

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

Defendants.

NO. 10-2-29400-7 SEA

~~PROPOSED~~ S C
ORDER:

- (1) GRANTING, IN PART,
PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY
JUDGMENT AND
- (2) DENYING DEFENDANTS'
SUMMARY JUDGMENT MOTION

THIS MATTER came before the Court upon plaintiffs' Motion for Partial Summary Judgment and Permanent Injunction and defendants' Cross-Motion for Summary Judgment. The Court heard oral argument on February 4, 2011. Plaintiffs D.F., S.F. and S.M.-O., by and through their parents, were represented by Eleanor Hamburger and Richard E. Spoonemore, SIRIANNI YOUTZ SPOONEMORE. Defendants Washington State Health Care Authority, Public Employees Benefits Board and Doug Porter, in his official capacity as Administrator of the Washington State Health Care Authority and Chairman of the Public Employees Benefits Board (collectively

1 "defendants"), were represented by Melissa A. Burke-Cain and Kristen K. Culbert,
2 OFFICE OF THE ATTORNEY GENERAL.

3 In their motion, defendants seek an order declaring that the Washington
4 State Health Care Authority's health care coverage, which lists Applied Behavior
5 Analysis therapy as a specific exclusion, complies with Washington's Mental Health
6 Parity Act, RCW 41.05.600. Defendants also seek summary judgment on plaintiffs'
7 claims for the failure to exhaust their administrative remedies. Plaintiffs, in their
8 motion, seek partial summary judgment and an injunction declaring that defendants
9 are required to cover Applied Behavior Analysis when the service is medically
10 necessary, and that defendants' exclusion of Applied Behavior Analysis is illegal under
11 the Mental Health Parity Act.

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

- 14 • Plaintiffs' Motion for Partial Summary Judgment and Permanent
15 Injunction;
- 16 • the Declaration of Lynda Gable and any exhibits attached thereto;
- 17 • the Declaration of Jeffrey D. Mills and any exhibits attached thereto;
- 18 • the Declaration of Richard E. Spoonemore and any exhibits attached
19 thereto;
- 20 • the Declaration of A.F., mother of D.F. and S.F. and any exhibits attached
21 thereto;
- 22 • Defendants' Cross-Motion for Summary Judgment and any exhibits
23 attached thereto;
- 24 • the Declaration of Joleen McMahon and any exhibits attached thereto;
- 25 • the Declaration of Melissa Burke-Cain and any exhibits attached thereto;
- 26 • the Declaration of Nicole Oishi and any exhibits attached thereto;

- 1 • Plaintiffs' Response to Defendants' Cross-Motion for Summary Judgment;
- 2 • the Second Declaration of Richard E. Spoonemore and any exhibits attached thereto;
- 3
- 4 • the Declaration of J.M. and any exhibits attached thereto;
- 5 • the Second Declaration of A.F. and any exhibits attached thereto;
- 6 • Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment and Injunctive Relief re: Mental Health Parity Act;
- 7
- 8 • the Declaration of Melissa Burke-Cain in Support of Defendants' Opposition to Plaintiffs' Partial Summary Judgment Motion and any exhibits attached thereto;
- 9
- 10 • the Declaration and Amended Declaration of Eliana Gall and any exhibits attached thereto;
- 11
- 12 • Defendants' Reply Brief in Support of Defendants' Cross-Motion for Summary Judgment;
- 13
- 14 • Plaintiffs' Reply in Support of Their Motion for Partial Summary Judgment and Injunctive Relief re: Violation of the Mental Health Parity Act;
- 15
- 16 • the Third Declaration of A.F. and any exhibits attached thereto;
- 17 • the Declaration of Allison Lowy Apple and any exhibits attached thereto;
- 18 • the Third Declaration of Richard E. Spoonemore and any exhibits attached thereto;
- 19
- 20 • the Declaration of Michael A. Fabrizio, M.A. and any exhibits attached thereto; and
- 21
- 22 • the Declaration of Stacey Shook, Ph.D., B.C.B.A.-D., C.M.H.C. and any exhibits attached thereto.
- 23

24 Based upon the foregoing, the Court hereby GRANTS, in part, plaintiffs'
25 Motion for Partial Summary Judgment and DENIES, in total, defendants' Motion for
26 Summary Judgment.

1 As set forth in a letter ruling dated May 23, 2011, which is incorporated
2 herein at *Exhibit A*, the Court concludes that, as a matter of law, plaintiffs are entitled
3 to a declaration that specific exclusions contained in health benefit plans administered
4 by the defendants that exclude coverage of Applied Behavior Analysis therapy, even
5 when medically necessary and performed by licensed health providers, do not comply
6 with Washington's Mental Health Parity Act, RCW 41.05.600. The Court further
7 declares that under the Mental Health Parity Act defendants are required to cover
8 medically necessary Applied Behavior Analysis therapy, as determined on an
9 individualized basis, when provided by licensed providers.


10 The Court reserves ruling, at this time, whether defendants are required
11 to cover Applied Behavior Analysis therapy when provided by certified or registered –
12 as opposed to licensed – health providers.

13 The Court denies, without prejudice, plaintiffs' request for injunctive
14 relief at this time. The Court anticipates that an evidentiary hearing may need to be
15 conducted after a ruling on class certification to determine whether an injunction
16 should issue against defendants as to the individual plaintiffs or a class of plaintiffs.

17 The Court denies defendants' motion for summary judgment because
18 (1) defendants have not complied with the Mental Health Parity Act (as set forth above
19 and in the Court's May 24, 2011 letter ruling), and (2) defendants' exhaustion defense
20 fails with respect to plaintiffs on summary judgment. The Court also concludes that
21 there is no need for other putative class members exhaust administrative remedies, *as*
set forth in the Court's May 24, 2011 letter ruling.

22 IT IS SO ORDERED.

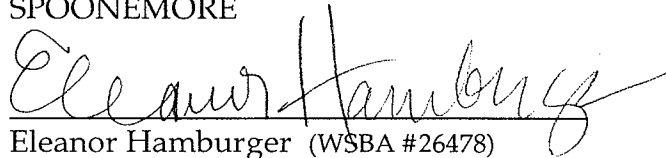
23 DATED this 7th day of June, 2011.

24
25 
26 Judge Susan J. Craighead
Superior Court Judge

1 Presented by:

2 SIRIANNI YOUTZ

3 SPOONEMORE

4 

5 Eleanor Hamburger (WSBA #26478)

6 Richard E. Spoonemore (WSBA #21833)

Attorneys for Plaintiffs

7
8 Approved as to Form by:

9 ROBERT M. McKENNA

10 Attorney General

11
12
13 _____
Melissa A. Burke-Cain (WSBA #12895)

Kristen K. Culbert (WSBA #32930)

14 Attorneys for Defendants

Exhibit A

Superior Court for the State of Washington
in and for the County of King

SUSAN J. CRAIGHEAD
Judge

May 23, 2011

King County Courthouse
Seattle, Washington 98104-2312
E-mail: Susan.Craighead@kingcounty.gov

Mr. Richard E. Spoonemore
Ms. Eleanor Hamburger
Sirianni Youtz Meier & Spoonemore
999 3rd Ave. Ste 3650
Seattle, WA 98104-4038

Ms. Melissa A. Burke-Cain
Ms. Kristen K. Culbert
Office of the Attorney General
Agriculture & Health Division
7141 Cleanwater Drive SW
P.O. Box 40109
Olympia, WA 98504

S.F., et al v. Washington State Health Care Authority, No. 10-2-29400-7 SEA
Cross-Motions for Summary Judgment

Counsel,

Before the Court are cross-motions for summary judgment. The Washington Health Care Authority (HCA) seeks an order declaring that its coverage under its Uniform Medical Plan (UMP) complies with the mental health parity law, RCW 41.05.600; HCA also seeks summary judgment dismissing the action because plaintiffs failed to exhaust their administrative remedies. For the reasons set forth below, HCA's motion for summary judgment is denied.

Plaintiffs seek partial summary judgment in the form of an injunction requiring HCA to cover Applied Behavioral Analysis (ABA) for children with autism for whom the service is medically necessary. For the reasons set forth below, this motion is granted in part.

Plaintiffs are a putative class of children who have Autism Spectrum Disorder (ASD) whose families are insured through HCA; the named plaintiffs under UMP and Aetna. There is no dispute about the diagnosis. ABA therapy is an intensive, one-on-one intervention that has shown success with some children with ASD, assisting them changing behaviors that make it difficult for them to interact with others. Children spend between 25-40 hours per week undergoing therapy, at a cost of as much as \$50,000 per year. Plaintiffs contend that ABA therapy can enable children with ASD to attend school, even in mainstream classrooms, or avoid institutionalization. HCA contends that there is no scientific evidence establishing statistically significant improvement in children who have undergone ABA therapy. Both Aetna and UMP, in accordance with HCA's policy, flatly exclude ABA therapy from coverage.

S.F. and his family first enrolled in the Aetna Public Employees Plan in January 2009. His family had previously been insured through Premera Blue Cross. Premera provided limited coverage for ABA

therapy. S.F. and his brother, D.F., received ABA therapy through a program prescribed and monitored by Dr. Stephen Glass, a well-known pediatric neurologist. The program was implemented by Allison Apple, Ph.D., who is a licensed mental health provider. The boys' parents were initially told that this therapy would be covered by Aetna under a "transition of Care" benefit, but later Aetna declined coverage for a consulting appointment with Dr. Glass and all other therapy related to ABA on the grounds that ABA is not covered under the plan. The parents appealed the denial; HCA denied the appeal on the grounds that the treatment was not "medically necessary." At that point, the parents requested an independent review of the dispute; this review found that ABA therapy is the standard medical care for children with autism and concluded that ABA therapy was medically necessary. After this review, Aetna paid for S.F.'s ABA therapy, which was provided by a master's level therapist who was a certified mental health counselor. However, as it had told S.F.'s parents it would, Aetna subsequently amended its certificate of coverage to specifically exclude ABA therapy, even if it was medically necessary.

HCA argues that it does not cover ABA therapy because it is provided by unlicensed practitioners. HCA contends that it only provides coverage for care performed by licensed health care providers, whether the care is for medical or mental health conditions. Plaintiffs acknowledge that many ABA therapists are not licensed by the State of Washington (although there is a voluntary national certification for ABA practitioners), but contend that HCA denied coverage in this case for care that would have been performed by licensed mental health providers. The crux of the plaintiffs' argument is that ABA is excluded from coverage by HCA regardless of who provides it and regardless of whether it is medically necessary for an individual child; in contrast, there is no similar blanket exclusion for any category of medical care. While HCA argues in this litigation that its concern is the licensure of the practitioners, it did not cite this basis as grounds for denying coverage to the named plaintiffs before the litigation began.

Both parties rely on language in the mental health parity law, RCW 41.05.600, to support their arguments. Plaintiffs cite RCW 41.05.600(1), which defines "mental health services" as "medically necessary outpatient and inpatient services provided to treat mental disorders covered by the diagnostic categories listed in the most current version of the diagnostic and statistical manual of mental disorders..." and then lists certain categories of treatment that are expressly not included in the definition of "mental health services." Plaintiffs argue that this provision means that all other mental services are to be covered, without limitation. This, they argue, was the legislature's way of remedying past discrimination against mental health care.

HCA points to RCW 41.05.600(2)(c), which provides in part that "[t]reatment limitations or any other financial requirements on coverage for mental health services are only allowed if the same limitations or requirements are imposed on coverage for medical and surgical services." HCA argues that this provision allows it to restrict coverage to licensed mental health care providers, since only medical and surgical services performed by licensed providers are covered. HCA also notes RCW 41.05.600(4), which provides that a health plan may require that "mental health services be medically necessary...if a comparable requirement is applicable to medical and surgical services."

The court is not persuaded that the statute's definition of mental health services evidences a legislative intent that all services that purport to remedy mental health problems must be covered by HCA, regardless of medical necessity. Similarly, the court is not persuaded that the legislature intended to require HCA to cover services no matter the qualifications of the provider. It appears from the language cited by HCA above, that the legislature anticipated that restrictions could be placed on coverage for mental health services as long as they were the same type of restrictions placed on coverage for medical and surgical services.

Although both parties attempt to persuade the court of their respective positions on the medical necessity of ABA therapy, or lack thereof, that is not an issue that needs to be resolved to rule on the plaintiffs' motion. From the evidence presented to the court, it is apparent that ABA therapy may provide benefit to some individuals. The plaintiffs are seeking the opportunity to establish medical necessity on a case by case basis.

The court concludes as a matter of law that HCA is not in compliance with the Mental Health Parity Act insofar as it imposes a blanket exclusion of ABA therapy, even when provided by licensed therapists. HCA is required by the Act to cover medically necessary ABA therapy (as determined on an individualized basis) that is provided by licensed therapists. The court cannot determine as a matter of law that HCA is required to cover ABA therapy provided by certified or registered providers because on this record it is not clear whether HCA covers mental health services provided by counselors or therapists who hold certifications or registrations, but not licenses. Neither is it clear whether a national certification as is held by some ABA providers is equivalent to any certification for providers of other mental health services currently covered by HCA.

Exhaustion: HCA contends that plaintiffs have failed to exhaust their administrative and/or contractual remedies and, therefore, their claims should be dismissed. It does not appear that the Administrative Procedure Act applies to this dispute; the relationship among the parties is contractual, governed by the Certificates of Coverage. S.F. has exhausted his contractual remedies under the Certificate of Coverage, inasmuch as he appealed the denial of coverage for ABA services, prevailed before the IRO, only to have Aetna change the Certificate of Coverage to thwart the result of his appeal. There is no need for other putative class members to go through a similar exercise when it is plain that the result will be the same. HCA's exhaustion defense fails on summary judgment.

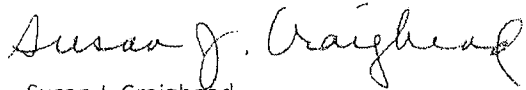
Request for a Permanent Injunction: The court has struggled with the plaintiffs' request for a permanent or, in the alternative, preliminary, injunction. The extent to which the court may resort to injunctive relief in the context of summary judgment is unclear; under CR 56, the court is not supposed to weigh facts, but the court must make findings of fact and conclusions of law to support entry of injunctive relief. The plaintiffs seek an injunction that would apply not only to them, but to other children with autism, yet this court has not yet been asked to certify this action as a class action. The parties advised the court at oral argument that the question of whether ABA therapy qualified as a neurodevelopmental therapy has yet to be litigated. While HCA has not presented any information contradicting plaintiffs' assertions that ABA therapy is medically necessary for them, plaintiffs have not

presented declarations from experts establishing medical necessity or the likelihood of irreparable harm, other than the fact that the IRO concluded that ABA therapy was medically necessary for S.F. It is certainly the opinion of the plaintiffs' parents that the lack of ABA therapy has caused and will continue to cause irreparable injury to them, but the court is not certain that this opinion alone can justify findings to support entry of injunctive relief. For these reasons, the court denies the request for injunctive relief without prejudice. The court anticipates that some type of evidentiary hearing could be conducted following a ruling on class certification to determine whether a preliminary injunction should issue, either as to these plaintiffs or as to a class of plaintiffs. The court welcomes suggestions from counsel regarding this procedure.

Counsel for plaintiffs is directed to present proposed orders to the court that include a list of all of the documents this court reviewed in connection with these cross-motions.

The court apologizes for the length of time it took this matter under advisement. I hope the parties can see the degree of care the court devoted to this very important case.

Sincerely,

A handwritten signature in cursive script that reads "Susan J. Craighead". The signature is written in dark ink and is positioned above the typed name.

Susan J. Craighead

Judge