am familiar with the duties and responsibilities of being a class
5 representative. If appointed as the representative, I will diligently look out for the
6 interests of all class members. I am not aware of any conflicts with any class members.

7
8 DATED: October 22, 2012, at Seattle, Washington.

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10 _____
11 M B S

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Exhibit A

DECLARATION OF M.B.S. - REDACTED

R.A. 000224

Regence Evolve PlusSM (Comprehensive) Policy

Group Number: 30000404

Medical Benefits



Regence BlueShield is an Independent Licensee
of the Blue Cross and Blue Shield Association

Regence BlueShield

DECLARATION OF M.B.S. - REDACTED

R.A. 000225

PROSTHETIC DEVICES

Category: 1	Category: 2	Category: 3
Provider: Preferred	Provider: Participating	Provider: Nonparticipating
Payment: After Deductible, We pay 80% and You pay 20% of the Allowed Amount. Your 20% payment will be applied toward the Maximum Coinsurance.	Payment: After Deductible, We pay 50% and You pay 50% of the Allowed Amount. Your 50% payment will be applied toward the Maximum Coinsurance.	Payment: After Deductible, We pay 50% of the Allowed Amount and You pay balance of billed charges. Your 50% payment of the Allowed Amount will be applied toward the Maximum Coinsurance.

We cover prosthetic devices for functional reasons to replace a missing body part, including artificial limbs, external or internal breast prostheses following a mastectomy and maxillofacial prostheses. Prosthetic devices or appliances that are surgically inserted into the body are otherwise covered under the appropriate facility provision (Hospital inpatient care or Hospital outpatient and Ambulatory Service Facility care) in this Medical Benefits Section. We will cover repair or replacement of a prosthetic device due to normal use or growth of a child.

REHABILITATION SERVICES

Category: 1	Category: 2	Category: 3
Provider: Preferred	Provider: Participating	Provider: Nonparticipating
Payment: After Deductible, We pay 80% and You pay 20% of the Allowed Amount. Your 20% payment will be applied toward the Maximum Coinsurance.	Payment: After Deductible, We pay 50% and You pay 50% of the Allowed Amount. Your 50% payment will be applied toward the Maximum Coinsurance.	Payment: After Deductible, We pay 50% of the Allowed Amount and You pay balance of billed charges. Your 50% payment of the Allowed Amount will be applied toward the Maximum Coinsurance.
Inpatient limit: ten days per Insured per Calendar Year Outpatient limit: 25 visits per Insured per Calendar Year		

We cover inpatient and outpatient rehabilitation services (physical, occupational and speech therapy services only) and accommodations as appropriate and necessary to restore or improve lost function caused by Injury or Illness.

SKILLED NURSING FACILITY (SNF) CARE

Category: 1	Category: 2	Category: 3
Provider: Preferred	Provider: Participating	Provider: Nonparticipating
Payment: After Deductible, We pay 80% and You pay 20% of the Allowed Amount. Your 20% payment will be applied toward the Maximum Coinsurance.	Payment: After Deductible, We pay 50% and You pay 50% of the Allowed Amount. Your 50% payment will be applied toward the Maximum Coinsurance.	Payment: After Deductible, We pay 50% of the Allowed Amount and You pay balance of billed charges. Your 50% payment of the Allowed Amount will be applied toward the Maximum Coinsurance.
Limit: 30 inpatient days per Insured per Calendar Year		

We cover the inpatient services and supplies of a Skilled Nursing Facility for Illness, Injury or physical disability. Room and board is limited to the Skilled Nursing Facility's average semiprivate room rate, except where a private room is determined to be necessary. Days for these services that are applied toward the Deductible will be applied against the Maximum Benefit limit on these services.

WW0112PPCOI

DECLARATION OF M.B.S. - REDACTED

R.A. 000226

Exhibit B

DECLARATION OF M.B.S. - REDACTED

R.A. 000227



Regence BlueShield is an independent licensee of the Blue Cross and Blue Shield Association

Explanation of Benefits

000019123

Plan Subscriber: L H
Print Date: 08/27/2012

Claims Detail

Patient: L H		PICCIANO, TRUDI K.								
Patient Year of Birth: 2009		1850 BOYER AVE E								
Patient Account with Provider:		SEATTLE WA 981122922								
Claim ID: E27248634600		Category 1 Provider: \$ Least Expensive								
Date of Service	Service Description	Amount Charged By Provider	Amount Not Covered	Regence Member Rate	Copay	Deductible	Remaining Amount	Member's Coinsurance	Amount Regence Paid	Member's Responsibility To Provider
07/09/12	Medical	\$250.00	\$250.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$250.00
PXN Pricing is based on maximum allowance for the service billed by this provider.										
Totals for this claim:									\$0.00	\$250.00
Patient: L H		PICCIANO, TRUDI K.								
Patient Year of Birth: 2009		1850 BOYER AVE E								
Patient Account with Provider:		SEATTLE WA 981122922								
Claim ID: E27249021100		Category 1 Provider: \$ Least Expensive								
Date of Service	Service Description	Amount Charged By Provider	Amount Not Covered	Regence Member Rate	Copay	Deductible	Remaining Amount	Member's Coinsurance	Amount Regence Paid	Member's Responsibility To Provider
07/12/12	Medical	\$150.00	\$150.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$150.00
PXN Pricing is based on maximum allowance for the service billed by this provider.										
Totals for this claim:									\$0.00	\$150.00

Claims Detail continues on page 3.

R.A. 000228

DECLARATION OF M.B.S. - REDACTED



Have questions? See page 1 for contact information.



Regence BlueShield is an Independent Licensee of the Blue Cross and Blue Shield Association

Explanation of Benefits

000019121

Plan Subscriber: L H
Print Date: 08/27/2012

Claims Detail

Patient: L H										FOX, SARA J 1850 BOYER AVE E SEATTLE WA 981122922	
Patient Year of Birth: 2009										Category 1 Provider Least Expensive	
Patient Account with Provider:											
Claim ID: E27325465000											
Date of Service	Service Description	Amount Charged By Provider	Amount Not Covered	Regence Member Rate	Copay	Deductible	Remaining Amount	Member's Coinsurance	Amount Regence Paid	Member's Responsibility To Provider	
07/18/12	Medical	\$187.50 -	\$187.50 =	\$0.00 -	\$0.00 -	\$0.00 =	\$0.00 -	\$0.00 =	\$0.00	\$187.50	
PXN Pricing is based on maximum allowance for the service billed by this provider.										Amount Not Covered:	
										Totals for this claim	
										\$0.00	
										\$187.50	

Patient: L H										NEW CARE CONCEPTS 2208 NW MARKET ST STE 520 SEATTLE WA 981074098	
Patient Year of Birth: 2009										Category 1 Provider Least Expensive	
Patient Account with Provider:											
Claim ID: E27361652000											
Date of Service	Service Description	Amount Charged By Provider	Amount Not Covered	Regence Member Rate	Copay	Deductible	Remaining Amount	Member's Coinsurance	Amount Regence Paid	Member's Responsibility To Provider	
07/18/12	Medical	\$440.00 -	\$0.00 =	\$440.00 -	\$0.00 -	\$0.00 =	\$440.00 -	\$0.00 =	\$440.00	\$0.00	
H20 The member's coinsurance maximum for the benefit plan year has been met with this or a prior claim.											
07/23/12	Medical	440.00 -	0.00 =	440.00 -	0.00 -	0.00 =	440.00 -	0.00 =	440.00	\$0.00	
H20 The member's coinsurance maximum for the benefit plan year has been met with this or a prior claim.											
07/25/12	Medical	440.00 -	0.00 =	440.00 -	0.00 -	0.00 =	440.00 -	0.00 =	440.00	\$0.00	
H20 The member's coinsurance maximum for the benefit plan year has been met with this or a prior claim.											
07/27/12	Medical	880.00 -	0.00 =	880.00 -	0.00 -	0.00 =	880.00 -	0.00 =	880.00	\$0.00	
H20 The member's coinsurance maximum for the benefit plan year has been met with this or a prior claim.											

Continued on page 7

R.A. 000229

DECLARATION OF M.B.S. - REDACTED



Have questions? See page 1 for contact information.



Regence BlueShield is an independent licensee of the Blue Cross and Blue Shield Association

Explanation of Benefits

Plan/Subscriber: L H
Print Date: 08/27/2012

Claims Detail

Patient: L H										PICCIANO, TRUDI K. 1850 BOYER AVE E SEATTLE WA 981122922	
Patient Year of Birth: 2009										Category 1 Provider \$ Least Expensive	
Patient Account with Provider:											
Claim ID: E27323122400											
Date of Service	Service Description	Amount Charged By Provider	Amount Not Covered	Regence Member Rate	Copay	Deductible	Remaining Amount	Member's Coinsurance	Amount Regence Paid	Member's Responsibility To Provider	
07/26/12	Medical	\$150.00 -	\$150.00 =	\$0.00 -	\$0.00 -	\$0.00 =	\$0.00 -	\$0.00 =	\$0.00	\$150.00	
PXN Pricing is based on maximum allowance for the service billed by this provider.										(Amount Not Covered)	
Totals for this claim									\$0.00	\$150.00	
Patient: L H										FOX, SARA J. 1850 BOYER AVE E SEATTLE WA 981122922	
Patient Year of Birth: 2009										Category 1 Provider \$ Least Expensive	
Patient Account with Provider:											
Claim ID: E27323252300											
Date of Service	Service Description	Amount Charged By Provider	Amount Not Covered	Regence Member Rate	Copay	Deductible	Remaining Amount	Member's Coinsurance	Amount Regence Paid	Member's Responsibility To Provider	
07/25/12	Medical	\$187.50 -	\$187.50 =	\$0.00 -	\$0.00 -	\$0.00 =	\$0.00 -	\$0.00 =	\$0.00	\$187.50	
PXN Pricing is based on maximum allowance for the service billed by this provider.										(Amount Not Covered)	
Totals for this claim									\$0.00	\$187.50	

Claims Detail continues on page 6.

Stay informed!
Review Your Benefits
Status on page 12

R.A. 000230

DECLARATION OF M.B.S. - REDACTED

Have questions? See page 1 for contact information.



Regence BlueShield is an Independent Licensee of the Blue Cross and Blue Shield Association

Explanation of Benefits

Plan Subscriber: L H
Print Date: 08/27/2012

Claims Detail

Patient: L H									
Patient Year of Birth: 2009									
Patient Account with Provider:									
<div style="display: flex; justify-content: space-between;"> Claim ID: E27249094000 WENDEL, SUSAN L 1850 BOYER AVE E SEATTLE WA 981122922 Category 1 Provider \$ Least Expensive </div>									
Date of Service	Service Description	Amount Charged By Provider	Amount Not Covered	Regence Member Rate	Copay	Deductible	Remaining Amount	Member's Coinsurance	Member's Responsibility To Provider
07/02/12	Medical	\$150.00	\$150.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$150.00
PXN Pricing is based on maximum allowance for the service billed by this provider.									
Totals for this claim									\$150.00
Patient: L H									
Patient Year of Birth: 2009									
Patient Account with Provider:									
<div style="display: flex; justify-content: space-between;"> Claim ID: E27249094400 WENDEL, SUSAN L 1850 BOYER AVE E SEATTLE WA 981122922 Category 1 Provider \$ Least Expensive </div>									
Date of Service	Service Description	Amount Charged By Provider	Amount Not Covered	Regence Member Rate	Copay	Deductible	Remaining Amount	Member's Coinsurance	Member's Responsibility To Provider
07/09/12	Medical	\$150.00	\$150.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$150.00
PXN Pricing is based on maximum allowance for the service billed by this provider.									
Totals for this claim									\$150.00

Claims Detail continues on page 4.

Stay informed!
Review Your Benefits
Status on page 12

R.A. 000231

DECLARATION OF M.B.S. - REDACTED

Have questions? See page 1 for contact information.



Regence BlueShield is an Independent Licensee of the Blue Cross and Blue Shield Association.

Explanation of Benefits

000019122

Plan Subscriber: L H
Print Date: 08/27/2012

Claims Detail

Patient: L H										Category 1 Provider: SEATTLE WA 981122922	
Patient Year of Birth: 2009										WENDEL, SUSAN L.	
Patient Account with Provider:										1850 BOYER AVE E	
Claim ID: E27323054300										\$ Least Expensive	
Date of Service	Service Description	Amount Charged By Provider	Amount Not Covered	Regence Member Rate	Copay	Deductible	Remaining Amount	Member's Coinsurance	Amount Regence Paid	Member's Responsibility To Provider	
07/23/12	Medical	\$225.00 -	\$225.00 =	\$0.00 -	\$0.00 -	\$0.00 =	\$0.00 -	\$0.00 =	\$0.00	\$225.00	
PXN Pricing is based on maximum allowance for the service billed by this provider.										(Amount Not Covered)	
Totals for this claim									\$0.00	\$225.00	
Patient: L H										Category 1 Provider: SEATTLE WA 981122922	
Patient Year of Birth: 2009										PICCIANO, TRUDI K.	
Patient Account with Provider:										1850 BOYER AVE E	
Claim ID: E27323121800										\$ Least Expensive	
Date of Service	Service Description	Amount Charged By Provider	Amount Not Covered	Regence Member Rate	Copay	Deductible	Remaining Amount	Member's Coinsurance	Amount Regence Paid	Member's Responsibility To Provider	
07/23/12	Medical	\$150.00 -	\$150.00 =	\$0.00 -	\$0.00 -	\$0.00 =	\$0.00 -	\$0.00 =	\$0.00	\$150.00	
PXN Pricing is based on maximum allowance for the service billed by this provider.										(Amount Not Covered)	
Totals for this claim									\$0.00	\$150.00	

Claims Detail continues on page 5.

R.A. 000232

DECLARATION OF M.B.S. - REDACTED



Have questions? See page 1 for contact information.



Regence BlueShield is an Independent Licensee of the Blue Cross and Blue Shield Association

Explanation of Benefits

000019120

Plan Subscriber: L H

Print Date: 08/27/2012

Claims Detail

Continued from page 7

Patient: L H										NEW CARE CONCEPTS 2208 NW MARKET ST STE 520 SEATTLE WA 981074098	
Patient Year of Birth: 2009										Category 1 Provider \$ Least Expensive	
Patient Account with Provider:											
Claim ID: E27361923300											
Date of Service	Service Description	Amount Charged By Provider	Amount Not Covered	Regence Member Rate	Copay	Deductible	Remaining Amount	Member's Coinsurance	Regence Paid	Member's Responsibility To Provider	
07/13/12	Medical	440.00 -	0.00 =	440.00 -	0.00 -	0.00 =	440.00 -	88.00 =	352.00	\$88.00	
								(440.00 * 20%)		(Coinsurance)	
07/14/12	Medical	495.00 -	0.00 =	495.00 -	0.00 -	0.00 =	495.00 -	99.00 =	396.00	\$99.00	
								(495.00 * 20%)		(Coinsurance)	
07/16/12	Medical	440.00 -	0.00 =	440.00 -	0.00 -	0.00 =	440.00 -	23.04 =	416.96	\$23.04	
								(440.00 * 20%)		(Coinsurance)	
The member's coinsurance maximum for the benefit plan year has been met with this or a prior claim.											
Totals for this claim									\$1,560.96	\$309.04	

Patient: L H										PICCIANO TRUDI K 1850 BOYER AVE E SEATTLE WA 981122922	
Patient Year of Birth: 2009										Category 1 Provider \$ Least Expensive	
Patient Account with Provider:											
Claim ID: E27366256200											
Date of Service	Service Description	Amount Charged By Provider	Amount Not Covered	Regence Member Rate	Copay	Deductible	Remaining Amount	Member's Coinsurance	Regence Paid	Member's Responsibility To Provider	
07/30/12	Medical	\$150.00 -	\$150.00 =	\$0.00 -	\$0.00 -	\$0.00 =	\$0.00 -	\$0.00 =	\$0.00	\$150.00	
										Amount Not Covered	
PXN Pricing is based on maximum allowance for the service billed by this provider.											
Totals for this claim									\$0.00	\$150.00	

Claims Detail continues on page 9.

R.A. 000233

DECLARATION OF M.B.S. - REDACTED



Have questions? See page 1 for contact information.



Regence BlueShield is an Independent Licensee of the Blue Cross and Blue Shield Association.

Print Date: 08/27/12
 Plan Subscriber: L H
 Subscriber ID:
 Group Name: IND WA APRIL
 Group ID: 30000404

Get members only savings on health-related products and services: <http://www.myRegence.com/advantages>

Please Note:
New Explanation of Benefits Statement

This document shows how benefits were applied to claims during the time span 08/14/2012-08/27/2012. It also calculates member responsibility.

THIS IS NOT A BILL.

Claims Summary

We processed 14 claims on your behalf.
 Contact the provider(s) to arrange payment, if not already paid.

Total Regence Paid: \$4,316.00	Total Member Responsibility To Provider(s): \$2,275.30
--------------------------------	--

Claims Detail - How your benefits were used to calculate these claims:

Patient: L H		Patient Year of Birth: 2009		Patient Account with Provider:		Category 1 Provider: SEATTLE WA 981122922		Member: FOX, SARA J. 1850 BOYER AVE E	
Claim ID: E27247639900						\$ Least Expensive			
Date of Service	Service Description	Amount Charged By Provider	Amount Not Covered	Regence Member Rate	Copay	Deductible	Remaining Amount	Member's Coinsurance	Member's Responsibility To Provider
07/11/12	Medical	\$187.50 -	\$187.50 =	\$0.00 -	\$0.00 -	\$0.00 =	\$0.00 -	\$0.00 =	\$187.50
PXN Pricing is based on maximum allowance for the service billed by this provider.									
Totals for this claim									\$187.50

Claims Detail continues on page 2.

Stay informed!
 Review Your Benefits
 Status on page 12

R.A. 000234

DECLARATION OF M.B.S. - REDACTED

Have questions? Contact your provider if you need to arrange payment. To learn more about your benefits, contact Regence:



Customer Service
 1 (888) 344-6347
 TTY: 711
 8:00 a.m. - 6:00 p.m. PT

Mailing Address
 (including appeals)
 PO BOX 1271 MS-C7A
 PORTLAND, OR 97207-1271

Help keep health care costs down. If you suspect fraud related to your claim, please call 1 (800) 922-4325.

Exhibit 17

R.A. 000235

REDLINE

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

[PROPOSED]

ORDER

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

(2) DENYING DEFENDANT'S CROSS
MOTION FOR PARTIAL SUMMARY
JUDGMENT AND

(3) CERTIFYING ORDER PER CR
54(b) AND RAP 2.3(b)(4)

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

ORDER GRANTING PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT, DENYING
DEFENDANT'S CROSS-MOTION AND
CERTIFYING ORDER - 1

CARNEY
BADLEY
SPELLMAN

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

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

- 3 • Plaintiff's Motion for Partial Summary Judgment re: Neurodevelopmental
4 Therapy Exclusion;
- 5 • Declaration of G. T. and the exhibits attached thereto;
- 6 • Declaration of Eleanor Hamburger and the exhibits attached thereto;
- 7 • Declaration of Kathleen Sirianni;
- 8 • Defendant's Opposition and Cross Motion For Partial Summary Judgment;
- 9 • Declaration of Timothy J. Parker and all exhibits attached thereto;
- 10 • Declaration of Rosey Messinger and all exhibits attached thereto;
- 11 • Declaration of Joseph M. Gifford, M.D., and all exhibits attached thereto;
- 12 • Plaintiff's Reply briefing in support of Plaintiff's Motion for Partial Summary
13 Judgment;
- 14 • Supplemental Declaration of Eleanor Hamburger and all exhibits attached thereto;
- 15 • Declaration of Charles A. Cowan, M.D.;
- 16 • Plaintiff's Supplemental Briefing in Support of Plaintiff's Motion for Partial
17 Summary Judgment and in Opposition to Defendant's Motion to Dismiss;
- 18 • Declaration of Kimberly MacDonald;
- 19 • Declaration of Patricia Moroney and all exhibits attached thereto;
- 20 • Declaration of Eleanor Hamburger and all exhibits attached thereto;
- 21 • Regence BlueShield's Response to Plaintiff's Supplemental Brief in Standing and
22 Justiciability;
- 23 • Declaration of Timothy J. Parker and all exhibits attached thereto;
- 24 • Declaration of Richard Rainey, M.D., and all exhibits attached thereto;
- 25

26 ORDER GRANTING PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT, DENYING
DEFENDANT'S CROSS-MOTION AND
CERTIFYING ORDER - 2

CARNEY
BADLEY
SPELLMAN

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

1 * Plaintiff's Consolidated Supplemental Reply Brief in Support of Plaintiffs'
2 Motion for Partial Summary Judgment and in opposition to Defendant's Motions
3 to Dismiss;

4 * Declaration of Eleanor Hamburger and all exhibits attached thereto;

5 * Supplemental Declaration of Kimberly MacDonald and all exhibits attached
6 thereto; and

7 * Supplemental Declaration of Charles A. Cowan, M.D., and

8 * Supplemental Declaration of Richard Rainey, M.D.s

9 Based upon the foregoing, the Court hereby GRANTS Plaintiffs' Motion for Partial
10 Summary Judgment re: Neurodevelopmental Therapy Exclusion, and DENIES Regence's
11 Cross-Motion for Summary Judgment.

12 1. ~~Given the broad mandate regarding mental health services in the Mental~~
13 ~~Health Parity Act, RCW 48.44.341, and pursuant to Washington's Declaratory Judgment Act,~~
14 ~~RCW 7.24, et seq., Plaintiffs O.S.T. and L.H. are entitled to a declaration that Regence's~~
15 ~~exclusion of neurodevelopmental therapies violates Washington public policy as well as~~
16 ~~Washington's Mental Health Parity Act. The court declares such exclusion void and~~
17 ~~unenforceable in this case.~~

18 2. ~~Under the Mental Health Parity Act Regence must provide coverage for all~~
19 ~~medically necessary "mental health services" to the same extent that it provides such~~
20 ~~coverage for other medical or surgical services. Neurodevelopmental therapies are mental~~
21 ~~health services designed to treat expressive language disorder, feeding disorders,~~
22 ~~phonological disorders and autism, disorders which are listed in the DSMIV. Since~~
23 ~~neurodevelopmental therapies can be medically necessary to treat all of these conditions,~~
24 ~~Regence cannot use a blanket exclusion to deny coverage for neurodevelopmental~~
25 ~~therapies.~~

26 ORDER GRANTING PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT, DENYING
DEFENDANT'S CROSS-MOTION AND
CERTIFYING ORDER - 3

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1 ~~3. This Court does not have to supersede or void the provisions of RCW~~
2 ~~48.44.450, the Neurodevelopmental Therapy Act, to reach its ruling. Under rules of~~
3 ~~statutory construction, courts do not interpret statutes in isolation. Courts interpret~~
4 ~~statutes *in pari materia*, considering all statutes on the same subject, taking into account~~
5 ~~all that the legislature has said on that subject and attempting to create a unified whole.~~
6 ~~Hallauer v. Spectrum Properties, Inc., 143 Wn.2d 126 (2001). Both the~~
7 ~~Neurodevelopmental Therapy Act and the Mental Health Parity Act can be read together~~
8 ~~and harmonized. The Neurodevelopmental Therapy Act only creates a minimum level of~~
9 ~~required coverage. Defendant Regence must meet the requirements of both Acts, the~~
10 ~~Mental Health Parity Act as well as the Neurodevelopmental Therapy Act and,~~
11 ~~accordingly, must provide coverage for medically necessary neurodevelopmental therapy~~
12 ~~for DSM-IV-TR diagnosed conditions.~~

13 ~~It is therefore ORDERED that any provisions the neurodevelopmental exclusion~~
14 ~~contained in Regence policies issued and delivered to Plaintiffs O.S.T. and L.H. on or after~~
15 ~~January 1, 2008 are invalid to the extent they that exclude coverage of neurodevelopmental~~
16 ~~therapies that are medically necessary to treat mental disorders addressed by RCW 48.44.341.~~
17 ~~All issues relating to visit and financial limits are reserved, and regardless of medical~~
18 ~~necessity are declared invalid, void and unenforceable by Defendant and its agents.~~

19 ~~The Court, having found that no just reason for delay obtains, that this order~~
20 ~~addresses a controlling issue of law to which there is substantial ground for difference of~~
21 ~~opinion and that immediate appellate review may materially advance the ultimate termination~~
22 ~~of this litigation, does hereby~~

23 ~~CERTIFY this order for immediately interlocutory appellate review pursuant to CR~~
24 ~~54(b) and RAP 2.3(b)(4).~~

25
26 ORDER GRANTING PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT, DENYING
DEFENDANT'S CROSS-MOTION AND
CERTIFYING ORDER -4

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DATED this _____ day of November, 2012.

John P. Erlick
Superior Court Judge

Presented by:

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Richard E. Spoonemore (WSBA #21833)
Attorneys for Plaintiffs

ORDER GRANTING PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT, DENYING
DEFENDANT'S CROSS-MOTION AND
CERTIFYING ORDER - 5

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