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-1609-RAJ

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THIRD AMENDED COMPLAINT

Noted for Consideration: August 7, 2023

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I. INTRODUCTION

The landmark Affordable Care Act ("ACA") prescribed a paradigm shift in the health insurance industry. So-called "fair discrimination" against people with disabilities was outlawed:

> Prior to the ACA's enactment, an insurer could generally design plans to offer or exclude benefits as it saw fit without violating federal antidiscrimination law—in particular, the Rehabilitation Act—so long as the insurer did not discriminate against disabled people in providing treatment for whatever conditions it chose to cover. The primary issue before us is ***whether the ACA's nondiscrimination mandate imposes any constraints on a health insurer's selection of plan benefits. We hold that it does.***

Schmitt v. Kaiser Found. Health Plan of Wash., 965 F.3d 945, 948 (9th Cir. 2020) (emphasis added). Before the ACA, insurers could design benefits to avoid coverage of people with disabilities and chronic health conditions. *See e.g.,* RCW 48.30.300(2). Now, however, health insurers have "an affirmative obligation not to discriminate in the provision of health care—in particular, to consider the needs of disabled people and not design plan benefits in ways that discriminate against them." *Schmitt,* 965 F.3d at 955.

Washington State is even more protective against discrimination than the ACA. In 2019, the Washington Legislature specifically outlawed discrimination on the basis of "present or predicted disability" and "other health conditions." RCW 48.43.0128. In 2021, it confirmed that such discrimination is a violation of the Washington Law Against Discrimination ("WLAD"). *See* RCW 49.60.178.

Plaintiffs' Third Amended Complaint ("TAC") adequately pleads claims for disability discrimination under the ACA's anti-discrimination law and Washington Law Against Discrimination ("WLAD") as well as the Washington Consumer Protection Act ("CPA"). Plaintiffs have amended their complaint to address the Court's concerns with the earlier pleadings, including changes related to the "proxy" to be considered by the

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Court for Plaintiffs' claims of proxy discrimination. This case should be permitted to move forward now.

Regence argues incorrectly that the TAC is no different from earlier versions because: (1) the "proxy" remains a comparison between hearing loss and hearing disability, Dkt. No. 57, pp. 9-11; and (2) Plaintiffs' allegations and ***evidence*** that Regence covers diagnostic hearing examinations must be ignored in favor of Regence's plan language that excludes "routine hearing examinations," *id.,* pp. 10, 13. Regence is wrong on both counts:

First, in 2020, Regence changed the Exclusion to specifically and categorically eliminate coverage of hearing aids, dropping the language that applied the Exclusion to all "hearing loss." *Id.,* ¶¶11, 42. Regence then separately excluded "routine hearing examinations." *Id.,* ¶42. This language makes clear that the trigger for the application of the Exclusion is (and, as alleged by Plaintiffs, has always been) a claim for coverage for hearing aids. ***The proxy, as defined by Regence, is hearing aid use***. *Id.* Plaintiffs allege that despite the earlier plan language, this was Regence's standard practice all along. *Id.*

Second, Plaintiffs discovered that Regence ***actually covers diagnostic hearing examinations for <u>all</u> insureds during the class period***, despite its representations in its contract that "routine hearing examinations" are excluded. Dkt. No. 54, ¶¶9-10, 43-45. Thus, insureds (with and without hearing disabilities) have their needs for hearing examinations met. *Id.* The Court must accept this allegation as true on a Motion to Dismiss. *See D.T. v. NECA/IBEW Family Med. Care Plan*, 2017 U.S. Dist. LEXIS 195186, at *6 (W.D. Wash. Nov. 28, 2017).

With these two clarifications, the proxy analysis is refined to one between hearing aid users and persons with hearing disabilities. That "fit" is quite close, if not 100%, since all or very nearly all hearing aid users are disabled, as the term "disability" is defined in federal and state anti-discrimination law. Dkt. No. 54, ¶¶73-83.

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1 Regence's remaining arguments are a hodgepodge of objections, some of which
2 were already rejected by the Ninth Circuit and all of which are inapposite. The Court
3 should reject all of Regence's arguments. The TAC remedies the Court's concerns with
4 the earlier complaints. This case should proceed to the merits, just like in *Schmitt*. *See*
5 *Schmitt v. Kaiser Found. Health Plan of Wash.*, 2022 U.S. Dist. LEXIS 138974 (W.D. Wash.
6 Aug. 4, 2022).[1]

7 ## II. ARGUMENT

8 ### A. Legal Standard for State and Federal Discrimination Claims.[2]

9 #### *1. Section 1557 Pleading Standard.*

10 Under Section 1557, Plaintiffs must allege the following: (1) they are individuals
11 with disabilities, in this case disabling hearing loss; (2) they are otherwise qualified to
12 receive the benefit in dispute (coverage for hearing aids); (3) they were/are denied the
13 benefit by reason of their disability; and (4) Regence is a covered entity that receives
14 federal financial assistance. *See Schmitt,* 965 F.3d at 954.

15 Plaintiffs have properly pled Section 1557 discrimination in at least three
16 independent ways: (1) Regence's Exclusion is a form of facial proxy discrimination, Dkt.
17 No. 54, ¶¶137-168; (2) the Exclusion has a disparate impact on insureds with disabilities,
18 *id.,* ¶¶169-174; and (3) the Exclusion is the result of discriminatory disparate treatment
19 because Regence did not apply the same clinical practices and procedures utilized by
20 Regence to determine coverage of other benefits when it designed and administered the
21 Hearing Exclusion. *Id.*, ¶¶175-181.

22

23

24 [1] In *Schmitt,* with class certification and dispositive motions pending, the parties have reached a tentative settlement agreement. Hamburger Decl., *Exh. 1. United States v. Howard*, 381 F.3d 873, 876 n.1
25 (9th Cir. 2004) (A court may take judicial notice of court records in another case).

26 [2] Plaintiffs adequately pled that Regence is subject to both Section 1557 and RCW 48.43.0128. Dkt. No. 54, ¶¶119-120; 127-129. Regence does not take issue with those allegations.

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2. RCW 48.43.0128 and WLAD Pleading Standard.

Under Plaintiffs' state law discrimination claims, Plaintiffs must allege that (1) they are individuals with disabilities as defined by state law; (2) Regence is a health carrier that offered non-grandfathered health benefit plans; (3) Regence, in its benefit design or implementation of the benefit design discriminated because of Plaintiffs' present or predicted disability or other health condition. *See* RCW 48.43.0128; RCW 49.60.030(1)(e); RCW 49.60.178.

Washington state law recognizes that discrimination comes in the form of disparate treatment, proxy discrimination, and disparate impact, just as does federal law. *See e.g., Sunderland Servs. v. Pasco,* 107 Wn. App. 109, 123, 26 P.3d 955, 962 (2001) (proxy discrimination based on disability and familial status); *Taylor v. Burlington N. R.R. Holdings, Inc.*, 193 Wn.2d 611, 614, 444 P.3d 606 (2019) (disability disparate treatment discrimination); *Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481, 498, 325 P.3d 193 (2014) (recognizing disparate impact discrimination under the WLAD).

Whether or not the exclusion is based on "discriminatory animus" cannot be determined on a motion to dismiss. *See e.g., Buhr v. Stewart Title of Spokane, LLC*, 2013 Wash. App. LEXIS 1773, at *19 (Ct. App. Aug. 1, 2013) (the trier of fact evaluates "dueling explanations" to determine if "discriminatory animus was more likely than not a substantial factor"); *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 637, 911 P.2d 1319 (1996) (whether disability was a substantial factor in discrimination is "strictly a question of fact"). Here, too, Washington courts look to federal anti-discrimination law for guidance. *Kumar,* 180 Wn.2d at 490. Thus, Washington courts also consider that discriminatory animus may include deliberate indifference. *See e.g., Mercer Island Sch. Dist. v. Office of Superintendent of Pub. Instruction*, 186 Wn. App. 939, 976, 347 P.3d 924 (2015). Plaintiffs adequately allege claims for each type of discrimination under state law. Dkt. No. 54, ¶¶182-196.

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B. Plaintiffs and the Proposed Class are "Disabled" Under State and Federal Anti-Discrimination Law.

Plaintiffs E.S. and Jodi Sternoff are both diagnosed with hearing impairments for which they require treatment with hearing aids. Dkt. No. 54, ¶¶21-22, 31, 60, 103-104, 109, 111, 113. Neither Plaintiff may have their needs met with over-the-counter ("OTC") non-prescription hearing aids (which have only been available since October 2022). *Id.*, ¶¶62, 64, 109, 113. Nor can either Plaintiff have their needs met with cochlear implants ("CIs"), because they are adequately treated with hearing aids. *Id.*, ¶¶66, 109. In sum, hearing aids (in the case of E.S., bone-anchored hearing aids, or BAHAs) are the only hearing treatment that can meet their needs. The proposed class is similarly situated. *Id.*, ¶29.

1. Plaintiffs and the Class Are Disabled under RCW 48.43.0128 and WLAD.

Plaintiffs and class members are disabled under Washington law, which defines disability as the presence of any "sensory, mental or physical impairment" that is medically cognizable or diagnosable. RCW 49.60.040(7)(a). The term "impairment" means any physiological disorder or any condition affecting various body systems, including the special sense organs and the nervous (neurological) system. RCW 49.60.040(7)(c)(i). This definition is, by design, broader than the federal definition of "disability."[3]

Hearing impairment is a cognizable, diagnosable sensory condition. Dkt. No. 54, ¶¶19, 50-55, 74; *see Townsend*, 147 Wn. App. at 626; *Wash. State Commc'n Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 187-89, 293 P.3d 413 (2013) ("[T]hose that are hard

[3] In 2006 the Washington Supreme Court defined "disability" by reference to the standards under the federal Americans with Disability Act of 1990. "The legislature then amended RCW 49.60.040 to include a substantially broader definition of 'disability.'" *Townsend v. Walla Walla Sch. Dist.*, 147 Wn. App. 620, 625, 196 P.3d 748, 751 (2008).

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of hearing are disabled ….”). Thus, under Washington law, since Plaintiffs and the proposed class have a diagnosed hearing impairment, they are disabled under Washington law whether their level of hearing impairment is diagnosed as mild, moderate, severe or profound.

2. *Plaintiffs and the Class Are Disabled under Section 1557 and Section 504.*

The definition of "disability" under federal law is slightly narrower than under state law. Under §1557, the term "disability" is defined consistent with §504 of the Rehabilitation Act, 29 U.S.C. §794, which in turn incorporates the definition of "disability" in the Americans with Disabilities Act ("ADA") as amended in 2008. *Schmitt*, 965 F.3d at 954; *see* 45 C.F.R. §92.102(c). The ADA defines "disability" with respect to an individual as "a physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. §12102(1)(A).

"Disability" under §1557 thus requires the following:

First, there must be a measurable impairment. For the purposes of this definition, a physical or mental impairment is:

> (1) Any physiological disorder or condition … affecting one or more body systems, such as … special sense organs, …; or
>
> (2) Any mental or psychological disorder, such as an intellectual disability (formerly termed "mental retardation"), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. §1630.2(h). Plaintiffs allege that hearing loss is a physiological disorder affecting the special sense organs of hearing. Dkt. No. 54, ¶¶50-55, 60. Diagnosis by a licensed hearing professional with hearing impairment is sufficient to satisfy this requirement. *See e.g., Krocka v. City of Chicago*, 203 F.3d 507, 512 (7th Cir. 2000) ; *Scutt v. UnitedHealth Ins. Co.*, 2022 U.S. Dist. LEXIS 45445, *12 (D. Haw. Mar. 15, 2022).

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Second, the impairment must "substantially limit" at least one major life activity of the individual, as defined by the ADA and §504. Major life activities include hearing, communicating and working. 42 U.S.C. §12102(2)(A). Importantly, in 2008, Congress expanded the definition. *See* 29 U.S.C. §705(9), *incorporating* 42 U.S.C. §12102(4)(A). Congress and federal regulators provided "rules of construction" to guide courts' interpretation of "disability" and "substantially limits." 42 U.S.C. §12102(4)(B); 28 C.F.R. §36.105(a)(2); 29 C.F.R. §1630.2(j). Post-2008, an impairment is a disability if it "substantially limits the ability of an individual to perform a major life activity ***as compared to most people in the general population."*** 29 C.F.R. §1630.2(j)(1)(ii); 28 C.F.R. §36.105(d)(1)(v). An impairment "need not prevent or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting." *Id.* This is "not meant to be a demanding standard" and must be construed "broadly, in favor of expansive coverage." 28 C.F.R. §36.105(d)(1)(i); 29 C.F.R. §1630.2(j)(1)(i). In sum, the ACA definition of "disability" simply requires (1) evidence of an impairment and (2) "substantial limitation" of "major life activities," when compared to the majority of the general population. *See* 42 U.S.C. §12102(2)(A), (4)(B); 28 C.F.R. §36.105(a), (d); 29 C.F.R. §1630.2(j); Dkt. No. 54, ¶¶130-136.

Plaintiffs have adequately alleged that they and the Class are disabled under federal anti-discrimination law:

First, both Plaintiff E.S. and Sternoff are diagnosed with hearing impairment: Plaintiff E.S. was born without an outer or properly formed middle ear on her right side, requiring a BAHA to be able to hear. Dkt. No. 54, ¶¶103-107, 116. Plaintiff Sternoff has moderate to severe hearing loss in her left ear and requires a "cross hearing aid." *Id.*, ¶¶111, 116. So are class members. *Id.*, ¶30. These allegations meet the first factor under federal law for "disability."

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Second, Plaintiffs' hearing impairment substantially limits at least one major life activity, hearing, ***when compared to the general population,*** as evidenced by their need for hearing aids, a recognized medical device. *Id.*, ¶¶58, 60-61, 74-75; *see* 21 C.F.R. §801.420. Specifically, the vast majority of the U.S. general population over the age of 12, ***approximately 77%***, have no hearing impairment at all and do not need hearing aids in order to hear. Dkt. No. 32-2; Dkt. No. 54, ¶53.

Thus, hearing aid users experience a substantial impairment in their hearing when compared to the general public. The vast majority of people do not experience a hearing impairment at all, and do not have an impairment substantial enough to require treatment with a hearing aid. In contrast, all people who use hearing aids have both (1) an objective diagnosis of hearing impairment, and (2) experience their hearing impairment so substantially as to require hearing aids to be able to hear, a major life activity. Dkt. No. 54, ¶¶58, 60-61, 73-83. When compared to the general population, Plaintiffs (and the proposed class) experience a substantial limitation in a major life activity and are disabled. *Id.*

As alleged, and confirmed by Plaintiffs' expert, Frank Lin, M.D., Ph.D., ***only*** people with hearing impairments require hearing aids. Dkt. No. 54, ¶¶73-75, 80; Hamburger Decl., *Exh. 2*, p. 5.[4] Dr. Lin will opine that insureds who seek hearing aids for their diagnosed hearing impairments do so because their daily lives have been "significantly and adversely impact[ed]" by their hearing loss. *See id.;* Dkt. No. 54, ¶77. In sum, since Plaintiffs and the proposed class are diagnosed with hearing impairment

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[4] The Court may take judicial notice of Dr. Lin's report in *Schmitt v. Kaiser* not for the truth of the matters asserted therein but to show what the Plaintiffs here will likely offer as evidence to support the plausibility of their claims. "Materials from a proceeding in another tribunal are appropriate for judicial notice." *Biggs v. Terhune*, 334 F.3d 910, 915 n.3 (9th Cir. 2003).

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1 and require prescription hearing aids in order to hear, a major life activity, they meet the
2 ACA definition of "disability."

3 ***3. No Epidemiological Threshold Applies to the State or Federal***
4 ***Definition of Disability.***

5 While Regence argues for, and the Court previously assumed a threshold of
6 moderate or greater hearing impairment (40 decibel hearing loss or more), *see* Dkt. No.
7 41, there is no such threshold in the state or federal anti-discrimination definition of
8 disability, caselaw or even generally-accepted medical practice. As Dr. Lin opined in the
9 *Schmitt* case, the 40 dB threshold is unrelated to any medical definition of disability.
10 Hamburger Decl., *Exh. 2,* p. 3. The "[r]esults of audiometric testing, standing alone, are
11 not sufficient to define disability at the individual patient level." *Id.* Nor should an
12 assumption that epidemiological approximation for "disability" be relied upon by the
13 Court because the epidemiological threshold has no relationship to either the ACA or
14 Washington definition of disability.[5]

15 The Washington Supreme Court previously rejected the use of any threshold for
16 determining whether an impairment is a disability under Washington law. *See Taylor v.*
17 *Burlington N. R.R. Holdings, Inc.*, 193 Wn.2d 611, 615, 444 P.3d 606 (2019) ("[O]besity
18 ***always*** qualifies as an impairment under the plain language of RCW 49.60.040(7)(c)(i)
19 because it is recognized in the medical community as a 'physiological disorder or
20 condition' that affects multiple body systems listed in the statute.") (emphasis added).
21 Hearing loss is also a recognized physiological condition that affects the body systems
22 listed in the WLAD definition. Dkt. No. 54, ¶184; *see Wash. State Commc'n Access Project*
23 *v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 187-89, 293 P.3d 413 (2013). All insureds with
24
25
26 [5] While Dr. Lin's epidemiological studies use the term "disability," it has a different meaning for those purposes than when the term "disability" is used in the ACA and the WLAD. *See* Hamburger Decl., *Exh. 3.*

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hearing impairment, whether mild, moderate, severe or profound, are disabled under the WLAD.

Under federal law, no court has applied an audiometric cut off for hearing disability under the current definition of "disability."[6] "Disability is found when (1) there is a diagnosed hearing impairment (whether classified as mild to profound) that (2) "substantially impacts" the individual's hearing in a manner that is different from the general population. *See e.g., Dunn v. La. Dep't of Pub. Safety & Corr.*, 2014 U.S. Dist. LEXIS 51170, at *16 (M.D. La. Apr. 14, 2014) (plaintiff was hearing disabled even though his hearing loss was not greater than 40 dB in his better ear). Since the majority of the general population do not require hearing aids to hear, a major life activity, any hearing impairment that is so substantial as to require use of a hearing aid is "disabling" under federal anti-discrimination law. In sum, as alleged by Plaintiffs, under either state or federal definitions of "disability," all hearing aid users are "disabled." Dkt. No. 54, ¶¶60-61, 74-81, 122-125.

C. Regence's Exclusion Is a form of Facial 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." *Schmitt*, 965 F.3d at 958, *citing Davis v. Guam*, 932 F.3d 822, 837 (9th Cir. 2019). Hearing aids are a proxy for hearing disability, in much the same way that gray hair is for old age or wheelchairs are for mobility impairments. *See e.g., Fuog v. CVS Pharmacy, Inc.*, 2022 U.S. Dist. LEXIS

[6]While the Court previously assumed such a cutoff, the assumption was an extrapolation from Plaintiffs' then-pled allegations. *See* Dkt. No. 41, n.2. Plaintiffs have amended their pleadings and now allege that all or virtually all ***hearing aid users*** are "disabled" under state and federal law definitions. Dkt. No. 54, ¶¶ 60-61. This is a critical change from the earlier complaint.

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1 84045, at *14 (D.R.I. May 10, 2022) (a proxy is "not a perfect correlation with disability,
2 but close enough so that discrimination on the basis of the proxy is essentially
3 discrimination on the basis of disability"); *McWright v. Alexander*, 982 F.2d 222, 228 (7th
4 Cir. 1992) ("no doubt a policy excluding wheelchairs would be such discrimination" due
5 to "handicap" [*sic.*]). Here, the Court must consider whether Regence's Exclusion,
6 eliminating all coverage for hearing aids, is a proxy for hearing disability such that the
7 limited coverage offered by Regence fails to "adequately serve the needs of hearing
8 disabled people as a group." *Schmitt,* 965 F.3d at 949.

9 Nor must Plaintiffs allege that Regence harbored animus towards insureds with
10 hearing disabilities. "Proxy discrimination is a form of facial discrimination." *Davis,* 932
11 F.3d at 837, *quoting Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1160
12 n.23 (9th Cir. 2013). And facial discrimination does not require proof of animus or even
13 deliberate indifference where, as here, no monetary damages are sought. *Schmitt,* 965
14 F.3d at 954 n.6 (*quoting Mark H. v. Lemahieu*, 513 F.3d 922, 937 (9th Cir. 2008)). "[B]y its
15 very terms, facial discrimination is 'intentional.'" *Lovell v. Chandler*, 303 F.3d 1039, 1057
16 (9th Cir. 2002). Indeed, the Ninth Circuit has already concluded that a health insurer's
17 benefit design "inherently involves intentional conduct." *Schmitt,* 965 F.3d at 954.
18 Washington courts likely follow this federal approach. *Kumar,* 180 Wn.2d at 490.

19 ***1. Hearing Aids Are a Proxy for Hearing Disability.***

20 The key question when considering the proxy fit is "whether the [E]xclusion
21 primarily affects disabled persons." *Schmitt,* 965 F.3d at 959. The Exclusion (which now
22 facially excludes only hearing aids, and effectively has always done so) exclusively, or
23 very nearly so, affects insureds with disabilities (as defined by state and federal law).
24 That is because Regence applies the Exclusion based on proxy criteria—need for hearing
25 aids—that are "almost exclusively indicators of membership in the disfavored group"—
26 hearing disability. *Pac. Shores Props., LLC,* 730 F.3d at 1160 n.23. *See* Dkt. No. 54, ¶187.

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1 As pled, hearing aids are prescribed when there is an objective diagnosis of
2 hearing impairment together with a subjective limitation on daily life. *Id.*, ¶58. Licensed
3 hearing care professionals rarely, if ever, prescribe or recommend hearing aids without
4 a diagnosis of hearing impairment. *Id.* And, hearing aids are rarely—if ever—used to
5 treat any condition other than hearing impairments. *Id.*, ¶¶ 80, 95. These allegations
6 comport with common sense: people only seek out hearing aids when they have a
7 hearing impairment that substantially impacts their daily life. *Id.*, ¶75. Thus, hearing
8 aid use correlates so closely with hearing disability as to be a proxy for it. Just like "a
9 classification based on 'service dogs' could, in many contexts, constitute a proxy for
10 discrimination 'because of' a handicap" so is a classification related to hearing aids
11 constitute a proxy for hearing disability here. *Cmty. Servs. v. Wind Gap Mun. Auth.*, 421
12 F.3d 170, 179 (3d Cir. 2005).

13 A proxy need not be all encompassing for the "fit" to work. *See e.g., Children's All.*
14 *v. City of Bellevue*, 950 F. Supp. 1491, 1497 (W.D. Wash. 1997). In that case, the ordinance
15 discriminated on the basis of disability even though many people with disabilities may
16 live with their families or independently rather than in congregate care facilities.
17 Although the ordinance did not impact all people with disabilities, it was still a proxy
18 for disability discrimination. The same is true for a classification based on enrollment in
19 special education courses. *See Bowers v. NCAA*, 563 F. Supp. 2d 508, 519 (D.N.J. 2008).
20 There "'[s]tudents enrolled in special education courses' is a proxy for 'students with
21 disabilities'" notwithstanding that some students with disabilities are not enrolled in
22 special education courses. In sum, if the policy is directed at a protected trait, such that
23 all or very nearly all of those ***impacted*** have the protected trait, the required "fit" is met.
24 *Schmitt,* 965 F.3d at 959 (at issue is "whether the exclusion primarily ***affects*** disabled
25 persons") (emphasis added).
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Additionally, since the Exclusion is directed at the predominant medical device used to treat hearing disability, the proxy is also met. Like wheelchairs for mobility disability, seeing-eye dogs or canes for visual impairment, hearing aids are a proxy for hearing disability because they are the key "manifestation" of a type of disability so as to be a proxy for it. *McWright,* 982 F.2d at 228; *Fuog,* 2022 U.S. Dist. LEXIS 84045, at *14; Dkt. No. 54, ¶¶94-100.

Regence argues that the Court has previously "rejected Plaintiffs' proxy discrimination theory," Dkt. No. 57, p. 9, but as Regence concedes, the Court's earlier determination was only that there was not a sufficient "fit" between "***hearing loss*** and hearing disability." *Id., citing* Dkt. No 53 at 4 (emphasis added). The TAC modifies the proxy (consistent with Regence's own rewrite of the Exclusion), alleging that Regence's exclusion of ***hearing aids*** is a proxy for hearing disability. Dkt. No. 54, ¶¶94-103. With this modification, the proxy is exact or very nearly so.[7] As explained above, all or nearly all users of hearing aids are "disabled" under state and federal law.

Regence also argues that the Court's consideration of hearing aids as the "proxy" for hearing disability would result in "curated coverage" to meet individual needs. *See* Dkt. No. 57, p. 10:13-14, *citing Schmitt,* 965 F.3d at 959. This is untrue.

First, Regence, not Plaintiffs, rewrote the Exclusion to apply to only hearing aids. Dkt. No. 54, ¶42; Dkt. No. 32-1, p. 32. Thus, Regence defined the proxy. Regence does not dispute that the effect of the Exclusion remains unchanged. Dkt. No. 57, p. 6:6-9. Plaintiffs allege that the Exclusion always targeted hearing aids.

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[7] Regence complains that Plaintiffs now use the term "prescription" to reflect that since October 2022, some hearing aids can be purchased over-the-counter ("OTC"). Dkt. No. 57, p. 10:1-10. Before October 2022, all hearing aids required a prescription, such that it was not necessary to distinguish between prescription and OTC hearing aids. This distinction is now required since this lawsuit seeks only coverage of hearing aids that require a prescription or recommendation by a licensed provider, consistent with the definition of "durable medical equipment" under the Regence contract. Dkt. No. 32-1, p. 10.

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1 ***Second,*** Plaintiffs do not seek "curated coverage" but rather to end Regence's use
2 of a "***curated exclusion***" of hearing aids. Plaintiffs want hearing aids to be covered under
3 Regence's broad DME benefit as it is currently defined. In essence, Plaintiffs seek to have
4 hearing aids treated like any other medical device.

5 ***Third,*** Regence misinterprets *Schmitt,* when it claims that it stands for the
6 proposition that Plaintiffs could not "omit ***coverage*** for cochlear implants from the
7 alleged proxy" and then uses this proposition to conclude that Plaintiffs cannot ignore
8 Regence's exclusion of "routine hearing examinations, OTC hearing aids, and other
9 treatments from the proxy." Dkt. No 57, p. 10:17-23. The passage in *Schmitt* addressed
10 the defendant's claim that the coverage offered by the insurer met the needs of insureds
11 who are hearing disabled. *Id.,* 965 F.3d at 959 ("If cochlear implants serve the needs of
12 most individuals with hearing disability, that fact would tend to undermine a claim of
13 proxy discrimination"). Here, Plaintiffs allege that CIs do not meet the needs of most
14 hearing disabled insureds, consistent with *Schmitt*. Dkt. No. 54, ¶¶84-86. The proposed
15 proxy here is properly defined.[8]

16 **2. *Plaintiffs Do Not Rely on Statistics for their Proxy Analysis.***

17 Regence claims that "plaintiffs' own statistics" show that hearing aid users do not
18 have "disabling hearing loss." Dkt. No. 57, pp. 11:8-10. Regence is wrong:

19 ***First,*** Plaintiffs need not prove proxy discrimination using statistics. Many cases
20 do not. *See e.g., Davis v. Commonwealth Election Comm'n*, 844 F.3d 1087 (9th Cir. 2016);
21 *Children's All.,* 950 F. Supp. at 1497; *New Horizons Rehab., Inc. v. Indiana*, 400 F. Supp. 3d
22 751, 765 (S.D. Ind. 2019). In the TAC, Plaintiffs allege that all hearing aid users (1) have
23 a diagnosed hearing impairment that (2) so substantially impacts their daily living that
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[8] Defendants cannot rewrite the proxy alleged in the complaint to its own liking. *See ARCO Envtl. Remediation, L.L.C. v. Dep't of Health & Envtl. Quality*, 213 F.3d 1108, 1114 (9th Cir. 2000) (Plaintiff is the "master of the complaint").

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1 they seek out prescription hearing aids. Dkt. No. 54, ¶¶58, 60-61, 73-83. Plaintiffs have
2 plausibly alleged that all hearing aid users are "disabled" under state and federal law.

3 ***Second,*** Regence equates the term "disabling hearing loss" with moderate or
4 greater hearing impairment (40dB or greater). Dkt. No. 57, p. 11:3-12. But as explained
5 in Plaintiffs' TAC, the state and federal laws defining "disability" do not correspond to
6 a specific audiometric threshold. Dkt. No. 54 ¶¶ 58-61, 121-124; *See* Hamburger Decl.,
7 *Exh. 3.* The state and federal definitions of "disability" guide the proxy determination,
8 not arbitrarily assumed epidemiologic thresholds.

9 ***Third,*** because Regence relies on the epidemiological studies cited—not the
10 federal or state definitions of disability—its claim that the Hearing Exclusion "applies
11 predominantly to non-disabled insureds" is incorrect. Dkt. No. 57, p. 11:23-25. As
12 alleged, the Exclusion eliminates all coverage of hearing aids. Dkt. No. 54, ¶42. The only
13 people who seek treatment with prescription hearing aids are people who are hearing
14 disabled, as defined by state and federal law, whether the hearing impairment is mild,
15 moderate, severe or profound. *Id.,* ¶¶73-75, 80-81. And, even if non-disabled people are
16 impacted by the Hearing Exclusion, such "over-discrimination is prohibited." *Schmitt,*
17 965 F.3d at 958.

18 ***Fourth,*** that some insureds with hearing disabilities have their needs met with CIs
19 does not relieve Regence of liability. *See* Dkt. No. 57, p.11. As the Ninth Circuit noted, an
20 insurer's provision of coverage of CIs "undermines" plaintiffs' discrimination claims
21 ***only*** if "cochlear implants serve the needs of most individuals with hearing disability."
22 *Schmitt,* 965 F.3d at 959. As plaintiffs allege, CIs do not.[9] Dkt. No. 54, ¶¶68, 84-86.
23 Moreover, CIs require invasive surgeries and are only available if treatment with (non-
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[9] Plaintiffs properly allege that CIs do not "serve the needs of most individuals with hearing disability." *Schmitt,* 965 F.3d at 959. Dkt. No. 54, ¶¶68, 84-86, 156. Regence misrepresents Plaintiffs' allegations when it claims otherwise. *See* Dkt. No. 57, p. 11:20-22.

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covered) prescription hearing aids is ineffective. Dkt. No. 54, ¶¶66-67. Accordingly, neither Plaintiffs nor any class member are eligible for CIs.

3. *Regence Has a Long History of Excluding Hearing Treatment.*

Consideration of the Hearing Exclusion's "historical facts"—its history, circumstances, and actual application —provide further evidence that the proxy (hearing aids) is closely aligned with a protected class (persons with hearing disabilities). *See Davis v. Guam*, 932 F.3d at 838; Dkt. No. 41, p. 6. The historical facts alleged cement the conclusion that the Exclusion is intentional discrimination.

For most of Regence's history it excluded all hearing treatment from coverage. This is because Regence's history is grounded in providing health coverage for able-bodied workers. Dkt. No. 54, ¶¶4, 36-37. Services typically relied upon by insureds with disabilities were intentionally excluded. *Id.* Regence historically excluded treatment for various disabilities and chronic health conditions, including mental health services, neurodevelopmental therapies, durable medical equipment, treatment for obesity, and, at issue here, hearing aids. *Id.,* ¶¶6-14, 36-40; *see e.g., O.S.T. v. Regence BlueShield*, 181 Wn.2d 691, 694, 335 P.3d 416 (2014) (challenging exclusion of neurodevelopmental therapies); *Solorio v. Regence Blueshield,* King Cty. Sup. Ct. No. 23-2-10004-2 SEA (challenging Regence's exclusion of all treatment related to obesity). Historically, these exclusions were permitted as a form of "fair discrimination." Dkt. No. 54, ¶¶40; RCW 48.30.300; *Schmitt,* 965 F.3d at 948.

The ACA and RCW 48.43.0128 ended these then legal but discriminatory insurance practices. Consequently, insurers, including Regence, must align their benefit design with these new anti-discrimination requirements, a transformative shift in how insurers do business. These historical facts help establish the discriminatory intent animating the Exclusion's history and continued use.

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4. *Regence's Targeted Enforcement of the Exclusion Further Supports Regence's Liability under Proxy Discrimination.*

When a defendant establishes a broadly applicable policy but targets enforcement against a protected class, such targeted enforcement is evidence of the policy's discriminatory intent. Dkt. No. 41, p. 7, *citing Pac. Shores Props., LLC,* 730 F.3d at 1162. Plaintiffs allege that Regence engages in just such targeted enforcement of the Exclusion. Dkt. No. 54, ¶¶153-157. Specifically, Regence has strictly enforced the Exclusion to bar hearing aids, the predominant and conventional treatment needed by insureds with hearing disabilities. Plaintiffs also allege and present actual evidence that that Regence does not enforce its exclusion of "routine hearing examinations" to deny the treatment likely to be most needed by non-disabled insureds—diagnostic hearing examinations. Dkt. No. 54, ¶¶43-44. Regence's targeted enforcement of the Exclusion against hearing aids provides further evidence of the Exclusion's discriminatory intent, supporting the conclusion that Plaintiffs have sufficiently alleged a claim of proxy discrimination.

5. *Regence Has no Clinical Justification for the Exclusion.*

Under the ACA, only clinical justifications can support otherwise discriminatory exclusions. *See* 45 C.F.R. §156.125(a), (c) (only clinical reasons can justify otherwise discriminatory benefit design); 81 Fed. Reg. 31405 ("Scientific or medical reasons can justify distinctions based on the grounds enumerated in Section 1557"); 81 Fed. Reg. 31408 ("Arbitrary exclusions based on protected traits are prohibited" but "[w]here differential treatment is justified by scientific or medical evidence, such treatment will not be considered discriminatory"). An insurer's reasons cannot be arbitrary or a pretext for discrimination. *Id. See also*, FAQ No. 45 ("[C]overed entities must use neutral, nondiscriminatory criteria in making decisions as to which benefits and services to cover, and their health coverage cannot operate in a discriminatory manner") found at: www.hhs.gov/civil-rights/for-individuals/section-1557/1557faqs/index.html#

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1 General%20Questions (last visited 7/2/23). *See Sumes v. Andres*, 938 F. Supp. 9, 11 (1996);
2 *Woolfolk v. Duncan*, 872 F. Supp. 1381, 1390 (E.D. Pa. 1995); *Glanz v. Vernick*, 750 F. Supp.
3 39, 46 (D. Mass. 1990) ("bona fide medical reasons" are the only basis under which
4 providers may withhold medical benefits based upon a patient's disability).

5 The same limitation is also a feature of state anti-discrimination law. Pursuant to
6 RCW 48.43.0128, discriminatory benefit design or coverage is only permitted if it is based
7 on "appropriately utilize[ed] medical management techniques." RCW 48.43.0128(2).
8 The Washington Office of the Insurance Commissioner has articulated this standard:
9 "Appropriate use of medical management techniques includes use of evidence based
10 criteria for determining whether a service or benefit is medically necessary and clinically
11 appropriate." WAC 284-43-5940(3). In sum, a health insurer must have a genuine
12 ***clinical*** reason for a particular benefit design that results in disparate treatment based
13 upon disability under both state and federal anti-discrimination law. Any other
14 justification is not permissible. As alleged by Plaintiffs, the Exclusion was put in place
15 and maintained without any clinical review of the medical efficacy and appropriateness
16 of coverage of hearing aids, as required by the ACA and its implementing regulations.
17 Dkt. No. 54, ¶¶41, 70.

18 **D. Regence Engaged In Disparate Treatment When it Imposed the Hearing Exclusion Without Evaluating Medical Necessity.**

19 Regence designed the Exclusion without considering the clinical efficacy of
20 hearing aids, as is required under Regence's various policies and practices. Dkt. No. 54,
21 ¶¶175-181. Regence argues that Plaintiffs' allegations are wrong, and that it does not go
22 through a clinical review process when deciding whether to cover or to exclude medical
23 services, including hearing aids. Dkt. No. 57, p.16:6-19. Regence cannot dispute
24 plausible allegations based upon its own policies and procedures with its bare objection.
25 *See D.T.*, 2017 U.S. Dist. LEXIS 195186, at *3.
26

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The documents cited by Plaintiffs in the TAC support their allegation that Regence's policies and procedures require a clinical evaluation of a particular service before it is excluded from coverage. Hearing aids meet the requirements for the technology assessment process. Dkt. No. 54, ¶¶175-176. As noted by Regence's policy, if a service or supply meets those requirements, then it is generally eligible for coverage. *Id.* Regence's design and administration of the Exclusion overrides any medical necessity consideration. *Id.,* ¶177. Regence's failure to consider whether hearing aids are clinically effective and therefore should be covered, or whether they are experiment/investigational and therefore excluded, is at the very least, deliberate indifference to the needs of insureds with hearing disabilities.

E. Alternatively, Plaintiffs Have Adequately Pled Disparate Impact Discrimination under State and Federal Law.

To plead a claim for disparate impact discrimination, Plaintiffs must demonstrate that "a facially neutral [ ] policy or practice has the 'effect of denying meaningful access to [ ] services' to people with disabilities." *Payan v. L.A. Cmty. Coll. Dist.*, 11 F.4th 729, 738 (9th Cir. 2021). If discrimination is found, the defendant must modify the practice or policy to ensure non-discriminatory access to the benefits or services. *Id.*

Plaintiffs have adequately pled a claim for disparate impact discrimination. *See* Dkt. No. 54, ¶¶169-174. Specifically, Regence's Exclusion denies meaningful access to DME by insureds with hearing disabilities. *Id.* A categorical exclusion of hearing aids disparately impacts insureds with hearing disabilities since the Exclusion only impairs persons with hearing disabilities. *See id.* Unable to dispute this, Regence claims that its exclusion of "routine hearing examinations" applies to all insureds, disabled and non-disabled alike, and therefore alleviates any disparate impact. Dkt. No. 57, p. 14.

"The problem with Defendant's motion is that it relies on factual allegations that controvert Plaintiff's allegations." *Carr v. United Healthcare Servs.*, 2016 U.S. Dist. LEXIS

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182561, at *7 (W.D. Wash., May 31, 2016). Plaintiffs allege and ***provide proof*** that Regence covers hearing examinations, despite the description in the plan that "routine hearing examinations" are excluded. Dkt. No. 54, ¶44. Plaintiffs anticipate that discovery from Regence will confirm that such coverage is routinely provided. Hamburger Decl., ¶2. At this stage of the proceedings, Plaintiffs' allegations that Regence covers hearing examinations, together with actual proof that it does, are more than sufficient. *D.T.*, 2017 U.S. Dist. LEXIS 195186, at *3.

Regence's Exclusion deprives insureds with hearing disabilities "meaningful access" in a second way—by eliminating any individualized medical necessity review in the internal claims and appeals process, and in external reviews. When a DME claim is denied, other insureds can appeal the denial and have an individual medical necessity review. Dkt. No. 32-1, pp. 43-45. Ultimately, they can ask an independent medical reviewer to decide if the DME is medically necessary. *Id.;* RCW 48.43.535. They have the right to have an individual medical necessity review at all stages of the process.

Regence's Exclusion blocks any consideration of the medical necessity of hearing aids, either internally or externally. When Regence administers the Exclusion, its standard practice is to deny claims when presented with a diagnosis of hearing loss together with a code for hearing aids. Dkt. No. 54, ¶11. Similarly, an external reviewer cannot reverse Regence's denial based on the Exclusion, even if the reviewer concludes that the hearing aids were medically necessary. *See Z.D. v. Grp. Health Coop.*, 2012 U.S. Dist. LEXIS 76498, at *13 (W.D. Wash. June 1, 2012); RCW 48.43.535(6). Thus, the Exclusion treats insureds with hearing disabilities differently, as a group, than all other insureds, denying them meaningful access to the DME benefit and to the claims and appeals process, when seeking coverage of hearing aids.

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F. Regence's Exclusion Violates the WLAD.[10]

Plaintiffs have adequately pled that Regence's Exclusion violates the WLAD. As noted above, the Exclusion violates RCW 48.43.0128. *See* §II.A-E.

1. *Plaintiffs May Enforce Violations of RCW 48.43.0128 via the WLAD.*

The WLAD incorporates and enforces RCW 48.43.0128. Specifically, the WLAD generally prohibits discrimination on the basis of disability in insurance. *See* RCW 49.60.030(1)(e) ("The right to be free from discrimination because of … the presence of any sensory, mental, or physical disability … is recognized and declared to be a civil right. This right shall include … the right to engage in insurance transactions … without discrimination …."). RCW 48.43.0128 furnishes Washingtonians with protection from illegal benefit design discrimination in a particular type of insurance known as non-grandfathered health plans, consistent with RCW 49.60.030(1)(e). WLAD describes the general prohibition of insurance discrimination, while RCW 48.43.0128 defines a very specific form of insurance discrimination applied only to non-grandfathered health plans.

The Legislature confirmed as much when, in 2021, when it added RCW 48.43.0128 directly to RCW 49.60.178. Specifically, the Legislature stated that practices that are "not unlawful" under RCW 48.43.0128 do "not constitute an unfair practice for the purposes of [the WLAD]." *Id.* Conversely, practices that are unlawful under RCW 48.43.0128 are also "unfair practices" under the WLAD. *See id.*

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[10] The Washington Court of Appeals recently clarified that a breach of contract claim may be brought to enforce a state or federal statutory violation, where, as here, such law is incorporated into the health insurance contract. *See* Dkt. No. 31-2, p. 58; *P.E.L. v. Premera Blue Cross*, 24 Wn. App. 2d 487, 496, 520 P.3d 486 (2022); *Schmitt v. Kaiser Found. Health Plan of Wash.*, 2022 U.S. Dist. LEXIS 138974, at *3 (W.D. Wash. Aug. 4, 2022); *compare* Dkt. No. 41, p. 19.

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This approach makes perfect sense. Since the two statutes govern the same subject matter (discrimination in health insurance), they must be read together "as constituting a unified whole … which maintains the integrity of the respective statutes." *Hallauer v. Spectrum Properties, Inc.*, 143 Wn.2d 126, 146, 18 P.3d 540 (2001). This way, "effect will be given to both to the extent possible" and "efforts will be made to harmonize statutes." *Walker v. Wenatchee Valley Truck and Auto Outlet, Inc.*, 155 Wn. App. 199, 208, 229 P.3d 871 (2010). This approach is consistent with both statutory schemes. *O.S.T.*, 181 Wn.2d at 702.

2. The Washington Office of the Insurance Commissioner (OIC) Did Not Authorize or Approve Regence's Exclusion.

Regence argues that Regence's Exclusion does not violate the WLAD because it was consistent with the OIC's essential health benefits rules. Dkt. No. 57, p. 18:7-19. The Ninth Circuit rejected a similar argument. *See Schmitt,* 965 F.3d at 955. It held that the Washington benchmark plan "is only the starting point" for determining ACA compliance, including Section 1557's non-discrimination requirements. *Id.* The Court held that "compliance with federal and state law regarding essential health benefits did not guarantee compliance with the ACA's nondiscrimination requirement." *Id.,* at 956. The fact that Regence's plan complied with the Washington benchmark or was not disapproved by the Insurance Commissioner is irrelevant. *Id.,* at 956-57 ("[W]hether or not [defendants] complied with section 1557 is a question of federal law on which we owe the state no deference."); *accord, O.S.T.*, 181 Wn.2d at 700, n. 9. The Court may not dismiss Plaintiffs' claims on this basis.

3. Plaintiffs Pled that the Exclusion Turns Exclusively on the Presence or Absence of Hearing Disability.

Regence complains that Plaintiffs have not met the pleading requirement that they show "coverage turns exclusively on the presence or absence" of their disability.

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Dkt. No. 57, p. 19. Not true. Plaintiffs allege that only insureds with hearing disabilities are denied treatment under the Hearing Exclusion based on the simple fact that only people with hearing disabilities use hearing aids. Dkt. No. 54, ¶¶58, 60-61, 73-83. Thus, the denial of coverage for hearing aids is triggered exclusively by the presence of disabling hearing impairment. *Id.*, ¶11.

But even if the Court assumes that the Exclusion turns on two factors (a diagnosis of hearing impairment and use of prescription hearing aids), the mere fact that two factors might cause discrimination does not allow Regence to avoid liability under the WLAD. Under Washington law, when an Exclusion turns solely on a protected trait, it is discrimination. *Cf., Edwards v. Farmers Ins. Co.*, 111 Wn.2d 710, 717, 763 P.2d 1226 (1988) ("There can be no doubt that these statutes apply when the discrimination is based solely on the person's status as a married person."). But *Edwards* did not rule out discrimination as a result of more than one factor. Discrimination may still be established when an exclusion is based on a protected trait and another qualifying factor. *Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171, 180, 930 P.2d 307 (1997). In such "mixed cases," the court must consider whether the "alleged reason" for the discriminatory exclusion was directed at the protected trait or at something else. *Id.* Where the exclusion is "more closely related" to the protected trait than the other qualifying factor, discrimination is found. *Id.*, at 180-181. *See e.g., Andrews v. Harrison Med. Ctr.*, 2010 Wash. App. LEXIS 2594, at *10 (Ct. App. Nov. 18, 2010) (A discriminatory motive must be a significant or substantial factor). Plaintiffs have more than sufficiently pled a discrimination claim under the WLAD for insurance discrimination.

Regence argues that since some hearing disabled people have coverage through Regence of CI's, and some people with hearing impairment do not need hearing aids, there is no discrimination. Dkt. No. 57, p. 19:2-6, citing *Johnson v. Metro. Prop. & Cas. Ins. Co.*, 2010 Wash. App. LEXIS 301 (Ct. App. Feb. 16, 2010). *Johnson,* however, does not

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1 stand for this proposition. In *Johnson,* the relevant insurance provision was based on
2 family status, not marriage (a protected trait). *Id.,* *18-19. Thus, the *Johnson* court
3 concluded, ***on summary judgment***, that the distinction in the insurance policy was not
4 related to marriage but rather wholly directed at permissible familial relations. *Id.* Here,
5 whether or not the Exclusion targets hearing disability, or more closely targets some
6 other factor, can only be determined after discovery.

7 **G. Plaintiffs Have Adequately Pled a Claim under the Washington CPA.**

8 Regence offers no unique arguments against Plaintiffs' CPA claim. Dkt. No. 57,
9 pp. 19-20. As alleged by Plaintiffs, Regence's Exclusion violates RCW 48.43.0128, and is
10 therefore subject to RCW 19.86.170. Dkt. No. 54, ¶¶197-201. Nor is Regence's Hearing
11 Exclusion authorized by the OIC or permitted by its regulations. *See* §II.F.2 above. If
12 the Court permits Plaintiffs' WLAD claim to enforce RCW 48.43.0128 to proceed, it
13 should also allow Plaintiffs' CPA claim to proceed.

14 **H. Plaintiffs Properly Seek Declaratory and Injunctive Relief.**

15 ***1. Declaratory and Prospective Injunctive Relief is Properly Pled.***

16 Plaintiffs properly seek prospective injunctive relief to ensure that Regence does
17 not reinstate the Exclusion. A defendant cannot moot a case or claim by ending its
18 unlawful conduct once it has been sued. *Brach v. Newsom*, 38 F.4th 6, 12 (9th Cir. 2022).
19 "Otherwise, a defendant could engage in unlawful conduct, stop when sued to have the
20 case declared moot, then pick up where he left off, repeating this cycle until he achieves
21 all his unlawful ends." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). Instead, when a
22 defendant changes its behavior, the defendant bears the "formidable burden of showing
23 that it is absolutely clear" that the wrongful behavior will not recur. *Id.,* quoting *Friends*
24 *of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 190 (2000).
25 Regence makes no such showing, nor can it on a Motion to Dismiss. Plaintiffs' claims
26 for prospective injunctive relief are proper.

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2. *Retrospective Injunctive Relief Is Properly Pled.*

Regence argues that retrospective injunctive relief, or "reprocessing" is not available as a remedy since the Ninth Circuit panel decision in *Wit v. United Behav. Health*, 2023 U.S. App. LEXIS 2039, *28 (9th Cir. Jan. 26, 2023). Regence misreads the *Wit* decision.

In *Wit*, Ninth Circuit found that ERISA's 29 U.S.C. §1132(a)(1)(B) does not provide for injunctive relief in the form of "reprocessing."[11] *Id.* That was the limit of *Wit's* holding. To date, no court has applied the holding in *Wit* regarding reprocessing outside of ERISA. Here, Plaintiffs and the proposed Class make no claim under ERISA's §1132. Instead, Plaintiffs' Section 1557, WLAD, and CPA claims permit the Court to utilize the full panoply of traditional equitable powers to remedy illegal discrimination.

Anti-discrimination law has always included broad equitable and injunctive relief among the tools available to a court to remedy legal violations. "There can be little doubt that where a violation of [anti-discrimination law] is found, the court is vested with broad remedial power to remove the vestiges of past discrimination and eliminate present and assure the non-existence of future barriers to the full enjoyment of equal [ ] opportunities by qualified [protected individuals]." *United States v. Ironworkers Local 86*, 443 F.2d 544, 553 (9th Cir. 1971). "[E]quitable remedies are a special blend of what is necessary, what is fair, and what is workable." *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973). "When such dereliction [of a legal duty] occurs, it is up to the courts in their traditional, equitable, and interstitial role to fashion the remedy." *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 987 (9th Cir. 1994).

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[11] *Wit* does not foreclose reprocessing as a form of equitable relief under ERISA's 29 U.S.C. §1123(a)(3). *Wit*, 2023 U.S. App. LEXIS 2039, at *28. The Ninth Circuit merely concluded that "Plaintiffs and the district court did not explain or refer to precedent showing how a 'reprocessing' remedy constitutes relief that was typically available in equity" as required by 29 U.S.C. §1123(a)(3). *Id. But see CIGNA Corp. v. Amara*, 563 U.S. 421, 441 (2011) ("[T]he fact that this relief takes the form of a money payment does not remove it from the category of traditionally equitable relief").

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Unless a statute affirmatively restricts a court's equitable jurisdiction, and Section 1557 does not, "the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010). Specifically, under Section 1557's disability prong, which incorporates the grounds of Section 504 of the Rehabilitation Act, all remedies under Title VI are available. 29 U.S.C. §794a(a)(2). These remedies include "injunctive relief and other forms of relief traditionally available in suits for breach of contract." *Bax v. Doctors Med. Ctr. of Modesto, Inc.,* 2021 U.S. Dist. LEXIS 160107, at *98-99 (E.D. Cal. Aug. 24, 2021), *citing to Smith v. Barton*, 914 F.2d 1330, 1338 (9th Cir. 1990). Accordingly, Section 1557 provides the Class with broad substantive rights to injunctive and equitable relief that include various "make whole" remedies imposed on the party liable for illegal discrimination. *See id.*

The Ninth Circuit has long approved of equitable relief in the form of permanent injunctive relief to enforce a defendant's compliance with a court order, even when the injunctive order requires reprocessing of previously submitted claims. *See e.g., Defs. of Wildlife v. United States EPA,* 420 F.3d 946, 978 (9th Cir. 2005) (Typically, when an entity violates the law, "we vacate the [entity's] action and remand to the [entity] to act in compliance with its statutory obligations."); *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 823 (9th Cir. 2002) (approving injunction requiring reprocessing of 68 permits); *United States v. Navajo Freight Lines, Inc.*, 525 F.2d 1318, 1325-26 (9th Cir. 1975) (equitable remedies under anti-discrimination law include placing class members in the position "which they would have occupied but for the discrimination"); *see also, Ollier v. Sweetwater Union High Sch. Dist.,* 768 F.3d 843, 859 (9th Cir. 2014) (approving injunction for violations of Title IX including reinstatement); *Criswell v. W. Air Lines, Inc.,* 514 F. Supp. 384, 394 (C.D. Cal. 1981), *affirmed Criswell v. W. Airlines,* 709 F.2d 544, 546 (9th Cir. 1983) (injunction including reinstatement and retraining); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1518 (9th Cir. 1989) (approving permanent injunctive relief since the "district

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1 court is required to attempt to make victims of discrimination whole by restoring them
2 to the position in which they would have been absent the discrimination"). Plaintiffs'
3 claim for reprocessing of excluded coverage is properly pled.

4
III. CONCLUSION

5 The Court should deny Defendants' Motion to Dismiss in full and permit
6 Plaintiffs' claims to proceed to the merits.

7 DATED: June 22, 2023.

8
I certify that the foregoing contains 8,372 words,
9
in compliance with the Local Civil Rules.

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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

[PROPOSED]
ORDER DENYING DEFENDANTS' MOTION TO DISMISS THIRD AMENDED COMPLAINT

Noted for Consideration:
August 7, 2023

THIS MATTER came before the Court on Defendants' Motion to Dismiss Third Amended Complaint. The Court has considered the Defendants' Motion, Plaintiffs' Response, the Defendants' Reply, and any declarations or exhibits submitted in support of those briefs. The Court has also considered the other pleadings and records on file, and: ____

____

____

____.

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Based upon the foregoing, the Court hereby DENIES Defendants' Motion to Dismiss Third Amended Complaint.

DATED: August _____, 2023.

____
RICHARD A. JONES
United States District Judge

Presented by:

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