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

DEFENDANTS' MOTION TO DISMISS THIRD AMENDED COMPLAINT

NOTE ON MOTION CALENDAR:
July 14, 2023

Oral Argument Requested

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I. MOTION

Defendants Regence BlueShield ("Regence") and Cambia Health Solutions, Inc. f/k/a The Regence Group ("Cambia") (collectively "Defendants") respectfully move the Court for an order dismissing Plaintiffs' Third Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6) on the grounds that it fails to state a claim for relief.

II. INTRODUCTION

This is Plaintiffs' *fourth* attempt to plead a claim for disability discrimination under Section 1557 of the Affordable Care Act ("ACA") based on their insurance plans' former exclusion of testing and treatment for hearing loss other than cochlear implants. In the five years since Plaintiffs filed their initial complaint, the legal and factual landscape has changed significantly because Plaintiffs now have coverage for hearing aids and a newly enacted Washington law requires such coverage. Despite these changes, Plaintiffs' claims still suffer from the same defects that required dismissal of their prior complaints.

Plaintiffs' Third Amended Complaint attempts to move the goalposts two ways: (1) it limits its analysis to *prescription* hearing aids, hoping to manufacture a closer fit with disability; and (2) because Plaintiffs (and the putative class) now have coverage for hearing aids, the Third Amended Complaint alleges that the *amount* of coverage is discriminatory. Ultimately, Plaintiffs' effort to force coverage of hearing aids was resolved the way it always should have been—by the Legislature. And none of the three main theories advanced by Plaintiffs—proxy discrimination, disparate impact, and intentional discrimination—states a claim.

First, Plaintiffs' proxy discrimination theory suffers from the same problems that it did in the Second Amended Complaint. Its fundamental flaw is that it attempts to correlate the Hearing Loss Exclusion with disability by focusing only on *part* of the Exclusion. Plaintiffs admit that the scope of the Exclusion has not changed. Nor has there been any change in Plaintiffs' cited statistics, which show that the Exclusion applies to *twice as many* non-disabled insureds as it does disabled insureds. The only meaningful change in the Third Amended Complaint is that

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Plaintiffs focus on ever-narrower parts of the Exclusion. In the Amended Complaint, Plaintiffs contended that the Hearing Loss Exclusion as a whole was a proxy for disability; then in the Second Amended Complaint, they alleged that the exclusion of hearing aids was the proxy. Now, they claim that Regence's (former) exclusion of *prescription* hearing aids is discriminatory. But the Court's role is to compare the full Hearing Loss Exclusion, including its exclusion of routine hearing examinations and other treatments, with the class of disabled insureds. Under that analysis, the result is the same as with each prior complaint—the Exclusion is not a proxy for disability because it applies to far more non-disabled than disabled insureds, and 20% of those with disabling hearing loss—the insureds with the most severe conditions—do receive coverage for cochlear implants. As this Court has previously held, there cannot be an almost exact fit with disability when only 27% of insureds with hearing loss are disabled but excluded from coverage.

Second, Plaintiffs' disparate impact theory repeats the allegations that were found insufficient in the Second Amended Complaint. Plaintiffs continue to rely upon an incorrect standard, asserting that the law requires insurers to provide meaningful access to the treatment all disabled insureds need to treat their disabilities. But the Ninth Circuit has repeatedly held that the ACA does not require health plans tailored to the specific needs of the disabled, and a disparate impact claim under *Alexander v. Choate* does not require meaningful access to whatever treatment is needed. Instead, it requires meaningful access to benefits that are accessible to non-disabled insureds, and the Hearing Loss Exclusion applies equally to disabled and non-disabled insureds.

Third, Plaintiffs' intentional discrimination theory similarly repeats the allegations dismissed for failure to state a claim in the Second Amended Complaint. The only additions are historical allegations that Regence's Blue Cross Blue Shield plans originated as employer-sponsored insurance programs. But virtually every current insurer offers employment-based policies, and employers' efforts to provide care for their employees a hundred years ago (and

today) do not render them discriminatory. Plaintiffs offer no other plausible allegations of intentional discrimination, and their claim based on this theory should be dismissed.[1]

The Court should reject Plaintiffs' most recent attempt to twist the facts in support of their legal theory. The Third Amended Complaint should be dismissed with prejudice.

III. BACKGROUND

A. The Second Amended Complaint and the Court's Dismissal.

Given the procedural history, Regence does not repeat, and assumes familiarity with, the background of the ACA, Plaintiffs' first two complaints, and the Ninth Circuit's decision in *Schmitt v. Kaiser Found. Health Plan of Wash.*, 965 F.3d 945, 954 (9th Cir. 2020). (*See also* Dkt. 37 (outlining history of ACA and procedural history).)

Plaintiffs' Second Amended Complaint asserted three different theories in support of Count 1, which alleged that the Hearing Loss Exclusion violates Section 1557 of the ACA: proxy discrimination, disparate impact, and intentional discrimination. (2d Am. Compl. ("SAC"), Dkt. 42 ¶¶ 60-99.) In addition to the state law claim under RCW 48.43.0128 that was asserted in their prior complaints, Plaintiffs also asserted claims under Washington's Consumer Protection Act, RCW 19.86 *et seq.*, and claims for declaratory and injunctive relief. (*Id.* ¶¶ 100-11.)

This Court granted Defendants' Motion to Dismiss Second Amended Complaint, holding that Plaintiffs had again "failed to allege a 'sufficiently close' fit between the proxy and disabled insureds." (Order, Dkt. 53 at 3.) Specifically, the statistics alleged in the Second Amended Complaint showed that Regence's "Exclusion does not 'predominantly affect disabled persons.' It 'predominantly' or 'primarily' affects non-disabled persons." (*Id.* at 4 (citing Dkt. 41 at 15) (non-disabled insureds with hearing loss are affected by Exclusion and outnumber hearing-disabled insureds two to one).) Further, the Court found that the Second Amended Complaint did "not make clear to what extent the proxy is overinclusive" because it provided "no factual

[1] Plaintiffs' state law theories are virtually unchanged from the prior complaints and should be dismissed for the same reasons they were previously dismissed.

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support for the conclusion that millions of individuals with a non-disabling hearing impairment only need 'screenings, or at most, a diagnostic evaluation.'" (*Id.*) The Court found that Plaintiffs' intentional discrimination theory also lacked factual support and rejected their disparate impact theory on the grounds that the Exclusion does not deny "Plaintiffs meaningful access to services that are easily accessible by others under the Regence plan." (*Id.* at 4-5.) Because the Court found no allegations to support discrimination, it also rejected Plaintiffs' state law theories. (*Id.* at 5-6.) Plaintiffs were again allowed to amend their complaint.

B. Recent Factual Developments.

In the 15 months since Plaintiffs filed their Second Amended Complaint, there have been several changes in the legal and factual landscape that are relevant to Plaintiffs' claims.

First, as of October 17, 2022, the FDA has made over-the-counter ("OTC") hearing aids available, at a price that is often significantly cheaper than prescribed hearing aids. 21 C.F.R. § 800.30; Medical Devices; Ear, Nose, and Throat Devices; Establishing Over-the-Counter Hearing Aids, 87 Fed. Reg. 50,698 (Aug. 17, 2022). OTC hearing aids can be purchased without a hearing test, without a diagnosis, and without a prescription. 87 Fed. Reg. 50,706-07. The FDA specifically stated that OTC hearing aids are intended to address "moderate hearing impairment," which this Court assumed to be disabling. *Id.* at 50,706.

Second, Washington enacted House Bill ("H.B.") 1222, which states that insurers "shall include coverage for hearing instruments, including bone conduction hearing devices." H.B. 1222 § 1(1), 68th Leg., 2023 Reg. Sess. (Wash. 2023).[2] It further requires coverage of "the initial assessment, fitting, adjustment, auditory training, and ear molds as necessary to maintain optimal fit." *Id.* § 1(2). This coverage is also offered to insureds who already have hearing aids. *Id.* The new law requires coverage of $3,000 per ear every three years for group plans or a new hearing instrument every five years for employer-sponsored plans. *Id.* §§ 1-2.

[2] Available at https://lawfilesext.leg.wa.gov/biennium/2023-24/Pdf/Bills/Session%20Laws/House/1222-S.SL.pdf?q=20230525083019.

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Third, Plaintiffs admit that their Regence policies now provide coverage for hearing aids. Plaintiffs complain that the coverage is limited to "$1,000 per year," which they assert is insufficient to cover the cost of their hearing aids. (3d Am. Compl. ("TAC"), Dkt. 54 ¶¶ 13, 110, 114.) However, as noted above, H.B. 1222 requires that Plaintiffs receive either a new hearing aid every five years or $3,000 toward a new hearing aid every three years, depending on their policy.

C. The Third Amended Complaint.

1. The Parties.

Plaintiff E.S. is the 12-year-old daughter and dependent of R.S. and J.S. She is insured under a Regence BlueShield insured health plan. (TAC, Dkt. 54 ¶ 21.) Plaintiff Jodi Sternoff is an adult who is also insured under a Regence BlueShield insured health plan. (*Id.* ¶ 9.) Plaintiffs allege that they and other members of the putative class "have been diagnosed with hearing loss . . . that limits a major life activity so substantially as to require medical treatment." (*Id.* ¶ 116.) Plaintiffs allege that they "require and/or will require hearing aids for their hearing loss, excluding treatment with cochlear implants." (*Id.* ¶ 117.) Plaintiffs also allege that they have paid out of pocket for medically necessary treatment for their hearing loss, including hearing aids and associated care. (*Id.* ¶ 126.)

Defendant Regence is an authorized health carrier based in King County and is engaged in the business of insurance in the State of Washington, including King County. (*Id.* ¶ 23.) Cambia is the nonprofit sole member and corporate owner of Regence. (*Id.* ¶ 24.)

2. The Hearing Loss Exclusion.

At the time the lawsuit was filed, Regence's insured health plans in Washington contained the following benefit exclusion:

> "We do not cover routine hearing examinations, programs or treatment for hearing loss, including but not limited to noncochlear

> hearing aids (externally worn or surgically implanted) and the surgery and services necessary to implant them."

(*Id.* ¶ 42 (quoting Plaintiffs' Regence Policy, Group No. 10018298).) Regence's 2020 health plan purchased by Plaintiffs contained a similar provision, which provided: "Hearing aids (externally worn or surgically implanted) and other hearing devices are excluded. This exclusion does not apply to cochlear implants." (*Id.*) The provision also excluded "Routine Hearing Examination." (*Id.* at 52.) Plaintiffs acknowledge in the Third Amended Complaint that the exclusions from the original and 2020 policies are "worded differently but ha[ve] the same effect." (*Id.*)

Consistent with the text of the policies, Plaintiffs previously interpreted the Exclusion to apply to all treatment for hearing loss except cochlear implants. (*See* Dkt. 32 ¶¶ 104-11 (alleging that Plaintiffs paid out of pocket for hearing examinations).) Furthermore, on their face, these policy provisions apply to all insureds under the plans at issue. Thus, a non-disabled person will not have coverage for a routine hearing examination, just as a disabled person would not have coverage for the same examination.

Plaintiffs acknowledge that their current policies do not include the Exclusion and that they now have coverage for hearing aids and hearing-related treatment. (TAC, Dkt. 54 ¶ 48.)

3. New Allegations in Third Amended Complaint.

Plaintiffs' Third Amended Complaint adds three categories of new allegations. First, it includes historical allegations related to the origins of private insurance and the enactment of Medicare and Medicaid. (*Id.* ¶¶ 36-41.) Second, it adds allegations related to the FDA's decision in October 2022 to allow sale of some OTC hearing aids. (*Id.* ¶¶ 12, 46-47.) Third, the new complaint includes allegations addressing Regence's recent decision to provide coverage for hearing treatment and hearing aids in many of its policies, including Plaintiffs' policies. (*Id.* ¶¶ 13, 48-49.)

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IV. STANDARD OF REVIEW

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "[D]ismissal for failure to state a claim under [Rule] 12(b)(6) is proper if there is a 'lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.'" *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011) (quoting *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988)).

V. ARGUMENT

A. Plaintiffs Fail to State a Claim for Proxy Discrimination.

For the third time, Plaintiffs assert proxy discrimination as their primary theory. They raise two arguments in support of their contention that the Hearing Loss Exclusion is a proxy for discrimination against the disabled. First, Plaintiffs claim that the Exclusion is discriminatory because it meets the treatment needs of the non-disabled while failing to meet the needs of the disabled. Second, they claim that statistics show that the "fit" between the Exclusion and the disabled is close enough to infer discrimination.

Both of these contentions, however, were included in Plaintiffs' Second Amended Complaint and failed to state a claim under the ACA. In the Third Amended Complaint, Plaintiffs continue to rely on an incorrect standard for proxy discrimination, improperly attempt to manufacture a fit by narrowing the scope of the Exclusion, and rehash arguments that the Court has already rejected. The Court should dismiss Plaintiffs' proxy discrimination claim in the Third Amended Complaint.

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1. Plaintiffs Continue to Rely upon an Incorrect Standard for Proxy Discrimination.

Proxy discrimination "arises when the defendant enacts a law or policy that treats individuals differently on the basis of seemingly neutral criteria that are so closely associated with the disfavored group that discrimination on the basis of such criteria is, constructively, facial discrimination against the disfavored group." *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1160 n.23 (9th Cir. 2013). A proxy discrimination claim addresses the use of "a technically neutral classification as a proxy to evade the prohibition of intentional discrimination." *McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir. 1992).

For the third time, Plaintiffs assert that "[p]roxy discrimination exists where 'the needs of hearing-disabled persons differ from the needs of persons whose hearing is merely impaired such that the exclusion is likely to predominately affect disabled persons.'" (TAC, Dkt. 54 ¶ 137.) This quote is from a footnote in *Schmitt* in which the Ninth Circuit was offering an "example" of how Plaintiffs might be able to meet the proxy discrimination standard through a logical rather than statistical fit. 965 F.3d at 959 n.8. The Court did *not*, however, modify the standard for proxy discrimination. It clearly stated that "the crucial question is whether the proxy's 'fit' is 'sufficiently close' to make a discriminatory inference plausible." *Id.* at 959 (quoting *Davis v. Guam*, 932 F.3d 822, 838 (9th Cir. 2019)). For a sufficiently close "fit," the neutral criteria must be "*almost exclusively* indicators of membership in the disfavored group." *Pac. Shores Props.*, 730 F.3d at 1160 n.23 (emphasis added); *see also Guam*, 932 F.3d at 838 ("Although proxy discrimination does not involve express racial classifications, the fit between the classification at issue and the racial group it covers is so close that a classification on the basis of race can be inferred without more."). This remains the standard that Plaintiffs must meet to state a claim for proxy discrimination.

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2. Plaintiffs Improperly Attempt to Manufacture a "Fit" by Narrowing the Description of the Benefit at Issue.

As before, Plaintiffs attempt to narrow the scope of the alleged benefit at issue in order to manufacture a fit with hearing-disabled insureds. In their first attempt to plead a proxy discrimination claim, Plaintiffs identified the neutral classification as being the Hearing Loss Exclusion itself, which they described as "excluding coverage of all treatment for hearing loss (except for cochlear implants)." (Am. Compl., Dkt. 32 ¶ 15.) Plaintiffs alleged that the Exclusion was a proxy for disability because "[n]on-disabled insureds rarely seek treatment for hearing loss." (*Id.* ¶ 106.) This Court rejected that theory on the grounds that Plaintiffs' own statistics showed that "the Exclusion mostly affects non-disabled insureds" because the majority of the hearing loss population is not disabled. (Order, Dkt. 41 at 15.)

Plaintiffs' Second Amended Complaint narrowed the scope of the alleged proxy in an attempt to create a better fit with the class of disabled insureds. Instead of alleging that the Hearing Loss Exclusion itself was a proxy for disability, Plaintiffs alleged that the exclusion of coverage for *hearing aids* was a proxy for disability because "'programs or treatment for hearing loss' are, in practical effect, coverage for 'hearing aids.'" (SAC, Dkt. 42 ¶ 23.)[3] In other words, Plaintiffs limited the proxy to hearing aids because they believed that this created a better fit with disability. (*Id.* ¶ 83 ("The impact of Regence's exclusion of hearing aids is . . . on those insureds who seek hearing aids. The vast majority of these individuals are disabled.").) This Court again rejected Plaintiffs' proxy discrimination theory, declining to adjust the scope of the proxy and instead noting that "the complaint fail[ed] to show that the 'fit' between hearing loss and hearing disability is sufficiently close." (Order, Dkt. 53 at 4.)[4]

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[3] Plaintiffs acknowledged that while the wording of the Hearing Loss Exclusion had changed its effect had not. (SAC, Dkt. 42 ¶ 23.)

[4] The Court also correctly noted that the statistics showing a majority of individuals with hearing loss to be non-disabled were "unchanged from the prior amended complaint." (Order, Dkt. 53 at 4.)

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In the Third Amended Complaint, Plaintiffs seek to narrow the scope of the proxy even further. Despite the fact that the scope of the Hearing Loss Exclusion has not changed (to the extent it still exists at all), Plaintiffs now limit the class to those who require "*prescription* hearing aids." (TAC, Dkt. 54 ¶ 29 (emphasis added).) Although the Hearing Loss Exclusion still excludes coverage for routine hearing examinations and coverage for all hearing aids, whether OTC or prescription, Plaintiffs ask the Court to look only at one part of the Exclusion—prescription hearing aids that Plaintiffs allege are more likely to be needed by disabled insureds. (*See id.* ¶ 61 ("[A]ll or nearly all individuals who use *prescribed* hearing aids (and are therefore affected by the Exclusion) are 'disabled.'" (emphasis added)).)[5]

The Ninth Circuit in *Schmitt* explicitly cautioned that plaintiffs may not tailor the scope of the proxy in order to create a fit with disability: "Just as '[t]he benefit . . . cannot be defined in a way that effectively denies otherwise qualified [disabled] individuals the meaningful access to which they are entitled,' **a section 1557 plaintiff cannot define the benefit so narrowly as to require an insurer to curate coverage for each individual's health care needs**." 965 F.3d at 959 (alterations in original; emphasis added) (quoting *Alexander v. Choate*, 469 U.S. 287, 301 (1985)). That is precisely what Plaintiffs here are attempting to do.

The Ninth Circuit, however, was clear that this is improper. In *Schmitt*, the court specifically noted that Kaiser's coverage of cochlear implants had to be taken into account when determining whether the proxy was underinclusive. *Id.* Just as the plaintiffs in *Schmitt* could not omit coverage for cochlear implants from the alleged proxy, Plaintiffs here cannot omit exclusions of routine hearing examinations, OTC hearing aids, and other treatments from the proxy. The Court should evaluate the entire Hearing Loss Exclusion and the full scope of its impact on the disabled and non-disabled when considering Plaintiffs' proxy theory.

[5] The logical implication of Plaintiffs' argument is that, although the Hearing Loss Exclusion was not discriminatory prior to October 2022 because it primarily affected non-disabled insureds, the FDA's decision to allow the sale of OTC hearing aids somehow rendered the Exclusion discriminatory even though its terms had not changed.

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3. The Third Amended Complaint Relies on the Same Statistics That Failed to Support a Proxy Discrimination Theory in the Prior Two Complaints.

In support of their allegation that the Hearing Loss Exclusion predominately affects disabled insureds, Plaintiffs again rely on the same statistics from the CDC's National Health and Nutrition Examination Survey that they cited in the Second Amended Complaint. (TAC, Dkt. 54 ¶¶ 163-65; SAC, Dkt. 42 ¶¶ 84-86.) In their Motion to Dismiss Second Amended Complaint, Defendants argued that Plaintiffs were attempting to manufacture a fit with disability by portraying the Exclusion as applying only to hearing aids. (Dkt. 45 at 14.) But even applying this impermissible limitation on the Exclusion, Plaintiffs' own statistics showed that at least 25% of hearing aid users did not have disabling hearing loss. (Dkt. 42 ¶ 86(c).) Therefore, even Plaintiffs' improperly narrowed proxy did not "almost exclusively" apply to the disabled. *Pac. Shores Props.*, 730 F.3d at 1160 n.23.

In dismissing the Second Amended Complaint, this Court agreed, finding that Plaintiffs' statistics were "unchanged from the prior amended complaint" and did not show that the Exclusion "predominately affect[s] disabled persons." (Order, Dkt. 53 at 4.) Plaintiffs' statistics in the Third Amended Complaint are again unchanged. Those statistics still show that 66.5% of the hearing loss population would *not* be disabled under the ADA but would still be subject to the Hearing Loss Exclusion. (*Id.* at 3-4 (citing Dkt. 41 at 15).) In fact, only 27.9% of individuals with hearing loss are disabled but denied coverage by the Exclusion. (Dkt. 41 at 15 (citing Dkt. 32-2 at 2).) Furthermore, Regence's policies containing the Exclusion provide coverage for cochlear implants, which serve the hearing needs of 20% of the hearing-disabled population. (TAC, Dkt. 54 ¶ 156 (citing Dkt. 32-2 at 2).)

These statistics are not only insufficient to support a proxy discrimination claim, as they were in the first and second amended complaints, they affirmatively show that the Hearing Loss Exclusion is not discriminatory because it applies predominately to non-disabled insureds.

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4. Plaintiffs' Needs-Based Allegations Do Not Support a Claim of Proxy Discrimination.

In their prior two complaints, Plaintiffs asserted a needs-based proxy discrimination theory in response to the Ninth Circuit's footnote in *Schmitt* that the plaintiffs in that case might be able to meet their pleading burden by showing how the needs of the disabled differ from those of insureds with non-disabling hearing loss such that the Exclusion predominately affects the disabled. *Schmitt*, 965 F.3d at 959 n.8. In the Second Amended Complaint, Plaintiffs alleged that the needs of insureds with non-disabling hearing loss were met by covered screenings and diagnostic tests while exclusion of hearing aids almost exclusively affected the disabled. (*See* SAC, Dkt. 42 ¶¶ 60-65.)

This Court rejected that theory, ruling that Plaintiffs had "implausibly" treated individuals with non-disabling hearing loss the same as those with no hearing loss. (Order, Dkt. 53 at 4.) Further, the Court found that Plaintiffs had failed to provide support for their conclusory allegation that insureds with non-disabling hearing loss needed only screenings and diagnostic tests. (*Id.*)

Plaintiffs reassert this "needs-based" argument in the Third Amended Complaint. (Dkt. 54 ¶¶ 137-43.) The argument is essentially the same as it was in the Second Amended Complaint: that the Exclusion predominately affects disabled insureds[6] because insureds with non-disabling hearing loss "are not affected by the Exclusion, as they have access to all the benefits they need"—hearing screenings and diagnostic evaluations. (*Id.* ¶¶ 138-39.) The Third Amended Complaint, however, adds numerous new allegations related to Plaintiffs' contention that *prescription* hearing aids—Plaintiffs' new proxy—are a sufficiently close fit with the disabled as to be discriminatory. (*See, e.g.*, *id.* ¶ 138 ("[T]he vast majority of Regence's insureds

[6] Again, this is not, by itself, sufficient to state a proxy discrimination claim; the Ninth Circuit in *Schmitt* simply said that a policy predominately affecting the disabled would tend to support an inference of discrimination. The ultimate test, however, is whether the fit is close enough that discrimination can be inferred without more.

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who use prescription hearing aids are 'disabled'" while others "are not affected by the Exclusion."); *see also id.* ¶¶ 73-83, 87-102.)

These allegations fail to cure the defects in Plaintiffs' Second Amended Complaint for the primary reason that, as discussed above, Plaintiffs improperly focus on just a subset of one part of the Hearing Loss Exclusion. As this Court has already ruled, given that individuals with non-disabling hearing loss outnumber those with disabling hearing loss two to one, it is implausible to assert that insureds with non-disabling hearing loss need no treatment whatsoever or that the Exclusion has no impact on them at all. (Order, Dkt. 53 at 4.) But because the Hearing Loss Exclusion's plain terms exclude coverage for all hearing loss treatment, that is the only way Plaintiffs can allege that the Exclusion is limited to hearing aids.[7]

Furthermore, many of Plaintiffs' new allegations misstate the facts as represented in prior complaints and in their cited statistics. Plaintiffs allege that "[t]he overwhelming majority of people who use hearing aids . . . are disabled," so the exclusion of coverage for hearing aids "impacts only or nearly entirely people with disabling hearing loss." (TAC, Dkt. 54 ¶¶ 79, 81.) Even though this improperly compares the class of disabled insureds to those "who use hearing aids" rather than to those who are subject to the Exclusion, Plaintiffs' own statistics show that at least a quarter of persons who self-report wearing a hearing aid do not have disabling hearing loss. (*Id.* ¶ 165(c).) Similarly, Plaintiffs' allegation that only 5% of people with hearing disability may be treated with cochlear implants is also refuted by their statistics, which show that cochlear implants serve the hearing needs of approximately 20% of the hearing-disabled population. (*Id.* ¶ 156 (citing Dkt. 32-2 at 2).)[8]

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[7] Plaintiffs' new allegations in Part V.H of the Third Amended Complaint are irrelevant because they assume the proxy is hearing aids rather than the Hearing Loss Exclusion. (TAC, Dkt. 54 ¶¶ 94-102.) They also ignore the fact that the Exclusion covers hearing aids for 20% of disabled insureds. (*Id.* ¶ 156 (citing Dkt. 32-2 at 2).)

[8] Plaintiffs likely meant that about 5% of *all* persons with hearing loss—disabled or non-disabled—can be treated with cochlear implants. That is true because two-thirds of those people are not disabled.

Plaintiffs further seek to narrow the scope of the proxy by alleging that the Exclusion does not affect insureds who do not seek medical treatment. (*Id.* ¶ 88.) The class definition, however, is not limited to insureds who had claims denied, and Plaintiffs explicitly seek recovery for "claims for hearing aids that were not submitted for payment due to [Regence's] policy." (*Id.* ¶¶ 29, 204.) Plaintiffs cannot have it both ways; they cannot seek as broad a class as possible by including anyone who needs a hearing aid while simultaneously excluding anyone who did not file a claim for purposes of creating a narrow proxy. In any event, as Plaintiffs admit, many people will not seek treatment for which they do not have coverage. That does not mean they are not subject to the Exclusion.

Ultimately, the Third Amended Complaint fails to support Plaintiffs' needs-based theory of proxy discrimination. It simply restates many of the conclusory allegations that this Court found insufficient in the Second Amended Complaint, and it fails to account for the fact that the Hearing Loss Exclusion as a proxy is both overinclusive because it includes the 66% of insureds with hearing loss who are not disabled, and underinclusive because it excludes the 20% of disabled insureds who receive coverage for cochlear implants. The Court should reject this theory and dismiss Plaintiffs' proxy discrimination claim.

B. Plaintiffs' Disparate Impact Theory Fails to State a Claim.

Plaintiffs' disparate impact claim in the Third Amended Complaint is virtually identical to the one that this Court dismissed in the Second Amended Complaint. (SAC, Dkt. 42 ¶¶ 88-92; TAC, Dkt. 54 ¶¶ 169-74.) Plaintiffs allege that the Hearing Loss Exclusion discriminates against them because they are "denied meaningful access to the coverage that they require to treat their disability—hearing aids." (TAC, Dkt. 54 ¶ 172.) This Court has already rejected this theory twice, most recently in its Order dismissing the Second Amended Complaint: "As for Plaintiffs' disparate impact theory, the Court maintains its prior analysis that all routine hearing examinations and programs and treatments for hearing loss are excluded from coverage. Accordingly, the Court cannot conclude that the hearing loss exclusion denies Plaintiffs

meaningful access to services that are easily accessible to others." (Order, Dkt. 53 at 4-5 (citing Dkt. 41 at 10).)

Plaintiffs' Third Amended Complaint offers no reason for the Court to reach a different result here. As discussed more thoroughly in Defendants' Motion to Dismiss Second Amended Complaint, the Ninth Circuit has recently affirmed that the Supreme Court's decision in *Alexander v. Choate* remains the standard applicable to disparate impact claims under Section 504 of the Rehabilitation Act and, by extension, Section 1557 of the ACA. *See Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 1210 (9th Cir. 2020) (Section 1557 of the ACA "does not create a new healthcare-specific anti-discrimination standard" and to state an ACA claim for "discrimination on the basis of their disability," plaintiffs "must allege facts adequate to state a claim under Section 504 of the Rehabilitation Act"); *Payan v. L.A. Cmty. Coll. Dist.*, 11 F.4th 729, 738 (9th Cir. 2021) ("To assert a disparate impact claim, a plaintiff must allege that a facially neutral . . . policy or practice has the 'effect of denying meaningful access to public services' to people with disabilities." (citation omitted)).

Plaintiffs allege that the treatment they require is the benefit to which they are denied meaningful access. But as this Court has held, the benefit at issue must be available to non-disabled insureds. (Dkt. 22 at 5 ("[S]ervices and treatments . . . related to hearing loss . . . are not, as Plaintiffs claim, otherwise available to other plan participants . . . ."); *see also Schmitt*, 965 F.3d at 955 (ACA "does not guarantee individually tailored health care plans").) As this Court has already twice ruled, because Plaintiffs are not denied meaningful access to plan benefits that are easily accessible by non-disabled insureds, their disparate impact theory must be dismissed.

C. Plaintiffs Fail to State a Plausible Claim for Intentional Discrimination.

Plaintiffs' intentional discrimination theory is also unchanged from the Second Amended Complaint and should be dismissed for the same reasons. As in their last complaint, Plaintiffs allege that Regence uses a "technology assessment process" "to evaluate whether a medical

service should be covered or excluded." (TAC, Dkt. 54 ¶ 175.) They contend that hearing aids meet the requirements of the technology assessment process, and Regence's exclusion of them therefore shows that "the design and administration of the exclusion was an intentional choice or, at the very least, the result of deliberate indifference to the effect it would have on its insureds with disabling hearing loss." (*Id.* ¶¶ 175-81.)

These allegations are unsupported by facts and contradicted by the documents cited in the Third Amended Complaint. Contrary to Plaintiffs' assertion, the technology assessment process Plaintiffs rely on is not intended to determine which products or services are covered. The manual cited by Plaintiffs in support of their allegations addresses the "Medical Policy Development and Review Process." (*Id.* ¶¶ 175, 177.)[9] This manual, by its terms, addresses the development of medical policies, which "provide guidelines for determining coverage criteria for specific medical and behavioral health technologies, including procedures, equipment, and services."[10] This manual therefore discusses the creation of the *policies* that will later determine eligibility for coverage of certain products or services. The "technology assessment process" cited by Plaintiffs is merely one part of this broader effort to create medical policies for new areas of care. Nowhere does the manual state that technologies that meet it or any other criteria should or will be covered. To the contrary, it specifically states that the policies created pursuant to the manual are "not intended to override the health insurance contract that defines the insured's benefits."

Nor do Plaintiffs' new historical allegations suggest any intentional discrimination. Plaintiffs allege that Blue Shield policies originated in the early 20th century when employers provided health coverage to their workers, excluding disability-related coverage. (TAC, Dkt. 54 ¶¶ 36-37.) If this allegation were sufficient to state a claim for intentional discrimination, every insurer would be liable because employer-based health insurance coverage is a standard feature

[9] Citing https://blue.regence.com/trgmedpol/intro/index.html.

[10] The Table of Contents page of the manual includes links to medical policies in several areas of care. *See* https://blue.regence.com/trgmedpol/contents/index.html.

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of the United States medical system. Furthermore, Regence's coverage of cochlear implants refutes any notion that it intentionally discriminates against the disabled. Unlike hearing aids and hearing treatment, which are used by the disabled and non-disabled alike, cochlear implants are used *only* by the disabled, and they are covered by Regence's policies that contain the Exclusion.

For these reasons, Plaintiffs have not plausibly alleged "deliberate indifference" to a federally protected right, as required to state a claim for intentional discrimination.[11] This Court dismissed Plaintiffs' intentional discrimination claim in the Second Amended Complaint, ruling that Plaintiffs had failed to provide any supporting facts for their allegation that Regence intended to discriminate against the disabled, and nothing in the Third Amended Complaint changes that result. (Order, Dkt. 53 at 4.) Plaintiffs' intentional discrimination claim should be dismissed.

D. Plaintiffs Fail to State a Claim Under the Washington Law Against Discrimination.

Plaintiffs again claim that the Hearing Loss Exclusion violates the Washington Law Against Discrimination ("WLAD"). (TAC, Dkt. 54 ¶¶ 182-96.) Plaintiffs allege that the Insurance Code prohibits discriminatory benefit design, RCW 48.43.0128, and that the WLAD prohibits insurers from discriminating on the basis of disability, RCW 49.60.030(1)(e). (TAC, Dkt. 54 ¶¶ 182-83.) Therefore, according to Plaintiffs, the WLAD incorporates the Insurance Code's prohibition of discriminatory benefit design. (*Id.* ¶ 183.) This claim fails because (1) the Exclusion is not discriminatory for the same reasons stated above, (2) state regulations expressly allowed the exclusion of hearing treatment from insurance policies, and (3) Plaintiffs cannot assert a claim for violation of the Insurance Code by suing under the WLAD.

First, the Exclusion is not discriminatory under state law for the same reasons discussed in Parts V.A-C, *supra*. Its application is not limited to the disabled because it also excludes

[11] Plaintiffs admit that the Exclusion is, at most, the result of "thoughtless indifference," not deliberate discriminatory animus. (TAC, Dkt. 54 ¶ 102.)

coverage for insureds with non-disabling hearing loss. Even if the definition of disability under state law is broader than under the ADA, as Plaintiffs allege, the Exclusion is still not a proxy for disability because it bars coverage of routine hearing examinations for insureds with no hearing loss at all, as well as all other forms of treatment for all degrees of hearing loss severity. And as discussed above, any coverage for screening or diagnostic testing would be equally available to both disabled and non-disabled insureds.

Second, the regulations implementing RCW 48.43.0128 explicitly state that insurers "must provide coverage that is substantially equal to the EHB-benchmark plan, as described in WAC 284-43-5642." WAC 284-43-5622(1). The plan described in WAC 284-43-5642 provides that "[a] health benefit plan . . . is not required to, include the following services as part of the EHB-benchmark package[:] . . . Hearing care, routine hearing examinations, programs or treatment for hearing loss including, but not limited to, externally worn or surgically implanted hearing aids, and the surgery and services necessary to implant them." WAC 284-43-5642(1)(b)(vii). This regulation amounts to a determination by the Office of the Insurance Commissioner that exclusion of treatment for hearing loss is not discriminatory, and courts "give substantial weight and deference to an agency's interpretation of the statutes and regulations it administers." *Pitts v. State, Dep't of Soc. & Health Servs.*, 129 Wash. App. 513, 523, 119 P.3d 896, 902 (2005). Defendants cannot have violated a state statute by following the directives of its implementing regulations.

Third, Plaintiffs have not demonstrated that the WLAD allows enforcement of the anti-discrimination provisions of the Insurance Code via a private right of action. This Court has previously held that Plaintiffs may not sue under RCW 48.43.0128 directly. (Order, Dkt. 53 at 5.) Plaintiffs therefore allege that the WLAD incorporates the prohibition of RCW 48.43.0128, but they provide no authority for this contention. To the contrary, the WLAD contains its own separate discrimination provision. *See* RCW 49.060.030. To state a claim under this provision, Plaintiffs must plead facts showing that "coverage turns exclusively on the presence or absence"

of their disability. (Order, Dkt. 53 at 5 (citing *Johnson v. Met. Prop. & Cas. Ins. Co.*, No. 63198–5–I, 2010 WL 532449 (Wash. Ct. App. Feb. 16, 2010)).) Regence, however, *provides* coverage for cochlear implants that are needed by 20% of hearing-disabled insureds, and it *excludes* coverage for all insureds with non-disabling hearing loss, who represent two-thirds of all hearing-impaired insureds. Because coverage does not turn exclusively on disability, Plaintiffs cannot state a claim under the WLAD.

E. Plaintiffs Fail to State a Claim Under the Washington Consumer Protection Act.

Plaintiffs' Consumer Protection Act ("CPA") claim is identical to the one asserted in their Second Amended Complaint, and it fails for the same reasons.

First, as discussed in Part V.D, *supra*, the Exclusion does not violate RCW 48.43.0128 or any other provision of Title 48 RCW, so it is not an action made subject to the CPA by RCW 19.86.170. To the extent Plaintiffs allege that the Exclusion constitutes a violation of the CPA separate and apart from a violation the Insurance Code, that argument fails for the reasons discussed in Parts V.A-C, *supra*. In short, conduct that is not discriminatory under the ACA or the Insurance Code cannot be an unfair or deceptive practice for purposes of the CPA.

Second, Defendants are exempt from any CPA claim based on the Exclusion because its use is specifically permitted by RCW 19.86 and its implementing regulations. RCW 19.86.170 ("[N]othing required or permitted to be done pursuant to Title 48 RCW shall be construed to be a violation of RCW 19.86.020 . . . ."). As discussed in Part V.D, *supra*, the regulations implementing RCW 48.43.0128 expressly provide that "[a] health benefit plan . . . is not required to, include the following services as part of the EHB-benchmark package[:] . . . Hearing care, routine hearing examinations, programs or treatment for hearing loss including, but not limited to, externally worn or surgically implanted hearing aids, and the surgery and services necessary to implant them." WAC 284-43-5642(1)(b)(vii). Because this regulation explicitly permits the exclusion of the services at issue here, Defendants are exempt from Plaintiffs' CPA claim.

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This Court dismissed Plaintiffs' CPA claim in the Second Amended Complaint on the grounds that Plaintiffs had failed to allege discrimination on the basis of disability, and the Third Amended Complaint provides no basis for a different result here.

F. Plaintiffs Fail to State Claims for Declaratory and Injunctive Relief.

Plaintiffs' claims for declaratory and injunctive relief should be dismissed for the same reasons as their other claims, but the claim for injunctive relief should be dismissed for the additional reasons that any prospective relief is now moot and the "retrospective" injunctive relief is actually just disguised damages.

1. Plaintiffs' Claims for Declaratory and Injunctive Relief Should Be Dismissed for the Same Reasons as Their Other Claims.

Counts IV and V of Plaintiffs' Third Amended Complaint, for Declaratory Relief and Injunctive Relief, respectively, do not assert any grounds for relief independent of the other claims. (TAC, Dkt. 54 ¶¶ 202-04.) Because the declaratory and injunctive relief claims are dependent on Plaintiffs successfully pleading another claim for relief, Counts IV and V should be dismissed for the reasons discussed above.

2. Plaintiffs' Request for Prospective Injunctive Relief Is Moot.

Plaintiffs describe their case as one "seeking prospective and retrospective injunctive relief." (*Id.* ¶ 101.) Plaintiffs prospectively seek to "[e]njoin Regence from applying the same or similar hearing aid exclusions now and in the future." (*Id.* at 46 ¶ 4.) However, Plaintiffs admit that their policies no longer contain the Hearing Loss Exclusion. (*Id.* ¶ 13.) Furthermore, the enactment of H.B. 1222 requires the coverage for hearing aids and related treatment up to $3,000 every three years. H.B. 1222 §§ 1-2. Because Plaintiffs are already receiving the coverage they seek to obtain by injunction, and because that coverage is now explicitly required by statute, Plaintiffs' request for prospective injunctive relief is moot and should be dismissed.

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3. Plaintiffs' Request for Retrospective Injunctive Relief Should Be Dismissed as Improper.

Plaintiffs assert that they "are not required to allege deliberate discrimination or intentional animus in this case seeking prospective and retrospective injunctive relief." (TAC, Dkt. 54 ¶ 101.) Discriminatory intent is only required if a plaintiff seeks compensatory damages. *Duvall v. County of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001) (citing *Ferguson v. City of Phoenix*, 157 F.3d 668, 674 (9th Cir. 1998), *as amended* (Oct. 8, 1998)), *as amended on denial of reh'g* (Oct. 11, 2001). This *mens rea* of intentional discrimination can be met by a showing of "deliberate indifference" rather than discriminatory animus. *Id.*; *see also Schmitt*, 965 F.3d at 954 n.6 ("To be entitled to monetary damages, however, [plaintiffs] must prove a *mens rea* of intentional discrimination . . . by showing deliberate indifference [or] discriminatory animus." (ellipsis and second brackets in original; internal quotation marks omitted) (quoting *Mark H. v. Lemahieu*, 513 F.3d 922, 938 (9th Cir. 2008))).

Here, Plaintiffs seek "retrospective injunctive relief" in the form of "reprocessing" and payment of prior claims for hearing treatment. (TAC, Dkt. 54 ¶ 204.) Plaintiffs also seek, as injunctive relief, processing of "claims for hearing aids that were not submitted for payment due to [Regence's] policy." (*Id.*) Plaintiffs assert that no showing of deliberate indifference or discriminatory animus is required for this relief because it is injunctive rather than compensatory. The Court should reject this contention because Plaintiffs' request for payment of submitted and unsubmitted prior claims is nothing more than a request for compensatory damages disguised as injunctive relief to avoid the *mens rea* requirement.

The Ninth Circuit addressed a similar situation in a recent ERISA case, *Wit v. United Behavioral Health*, 58 F.4th 1080, 1095 (9th Cir. 2023). In that case, to avoid the problem of individualized issues on class certification, the plaintiffs framed their requested relief on the denial of benefits claim not as payment of the benefits owed but as an injunction ordering reprocessing of denied claims. *Id.* at 1090. The court reversed the district court's certification of

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the class on these grounds, ruling that "reprocessing is not truly the *remedy* that Plaintiffs seek, it is the *means to the remedy* that they seek." *Id.* at 1095. Because reprocessing was found to be merely a means to obtain the true remedy—payment of the benefits—it was not allowed as an equitable remedy. *Id.*

Although that case involved ERISA rather than the ACA, the principle applies equally here. Cases under the Rehabilitation Act and, by extension, the ACA impose a heightened standard for the recovery of compensatory damages: discriminatory animus or deliberate indifference. Just as the plaintiffs in *Wit* sought to avoid individualized issues by seeking reprocessing rather than payment, Plaintiffs here seek to avoid the *mens rea* requirement for damages by framing their request as seeking an injunction. But as the Ninth Circuit ruled, that injunction would simply be the *means* of obtaining the true remedy, which is the payment of monetary damages. The Court here should not allow Plaintiffs to sidestep the requirements for damages and should dismiss their request for retrospective injunctive relief as improper.

G. The Court Should Deny Leave to Amend.

Although Federal Rule of Civil Procedure 15(a) provides that leave to amend should be freely granted "when justice so requires," a district court should deny leave when "'it determines that the pleading could not possibly be cured by the allegation of other facts.'" *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (quoting *Doe v. United States,* 58 F.3d 494, 497 (9th Cir. 1995)). However, "when a district court has already granted a plaintiff leave to amend, its discretion in deciding subsequent motions to amend is 'particularly broad.'" *Chodos v. W. Publ'g Co.*, 292 F.3d 992, 1003 (9th Cir. 2002) (quoting *Griggs v. Pace Am. Grp., Inc.,* 170 F.3d 877, 879 (9th Cir. 1999)). This is particularly true where the court has notified the plaintiff "of the deficiencies in his pleadings, advis[ed] him how to correct them, and afford[ed] him multiple opportunities to amend." *McKinney v. Baca*, 250 F. App'x 781 (9th Cir. 2007) (denying leave to amend after dismissal of second amended complaint).

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The Third Amended Complaint is Plaintiffs' fourth attempt to plead a claim for disability discrimination. Plaintiffs have been repeatedly notified of the deficiencies in their complaints and have been advised by this Court and the Ninth Circuit of how those deficiencies might be corrected. Plaintiffs' inability to state a claim on their fourth try after specific direction from two courts leads to the conclusion that the deficiencies in their claims cannot be cured by the allegation of additional facts. The Court should deny leave to amend as futile.

VI. CONCLUSION

For the reasons above, Defendants respectfully request that the Court grant their Motion to Dismiss Plaintiffs' Third Amended Complaint.

DATED: June 20, 2023.

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I certify that this memorandum contains 7591 words, in compliance with the Local Civil Rules.

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

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS THIRD AMENDED COMPLAINT

[PROPOSED]

This matter came before the Court on the Motion to Dismiss Third Amended Complaint filed by defendants Regence BlueShield and Cambia Health Solutions, Inc. (collectively, "Defendants"). The Court has reviewed the Motion, papers filed in response and in support thereof, and the records and files herein. Being fully informed, the Court hereby ORDERS that:

1. Defendants' Motion to Dismiss Third Amended Complaint is GRANTED in its entirety for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

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2. Plaintiffs' Third Amended Complaint and all claims therein are DISMISSED with prejudice.

IT IS SO ORDERED.

Dated this __ day of _____, 2023.

THE HONORABLE RICHARD A. JONES
UNITED STATES DISTRICT JUDGE

Presented By:

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