

HON. SUSAN J. CRAIGHEAD
Noted for Hearing: January 6, 2012 at 10:00 a.m.
With Oral Argument

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:
DEFENDANT HCA'S COVERAGE OF
ABA THERAPY WITH CONDITIONS

I. INTRODUCTION

Notwithstanding this Court's Order of June 7, 2011, defendant Washington State Health Care Authority (HCA) has announced that, as of July 1, 2012, it will exclude all Applied Behavior Analysis (ABA) therapy unless (1) it is classified as one of two limited types of ABA, (2) it is provided as part of an Institutional Review Board-approved study, and (3) such study uses a comparator arm of individuals who do not receive ABA therapy. *See* Declaration of Eleanor Hamburger (11/29/11) ("Hamburger Decl."), *Exh. A* (HTCC Findings and Coverage Decision on ABA Therapy 9/16/11) ("HTCC conditions"), pp. 1-2; *Exh. B* (excerpts from James Dep.), p. 15:13-16. Under this policy, HCA will automatically deny coverage of all other ABA therapy without an individualized determination of medical necessity. *Compare* Hamburger

1 Decl., *Exh. A*, p. 2 with Order (6/7/11), p. 4 (“under the Mental Health Parity Act,
2 defendants are required to cover medically necessary Applied Behavior Analysis
3 therapy, as determined on an individualized basis, when provided by licensed
4 providers”). In practice, the new “conditions” will result in a denial of all ABA therapy
5 because, as HCA has admitted, no such studies exist in the State of Washington, and
6 HCA will not fund one out of its existing budget. Hamburger Decl., *Exh. B*, pp. 49:8-11;
7 52:10-25.

8 HCA claims that it is required to impose these conditions to effectively
9 exclude coverage of all ABA therapy because of a September 16, 2011 decision made by
10 a committee appointed by it known as the Health Technology Clinical Committee
11 (HTCC). *Id.* at 10:19-25. HCA’s HTCC decided that ABA therapy should *only* be
12 covered by HCA’s self-funded health benefit plans if its conditions are met. HCA
13 contends that it must, by statute, implement the HTCC conditions.¹ *Id.*

14 HCA, however, cannot use the HTCC decision to override the legal
15 requirements of the Mental Health Parity Act. As the HTCC statute makes clear, state
16 law trumps any decisions made by the HTCC. RCW 70.14.120(1)(a) (agency shall
17 comply with HTCC decision “unless . . . [t]he determination conflicts with an . . .
18 applicable state statute . . .”). Here, the conditions impose restrictions upon mental
19 health care which gut the requirements of the Mental Health Parity Act. Specifically,
20 the HTCC conditions impose additional restrictions on coverage of ABA therapy,
21 regardless of medical necessity. These new conditions do the same thing as the prior
22 blanket exclusion of ABA therapy – they eliminate all or nearly all coverage of the
23 therapy without regard for medical necessity. The HTCC conditions also violate
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25 ¹ Until the conclusion of this case, HCA has stipulated that it will provide coverage *without* the
26 HTCC conditions. See Hamburger Decl., *Exh. C* (7/17/11 Stipulation and Second Addendum to
Stipulation).

1 Washington's Network Adequacy rules because, as a practical matter, the conditions
2 limit access to medically necessary services to the limited number of "spots" available
3 in any theoretical research study that meets HCA's requirements, and to those insureds
4 who are geographically near the research site.

5 Even if such a study were to exist somewhere in Washington state and
6 provided access to all insureds regardless of geography or space limitations in the
7 study, HCA's conditions would still be improper. These conditions exclude coverage
8 for enrollees who are unwilling to participate in such a study and those who have been
9 found to need a different type of ABA therapy. Hamburger Decl., *Exh. B*, pp. 49:21-
10 51:17.

11 In sum, the conditions - apparently established out of the HTCC's
12 concern that further study of ABA therapy should be encouraged - *have nothing to do*
13 *with any individualized determination of medical necessity*:

14 Q. And it's your understanding that the Health Care
15 Authority must implement these conditions,
16 regardless of any finding of medical necessity for an
17 individual Regence/UMP insured.

18 A. That is my understanding.

19 *Id.* at 51:13-17. HCA's new "conditions" are nothing more than a backdoor method of
20 excluding coverage of ABA therapy, either altogether or to all but a very select few.
21 For these reasons, the HTCC conditions should be declared invalid.

22 II. RELIEF REQUESTED

23 This motion seeks a declaration that HCA's new "conditions" for
24 coverage of ABA therapy are void and unenforceable because they violate the
25 requirements of the Mental Health Parity Act, RCW 41.05.600.
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III. EVIDENCE RELIED UPON

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

IV. FACTS

A. ABA Is First Referred To HCA's Health Technology Assessment Process

In 2009, class representative S.F. appealed the denial of coverage of his ABA therapy by Dr. Stephen Glass. Spoonemore Decl. (1/21/11), *Exh. B*. S.F.'s appeal was denied by Aetna and then later HCA on the grounds that his ABA therapy, despite being provided by a licensed child neurologist, was "educational" in nature and, therefore, not medically necessary. *Id.* at AGO004318; *Exh. C*. S.F.'s parents then appealed the denials to an Independent Review Organization (IRO) and prevailed. Spoonemore Decl. (12/2/10), *Exh. K*. The IRO specifically found that:

ABA therapy is an essential health care service for patients with autism spectrum disorder. It is considered a health care service and is not educational in nature. It meets all of the aforementioned criteria and is not a specific plan exclusion.

Id., *Exh. K* at 6. As a result, in 2009, HCA covered ABA therapy for S.F. *Id.*, *Exh. Q* at 1 (Plan "must abide by this [IRO] decision, and will therefore cover ABA therapy for [S.F.]"). However, the letter indicated that the plan would be amended to specifically exclude ABA even if it was medically necessary:

Aetna PEP will update the 2010 benefits booklet to more clearly exclude ABA therapy from coverage. This means that ABA therapy will be a specific benefit exclusion effective January 1, 2010, and will not be coverage by Aetna PEP in 2010, regardless of whether or not it is medically necessary.

Id., *Exh. Q*. This decision was made by HCA. S.F.'s mother met with the former HCA Administrator, Steven Hill, to ask him to reconsider HCA's decision to specifically

1 exclude ABA even when medically necessary. He refused to change the exclusion. *Id.*,
2 *Exh. P* (“Thus, I have re-affirmed the HCA position on this matter.”).

3 Shortly after that meeting, Mr. Hill referred ABA therapy for a Health
4 Technology Assessment. Hamburger Decl., *Exh. D*. Leah Hole-Curry was in charge of
5 the HCA Health Technology Assessment process at that time. *Id.*, *Exh. E*, (excerpts
6 from Hole-Curry Dep.), pp. 17:10-18:22. She testified that HCA learned that the federal
7 Agency for Healthcare Research and Quality (AHRQ) would be reviewing various
8 treatments for autism. As a result, HCA decided to wait for the results of the federal
9 study and then use its own consultant, in this case, Oregon Health Sciences University
10 (OHSU), to refine the analysis from the federal report to meet the specific topic to be
11 addressed in the Washington state assessment regarding ABA therapy for autism. *Id.*,
12 *Exh. E* at 50:7-52:12.

13 **B. The Federal AHRQ Report**

14 On April 14, 2011, the AHRQ report was issued. *Id.*, *Exh. F* (excerpts from
15 Therapies for Children with Autism Spectrum Disorders). The report evaluated the
16 effectiveness of many different types of therapeutic interventions for children with
17 autism. The report evaluated ABA therapy. It also evaluated many other kinds of
18 interventions, many of which did not use ABA therapy techniques.

19 The AHRQ report concluded “evidence supports early intensive
20 behavioral and developmental intervention *including* the [Lovaas] model and Early
21 Start Denver Model (ESDM) for improving cognitive performance, language skills and
22 adaptive behavior in some groups of children.” *Id.* at iv (emphasis added). The AHRQ
23 report explicitly did not limit its findings to only the Lovaas and ESDM forms of ABA
24 therapy. Instead, it recognized that these forms of early, intensive one-to-one
25 behavioral intervention for children with autism have demonstrated significant
26 improvement and are shown to be effective for some children. *Id.*

1 **C. OHSU Is Tasked With Analyzing The AHRQ Report And Gathering**
2 **Additional Data**

3 HCA contracted with OHSU to analyze the AHRQ report related to the
4 HTA review of ABA therapy. OHSU was asked to excerpt the behavioral interventions
5 that are based on ABA therapy from the AHRQ report. *Id.*, *Exh. E* at 62:1-15. HCA also
6 asked OHSU to conduct additional original analysis including a review of Medicare
7 coverage decisions, if any, treatment guidelines, cost effectiveness data, cost data, state
8 agency utilization data, and coverage policies of other insurers and other state
9 agencies. *Id.* at 63:13-65:17. OHSU then compiled a report with recommendations for
10 the HTCC to review. The report was made publicly available as of May 23, 2011. *See*
11 *id.* at 66:11-68:2; *Exh. G* (excerpts of “Applied Behavioral Analysis and Other Behavioral
12 Therapies for the Treatment of Autism Spectrum Disorder”).

13 The OHSU report got a number of issues wrong. As Ilene Schwartz,
14 Ph.D., explained:

- 15 • OHSU mistakenly included in its analysis studies of
16 discredited therapeutic techniques that are not ABA
17 therapy, thus weakening the data that OHSU
18 represented related to ABA therapy. *Id.*, *Exh. H*
19 (excerpts of Schwartz Dep.) at 48:1-21 (“[OHSU]
20 comingled so many different interventions that they
21 lost the effectiveness of the [ABA] interventions”).
- 22 • OHSU rejected any consideration of single case
23 intervention research. *Id.* at 48:22-50:5 (“[T]here has
24 been clearly over 30 years of research on autism done
25 by applied behavior analysts using single case design
26 research and [] this review out of hand dismisses it
 all”).

 The OHSU also reported other facts incorrectly:

- OHSU incorrectly reported that no Washington state
 agency coverage ABA therapy for autism, when the
 Washington State Department of Social and Health
 Services (DSHS) clearly does. *Compare id.*, *Exh. G*

1 (excerpts of OHSU study) at 2, 10-11, to *S.A.H. ex rel.*
2 *S.J.H. v. State Dept. of Soc. & Health Services*, 136 Wn.
3 App. 342, 349, 149 P.3d 410, 414 (2006) (ABA therapy
4 covered under DSHS's Medicaid services to children).

- 5 • OHSU incorrectly reported that in Washington state,
6 the only insurer to provide coverage for ABA therapy
7 was Aetna. See Hamburger Decl., *Exh. G*, p. 6 (the
8 OHSU mischaracterizes Aetna's coverage as applying
9 to "intensive *educational* intervention," revealing the
10 OHSU drafters' bias against coverage of ABA
11 therapy).² See *id.*, *Exh. I* (Aetna ABA Medical
12 Necessity Guide). Premera Blue Cross covers ABA
13 therapy as well. See A.F. Decl. (1/21/11), ¶4.
- 14 • OHSU did not conduct a "cost-effectiveness" analysis.
15 Instead, it merely assumed that the cost of ABA
16 therapy would be \$50,000 per person annually and
17 that 50 percent of children with autism under the age
18 of 12 would use the service. See Hamburger Decl.,
19 *Exh. G*, pp. 12-13. OHSU apparently did not conduct
20 any actual analysis of the potential cost of the therapy,
21 nor compared that cost to the cost of untreated autism.
22 OHSU's assumption is baffling when there exists
23 significant utilization data from which a researcher
24 may obtain an accurate, evidence-based analysis of the
25 cost of providing ABA therapy. See also *id.*, *Exh. E* at
26 77:17-78:2.

18 **D. On May 23, 2011, The Court Found For The Plaintiffs On Their**
19 **Motion For Partial Summary Judgment**

20 The Court issued its letter ruling on the parties' cross summary judgment
21 motions on May 23, 2011. The Court's Order was entered on June 7, 2011. The Court
22 concluded that HCA's explicit blanket exclusion of ABA therapy violated the Mental
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25 ² OHSU apparently only looked at policies it could locate (not actual practice) for just three
26 insurers—Group Health, "BCBS" (which is apparently, the National Blue Cross Blue Shield Association,
and not either Regence or Premera, the Blue plans in Washington State) and Aetna. *Id.*, *Exh. E*, pp. 78:17-
79:11.

1 Health Parity Act. It held that HCA must make an individualized determination of
2 medical necessity when requests for ABA therapy to treat ASDs are made:

3 [S]pecific exclusions contained in health benefit plans
4 administered by the defendants that exclude coverage of
5 Applied Behavior Analysis therapy, even when medically
6 necessary and performed by licensed health providers, do
7 not comply with Washington’s Mental Health Parity Act,
8 RCW 41.05.600. The Court further declares that under the
9 Mental Health Parity Act, defendants are required to cover
medically necessary Applied Behavior Analysis therapy, as
determined on an individualized basis, when provided by
licensed providers.

10 Order (6/7/11), p. 4. In essence, the Court ruled that the only restriction that HCA can
11 impose on the provision of mental health services, including ABA therapy, is medical
12 necessity. The Court’s ruling, however, was never included in OHSU’s report or
13 otherwise communicated by HCA to the HTCC. Hamburger Decl., *Exh. E*, pp. 85:13-
14 86:18. Ms. Hole-Curry, the HTCC’s director at the time, and HCA’s Rule 30(b)(6)
15 witness, testified that it wasn’t provided because she deemed it “irrelevant.” *Id.* at
16 86:19-88:25. Ms. Hole-Curry stated that it is up to the state agency (not the HTCC) to
17 determine whether the coverage decision is in conflict with a court decision or state or
18 federal law. *Id.* at 88:2-25. If a coverage decision does conflict with the law, she
19 pointed out, the HTCC statute provides that the agency need not implement it.³ *Id.*

20 **E. HTCC Decides To Cover ABA Therapy For Autism With Conditions**

21 On June 17, 2011, the HTCC met and considered whether HCA should
22 cover ABA therapy. The HTCC heard public testimony about the need for coverage.
23 At the conclusion, *the HTCC voted that ABA therapy should be covered by HCA.* The
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25 ³ HCA also never informed the HTCC in September 2011 about the July 17, 2011 Stipulation that
26 required HCA to cover all medically necessary ABA therapy, even when provided outside of a research
study. *Id.*, *Exh. E* at 99:4-8.

1 HTCC voted, however, to cover ABA therapy with “conditions” and requested that the
2 staff put together additional information about those “conditions” for the next meeting
3 on September 16, 2011. *See* Schwartz Decl. (6/21/11), ¶¶3-4. The exact nature of the
4 “conditions” was unclear from the meeting. Dr. Schwartz thought that the conditions
5 would be some type of utilization review, occurring on an individualized basis, to
6 evaluate the medical necessity of the specific ABA therapy provided to each individual.
7 *See id.* HCA, however, believed that the “conditions” were to limit coverage to only
8 ABA therapy provided within the narrow confines of participation in a research study.
9 *See* Hole-Curry Decl. (6/28/11), ¶10.

10 **F. On September 16, 2011, HTCC Votes On The “Conditions” For**
11 **Coverage Of ABA Therapy**

12 At the next meeting of the HTCC, HCA proposed to the HTCC that the
13 “conditions” be the following:

- 14 • Only the Lovaas or ESDM forms of ABA therapy
15 would be covered.
- 16 • Those two types of ABA therapy will only be covered
17 when provided to HCA enrollees as participants in a
18 research study.
- 19 • The research study must have a comparator arm of
20 individuals who are not receiving Lovaas or ESDM
21 ABA therapy.
- 22 • The research study must be registered with
23 clinicaltrials.gov and be approved by the Institutional
24 Review Board.
- 25 • The conditions expressly exclude all other coverage of
26 ABA therapy.

Hamburger Decl., *Exh. A*, pp. 1-2.

The HTCC decision on ABA therapy is *the first and only time* HCA has imposed the “condition” of evidence development on coverage of any therapy -

1 medical, surgical or mental health. *Id.*, *Exh. B* at 12:6-8. In fact, there is no internal
2 policy or even “general principles” previously adopted by HCA that authorizes HTCC
3 to impose a condition of “evidence development” on coverage for any therapy. *Id.*,
4 *Exh. E* at 90:12-93:1. Ms. Hole-Curry developed the draft of the “conditions” herself
5 after the June 16, 2011 HTCC meeting. *Id.* at 93:19-98:4; *Exh. J*. The HTCC voted to
6 impose these conditions, without any consideration of the Court’s June 7, 2011 Order.
7 *Id.*, *Exh. E* at 98:11-99:8.

8 **G. HCA Plans To Implement The HTCC “Conditions”**

9 HCA is moving forward with plans to implement the HTCC conditions
10 as of July 1, 2012. *Id.*, *Exh. B* at 15:13-16. HCA admits that it plans to impose the HTCC
11 conditions *regardless of medical necessity*. As HCA’s Rule 30(b)(6) witness testified,
12 any ABA therapy provided outside of an approved research study will not be covered.

13 Q. Is it your understanding that under the HTCC
14 condition[s] if a Regence/UMP insured is not in a
15 study that the conditions prohibit coverage of ABA
therapy for autism in that situation?

16 A. What I understand is --- and I will just read this
17 directly from the determination -- . . . “Applied
18 Behavioral Analysis based behavioral interventions
19 not using either the UCLA/Lovaas model or Early
20 Start Denver Model within an investigational setting
meeting the criteria” meaning that those are non-
covered indicators.

21 Q. And just to be clear, non-covered indicator means that
22 the service should not be covered.

23 A. Correct.

24 Q. And so if a child receives ABA therapy for autism,
25 regardless of medical necessity, under the conditions
26 described in Exhibit 3, if [the child is] not in a study,
there would be no coverage.

...

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2 A. That is my understanding according to the
3 determination as it is written.

4 *Id.*, *Exh. B* at 49:21-51:2. ABA therapy that differs or is modified from the Lovaas or
5 ESDM will not be covered:

6 Q. And again, under these conditions, if a child seeks
7 ABA therapy for autism but [the child is] not receiving
8 the UCLA/Lovaas model or the Early Start Denver
9 Model then, under these conditions, the service would
10 not be covered, regardless of medical necessity.

11 A. That is correct, because the determination reads the
12 limitations of coverage include that those are the
13 models that must be used as coverage with evidence
14 development.

15 *Id.* at 51:3-12. The conditions would apply even to HCA enrollees who are
16 geographically far from an approved study. Those enrollees (most likely very young
17 children) would have to travel to the research site to obtain coverage. *Id.* at 60:4-8. The
18 conditions would not be “waived” or lifted. *See id.*

19 HCA does not know of a single existing study that meets its “conditions.”
20 *Id.* at 49:8-11 (“We have not yet identified studies . . .”). HCA does not intend to
21 devote any of its existing funding to funding or conducting such a research study. *Id.*
22 at 52:10-25.

23 HCA has apparently never considered whether HTCC was actually
24 empowered to impose the condition of “evidence development.” HCA’s Rule 30 (b)(6)
25 witness, Elizabeth James, the interim deputy director of the Uniform Medicaid Plan,
26 testified that she did not know whether there was any statutory authority to impose
the conditions. *Id.* at 12:17-22. She never requested any legal analysis related to
HTCC’s authority to impose the conditions. *Id.* at 14:16-21. She could not recall ever
reviewing any such analysis. *Id.* at 15:8-10.

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V. ANALYSIS

A. Mental Health Parity Act Trumps The HTCC Statute

Enacted at the same time as the Mental Health Parity Act, the HTCC statute specifically states that its determinations cannot be used to override state law:

(1) A participating agency shall comply with a determination of the committee under RCW 70.14.110 *unless:*

(a) *The determination conflicts with an applicable federal statute or regulation, or applicable state statute*

RCW 70.14.120 (emphasis added). The HTCC conditions must give way if they violate the Parity Act.

B. HCA Violates The Mental Health Parity Act When It Applies A Special “Condition” To Coverage Of ABA Therapy For Autism That Is Unrelated To Medical Necessity And That Is Not Applied To Medical And Surgical Services

HCA’s “condition of evidence development” violates the Mental Health Parity Act for the following reasons: *First*, the “condition of evidence development” cannot be imposed to work-around the Court’s conclusion that the Parity Act requires individualized determination of medical necessity. *Second*, the condition is not applied to any medical or surgical services, and is therefore not “comparable” to any treatment conditions applied to those services. *Third*, neither HCA nor the HTCC have the authority to impose conditions on coverage, apart from specific clinical criteria that may be challenged in an individual IRO appeal. There simply is no legal basis for HCA to require enrollees to participate in research study in order to obtain the mental health coverage to which they are entitled.

1 **1. The Mental Health Parity Act requires an individualized**
2 **determination of medical necessity for all “mental health**
3 **services” covered by the Act**

4 HCA cannot impose new conditions to try to short-circuit the
5 “individualized determination of medical necessity” required by the Parity Act. Order
6 (6/7/11), p. 4. The defining feature of the Parity Act is the coverage requirement. All
7 “mental health services” to treat non-excluded DSM-IV mental conditions must be
8 covered, so long as the services are “medically necessary.” RCW 41.05.600(2).

9 The Court has found that (1) autism is a mental condition covered by the
10 Parity Act, (2) ABA therapy is a therapy to treat individuals with autism, and (3) ABA
11 therapy can be medically necessary for some children with autism. Order (6/7/11),
12 *Exh. A* (Letter Ruling), p. 1. The Court concluded that a blanket exclusion of coverage
13 of all ABA therapy to treat autism was improper. *Id.* at 2. It found that HCA is
14 required to cover medically necessary ABA therapy as determined on an
15 individualized basis. *Id.*; see also Order (6/7/11), p. 4 (“[U]nder the Mental Health
16 Parity Act, defendants are required to cover medically necessary Applied Behavior
17 Analysis therapy, as determined on an individualized basis”). If HCA determines
18 that ABA is not medically necessary for a specific insured, then that insured may seek a
19 review of that individual determination before an IRO, just as S.F. did. *Id.*, *Exh. A* at 2;
20 RCW 48.43.535.

21 HCA admits that under its new “conditions,” it will not determine
22 coverage based upon an individual determination of medical necessity. HCA’s
23 Rule 30(b)(6) witness testified that the HTCC conditions require HCA to deny all
24 coverage of all ABA therapy provided outside of a research study, regardless of the
25 medical necessity of the therapy for the individual patient:

26 Q. And it’s your understanding that the Health Care
 Authority must implement these conditions,

1 regardless of any finding of medical necessity for an
2 individual Regence/UMP insured.

3 A. That is my understanding.

4 Hamburger Decl., *Exh. B*, p. 51:13-17.

5 Such an exclusion is improper under the law. The Parity Act does not
6 allow HCA to exclude medically necessary ABA therapy simply because it is provided
7 outside of a research study. RCW 41.05.600 (2). The Act is explicit. The only reason a
8 “mental health service” to treat a non-excluded mental condition can be denied is
9 medical necessity. *Id.* The Court has already determined that such “medical necessity”
10 decisions must occur on an individualized basis.

11 HCA cannot argue that the conditions are similar to “treatment
12 guidelines” or clinical review criteria that the HTCC is generally charged with creating,
13 after deciding upon coverage. Such guidelines or criteria are designed to be used *when*
14 *evaluating medical necessity.* See WAC 284-43-130 (“clinical review criteria’ means
15 the written screens, decision rules, medical protocols or guidelines used by the carrier
16 *as an element in the evaluation of medical necessity and appropriateness*”)
17 (emphasis added).

18 Participation in a research study, however, has nothing to do with
19 whether a service is medically necessary for a particular individual. Indeed,
20 participation in a study limits access to medically necessary services, since therapists
21 must provide ABA services according to the study protocol and cannot modify the
22 type of ABA therapy provided to a child study participant based upon his or her
23 individual need. Dr. Schwartz explained at her deposition that limiting coverage to
24 only two narrow forms of ABA therapy within the confines of a research study impairs
25 the right of children to get the services that they need:

26 What I think the HCA should do is to say let’s identify highly
 qualified people , such as Board Certified Behavior Analysts,

1 who can supervise behavioral programs and then give them
2 the flexibility and latitude to provide the program that the
3 child needs. For some children that might be a combination
4 of DATA Project and ESDM, or Lovaas and Walden, or
5 Lovaas and LEAP, which are all ABA programs.

6 I think having some conditions is fine. Have them create a
7 registry, every six months you have to submit data to
8 demonstrate progress. That's fine. But to limit it to these two
9 is, again, just making too many restrictions and putting up
10 barriers for access rather than facilitating access.

11 It's kind of like saying to a physician, you can prescribe these
12 two antibiotics and that's it, even though there are many
13 others out there.

14 Hamburger Decl., *Exh. H*, pp. 55:21-56:15.

15 **2. HCA's "conditions" are not comparable to any similar
16 condition imposed on medical and surgical services**

17 HCA may not impose its "condition of evidence development" for
18 another reason. The "condition" would be uniquely applied to ABA therapy. There is
19 no other service - medical, surgical or mental health - which HCA covers subject to
20 participation in a research study. *Id.*, *Exh. B* at 12:6-8. This unique condition violates
21 the "comparability" requirement of the Parity Act, RCW 41.05.600(2)(c)(i):

22 Treatment limitations or any other financial requirements on
23 coverage for mental health services are only allowed if the
24 same limitations or requirements are imposed on coverage
25 for medical and surgical services.

26 *Id.* The Parity Act was designed to end the historic discrimination against people with
27 mental health conditions. That is why the Act specifically included a "comparability"
28 requirement:

29 The legislature finds that the potential benefits of
30 improved access to mental health services are significant.
31 Additionally, the legislature declares that it is not cost-
32 effective to treat persons with mental disorders differently
33 than persons with medical and surgical disorders.

1 Therefore, the legislature intends to require that
2 *insurance coverage be at parity for mental health services,*
3 *which means this coverage be delivered under the same*
4 *terms and conditions as medical and surgical services.*

5 Spoonemore Decl. (12/2/10), *Exh. A*, pp. 1-2 (Final Substitute House Bill 1154, 2005
6 Leg.) (emphasis added). *See also id.*, *Exh. B* at 7 (Sunrise Review on Mental Health
7 Parity: “The argument that physical and mental illnesses should be treated the same in
8 insurance coverage, as a matter of fairness has ethical appeal that goes beyond the
9 sunset criteria”).

10 HCA cannot, as a matter of law, impose a unique treatment limitation,
11 such as coverage only when the enrollee participates in a research study, if it does not
12 impose the same limitation on medical and surgical services. Here the testimony is
13 unequivocal – there is no such limitation on coverage of *any* medical and surgical
14 services. HCA may not single out ABA therapy for autism to apply a unique
15 “condition with evidence development.”

16 **3. HTCC has no authority to require enrollees to participate**
17 **in a research study in order to obtain coverage of a**
18 **medically necessary mental health treatment like ABA**
19 **therapy**

20 No one at HCA apparently considered whether HTCC had the authority
21 to require participation in a research study as a “condition” of coverage. As a matter of
22 law, the HTCC has no such authority.

23 The original legislation, HB 2575 (2005), anticipated that a state-funded
24 health technology assessment center would provide “transparent access to the scientific
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1 basis of coverage decisions and treatment guidelines.”⁴ Hamburger Decl., *Exh. K* (Final
2 Bill Report HB 2575, 1/19/06), p. 3. The concept that the HTCC would establish
3 “treatment guidelines” was carried forward into the HTCC’s regulatory framework.
4 The HTCC may impose “special conditions” on covered services, but those conditions
5 are limited to identifying the specific situations where the therapy is “safe, efficacious
6 and cost-effective.” WAC 182-55-035(1)(b) (“Coverage is allowed with special
7 conditions because the evidence is sufficient to conclude that the health technology is
8 safe, efficacious, and cost-effective in only certain situations).

9 Here, there is no determination by the HTCC that ABA therapy for
10 autism is only “safe, efficacious and cost-effective” when performed in a research
11 study. No evidence supports such a conclusion. Indeed, limiting coverage to services
12 provided in a research study makes the service even *more expensive*, not cost effective.
13 See Hamburger Decl., *Exh. H*, pp. 20:10-20, 54:1-15.

14 What is clear is this: *The HTCC decided to provide coverage for ABA*
15 *therapy for autism*. The HTCC was unsure about the specific clinical criteria to be
16 used when providing coverage. (This may be because it was not provided with
17 sufficient information or expertise by either HCA or OHSU.) But instead of developing
18 treatment guidelines for the relevant state agencies, as it is authorized to do
19 (RCW 70.14.110(1)(b)), the HTCC decided to impose a “condition” that has nothing to
20 do with clinical guidelines. HTCC cannot require insureds to participate in a research
21 study just so that they may get the coverage that they are entitled to under the Parity
22 Act.

23 _____
24 ⁴ Notably, the final legislation envisioned that consumer could appeal determinations made upon
25 unsupported reports or that utilized improper “conditions.” See Hamburger Decl., *Exh. K*, p. 3 (“An
26 appeals process is established for patients, providers, and stakeholders to appeal determination of the
[HTCC]”). Governor Gregoire, however, vetoed that provision of the statute. *Id.* Thus, the only way the
Class can challenge the HTCC determination is through this Motion.

1 **C. HCA’s “Condition” Also Violates Washington’s Network Adequacy**
2 **Statute And Rules**

3 HCA’s coverage with the “condition of evidence development” is also
4 improper because it would limit coverage of medically necessary ABA therapy to
5 (1) only those specific spots available in a research study and (2) those insureds who
6 lived geographically close to the site of the research study.

7 HCA already conceded that Washington State’s Network Adequacy
8 statute and regulations apply to its self-funded health benefit plans. *See* Def.’s Cross-
9 Mot. for Summ. J. (1/12/11), p. 6 (“Under RCW 41.05.017, the HCA’s UMP is subject to
10 the provisions in RCW 48.43.515, a statute applicable to all health care insurers in
11 Washington . . .”). The Network Adequacy statutes, RCW 48.43.500 and .515, require
12 health plans, including HCA’s UMP, to ensure that enrollees are entitled to sufficient,
13 timely and appropriate health care services and choice among health care providers. In
14 particular, the statute requires that “[e]ach carrier must provide for appropriate and
15 timely referral of enrollees to a choice of specialists within the plan if specialty care is
16 warranted. If the type of medical specialist needed for a specific condition is not
17 represented on the specialty panel, enrollees must have access to nonparticipating
18 specialty health care providers.” RCW 48.43.515(4).

19 The Legislature’s focus on “sufficient and timely access” was fleshed out
20 in regulations issued by the Insurance Commissioner. In particular, health carriers and
21 HCA are required to maintain adequate networks of providers in order to ensure that
22 health plan enrollees can obtain treatment in their local communities without undue
23 delay, traveling onerous distances or incurring additional out-of-pocket expenses:

24 In any case where the health carrier has an absence of or an
25 insufficient number or type of participating providers or
26 facilities to provide a particular covered health care service,
 the carrier shall ensure . . . that the covered person obtains
 the covered service from a provider or facility within
 reasonable proximity of the covered person at no greater cost

1 *to the covered person than if the service were obtained from*
2 *network providers and facilities* or shall make other
arrangements acceptable to the commissioner.

3 WAC 284-43-200(3) (emphasis added). An example of “reasonable proximity” is
4 provided in the regulations:

5 For example, a carrier should not require travel of thirty
6 miles or more when a provider who meets carrier standards
7 is available for inclusion in the network and practices within
8 five miles of enrollees.

9 WAC 284-43-200(4).

10 Here, the HTCC’s “condition” would artificially limit coverage of ABA
11 therapy to only those providers and services approved through the research study.
12 Such a limitation would result in exclusion of coverage for enrollees unable to
13 participate in the research study due to (a) lack of space in the study; (b) geographic
14 distance from the research site; (c) the need for a form of ABA therapy other than the
15 strict Lovaas or ESDM models; or (d) not qualifying for participation in the study due
16 to other limitations, such as age, or dissimilarity to the comparator group. For
17 example, plaintiff S.M.-O. would not be eligible for coverage for ABA therapy under
18 the HTCC conditions because S.M.-O. receives a modified form of Lovaas therapy.
Hamburger Decl., *Exh. L* (excerpts of S.M. Dep.), p. 20:15-21.

19 As a practical matter, once a mental health therapy has been determined
20 to be medically necessary for an HCA insured, HCA cannot deny or delay coverage of
21 the individual’s therapy because of artificially-imposed restrictions on access,
22 including that the enrollee participate in a research study. That is the precise problem
23 that the Network Adequacy laws were designed to address.

24 **VI. CONCLUSION**

25 The Court issued a landmark decision on June 7, 2011, holding that the
26 Mental Health Parity Act requires an individualized determination of medical

1 necessity for all mental health services to treat non-excluded mental disorders. The
2 Court should not permit HCA to work around the Court's Order by imposing a new
3 condition of participating in a research study, for coverage of ABA therapy for autism.
4 Washington's Mental Health Parity Act and its Network Adequacy statutes and
5 regulations prohibit HCA's conditions.

6 DATED: November 29, 2011.

7 SIRIANNI YOUTZ SPOONEMORE

8 /s/ Eleanor Hamburger
9 Eleanor Hamburger (WSBA #26478)
10 Richard E. Spoonemore (WSBA #21833)
11 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 29, 2011, I caused a copy of the foregoing document to be served on all counsel of record as indicated below:

William G. Clark (WSBA #9234)	<input checked="" type="checkbox"/>	By United States Mail
Melissa A. Burke-Cain (WSBA #12895)	<input type="checkbox"/>	By FedEx/UPS
Kristen Culbert (WSBA #32930)	<input type="checkbox"/>	By Legal Messenger
Justin D. Farmer (WSBA #41697)	<input checked="" type="checkbox"/>	By Email
ATTORNEY GENERAL OF WASHINGTON		billc2@atg.wa.gov
Division of Social & Health Services		melissab@atg.wa.gov
7141 Cleanwater Drive SW		kristenc1@atg.wa.gov
P.O. Box 40124		justinf2@atg.wa.gov
Olympia, WA 98504-0124		jenniferb4@atg.wa.gov
<i>Attorneys for HCA, PEBB and Porter</i>		beverlyc@atg.wa.gov
		lisas6@atg.wa.gov
		pattip@atg.wa.gov

DATED: November 29, 2011, at Seattle, Washington.

/s/ Eleanor Hamburger