

No. 89084-6
(Court of Appeals No. 69821-4-I)

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Respondents / Plaintiffs,

v.

REGENCE BLUESHIELD,

Petitioner / Defendant.

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

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I. IDENTITY OF PETITIONER

This Court accepted transfer of Regence BlueShield's appeal from a declaratory judgment (no. 88940-6). Regence asks this Court in its discretion under RAP 13.5 also to review the decision designated in section II, below.

II. DECISION

Regence seeks review of the Court of Appeals' rulings denying discretionary review (*see* Appendices A and B) of the trial court's Order Certifying Neurodevelopmental Class under CR 23(b)(3) (copy at Appendix C).

III. ISSUES PRESENTED FOR REVIEW

Coverage of neurodevelopmental therapies is mandated by statute up to age six for non-employer sponsored group health plans. RCW 48.44.450. In a declaratory judgment, the superior court ruled that the subsequently adopted Mental Health Parity Act—which does not mention neurodevelopmental therapies—requires health carriers to cover such therapies in all health plans. *See* RCW 48.44.341. This Court accepted transfer of Regence's appeal from the declaratory judgment. The following additional issue is presented for discretionary review:

Did the superior court abuse its discretion in certifying a class under CR 23(b)(3) for the purpose of seeking individualized damages where (1) individual issues of diagnosis and medical necessity will predominate over the identified common issue—a legal issue already decided on summary judgment; (2) class treatment is not superior to the administrative appeal process provided by statute to adjudicate

individual claims; and (3) the class as defined includes persons who lack standing and is not ascertainable?

Review of the foregoing issue is appropriate under RAP 13.5(b) where Regence already has an appeal pending before this Court, where the decision to certify a class under CR 23(b)(3) is contrary to state and federal law (including a federal district court decision by Judge Lasnik denying (b)(3) certification under analogous facts), and where certification of similar, additional classes is being sought in this and other cases.

IV. STATEMENT OF FACTS

Subject to limitations, the insurance code requires health carriers to cover medically-necessary neurodevelopmental therapies in employer-sponsored group health plans. RCW 48.44.450. The statute does not require health plans covering individuals or non-employer-sponsored groups to cover neurodevelopmental therapies.

Nevertheless, the trial court declared that a subsequently adopted and more general statute that does not mention neurodevelopmental therapies—the Mental Health Parity Act—requires coverage of such therapies in all health plans. *Order Granting Summary Judgment* (copy at Appx. D). Specifically, the trial court ruled that neurodevelopmental therapies can be “mental health services” as defined by the Parity Act. *Id.*; see RCW 48.44.341(1). The trial court entered a declaratory judgment and certified it as a final judgment under CR 54(b), subject to immediate appeal as of right. *Id.*

A day after entering the declaratory judgment, the trial court certified a class under CR 23(b)(3) for the purpose of seeking individualized damages on behalf of class members. Appx. C. The class is composed of all members of Regence individual and non-employer-sponsored health plans who “have required or [now] require neurodevelopmental therapy for the treatment of a qualified mental health condition.” *Id.*

Subject to exceptions not pertinent here, “mental health services” subject to the Parity Act must be “[1] medically necessary [and] [2] provided to treat mental disorders covered by the diagnostic categories listed in...the diagnostic and statistical manual of mental disorders [“DSM”][.]” RCW 48.44.341(1). Determining class membership would thus require individualized determination that neurodevelopmental therapy was medically necessary to treat a person’s diagnosed, DSM-listed mental disorder. It is not feasible to identify all potential class members, much less confirm class membership, because the class includes persons who have never received neurodevelopmental therapies or had a claim submitted to or denied by Regence.

After filing its notice of appeal from the declaratory judgment, Regence moved for discretionary review of the class-certification order. On March 20, 2013, a commissioner of this Court entered a notation ruling denying Regence’s motion for discretionary review. Appx. B. A panel of Court of Appeals judges denied Regence’s motion to modify that ruling. Appx. A.

V. REASONS WHY RELIEF SHOULD BE GRANTED

A. The Trial Court Committed Probable (if Not Obvious) Error in Entering the Class-Certification Order.

The circumstances in which this Court will accept review of an interlocutory decision of the Court of Appeals include where the Court of Appeals has “committed an obvious error which would render further proceedings useless” or “committed probable error and the decision of the Court of Appeals substantially alters the status quo or substantially limits the freedom of a party to act.” RAP 13.5(b). These are the same standards that the Court of Appeals applies in deciding whether to accept review of an interlocutory decision by a trial court. RAP 2.3(b). Thus, the reasons why the Court of Appeals erred in denying discretionary review are evident in why the trial court committed probable (if not obvious) error in entering the class-certification order.

The essence of the probable and obvious error criteria is an inverse relationship between the certainty of error and its impact on the proceeding. *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 463 n.6, 232 P.3d 591 (2010). Although RAP 2.3(b)(2)’s “probable error” standard was originally intended to apply to injunctions, in practice that distinction “immediately disappeared.” *Id.*, citing G. Crooks, *Discretionary Rev. of Trial Ct. Decisions*, 61 WASH. L. REV. 1548, 1545-46 (1986).

The trial court erred in certifying a class under CR 23(b)(3) because (1) common issues necessarily do not predominate, (2) the trial

court did not find that class treatment would be superior to other available methods of adjudication (and it is not), and (3) the class is not be ascertainable. Review by this Court is appropriate because further proceedings are wasteful, if not useless, and likely to frustrate and confuse class members where a class has been erroneously certified and any relief granted to the class could be undone by a post-trial appeal on class certification.

1. Individualized Diagnosis and Medical Necessity Will Predominate Over Issues Common to the Class as a Whole.

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

Courts have repeatedly ruled that, where individualized diagnosis and medical necessity are elements of class members’ claims, as they are here, those issues will predominate over any issues common to the class as

¹ Aside from amendments on unrelated issues (residual funds), CR 23 is identical to Fed. R. Civ. P. 23. For this reason, Washington courts frequently seek guidance from cases applying the federal rule and considers such cases “highly persuasive.” *Schnall v. AT&T Wireless Svcs., Inc.*, 171 Wn.2d 260, 270, 259 P.3d 129 (2011).

a whole.² The superior court concluded the existence of issues requiring individualized proof did not preclude (b)(3) certification because the court has a “wide variety of management options” to deal with issues affecting individual class members, citing *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 63 P.3d 198 (2003). But the court did not identify a specific management option that could address the individualized issues presented here.³

It was error to certify a class under CR 23(b)(3) where individualized issues of diagnosis and medical necessity would predominate over issues common to the class as a whole.

² See, e.g., *Batas v. Prudential Ins. Co. of Am.*, 37 A.D.3d 320, 831 N.Y.S.2d 371 (2007) (denying certification under (b)(3) equivalent where “the medical necessity issue—unique and complex in each class member’s particular case—would predominate over questions of law or fact common to the class as a whole”); *Tinman v. Blue Cross & Blue Shield of Mich.*, 264 Mich. App. 546, 692 N.W.2d 58, 67-68 (2004) (reversing certification where liability depended on individualized proof of diagnosis and medical necessity, as those inquiries would predominate); *Pecere v. Empire Blue Cross & Blue Shield*, 194 F.R.D. 66, 71 (E.D. N.Y. 2000) (denying certification “because plaintiffs’ claims hinge on whether or not the treatment for each of their individual conditions was ‘medically necessary’”); *Doe I v. Guardian Life Ins. Co. of Am.*, 145 F.R.D. 466, 475-76 (N.D. Ill. 1992) (denying certification because individualized issues, such as whether each plan beneficiary was properly diagnosed with a particular disorder, would predominate over the common issue of whether the disorder was a mental or physical illness under the plan).

³ *Sitton* is inapposite because, there, the insurer had already determined individual medical necessity, and the liability inquiry was not whether each determination was correct but whether the insurer’s review process had a bad faith purpose. 116 Wn. App. at 249-50. That question—unlike individualized diagnosis and medical necessity—was answerable based on class-wide proof. *Id.*

2. The Independent Administrative Review Provided by Statute Is a Superior Means of Adjudication than Class Treatment of Individual Damages Claims.

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

Any health plan member has a statutory right to review of a carrier’s coverage decision by an independent review organization (IRO). RCW 48.43.535(2). IRO decisions are binding on carriers, and carriers are responsible to pay their fees. RCW 48.43.535(7). The IRO is designed to deal with individual claims, such as those involved here, that depend on individualized issues like diagnosis, claim submission and denial, and medical necessity. The IRO is composed of independent medical experts qualified to make determinations of medical necessity. RCW 48.43.535(3), (5).

In *Z.D. v. Group Health Co-op.*, federal district court Judge Robert Lasnik ruled that (b)(3) class treatment of individualized damages claims was not superior where plan members could seek IRO review of neurodevelopmental therapy claims. 2012 WL 1977962 at *12-13 (W. D.

Wash., June 1, 2012). Judge Lasnik recognized that a different subsection of Civil Rule 23—subsection (b)(2)—applies where only declaratory or injunctive relief is sought. *Id.* Armed with a declaratory judgment, members of the (b)(2) class could individually seek IRO review of their damages claims.⁴ But in the context of subsection (b)(3), the court recognized that liability to individual class members could not be determined class wide and ruled that the IRO was a superior forum to adjudicate individual damages claims. *Id.* at *13.

In *Z.D.*, the court granted certification under subsection (b)(2) to seek declaratory and injunctive relief on behalf of class members. In this action, Plaintiffs never sought certification under subsection (b)(2), only (b)(3). Although the IRO may not grant declaratory or injunctive relief, it does not follow that class treatment is a superior means of adjudicating individual damages claims, once a declaratory judgment is entered. It was error to certify a (b)(3) class, with the intention of allowing recovery of individualized damages, where a superior means exists to adjudicate individualized damages claims.

⁴ The district court ruled that the availability of IRO review did not weigh against (b)(2) certification because individualized damages are not available to a (b)(2) class and the IRO was not a proper forum to seek declaratory or injunctive relief. 2012 WL 1977962 at *6.

3. The Class Is Not Ascertainable Because It Includes Persons Who Have Never Received Neurodevelopmental Therapy or Had a Claim Submitted to or Denied by Regence.

The class as defined includes persons who “required or require” neurodevelopmental therapies, regardless of whether they received the services or whether a claim was submitted to or denied by Regence. This should have precluded certification for two reasons.

First, members of a class must possess the same interest and claims as the class representatives. *East Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977). Many members of the class here have no breach of contract claim because the class definition does not require denial or even submission of a claim. *See Batas v. Prudential Ins. Co. of Am.*, 37 A.D.3d 320, 831 N.Y.S.2d 371 (2007) (holding a class was not certifiable where it included persons who had not been denied medically necessary care and thus had no viable cause of action for breach of contract).

Second, the class is not ascertainable because identifying class members requires inquiring into the merits of each potential member’s claim. A class definition that requires mini-hearings on the merits to determine class membership is untenable. *See, e.g., Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 403 (E.D. Pa. 1995) (rejecting as untenable a class defined as persons who received unsolicited faxes, where whether the fax was unsolicited was a central liability inquiry); *Rios v. Marshall*, 100 F.R.D. 395, 403 (S.D. N.Y. 1983) (defining class to exclude

farmworkers allegedly deterred from applying for jobs, as they could not be identified). The class here is defined in terms of the liability issues, in that a person is a member only if he or she is diagnosed with a “qualified mental health condition” and “require[s]” neurodevelopmental therapy. Appx. C at 5. Furthermore, whether a person “require[s]” neurodevelopmental therapy is not determinable by a court because it depends on whether the treatment is medically necessary, a determination reserved to the insurance carrier. RCW 48.44.341(4).

B. Discretionary Review of Class Certification Is Common, and Review Need Not Have Any Effect on the Pending Appeal.

Certification of a class can have significant consequences and thus merits careful review. *See Darling v. Champion Home Builders Co.*, 96 Wn.2d 701, 706, 638 P.2d 1249 (1982) (observing that court oversight “is appropriate to guard against...abuses”). In addition, further proceedings are useless and wasteful where a class has been erroneously certified. As a result, review of class certification is common. *See, e.g., Schnall v. AT&T Wireless Svcs., Inc.*, 139 Wn. App. 280, 161 P.3d 395 (2007), *rev'd in part*, 171 Wn.2d 260 (2011); *Nelson v. Appleway Chevrolet, Inc.*, 129 Wn. App. 927, 121 P.3d 95 (2005), *aff'd*, 160 Wn.2d 173 (2007); *Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 64 P.3d 49 (2003); *Sitton*, 116 Wn. App. 245 (2003) (all on discretionary review of class certification).

Furthermore, review is appropriate and warranted because other trial courts have recently invoked CR 23(b)(3) to certify classes of persons insured under health insurance contracts for the purpose of seeking

individualized damages. *See, e.g., Appx. E (A.G. v. Premera Blue Cross)*. In addition, Plaintiffs in this case intend to seek certification of a second subclass.

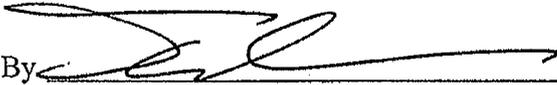
This Court may grant review of class certification and consolidate that review with the appeal currently pending in this Court, or it may keep class certification separate and stay that review pending the outcome of the existing appeal. Should Regence prevail in the existing appeal, review of class certification would become moot.

VI. CONCLUSION

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

DATED this 17th day of July, 2013.

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By 

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CERTIFICATE OF SERVICE

I, Patti Saiden, certify that I am over the age of 18 years and competent to be a witness herein. On July 17, 2013, I served in the manner indicated a true and correct copy of the foregoing document on counsel of record as follows:

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

DATED this 17th day of July, 2013.



Patti Saiden, Legal Assistant

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STATE OF WASHINGTON
2013 JUL 18 AM 9:34

REGENE BLUESHIELD'S
MOTION FOR DISCRETIONARY REVIEW
OF CLASS CERTIFICATION - 12

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Regence Blue Shield v. O.S.T., et al.
COA Case No. 69821-4-I
King Cty. Sup. Court Case No. 11-2-34187-9 SEA

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C	12/13/12	Order Certifying Neurodevelopmental Class Under Civil Rule 23(b)(3)
D	12/12/12	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
E	05/22/13	11-2-303-33-4; <i>A.G. v. Premera Blue Cross</i> Order: (1) Granting Plaintiffs' Motion for Class Certification; (2) Ordering Classwide injunctive Relief; and (3) Instructing Class to Seek Permission for Entry of Order Under RAP 7.2(e)

APPENDIX

A

RICHARD D. JOHNSON,
Court Administrator/Clerk

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CASE #: 69821-4-1
Regence Blue Shield, Petitioner v. O.S.T et al, Respondents

Counsel:

Please find enclosed a copy of the Order Denying Motion to Modify the Commissioner's ruling entered in the above case today.

The order will become final unless counsel files a motion for discretionary review within thirty days from the date of this order. RAP 13.5(a).

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

enclosure

SSD

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

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

Respondents,

v.

REGENCE BLUESHIELD, a Washington
corporation,

Petitioner.

No. 69821-4-1

ORDER DENYING
MOTION TO MODIFY

Petitioner Regence BlueShield has filed a motion to modify the commissioner's March 20, 2013, ruling denying its motion for discretionary review. The respondents have filed a response, and the petitioner has filed a reply. We have considered the motion under RAP 17.7 and have determined that it should be denied. Now, therefore
It is hereby

ORDERED that the motion to modify is denied.

Done this 17th day of June, 2013.

COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2013 JUN 17 PM 3:09

Leach, C. J.

Dwyer, J.
Gors

APPENDIX

B

RICHARD D. JOHNSON,
Court Administrator/Clerk

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CASE #: 69821-4-1
Regence Blue Shield, Petitioner v. O.S.T et al, Respondents

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on March 20, 2013, regarding petitioner's motion for discretionary review:

"This matter is one of several pending in state and federal trial courts and this court brought by plaintiffs, children who have been denied coverage for neurodevelopmental therapy (speech, occupational, behavioral and/or physical therapy), for the treatment of developmental delays and neurodevelopmental disabilities such as autism, based on a neurodevelopmental therapy exclusion in individual health plans purchased by their parents.

Plaintiffs take the position that the exclusion violates the Mental Health Parity Act, RCW 49.44.341, which requires that "all health service contracts providing health benefit plans that provide coverage for medical and surgical services" shall also provide "mental health services." The statute, enacted in 2005, did not apply to individual health plans until 2008.

The insurers argue that the exclusion is permitted by the earlier Neurodevelopmental Therapy Mandate, enacted in 1989, which provides that an "employer-sponsored *group* health contract for comprehensive health care service . . . shall include coverage for neurodevelopmental therapies for covered individuals under the age of six." (Italics mine) RCW 48.44.450. The insurers note that since 1989, they have offered *individual* health plans that exclude neurodevelopmental therapy benefits and that the policies are priced accordingly, i.e. the insureds pay a lower premium than they would absent the exclusion.

This fundamental issue is pending in this court in two cases that are in line to be heard by a panel of judges in the July 2013 term: O.S.T. v. Regence Blue Shield, No. 69724-2-1 (review under RAP 2.2(d) based on trial court's CR 54(b) findings); and A.G. v. Premera Blue Cross and Lifewise of Washington, No. 68726-3-1 (discretionary review granted under RAP 2.3(b)).

In the present matter, in December 2012 the trial court certified a class under CR 23(b)(3) of all individuals, who are covered or have been covered under a non-ERISA health plan, and have required or require neurodevelopmental therapy for treatment of a qualified mental health condition. Also in December 2012, the trial court granted in part and denied in part Regence's motion to dismiss plaintiffs' claims for lack of standing. The court granted the motion with respect to plaintiff O.S.T.'s claim for injunctive relief because he is no longer an insured, denied the motion with respect to O.S.T.'s claim for damages, and denied the motion with respect to L.H.'s standing for declaratory and injunctive relief.

Regence now seeks discretionary review of the class certification order, arguing that the predominance and superiority requirements for class certification are not met. Regence argues that individual issues will predominate over common ones and that the statutory independent review process (IRO) in chapter 48.43 RCW is superior to class action litigation. Plaintiffs respond that class claims predominate and that the IRO process is unavailable/unhelpful because reviewers' statutory authority is limited to determining medical necessity or appropriateness of treatment consistent with the scope of covered benefits in the medical plan, i.e. it does not include determining whether a plan meets state law. RCW 48.43.535. See Z.D. v. Group Health Cooperative, No. C11-1119RSL (W.D. Wash. June 1, 2011), 2012 WL 1977962.

Regence also seeks review of that part of the order denying its motion to dismiss standing as to L.H. Regence argues that L.H. has not been diagnosed with a DSM-IV condition by a properly licensed professional, i.e. a medical doctor, and that Regence paid L.H.'s claims under the rehabilitation benefit in his policy. L.H. responds that he has been diagnosed by his therapists with a DSM-IV mental health condition, expressive language disorder. He also argues that although some claims were paid under the rehabilitation benefit, they no longer are because it has a limit on the number of visits that would not apply if his claims were processed as a mental health benefit.

Regence has raised debatable issues, but it has not demonstrated probable error that substantially alters the status quo or substantially limits its freedom to act. Even if Regence demonstrated probable error, it does not make practical sense for this court to take review of these issues now. As noted above, the fundamental mental health parity issue is pending in two cases which are expected to be heard by a panel of judges in July 2012. If the insurers prevail, it appears that the litigation will terminate. If the insureds prevail, the litigation presumably will go forward, although the possibility of settlement may increase. Moreover, the issue before the court on appeal is a discrete, legal issue. Even if the parties were able to comply with the expedited briefing schedule and also address the issues of class certification and standing, allowing review of these issues would unnecessarily complicate the appeal and make a timely decision on the fundamental statutory/parity issue more difficult.

Alternatively, Regence asks that this court stay the trial court proceedings pending the appeals in O.S.T. v. Regence Blue Shield, No. 69724-2-I, and A.G. v. Premera Blue Cross and Lifewise of Washington, No. 68726-3-I. The trial court is in a better position to determine whether a stay is appropriate.

Therefore, it is

ORDERED that discretionary review is denied."

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Johnson', with a long horizontal flourish extending to the right.

Richard D. Johnson
Court Administrator/Clerk

c: Honorable John Erlick

ssd

APPENDIX

C

HON. JOHN P. ERLICK
Noted for Hearing: November 26, 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

~~PROPOSED~~
ORDER CERTIFYING
NEURODEVELOPMENTAL CLASS
UNDER CIVIL RULE 23(b)(3)

THIS MATTER came before the Court based upon the Plaintiffs' Motion for Class Certification of Neurodevelopmental Therapy Class. Plaintiffs are represented by Eleanor Hamburger and Richard E. Spoonemore, SIRIANNI YOUTZ SPOONEMORE. Defendant is represented by Timothy J. Parker, CARNEY BADLEY SPELLMAN P.S.

The Court heard oral argument on November 2, 2012, and issued an oral decision at that time. In addition to oral argument, the Court reviewed and considered the pleadings and record herein, including:

- Plaintiffs' Motion for Class Certification;
- the Declaration of Richard E. Spoonemore;
- the Declaration Eleanor Hamburger;
- the Declaration of Frank Fox, Ph.D.;

ORIGINAL

ORDER CERTIFYING NEURODEVELOPMENTAL CLASS - 1

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

- 1 • the Declaration of Kathleen Sirianni;
- 2 • Defendants' Response to Motion for Class Certification;
- 3 • the Declaration of Jason Anderson;
- 4 • the Second Declaration of Joseph M. Gifford, M.D.;
- 5 • Plaintiffs' Reply in Support of Motion for Class Certification;
- 6 • Plaintiffs' Supplemental Brief on Class Certification;
- 7 • The Supplemental Declaration of Eleanor Hamburger;
- 8 • Regence's Response to Plaintiffs' Supplemental Brief on Class
- 9 Certification; and
- Plaintiffs' Supplemental Reply Brief in Support of Motion for Class Certification.

10 Based upon the foregoing, the Court hereby finds that all of the requirements of
11 Civil Rule 23 are met for the certification of a class and therefore GRANTS plaintiffs'
12 Motion for Class Certification of a Neurodevelopmental Class. The Court further
13 appoints class counsel and class representatives, and directs notice as set forth below.

14 **A. Standards**

15 Civil Rule 23 is to be liberally interpreted because it avoids the multiplicity of
16 litigation, saves members of the class the cost and trouble of filing individual lawsuits,
17 and also frees the defendant from the harassment of identical future litigation. A class
18 is always subject to later modification, or decertification and, therefore, the trial court
19 should err in favor of certifying the class. *Moeller v. Farmers Ins.*, 173 Wn.2d 264, 278,
20 267 P.3d 998 (2011); *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 318, 54 P.3d 665
21 (2002).

22 **B. Class Certification Under CR 23(a).**

23 **1. Numerosity**

24 With respect to CR 23(a)(1), the Court finds that the class can reasonably be
25 expected to number in the thousands, and is so numerous that joinder is impracticable.

26 Declaration of Frank Fox, Ph.D., ¶9; *Miller v. Farmer Brothers Co.*, 115 Wn. App. 815,

1 821, 64 P.3d 49 (2003) (classes exceeding 40 members typically satisfy the numerosity
2 requirement).

3 2. Commonality

4 The commonality requirement under CR 23(a)(2) is also met, as there are
5 common questions of law and fact that affect all members of the class. Plaintiffs
6 contend that Washington State's Mental Health Parity Act (the "Parity Act") requires
7 Regence to cover "mental health services," defined as any medically necessary
8 outpatient and in-patient service provided to treat a mental disorder covered by the
9 diagnostic categories in the DSM-IV-TR (subject to certain exceptions which are not
10 implicated here). Second Amended Complaint, ¶¶6-11, 17. Plaintiffs further contend
11 that the Parity Act renders void and unenforceable all health plan provisions that
12 exclude coverage or establish treatment limitations different than those generally
13 applied to medical and surgical services. *Id.* Adjudication of these common issues will
14 determine whether the plaintiffs and the class are entitled to declaratory and injunctive
15 relief, as well as damages for breach of contract and violations of the Consumer
16 Protection Act.

17 3. Typicality

18 The claims of the plaintiffs are typical of those of the class as required by CR
19 23(a)(3). Here, plaintiffs base their claims on the same legal theory as those of the class
20 as a whole, *i.e.*, that the Parity Act requires Regence to provide coverage for medically
21 necessary mental health services, including neurodevelopmental therapies designed to
22 treat qualified DSM-IV-TR mental health conditions. O.S.T. contends that he was
23 denied coverage for medically necessary treatment to treat his DSM-IV feeding
24 disorder and autism because of Regence's blanket exclusion of neurodevelopmental
25 therapies in these policies. L.H. maintains that his medically necessary treatment for
26 neurodevelopmental therapies has been curtailed in violation of the Parity Act. They

1 are both well-positioned to represent the interests of other individuals with DSM-IV-
2 TR conditions, who have required or will require neurodevelopmental therapies.

3
4 **4. Adequacy**

5 The Court also finds that the named plaintiffs are adequate class representatives
6 who have chosen counsel experienced in class actions of this nature. The named
7 plaintiffs and their counsel meet the requirement of adequate representation under CR
8 23(a)(4). The claims advanced by O.S.T. and L.H. are not in conflict with any interests
9 of the proposed class. In pursuing their claims, the named plaintiffs will necessarily
10 advance the interests of the entire class. Moreover, any class member who wishes to
11 exclude themselves from the class will be given an opportunity to opt-out.

12 The declarations of counsel who represent the plaintiffs establish that they are
13 well-qualified to represent the class. Declaration of Richard E. Spoonemore in Support
14 of Plaintiffs' Motion for Class Certification of Neurodevelopmental Therapy Class,
15 ¶¶2-7; Declaration of Eleanor Hamburger in Support of Plaintiffs' Motion for Class
16 Certification of Neurodevelopmental Therapy Class, ¶¶2-9. Counsel for the class
17 representatives has extensive experience in class actions. They also have ample
18 experience and have enjoyed considerable success in similar types of ERISA and non-
19 ERISA litigation, as well as in other class action litigation. Counsel has undertaken
20 significant steps to identify and investigate potential claims. The Court is satisfied that
21 they have, and will, commit adequate resources to conduct this litigation. The Court
22 therefore finds that the plaintiffs' attorneys are qualified, experienced and able to
23 pursue the legal interests of the entire proposed class. The requirements of CR 23(b)(4)
24 are satisfied.

25 **C. Class Certification Under CR 23(b)(3).**

26 Finally, the Court finds that certification under CR 23(b)(3) is appropriate.
Common questions of law or fact predominate over the questions affecting individual

1 class members. Specifically, the questions of whether Regence may (1) exclude
2 neurodevelopmental therapies that are medically necessary to treat class members'
3 qualifying DSM-IV-TR mental health conditions or (2) limit these therapies when those
4 limitations are not generally applied to medical and surgical services predominate over
5 individual issues, such as medical necessity and damages. *Sitton v. State Farm Mut.*
6 *Auto Ins. Co.*, 116 Wn. App. 245, 254-56, 63 P.3d 198 (2003).

7 Resolving this dispute within the context of a class action is superior and more
8 efficient than other methods of adjudications, and class-wide resolution would
9 promote uniformity. The plaintiffs have raised a common issue — Regence's
10 compliance with the Parity Act — which is central to the claims of all class members.
11 The Court recognizes that individual issues may pose management issues as this case
12 progresses. Nonetheless, given the broad discretion afforded to trial courts under
13 CR 23(b)(3), the Court does not find that this case would be unmanageable given that it
14 has a wide variety of management options available to it. *Sitton*, 116 Wn. App. at 256,
15 259-60.

16 **D. Class Definition.**

17 Accordingly, the Court hereby CERTIFIES the following Neurodevelopmental
18 Therapy Class under CR 23(b)(3):

19 All individuals who (1) are, or have been covered under a
20 non-ERISA group "health plan" as that term is defined by
21 RCW 48.43.005(19), that has been or will be delivered,
22 issued for delivery, or renewed on or after January 1, 2006
23 by Regence BlueShield, a Washington corporation, or an
24 individual "health plan" as that term is defined by RCW
25 48.43.005(19), that has been or will be delivered, issued for
26 delivery, or renewed on or after January 1, 2008 by Regence
BlueShield, a Washington corporation, and (2) have
required or require neurodevelopmental therapy for the
treatment of a *qualified mental health condition*.

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Definitions: For purposes of the class, the phrase "qualified mental health condition" shall mean a condition listed in the DSM-IV-TR other than (a) substance related disorders and (b) life transition problems, currently referred to a "V" codes, and diagnostic codes 302 through 302.9 as found in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, published by the American Psychiatric Association, where the service received, required, or expected to be required is not properly classified as skilled nursing facility services, home health care, residential treatment, custodial care or non-medically necessary court-ordered treatment.

E. Appointment of Class Counsel and Class Representatives.

The Court appoints SIRIANNI YOUTZ SPOONEMORE, Richard Spoonemore and Eleanor Hamburger, as class counsel, and names plaintiffs O.S.T. and L.H. (by and through their parents) as the class representatives.

F. Notice.

Class counsel shall draft and submit for Court approval a form of notice within 21 days after this Order. The proposed form of notice shall comply with the requirements of CR 23(c)(2), including the right to opt-out of the action. At that time, class counsel shall also file a notice plan for review and approval by the Court.

DATED this 13th day of ^{December} ~~November~~, 2012.



John P. Erlick
Superior Court Judge

1 Presented by:

2 SIRIANNI YOUTZ SPOONEMORE

3

4 /s/ Richard E. Spoonemore

Richard E. Spoonemore (WSBA #21833)

5 Eleanor Hamburger (WSBA #26478)

r Spoonemore@sylaw.com + ehamburger@sylaw.com

6 Attorneys for Plaintiffs

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APPENDIX

D

HON. JOHN P. ERLICK
Noted for Hearing: November 21, 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

[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

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.

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

- Plaintiff's Motion for Partial Summary Judgment re: Neurodevelopmental
Therapy Exclusion;
- Declaration of G.T. and the exhibits attached thereto;

ORIGINAL

ORDER GRANTING PLTFFS' MOTION FOR PARTIAL SUMMARY
JUDGMENT RE: NEURODEVELOPMENTAL THERAPY
EXCLUSION AND DENYING DEF'S CROSS MOTION - 1

SIRIANNI YOUTZ SPOONEMORE
999 THIRD AVENUE, SUITE 3650
SEATTLE, WASHINGTON 98104
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- Declaration of Eleanor Hamburger and the exhibits attached thereto;
- Declaration of Kathleen Sirianni;
- Defendant's Opposition and Cross Motion For Partial Summary Judgment;
- Declaration of Timothy J. Parker and all exhibits attached thereto;
- Declaration of Rosey Messinger and all exhibits attached thereto;
- Declaration of Joseph M. Gifford, M.D., and all exhibits attached thereto;
- Plaintiff's Reply briefing in support of Plaintiff's Motion for Partial Summary Judgment;
- Supplemental Declaration of Eleanor Hamburger and all exhibits attached thereto;
- Declaration of Charles A. Cowan, M.D.;
- Plaintiff's Supplemental Briefing in Support of Plaintiff's Motion for Partial Summary Judgment and in Opposition to Defendant's Motion to Dismiss;
- Declaration of Kimberly MacDonald
- Declaration of Patricia Moroney and all exhibits attached thereto;
- Declaration of Eleanor Hamburger and all exhibits attached thereto;
- Regence BlueShield's Response to Plaintiff's Supplemental Brief in Standing and Justiciability;
- Declaration of Timothy J. Parker and all exhibits attached thereto;
- Declaration of Richard Rainey, M.D., and all exhibits attached thereto;
- Plaintiff's Consolidated Supplemental Reply Brief in Support of Plaintiffs' Motion for Partial Summary Judgment and in opposition to Defendant's Motions to Dismiss;
- Declaration of Eleanor Hamburger and all exhibits attached thereto;
- Supplemental Declaration of Kimberly MacDonald and all exhibits attached thereto; and
- Supplemental Declaration of Charles A. Cowan, M.D.

1 Based upon the foregoing, the Court hereby GRANTS Plaintiffs' Motion to for
2 Partial Summary Judgment re: Neurodevelopmental Therapy Exclusion, and DENIES
3 Regence's Cross-Motion for Summary Judgment.

4 1. Given the broad mandate regarding mental health services in the Mental
5 Health Parity Act, RCW 48.44.341, and pursuant to Washington's Declaratory
6 Judgment Act, RCW 7.24, *et seq.*, Plaintiffs O.S.T. and L.H. are entitled to a declaration
7 that Regence's exclusion of neurodevelopmental therapy violates Washington public
8 policy and the Mental Health Parity Act. The Court declares such exclusion void and
9 unenforceable in this case.

10 2. Under the Mental Health Parity Act Regence must provide coverage for
11 all medically necessary "mental health services" to the same extent that it provides
12 such coverage for other medical or surgical services. Neurodevelopmental therapies
13 ~~are~~ ^{include} ~~see~~ mental health services designed to treat expressive language disorder, feeding
14 disorders, phonological disorders and autism, disorders which are listed in the DSM-
15 IV. Since neurodevelopmental therapies can be medically necessary to treat all of these
16 conditions, Regence cannot use a blanket exclusion to deny coverage for
17 neurodevelopmental therapies.

18 3. This Court does not have to supersede or void the provisions of
19 RCW 48.44.450, the Neurodevelopmental Therapy Act, to reach its ruling. Under rules
20 of statutory construction, courts do not interpret statutes in isolation. Courts interpret
21 statutes *in pari materia*, considering all statutes on the same subject, taking into account
22 all that the legislature has said on that subject and attempting to create a unified whole,
23 Hallauer v. Spectrum Properties, Inc., 143 Wn.2d 126 (2001). Both the
24 Neurodevelopmental Therapy Act and the Mental Health Parity Act can be read
25 together and harmonized. The Neurodevelopmental Therapy Act only creates a
26 minimum level of required coverage. Defendant Regence must meet the requirements

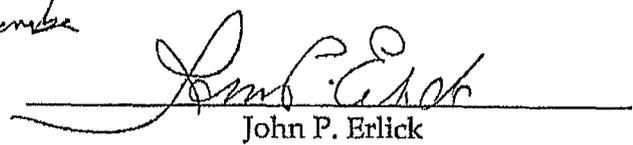
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of both Acts, the Mental Health Parity Act as well as the Neurodevelopmental Therapy Act and, accordingly, must provide coverage for medically necessary neurodevelopmental therapy for DSM-IV-TR diagnosed conditions.

It is therefore ORDERED that any provisions contained in Regence policies issued and delivered to Plaintiffs O.S.T. and L.H. on or after January 1, 2008 that exclude coverage of neurodevelopmental therapies regardless of medical necessity are declared invalid, void and unenforceable by Defendant and its agents.

DATED this 12th day of November, 2012.

December



John P. Erlick
Superior Court Judge

Presented by:

SIRIANNI YOUTZ SPOONEMORE

/s/ Richard E. Spoonemore
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 November 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
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: November 13, 2012, at Seattle, Washington.

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

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APPENDIX

E

FILED
KING COUNTY WASHINGTON

MAY 22 2013

HON. MICHAEL J. TRICKEY
Noted for Presentation: May 16, 2013
Without Oral Argument

SUPERIOR COURT CLERK
BY Gaylor Greer
DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

A.G., by and through his parents, J.G. and
K.G., and K.N. and T.N., by and through
their parents P.N. and L.N., each on his or
her own behalf and on behalf of all similarly
situated individuals,

Plaintiffs,

v.

PREMERA BLUE CROSS and LIFEWISE OF
WASHINGTON, Washington corporations,

Defendants.

NO. 11-2-30233-4 SEA

MSJ
[PROPOSED] ORDER:

- (1) GRANTING PLAINTIFFS'
MOTION FOR CLASS
CERTIFICATION;
- (2) ORDERING CLASSWIDE
INJUNCTIVE RELIEF; AND
- (3) INSTRUCTING CLASS TO SEEK
PERMISSION FOR ENTRY OF
ORDER UNDER RAP 7.2 (e)

THIS MATTER came before the Court after the Court granted Plaintiffs' Motion for Leave to File For Class Certification and Injunctive Relief under RAP 7.2(e), and based on Plaintiffs' Motion for Class Certification and Injunctive Relief. The Court heard oral argument on May 2, 2013. Plaintiffs were represented by Eleanor Hamburger and Richard E. Spoonemore, SIRIANNI YOUTZ SPOONEMORE HAMBURGER. Defendants Premera Blue Cross and Lifewise of Washington ("Defendants") were represented by Barbara J. Duffy, and Gwendolyn C. Payton, LANE POWELL PC.

I. MATERIAL CONSIDERED

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

- Plaintiffs' Motion for Class Certification and Injunctive Relief;

ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION AND ISSUING INJUNCTIVE RELIEF - 1

ORIGINAL

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER
999 THIRD AVENUE, SUITE 3650
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- 1 • the Declaration of J.G.;
- 2 • the Declaration of P.N.;
- 3 • Declaration of Eleanor Hamburger and the exhibits attached thereto;
- 4 • Defendants' Opposition to Plaintiffs' Motion for Class Certification;
- 5 • Defendants' Opposition to Plaintiffs' Motion for Injunctive Relief;
- 6 • Declaration of Barbara J. Duffy in Support of Defendants' Opposition to
- 7 Class Certification and Injunctive Relief, and all exhibits attached thereto;
- 8 • Plaintiffs' Reply in Support of Class Certification;
- 9 • Plaintiffs' Reply in Support of Classwide Injunctive Relief;
- 10 • The Supplemental Declaration of Eleanor Hamburger and the exhibits
- 11 attached thereto.

12 • Defendants' objection to the proposed order. MR

13 **II. PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

14 Based upon the foregoing, the Court hereby finds that all of the requirements of
15 Civil Rule 23 are met for the certification of a class and therefore GRANTS plaintiffs'
16 Motion for Class Certification. The Court appoints class counsel and class
17 representatives and directs notice as set forth below.

18 **A. Standards**

19 Civil Rule 23 is to be liberally interpreted because it avoids the multiplicity of
20 litigation, saves members of the class the cost and trouble of filing individual lawsuits,
21 and also frees the defendant from the harassment of identical future litigation. A class
22 is always subject to later modification, or decertification and, therefore, the trial court
23 should err in favor of certifying the class. *Moeller v. Farmers Ins.*, 173 Wn.2d 264, 278,
24 267 P.3d 998 (2011); *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 318, 54 P.3d 665
25 (2002).
26

1 **B. Class Certification Under CR 23(a).**

2 **1. Numerosity**

3 With respect to CR 23(a)(1), the Court finds that the class can reasonably be
4 expected to number in the thousands, and is so numerous that joinder is impracticable.
5 Declaration of Frank Fox, Ph.D., ¶9; *Miller v. Farmer Brothers Co.*, 115 Wn. App. 815,
6 821, 64 P.3d 49 (2003) (classes exceeding 40 members typically satisfy the numerosity
7 requirement).

8 **2. Commonality**

9 The commonality requirement under CR 23(a)(2) is also met, as there are
10 common questions of law and fact that affect all members of the class. Plaintiffs
11 contend that Washington State's Mental Health Parity Act (the "Parity Act") requires
12 Premera to cover "mental health services," defined as any medically necessary
13 outpatient and in-patient service provided to treat a mental disorder covered by the
14 diagnostic categories in the DSM-IV-TR (subject to certain exceptions which are not
15 implicated here). Amended Complaint, ¶¶ 29-30, 31-34, 35-37. Plaintiffs further
16 contend that the Parity Act renders void and unenforceable all health plan provisions
17 that exclude coverage or establish treatment limitations different than those generally
18 applied to medical and surgical services. *Id.* Adjudication of these common issues will
19 determine whether the plaintiffs and the class are entitled to declaratory and injunctive
20 relief, as well as damages for breach of contract and violations of the Consumer
21 Protection Act.

22 **3. Typicality**

23 The claims of the plaintiffs are typical of those of the class as required by
24 CR 23(a)(3). Here, plaintiffs base their claims on the same legal theory as those of the
25 class as a whole, *i.e.*, that the Parity Act requires Premera to provide coverage for
26 medically necessary mental health services, including neurodevelopmental therapies

1 designed to treat qualified DSM-IV-TR mental health conditions. Plaintiffs A.G., K.N.
2 and T.N. contend that they were denied medically necessary treatment to treat their
3 DSM-IV conditions of autism because of Premera's blanket exclusions and limitations
4 on coverage of neurodevelopmental therapies in these policies. They are all well-
5 positioned to represent the interests of other individuals with DSM-IV-TR conditions,
6 who have required or will require neurodevelopmental therapies.

7
8 **4. Adequacy**

9 The Court also finds that the named plaintiffs are adequate class representatives
10 who have chosen counsel experienced in class actions of this nature. The named
11 plaintiffs and their counsel meet the requirement of adequate representation under
12 CR 23(a)(4). The claims advanced by A.G., K.N. and T.N. are not in conflict with any
13 interests of the proposed class. In pursuing their claims, the named plaintiffs will
14 necessarily advance the interests of the entire class. Moreover, any class member who
15 wishes to exclude themselves from the class will be given an opportunity to opt-out.

16 The declarations of counsel who represent the plaintiffs establish that they are
17 well-qualified to represent the class. Spoonemore Decl. (2/17/12), ¶¶ 2-7; Hamburger
18 Decl. (2/21/12), ¶¶ 2-9. Counsel for the class representatives has extensive experience
19 in class actions. They also have ample experience and have enjoyed considerable
20 success in similar types of ERISA and non-ERISA litigation, as well as in other class
21 action litigation. Counsel has undertaken significant steps to identify and investigate
22 potential claims. The Court is satisfied that they have, and will, commit adequate
23 resources to conduct this litigation. The Court therefore finds that the plaintiffs'
24 attorneys are qualified, experienced and able to pursue the legal interests of the entire
25 proposed class. The requirements of CR 23(b)(4) are satisfied.
26

1 **C. Class Certification Under CR 23(b)(3)**

2 Finally, the Court finds that certification under CR 23(b)(3) is appropriate.
3 Common questions of law or fact predominate over the questions affecting individual
4 class members. Specifically, the questions of whether Premera may (1) exclude
5 neurodevelopmental therapies that are medically necessary to treat class members'
6 qualifying DSM-IV-TR mental health conditions or (2) limit these therapies when those
7 limitations are not generally applied to medical and surgical services predominate over
8 individual issues, such as medical necessity and damages. *Sitton v. State Farm Mut.*
9 *Auto Ins. Co.*, 116 Wn. App. 245, 254-56, 63 P.3d 198 (2003).

10 Resolving this dispute within the context of a class action is superior and more
11 efficient than other methods of adjudications, and class-wide resolution would
12 promote uniformity. The plaintiffs have raised a common issue -- Premera's
13 compliance with the Parity Act -- which is central to the claims of all class members.
14 Given the broad discretion afforded to trial courts under CR 23(b)(3), the Court does
15 not find that this case would be unmanageable given that it has a wide variety of
16 management options available to it. *Sitton*, 116 Wn. App. at 256, 259-60.

17 **III. CLASSWIDE INJUNCTIVE RELIEF**

18 The Court hereby GRANTS Plaintiff's Motion for Classwide Injunctive Relief
19 and enters the following findings of fact and conclusions of law as required by
20 CR 52(a)(2)(A). See *Turner v. City of Walla Walla*, 10 Wn. App. 401, 405, 517 P.2d 985
21 (1974).

22 **A. Civil Rule 52(a)(2)(A) Findings of Fact.**

23 1. Plaintiff A.G. is the 13 year old son of J.G. and K.G. who live in Renton,
24 Washington. J.G. Decl., ¶2.

1 2. In 2006, Plaintiff A.G. was diagnosed with autism by a licensed
2 psychologist and speech language pathologist, both at Seattle Children's Hospital. *Id.*,
3 ¶3.

4 3. In 2007, Plaintiff A.G.'s pediatrician, Dr. MacPherson, referred him to
5 Valley Medical Center's Children's Therapy Program ("Valley") for
6 neurodevelopmental evaluation and therapy. *Id.*, ¶4. The evaluations by Valley's
7 therapists recommended that Plaintiff A.G. receive weekly occupational therapy and
8 speech therapy. *Id.*, ¶5.

9 4. Premera Blue Cross is the nonprofit owner of Lifewise Health Plan of
10 Washington. Hamburger Decl., *Exh. B*. Both Premera Blue Cross and Lifewise Health
11 Plan of Washington are licensed health care service contractors in Washington state,
12 also known as "health carriers." *Id.*; see RCW 48.43.005(23).

13 5. Plaintiff A.G. is and has been insured under an individual policy issued
14 by Lifewise Health Plan of Washington since at least January 1, 2006. J.G. Decl., ¶2; see
15 Duffy Decl. (10/12/11), ¶2, *Exh. A*.

16 6. Plaintiff A.G. received neurodevelopmental speech and occupational
17 therapy from Valley Medical Center's Children's Therapy Clinic since 2007. J.G. Decl.,
18 ¶¶4-5. Valley submitted the bills for A.G.'s speech and occupational therapy services
19 to Lifewise, which paid for the services, at least for the first twenty visits. *Id.*, ¶9.
20 Lifewise never questioned the medical necessity of the visits. *Id.*

21 7. In late July, 2011, Plaintiff A.G.'s parents received an envelope with forms
22 called "Explanations of Benefits" (EOBs) from Lifewise. *Id.* ¶10, *Exh. A*. These
23 documents revealed that Lifewise had conducted a retrospective review of the
24 neurodevelopmental therapy provided to A.G. since January 1, 2010, and determined
25 that, in its view, all of the therapy was incorrectly covered. *Id.* The EOBs stated "our
26 medical staff reviewed this claim and determined this service is not covered by your

1 plan." *Id.* In sum, Lifewise determined that nearly \$24,000 in neurodevelopmental
2 therapies had been improperly paid, and that A.G.'s parents were financially
3 responsible for all of the treatment. *Id.*

4 8. A.G.'s father called Lifewise to object to the determination and to request
5 an explanation. *Id.*, ¶¶12-14. On August 12, 2011, Lifewise sent J.G. a letter confirming
6 the decision. Lifewise maintained that there was no coverage for neurodevelopmental
7 therapies because of an explicit exclusion in its policy:

8 This letter is being issued to provide confirmation the following listed of
9 claims (*sic*) were processed incorrectly and will be adjusted as
10 Neurodevelopment[al] therapy is not a covered benefit under the above
11 listed policy.

12 *Id.*, ¶13, *Exh. B.* Lifewise included a copy of the relevant section of A.G.'s contract
13 which contained the only exclusion it relied upon:

14 EXCLUSIONS

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

17 ...

18 Learning Disorders and Neurodevelopmental Therapy

19 Services, therapy and supplies related to the treatment of learning
20 disorders, cognitive handicaps, dyslexia, *developmental delay or*
21 *neurodevelopmental disabilities.*

22 *Id.*, *Exh. B.*, Contract pp. 30-31 (emphasis added); *see also*, Duffy Decl., *Exh. A.*, pp. 30-31.

23 9. Since Lifewise retroactively denied coverage of Plaintiff A.G.'s therapy
24 services, his parents had been forced to eliminate his speech therapy. *Id.*, ¶15. His
25 parents may be forced to reduce or eliminate his occupational therapy. *Id.*, ¶17. Valley
26 Medical Center has begun to bill Plaintiff A.G.'s parents for the amount retroactively
denied by Premera. *Id.*, ¶¶18; 20. Valley has sent collections notices and calls to
Plaintiff A.G.'s parents. *Id.*

1 10. K.N. and T.N. are the daughters of P.N. and L.N. They are six and four
2 years old, respectively. They are both diagnosed with autism. P.N. Decl. (10/12/12),
3 ¶¶ 3-8. K.N. and T.N. are covered under an individual insurance policy issued by
4 Lifewise. *Id.*

5 11. Their mother was told by Premera on at least two occasions that their
6 neurodevelopmental therapies were excluded under their Lifewise contract.
7 Hamburger Decl. (4/4/13), *Exh. F*, P.N. Dep., pp. 34-36; 48-50.

8 12. Nonetheless both girls received limited coverage of speech and
9 occupational therapy services to treat their autism in 2012. P.N. Decl. (10/12/12),
10 ¶¶ 3-8. Lifewise contends that the coverage was provided pursuant to the plaintiffs'
11 rehabilitation benefit.

12 13. When T.N. and K.N. reached 20 sessions of speech, occupational and
13 physical therapies combined, Lifewise stopped its coverage for the therapies. *Id.*, ¶ 8.

14 14. Their mother, P.N., appealed the denial of coverage in June and August
15 of 2012, requesting coverage of this medically necessary treatment for their DSM-IV
16 condition of autism without the rehabilitation benefit's treatment limits, but Lifewise
17 asserted that it was irrelevant whether either girl needed the service, or whether the
18 service was properly a mental health service. *See id.*, ¶ 12, *Exhs. E, F, G, and H.*

19 15. Dr. Stephen Glass, Plaintiffs' expert neurologist opines that access to
20 neurodevelopmental therapies to treat DSM-IV conditions is an essential health benefit
21 for children with developmental disabilities. Glass Decl. (10/12/12), ¶¶ 5-9.

22 Children who need these therapies, but do not receive them (or do not
23 receive them in a timely manner and at the required intensity) are likely to
24 lose the opportunity to have the impact of their developmental deficits
25 reduced to the maximum degree or, to enjoy the prospects of their
26 development being restored to normal functioning, or at the very least, as
near to normal functioning as possible. The harm attendant in the delay
to provide EI [Early Intervention] services is real and substantial.

1 Especially for the very young child, losing access to needed therapies in a
2 timely manner can make reversible or treatable developmental conditions
3 more severe, of greater long-term functional impact and at times,
4 devastating, and unneeded, consequences may be seen.

5 *Id.*, ¶ 8. Early intervention can mean the difference between near normal development
6 and life-long disability. Providing this therapy to young children when they are two,
7 three or four years old is of extraordinarily greater value than providing it when they
8 are one or more years older. *Id.*, ¶ 6.

9 **B. CR 52(a)(2)(A) Conclusions of Law.**

10 1. A plaintiff is entitled to a preliminary injunction when "(1) he has a clear
11 legal or equitable right, (2) he has a well-grounded fear of immediate invasion of that
12 right, and (3) that the acts he is complaining of have or will result in actual and
13 substantial injury." *DeLong v. Parmelee*, 157 Wn. App. 119, 150-51, 236 P.3d 936, 951-52
14 (2010).

15 2. On April 17, 2012, the Court concluded that Defendants' exclusion for
16 "[s]ervices, therapy and supplies related to the treatment of ... developmental delay or
17 neurodevelopmental disabilities" - violate Washington public policy and the Mental
18 Health Parity Act. The Court further concluded that "neurodevelopmental therapies
19 are "mental health services" designed to treat autism, a mental disorder listed in the
20 DSM-IV." At that time, the Court ordered Premera to not apply the
21 Neurodevelopmental therapy exclusion in Plaintiff A.G.'s contract, and to review "any
22 new claims submitted by Plaintiff A.G. and/or his providers for Neurodevelopmental
23 therapy as a mental health benefit, and consistent with all other provisions in Plaintiff
24 A.G.'s contract, including medical necessity."

25 3. Now that a class has been certified, the Class has a "clear legal and
26 equitable right" to the same declaratory and injunctive relief issued to Plaintiff A.G.

1 4. The Class has a well-grounded fear of immediate invasion of that right
2 given that Defendants admit that they have not changed their health plan language or
3 coverage policies for any insured other than Plaintiff A.G. based upon the Court's
4 April 17, 2012 Order. Defendants admit that they have denied, and continue to deny,
5 coverage of class members' neurodevelopmental therapy under the
6 neurodevelopmental therapy exclusion (whether at birth in their individual plans or
7 after age six in their group plans) and do not cover neurodevelopmental therapies as a
8 mental health benefit.

9 5. Defendants' exclusion has caused the Class actual and substantial harm
10 and will continue to do so unless enjoined. With timely services, class members are
11 likely to be less disabled, have fewer long-term care needs, and may avoid costly,
12 complex and risk-laden treatment or procedures. Glass Decl., ¶ 9. Without the
13 services, children with conditions that could have been reversed or treated, end up
14 more impaired, with greater long-term functional disabilities, and, at times,
15 experiencing devastating and avoidable consequences. *Id.*, ¶ 8; *see, e.g., LaForest v.*
16 *Former Clean Air Holding Co., Inc.*, 376 F.3d 48, 55 (2d Cir. 2004). Money damages are
17 insufficient to compensate the Class for the resulting developmental loss. *See*
18 *Washington Fed'n of State Employees (WSFE), Council 28, AFL-CIO v. State*, 99 Wn. 2d 878,
19 891, 665 P.2d 1337 (1983) (It is "well nigh irrefutable" that a cancellation of health
20 insurance is an injury that has no remedy at law).

21 6. Under the balancing of the relative interests of the parties and the public,
22 the balance tips in favor of issuing a preliminary injunction. *Kucera v. State, Dept. of*
23 *Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000). The loss of medically necessary
24 therapies needed to maintain and improve a disabled child's functioning at a critical
25 time in his development causes actual and substantial injury. In contrast, *Premera*
26

1 suffers no hardship when it is enjoined from enforcing a provision of its contracts that,
2 as this Court has concluded violate state law and public policy.

3 7. Any bond requirement is waived under RCW 7.40.080 because "a
4 person's health ... would be jeopardized" without this preliminary injunction.

5 IV: CONCLUSION

6 It is therefore ORDERED that Plaintiffs' Motion for Class Certification and
7 Injunctive Relief is GRANTED in full. It is further ORDERED that:

8 A. Class Definition:

9 The Class shall be defined as all individuals

- 10 (1) covered under a non-ERISA large group "health plan" as that term is
11 defined by RCW 48.43.005 (19), that has been or will be delivered,
12 issued for delivery, or renewed on or after January 1, 2006 by *Premera*
13 or an individual or small group "health plan" as that term is defined
14 by RCW 48.43.005 (19), that has been or will be delivered, issued for
15 delivery or renewed on or after January 1, 2008 by *Premera*; and
16 (2) who have required, require, or are expected to require
17 neurodevelopmental therapy for the treatment of a qualified mental
18 health condition.

17 Definitions:

- 18 (1) the term "*Premera*" shall mean (a) *Premera Blue Cross*; (b) *Lifewise*
19 of Washington; (c) any affiliate of defendant; (d) predecessors or
20 successors in interest of any of the foregoing; and (e) all subsidiaries
21 or parent entities of any of the foregoing; and
22 (2) the term "qualified mental health condition" shall mean a condition
23 listed in the DSM-IV-TR other than (a) substance related disorders
24 and (b) life transition problems, currently referred to as "V" codes,
25 and diagnostic codes 302 through 302.9 as found in the Diagnostic
26 and Statistical Manual of Mental Disorders, Fourth Edition,
published by the American Psychiatric Association, where the
service received, required, or expected to be required is not properly
classified as skilled nursing facility services, home health care,

1 residential treatment, custodial care or non-medically necessary
2 court-ordered treatment.

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

4 The Court appoints SIRIANNI YOUTZ SPOONEMORE HAMBURGER, Richard
5 Spoonemore and Eleanor Hamburger, as class counsel, and names plaintiffs A.G., K.N.
6 and T.N. (by and through their parents) as the class representatives.

7 **C. Entry of this Order.**

8 This Order shall not be entered until permission is granted by the appropriate
9 appellate court pursuant to RAP 7.2(e).

10 **D. Notice**

11 Class counsel shall draft and submit for Court approval a form of notice within
12 7 days after entry of this Court's Order. The proposed form of notice shall comply with
13 the requirements of CR 23(c)(2), including the right to opt-out of the action. The Notice
14 shall also inform class members of the Court's Order regarding classwide injunctive
15 relief. Class counsel shall, at the same time, file a notice plan for review and approval
16 by the Court.

17 **E. Injunctive Relief**

18 **1. Defendants' Neurodevelopmental Therapy Exclusions Are
19 Stricken.**

20 The provisions contained in class members' health plans that exclude coverage
21 of neurodevelopmental therapies to treat DSM-IV conditions covered by the Mental
22 Health Parity Act are declared invalid, void and unenforceable by Defendants and
23 their agents.

24 **2. Classwide Injunctive Relief.**

25 Defendants shall not apply the neurodevelopmental therapy exclusion in class
26 members' health plans (whether at birth in the defendants' individual plans or after

1 age six in defendants' group plans) to their requests for coverage of
2 neurodevelopmental therapy services while this litigation is ongoing. Defendants shall
3 review class members' claims for neurodevelopmental therapies as a mental health
4 benefit and consistent with all other provisions in class members' contracts, including
5 medical necessity.

6 **F. Issues Reserved**

7 The Court reserves ruling on whether Premera may impose visit limits on
8 neurodevelopmental mental health services when such limits are not generally applied
9 to medical and surgical services.

10 DATED this 22nd day of May, 2013.

11
12
13 
14 Michael J. Trickey
15 Superior Court Judge

16 Presented by:

17 SIRIANNI YOUTZ
18 SPOONEMORE HAMBURGER

19 
20 Eleanor Hamburger (WSBA #26478)
21 Richard E. Spoonemore (WSBA #21833)
22 Attorneys for Plaintiffs
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