

HON. ROBERT S. LASNIK

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ANDREA SCHMITT, and ELIZABETH  
MOHUNDRO, both on their own behalf, and on  
behalf of all similarly situated individuals,

Plaintiffs,

v.

KAISER FOUNDATION HEALTH PLAN OF  
WASHINGTON; KAISER FOUNDATION  
HEALTH PLAN OF WASHINGTON  
OPTIONS, INC.; KAISER FOUNDATION  
HEALTH PLAN OF THE NORTHWEST; and  
KAISER FOUNDATION HEALTH PLAN,  
INC.,

Defendants.

NO. 2:17-cv-1611-RSL

SECOND AMENDED  
COMPLAINT  
(CLASS ACTION)

**I. PARTIES**

1. *Andrea Schmitt*. Plaintiff Andrea Schmitt is diagnosed with hearing loss. Schmitt is insured under a Kaiser Foundation Health Plan of Washington insured health plan that was issued and delivered in King County, Washington. Schmitt's health

1 coverage is through her employment at Columbia Legal Services, which is  
2 headquartered in Seattle, Washington.

3 2. **Elizabeth Mohundro.** Plaintiff Elizabeth Mohundro is diagnosed  
4 with hearing loss. Mohundro is insured under a Kaiser Foundation Health Plan of  
5 Washington Options Inc. health plan that was issued and delivered in King County  
6 Washington. Mohundro's coverage is through her employment at World Association  
7 for Children and Parents (WACAP), a nonprofit international adoption and child  
8 assistance agency headquartered in Renton, Washington.

9 3. **Kaiser.** Defendants Kaiser Foundation Health Plan of Washington,  
10 Kaiser Foundation Health Plan of Washington Options, Inc. and Kaiser Foundation  
11 Health Plan of the Northwest are health care service carriers that do business in the state  
12 of Washington. Kaiser Foundation Health Plan of Washington and Kaiser Foundation  
13 Health Plan of Washington Options do business in King County, Washington. Based on  
14 information and belief, all three are wholly-owned subsidiaries of Kaiser Foundation  
15 Health Plan, Inc., a California nonprofit corporation. For the purpose of this Complaint,  
16 all are referred to as a single defendant, "Kaiser."

## 17 II. JURISDICTION AND VENUE

18 4. This action arises under the Patient Protection and Affordable Care  
19 Act ("Affordable Care Act" or "ACA") §1557, 42 U.S.C. §18116.

20 5. Jurisdiction of this Court also arises pursuant to 28 U.S.C. §§1331,  
21 1343.

22 6. Venue is proper under 28 U.S.C. §1391(b)(1) and (2), because, *inter*  
23 *alia*, a defendant resides or may be found in this district and a substantial part of the  
24 events giving rise to the claim occurred in King County.

### III. NATURE OF THE CASE

7. Plaintiffs seek to end Kaiser's standard discriminatory practice of categorically excluding all benefits for treatment of hearing loss, except for cochlear implants. Specifically, Kaiser's insured health plans in Washington contain the same or similar benefit exclusion:

Hearing Examinations and Hearing Aids	Preferred Provider Network	Out of Network
Hearing aids including hearing aid examinations.	Not covered; <i>Member pays 100%</i> of all charges	Not covered; <i>Member pays 100%</i> of all charges
<p><b>Exclusions:</b> <i>Programs or treatments for hearing loss</i> or hearing care including, but not limited to, externally worn hearing aids or surgically implanted hearing aids and the surgery and services necessary to implant them other than for cochlear implants; hearing screening tests including but not limited to non-cochlear hearing aids (externally worn or surgically implanted) and the surgery and services necessary to implant them other than for cochlear implants; hearing screening tests required under Preventive Services.</p>		

(emphasis in original and added). (In this Complaint, the condition is referred hereafter to as "Hearing Loss" and Kaiser's exclusion as the "Hearing Loss Exclusion.") Kaiser excludes benefits for Hearing Loss even when the treatment is medically necessary to treat qualified individuals with disabilities such as the named Plaintiffs. Kaiser applies its Hearing Loss Exclusion even though it covers the same benefits for other health conditions, including coverage of outpatient office visits and durable medical equipment or prosthetic devices.

8. By categorically excluding insureds with Hearing Loss from all medical treatment related to their disability (except for cochlear implants), Kaiser engages in illegal disability discrimination. The Affordable Care Act prohibits

1 discrimination on the basis of disability by covered entities, including health insurers  
 2 like Kaiser. *See* 42 U.S.C. §18116. Specifically, Section 1557 provides that “an individual  
 3 shall not, on the ground prohibited under ... Section 504 of the Rehabilitation Act of 1973  
 4 (29 U.S.C. §794) be excluded from participation in, *denied the benefits of* or be subjected  
 5 to discrimination under *any health program* or activity....” 42 U.S.C. §18116(a)  
 6 (emphasis added); 45 C.F.R. §92.101(a)(1); *see also* 45 C.F.R. §92.207(b)(2) (“A covered  
 7 entity shall not, in providing or administering health-related insurance or other health  
 8 related coverage ... have benefit designs that discriminate on the basis of ... disability.”).  
 9 As the federal regulators state, “an explicit, categorical (or automatic) exclusion or  
 10 limitation of coverage for all health services related to [race, gender, age or disability] is  
 11 unlawful on its face.” 81 Fed. Reg. 31429.

12 9. Kaiser is a covered “health program or activity” that must comply  
 13 with the Affordable Care Act’s §1557.

14 10. Kaiser violates §1557 and engages in illegal discrimination on the  
 15 basis of disability by designing its health plans to include a blanket Hearing Loss  
 16 Exclusion.

17 11. This lawsuit seeks remedies under the Affordable Care Act arising  
 18 out of Kaiser’s failure to comply with §1557. It seeks a court order declaring Kaiser’s  
 19 blanket exclusion of benefits for Hearing Loss void and unenforceable, enjoining Kaiser  
 20 from continuing to apply the Hearing Loss Exclusion and requiring corrective notice to  
 21 all Kaiser insureds concerning its required coverage of Hearing Loss. It also seeks  
 22 damages stemming from Kaiser’s deliberate discriminatory exclusion of medically  
 23 necessary care that, but for the application of its Exclusion, would otherwise be covered.

#### 24 IV. CLASS ALLEGATIONS

25 12. *Definition of Class.* The class consists of all individuals who:

1 (1) have been, are or will be insured under a health  
2 insurance plan that has been, is or will be delivered,  
3 issued for delivery, or renewed by (a) Kaiser; (b) any  
4 affiliate of Kaiser; (c) predecessors or successors in  
5 interest of any of the foregoing; and (d) all  
6 subsidiaries or parent entities of any of the  
7 foregoing, at any time on or after October 30, 2014;  
8 and

9 (2) have required, require or will require treatment for  
10 Hearing Loss other than treatment associated with  
11 cochlear implants.

12 13. *Size of Class.* The class of Kaiser insureds who have required,  
13 require or will require treatment for Hearing Loss, excluding treatment associated with  
14 cochlear implants, is expected to be so numerous that joinder of all members is  
15 impracticable.

16 14. *Class Representative Schmitt.* Named plaintiff Schmitt is an  
17 enrollee in a Kaiser insured health plan in the State of Washington. Schmitt has Hearing  
18 Loss that requires treatment other than cochlear implants. She is a “qualified individual  
19 with a disability” under the Affordable Care Act and Section 504 of the Rehabilitation  
20 Act. She requires outpatient office visits (such as to a licensed audiologist) and durable  
21 medical equipment or prosthetic devices (such as hearing aids) to treat her Hearing Loss.  
22 Consistent with the written language of her policy, Kaiser confirmed to Schmitt that she  
23 has no coverage for all benefits for Hearing Loss (except that related to cochlear  
24 implants) including coverage of her hearing aids and outpatient office visits to her  
25 audiologist because of Kaiser’s blanket Hearing Loss Exclusion. Plaintiff’s claim is  
26 typical of the claims of the other members of the class. Plaintiff Schmitt will fairly and  
adequately represent the interests of the class.

15. *Class Representative Mohundro.* Named plaintiff Mohundro is an  
enrolled in a Kaiser insured health plan in the State of Washington. Mohundro has

1 Hearing Loss that requires treatment other than cochlear implants. She is a “qualified  
2 individual with a disability” under the Affordable Care Act and Section 504 of the  
3 Rehabilitation Act. She requires outpatient office visits (such as to a licensed audiologist)  
4 and durable medical equipment or prosthetic devices (such as hearing aids) to treat her  
5 Hearing Loss. Plaintiff Mohundro’s Kaiser plan contains the same or similar standard  
6 exclusion of coverage for Hearing Loss described above. While covered by Kaiser,  
7 Plaintiff Mohundro needed treatment for her hearing loss, including outpatient medical  
8 office visits to her audiologist and durable medical equipment in the form of hearing  
9 aids. Due to Kaiser’s blanket exclusion, Mohundro was forced to pay for this treatment  
10 out-of-pocket. Nonetheless, she has presented her claim to Kaiser for payment, which  
11 denied coverage. Plaintiff Mohundro’s claim is typical of the claims of other members  
12 of the class. She will fairly and adequately represent the interests of the class.

13 16. *Common Questions of Law and Fact.* This action requires a  
14 determination of whether Kaiser’s blanket Hearing Loss Exclusion violates the  
15 requirements of the Affordable Care Act’s Section 1557 and discriminates against  
16 Plaintiffs and the class on the basis of their disability, Hearing Loss. Adjudication of this  
17 issue will in turn determine whether Kaiser may be enjoined from enforcing the Hearing  
18 Loss Exclusion, and found liable under the Affordable Care Act for injunctive relief,  
19 classwide damages and other relief.

20 17. *Kaiser Has Acted on Grounds Generally Applicable to the Class.*  
21 Kaiser, by imposing a uniform, blanket exclusion of all coverage for Hearing Loss, has  
22 acted on grounds generally applicable to the class, rendering declaratory relief  
23 appropriate respecting the whole class. Certification is therefore proper under  
24 FRCP 23(b)(2).

1 18. *Questions of Law and Fact Common to the Class Predominate Over*  
2 *Individual Issues.* The claims of the individual class members are more efficiently  
3 adjudicated on a classwide basis. Any interest that individual members of the class may  
4 have in individually controlling the prosecution of separate actions is outweighed by the  
5 efficiency of the class action mechanism. Upon information and belief, there has been  
6 no class action suit filed against these defendants for the relief requested in this action.  
7 This action can be most efficiently prosecuted as a class action in the Western District of  
8 Washington, where several of the Kaiser defendants have their principal place of  
9 business, do business, and where the disputed health insurance plan was issued. Issues  
10 as to Kaiser's conduct in applying standard policies and practices towards all members  
11 of the class predominate over questions, if any, unique to members of the class.  
12 Certification is therefore additionally proper under FRCP 23(b)(3).

13 19. *Class Counsel.* Plaintiffs have retained experienced and competent  
14 class counsel.

15 **V. FACTUAL BACKGROUND**

16 20. During the relevant time periods, Plaintiffs and members of the  
17 class have been insured in one or more Kaiser insured plans.

18 21. Plaintiffs and other members of the class have been diagnosed with  
19 Hearing Loss, a physical impairment that limits a major life activity so substantially as  
20 to require medical treatment. As a result, Plaintiffs and other members of the class are  
21 "qualified individuals with a disability." *See* 28 C.F.R. §39.103.

22 22. Plaintiffs and other members of the class have required, require  
23 and/or will require medical treatment for their Hearing Loss, excluding treatment with  
24 cochlear implants.

1           23. Kaiser is a “health program or activity” part of which receives  
2 federal financial assistance. 42 U.S.C. §18116; 45 C.F.R. §92.4. As a result, Kaiser is a  
3 “covered entity” under the Affordable Care Act, Section 1557.

4           24. Kaiser provided assurances to the U.S. Department of Health and  
5 Human Services that it complies with the requirements of Section 1557. *See* 45 C.F.R.  
6 §92.5.

7           25. Despite these assurances, Kaiser has designed, issued and  
8 administered Washington health plans that exclude all benefits for Hearing Loss, except  
9 for cochlear implants. Kaiser continues to do so, to date.

10           26. Kaiser designed its health benefits with the Hearing Loss Exclusion,  
11 even though it knew that its enrollees with Hearing Loss needed medical treatment for  
12 their condition, other than cochlear implants. It did so, despite the non-discrimination  
13 assurances Kaiser provided to the federal government and its enrollees.

14           27. Based upon the Hearing Loss Exclusion, Kaiser has excluded  
15 coverage of medically necessary services and/or equipment for Schmitt, Mohundro and  
16 other members of the class, solely because the services and equipment would treat their  
17 Hearing Loss.

18           28. As a result of Kaiser’s deliberate discriminatory actions, Kaiser  
19 insureds with Hearing Loss, like Schmitt and Mohundro, do not have benefits for  
20 medically necessary outpatient office visits to audiologists or for medically necessary  
21 hearing aids, a type of durable medical equipment or prosthetic device.

22           29. Kaiser excludes all coverage for outpatient office visits and durable  
23 medical equipment or prosthetic devices to treat Hearing Loss, even though it covers  
24 medically necessary outpatient office visits and durable medical equipment or prosthetic  
25 devices for other medical conditions.



1           30. Kaiser’s Hearing Loss Exclusion excludes benefits for individuals  
2 with Hearing Loss based solely on their disability, Hearing Loss, while, at the same time,  
3 covering other similar benefits for persons with other medical conditions.

4           31. As a result, Plaintiffs and members of the class have paid out-of-  
5 pocket for medically necessary treatment for their Hearing Loss, including audiology  
6 examinations and hearing aids. Other class members have been forced to forgo needed  
7 medical treatment due to Kaiser’s conduct.

8           32. No submission of a claim or administrative appeal of a denial of a  
9 claim for an audiology exam or hearing aids is required before a lawsuit may be brought  
10 under §1557. See 45 C.F.R. §92.301(a); 81 Fed. Reg. 31441. Any such effort to obtain a  
11 denial and appeal would have been futile. Nonetheless, Plaintiff Mohundro submitted  
12 her claim for coverage of her hearing aid to Kaiser and was denied.

13                                   **VI. CLAIM FOR RELIEF:**  
14                                   **VIOLATION OF AFFORDABLE CARE ACT §1557, 42 U.S.C. §18116**

15           33. Plaintiffs re-allege all paragraphs above.

16           34. Section 1557, 42 U.S.C. §18116, provides that “an individual shall  
17 not, on the ground prohibited under ... section 504 of the Rehabilitation Act of 1973 ...  
18 be excluded from participation in, *denied the benefits of*, or be subjected to  
19 discrimination under, any health program or activity, any part of which is receiving  
20 Federal financial assistance....” (emphasis added).

21           35. Defendants receive federal financial assistance and are therefore a  
22 “covered entity” for purposes of Section 1557.

23           36. Plaintiffs are “qualified persons with a disability” under both  
24 Section 504 and Section 1557.

25           37. Persons like Schmitt and Mohundro who have hearing loss are  
26 discriminated against by Kaiser because it designed and applies the Hearing Loss

1 Exclusion to exclude coverage of medically necessary audiological examinations, a type  
2 of out-patient office visit, and coverage of medically necessary hearing aids, a type of  
3 durable medical equipment or prosthetic device. Under the Exclusion, only people with  
4 Hearing Loss, a qualifying disability, are excluded from the benefits that they require.  
5 Out-patient office visits and durable medical equipment/prosthetic devices are covered  
6 for other health conditions under Kaiser’s policies.

7 38. Defendants have continued to impose the Hearing Loss Exclusion,  
8 despite the warning from the U.S. Department of Health and Human Services that “[a]n  
9 explicit, categorical (or automatic) exclusion or limitation of coverage for all health  
10 services related to [a particular race, gender, age or disability] is unlawful on its face.”  
11 See 81 Fed. Reg. 31429. It has done so despite the non-discrimination assurances it gave  
12 to the federal government and its enrollees.

13 39. By excluding benefits for all health care related to hearing loss,  
14 (except for cochlear implants), Kaiser has intentionally discriminated, and continues to  
15 discriminate on the basis of disability, against persons with Hearing Loss, including  
16 Plaintiffs and the class they seek to represent, in violation of Section 1557.

17 **VII. DEMAND FOR RELIEF**

18 WHEREFORE, Plaintiffs request that this Court:

19 1. Certify this case as a class action; designate the named Plaintiffs  
20 Andrea Schmitt and Elizabeth Mohundro as class representatives; and designate  
21 SIRIANNI YOUTZ SPOONEMORE HAMBURGER, Eleanor Hamburger and Richard E.  
22 Spoonemore, as class counsel;

23 2. Enter judgment on behalf of the Plaintiffs and the class due to  
24 Kaiser’s discrimination on the basis of disability;

1           3.       Declare that Kaiser may not design, administer or apply the blanket  
2 Hearing Loss Exclusion and/or other contract provisions, policies or practices that  
3 exclude health benefits solely on the basis of disability;

4           4.       Enjoin Kaiser from designing, administering or applying the  
5 blanket Hearing Loss Exclusion and/or other similar violations of the Affordable Care  
6 Act now and in the future;

7           5.       Enter judgment in favor of Plaintiffs and the class for damages in an  
8 amount to be proven at trial due to Kaiser’s violation of Section 1557 of the Affordable  
9 Care Act;

10          6.       Award Plaintiffs and the class their attorney fees and costs under 42  
11 U.S.C. §1988; and

12          7.       Award such other relief as is just and proper.

13               DATED: February 28, 2018.

14                               By: s/ Eleanor Hamburger

15                               By: s/ Richard E. Spoonemore

16                               Eleanor Hamburger (WSBA #26478)  
17                               Richard E. Spoonemore (WSBA #21833)  
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24                               Attorneys for Plaintiffs

**CERTIFICATE OF SERVICE**

I hereby certify that on February 28, 2018, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

- **Mark A. Bailey**  
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DATED: February 28, 2018, at Seattle, Washington.

*/s/ Eleanor Hamburger*  
 \_\_\_\_\_  
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