

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. on their own behalf
and on behalf of all similarly situated
individuals,

Plaintiffs,

v.

WASHINGTON STATE HEALTH CARE
AUTHORITY, et al.,

Defendants.

NO. 10-2-29400-7 SEA

CLASS'S MOTION FOR PARTIAL
SUMMARY JUDGMENT RE:
COVERAGE OF ABA THERAPY
PROVIDED BY CERTIFIED
COUNSELORS

I. INTRODUCTION

On June 7, 2011, the Court found in favor of Plaintiffs' Motion for Partial Summary Judgment, holding that HCA was required to cover medically necessary Applied Behavior Analysis (ABA) therapy, as determined on an individualized basis, when provided by licensed providers. Order (6/7/11), p.4. At that time, the Court reserved ruling on whether HCA is required to cover ABA therapy when provided by certified – as opposed to licensed – health providers.¹ *Id.*

¹ The Class does not seek a determination about coverage of services provided by "registered" counselors, since that classification is no longer in existence.

1 Since June 2011, three things have occurred that render it necessary for
2 the Court to consider whether HCA may exclude or deny coverage of medically
3 necessary ABA therapy services when provided by a certified counselor.

4 **First**, the parties have reached a temporary stipulation which effectively
5 removes the blanket exclusion of ABA therapy from the 2011 Certificate of Coverage.
6 Under the Stipulation, HCA must ensure that requests for coverage of ABA therapy are
7 reviewed for coverage in a manner similar to other mental health services:

8 Under this stipulation, claims will be processed in the same
9 manner as all other claims for mental health services under
10 the Uniform Medical Plan (UMP) Certificate of Coverage,
11 including the standard UMP medical necessity definition and
approved providers.

12 Hamburger Decl. (11/29/11), *Exh. C*, July 17, 2011 Stipulation, ¶7. The parties have
13 agreed that the stipulation will stay in place until the conclusion of this litigation. *Id.*,
14 Second Addendum to the July 17, 2011 Stipulation.

15 **Second**, class members have begun to submit claims in accordance with
16 the Stipulation. Claims have been denied because the services described in the claims
17 were provided by certified counselors. *See id.*, *Exhs. M, N* (appeals filed on behalf of
18 class members S.F. and M.F.). HCA's counsel has confirmed that Regence/UMP will
19 **deny** claims for coverage of ABA therapy services when those services are provided by
20 certified counselors. *See id.*, *Exh. O*, Burke-Cain letter (11/23/11) ("We did not
21 stipulate to cover claims that are submitted by providers who have no Washington
22 license. We did not stipulate to cover claims for services when the actual provider is
23 unlicensed and the licensed provider is billing for the work of an unlicensed
24 provider").

25 **Third**, extensive additional discovery has been taken. Specifically, HCA's
26 employee charged with monitoring and implementing the UMP/Regence contract,

1 Janie Hansen testified that the *2011 Certificate of Coverage does not exclude of*
2 *coverage of mental health services provided by certified counselors. Id., Exh. P*, Hansen
3 Dep. pp. 43:1-7; 48:15-49:5.

4 Plaintiffs now move for partial summary judgment to obtain a
5 declaration that defendants may not deny coverage of medically necessary ABA
6 therapy to Class members when that service is provided by a certified counselor.
7 HCA's 2011 Certificate of Coverage includes coverage for medically necessary mental
8 health services provided by certified counselors. As a matter of contract law, HCA
9 cannot exclude coverage of medically necessary ABA therapy simply because the
10 therapy is provided by a certified counselor.

11 II. EVIDENCE RELIED UPON

12 The Class relies upon the Declaration of Eleanor Hamburger and all
13 attached exhibits, as well as the pleadings, records and files in this case.

14 III. FACTS

15 A. Certified Counselors Are Authorized by the Washington 16 Department of Health to Provide Counseling Services.

17 Starting July 1, 2009, Washington state created eight (8) different
18 counseling credentials, all monitored by the Washington Department of Health.
19 Hamburger Decl. (11/29/11), *Exh. Q* (Washington State Dept. of Health fact sheet). As
20 of July 1, 2010, the former "registered counselor" credential was abolished.
21 RCW 18.19.902. The classification of certified counselor was retained, and applies to
22 individuals who have at least a bachelor's degree in a counseling-related field, and
23 who have otherwise completed the Washington Department of Health requirements
24 for certification. Certified counselors have a specific statutory scope of practice that is
25 fairly broad. *See* RCW 18.19.200 ("Certified counselors ... may counsel and guide a
26 client in adjusting to life situations, developing new skills, and making desired

1 changes, in accordance with the theories and techniques of a specific counseling
2 method and established practice standards...”). ABA therapy is included within that
3 scope of practice. *See, e.g.*, Shook Decl. (1/26/11), ¶¶5-7; Fabrizio Decl. (1/27/11), ¶5.
4 Many certified counselors in the State of Washington provide ABA therapy. *Id.*, ¶4;
5 Shook Decl., ¶7; Hamburger Decl. (11/29/11), *Exh. T*.

6 **B. The 2011 Certificate of Coverage for HCA’s Uniform Medical**
7 **Plan (UMP) Does Not Exclude Coverage for Services Provided**
8 **by Certified Counselors.**

9 HCA asserts that it only provides coverage for mental health services
10 provided by licensed providers. *See* Def.’s Reply in Supp. of Cross Mot. for Summ. J.
11 (1/21/11), p. 3; Hamburger Decl. (11/29/11), *Exh. O*, Burke-Cain letter, p. 3
12 (11/23/11). Yet the 2011 Certificate of Coverage does not contain such a limitation.²
13 The Certificate of Coverage permits the provision of mental health services by a
14 certified provider. It defines a “provider” as:

15 ... an individual medical professional (such as a doctor or a
16 nurse), hospital, skilled nursing facility, pharmacy, program,
17 equipment and supply vendor, or other facility, organization
18 or entity that provides care or bills for health care services or
19 products.

20 Hamburger Decl. (11/29/11), *Exh. R*, 2011 UMP Certificate of Coverage p. 103. The
21 definition of “provider” is not limited to licensed professionals. Rather, it includes any
22 “individual medical professional” who provides care or bills for health care services.
23 *Id.*

24 There is a specific contractual exclusion for “registered counselors” under
25 the Mental Health services benefits and under the list of general exclusions. *Id.*,

26 ² HCA previously conceded that its Certificate of Coverage establishes the terms and conditions
under which coverage is provided to its self-funded health benefit plan enrollees. *See* Oishi Decl.
(1/7/11), ¶2.

1 pp. 21, 45. In contrast, there is no such exclusion of “certified counselors” anywhere in
2 the Certificate of Coverage. HCA’s contract manager for the UMP/Regence contract,
3 Ms. Hansen, could not locate *any* language within the 2011 Certificate of Coverage that
4 purports to exclude coverage of mental health services provided by certified
5 counselors. *Id.*, *Exh. P*, Hansen Dep., pp. 43:1-7; 48:15-49:5.

6 Not only is this benefit promised by contract, but UMP/Regence informs
7 HCA enrollees that the 2011 Certification of Coverage covers certified counselors. For
8 example, plaintiff S.M.O.’s mother called UMP/Regence to determine whether certified
9 counselors were covered. She was informed, both over the phone and in writing, that
10 Regence/UMP *did* cover certified counselors. *See id.*, *Exh. S*, Regence/UMP letter to
11 S.M. (2/10/11).

12 Our records indicate that you contacted the Customer Service
13 Department on January 26, 2011 and were advised that
14 Certified Mental Health Counselors are a covered provider
15 type for mental health services but Registered Mental Health
16 Counselors are excluded from coverage under the Plan. For
17 complete benefit information, please refer to your Certificate
of Coverage (COC) which can be viewed online at
<http://www.ump.hca.wa.gov>.

18 *Id.* The UMP/Regence letter confirms that the “complete benefit information” can be
19 found in the Certificate of Coverage.

20 **C. The July 17, 2011 Stipulation Required HCA to Halt Applying
21 its Blanket Exclusion of ABA Therapy in the 2011 Certificate of
Coverage.**

22 After the Court issued its June 7, 2011 Order, the parties agreed to a
23 Stipulation that now governs coverage of ABA therapy until the completion of this
24 litigation. The Stipulation requires HCA to direct UMP/Regence to halt all application
25 of the blanket exclusion of ABA therapy. *Id.*, *Exh. C*, July 17, 2011 Stipulation and
26 Second Addendum, ¶¶7, 10. Under the Stipulation, claims for coverage of ABA

1 therapy must be processed in the same manner as all other claims for mental health
2 services under the Certificate of Coverage, and considered under the general definition
3 of “medical necessity.”

4 **D. Despite the Stipulation, ABA Therapy for the Named Plaintiffs and**
5 **Others Has Been Denied Solely Because the Therapy is Provided**
6 **by a Certified Counselor.**

7 Class counsel has submitted two internal appeals on behalf of class
8 members. Class member M.F.’s initial claims were apparently denied by
9 UMP/Regence because the ABA therapy service provided to the class member was
10 administered by a certified counselor. *See* Hamburger Decl. (11/29/11), *Exh. N* (appeal
11 on behalf of M.F.). Named Plaintiff S.F.’s initial claims were denied because the service
12 was deemed “excluded.” Class counsel has received no substantive response
13 regarding either appeal from UMP/Regence. *Id.*, ¶2.

14 Class counsel has, however, received a response from HCA’s counsel.
15 HCA counsel indicated that both claims were denied because the services were
16 provided by “unlicensed” providers. HCA indicated that, *despite the plain language*
17 *of the 2011 Certificate of Coverage, it will exclude coverage of ABA therapy when*
18 *provided by certified counselors.* *Id.*, *Exh. O*, p. 3 (“In entering into the stipulation,
19 HCA has been clear that the blanket exclusion will not apply, but that the provider of
20 services must be licensed and compliant with licensing laws under the Department of
21 Health regulations”).

22 **IV. ARGUMENT**

23 **A. Standard of Review: HCA’s 2011 Certificate of Coverage Must**
24 **Be Interpreted Using the Same Rules Used for Other Insurance**
25 **Contracts.**

26 The Court has determined that class members’ rights under the 2011
Certificate of Coverage are contractual in nature. Order (6/7/11), *Exh. A*, Letter
Ruling, p. 3 (“the relationship among the parties is contractual, governed by the

1 Certificates of Coverage”); see *Washington Fed’n of State Employees, AFL-CIO, Council 28*
2 *AFSCME v. State*, 101 Wn.2d 536, 539, 682 P.2d 869 (1984); Oishi Decl., ¶2 (“The COC
3 [Certificate of Coverage] is a publication containing the terms and conditions of
4 covered benefits for UMP members”).

5 The same rules of interpretation applicable to insurance contracts are
6 applied to health insurance contracts, including HCA’s Certificate of Coverage. *Brown*
7 *v. Snohomish County Physicians Corp.*, 120 Wn.2d 747, 753, 845 P.2d 334 (1993); *Myers v.*
8 *Kitsap Physicians Serv.*, 78 Wn.2d 286, 288, 474 P.2d 109 (1970) (“We must employ the
9 rules generally applicable to the interpretation of insurance contracts” in reviewing
10 health contracts). Thus, any ambiguities in the contract must be interpreted in the light
11 most favorable to the insured. *Myers*, 78 Wn.2d at 288; *Morgan v. Prudential Ins. Co. of*
12 *Am.*, 86 Wn.2d 432, 435, 545 P.2d 1193 (1976). The language of the health insurance
13 contract must be interpreted in the manner that the average prudent layperson would
14 understand it. *Myers*, 78 Wn.2d at 289-90; *Morgan*, 86 Wn.2d at 435.

15 This is particularly true in cases involving self-funded plan
16 administrators like the HCA, which simultaneously control both payment and access to
17 treatment for thousands of public servants. *Micheletti v. State Health Benefits Comm’n*,
18 913 A.2d 842, 850 (N.J. App. 2007). In *Micheletti*, a case involving coverage of ABA
19 therapy under the New Jersey self-funded state employee health benefit plan, the New
20 Jersey appellate court found that the relevant Certificate of Coverage must be
21 interpreted in light of the goals of the health benefits program.

22 By undertaking that very consequential role in the financial
23 security of public employees and their families, the State also
24 undertakes to play fair with them. Hidden or unfair
25 reservation in insurance policies are ignored because they do
26 not reflect the reasonable expectation of the parties []
because of the significance of health insurance to public
employees and their families, and the Legislature’s

1 undertaking to furnish insurance and determine its scope,
2 *one of the goals of the Legislature must have been to insure*
3 *the fair and even-handed application of Program provisions,*
 4 *and the avoidance of crammed interpretations of ambiguous*
 5 *terms.*

6 *Id.* at 851 (emphasis added). Like the New Jersey public employee self-funded
7 administrator, HCA’s interpretation of its Certificate of Coverage, including whether
8 certified counselors are considered “providers” under the contract, is not entitled to
9 any deference by this Court. *Myers*, 78 Wn.2d at 288. HCA, just like any insurer, must
10 have its contracts interpreted based upon the plain language of the contract, with any
11 coverage exclusions expressed clearly and unequivocally. *Id.* If there are any
12 ambiguities in the contract, they must be interpreted in favor of the enrollee. *Id.*

13 **B. HCA Cannot Exclude Coverage of medically Necessary Mental**
14 **Health Services When Provided by Certified Counselors Within**
15 **Their Scope of Practice.**

16 Under long-standing Washington insurance law, all exclusions or
17 limitations must appear on the face of the insurance contract in order to be enforceable.
18 *American Star Ins. Co. v. Grice*, 121 Wn.2d 869, 875, 854 P.2d 622 (1993); *see also Micheletti*,
19 913 A.2d at 852 (“Exclusionary language in an insurance contract is strictly
20 interpreted”). “Coverage exclusions are contrary to the fundamental protective
21 purpose of insurance and will not be extended beyond their clear and unequivocal
22 meaning. Exclusions should also be strictly construed against the insurer.” *Bordeaux,*
23 *Inc. v. Am. Safety Ins. Co.*, 145 Wn. App. 687, 694, 186 P.3d 1188 (2008); *Stuart v. Am.*
24 *States Ins. Co.*, 134 Wn.2d 814, 818-19, 953 P.2d 462 (1998). Exclusions that are
25 undisclosed, ambiguous, or otherwise not set forth with clarity such that an average
26 insured would understand exactly what is excluded are “ineffective.” *McDonald v.*
 27 *State Farm & Cas. Co.*, 119 Wn.2d 724, 733, 837 P.2d 1000 (1992) (“Thus, if an insurance
 28 policy’s exclusionary language is ambiguous, the legal effect of such ambiguity is to
 29 find the exclusionary language ineffective”). Finally, whether an exclusion is properly

1 set forth in an insurance contract is a question of law. *George v. Farmers Ins. Co. of*
2 *Washington*, 106 Wn. App. 430, 439, 23 P.3d 552 (2001).

3 HCA cannot by internal policy or by other fiat impose a condition on
4 coverage that is not present in its Certificate of Coverage. HCA's 2011 Certificate of
5 Coverage only excludes mental health services provided by registered counselors. The
6 Certificate of Coverage does not exclude mental health services when provided by
7 certified counselors properly practicing within their scope of practice as described by
8 RCW 18.19.200.

9 If HCA wants to limit its provider categories to just licensed providers,
10 then it can certainly do so by setting that limitation out in the Certificate of Coverage.
11 It cannot, however, create an internal, hidden limitation which conflicts with the plain
12 language of the governing contract and with the public information provided to its
13 enrollees.

14 **C. ABA Therapy Can Be Provided by Either Licensed or Certified**
15 **Providers.**

16 HCA may argue that ABA therapy can only be provided within the scope
17 of practice of a licensed provider. The provision of ABA therapy, however, falls within
18 the scope of practice of *both* licensed mental health counselors and certified counselors.

19 The scope of practice for certified counselors is:

20 Certified counselors ... may counsel and guide a client in
21 adjusting to life situations, developing new skills, and
22 making desired changes, in accordance with the theories and
23 techniques of a specific counseling method and established
24 practice standards...

25 RCW 18.19.200 (2). As defined in RCW 18.225.010, "mental health counseling" as
26 provided by licensed counselors means:

the application of principles of human development, learning
theory, psychotherapy, group dynamics, and etiology of

1 mental illness and dysfunctional behavior to individuals,
2 couples, families, groups, and organizations, for the purpose
3 of treatment of mental disorders and promoting optimal
4 mental health and functionality. Mental health counseling
5 also includes, but is not limited to, the assessment, diagnosis,
6 and treatment of mental and emotional disorders, as well as
7 the application of a wellness model of mental health.

8 *Id.* The scope of practice of a licensed counselor is broader than the scope of practice
9 for certified counselors (and includes activities such as assessment and diagnosis). Yet
10 there is significant overlap between the two scopes of practice. One area of overlap is
11 this: both can provide ABA therapy to treat individuals with autism.

12 ABA therapy is a “systematized process of collecting data on a child’s
13 behaviors and using a variety of behavioral conditioning techniques to teach and
14 reinforce desired behaviors while extinguishing harmful or undesired behaviors.”
15 *McHenry v. PacificSource Health Plans*, 679 F. Supp. 2d 1226, 1231 (D. Or. 2010). In
16 essence, it uses “behavioral principles to shape behaviors and teach new skills in an
17 individual.” *Id.* Thus, certified counselors may “guide a client in adjusting to life
18 situations” and “develop new skills” in accordance with the theories and techniques
19 related to ABA therapy. *See* RCW 18.19.200(2). Licensed counselors may also “apply
20 the principles of human development” (ABA therapy) for the purpose of treating the
21 patient’s mental disorder (autism). *See* RCW 18.225.010. Licensed *and* certified
22 counselors have been and are providing ABA therapy to Washington residents with
23 autism.³ *See* Apple Decl. (1/27/11), ¶4; Shook Decl. (1/26/11), ¶¶ 5-7; Fabrizio Decl.

24 ³ The vast majority of the providers on the Washington Autism Advocacy list are also Board
25 Certified Behavior Analysts. The certification is issued by the Behavior Analyst Certification Board, a
26 national nonprofit certification organization accredited by the National Commission for Certifying
Agencies. *See* <http://www.bacb.com/index.php?page=1> (last visited 11/28/11). The BCBA credential
ensures, in addition to the Washington State Department of Health licensure or certification, that the
provider has sufficient expertise to perform ABA therapy.

1 (1/27/11) ¶¶4-5; Hamburger Decl. (11/29/11), *Exh. T*, Washington Autism Advocacy's
2 list of BCBA's in Washington state.

3 **V. CONCLUSION**

4 HCA cannot exclude medically necessary ABA therapy coverage just
5 because it is provided by certified counselors. There is no such explicit exclusion in the
6 UMP/Regence 2011 Certificate of Coverage. HCA cannot impose such an exclusion
7 through an internal policy or otherwise.

8 DATED: November 29, 2011.

9 SIRIANNI YOUTZ SPOONEMORE

10 /s/ Eleanor Hamburger

11 Eleanor Hamburger (WSBA #26478)

12 Richard E. Spoonemore (WSBA #21833)

13 Attorneys for Plaintiffs
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