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3 IN THE UNITED STATES DISTRICT COURT  
4 FOR THE DISTRICT OF ALASKA  
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6 PETER HEWKO,

7  
8 Plaintiff,

Case No. 3:19-cv-00169-JWS

9 vs.

10 COFFMAN ENGINEERS, INC.;  
11 COFFMAN ENGINEERS, INC.  
12 WELFARE PLAN; REGENCE BLUE  
13 SHIELD,

14 Defendants.  
15

**ORDER ON MOTIONS  
FOR SUMMARY JUDGMENT  
Docs. 77 and 101**

16 **I. MOTIONS PRESENTED**

17 At docket 77 Defendant Regence Blueshield (Regence) filed a motion for  
18 partial summary judgment, to which Defendant Coffman Engineers, Inc. and  
19 Coffman Engineers, Inc. Welfare Plan (collectively, Coffman) joined at docket 78.  
20 The motion seeks dismissal of Plaintiff's first two claims, which are based on a  
21 denial of benefits. Plaintiff Peter Hewko (Plaintiff) filed his response and his cross-  
22 motion for summary judgment at docket 101. Regence filed its response/reply at  
23 docket 105. Plaintiff replied at docket 111. Regence filed a surreply with the court's  
24 permission at docket 118. Oral argument would not be of assistance to the court.  
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## II. BACKGROUND

Plaintiff was formerly employed by Coffman, which provides health insurance benefits to its employees by and through a self-funded benefits plan, the Coffman Engineers, Inc. Welfare Plan (the Plan). The Plan is regulated and governed by the Employee Retirement Income Security Act (ERISA). Regence is the “Claims Administrator” for the Plan and as such provides administrative services for claims made under the Plan. Regence has discretion under the Plan, as the Claims Administrator, to interpret the Plan and make benefit determinations,<sup>1</sup> but Regence does not assume any financial risk or obligations with respect to claims.<sup>2</sup> All covered medical services and supplies are paid for by Coffman.<sup>3</sup>

In June of 2016, while employed with Coffman and eligible for benefits under the Plan, Plaintiff suffered a cerebral stroke. He was hospitalized and incurred substantial medical expenses both during and after his hospitalization, including expenses stemming from rehabilitative services. The Plan had a provision covering rehabilitation services. Under that provision, Plaintiff’s rehabilitative therapy was covered, but the benefit was limited to 30 inpatient days per calendar year and 25 outpatient visits per calendar year.<sup>4</sup> In April of 2017, Plaintiff’s mother, Jane Hewko, learned that there was a provision in the Plan that covered

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<sup>1</sup> A.R. 3540.

<sup>2</sup> A.R. 3542, 3482.

<sup>3</sup> A.R. 3482.

<sup>4</sup> A.R. 3508, 3586, 3664

1 neurodevelopmental therapy services. That provision included coverage for  
2 unlimited inpatient therapy and 25 outpatient therapy visits per calendar year.<sup>5</sup>  
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4 Plaintiff, through his mother, wrote Regence to request that Plaintiff's family be  
5 reimbursed for out-of-pocket costs related to Plaintiff's rehabilitation that she  
6 believed should have been covered under the neurodevelopmental therapy provision,  
7 because unlike the rehabilitation services provision it provides unlimited inpatient  
8 therapy.<sup>6</sup> Regence denied the request, explaining that it had never received a claim  
9 from one of Plaintiff's providers that showed Plaintiff was eligible for  
10 neurodevelopmental therapy.<sup>7</sup> Regence argues that this decision is correct under the  
11 Plan. It asserts that Plaintiff was only eligible for benefits under the rehabilitation  
12 services provision because, based on what was submitted to Regence by his  
13 providers, therapy was needed to help him regain skills or functions that he had lost  
14 as a result of an illness. It asserts that Plaintiff was not eligible for benefits under the  
15 neurodevelopmental therapy provision because that provision only applies to services  
16 needed to treat delays in normal development and unrelated to an injury or illness.  
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21 This ERISA lawsuit followed. Plaintiff asserts three claims against  
22 Defendants.<sup>8</sup> The first is based on a denial of benefits. The complaint alleges that  
23 Regence abused its discretion by denying him neurodevelopmental therapy benefits.  
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26 <sup>5</sup> A.R. 3501, 3579, 3657

27 <sup>6</sup> A.R. 1355-1357.

28 <sup>7</sup> A.R. 1363-1364.

<sup>8</sup> Doc. 61.

1 It also alleges that Regence misrepresented the available coverage by telling Plaintiff,  
2 his family, and the hospital that his coverage for restorative therapies was limited to  
3 30 inpatient days and not informing him about the unlimited inpatient benefits  
4 available under the neurodevelopmental therapy provision. The complaint alleges  
5 that Regence abused its discretion when it failed “to engage [in] adequate and  
6 reasonable communications . . . regarding [Plaintiff’s] benefits under [the Plan] and  
7 what was required to obtain those benefits . . . ” and that his appeal rights were not  
8 adequately explained.<sup>9</sup>

11 The second claim is one for equitable surcharge. Plaintiff alleges that as a  
12 result of the denial by Regence, he has had to pay for medical, rehabilitative, or  
13 attendant care that should have been paid for under the terms of the Plan. He  
14 requests reimbursement from Defendants.

17 The third claim is that Regence and Coffman failed to provide requested  
18 information and documents related to the Plan and that this failure prejudiced his  
19 efforts to obtain benefits. He requests an award pursuant to 29 U.S.C. § 1132(c)(1)  
20 and/or (c)(3).

22 Regence filed this motion for partial summary judgment on Plaintiff’s first  
23 two claims because “they are predicated on [Plaintiff’s] mistaken claim that he is  
24 entitled to neurodevelopmental therapy benefits and that Regence misadvised him  
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<sup>9</sup> Doc. 61 at p. 8.

1 regarding whether he was entitled to those benefits.”<sup>10</sup> It asserts that the plain  
2 language of the Plan unequivocally covers Plaintiff’s therapy under the rehabilitative  
3 services benefit and that even if there were some ambiguity Regence’s interpretation  
4 is entitled to deference as reasonable. Given that Plaintiff was not eligible for  
5 neurodevelopmental therapy benefits, Regence argues, it did not fail to inform him  
6 about the availability of those benefits. Plaintiff, in turn, requests summary judgment  
7 in his favor arguing that the Plan’s provision for unlimited inpatient  
8 neurodevelopmental therapy benefits applied to his situation and that Regence’s  
9 decision should not be accorded deference under the abuse of discretion standard  
10 because of Regence’s errors and miscommunication. Regence does not seek  
11 summary judgment as to Plaintiff’s third claim.  
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### 15 III. STANDARD OF REVIEW

16 Where an ERISA plan grants “discretionary authority to determine eligibility  
17 for benefits or to construe the terms of the plan” the default standard of review is for  
18 abuse of discretion.<sup>11</sup> Here, it is undisputed that the Plan grants Regence  
19 discretionary authority to determine eligibility for benefits and to construe the Plan’s  
20 terms and conditions. Consequently, Regence’s interpretation of the Plan’s  
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26 <sup>10</sup> Doc. 77 at p.2.

27 <sup>11</sup> *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989); *Tapley v. Locals 302 &*  
28 *612 of Int’l Union of Operating Eng’rs-Emp’rs Const. Indus. Ret. Plan*, 728 F.3d 1134,  
1139 (9th Cir. 2013).

1 provisions addressing rehabilitative and neurodevelopmental therapy benefits is  
2 reviewed for abuse of discretion.

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4 While a Rule 56 motion can be filed in an ERISA case governed by an abuse  
5 of discretion standard, “[t]raditional summary judgment principles have limited  
6 application” in such cases.<sup>12</sup> “[T]he usual tests of summary judgment, such as  
7 whether a genuine dispute of material fact exists, do not apply.”<sup>13</sup> Instead, a motion  
8 for summary judgment is “merely the conduit to bring the legal question before the  
9 district court.”<sup>14</sup>  
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#### 11 IV. DISCUSSION

##### 12 **Regence’s interpretation of the Plan**

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14 Plaintiff received coverage for his restorative therapy pursuant to the Plan’s  
15 rehabilitation services provision. The benefits under that provision were limited in  
16 nature. After an inquiry from Plaintiff’s mother as to whether he could be covered  
17 under the more generous neurodevelopmental therapy provision, Regence determined  
18 that Plaintiff was not eligible for benefits under that provision because it only  
19 covered therapy needed to restore function due to a developmental delay and not due  
20 to an illness, such as a stroke. When reviewing Regence’s interpretation of the Plan  
21 for abuse of discretion, the court must grant its decision a “high level of deference.”<sup>15</sup>  
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<sup>12</sup> *Stephan v. Unum Life Ins. Co. of Am.*, 697 F.3d 917, 929 (9th Cir. 2012).

27 <sup>13</sup> *Id.* at 930 (quoting *Nolan v. Heald College*, 551 F.3d 1148, 1154 (9th Cir. 2009)).

28 <sup>14</sup> *Id.*

<sup>15</sup> *Tapley*, 728 F.3d at 1139.

1 The court will not disturb the decision unless the interpretation is “not grounded on  
2 *any* reasonable basis.”<sup>16</sup> Regence’s interpretation of the Plan as to coverage “need  
3 not be the one this court would have reached, but only an interpretation which has  
4 rational justifications.”<sup>17</sup> This standard, however, is not necessarily a rubber stamp.  
5 The court must closely read the contested terms and apply basic principles of contract  
6 interpretation to the analysis.<sup>18</sup> Consequently, Regence’s interpretation constitutes an  
7 abuse of discretion standard if it: (1) conflicts with the plain language of the Plan; (2)  
8 “renders nugatory” other provisions in the Plan; or (3) “lacks any rational nexus” to  
9 the primary purpose of the Plan.<sup>19</sup>

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13 The court turns first to the plain language of the Plan’s neurodevelopmental  
14 therapy provision. That provision reads as follows:

15 NEURODEVELOPMENTAL THERAPY. . .  
16 The Plan covers inpatient and outpatient neurodevelopmental therapy  
17 services. . . . To be covered, such services must be to restore or  
18 improve function. Covered Services include only physical therapy,  
19 occupational therapy and speech therapy and maintenance service, if  
20 significant deterioration of the Claimant’s condition would result  
21 without the service. You will not be eligible for both the  
22 Rehabilitation Services benefit and this benefit for the same services  
23 for the same condition.<sup>20</sup>

23 <sup>16</sup> *Id.* (quoting *Oster v. Barco of Cal. Emps.’ Ret. Plan*, 869 F.2d 1215, 1218 (9th Cir.  
24 1988)).

25 <sup>17</sup> *Id.* at 1140 (quoting *Smith v. CMTA-IAM Pension Trust*, 654 F.2d 650, 655 (9th Cir.  
26 1981)).

26 <sup>18</sup> *Id.*

27 <sup>19</sup> *Id.*

28 <sup>20</sup> A.R. 3501, 3579, 3657. There is a slight difference in wording in the 2018 version, but  
that difference is not relevant to the court’s analysis.

1 Read alone, the provision covering neurodevelopmental therapy is unclear because  
2 the term “neurodevelopmental” is not defined in the Plan, and the use of the phrase  
3 “restore or improve lost function” could reasonably suggest that it covers therapy  
4 needed to regain function a claimant once had. However, Regence’s determination  
5 that this provision covers therapy needed only as a result of delays in normal  
6 development does not conflict with its plain language. It falls within the ordinary  
7 sense of the term “neurodevelopmental,” which is defined as “relating to, or  
8 involving the development of the nervous system.”<sup>21</sup> Development, in turn, is  
9 defined as “related to growth” or “[t]he growth or formation of an organ or other  
10 structure that is a natural part of the anatomy of an organism.”<sup>22</sup> Neurodevelopmental  
11 disorders are generally described as “a group of conditions with onset in the  
12 developmental period[,] . . . typically manifest[ing] in early development . . . and are  
13 characterized by developmental deficits that produce impairments of personal, social,  
14 academic, or occupational functioning.”<sup>23</sup> Indeed, Regence’s interpretation  
15 corresponds with the Washington Administrative Code’s description of  
16 “neurodevelopmental therapy” as consisting of therapy needed “to restore or improve  
17 function based on developmental delay.”<sup>24</sup>

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24 <sup>21</sup> *Neurodevelopmental*, Oxford English Dictionary,  
25 <https://www.oed.com/view/Entry/126386> (last visited April 14, 2021).

26 <sup>22</sup> *Development*, Oxford English Dictionary, <https://www.oed.com/view/Entry/51434> (last  
27 visited April 14, 2021).

28 <sup>23</sup> Diagnostic and Statistical Manual of Mental Disorder, S2H1 (5th ed. 2013).

<sup>24</sup> Wash. Admin. Code 284-43-5642(10)(a)(i). The parties do not dispute that Washington  
law applies under the Plan.



1 Regence’s interpretation of neurodevelopmental therapy as applying only to  
2 those needing therapy because of a developmental delay does not render other  
3 provisions in the Plan “nugatory.” To the contrary, this interpretation is all the more  
4 reasonable when considered in light of the rehabilitation services provision. The  
5 rehabilitative services provision in the 2016 version of the Plan reads as follows:  
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7 REHABILITATION SERVICES . . .

8 The Plan covers inpatient and outpatient rehabilitation services  
9 (physical, occupational and speech therapy services only) and  
10 accommodations as appropriate and necessary to restore or improve  
11 lost function cause by Illness or Injury. You will not be eligible for  
12 both the Neurodevelopmental Therapy benefits and this benefit for the  
13 same services for the same condition.<sup>25</sup>

14 It specifically identifies when coverage under this provision is triggered: when a  
15 claimant needs therapy to restore or improve “lost function caused by Illness or  
16 Injury.”<sup>26</sup> A stroke falls within the Plan’s definition of illness.<sup>27</sup>

17 The distinction between rehabilitative therapy and neurodevelopmental  
18 therapy is even more clear in the revised rehabilitation services provision as it is set  
19 forth in the 2017 and 2018 versions of the Plan, which read as follows:  
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21 The Plan covers inpatient and outpatient rehabilitation services  
22 (physical, occupational and speech therapy services only) and  
23 accommodations as appropriate and necessary to help a person regain,  
24 maintain, or prevent deterioration of a skill or function that has been  
25 acquired but then lost or impaired due to Illness, Injury or disabling  
26 condition. You will not be eligible for both the Neurodevelopmental

27 <sup>25</sup> A.R. 3508.

28 <sup>26</sup> A.R. 3508.

<sup>27</sup> A.R. 3544, 3624, 3702.

1           Therapy benefit and this benefit for the same services for the same  
2           condition.<sup>28</sup>

3           The provision clarifies that it applies when rehabilitation is needed to help a claimant  
4           regain a function that he once had but lost, which would be the situation occurring  
5           with a stroke. Nothing about Regence’s interpretation lacks a rational nexus to the  
6           purpose of the Plan.  
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8           In sum, the court concludes that Regence’s interpretation of the Plan and its  
9           resulting decision that Plaintiff did not qualify for the neurodevelopmental therapy  
10          benefit was not an abuse of discretion. It is a reasonable to conclude that a claimant  
11          can only be covered for restorative services under the neurodevelopmental therapy  
12          provision if those services are meant to restore normal levels of functioning after a  
13          diagnosis of developmental delay and that such services rendered after a stroke fall  
14          under the rehabilitative services provision.  
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17          **Other factors related to abuse of discretion review**

18          Plaintiff argues that this court should apply a level of skepticism to Regence’s  
19          decision here, because “a claims administrator’s discretionary authority can be  
20          overrode (sic) when there is evidence of bias driven decision making or flagrant  
21          procedural violations.”<sup>29</sup> The abuse of discretion standard is not outright replaced by  
22          a de novo standard except in the “rare class of cases” where the “administrator  
23          engage[d] in wholesale and flagrant violations of procedural requirements of ERISA”  
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28          <sup>28</sup> A.R. 3586, 3664-65.

<sup>29</sup> Doc. 101 at p. 24.

1 such as “failing to comply with virtually every applicable mandate of ERIA.”<sup>30</sup>  
2 Instead, the existence of a procedural irregularity is simply a factor to be considered  
3 in deciding whether an administrator’s decision was an abuse of discretion.<sup>31</sup>  
4 Evidence that the administrator “engaged in an ongoing, good faith exchange of  
5 information” with the claimant suffices to accord broad deference to the decision  
6 despite any procedural errors.<sup>32</sup> The same is true of a conflict of interest. It is a  
7 factor to be considered on a case-by-case basis.<sup>33</sup> “An egregious conflict may weigh  
8 more heavily (that is, may cause the court to find an abuse of discretion more readily)  
9 than a minor, technical conflict might.”<sup>34</sup> Even in a situation where there is a  
10 structural conflict of interest—where the same entity which makes the benefits  
11 determination is that same entity funding the ERISA plan— the decision will still be  
12 accorded deference if unaccompanied by “evidence of malice, of self-dealing, or of a  
13 parsimonious claims-granting history.”<sup>35</sup>

14 While Plaintiff acknowledges that Regence does not have a structural conflict  
15 of interest because it does not fund the Plan, it argues that the court should  
16 nonetheless look skeptically upon its decision given its overall conduct here. In  
17 support of his position, he cites this court’s decision in *Mason v. Federal Express*

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24 <sup>30</sup> *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 971 (9th Cir. 2006).

25 <sup>31</sup> *Id.* at 972.

26 <sup>32</sup> *Id.* (internal quotation marks omitted).

27 <sup>33</sup> *Id.* at 968.

28 <sup>34</sup> *Id.*

<sup>35</sup> *Id.*

1 *Corporation.*<sup>36</sup> In *Mason*, this court concluded that the plan administrator was  
2 operating under a conflict of interest even though a structural conflict was not  
3 present. It gave credence to the argument that the claims administrator had financial  
4 incentives to provide favorable financial results for the company funding the ERISA  
5 plan based on specific factual and procedural irregularities related to the  
6 administrator’s review of the claimant’s medical record—including the  
7 administrator’s attempt to influence a medical determination regarding whether the  
8 claimant was disabled.<sup>37</sup>

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11         There are no equivalent irregularities or potential conflicts in the record here.  
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13 Plaintiff points to two denials by Regence to show that its decision making was  
14 irregular here. A couple of months after his stroke, Regence denied Plaintiff’s pre-  
15 authorization request for a neurorehabilitative program offered through Rehab  
16 Without Walls, a home health care service.<sup>38</sup> Coverage for Rehab Without Walls  
17 depended on the Plan’s separate home health care provision, not the  
18 neurodevelopmental therapy provision. Indeed, the program offered through Rehab  
19 Without Walls was described as a home neurorehabilitative program, not a  
20 neurodevelopmental program.<sup>39</sup> Regence denied the preauthorization request  
21 because it concluded that Rehab Without Walls provided and charged for premium  
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<sup>36</sup> 165 F. Supp. 3d 832 (D. Alaska 2016).

27 <sup>37</sup> *Id.* at 850-56.

28 <sup>38</sup> A.R. 517-19.

<sup>39</sup> A.R. 511.

1 home health services that were not medically necessary.<sup>40</sup> This specific denial itself  
2 is not at issue in this case<sup>41</sup> and the denial does not otherwise cast doubt on  
3 Regence's interpretation of the neurodevelopmental therapy provision. It does not  
4 suggest a concerning irregularity or inconsistency in the record, a failure to  
5 investigate, or the presence of bias or self-dealing.  
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8 The same is true of Regence's 2018 denial of Plaintiff's pre-authorization  
9 request for a long-term stay at Quality Living in Omaha, Nebraska, which is a skilled  
10 nursing facility providing rehabilitation services. Coverage for this stay had to meet  
11 the requirements under the Plan's skilled nursing facility provision, although  
12 Plaintiff, through his mother, asserted it could be covered under the  
13 neurodevelopmental therapy provision. Regence denied the request as not medically  
14 necessary, but Plaintiff appealed that decision, and as a result of that appeal, Regence  
15 approved a limited 10-day stay under the Plan's skilled nursing facility provision.  
16 Plaintiff now argues that the 10-day stay was far less than what was authorized under  
17 any of the various therapy provisions; but whether a longer stay should have been  
18 authorized under the skilled nursing facility provision is not at issue in this case.  
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20 Rather, the complaint alleges that this stay should have been authorized pursuant to  
21 his neurodevelopmental therapy benefits, which Regence reasonably determined  
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26 <sup>40</sup> A.R. 517.

27 <sup>41</sup> There was no appeal filed to challenge Regence's determination that the offered home  
28 health services of Rehab Without Walls was medically necessary, and the complaint in this  
case does not address this issue specifically.

1 were not available to Plaintiff. The facility did not propose treatment that could be  
2 coded as neurodevelopmental therapy. Indeed, the record shows that the Quality  
3 Living representative told Regence that the facility was not providing developmental  
4 therapy services and that it was her understanding that stroke victims were not coded  
5 as having developmental conditions.<sup>42</sup> Again, nothing about Regence's limited  
6 authorization suggests the presence of bias or self-dealing, a failure to review the  
7 claim, or some other inconsistency.<sup>43</sup>

10 Plaintiff argues that procedural errors and misleading communications by  
11 Regence as to his neurodevelopmental therapy benefits weigh heavily against  
12 Regence in the abuse of discretion analysis. He relies on a letter his mother received  
13 on August 31, 2017 from Regence.<sup>44</sup> That letter was in response to her July 26, 2017  
14 letter to Regence, in which she challenges Regence's failure to inform her about the  
15 Plan's neurodevelopmental therapy benefits.<sup>45</sup> Her letter is premised on her belief  
16 that Plaintiff was in fact eligible for such benefits; she complains in the letter that if  
17 Regence would have informed her about the availability of these benefits Plaintiff  
18 would have been able to remain in the hospital longer, and she asserts that the Plan's  
19 neurodevelopmental benefits should have covered more of his rehabilitation.  
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24 <sup>42</sup> Doc. 111-2 at pp. 12-14.

25 <sup>43</sup> Indeed, Regence points to evidence that the 10-day stay could be extended depending on  
26 whether his providers at Quality Living could show that Plaintiff had made progress at the  
27 facility during his stay. A.R. 1184-85.

28 <sup>44</sup> A.R. 1363-1364.

<sup>45</sup> A.R. 1356-57.

1 Regence’s response letter states that the Plan does in fact provide for  
2 neurodevelopmental therapy benefits but that “[b]enefits are applied to services on  
3 claims submitted to Regence based on the diagnosis codes listed on the claims by the  
4 performing providers.”<sup>46</sup> Regence goes on to explain that Plaintiff’s care providers  
5 had not submitted any claims with the necessary neurodevelopmental diagnosis code  
6 and therefore he was not eligible for reimbursement under that provision.<sup>47</sup> While  
7 the letter does not explain why Plaintiff’s injuries do not fall within the confines of  
8 the neurodevelopmental therapy provision, it places the onus on Plaintiff to discuss  
9 the diagnosis with his providers. The letter is not egregiously misleading, nor does it  
10 guarantee coverage under the neurodevelopmental therapy provision. In it, Regence  
11 clearly rejects Plaintiff’s request for reimbursement and explains that Plaintiff will  
12 not be able to receive such benefits unless Regence receives a claim from his treating  
13 providers that is coded as neurodevelopmental. The denial is consistent with its own  
14 internal communications.<sup>48</sup>

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19 Plaintiff also argues that Regence failed to respond to his attorney’s letter  
20 dated January 25, 2019.<sup>49</sup> Like this lawsuit, the letter is premised on the assumption  
21 that Plaintiff had been entitled to neurodevelopmental benefits and therefore more of  
22 his therapy should have been covered under the Plan. It also specifically challenges  
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<sup>46</sup> A.R. 1363.

27 <sup>47</sup> A.R. 1364.

28 <sup>48</sup> A.R. 1359-62.

<sup>49</sup> A.R. 3367-71.

1 Regence’s denial for pre-authorization to stay at Quality Living. Regence argues that  
2 it did discuss the letter with Plaintiff’s attorney and was told that it was not an appeal  
3 of any specific decision but rather was a legal complaint.<sup>50</sup> The letter was routed to  
4 Regence’s legal department.<sup>51</sup> Plaintiff disputes the veracity of Regence’s account  
5 and maintains that Regence did not properly follow up on this appeal letter.<sup>52</sup> The  
6 court need not decide the issue, because even if Regence failed to properly process  
7 the letter as an appeal, any such irregularity does not warrant a finding that Regence  
8 abused its discretion in handling Plaintiff’s continued demands for  
9 neurodevelopmental therapy benefits. There was an open line of communication  
10 between Regence and Plaintiff, and Regence told Plaintiff that none of his providers  
11 coded the services rendered to him as neurodevelopmental to warrant the application  
12 of those Plan benefits.

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17 In his reply, Plaintiff provides the transcripts of phone calls between his  
18 mother and a Regence representative in late 2018 as evidence that Regence admitted  
19 that he should have received neurodevelopmental therapy benefits or at least  
20 egregiously misled him as to Regence’s position. Indeed, in the first conversation it  
21 appears that the representative did not understand the neurodevelopmental therapy  
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<sup>50</sup> Doc. 105 at pp. 9-10; Doc. 106.

26 <sup>51</sup> Doc. 105 at p. 10; Doc. 106. Regence filed a motion to supplement the administrative  
27 record with an internal email that included task notes related to these discussions. Plaintiff  
28 did not file an objection to the motion itself, but he objects to the relevancy and veracity of  
these notes in his reply brief.

<sup>52</sup> Doc. 111 at p. 20.



1 benefit or what could trigger eligibility for the benefit. She was clearly confused as  
2 to how the neurodevelopmental therapy benefit differed from the rehabilitative  
3 services benefit.<sup>53</sup> She made many, what appear to be, incorrect or misleading  
4 statements. However, a review of these conversations indicate this representative  
5 nonetheless made clear that the benefits Regence provides under the Plan depends on  
6 what the health care provider codes for treatment.<sup>54</sup> She told Plaintiff's mother she  
7 would call the provider at issue, which was Quality Living, and discuss her  
8 understanding of the benefit.<sup>55</sup> The Regence representative then placed a call to  
9 Quality Living and that facility's representative informed her that it does not bill  
10 treatment as developmental because, while there is no age restriction on who can  
11 obtain developmental therapy, such treatment does not apply to people requiring  
12 rehabilitation due to a stroke.<sup>56</sup> After that discussion, on December 5, 2018,  
13 Regence's representative told Plaintiff's mother that she had researched the issue  
14 further and that a stroke is not considered neurodevelopmental under the applicable  
15 list of diagnosis codes.<sup>57</sup> She stated that neurodevelopmental therapy occurs when a  
16 patient needs to regain a function that he never had.<sup>58</sup>

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24 <sup>53</sup> See, e.g. doc. 111-1 at pp. 14-15.

25 <sup>54</sup> *Id.* at pp. 5, 22.

26 <sup>55</sup> *Id.* at pp. 15, 19.

27 <sup>56</sup> Doc. 111-2 at pp. 12, 14.

27 <sup>57</sup> Doc. 111-3 at pp. 2-3.

28 <sup>58</sup> *Id.*

