

HONORABLE RICHARD A. JONES

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

R.H., et al.,

Plaintiffs,

v.

PREMERA BLUE CROSS, et al.

Defendants.

CASE NO. C13-97RAJ

ORDER

I. INTRODUCTION

This matter comes before the court on Plaintiff R.H.’s renewed unopposed motion for preliminary approval of settlement agreement. Dkt. # 68. After extensive negotiations, the parties have reached an agreement that appears to fundamentally change the insurance landscape for all of defendants’ Washington insureds with developmental disabilities and autism, and provides the class with broad and immediate relief. On July 7, 2014, the court granted plaintiff’s unopposed motion to certify the class and denied plaintiff’s motion for preliminary approval of the settlement agreement. Dkt. # 65. On July 21, 2014, the court denied plaintiff’s motion for reconsideration. Dkt. # 67. Plaintiff

1 has now provided the court sufficient information and legal authority for the court to
2 grant preliminary approval of the settlement agreement.

3 For the reasons stated below, the court GRANTS plaintiff’s motion for
4 preliminary approval.¹

5 **II. BACKGROUND**

6 In January 2013, plaintiff R.H., by and through his parents and guardians, P.H. and
7 N.B.-H, filed this case alleging that Premera Blue Cross and LifeWise Health Plan of
8 Washington (“Premera”) failed to comply with Washington’s Mental Health Parity Act
9 (“Parity Act”). Dkt. # 1. The Parity Act generally requires Washington health plans to
10 cover medically necessary outpatient and inpatient services to treat mental disorders
11 covered by the diagnostic categories listed in the most current version of the Diagnostic
12 and Statistical Manual of Mental Disorders (“DSM” or “DSM-IV”) under the same terms
13 and conditions as medical and surgical services. *See* RCW 48.44.341; *J.T. v. Regence*
14 *BlueShield*, 291 F.R.D. 601, 606 (W.D. Wash. 2013).

15 The Employee Retirement Income Security Act (“ERISA”) governs the health
16 care plans at issue here, and thus plaintiff brings his claims under its provisions. *See* 29
17 U.S.C. § 1002. Plaintiff’s complaint sets forth three claims for relief: (1) breach of
18 fiduciary duties pursuant to ERISA § 404(a)(1), 29 U.S.C. § 1104(a); (2) recovery of
19 benefits, clarification of rights under terms of the plan, and clarification of rights to future
20 benefits under the plan pursuant to ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B);
21 and (3) to enjoin acts and practices in violation of the terms of the plans, to obtain other
22 equitable relief, and to enforce the terms of the plans pursuant to ERISA § 502(a)(3), 29
23 U.S.C. § 1132(a)(3). Dkt. # 1 ¶¶ 29–41.

24 Plaintiff contends that Premera has adopted a uniform policy excluding coverage
25 for neurodevelopmental therapy (“NDT”) therapy to treat DSM conditions for individuals
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27 ¹ No party has requested oral argument, and the court finds oral argument unnecessary.

1 over the age of six and imposing visit limits on such therapies when covered under its
2 “rehabilitation” benefit. *Id.* ¶ 12. Plaintiff alleges that he was denied coverage for speech
3 and occupational therapy necessary to treat his DSM condition of pervasive
4 developmental disorder-not otherwise specified (DSM-IV 299.8) and developmental
5 delays (DSM-IV 315.9) after reaching visit limits under his rehabilitation benefit. *Id.*
6 Plaintiff alleges that he understood that his applied behavior analysis (“ABA”) therapy to
7 treat his autism was not covered. *Id.* Plaintiff alleges that to the extent that Premera
8 provides any coverage of NDT or ABA therapies, it generally imposes treatment
9 limitations that were not at parity with coverage for medical and surgical services. *Id.*
10 With respect to the ABA therapy, plaintiff contends that Premera’s internal policies and
11 procedures created a *de facto* exclusion of ABA therapy to treat plaintiff’s autism
12 syndrome disorder (“ASD”). Dkt. # 60 (Plf’s Mot.) at 4.

13 With respect to the NDT therapy, the proposed settlement agreement eliminates
14 Premera’s alleged NDT age exclusion and treatment limits when those therapies are
15 provided to treat DSM-IV mental health conditions. The proposed settlement agreement
16 also provides a \$3.5 million settlement fund to address NDT class members’ claims for
17 reimbursement for uncovered NDT services to treat mental health conditions during the
18 class period. Plaintiff seeks certification for the NDT class under Rule 23(b)(3).

19 With respect to the ABA therapy, the parties agreed to resolve, on a class-wide
20 basis, the criteria for coverage on a prospective basis. Dkt. # 60 at 5. The past damage
21 claims held by class members were not settled. *Id.* The proposed settlement agreement
22 does not waive the claims of class members who were unable to receive coverage for
23 ABA therapy in the past, and allows individual class members to pursue individual
24 damage claims on a case-by-case basis. *Id.* Plaintiff seeks certification of the ABA class
25 under Rule 23(b)(2).

1 **III. ANALYSIS**

2 The court’s findings on the issue of whether the settlement is fair, reasonable, and
3 adequate are necessarily preliminary. The court previously denied plaintiff’s motion
4 because plaintiff had not provided any information to the court that would allow it to
5 conclude that \$3.5 million is adequate and sufficient to pay thousands of class members,
6 and because of concerns regarding the adequacy of requested fees and incentive
7 payments, the adequacy of the *cy pres* award, and the adequacy of the form of the notice.
8 Plaintiff has addressed all of the court’s concerns.

9 Under the terms of the settlement agreement, Premera will provide prospective
10 coverage of medically necessary NDT to treat individuals with a mental health condition.
11 Dkt. # 62-1 (Settlement Agreement) ¶ 6.1. In doing so, Premera has agreed to eliminate
12 its age exclusion, treatment limitations, and caps. *Id.* ¶¶ 6.1.2-.4. Premera has also
13 agreed to provide medically necessary ABA therapy coverage to treat autism, and to
14 eliminate its age exclusion, treatment limitations, and caps with respect to ABA therapy
15 as well. *Id.* ¶¶ 6.2.1-.2. The agreement also provides for a \$3,500,000 fund for the NDT
16 class from which payment will be made for attorney’s fees, costs, claims administration
17 costs, payments to R.H. and J.P. for retrospective ABA coverage, incentive awards, and
18 class members’ claims for uncovered NDT. *Id.* ¶ 8.

19 NDT class members will be eligible for payment from the settlement fund upon
20 submission of a claim form that verifies the claimant’s DSM diagnosis, the dates of the
21 NDT for that diagnosis, the providers of the treatment, and the unreimbursed charges or
22 debt incurred with that treatment. *Id.* ¶ 8.4. Class members must provide documentation
23 to support their claim for reimbursement. *Id.* ¶ 8.4.2.1. An independent claims processor
24 will review the claims, confirm coverage with Premera, ensure that there are no duplicate
25 claims, and provide an opportunity for class members to cure any problems with a
26 deficient claim form. *Id.* ¶¶ 8.4.3.1-.2.

1 Plaintiff has provided sufficient evidence, under seal due to the confidential nature
2 of the data provided, that indicates that even a 16 percent claim submission rate would
3 result in 100 percent of claims being paid. Dkt. ## 69 & 70 (Spoonemore Decl.) ¶ 2. In
4 the court’s experience, a 16 percent participation rate is within the normal range for
5 participants in class actions. See *Chesbro v. Best Buy Stores, L.P.*, Case No. C10-
6 774RAJ, 2014 WL 793362, *4 n.3 (W.D. Wash. Feb. 26, 2014) (“this court has
7 previously found that 8.5 percent of participation is within the normal range for
8 participants in class actions.”).

9 With respect to attorney’s fees, the Ninth Circuit has established a benchmark
10 award for attorney’s fees of twenty-five percent of the common fund. *Torrissi v. Tucson*
11 *Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993). Plaintiff’s counsel may seek a
12 thirty-five percent fee award, or \$1,225,000.² A twenty-five percent fee award would
13 result in \$875,000, which is closer to the lodestar calculation provided by plaintiffs for
14 actual hours expended. Dkt. # 68 at 15. Nevertheless, counsel obtained an
15 unprecedented expansion of coverage for NDT and ABA services for class members
16 despite substantial risk involved in the litigation. The court will reserve its ruling on
17 attorney’s fees until it has reviewed plaintiffs’ motion for attorney’s fees to determine
18 whether an upward departure to thirty-five percent of the common fund is warranted.
19 The relevant provision in the Settlement Agreement only secures the defendants’
20 agreement not to oppose a later motion for attorney’s fees up to thirty-five percent.
21 Accordingly, on a preliminary basis, and with the caveat that the court will take a careful
22 look at the attorney’s fees motion, plaintiffs have satisfied the court’s concerns with
23 respect to attorney’s fees.

26 ² Plaintiffs indicate for the first time that class counsel may not seek thirty-five percent.
27 Dkt. # 68 at 15.

1 Plaintiff has also provided the court with evidence and legal authority that, on a
2 preliminary basis, the incentive award of \$25,000 to each plaintiff and guardian (for a
3 total of \$100,000) is reasonable where they have all dedicated substantial time, effort and
4 undertaken risk to protect the interests of plaintiffs.³ *See Staton v. Boeing Co.*, 327 F.3d
5 938, 977 (9th Cir. 2003) (district court must evaluate their awards individually, using
6 relevant factors including the actions the plaintiff has taken to protect the interests of the
7 class, the degree to which the class benefitted from those actions, and the amount of time
8 and effort the plaintiff expended in pursuing the litigation).

9 With respect to the *cy pres* award in the event that funds remain, plaintiff has
10 demonstrated the Settlement Agreement follows the “next best distribution” mandate
11 followed by the Ninth Circuit. *See Lane v. Facebook, Inc.* 696 F.3d 811, 821-22 (9th Cir.
12 2012). Under the Settlement Agreement, any *cy pres* award must be distributed to
13 organizations to assist families with a family member with developmental conditions to
14 access health care and health coverage. Since any *cy pres* award must go to organizations
15 to assist families with a developmentally disabled family member to access health
16 coverage, the court finds that, on a preliminary basis, any such distribution accounts for
17 the nature of plaintiff’s lawsuit, the objectives of the underlying statutes, and the interests
18 of silent class members. *See Lane*, 696 F.3d at 821.

19 Finally, the court finds that the form of notice that class counsel provides, which it
20 proposes to be mailed to all class members, is reasonable. Fed. R. Civ. P. 23(c)(2)(B)
21 (requiring “best notice that is practicable under the circumstances, including all members
22 who can be identified through reasonable effort”). However, the court has changed some
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25 ³ The court will accept counsel’s declaration representing the time and effort undertaken
26 by class representatives on preliminary approval. Dkt. # 69 (Spoonemore Decl.) ¶4. However,
27 the court expects that the class representatives will provide declarations to the court detailing the
time and effort they dedicated in support of the motion for incentive awards.

1 of the deadlines below. Accordingly, counsel shall revise the deadlines to conform to this
2 order.

3 **IV. PRELIMINARY APPROVAL**

4 This section sets forth formal findings and conclusions supporting the court's
5 preliminary approval of this class settlement. The court has largely adopted this section
6 from the plaintiff's proposed order. To the extent anything in this section conflicts with
7 another section of this order, the language of the other section will control.

8 1. The Court, for purposes of this Order, adopts the definitions set forth in the
9 Settlement Agreement submitted in support of this motion.

10 2. The Court finds that the Settlement Agreement, including all exhibits
11 thereto, is preliminarily approved as fair, reasonable and adequate and within the range of
12 reasonableness for preliminary settlement approval. The Court finds that: (a) the
13 Settlement Agreement resulted from extensive arm's length negotiations; and (b) the
14 Settlement Agreement is sufficient to warrant notice of the Settlement Agreement to
15 persons in the Classes and a full hearing on the approval of the Settlement Agreement.

16 3. Class counsel's proposed webpage notice and protocol is approved. Class
17 counsel will establish a Settlement Website no later than September 12, 2014
18 (www.sylaw.com/PremeraSettlement), which will provide information about the
19 settlement, including the complete Settlement Agreement, the notice mailed to Class
20 members, the claim form instructions, and the motion for attorney's fees and incentive
21 awards.

22 4. The Court finds that the proposed revised Notice of Settlement meets the
23 requirements of Federal Rule of Civil Procedure 23 and the applicable law in that it fairly
24 and adequately describes the terms of the Agreement, gives notice of the time and place
25 of the hearing for final approval of the Agreement, and describes how a class member
26 may comment on, opt out of, object to, or support the Agreement. The Court finds that
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1 the revised Claim Form, Claim Form Matrix and Claim Form Instructions, provide Class
2 members with NDT claims a reasonable method to file claims.

3 5. The Court directs the Claims Administrator, Nickerson & Associates, to
4 mail the revised Notice of Settlement and Claim Form material to Class members no later
5 than September 12, 2014. The Court concludes that direct mail notice to Class members
6 is the best notice practicable under the circumstances.

7 6. Claims by NDT class members must be received by the claims processor on
8 or before November 21, 2014.

9 7. Class counsel shall file their motion for attorney's fees, costs and incentive
10 awards on or before September 12, 2014. This application shall also be posted on the
11 Settlement Website on September 12, 2014.

12 8. Class members who wish to comment on, opt out of or object to the
13 proposed Settlement Agreement must submit written comments and/or objections to the
14 claims processor no later than November 21, 2014. The claims processor shall promptly
15 provide copies to counsel for each party, and file any material with the Court.

16 9. Class members who wish to appear at the final Settlement Approval
17 hearing may do so if they submit written notice that they intend to appear in person or
18 through counsel. If Class members wish to appear in person or through counsel at the
19 hearing, they must also describe the nature of their comment or objection in their written
20 notice of intent to appear. Written notice of intent to appear must be received by the
21 claims processor no later than November 21, 2014. The claims processor shall promptly
22 provide copies to counsel for each party, and file any material with the Court.

23 10. A Motion for Final Approval of the Settlement Agreement and responses to
24 comments and objections, together with any supporting declarations or other
25 documentation, must be filed no later than December 11, 2014, and noted for January 2,
26 2015. This motion shall be posted on the Settlement Website on December 11, 2014.

1 11. A final approval hearing will be held on January 9, 2015 at 10:00 a.m. at
2 the United States District Court for the Western District of Washington, 700 Stewart
3 Street, Seattle, WA 98101, at which time the court will determine, among other matters,
4 whether the Settlement Agreement is fair, reasonable, and adequate.

5 **V. TIMELINE**

6 September 12, 2014	Deadline by which Settlement Website must be available to 7 the public, and deadline for Class Administrator to serve 8 CAFA Notice pursuant to 28 U.S.C. § 1715(b).
9 September 12, 2014	Deadline for Class Counsel to file motion for attorney's fees 10 and incentive awards and make it available on the Settlement 11 Website.
12 November 21, 2014	Deadline for Class members to submit claims, exclude 13 themselves from the Settlement Classes, or file objections.
14 December 11, 2014	Deadline for class counsel to file motion for final approval, 15 setting forth expected recoveries for class members, and 16 responding to any objections.
17 January 9, 2015	Final approval hearing.

18 Dated this 6th day of August, 2014.

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21 The Honorable Richard A. Jones
22 United States District Judge
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