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9 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF LOS ANGELES

11 ANDREW A. ARCE, a minor, by and
12 through his Guardian ad Litem,
13 GUILLERMO ARCE; GUILLERMO
14 ARCE,

15 Plaintiffs,

16 vs.

17 KAISER FOUNDATION HEALTH PLAN,
18 INC., AND DOES 1 THROUGH 100,
19 INCLUSIVE,

20 Defendants.

Case No.: BC 388689

Hon. Emilie H. Elias
[Dept. 308]

**NOTICE OF ERRATA REGARDING
PLAINTIFFS' FIRST AMENDED
COMPLAINT**

Date Action Filed: April 8, 2008
Trial Date: None set

21
22 Plaintiffs make this notice to correct the omission of text from plaintiffs' First Amended
23 Complaint. The omitted text is as follows:

24 On page 1, line 13, after the word "Arce,"

25 "Individually and on behalf of other similarly-situated persons,"

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27 ///

28 ///

1 On page 16, line 5, in paragraph 68, after the text “17200.”

2 I. Plaintiffs, individually and on behalf of other similarly situated people, allege as
3 follows: Plaintiffs are bringing this cause of action for injunctive relief and declaratory
4 relief as a class action on behalf of the proposed class pursuant to Code of Civil
5 Procedure section 382. The proposed class consists of three subclasses. First, all
6 California residents who were Kaiser policyholders or health plan members whose
7 applied behavioral analysis for an autism spectrum disorder was wrongfully determined
8 to be not covered in violation of California law. Second, all California residents who
9 were Kaiser policyholders or health plan members whose speech therapy for an autism
10 spectrum disorder was wrongfully determined to be not covered in violation of
11 California law. Third, all California residents who were Kaiser policyholders or health
12 plan members whose occupational therapy for an autism spectrum disorder was
13 wrongfully determined to be not covered in violation of California law

14 II. Excluded from the class are defendants, their officers, directors, and employees; any
15 entity in which any defendant has a controlling interest, the defendants’ affiliates, legal
16 representatives, attorneys, heirs or assigns; the defendants’ immediate families; any
17 federal, state, or local government entity, any judge, justice or judicial officer presiding
18 over this matter, the members of their immediate families, and their judicial staffs; and
19 any insured or member whose coverage is subject to the provisions of the Employee
20 Retirement Income Security Act.


21 III. This action has been brought and may properly be maintained as a class action pursuant
22 to the provisions of Code of Civil Procedure section 382 because there is a well-defined
23 community of interest in the litigation and the proposed class is easily ascertainable.

- 24 • **Numerosity**: The class is so numerous that individual joinder of all members would
25 be impracticable. While the exact number of class members is unknown, upon
26 information and belief, plaintiffs allege that the proposed class would include
27 hundreds, if not thousands, of policyholders.
- 28 • **Commonality**: Common questions of law and fact that pertain to all class members,
and which predominate over other questions that affect only individual class members,

1 A copy of the First Amended Complaint that includes the omitted text is attached as
2 exhibit A.

3 Dated: July 3, 2008

4 LAW OFFICES OF SCOTT C. GLOVSKY

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6 BY: 
7 SCOTT C. GLOVSKY, Esq.
8 Attorneys for Plaintiff
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10 ANDREW A. ARCE, a minor, by and
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16 vs.

17 KAISER FOUNDATION HEALTH PLAN,
18 INC., AND DOES 1 THROUGH 100,
19 INCLUSIVE,

20 Defendants.

Case No.: BC 388689

FIRST AMENDED COMPLAINT

1. Breach of the Duty of Good Faith and Fair Dealing;
2. Breach of Contract;
3. Business & Professions Code section 17200; and
4. Business & Professions Code section 17500

21
22 Plaintiff Andrew A. Arce, by and through his Guardian ad Litem, and plaintiff Guillermo
23 Arce allege based on the knowledge of Guillermo Arce with respect to his own acts and on
24 information and belief with respect to all other matters:

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GENERAL ALLEGATIONS

1.

INTRODUCTION

1. Plaintiff Andrew Arce is a 26-month old boy with autism. The Kaiser Foundation Health Plan has been wrongfully denying care for Andrew along with thousands of other autistic children. Although California's Mental Health Parity laws require Kaiser to provide care for the treatment of autism, and early treatment leads autistic children to make substantial and sustained gains in IQ, language, academic performance, and adaptive behavior, Kaiser refuses to provide the care that autistic children desperately need to achieve their full potential.

2. In 1999, the California Legislature enacted the California Mental Health Parity Act. In that Act, the Legislature *mandated* that health care plans and health care insurers provide treatment for mental illnesses, including **autism**, to the same extent that they provide treatment for physical illnesses. The Legislature even made it a *crime* to willfully violate the statute – a crime repeatedly committed on a daily basis by Kaiser.

3. In enacting that statute, the Legislature specifically acknowledged that because “[t]he failure to provide adequate coverage for mental illnesses in private health insurance policies has resulted in significant increased expenditures for state and local governments,” it was important to require health care plans to cover care and treatment for mental illnesses, including autism. Yet – every day – Kaiser undermines the goal of relieving the taxpayers from the onerous burden of paying for the treatment of mental illnesses by willfully refusing to provide treatment to autistic children covered under its plans and by sending them to government supported “Regional Centers” for evaluation and treatment.

4. Foisting its statutory duty to provide such treatment onto California's taxpayers in part allowed Kaiser to make “gigantic jumps in net income, operating income and investment income for the third quarter ending September” 2007. (San Francisco Business Times, 11/7/07, Chris Rauber). In fact, Kaiser more than *doubled* its net income during that same time period. But it

1 did so on the back of California's taxpayers.

2 5. This action is intended to require Kaiser to honor its statutory and contractual
3 obligations with respect to both plaintiff Andrew A. Arce and all other California plan members
4 requiring medically necessary diagnosis, care and treatment for autism, and to relieve California's
5 taxpayers from the burden placed on them by Kaiser's violation of the law.

6
7 2.

8 **THE CALIFORNIA MENTAL HEALTH PARITY ACT**

9
10 6. In 1999, the California Legislature enacted AB 88 (Stats. 1999, c. 534), commonly
11 known as the Mental Health Parity Act. That Act added a new section to the Health & Safety
12 Code and a new section to the Insurance Code. The new sections in each code require health care
13 plans and health insurance companies to "provide coverage for the diagnosis and medically
14 necessary treatment of severe mental illnesses of a person of any age . . . under the same terms
15 and conditions applied to other medical conditions . . ." (Health & Safety Code section
16 1374.72(a); Insurance Code section 10144.5(a); emphasis added.) Among the conditions which
17 are included in the statute requiring mandatory coverage is autism. (Health & Safety Code
18 section 1374.72(d)(7); Insurance Code section 10144.5(d)(7).

19 7. As reflected in the legislative history of the bill, the intent of the bill was "to prohibit
20 discrimination against people with biologically-based mental illnesses, to dispel unsound
21 distinctions between mental and physical illnesses, and require equitable coverage to prevent
22 adverse risk selection." (Analysis, Assembly Concurrence in Senate Amendments, 9/8/99, pp 2-
23 3.)

24 8. In section 1 of the Act, the Legislature said:

25 (a) The Legislature *finds and declares* all of the following:

- 26 (1) Mental illness is real.
27 (2) Mental illness can be reliably diagnosed.
28 (3) Mental illness is treatable.

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(4) Treatment of mental illness is cost-effective.

(b) The Legislature further *finds and declares* all of the following:

* * *

(3) Limitations in coverage for mental illness in private insurance policies have resulted in *inadequate treatment for persons with these illnesses*.

(4) Inadequate treatment causes relapse and *untold suffering for individuals with mental illnesses and their families*.

(c) The Legislature further *finds and declares* all of the following:

* * *

(2) The failure to provide adequate coverage for mental illnesses in private health insurance policies has resulted in *significant increased expenditures for state and local governments*.

(Emphasis added.)

9. The Legislative Counsel’s Digest for AB 88, as enacted, also noted that “a willful violation of the provisions relating to health care service plans *is a crime*.” (Emphasis added.)

3.

KAISER’S MISREPRESENTATIONS ABOUT ITS PROVISION OF COVERAGE FOR TREATMENT OF AUTISM

10. Kaiser has a pattern and practice of willfully refusing coverage for diagnosis and treatment of autism, in direct conflict with the mandates of section 1374.72. Not only is this pattern and practice a violation of that statute – and therefore a crime – it is also a direct breach of Kaiser’s own representations.

11. On its website, Kaiser represents that it will “[p]rovide assessment, consultation, treatment of children, adolescents, and their families from a developmental, multidisciplinary, and best practices perspective.” (See <http://www.permanente.net/homepage/kaiser/pages/d11809->

1 [top.html](#).) It also says that it will “[m]aintain commitment to early identification and treatment”
2 and will “[e]ducate, support and empower families.”

3 12. Those representations are false. In fact, Kaiser does not fulfill any of those promises.
4

5 4.

6 **THE PARTIES**

7 13. Plaintiff Andrew A. Arce (“Andrew”) is a minor, born December 14, 2005, who is
8 represented in this action by his father, Guillermo Arce as his Guardian ad Litem.

9 14. Plaintiff Guillermo Arce is the father of plaintiff Andrew A. Arce, a minor, and, as
10 such is legally responsible for payment of all medical care and treatment provided to Andrew.
11 Plaintiffs are both residents of the County of Los Angeles and the contract at issue in this action
12 was entered into in Los Angeles County and the defendants’ performance under the contract is
13 owed in Los Angeles County.

14 15. Defendant Kaiser Foundation Health Plan (“Kaiser”) is a California corporation
15 authorized to transact and transacting business in California with its principal place of business in
16 California.

17 16. The true names or capacities, whether individual, corporate, associate, or otherwise,
18 of defendants DOES 1 through 100, are unknown to plaintiffs, who therefore sue said defendants
19 by such fictitious names. Each of the defendants sued herein as a DOE is legally responsible in
20 some manner for the events and happenings referred to, and legally caused injury and damages
21 proximately thereby to plaintiffs as herein alleged. DOES 1 through 100 are citizens and
22 residents of the State of California. Plaintiffs will ask leave of this court to amend this complaint
23 to insert their true names and capacities in place and instead of the fictitious names when the
24 same become known to plaintiffs.

25 17. At all relevant times, defendants, and each of them, were joint venturers, independent
26 contractors, or the agents and employees of each of the remaining defendants, and at all times
27 may have been acting within the purpose and scope of said agency and employment, and if so,
28 each defendant has ratified and approved the acts of his agent.

FACTUAL BACKGROUND

18. At all relevant times, Andrew has been covered under a health care plan issued by Kaiser, member number 00-16761608. The material terms of the Kaiser plan require it to provide assessment, diagnosis and medically-necessary treatment to Andrew.

19. Pursuant to California's mental health parity law, Health & Safety Code section 1374.72, health care plans are required to provide medically necessary care and treatment, including hospital care, doctor visits, outpatient services and prescription drugs, for treatment of specified mental illnesses at a level equal to the provision of benefits for physical illnesses. Section 1374.72(d)(7) specifically mandates that such coverage must be provided by health care plans for medically necessary diagnosis, care and treatment of autism.

20. Andrew was born on December 14, 2005 and is currently 2-1/2 years old.

21. Because of certain symptoms, Andrew was referred by his pediatrician in October 2, 2007 to speech and occupational therapists for an assessment to rule out autism as the cause of Andrew's problems, including lack of speech, and lack of affection. Andrew was not given an appointment until October 15, 2007 (and Kaiser later cancelled this appointment).

22. Kaiser itself acknowledges the critical importance of prompt diagnosis and early intervention for children diagnosed with autism. As Kaiser says on its own website: "It's very important that children be *diagnosed as early as possible so we can provide critical intervention and education services.*" (See <http://www.kpsacramento.org/index.php?content=76>; emphasis added.) This statement is an acknowledgment of numerous studies and reports demonstrating that with a young child, like Andrew, earlier diagnosis and earlier and more comprehensive intervention are the most effective and that delay in diagnosis and intervention – even of a few weeks – can result in lost opportunities for treating the condition.

23. The day before the scheduled assessment appointment, Kaiser called Guillermo to cancel the appointment, and offered an appointment yet another two weeks later. Guillermo objected to the delay and, ultimately, the assessment was performed on October 23, 2007. At that

1 time, it was determined that Andrew needed to be evaluated by Kaiser's Interdisciplinary Team
2 for an official diagnosis. Kaiser told Guillermo that the appointment would have to be scheduled
3 for December 5, 2007 because one member of the team was on sick leave. Thus, since the initial
4 referral in October, Andrew's assessment was delayed for more than three months.

5 24. While waiting for the KID's Clinic appointment, Andrew's pediatric neurologist
6 prescribed Pediasure – a liquid food replacement – for Andrew because, as a result of his
7 condition, he does not realize there is food in his mouth and he does not swallow. As a result of
8 this condition, Andrew chronically becomes dehydrated and suffers from diarrhea. In the first of
9 many refusals that would come during the next few months, Kaiser refused to pay for the
10 Pediasure, despite the fact that it was determined to be medically necessary by Andrew's pediatric
11 neurologist. Instead, Kaiser referred the Arces to their local Regional Center maintained through
12 taxpayer funding by the California Department of Developmental Services. The Regional Center
13 – and the taxpayers that support it – began to pay for the Pediasure necessary to keep Andrew
14 alive.

15 25. Two days before *that* appointment, Kaiser called again and again cancelled the
16 appointment, stating that a team member was on sick leave and offered an appointment in January
17 or February. Guillermo declined such a long-delayed appointment, knowing the importance of
18 early diagnosis and intervention, asked for an out-of-network referral and filed a grievance. In
19 fact, the assessment team that Kaiser was insisting be utilized for Andrew had been out of
20 commission since October 2007 and all regularly scheduled diagnostic clinics had been cancelled
21 because of the absence of the pediatric neurologist on the team. There was no date certain as to
22 when the team would meet again.

23 26. On or about December 18, 2007, Kaiser refused to permit Andrew's assessment to be
24 made out-of-network, in spite of the long delays in providing that assessment in-network,
25 asserting that Andrew's assessment was "not . . . urgent" and that the "consultation does not need
26 to be expedited" – all this despite Kaiser's own acknowledgment that it is "very important that
27 children be diagnosed as early as possible so we can provide critical intervention and education
28 services." Thus, even though Kaiser was unable to provide the care in-network, it refused to

