THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

E.S., by and through her parents, R.S. and J.S., and JODI STERNOFF, both on their own behalf, and on behalf of all similarly situated individuals,

Plaintiffs,

v.

REGENCE BLUESHIELD; and CAMBIA HEALTH SOLUTIONS, INC., f/k/a THE REGENCE GROUP,

Defendants.

No. 2:17-cv-01609-RAJ

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION

Plaintiffs' Opposition to Defendants' Motion to Dismiss ("Opposition") reflects a fundamental misunderstanding of the purpose and application of Section 1557 of the Patient Protection and Affordable Care Act ("ACA"), 42 U.S.C. § 18116. Plaintiffs argue that Section 1557 represents a complete overhaul of anti-discrimination law that has been in place for more than 30 years. But the plain language of the statute and the weight of authority interpreting it provide just the opposite—disability discrimination claims under the ACA are analyzed under the same standards as claims asserted under Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act ("ADA"). 29 U.S.C. § 794; 42 U.S.C. § 12132. Those

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statutes have been consistently interpreted to allow facially-neutral exclusions of insurance benefits that apply equally to the disabled and non-disabled alike.

Regence's Hearing Loss Exclusion falls squarely within that rule. It limits coverage based not on a disability but on a specific medical condition—hearing loss—that may affect both the disabled and non-disabled. The regulations implementing Section 1557 and the case law interpreting the Rehabilitation Act and the ADA provide that such restrictions do not discriminate on the basis of disability. Plaintiffs cannot distinguish those authorities.

If Congress had intended to create new substantive rights that dispensed with three decades' worth of discrimination jurisprudence, it could have done so explicitly, but it did not. Plaintiffs now ask the Court to assume Congress's legislative function in creating new rights unsupported by the text, legislative history, or case law. The result of such a step, however, would be dramatically increased administrative and adjudicative burdens for insurers and courts, and significantly higher premiums for insureds. The Court should decline Plaintiffs' invitation and grant Defendants' Motion to Dismiss.

II. ARGUMENT

A. Section 1557 Did Not Change the Standards by Which Disability Discrimination in Health Insurance Is Analyzed.

In enacting the ACA, Congress did not create an entirely new theory of anti-discrimination law applicable to health programs. Instead, it explicitly incorporated the existing frameworks of four statutes, including Section 504 of the Rehabilitation Act.[1] In their Response, Plaintiffs misinterpret Section 1557 and relevant case law. Rather than create a new and broader substantive right, Section 1557 simply ensures that current discrimination law applies to the new exchanges and markets created by the ACA, and the case law is clear that Section 504 of the

[1] The preamble to final rule implementing Section 1557 makes this point explicitly: "It is important to recognize that this final rule, except in the area of sex discrimination, applies pre-existing requirements in Federal civil rights laws . . . ." 81 Fed. Reg. 31376.

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Rehabilitation Act does not impose liability for facially-neutral exclusions of coverage for certain medical conditions.

1. The Rehabilitation Act Already Prohibited Discrimination in Health Insurance Benefit Design.

Plaintiffs argue that Section 1557 must have created new substantive rights because it, for the first time, extended discrimination prohibitions to benefit design in health coverage. (Opposition, Dkt. 14 at 14-17). To the contrary, insurance policies of covered entities have long been subject to discrimination law. Section 504 of the Rehabilitation Act applies to "any program or activity receiving Federal financial assistance," 29 U.S.C. § 794(a), which includes private companies "if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole." *Id.* § 794(b)(3)(A)(i). Thus, health care providers participating in the Medicare or Medicaid program are in receipt of federal funds and are subject to the nondiscrimination provisions of Section 504. It contains no language that would prevent claims based on discriminatory benefit design, and multiple pre-ACA cases have applied both the Rehabilitation Act and the ADA to such claims. *See, e.g.*, *Modderno v. King*, 82 F.3d 1059 (D.C. Cir. 1996) (exclusion of coverage for mental illness did not violate Section 504 in the way "a plan that distinguished between disabling and non-disabling mental illness" would); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674 (8th Cir. 1996) (employer's denial of coverage for infertility treatment did not discriminate on the basis of disability under the ADA).

This is not to say that the ACA made no changes to existing discrimination law. It broadened the scope of organizations that are subject to such prohibitions by applying the law to "any health program or activity, *any part of which* is receiving Federal financial assistance." 42 U.S.C § 18116(a) (emphasis added). This change was intended to ensure that existing anti-discrimination standards would apply to individuals participating in health programs and activities receiving federal financial assistance from HHS, those administered by HHS, and

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health plans participating in health insurance marketplaces. It did not, however, change the scope of the conduct proscribed.

2. Courts Have Rejected Plaintiffs' Argument That Section 1557 Creates New Substantive Rights.

Only one court has reached the conclusion that Section 1557 creates new substantive rights apart from existing discrimination law. *See Rumble v. Fairview Health Services*, No. 14-CV-2037 SRN/FLN, 2015 WL 1197415 (D. Minn. Mar. 16, 2015).[2] Defendants' Motion, however, discusses three opinions that expressly reject *Rumble* and its reasoning. (Motion, Dkt. 11 at 8-10) (citing *Se. Pa. Transp. Auth. v. Gilead Scis., Inc.*, 102 F. Supp. 3d 688, 698-99 (E.D. Pa. 2015); *Briscoe v. Health Care Serv. Corp.*, No. 16-CV-10294, 2017 WL 5989727, at *9-10 (N.D. Ill. Dec. 4, 2017); *York v. Wellmark, Inc.*, No. 4:16-cv-00627-RGE-CFB, 28-35 (S.D. Iowa Sept. 6, 2017)).

Plaintiffs effectively concede this point. Although their Opposition cites *Rumble*, they make no attempt to address *Gilead*, *Briscoe*, *York*. (Opposition, Dkt. 14 at 16). The reasoning of those Courts is persuasive: If Congress had intended to create a new right independent of existing law, it could have defined the scope of Section 1557 by category (*i.e.*, race, color, national origin, sex, disability, and age). Instead, it expressly incorporated the existing statutes and their "enforcement mechanisms," demonstrating an intent to apply those laws' standards.

B. The Hearing Loss Exclusion Does Not Discriminate on the Basis of Disability.

Plaintiffs contend that the Hearing Loss Exclusion is a facial classification based on disability, and even if it is not, it disproportionately denies hearing-disabled insureds "meaningful access" to benefits. (Opposition, Dkt. 14 at 19-26.) Hearing loss, however, is not a disability but rather a medical condition that can, in some circumstances, result in disability.

[2] Though *Rumble* holds that Section 1557 applies a different standard than Section 504 of the Rehabilitation Act, it declines to define that standard. *Id.* at *12. Nor has any other court articulated the standard that purportedly applies to disability discrimination claims under Section 1557 or how it differs from the well-defined standards applicable to Section 504.

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Neither the implementing regulations nor the applicable case law supports a finding of disability discrimination based on a neutral policy such as the Hearing Loss Exclusion.

1. Hearing Loss Is Not a Disability.

In their Opposition, Plaintiffs repeatedly refer to hearing loss as a disability. (*See, e.g.*, Opposition, Dkt 14 at 9, 13, 24, 27.) This is a fundamental fallacy of Plaintiffs' argument. Defendants' Motion argued that hearing loss is not necessarily a disabling condition, (Motion, Dkt 11 at 11, 17, 22), but Plaintiffs never address the fact that both disabled and non-disabled people can suffer from hearing loss and seek treatment that may not be covered under their plans.

The Rehabilitation Act incorporates the ADA's definition of "disability" as, inter alia, "a physical or mental impairment that substantially limits one or more major life activities. 29 U.S.C. § 705(20)(B). In order to find that the Hearing Loss Exclusion is a disability-based exclusion, the Court would have to find that every person who seeks hearing treatment, including routine hearing examinations, is disabled under this definition. It is self-evident, however, that insureds can suffer from, and receive treatment for, temporary or mild forms of hearing loss that do not substantially limit a major life activity and therefore do not rise to the level of disability. Courts have likewise acknowledged this fact. *See, e.g.*, *Santiago Clemente v. Exec. Airlines, Inc*., 213 F.3d 25, 30 (1st Cir. 2000) (finding that plaintiff's level of hearing loss did not constitute a disability); *Ayotte v. McPeek*, No. 08-CV-02508-WJM-MJW, 2011 WL 2531255, at *6 (D. Colo. June 24, 2011) ("[T]he Court finds that Plaintiff's hearing impairment does not rise to the level of a disability under the Rehabilitation Act . . . .").

Plaintiffs' only attempt to address this error is in a footnote, in which they assert that the class is limited to insureds who have hearing loss severe enough to require treatment, which necessarily qualifies as a disability. (Opposition, Dkt. 14 at 13, n. 1). First, the relevant inquiry here is the scope of the Exclusion's application, not the scope of the proposed class. Regardless of how Plaintiffs define their putative class, if the Hearing Loss Exclusion applies equally to both disabled and non-disabled people with hearing loss, then it does not classify on the basis of

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disability. Second, both *Santiago* and *Ayotte* involved plaintiffs who had received treatment for hearing loss, and in both cases, the Court found that the plaintiff's hearing loss did not rise to the level of a disability under the Rehabilitation Act.

Neither the ACA nor the Rehabilitation Act contains any requirement of coverage for any and all medical conditions that could, in a severe enough case, result in disability. Such a requirement would preclude exclusions for innumerable conditions, including mental illness, which multiple courts have found to be excluded on a non-discriminatory basis. (See Motion, Dkt 11 at 11-16). Because the Hearing Loss Exclusion applies to treatment for both disabling and non-disabling hearing loss, it is not a classification "based on disability".

2. Regulations Implementing Section 1557 Do Not Support Plaintiffs' Argument.

Plaintiffs' reliance on regulations enacted by the Department of Health and Human Services' Office of Civil Rights ("OCR") is also unavailing. The Opposition relies heavily upon 45 C.F.R § 92.207(b)(4), which provides that covered entities shall not "[h]ave or implement a categorical coverage exclusion or limitation for all health services related to gender transition." (Opposition, Dkt. 14 at 13). Plaintiffs wrongly suggest that "hearing loss" could be substituted for "gender transition" without altering the principle behind the rule. This regulation relates to discrimination on the basis of sex, not disability, and more importantly, OCR made clear that the reason exclusion of treatment for gender transition is discriminatory is because it *only* affects transgender individuals. *See* 81 Fed. Reg. 31429 ("[I]n singling out the entire category of gender transition services, such an exclusion or limitation systematically denies services and treatments for transgender individuals and is prohibited discrimination on the basis of sex.").

The Hearing Loss Exclusion, to the contrary, does not single out disabled individuals but instead applies equally to disabled and non-disabled insureds. OCR expressly provided that such neutral exclusions do not run afoul of this rule:

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> The final rule does not prevent covered entities from utilizing reasonable medical management techniques; nor does it require covered entities to cover any particular procedure or treatment. It also does not preclude a covered entity from applying neutral, nondiscriminatory standards that govern the circumstances in which it will offer coverage to all its enrollees in a nondiscriminatory manner.

Id. at 31434; *see also* Motion, Dkt 11 at 20-24 (discussing regulations).

In the alternative, Plaintiffs assert that the Court must allow discovery into "whether coverage for the same or a similar service or treatment is available to individuals outside of [the] protected class . . . and . . . the reasons for any differences in coverage." (Opposition, Dkt. 14 at 15 (quoting 81 Fed. Reg. 31433)). Plaintiffs' Complaint, however, does not allege that Defendants offer treatment for hearing loss to any insureds. Because the Hearing Loss Exclusion does not apply solely to the disabled, either by its terms or in application, it is not discriminatory under OCR's regulations.

3. Plaintiffs Misinterpret Applicable Case Law.

Defendants' Motion discusses a long line of cases beginning with *Alexander v. Choate*, 469 U.S. 287, 105 S. Ct. 712, 83 L. Ed. 2d 661 (1985), and involving at least eight federal Courts of Appeals, in which courts have held that exclusions or limitations on insurance coverage for a particular type of treatment does not discriminate on the basis of disability despite an alleged disproportionate impact on certain disabled individuals. (Motion, Dkt. 11 at 17-22). Plaintiffs respond by arguing that (1) *Alexander* actually favors their position, (2) the pre-ACA cases cited by Defendants are inapposite, and (3) the Ninth Circuit's decision in *Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1996), controls the analysis of a facially-neutral exclusion. (Opposition, Dkt. 14 at 23-30.) As discussed below, these arguments should be rejected.

a. Plaintiffs' Reliance on *Alexander* Is Based on the Erroneous Assertion That Hearing Loss Is a Disability.

Plaintiffs' contention that *Alexander* supports their claim relies on the same hearing-loss-as-disability fallacy discussed in Part II.B.1, *supra*. (Opposition, Dkt. 14 at 17-19.) As Plaintiffs acknowledge, the U.S. Supreme Court, in *Alexander*, held that a state's reduction of its inpatient

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hospitalization limit to 14 days did not deny the disabled plaintiffs "meaningful access" to Medicaid benefits under Section 504 of the Rehabilitation Act because the reduction applied equally to disabled and non-disabled patients. *Alexander*, 469 U.S. at 309. In reaching this conclusion, the Court noted that Section 504 does not require insurers to prioritize certain illnesses just because they may afflict the disabled in particular; instead, it merely requires that the disabled have an equal opportunity to participate in the benefit that is being offered. *Id.* at 303-04. Because the 14-day limit was "neutral on its face" and did not exclude the disabled from "the particular package of Medicaid services" being provided, it did not violate the Rehabilitation Act. *Id.* at 309.

Plaintiffs attempt to distinguish *Alexander* on the grounds that "Regence's exclusion calls out a particular disability—hearing loss—and limits the benefits provided," (Opposition, Dkt. 14 at 24), but this argument fails for the reasons previously discussed. Specifically, the Hearing Loss Exclusion represents a permissible choice by an insurer not to cover treatment for a certain medical condition, whether or not that condition substantially limits a major life activity in any particular individual. Just like the 14-day limitation in *Alexander*, the Hearing Loss Exclusion is a facially-neutral policy that classifies on the basis of coverage that is allegedly used frequently by some disabled insureds. This Court should reject Plaintiffs' claims for the same reasons that Supreme Court rejected the claims in *Alexander*.

b. The Pre-ACA Cases Cited by Defendants Apply with Equal Force to Plaintiffs' Claims.

Plaintiffs attempt to distinguish the long line of cases holding that facially-neutral coverage limitations do not discriminate on the basis of disability by arguing that (1) the ADA's "safe harbor" provision, 42 U.S.C. § 12201(c), renders it inapposite to Rehabilitation Act (and therefore ACA) claims, (2) cases involving long-term disability benefits are inapposite to claims involving health insurance benefits, and (3) cases involving state programs do not apply to claims against private insurers. (Opposition, Dkt. 14 at 26-30). Plaintiffs are wrong.

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First, none of the cited opinions rely upon the safe harbor provision to allow an otherwise-discriminatory policy. Instead, all of them hold that the policies did not classify based on disability in the first place. *See Krauel*, 95 F.3d at 678 ("In this case, the Plan's infertility exclusion does not single out a particular group of disabilities, allowing coverage for some individuals with infertility problems, while denying coverage to other individuals with infertility problems."); *Modderno*, 82 F.3d at 1061 ("[T]he limits contained in the Plan do not in any way track the Rehabilitation Act's definition of disability—the only ground on which the Act forbids discrimination.");[3] *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 608 (3d Cir. 1998) ("So long as every employee is offered the same plan regardless of that employee's contemporary or future disability status, then no discrimination has occurred even if the plan offers different coverage for various disabilities."); *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1101 (10th Cir. 1999) (quoting *Ford*, 145 F.3d at 608) ("Every [Thiokol] employee had the opportunity to join the same plan with the same schedule of coverage, meaning that every [Thiokol] employee received equal treatment."). In each case, the Court held that the policy at issue was not discriminatory, and none of them based that finding on the ADA's safe harbor provision.

Plaintiffs' second argument fails because they offer no principled reason why disability benefits cases should not apply to health benefits claims. They argue only that, after the ACA, "[i]nsurers, like Regence, can no longer exclude benefits for health insurance coverage based upon an insured's disability." (Opposition, Dkt. 14 at 29). But again, the Hearing Loss Exclusion is not based on an insured's disability; it is based on the facially-neutral condition of hearing loss, which affects the disabled and non-disabled alike. Furthermore, the principle underlying these long-term disability cases originated in *Alexander*—a health benefit case—and has been applied in a variety of factual circumstances. For example, in *Weyer v. Twentieth Century Fox Film Corp.* the Ninth Circuit expressly relied upon *Krauel*—a health insurance

[3] Plaintiffs' attempt to distinguish *Modderno* also fails because that opinion analyzed a claim under the Rehabilitation Act as well as one under the ADA.

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case—for the proposition that "there is no discrimination under the [ADA] where disabled individuals are given the same opportunity as everyone else, so insurance distinctions that apply equally to all employees cannot be discriminatory." 198 F.3d 1104, 1116 (9th Cir. 2000) (citing *Krauel*, 95 F.3d at 678).

Plaintiffs next attempt to distinguish three other cases cited by Defendants on the grounds that they involve "state public assistance programs, not private health insurers," and because "[n]one involved a blanket exclusion based solely on a disability." (Opposition, Dkt. 14 at 29). Plaintiffs fail to mention, however, that *Alexander*, which is the seminal case on this issue and was relied upon by the Ninth Circuit in *Weyer*, was also a public assistance case. And as noted, the current case also does not involve an exclusion based on a disability. *See* Part II.B.1, *supra*.

In sum, whether applied under the Rehabilitation Act or the ADA, and whether applied to public or private disability benefits or health benefits, the principle is the same: it is equal *access* that is required, not equal results. Because the Hearing Loss Exclusion provides the same access to benefits for the disabled and non-disabled, it does not discriminate on the basis of disability.

c. *Crowder* Does Not Control.

Plaintiff contends that, even if the Hearing Loss Exclusion is deemed to be a facially-neutral exclusion, it still denies Plaintiffs "meaningful access" to benefits. (Opposition, Dkt. 14 at 25 (citing *Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996))). In *Crowder*, the plaintiffs were visually impaired persons who use guide dogs and sought an exemption from the state's imposition of quarantine on carnivorous animals entering the state. *Crowder*, 81 F.3d at 1481. Relying on a separate provision of the ADA that precludes the exclusion of or denial of benefits of public services, the court concluded that the quarantine "effectively denies meaningful access to state services, programs, and activities while such services, programs, and activities remain open and easily accessible by others" and "effectively precludes visually-impaired persons from using a variety of public services, such as public transportation, public parks, government buildings and facilities, and tourist attractions[.]" *Id.* at 1485.

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Crowder is distinguishable. The Hearing Loss Exclusion does not operate to deny to the disabled access to services, programs and activities that remain available to others. Rather, it denies coverage to *all* persons, disabled or not disabled. *Weyer*, which is much more factually analogous, controls. *Weyer* was an action challenging an employer's insurance plan, which offered greater benefits for physical disabilities than mental disabilities. 198 F.3d at 1107-08. The Ninth Circuit held that where disabled employees have access to the same benefits as non-disabled employees, "there is no discrimination." *Id.* at 1116. That is precisely the case here. Like the plaintiff in *Weyer*, Plaintiffs here had "the same opportunity . . . [as] the rest of [the] employees—buy into the group policy with the limitation . . . or buy her own individual insurance coverage without the limitation at whatever the market price may be." *Id.* There is no allegation that Plaintiffs were charged a higher price due to their alleged disability or that they received different terms. As the Court held in *Weyer*, "insurance distinctions that apply equally to all employees cannot be discriminatory." *Id.*

By contrast, *Crowder* did not involve insurance coverage at all. Visually impaired visitors subject to the policy had no means of circumventing the restriction in the way the plaintiff did in *Weyer* and Plaintiffs do here. Whatever burden Hawaii's quarantine policy placed on blind travelers who use guide dogs, it is far less relevant to the current case than the Ninth Circuit's analysis of differing insurance benefits offered by an employer's policy.

C. Plaintiffs' Proposed Theory Would Cause Substantial Disruption to Health Insurance Markets.

The case law applying anti-discrimination principles under Section 504 of the Rehabilitation Act has been consistently applied since *Alexander* was decided more than 30 years ago. Congress is presumed to be aware of the cases interpreting its laws, and if it had intended to upend that well-established line of cases, it could have explicitly done so. Instead, it expressly incorporated the enforcement mechanism of the Rehabilitation Act for claims under

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Section 1557. Absent clear direction from Congress, this Court should not rewrite three decades of discrimination law because to do so would have significant impacts on the insurance industry.

If, as Plaintiffs believe, all covered entities are required to provide full coverage for all conditions that could potentially result in disability, insurers will be forced to analyze every coverage decision for its potential impact on insureds who may have one of innumerable disabilities. *See Alexander*, 469 U.S. at 298 ("[R]espondents' position would in essence require each recipient of federal funds first to evaluate the effect on the handicapped of every proposed action that might touch the interests of the handicapped, and then to consider alternatives for achieving the same objectives with less severe disadvantage to the handicapped. The formalization and policing of this process could lead to a wholly unwieldy administrative and adjudicative burden."); *Ford*, 145 F.3d at 608 ("The ADA does not require equal coverage for every type of disability; such a requirement, if it existed, would destabilize the insurance industry in a manner definitely not intended by Congress when passing the ADA.").

If Congress had intended this result, it could have mandated coverage for hearing loss when it determined "essential benefits" that must be provided by all insurers. 42 U.S.C. § 18022(b). Reading that requirement into the law now would usurp the legislative function reserved to Congress, and the Court should decline the invitation to do so.

III. CONCLUSION

For the reasons above, Plaintiffs respectfully request that the Court grant their Motion to Dismiss.

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DATED: March 2, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notice of such filing to the following counsel of record:

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Executed on March 2, 2018, at Seattle, Washington.

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