The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

ANDREA SCHMITT; ELIZABETH MOHUNDRO; and O.L. by and through her parents, J.L. and K.L., each on their own behalf, and on behalf of 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.	CASE NO. 2:17-cv-1611-RSL DEFENDANTS' OPPOSITION AND CROSS MOTION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT RE: VIOLATION OF RCW 48.43.0128 AND BREACH OF CONTRACT NOTED ON MOTION CALENDAR: FRIDAY, JUNE 23, 2023 (MOTION); FRIDAY, JULY 14, 2023 (CROSS MOTION) ***ORAL ARGUMENT REQUESTED***

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I. INTRODUCTION

Plaintiffs' motion seeks to re-write Washington law. They essentially claim that when the legislature enacted RCW 48.43.0128 to mirror pre-Trump federal anti-discrimination regulations, it in fact mandated coverage for all medically necessary services that could treat any diagnosable condition, including hearing aids (and eyeglasses, contacts, etc.). Plaintiffs' unsupported radical position is directly contradicted by the legislative history and language of the statute, as well as settled state law defining intentional discrimination. Their argument also renders the legislature's newly (2023) enacted hearing aid mandate, meaningless. It misconstrues the meaning of "disability" in RCW 48.43.0128, which, if adopted, would lead to the absurd result that everyone needing any healthcare under a plan would be "disabled." Finally, Plaintiffs' argument ignores the interpretation of the agency charged by the legislature with broad authority to implement RCW 48.43.0128, the Office of the Insurance Commissioner ("OIC"). OIC has repeatedly and expressly found that the exclusion of hearing aids is not a discriminatory benefit design, and has approved and certified the very plans Plaintiffs contend are discriminatory.

In fact, the statute is a straightforward law meant to mirror federal consumer protections that existed under the Affordable Care Act ("ACA"), but which were under heavy attack during the Trump administration. There is zero basis to find the law is "far broader" than federal law and Plaintiffs offer none. OIC's interpretation of the law is consistent with how benefit design discrimination is understood under federal law.

Plaintiffs' "facts" also have no basis. Plaintiffs rely exclusively on the inadmissible opinions of a law professor in West Virginia to outline a history of discrimination which she contends can be imputed to Kaiser. None of this alleged history applies to Kaiser, which began as a community-based, member driven, non-profit managed care organization, as set forth in the Declaration of Cheryl Scott ("Scott Decl."). It engaged in none of the practices denounced by Plaintiffs and in fact insured the vulnerable high-risk individuals who were shut out of the private for-profit indemnity health insurance market described by Plaintiffs. Scott Decl., ¶¶14-18. Kaiser

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has covered treatment for hearing loss, including hearing disability, for decades, including cochlear implants for serious to profound hearing loss, bone anchored hearing aids for middle ear conductive hearing loss, and examinations for hearing loss. Kaiser has also long covered hearing aids as a rider for all large group plans. Declaration of Jessica Hamp ("Hamp Decl.") ¶14. The exclusion of hearing aids is in the plans designed to be most affordable. *Id.* Even though the law does not require Kaiser to cover hearing aids, Kaiser considered whether to offer the benefit as a plan enhancement and followed the same process and considered the same factors as for all other benefits. Hamp Decl., ¶ 14; Declaration of Amanda Kirangi ("Kirangi Decl."), ¶ 4.

Nor are hearing aids a proxy for hearing disability. In fact, the overlap between hearing aid usage and hearing disability is only *weakly* correlated. Declaration of Defendants' expert Scott Carr ("Carr Decl."), Ex. B, p. 21-23. See also Judge Jones' opinion in *E.S. v. Regence BlueShield*, W.D. Wash. Case No. 17-1609, 2022 U.S. Dist. LEXIS 17366, *22-*23 (W.D. Wash., Jan. 31, 2022). Plaintiffs rely on the opinion testimony of Dr. Lin who redefines "disability" untethered from any methodology or standard and includes unverifiable subjective standards that cannot be tested in a data set. Dr. Lin's opinion was tested using four different measures of "disability" using a nationally recognized data set. When scrutinized using well regarded methodology and scientific methods, Dr. Lin's opinions contradict the data and even his own prior research. Carr Decl., Ex. B, pp. 25-27.

Since the legislature mandated hearing aid coverage in Plaintiff O.L.'s plan beginning January 1, 2024, her breach of contract claim seeks monetary damages in the form of reimbursement. Marisseau Decl., Ex. I (82:8-13). Plaintiff Schmitt has never submitted a claim to Kaiser for hearing aid coverage, even when she had coverage under a rider. Kaiser has never denied a hearing aid claim for Schmitt. There is no breach of contract.

Because the admissible facts are undisputed, and Kaiser did not intentionally discriminate against the Plaintiffs based on hearing disability, the Court should enter summary judgment.

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II. UNDISPUTED FACTS

A. Kaiser's Coverage for Hearing Disability

Kaiser has covered cochlear implants in all its health plans as early as 1995, to treat patients with "severe to profound hearing loss." Declaration of Medora Marisseau ("Marisseau Decl."), Ex. A (70:1-25; 71:1-12). Kaiser began covering bone anchored hearing aids (BAHAs) in all plans as of 2005, for treatment of severe sensorineural hearing loss, as well as middle ear hearing loss. *Id.* Kaiser also has offered coverage of standard hearing aids for all large group plans for many years, and includes hearing aid coverage in its Medicare Advantage plans. Hamp Decl. ¶14.

Kaiser's base benefit plan is designed to be the most affordable plan offering comprehensive medical benefits. It includes a hearing benefit that covers cochlear implants, BAHAs, and "hearing examinations relating to hearing loss." It excludes routine hearing exams and hearing aids and services to fit them. Hamp Decl., p.2 n.1; Dkt. 133-1, p. 8.

Hearing aids and eyeglasses have long been considered ancillary to comprehensive ("major medical") benefits and this concept was codified by Congress into Medicare in 1966. Scott Decl. ¶25; 42 U.S.C. 1395y(a)(7) (excluding eyeglasses and hearing aids or examinations therefor).[1] Medicare, the largest provider of healthcare in the country, informed Kaiser's decision to limit coverage of hearing aids and optical hardware in the base benefit plan. Dkt. 133-15, pp. 3-4

In 2015, OIC expressly confirmed that it was not discriminatory to exclude hearing aids in individual and small group plans. Hamp Decl., Ex. C at 21. Thereafter, Kaiser evaluated whether to include coverage for hearing aids and adult optical hardware as a plan enhancement. Hamp Decl. ¶14; Kirangi Decl., ¶4. Kaiser followed the same process it applies to other benefit design considerations. To address the adverse selection and increased premium costs, Kaiser considered a combined optical/hearing aid benefit with dollar limits, but the benefits system configuration would not support a combined benefit. A rider for use by just some of these plans could not be

[1] Despite amendments to other portions of § 1395y(a)(7), Congress has retained the exclusion of hearing aids and eyeglasses. *Zells v. U.S. Sec. of HHS*, 2009 U.S. Lexis 139475 (C.D. Cal 2009), aff'd, 414 Fed. Appx. 917 (9th Cir. 2011).

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offered since individual and small group plans cannot be individualized. See WAC 284-71-095. Given these challenges, and the lack of demand, Kaiser did not proceed. Kirangi Decl. ¶8.

B. Background of Benefit Design Discrimination Applicable to Essential Health Benefits

To balance affordability and comprehensive coverage, the Affordable Care Act ("ACA"), requires ten categories of Essential Health Benefits ("EHB") in all (non-grandfathered) individual and small group plans. The ACA also established healthcare exchanges, which are the sole marketplace where individual and small group health insurance policies that qualify for federal subsidies can be sold to the public in each state. Washington chose to operate its exchange (rather than having the federal government do so), which is called the Washington Health Benefit Exchange or WAHBE. RCW 43.71.005 *et seq.* However, states operating their own exchanges must follow federal EHB regulations.[2] These regulations prohibit discrimination in benefit design: a "State's EHB-benchmark plan must: … Not include discriminatory benefit designs that contravene the non-discrimination standards defined in 45 C.F.R. § 156.125."[3] States must also certify that their benchmark plan is non-discriminatory. 45 C.F.R. 156.111. States have the primary enforcement obligations for enforcing the EHB non-discrimination provision. 42 U.S.C. 300gg-22.

Following the ACA, Washington legislature enacted RCW 48.43.715 which directs OIC by rule to select Washington's benchmark plan and to supplement that plan as necessary to provide all EHBs mandated by the ACA.

In 2013, OIC issued regulations defining EHBs. Hearing aids were expressly not required to be covered. WAC 284-43-5640(1)(b)(vii). This regulation was effective until December 31, 2017.

[2] 45 C.F.R. 156.100 *et seq.*

[3] "An issuer does not provide EHB if its benefit design, … discriminates based on an individual's … present or predicted disability…." 45 C.F.R. 156.125 (enacted pursuant to section 1302 of the ACA (42 U.S.C. 18022(b)(4)). OIC can supplement the benchmark plan by rule to meet this standard. See WAC 284-43-5640(7)(d).

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As part of the 2015 rulemaking process to update the EHB regulations, public comments objected to OIC's proposed rule to continue the hearing aid exclusion, contending it was benefit design discrimination:

> Comment: Several commenters said that the EHBs exclude coverage of hearing care and aids, and said that excluding these services and devices constitutes disability discrimination. They cited ACA § 1302, which says that EHB can't be designed "in ways that discriminate against individuals because of their . . . disability." . . . As such, these commenters said, the ACA's nondiscrimination laws prohibits discrimination on the basis of hearing impairment when the impairment constitutes a disability, and would thereby prevent plan benefit designs that could lead to such discrimination, so plans should cover hearing care and devices in the ambulatory service category to the extent that such devices are medically necessary.
>
> [OIC's] Response: The EHB rule does require health plans to cover cochlear hearing aids, and adding non-cochlear hearing aids would still be considered a state mandate despite the applicability of the ADA to the ACA . . . . Very few states require health plans to provide this benefit as part of their EHB benefit package, and HHS does not require states to include this coverage as part of the Essential Health Benefits. As a result, the OIC did not add non-cochlear hearing aids as an Essential Health Benefit.

Hamp Decl. Ex. C, at p. 21

The subsequent regulations reaffirmed that plans are "not required to [cover] Hearing aids other than cochlear implants." WAC 284-43-5642(7)(c)(iv).

C. RCW 48.43.0128 was Enacted to Preserve Select Federal Consumer Protection Rights Under Attack by the Trump Administration

The Obama administration issued its final ACA 1557 regulations, effective January 1, 2017. Shortly after the election, enforcement of the portions of the regulations regarding nondiscrimination for gender identity and pregnancy termination was blocked. *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex 2016). In May 2019, the Trump administration issued proposed regulations eliminating those provisions. 84 Fed. Reg. 27846. A federal lawsuit, eventually heard in the Supreme Court, was filed attacking the constitutionality of the entire ACA. *Texas v. United States*, N.D. Tex. Case No. 4:18-cv-00167-0; 352 F. Supp. 3d 665

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(N.D. Tex. 2018); 945 F.3d 355 (5th Cir. 2019); *California v. Texas*, __ U.S. __, 141 S. Ct. 2104, 210 L. Ed. 2d 230 (2021).

In response, the Washington legislature passed RCW 48.43.0128, part of a larger legislative package of health care reform, entitled: "an act relating to making state law consistent with selected federal consumer protections in the patient protection and affordable care act." RCW 48.43.0128, was initially applicable only to the "individual or small group market." (*see* Dkt. # 133-9 at p. 1; 21). It was subsequently amended to apply to large group plans effective June 11, 2020. S.H.B. 2338 (Chapter 228, Laws of 2020). This statute was applicable to Plaintiff O.L.'s plan in June 2020 and to Plaintiff Schmitt's plan in April 2019.

The statute provides in relevant part:

> A health carrier offering a nongrandfathered health plan . . . may not:
>
> (a) In its benefit design or implementation of its benefit design, discriminate against individuals because of their age, expected length of life, present or predicted disability, degree of medical dependency, quality of life, or other health conditions.

RCW 48.43.0128(1).

The legislature's "brief summary of the bill" explains that it "codifies certain provisions of the federal Patient Protection and Affordable Care Act." Marisseau Decl., Ex. B. The legislature's summary of public testimony prior to passage stated: "When the ACA passed in 2020, it took away fear that people would be denied health care coverage or dropped from coverage. This bill seeks to ensure people of Washington will be protected, regardless of what happens at the federal level[.]" *Id.*

D. Following Passage of RCW 48.43.0128, OIC Reviewed and Approved Kaiser's Exclusion as Non-Discriminatory

OIC specifically reviewed Kaiser's base benefit plans (like Plaintiffs') for compliance with RCW 48.43.0128 and approved them as non-discriminatory. Hamp Decl., ¶6 and Ex. A, p. 002241; WAC 284-43-5930(2). Approval of Kaiser's base benefit plan was not merely an oversight or non-enforcement on behalf of OIC, as OIC has issued disapproval letters for other

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discriminatory benefit designs under RCW 48.43.0128. Marisseau Decl., Ex. C. Kaiser also received approval and certification from WAHBE for Exchange plans (such as Plaintiff Schmitt's), in compliance with state and federal nondiscrimination laws. Hamp Decl., Exs. D & E.

E. Kaiser Undertook Its Own Review for Nondiscriminatory Benefit Design.

Kaiser evaluated its plans for compliance with benefit design nondiscrimination. Changes were made regarding age-limits and language for gender health was expanded. No compliance violation was found regarding the Exclusion. Hamp Decl. and Ex. F.

F. Washington's Legislative Efforts to Pass a Hearing Aid Coverage Mandate

In 2016, 2020 (HB 1047), and 2021 (resubmitted HB 1047), bills were introduced to mandate health insurance coverage for hearing aids. All efforts failed.

It was not until April 2023 that the legislature passed HB 1222. That law adds a new section to RCW 48.43 and mandates coverage for hearing aids only in non-grandfathered large group plans (such as Plaintiff O.L.'s) beginning January 1, 2024. The legislature simultaneously passed SB 5338, directing OIC, as provided under HB 1222, "to determine whether to request approval from" CMS to modify Washington's EHB benchmark plan to include hearing aids for individual and small group plans.

G. There is Little Correlation Between Hearing Aid Usage and Disabling Hearing Loss

Dr. Scott Carr, Kaiser's expert, opines there is only a low or weak correlation between using a hearing aid and hearing disability. The vast majority of hearing-impaired people have only mild hearing loss (80+%), many of whom use hearing aids. Simultaneously, the vast majority of hearing disabled individuals (approaching 79%) do not use hearing aids, even when financial considerations are eliminated. Carr Decl., Ex. B; *see also* Declaration of Dr. Benjaman Gilham ("Gilham Decl."), ¶10. The overlap between two groups (hearing aid users and hearing disabled) is weak. *See also E.S. v. Regence, supra* at p.3. Audiologist, Dr. Susan Porter, testified that as hearing loss gets more severe, cochlear implants and bone anchored hearing aids, not air conduction hearing aids, are used. Marisseau Decl., Ex. E (33:1-13, 18-25; 34: 1-5). The

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percentage of patients in a practice with hearing loss that can be helped by bone anchored hearing aids can vary, including up to 20%. Gilham Decl. ¶7.

H. Hearing Aids are Not Durable Medical Equipment and Would Not be Covered as DME if the Exclusion Were Eliminated.

Durable Medical Equipment ("DME") is defined in Plaintiffs Schmitt and O.L.'s plans as: "**Devices, Equipment and Supplies (for home use)"** and one of the required elements for DME coverage is that it be "used in the Member's home." Dkt. 133-1, p. 7. Hearing aids and optical hardware (eyeglasses) are wearable personal items and not considered durable medical equipment by Kaiser or in the health insurance industry generally. Kaiser issues hearing aid riders to cover hearing aids because there is not a benefit to which coverage otherwise would apply if the Exclusion were removed. Hamp Decl. ¶16.

III. MOTION TO STRIKE INADMISSIBLE TESTIMONY OF PLAINTIFFS' EXPERTS

Fed. R. Evid. 702 requires qualified expert testimony to be based on sufficient facts or data, the product of reliable principles and methods, and reliably applied to be helpful to the jury.

The opinions of Dr. Lin (who is not an audiologist) that virtually everyone who uses hearing aids would be considered to have a hearing disability "from a medical standpoint"[4] should be stricken. Dr. Lin does not cite to any publication that adopts his definition of "hearing disability" and his definition is not recognized by audiologists and is directly at odds with the standards for "disabling hearing loss" as defined by the World Health Organization ("WHO") and other researchers, as those with at least "moderate" hearing loss. Carr Decl., pp. 17-18; Gilham Decl., ¶¶4-5 Dr. Lin's personal "medical" definition of disability is neither relevant nor helpful. Instead it creates confusion.[5]

Dr. Lin's derivative opinion – that everyone who uses hearing aids is disabled (under his definition) - must be stricken because it is not the product of reliable data or sound scientific

[4] Dkt. 131 at 5.

[5] Dr. Lin's definition is at odds with Plaintiffs' proposed legal definition and with the applicable legal definition of disability. (*see infra*)

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methodology. The District Court must perform a "gatekeeping role" and may apply four non-exclusive factors to determine whether the methodology used to generate an expert opinion is based on junk science:

> "(1) whether the method has gained general acceptance in the relevant scientific community, (2) whether the method has been peer-reviewed, (3) whether the method 'can be (and has been) tested'; and (4) whether there is a "known or potential rate of error"
>
> the expert 'must explain precisely how [he] went about reaching [his] conclusions and point to some objective source … to show that [he has] followed the scientific method, as it is practice by (at least) a recognized minority of scientists in his field'"

Cabrera v. Cordis Corp., 134 F.3d 1418, 1420 (9th Cir. 1998) (citing *Lust by & Through Lust v. Merrell Dow Pharm.*, 89 F.3d 594, 597 (9th Cir. 1996) (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311 (9th Cir. 1995)).

Dr. Lin identifies no data or methodology to support his conclusion even under his own definition. He uses the term "hearing disability" to mean any measurable hearing loss combined with any self-reported "functional restrictions." Carr Decl., Ex. B, P. 16. "In effect, Dr. Lin leaves no room for people to have mild hearing loss that is observable but not disabling – a position that is contradicted by the definitions for "hearing disability" used in published statistical analyses of hearing loss … And, he provides no basis to match his definitions of "functional restrictions" to available data compilations of self-reported hearing limitations." Carr Decl., p. 16.. Drawing such a conclusion with no facts or data violates Rule 702 (b) and is not based any "generally accepted" practice in a scientific community. Dr. Lin's opinion is not capable of being peer reviewed (because it cannot be verified) and has an unknown rate of error. It should be stricken.

The opinions of Plaintiff's legal expert, Valerie Blake, should also be stricken. Blake, a law professor with no experience in the health insurance industry, gives opinions about "commercial health insurance" which she tries, with no factual basis, to impute to Kaiser. For this reason alone, her opinions regarding the commercial insurance industry should be stricken. *See* Fed. R. Evid. 702(a) (requiring an expert to possess "scientific, technical, or other specialized knowledge"). Kaiser's expert, Cheryl Scott, the former longtime CEO of Group Health

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Cooperative and expert in health benefit plans and financing, explains that Blake confuses the history of private for-profit indemnity insurance with the non-profit community based managed care organizations such as Kaiser. Scott Decl., ¶ 8. As a non-profit managed care organization, Kaiser had a completely different history, principles and practices, than the indemnity insurers described by Blake. In fact, Kaiser served the "high risk individuals" that Blake says were discriminated against by for-profit indemnity insurers. Scott Decl., ¶19. Blake also inappropriately imputes practices like experience rating and blanket preexisting condition exclusions to Kaiser, despite the fact Kaiser did not engage in those practices. Scott Decl., ¶¶ 14-25. Blake does this solely on the basis that Kaiser provided health benefits to unions – claiming this shows that Kaiser adopted the discriminatory motives of employers. This is a non-sequitur. These opinions should be stricken.

Blake's remaining legal opinions are inadmissible, including her opinions on the legislative history and purpose of various federal statutes, and her legal conclusions about discrimination. (Dkt. 130 at ¶¶ 9-18; 20; 21; 22 – 44). These opinions impermissibly state her opinions on the law and how she believes the law should be applied to the facts and must be stricken. *Elsayed Mukhtar v. Cal. State Univ., Hayward*, 299 F.3d 1053, 1066 n. 10 (9th Cir. 2002)"); *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004); *McDevitt v. Guenther*, 522 F. Supp. 2d 1272, 1292-93 (D. Haw. 2007).

IV. ARGUMENT

The Exclusion does not "discriminate" against the hearing "disabled," because the hearing disabled are not treated differently than the non-disabled. According to their argument, Plaintiffs' comparators are other *disabled* individuals, not the non-disabled. Plaintiffs provide no argument or proof that the Exclusion favors the non-disabled over the disabled. Plaintiffs' efforts to show hearing aids as a "proxy" for disability also fail because they are based on an erroneous legal argument and because there is no admissible evidence supporting it. The undisputed evidence is to the contrary—there is little correlation between the two. Plaintiffs also have no evidence of

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discriminatory animus, which they must show. Kaiser is entitled to assert legitimate non-discriminatory reasons for the Exclusion under the *McDonnell Douglas* burden shifting analysis. Finally, since Schmitt never submitted a claim for hearing aids, she has no breach of contract claim as a matter of law.

A. OIC's Determination that the Exclusion is Not a Violation of RCW 48.43.0128 is Entitled to Significant Deference.

The Court should defer to OIC's determination that the Exclusion did not violate RCW 48.43.0128 under the prudential primary jurisdiction doctrine. *Far East Conference v. United States*, 342 U.S. 570, 574-75, 72 S. Ct. 492, 96 L. Ed. 576 (1952); *Hargrave v. Freight Distrib. Serv., Inc.*, 53 F.3d. 1019, 1021-22 (9th Cir. 1995). This assures "uniformity and consistency in the regulation of a business entrusted to a particular agency," especially involving issues of first impression by an agency charged by a statute with broad regulatory authority over the issue at hand, and requiring expertise and uniformity of administration. *Far East Conference*, 342 U.S. at 574-75; *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (2008); *Dahl v. HEM Pharmaceuticals Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1987). Protection of the integrity of the regulatory scheme is another important consideration. *Clark*, *supra* at 1114. Where the primary jurisdiction factors apply and the administrative agency has already decided the issue, the Court should defer to the agency's decision. *Smith v. Sprint Communs. Co., L.P.*, No. C 96-2067 FMS, 1996 U.S. Dist. LEXIS 23272, at *12-14 (N.D. Cal. Sep. 13, 1996) (deferring to the Cal PUC's determination regarding the lawfulness of the defendant's actions).

Here, the scope of RCW 48.43.0128 is an issue of first impression. The legislature gave OIC broad authority to determine whether the Exclusion is discriminatory under RCW 48.43.0128, and OIC determined the Exclusion complies.

RCW 48.18.100 states: "No insurance policy form . . . may be issued, delivered, or used unless it has been filed with and *approved by the commissioner*." (emphasis added). RCW 48.43.0128(8) further grants OIC the authority to determine whether health plans benefit design is

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discriminatory. The statute expressly confers power to the Insurance Commissioner to adopt any rules needed to implement the non-discrimination portions of the statute:

> Unless preempted by federal law, the commissioner shall adopt any rules necessary to implement subsections (1) and (2) of this section, consistent with federal rules and guidance in effect on January 1, 2017, implementing the patient protection and affordable care act.

RCW 48.43.0128(8).

Enforcement of the Insurance Reform Act is expressly left to OIC, which can issue fines or suspend or revoke an insurer's certificate of authority. *See* RCW 48.43.0122(2); *see also* RCW 48.43.047(3). And, for individual and small groups to be sold on the Exchange (like Plaintiff Schmitt's), the legislature expressly provided the WAHBE board "shall" certify a plan as a qualified health plan to be offered through the exchange if the plan, among other factors, the plan "is determined by the (a) Insurance commissioner to meet the requirements of Title 48 RCW and rules adopted by the commissioner pursuant to chapter 34.05 RCW to implement the requirements of Title 48 RCW." RCW 48.71.065.

Regulations promulgated under RCW 48.43.0128 evidence OIC's authority to determine whether health plans comply with the nondiscrimination statute. *See*, *e.g.*, WAC 284-43-5930(2): "The commissioner will determine whether an issuer's actions to comply with this section are consistent with current state law [and] the legislative intent underlying RCW 48.43.0128." (emphasis added). Consumer complaints "related to the issuer's compliance with RCW 48.43.0128" are to be directed to "the office of the insurance commissioner as the designated entity to file a complaint regarding compliance with RCW 48.43.0128." WAC 284-43-5980(1)(g) & -5980(3).

OIC has specifically examined the Exclusion and concluded it was not in violation of RCW 48.43.0128. The Court should defer to OIC's determination.

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B. The 2023 Hearing Aid Mandate Demonstrates RCW 48.43.0128 did Not Require Hearing Aid Coverage Under the Guise of Discrimination.

HB 1222, passed in April 2023, adds a new section to Washington's "Insurance Reform" statute (RCW 48.43) and mandates coverage of hearing aids in nongrandfathered large group insured health plans beginning January 1, 2024. This mandate was passed two years after large group plans became subject to RCW 48.43.0128 (benefit design non-discrimination). HB 1222 makes no mention of RCW 48.43.0128. Why would the legislature require large group plans (and not all plans) to cover hearing aids, if exclusion of hearing aids violated RCW 48.43.0128? Certainly, the legislature knew that regulations expressly sanctioned the exclusion of hearing aids from plans sold on the Exchange, yet the legislature did not include those (individual and small group) plans in HB 1222. Plaintiffs' contention – that the exclusion of hearing aids is void under RCW 48.43.0128—would render the legislature's passage of HB 1222 meaningless. *See Spokane Cty. Health Dist. v. Brockett*, 120 Wn.2d 140, 839 P.2d 324 (1992) ("the Legislature is presumed not to pass meaningless legislation and in enacting an amending statute, a presumption exists that a change was intended"). Because the legislature is presumed to know the law, the only reasonable conclusion is that Plaintiffs' contention is wrong.

SB 5338, also passed in April 2023, is applicable to nongrandfathered individual and small group plans including those sold on the Exchange. It is directed at "modify[ing]" the state's EHB benchmark plan through the 45 C.F.R. 156.111 approval process, and refers to the new mandate (HB 1222) as the basis for the modification. It does not mention RCW 48.43.0128. There would be no need to modify the state's EHB benchmark plan if the legislature believed the exclusion of hearing aids was discriminatory since a discriminatory benefit design "does not provide EHB."[6] OIC Commissioner Kreidler addressed this issue with respect to the failed 2021 hearing aid bill (HB 1047). Writing to the sponsoring legislators, he stated:

> The ACA requires that states defray the cost of mandated benefits in individual health plans that are in addition to the EHB. As a result of my office's discussions with Representatives Wicks and Orwall, my office met with staff from the federal

[6] 45 C.F.R. 156.125

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> Center for Medicare and Medicaid Services (CMS). Staff from CMS confirmed our analysis that providing hearing aid coverage would create a mandated benefit and require the state to defray the costs of coverage for these benefits in the individual market."

Marisseau Decl., Ex. F. SB 5338, by modifying the EHB benchmark plan though the CMS approval process to include the new mandate in HB 1222, avoids the defrayal cost of the mandate to the state. None of this is necessary if the exclusion of hearing aids from the EHB benchmark plan was discrimination.

C. The Exclusion is Not a Violation of RCW 48.43.018.

1. Washington's Well-Established Definition of "Discrimination" Applies to RCW 48.43.0128.

Decades of Washington (and federal) caselaw describe intentional "discrimination" to mean treating members of a protected group differently than those who are not in the protected group: "'Disparate treatment'" … is the most easily understood type of discrimination. The [defendant] simply treats some people less favorably than others because of their [protected trait]." *Blackburn v. Dept of Soc & Health Servs*., 186 Wn.2d 250, 258, 375 P.3d 1076 (2016); *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 637, 911 P.2d 1319 (1996) (plaintiffs did not establish "that they had not been treated in a fashion comparable to nondisabled persons"); *Kirby v. City of Tacoma*, 124 Wn. App. 454, 467, 98 P.3d 827 (2004) (intentional discrimination means the disabled employee "was treated differently than someone not in the protected class").

RCW 48.43.0128 states, in part, that a non-grandfathered health plan may not: "In its benefit design or implementation of its benefit design, *discriminate* against individuals *because of* their present or predicted *disability*[.]" (emphasis added).

This statute made "benefit design" subject to non-discrimination under state law, just as the federal regulation promulgated under the Affordable Care Act relating to Essential Health Benefits ("EHB") included "benefit design" as a prohibited ground for discrimination. See 45 C.F.R. § 156.125 ("[a]n issuer does not provide EHB if its benefit design, or the implementation of its benefit design, discriminates based on . . . disability") Neither RCW 48.43.0128 nor the

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federal regulation define "discrimination," or provide any basis to conclude it means anything other than what it has always meant, that is treating the disabled less favorably than the non-disabled.

Fell, supra, illustrates this point. In a case of first impression, the Washington Supreme Court examined a claim for intentional disability discrimination in the context of public accommodations. Plaintiffs argued that although there was no fixed place within the Spokane transit system to which they were denied access, the exclusion of paratransit services was disability discrimination under the WLAD.[7] *Id.* at 638. The Court rejected the argument and applied the "comparability test;" whether the challenged policy or practice results in "differential treatment" between the disabled and the non-disabled. The Court held the plaintiffs must prove "they were discriminated against by receiving treatment that was not comparable to the level of designated services provided to individuals without disabilities," and that "disability was a substantial factor causing the discrimination." *Id.* 637. In reaching this result, the Court stated:

> To agree with the plaintiffs' approach would be to effectively legislate an unrestricted right to services. The certain result would be endless litigation over the alleged service entitlements, with the decision as to how an agency must allocate its resources left to the judiciary, the branch of government by design the furthest removed from the will of the people.

Fell, 128 Wn.2d at 636-37, 911 P.2d at 1328.

Federal law is the same. For example, the Rehabilitation Act (which governs Section 1557's legal standards for a discriminatory benefit design due to disability) requires a plaintiff to show that non-disabled individuals were treated more favorably. *E.g., Atayde v. NAPA State Hosp.*, 255 F. Supp. 3d 978, 1000 (E.D. Cal. 2017); *see also Schmitt v. Kaiser Found. Health Plan of Washington*, 965 F.3d 945, 958 (9th Cir. 2020) (treating individuals differently on the basis of seemingly neutral criteria that are so closely associated with the disfavored group is discrimination by proxy).

[7] The WLAD also does not define "discrimination."

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2. Plaintiffs' Discrimination Theory is Based on Comparing Benefits Provided to Different Disabled Groups--Not Between the Disabled and the Non-Disabled.

Tellingly, Plaintiffs' discrimination claim is *not* based on disparate treatment between the disabled and the non-disabled with respect to the Exclusion, since everyone covered under the base benefit plan is subject to the Exclusion. *See Fell, supra.* Instead, they assert the "disparate treatment" is between the disabled for whom DME (such as hospital beds, oxygen equipment, and "shoe inserts for severe diabetic foot disease") is covered and the hearing disabled who want hearing aids. Dkt. 21:1-8; Ex. A, pp. 17. This is not disability discrimination.

Plan design discrimination "because of disability" cannot be shown by comparing different benefits provided to different disabled groups. Plaintiffs concede as much: "A defendant discriminate[s] against the plaintiff by providing treatment no comparable to the level of services provided *to individuals without disabilities*." Dkt. 129, p. 20 (emphasis added), *citing Wash. State Commc'n Access Project v. Regal Cinemas, Inc.*, 173 Wash. App 174, 187, 293 P.3d 413 (2013). Yet, in the very next sentence, Plaintiffs reveal their actual comparator group is *not* "individuals without disabilities" – it is people who need Durable Medical Equipment. Plaintiffs present no facts, nor do they even argue, that this group is not disabled. Nor could they, since one of the requirements for coverage of Durable Medical Equipment is that it be "useful *only* in the presence of an illness or injury." Under Plaintiffs' own definition of disability ("any sensory, metal or physical impairment that is medically cognizable or diagnosable"), everyone who meets the coverage criteria for Durable Medical Equipment is disabled. This is fatal to their entire argument.

Plaintiffs' argument fails for the additional reason that hearing aids are not Durable Medical Equipment. "Hearing aids and optical hardware (eyeglasses) are not considered durable medical equipment by Kaiser or in the health insurance industry generally. The reason why Kaiser uses hearing aid (and adult vision coverage) riders to cover hearing aids is because there is not a benefit to which coverage otherwise would apply if the Exclusion were removed." Hamp Decl. ¶16. The DME benefit is described in the Plan as: "Devices, Equipment and Supplies (**for home use**)" and one of the required elements for DME coverage is that it be "used in the Member's

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home." Plf. Ex. A, p. 17 (emphasis added). Medicare's definition likewise requires DME to be prescribed by a provider for "use in your home." https://www.medicare.gov/coverage/durable-medical-equipment-dme-coverage. Hearing aids are not DME, the Exclusion does not appear anywhere under the DME benefit section, and Kaiser does not consider hearing aids as DME. In addition to Plaintiffs' DME argument being legally irrelevant to their disability discrimination claim, it is also undisputably factually wrong.

3. "Disability" Under the Benefit Design Nondiscrimination Statute is Not Governed by RCW 49.60.040.

The non-discrimination in benefit design statute, RCW 48.43.0128(1), was part of larger health insurance reform legislation specifically adopted to make state law "*consistent* with selected federal consumer protections in the affordable care act." Plaintiffs' Ex. I, p.1. That legislation set out a detailed scheme for OIC's implementation of the statute.

Subsection 1 of RCW 48.43.0128 (nondiscrimination in benefit design] contains no definition of "disability" and no reference to the WLAD. Subsection 8 of RCW 48.43.0128 instructs OIC to adopt "any rules necessary to implement subsections (1) and (2) of this section, *consistent with federal rules and guidance in effect on January 1, 2017*, implementing the patient protection and affordable care act." (emphasis added). In contrast, subsection 3 of the statute (relating to gender affirming treatment) expressly references definitions under the WLAD: "A health carrier may not deny or limit coverage for gender affirming treatment when that treatment is prescribed to an individual because of, related to, or consistent with a person's gender expression or identity, **as defined in RCW 49.60.040**…" (emphasis added).

These provisions make it clear that "disability" discrimination in benefit design is not defined by WLAD, but by federal law. Under the cannon of statutory construction *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of the other), by calling out the application of the WLAD definition only to "gender expression or identity," the legislature unambiguously did not intend the WLAD to apply to "disability." *See Wright v. Lyft, Inc.*, 189 Wn.2d 718, 727, 406 P.3d 1149 (2017). The legislature also directed OIC to make rules for the

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non-discrimination in benefit design "consistent with federal rules and guidance in effect on January 1, 2017," which was also consistent with the legislature's expressed intent to make state law "consistent with selected federal consumer protections in the affordable care act."

In addition, in 2020, the legislature amended another Insurance Cods statute, RCW 48.30.300, ("unfair discrimination, generally). That statute states:

> A person or entity engaged in the business of insurance in this state may not refuse to issue any contract of insurance or cancel or decline to renew such contract **because of the sex, marital status, or sexual orientation as defined in RCW 49.60.040, or the presence of any disability of the insured or prospective insured.** The amount of benefits payable, or any term, rate, condition, or type of coverage may not be restricted, modified, excluded, increased, or reduced on the basis of the sex, marital status, or sexual orientation, or be restricted, modified, excluded, or reduced on the basis of the presence of any disability of the insured or prospective insured.

(emphasis added). The WLAD definition is again referenced only with respect to "sexual orientation" and not to disability. Applying the grammatical "rule of the last antecedent, which instructs that absent other indicia of meaning, "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows[,]" it is clear that the legislature, again, did not intend the WLAD definition of "disability" to apply to the benefit design statute. *BOKF, NA v. Estes*, 923 F.3d 558, 563 (9th Cir. 2019), *citing Barnhart v. Thomas*, 540 U.S. 20, 26, 124 S. Ct. 376, 157 L. Ed. 2d 333 (2003).

Plaintiffs cite no authority or legislative history to support their argument that the legislature intended RCW 48.43.0128 to vastly expand the scope of federal ACA consumer protections, much less incorporate the WLAD's "disability" definition. Plaintiffs' sole argument is that the WLAD definition should apply because the WLAD contains a prohibition on discrimination relating to "insurance transactions," *e.g.*, RCW 49.60.178. One major problem with their argument is that RCW 49.60.178 expressly recognizes that RCW 48.43.0128 is more limited than the WLAD: "a practice which is not unlawful under RCW 48.30.300, 48.44.220, 48.46.370, or 48.43.0128 does not constitute an unfair practice for the purposes of this section." This provision would be unnecessary if RCW 48.43.0128 incorporated "disability" from the WLAD.

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The fallacy of Plaintiffs' argument is easily demonstrated. Federal law defines disability as impairment that "substantially limits one or more major life activities" including hearing. See 42 U.S.C. 12102(1)-(2). Unlike federal law, the WLAD contains an incredibly broad definition of disability—anyone with a "medically cognizable or diagnosable condition," whether or not it limits any activity, and regardless of whether it is temporary, or "trivial"--is disabled. RCW 49.60.040(7). Every person needing any healthcare would necessarily be "disabled" under this definition, so any benefit limitation on any medicine, drug, treatment, service or device would be a perfect proxy for disability. But, since there would be virtually no *non-disabled* individuals who need services under a health plan, there could never be discrimination (disparate treatment between the disabled and the non-disabled). When viewed with the proper understanding of "discrimination" (favoring the non-disabled over the disabled), Plaintiffs' argument—that essentially everyone covered under a health plan is disabled using the WLAD definition—provides *less* protection against discrimination than under federal law. Plaintiffs' argument is directly contrary to the intent of RCW 48.43.0128.

If Plaintiffs' argument were reasonable, then the Court must give "substantial weight and deference to an agency's interpretation of the statutes and regulations it administers" where there is ambiguity. *Pitts v. State Dep't of Soc. & Health Servs.*, 129 Wn. App. 513, 523, 119 P.3d 896, 902 (2005); *see also Regence Blueshield v. Ins. Comm'r*, 131 Wn. App. 639, 128 P.3d 640 (Wash. Ct. App. 2006). OIC expressly rejected the assertion that the exclusion of hearing aids was discrimination under the federal regulation upon which RCW 48.43.0128 is modeled. Ex. C to Hamp Dep. OIC's subsequent approval of Plaintiffs' plans following the enactment of RCW 48.43.0128, and express application of the non-discrimination criteria in its review, demonstrate that OIC necessarily concluded the Exclusion was not discriminatory under the statute. OIC's interpretation of RCW 48.43.0128 is entitled to "great weight."

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D. Proxy Discrimination Legal Standards

Because the Exclusion is neither categorical nor facially discriminatory, Plaintiffs seek to prove discriminatory intent based on the theory of proxy discrimination. "In a case of proxy discrimination a defendant discriminates against individuals on the basis of criteria that are almost exclusively indicators of membership in the disfavored group." *Pacific Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1160 n. 23 (9th Cir. 2013). Plaintiffs must show that the Exclusion "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." *Smith v. Walgreen's Boots All., Inc.*, 2022 U.S. Dist. LEXIS 163474, *7 (N.D. Cal. Sept. 9, 2022); *citing Davis v. Guam*, 932 F.3d 822, 837 (9th Cir. 2019) (*quoting Pacific Shores*, 730 F.3d at 1160 n.23); see also *Fuong v. CVS Pharmacy, Inc.*, 2022 U.S. Dist. Lexis 84045 at *14 (D.R.I. 2022) ("a reasonably strong correlation between disability and larger opioid prescriptions" can state a proxy discrimination claim, but "the closeness of the fit is a fact-sensitive determination that will require reliable expert testimony")(emphasis added). A policy is not facially discriminatory under proxy theory if the "trigger" is not disability. *Walgreen's Boots*, 2022 U.S. Dist. LEXIS at *6. Establishing a proxy discrimination claim based on statistics depends on establishing that the alleged proxy is "unexplainable on grounds other than" discriminatory motive. *Pacific Shores*, 730 F.3d at 1159 (9th Cir. 2013), *quoting Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 266-68, 7 S.Ct. 555, 50 L. Ed. 2d 450 (1977).

Washington caselaw on proxy discrimination is sparse. There are only a handful of cases that mention that some trait may be a proxy for a protected class, mostly in the context of jury selection in criminal cases, and child placement decisions by the state. Only two discovered cases discuss proxy discrimination in the context of a practice or policy applicable to this case. In *Kustura v. Dep't of Labor & Indus.*, 142 Wn. App. 655, 686-69, 175 P.3d 1117 (2008), the court rejected a claim that the Department of Labor & Industries used language as a proxy for national origin by providing interpreter services for Spanish claimants but not other languages. And in

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Sunderland Servs. v. Pasco, 107 Wn. App. 109, 26 P.3d 955 (2001), the court held that a city zoning ordinance defining a "family" constituted facial discrimination against the "handicapped." The court did not mention "proxy" but cited the proxy discrimination case of *Children's Alliance v. City of Bellevue*, 950 F. Supp. 1491 (W.D. Wash. 1997). No discovered Washington case has defined the contours of discrimination by proxy, but to the extent Washington courts would find that proxy discrimination can apply to claims under RCW 48.43.0128, it is reasonable to assume that they would adopt the federal courts' analysis that the "fit" between a policy's neutral criteria must be "sufficiently close" to a protected class, as articulated in *Pacific Shores* and the Ninth Circuit's *Schmitt* opinion.

Schmitt and O.L. contend the alleged violation of RCW 48.43.0128 is a breach of contract for which they seek damages[8]; therefore in addition to discrimination by proxy: "Schmitt and Mohundro 'must prove a *mens rea* of 'intentional discrimination' . . . by showing 'deliberate indifference' [or] 'discriminatory animus.'" *Schmitt*, 965 F.3d at 954 n.6; *quoting Mark H. v. Lemahieu*, 513 F.3d 922, 938 (9th Cir. 2008).

E. Hearing Aids are Not a Proxy for Hearing Disability.

Plaintiffs' proxy argument misapplies the law and is based on inadmissible evidence. Plaintiffs do not even argue that the Exclusion is a proxy for hearing *disability*—rather they assert "hearing aids are a proxy for *hearing impairment*." Because "disability" under the statute is not defined by the WLAD, their entire proxy argument is legally wrong. *See supra*, pp. 19-20. Dr. Lin's "medical" definition of hearing disability is inadmissible and unsupported. *See supra*, pp. 9-10. Dr. Carr provided detailed data analysis using four different thresholds for "disability" – all of which are well supported and one of which includes the threshold used by Plaintiffs' own expert. Carr Decl., Exh. B, p. 27. He analyzed data from the NHANES surveys, acknowledged as a reliable source by Dr. Lin. *See* Carr Decl., Ex. B, pp.24-26. Using reliable data, Dr. Carr tested

[8] *See* Plaintiff's Fourth Amended Complaint (Dkt. #65) at ¶ 19, ¶ 25, and p.31. Marisseau Decl., Exh. __(Schmitt Depo and J.L. Depo).

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whether hearing aid usage closely corresponds with hearing disability, using recognized statistical methodology. He found there is a low or weak level of correlation ranging between 0.31 and 0.47 depending on the definition of disability used. This is consistent with the experience of audiologists who fit hearing aids. See Marisseau Decl., Exh. E (Porter deposition); Gilham Decl., ¶10. As a matter of law, a low or weak correlation is not such a close fit that hearing aids are synonymous with hearing disability. This together with Kaiser's coverage of other hearing aids (bone anchored and cochlear implants) demonstrate the Exclusion is not a proxy for disability.

F. Kaiser's Articulated Justifications for the Exclusion Constitute Legitimate Nondiscriminatory Reasons and Do Not Need to be "Medical" or "Clinical."

Because Plaintiffs fail to prove facial discriminatory intent through proxy (or because they must also show discriminatory animus in addition to proxy), they attempt to show discriminatory intent through circumstantial evidence. The only circumstantial evidence Plaintiffs can muster is the inadmissible opinion of their legal expert, Blake, who attempts to impute to Kaiser a motivation to discriminate, based on the alleged history of discrimination by private indemnity insurers. Kaiser has articulated legitimate, nondiscriminatory reasons for the Exclusion, and Plaintiffs have no evidence of pretext.

Plaintiffs clearly foresaw this problem. Accordingly, they argue that only "medically" or "clinically" based reasons can be legitimate nondiscriminatory reasons. The only authority they cite for this faulty proposition is the language of RCW 48.43.0128(2): "Nothing in this section may be construed to prevent a carrier from appropriately utilizing reasonable medical management techniques."

Plaintiffs confuse the well-established burden shifting under *McDonnell Douglas* used to determine discriminatory intent (a *prima facie* element of a discrimination claim), with a statutory exception to discriminatory benefit design.

Black letter Washington law holds that a plaintiff may make a *prima facie* case of disability discrimination by either providing direct evidence of discriminatory intent, or where intent is established through circumstantial evidence or inference, the burden shifting test delineated by

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McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) applies. *Alonso v. Qwest Commc'ns Co.*, 178 Wn. App. 734, 315 P.3d 610 (2013); *Hines v. Todd Pac. Shipyards*, 127 Wn. App. 356, 112 P.3d 522 (2005). Once a plaintiff raises an inference of discriminatory intent, a defendant has the burden of production (but not persuasion) to articulate a "legitimate nondiscriminatory reason" for the challenged policy, and if it does the burden shifts to the plaintiff to show that the defendant's reason is a pretext for discrimination. While there is no caselaw interpreting RCW 48.43.0128, this burden-shifting approach has been consistently applied to adjudicate claims of disability discrimination under Washington law. *See, e.g., Cornwell v. Microsoft Corp.*, 192 Wn.2d 403, 411, 430 P.3d 229, 234 (2018).

In contrast, the statute permits what would otherwise be discriminatory, *if* there is a clinical basis for the design. Commentary to the federal regulation that mirrors RCW 48.43.0128, gives an example of an age limit on infertility treatments. Marisseau Decl., Ex. G. This benefit design is direct evidence of intentional discrimination, so *McDonnell Douglas* burden shifting does not apply. Nevertheless, the commentary states that this benefit design is discriminatory if "there is no clinical basis for the age limitation." 87 Fed. Reg. 27302. OIC has followed this approach with respect to RCW 48.43.0128. Marisseau Decl., Ex. C.

That benefit design is an intentional act is beside the point. It is the *discriminatory* intent in the design of the benefit that is at issue. The Court must consider Kaiser's legitimate non-pretextual reasons for the Exclusion.

Washington courts hold that compliance with federal and state regulations can constitute a legitimate nondiscriminatory reason. *See, e.g., Fell*, 128 Wn.2d at 642, 911 P.2d at 1331. Kaiser's base benefit plan containing the Exclusion was specifically approved and certified as meeting nondiscrimination standards, OIC regulations expressly allowed the Exclusion, and OIC's guidance stated exclusion of hearing aids was not discriminatory. Kaiser expressly relied on the letter of the law and the regulatory guidance in addition to performing its own review, which constitutes a legitimate, nondiscriminatory reason for the Exclusion.

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In addition, adverse selection in the market and keeping premium cost down for members, and administrative challenges with an optical/hearing aid benefit were the bases for Kaiser's decision not to eliminate the Exclusion. Kirangi Decl. *Fell*, 128 Wn.2d at 642, 911 P.2d at 1331. Nor can riders be offered just for some individual and small group plans. Kaiser has articulated legitimate nondiscriminatory reasons for the Exclusion.

G. Schmitt Fails to Show any 'Breach' of Contract and Her Claim Should be Dismissed.

Schmitt's breach of contract claim fails for the additional reason that Schmitt undisputedly has never submitted a claim for hearing aids or related services to Kaiser. Marisseau Decl., Ex. H (51:1-6; 91:22-25). Even when Schmitt's Kaiser plan covered hearing aids in a rider, she failed to submit a claim. Marisseau Decl., Ex. H (35:13-21; 91:22-25). Submission of a claim was a condition precedent to payment under the terms of her plan. *See* Dkt. #18-1 (GHC plan issued to Schmitt's employer), at p. 49. Because no claim was submitted, Kaiser did not breach its contractual obligations by failing to cover her hearing aids. Plaintiffs appear to concede this in the Conclusion of their motion, which seeks summary judgment on the breach of contract claim only for O.L. Summary judgment dismissal is appropriate as to Schmitt's contract claim for this reason as well.

V. CONCLUSION

Kaiser did not violate RCW 48.43.0128 as a matter of law and undisputed fact. Therefore, there is no breach of contract. The Court should not accept Plaintiffs' invitation to re-write Washington law to adopt legal interpretations contrary to the legislative intent, the express statutory language and the interpretation of OIC. Plaintiffs have no admissible evidence of any discriminatory intent, much less the deliberate indifference or *mens rea* they are required to show. Nor can they preclude Kaiser from setting forth the legitimate non-discriminatory reasons for the Exclusion. No reasonable fact finder could conclude discriminatory intent. Summary judgment for Kaiser should be granted.

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Respectfully submitted this 20th day of June, 2023.

I certify that this memorandum contains 8,398 words, in compliance with the Local Civil Rules

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CERTIFICATE OF SERVICE

I, Luci Brock, affirm and state that I am employed by Karr Tuttle Campbell in King County, in the State of Washington. I am over the age of 18 and not a party to this action. My business address is: 701 Fifth Avenue, Suite 3300, Seattle, Washington 98104. On this day, I caused a true and correct copy of the foregoing document to be filed with the Court and served on the parties listed below in the manner indicated.

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct, to the best of my knowledge.

Executed on this 20th day of June, 2023, at Seattle, Washington.

s/Luci Brock
Luci Brock
Legal Assistant

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The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

ANDREA SCHMITT; ELIZABETH MOHUNDRO; and O.L. by and through her parents, J.L. and K.L., each on their own behalf, and on behalf of 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.	CASE NO. 2:17-cv-1611-RSL [PROPOSED] ORDER GRANTING DEFENDANTS' CROSS MOTION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT RE: VIOLATION OF RCW 48.43.0128 AND BREACH OF CONTRACT

Having reviewed and considered the briefs, evidence and arguments submitted in support of, and in opposition to, Defendants' Cross Motion to Plaintiffs' Motion for Partial Summary Judgment Re: Violation of RCW 48.43.0128 and Breach of Contract,

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The Court hereby GRANTS Defendants' Cross Motion to Plaintiffs' Motion for Partial Summary Judgment. Plaintiffs' claim for violation of RCW 48.43.0128 and Breach of Contract (Count II of the Fourth Amended Complaint) is hereby dismissed with prejudice.

IT IS SO ORDERED this ___ day of _____, 2023.

_____
The Honorable Robert S. Lasnik

Presented by:

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Attorneys for the Defendants

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct, to the best of my knowledge.

Executed on this 20th day of June, 2023, at Seattle, Washington.

s/Luci Brock
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