Hon. 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

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Noted for Consideration: March 2, 2018

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER
701 FIFTH AVENUE, SUITE 2560
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

Table of Contents

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER
701 FIFTH AVENUE, SUITE 2560
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

Table of Authorities

CASES

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER
701 FIFTH AVENUE, SUITE 2560
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER
701 FIFTH AVENUE, SUITE 2560
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

STATUTES

REGULATIONS

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER
701 FIFTH AVENUE, SUITE 2560
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

RULES

TREATISES

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER
701 FIFTH AVENUE, SUITE 2560
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

I. INTRODUCTION

The Affordable Care Act ensured that all Americans, including those with disabilities, have access to quality and affordable health coverage. Congress put in place layered protections which, when taken together, provide people with disabilities, many of whom had been historically excluded from health insurance benefits, with coverage for their medical conditions. These protections included: the elimination of pre-existing condition limitations, lifetime and annual caps on coverage; guaranteed issue of health coverage to all and guaranteed renewability of that coverage; and the creation of ten broad categories of required benefits (known as "essential health benefits"), among other consumer protections.

The ACA did more than just expand access to health insurance, however. Section 1557, the ACA's anti-discrimination law, ensured that people with disabilities would have real coverage for their conditions, free from discrimination, ***after*** they are enrolled in health insurance. Congress extended anti-discrimination law under Section 504 of the Rehabilitation Act to health benefits provided under contracts of insurance that receive federal financial assistance:

> ***[A]n individual shall not, on the ground prohibited under … section 504 of the Rehabilitation Act of 1973*** (29 U.S.C. §794), be excluded from participation in, ***be denied the benefits of, or be subjected to discrimination under, any health program or activity***, any part of which is receiving Federal financial assistance, ***including*** credits, subsidies, or ***contracts of insurance….***

42 U.S.C. §18116(a) (emphasis added). The federal regulators determined that Section 1557 prohibits discrimination on the basis of disability in how insurance companies design their benefits:

> ***A covered entity shall not***, in providing or administering health-related insurance or other health related coverage … ***have benefit designs that discriminate on the basis of … disability***.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER
701 FIFTH AVENUE, SUITE 2560
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

45 C.F.R. §92.207(b)(2) (emphasis added). Importantly, Congress did ***not*** import the Americans with Disabilities Act ("ADA") into Section 1557, which includes a "safe harbor" for most disability discrimination by health insurers. *See* 42 U.S.C. §12201(c).

Section 1557 and its related regulations now ensure that the ***benefit design*** of health insurance plans cannot discriminate, even when such discrimination is the result of thoughtlessness or indifference. *See Crowder v. Kitagawa,* 81 F.3d 1480, 1484 (9th Cir. 1996), *citing Alexander v. Choate,* 469 U.S. 287, 295, 105 S. Ct. 712 (1985). The law ends the historic insurance practice of designing, marketing and administering health benefits in a manner that excludes coverage for persons with disabilities. After the ACA, categorical exclusions of coverage based solely on a disability, without any scientific or medical basis, are no longer permissible. *See* 81 Fed. Reg. 31405, 31407-08. People with disabilities now not only have access to insurance, they have real coverage as well.

Defendants Regence BlueShield and Cambia (hereinafter "Regence") design, market and administer a blanket exclusion of all benefits related to a federally-recognized disability, hearing loss:

> We do not cover … ***hearing examinations, programs or treatment for hearing loss***, including but not limited to, non-cochlear hearing aids (externally worn or surgically implanted) and the surgery and services necessary to implant them.

Dkt. No. 12-1, pp. 65 of 110 (emphasis added) (hereinafter, the condition is referred to as "Hearing Loss" and the exclusion as the "Hearing Loss Exclusion"). The Hearing Loss Exclusion, by its terms, is broadly applied to all treatment for hearing loss, including ***but not limited to,*** hearing aids, surgery, and office visits with audiologists. *Id.* If a claim is submitted with a diagnostic code for hearing loss, it is automatically denied, without regard for medical necessity. Such categorical exclusions, applied without any scientific or medical justification, are a form of disability discrimination.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER
701 FIFTH AVENUE, SUITE 2560
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

Regence argues that an exclusion of all coverage for a particular disability contained in a health insurance plan can ***never*** be discrimination on the basis of disability. Dkt. No. 11, pp. 10-11. Relying upon pre-ACA caselaw, Regence argues that a categorical exclusion of all coverage based solely on a disability is proper simply because the exclusion appears in insurance policies that govern benefits provided to both disabled and non-disabled insureds, despite ACA regulations and OCR guidance to the contrary. *Id.*, pp. 8-10, 20-24. Regence argues that to hold otherwise would have a "profound" effect on health insurance markets. *Id.*, p. 19. In essence, Regence argues that Section 1557 did nothing new.

Regence is wrong. Section 1557 significantly expanded anti-discrimination law as an integral part of comprehensive health insurance reform:

First, Section 1557 of the ACA extended the scope of anti-discrimination law to reach the content and design of private health insurance benefits. *Compare* 42 U.S.C. §18116(a) *with* 29 U.S.C. §794; *see* Sidney D. Watson, "Section 1557 of the Affordable Care Act: Civil Rights, Health Reform, Race, and Equity," 55 HOW. L.J. 855, 873 (Spring 2012) (hereinafter "Civil Rights, Health Reform"). Neither the ADA, Section 504 nor the caselaw from before the ACA provided this protection – that is why Section 1557 was enacted.

Second, OCR has concluded that a categorical exclusion of coverage based upon a disability, without any medical or scientific justification, is likely a form of disability discrimination. 81 Fed. Reg. 31405, 31408; *see Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778 (1984). Here, the plain language of the Exclusion eliminates all coverage solely because the treatment is provided for hearing loss, a federally-recognized disability. No scientific or medical reason for the exclusion is provided. The Exclusion fits precisely into the examples provided by OCR. *See* 81 Fed. Reg. 31429.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER
701 FIFTH AVENUE, SUITE 2560
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

Third, Regence's Hearing Loss Exclusion is not "evenhanded" coverage. *Choate,* 469 U.S. at 304. While Section 1557 does not force Regence to offer any specific coverage, once Regence designs a policy that offers coverage of "Office Visits," "Durable Medical Equipment" and other generic benefits, it must apply them in an "neutral, non-discriminatory" manner that does not deny "meaningful access" to insureds with disabilities. 81 Fed. Reg. 31434; *Crowder,* 81 F.3d at 1484. Regence's Exclusion impermissibly burdens insureds with hearing loss by denying them access to otherwise covered medically necessary treatment. In turn, insureds with hearing loss risk impaired health, isolation from their community, and for children like E.S., possible delays to their development. The Exclusion also denies insureds with hearing loss meaningful access to mandated external review procedures. *See* 45 C.F.R. §147.136(c); RCW 48.43.535(6). Insureds without hearing loss may appeal denials of claims for durable medical equipment to the mandated independent review process and have Regence's denials reversed based upon medical necessity. In contrast, insureds with hearing loss like E.S. who pursue such reviews can never win. Even if an independent reviewer concludes that the treatment is medically necessary as defined by the contract, the Regence Hearing Loss Exclusion blocks all coverage on the basis of disability.

Fourth, Regence relies on pre-ACA caselaw based upon the ADA's insurance "safe harbor" that was ***not*** imported into Section 1557. Unlike the ADA, Section 1557 has no "safe harbor" for insurers that engage in disability-based underwriting or administration of "risk." For that reason, the ADA caselaw relied upon by Regence is inapplicable. Evaluating pre-ACA caselaw that does not invoke the ADA insurance safe harbor reveals that, under Section 504 and Section 1557, categorical exclusions of coverage based upon a disability may be discriminatory when they deny an insured "meaningful access" to the benefits offered.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER
701 FIFTH AVENUE, SUITE 2560
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

Regence's Motion to Dismiss should be denied in full.

II. FACTS

A. Plaintiffs' Complaint Adequately Pled All Required Facts

The Complaint sets forth all the facts necessary for relief:

- Plaintiffs E.S. and Sternoff are enrolled in a Regence BlueShield insured plan. Dkt. No. 1, ¶¶1, 2, 16, 21.
- Plaintiffs are qualified individuals with a disability, whose hearing loss limits a major life activity, hearing. *Id.*, ¶¶1, 2, 16, 22; 29 U.S.C. §705(20)(B).
- Plaintiffs require outpatient office visits with their audiologists and durable medical equipment in the form of hearing aids, in order to treat their hearing loss. *Id.*, ¶¶16, 23.
- Plaintiffs' Regence insured health plan is a "health program or activity" part of which receives federal financial assistance. *Id.*, ¶24; 42 U.S.C. §18116; 45 C.F.R. §92.4. As a result, Regence is a "covered entity" and bound to comply with Section 1557, 42 U.S.C. §18116(a).
- Plaintiffs' Regence health plan covers outpatient medical/surgical office visits and durable medical equipment. Dkt. No. 1, ¶¶9, 29.
- Plaintiffs' Regence health plan excludes all coverage of treatment for hearing loss, including outpatient medical office visits and durable medical equipment, except for that related to cochlear implants. *Id.*, ¶¶9, 16, 18, 26-31.
- Plaintiffs alleged that Regence's Hearing Loss Exclusion was a "deliberate discriminatory action" because it is a categorical exclusion of coverage based upon a disability. *Id.*, ¶28.
- Plaintiffs alleged that any submission of a claim or appeal would have been futile. *Id.*, ¶32. Nonetheless, E.S. pursued her administrative appeal rights under her Regence plan, to no avail. *Id.*

B. But for Regence's Hearing Loss Exclusion, Plaintiffs' Treatment for Hearing Loss Would Be Covered

Plaintiffs' Regence policy covers outpatient medical office visits and durable medical equipment, among other services needed by insureds with hearing loss. *See* Dkt. No. 12-1, p. 45 out of 110 ("We cover office visits for treatment of Illness or Injury"), ("We

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER
701 FIFTH AVENUE, SUITE 2560
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

cover professional services, second opinions and supplies…that are generally recognized and accepted non-surgical procedures for diagnostic or therapeutic purposes in the treatment of Illness or Injury"); *id.*, pp. 46-47 out of 110 ("Durable Medical Equipment means an item that can withstand repeated use, is primarily used to serve a medical purpose , is generally not useful to a person in the absence of Illness or Injury and is appropriate for use in the Member's home"). These services are covered when medically necessary to treat an Illness or Injury, as defined by the plan. *Id.*, pp. 105-106 out of 110. ("Illness means congenital malformation that causes functional impairment; a condition, disease, ailment or bodily disorder other than an Injury and pregnancy"), ("Medically Necessary … means health care services or supplies that a Physician or other health care Provider, exercising prudent clinical judgment, would provide to a patient for the purpose of preventing, evaluating, diagnosing, or treatment an Illness, Injury, disease or its symptoms…"). Plaintiffs alleged that they require coverage of medically necessary outpatient office visits to an audiologist and durable medical equipment in the form of hearing aids to treat their disability of hearing loss. Dkt. No. 1, ¶16. But for the application of the Hearing Loss exclusion, the treatment would be covered. *See id.*

C. Regence Assured Plaintiffs that it Would Comply with Section 1557

Regence's policy confirms that it may not discriminate on the basis of disability. Regence contractually promised to comply with Section 1557 and its implementing regulations:

> **GOVERNING LAW AND BENEFIT ADMINISTRATION**
>
> The Contract will be governed by and construed in accordance with the laws of the United States of America and by the laws of the state of Washington, without regard to its conflict of law rules.

Dkt. No. 12-1, p. 10 out of 110. Regence further represented that "Regence complies with applicable Federal civil rights laws and does not discriminate on the basis of …

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER
701 FIFTH AVENUE, SUITE 2560
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

disability…. Regence does not exclude people or treat them differently because of … disability…." *Id.,* p. 19 out of 110. These representations are required when an insurer, receives federal financial assistance that subjects it to Section 1557. *See* 45 C.F.R. §92.8.

D. Regence Applied the Hearing Loss Exclusion to Deny Coverage of Medically Necessary Hearing Aids to Plaintiff E.S. and Sternoff and Others

Despite these representations, Regence designed, marketed and administered a standard exclusion that discriminates on the basis of disability: "***We do not cover routine hearing examinations, programs or treatment for hearing loss***." Dkt. No. 12-1, pp. 65 of 110 (emphasis added). On its face, the language eliminates all coverage for "routine hearing examinations, programs or treatment for hearing loss" (outpatient medical visits, durable medical equipment etc.) for a specific disability (hearing loss), with one exception, treatment related to cochlear implants.[1] Regence's claim that it is "undisputed" that the Hearing Loss Exclusion "applies to ***all insureds***, disabled and non-disabled alike" is without merit. Dkt. No. 11, p. 1:24-25. By its terms, and discovery will likely reveal, ***only*** persons ***with hearing loss*** or those who are regarded as having hearing loss significant enough to require treatment are denied coverage for the "programs or treatment" they need and that would be otherwise covered under the "Office Visits," "Durable Medical Equipment" and other generic provisions of the

[1] "Disability" under Section 504 includes persons "regarded as having such an impairment." *See* 29 U.S.C. §705(20)(B), incorporating 42 U.S.C. §12102(3). Undiagnosed insureds who are referred for treatment because their treating providers believe that they may have hearing loss severe enough to require further medical treatment, have a "disability" under Section 504 and Section 1557. While not all people with hearing loss require medical treatment for it, *see* Dkt. No. 11, p. 11, *citing Santiago Clemente v. Exec. Airlines, Inc,* 213 F.3d 25 (1st Cir. 2000), the proposed class definition here is limited to just those insureds with severe enough hearing loss as to require medical treatment for it, or those regarded as having such a serious condition. *See* Dkt. No. 1, ¶14.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER
701 FIFTH AVENUE, SUITE 2560
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

Regence insurance contract.[2] *See* Dkt. No. 1, ¶¶16, 23. Even if the Exclusion does not exclusively affect insureds with hearing loss, it may still result in discrimination. *See Crowder*, 81 F.3d at 1485.

III. ARGUMENT

A. Motion to Dismiss Legal Standard

Under Fed. R. Civ. P. 12(b)(6), the court construes a complaint in the light most favorable to the non-moving party. *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009).

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Id. (citation omitted). As a result, dismissal is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1167 (9th Cir. 2002).

B. The Affordable Care Act Extends Anti-Discrimination Protection to the Design of Health Insurance Coverage

The ACA was intended to provide comprehensive health care reform to ensure that every American, even if disabled, would have access to quality, affordable health care and health coverage. *See* Dkt. No. 11, p. 2. To achieve this goal, the ACA took aim at two types of discrimination in health insurance:

---

[2] Newborns receive covered hearing screenings as part of the ACA's mandated preventive coverage. *See* https://www.healthcare.gov/preventive-care-children/ (last visited 2/20/18). Discovery may reveal that hearing examinations are covered for insureds without hearing loss, such as when part of a diagnostic process for other medical conditions.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER
701 FIFTH AVENUE, SUITE 2560
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

> Insurance discrimination takes two primary forms: [1] discrimination in ***who can access*** insurance and [2] discrimination in ***what benefits (or content) they receive***.

Blake, Valerie K., "Restoring Civil Rights to the Disabled in Health Insurance," 95 NEB. L. REV. 1071, 1079 (2017) (hereinafter, "Restoring Civil Rights") (brackets and emphasis added). The ACA addresses both kinds of health insurance discrimination.

First, the ACA ended discrimination in access to health coverage. The ACA mandated guaranteed issue of health coverage and guaranteed renewability of that coverage. *See* 42 U.S.C. §§300gg-1; 300gg-2. It outlawed the use of pre-existing condition limitations, clauses that limited or excluded benefits for conditions that "pre-existed" the insured's enrollment in the health insurance coverage. *See* 42 U.S.C. §300gg-3(b)(1). The ACA also prohibited discrimination based on health status when determining eligibility for enrollment in health coverage. *See* 42 U.S.C. §300gg-4. All of these protections are designed to ensure that, post-ACA, people with various health conditions or disabilities would not be discriminated against when they apply to enroll in health coverage.

But legislating non-discrimination in enrollment alone is not sufficient to ensure that all people, regardless of health status, condition or disability, actually have comprehensive coverage. Without regulating the content of health insurance plans, insurers could simply design benefits to exclude coverage for health conditions that they previously avoided through medical underwriting and pre-existing condition clauses. As a result, Congress also ended the ***second*** form of insurance discrimination – discrimination in benefit design – as part of the ACA. That is why Section 1557 specifically expanded anti-discrimination law in Section 504 to "contracts of insurance." 42 U.S.C. §18116(a). In addition, Congress also mandated a standard benefit design with ten categories of Essential Health Benefit categories and ended annual and lifetime caps

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER
701 FIFTH AVENUE, SUITE 2560
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

on coverage. *See* 42 U.S.C. §§18022; 300gg-11.[3] These ACA requirements, taken together, ensure that covered entities like Regence cannot use benefit design as a means of excluding people with disabilities (as well as racial minorities, women, and the elderly) from the promise of truly comprehensive health coverage. *See* Restoring Civil Rights, 95 NEB. L. REV. at 1108-09; *Rumble v. Fairview Health Servs.*, 2015 U.S. Dist. LEXIS 31591, at *29, n.6 (D. Minn., March 16, 2015) ("Congress likely intended to create a new right and remedy in a new context without altering existing laws.").

The ACA, including Section 1557, was designed to have a transformative impact on the nation's health insurance markets. While Section 1557 applies traditional "enforcement mechanisms" available under Section 504 (such as a private cause of action) to Section 1557, it expressly ***expands*** the scope of disability discrimination in Section 504 to include "credits, subsidies or contracts of insurance" that receive federal financial assistance. 42 U.S.C. §18116(a). This is an ***expansion*** of the scope of Section 504. *See* 29 U.S.C. §794; Civil Rights, Health Reform, 55 HOW. L.J. at 873. Although principles of existing anti-discrimination law are imported into Section 1557, these principles are now applied in a new context – benefit design, marketing and administration of private health insurance plans.

Importantly, Congress did ***not*** incorporate the "enforcement mechanisms" available under the ADA to Section 1557. *See Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003) (Where Section 504 and the ADA have statutory distinctions relevant to a particular case, they should not be interpreted interchangeably). Congress rejected the ADA's "safe harbor" provision that would allow insurers to continue to use

[3] Congress added significant financial supports designed to stabilize the insurance market to compensate for significantly constraining medical underwriting and other methods of excluding potentially high-cost insureds from private health insurance. Restoring Civil Rights, 95 NEB. L. REV. at 1118. Thus, the elimination of insurers' ability to discriminate on the basis of disability was an intentional result of the ACA. *See* Dkt. No. 11, pp.19-20. Regence had since 2010 to prepare for this change. *See* 81 Fed. Reg. 31378, 31430.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER
701 FIFTH AVENUE, SUITE 2560
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

discriminatory underwriting or disability-based exclusions. *See* 42 U.S.C. §12201(c). Instead, Congress chose to import only the "enforcement mechanisms" from Section 504, which provides no such defense for health insurers. *See* 29 U.S.C. §794.

C. The Legal Standard for Pleading a Claim of Disability Discrimination Against a Health Insurer Under Section 1557

Plaintiffs and Regence agree on the basic legal framework. Regence does not dispute that a private cause under Section 1557 exists. *See Callum v. CVS Health Corp.*, 137 F. Supp. 3d 817, 848 (D.S.C. 2015) ("Section 1557 creates a private cause of action."); *Rumble,* 2015 U.S. Dist. LEXIS 31591, at *16, n.3; *Esparza v. Univ. Med. Ctr. Mgmt. Corp.*, 2017 U.S. Dist. LEXIS 142944, at *9 (E.D. La., Sep. 5, 2017). Both parties agree that Section 1557 references and incorporates Section 504 of the Rehabilitation Act, which prohibits discrimination on the basis of disability. 42 U.S.C. §18116(a). Section 1557 actually provides three independent bases for anti-discrimination protection:

> [A]n individual shall not, on the ground prohibited under … section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794), [1] be excluded from participation in, [2] be denied the benefits of, or [3] be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance including … contracts of insurance.

Id. (brackets added). Thus, the statutory language protects health insureds from access discrimination, content or benefit design discrimination and, a catchall, other discriminatory actions by health insurers.

To demonstrate a claim of discrimination on the basis of disability under Section 1557, a plaintiff must demonstrate that: (1) the plaintiff is a qualified individual with a disability, as defined in Section 504 of the Rehabilitation Act; (2) she was denied the benefits of a health program or activity which receives federal financial assistance; and (3) the denial is on the basis of the plaintiff's disability. *Esparza,* 2017 U.S. Dist. LEXIS 142944, at *21; *SEPTA v. Gilead Scis., Inc.,* 102 F. Supp. 3d 688, 699 (E.D. Pa. 2015); *see e.g.,*

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER
701 FIFTH AVENUE, SUITE 2560
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

Tovar v. Essentia Health, 187 F. Supp. 3d 1055, 1059 (D. Minn. 2016) (an allegation that a covered health program or activity provided a plaintiff with fewer benefits ***because of*** a protected status under Section 1557 "would clearly be discrimination under the ACA"); *Callum,* 137 F. Supp. 3d at 831.[4] While Regence ignores this test, it implicitly concedes that only the third prong of the test is disputed. Dkt. No. 11, pp. 10-11.

The first two prongs of the Section 1557 disability discrimination test are easily met:

First, Plaintiffs allege that they are qualified individuals with a disability (due to their hearing loss) under Section 504 of the Rehabilitation Act and therefore Section 1557. Dkt. No. 1, ¶¶1, 2, 16, 22; 29 U.S.C. §705(20)(B); *see Esparza,* 2017 U.S. Dist. LEXIS 142944, at *40.

Second, it is also undisputed that Regence is a "covered entity" subject to Section 1557 by reason of federal financial assistance. *See* 42 U.S.C. §18116(a); 45 C.F.R. §92.4. Plaintiffs alleged it. Dkt No. 1, ¶¶3-4, 24-25. Regence's obligation to comply with Section 1557 is also reflected in Regence's health plan. Dkt. No. 12-1, pp. *Id.*, pp. 10 out of 110; 45 C.F.R. §92.8.

The only issue in dispute is whether Plaintiffs have plausibly pled a claim that Regence's Hearing Loss Exclusion denies Plaintiffs and similarly situated others benefits ***because of*** their disability.

D. Section 1557's Implementing Regulations Prohibit Categorical Exclusions of Coverage Based Solely upon a Disability

The ACA directed health insurers to comply with federal anti-discrimination law in the design of health benefits and authorized federal rulemaking by OCR on this issue.

---

[4] Regence's claim that these cases do not support Plaintiffs' theory, makes no sense. *See* Dkt. No. 11, p. 17. All stand for the proposition that a Section 1557 claim is sufficiently pled if the plaintiff asserts that a covered health entity denied the plaintiff a benefit ***because of*** a disability. *See e.g., Tovar*, 187 F. Supp. 3d at 1059. That is exactly what Plaintiffs have done.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER
701 FIFTH AVENUE, SUITE 2560
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

42 U.S.C. §18116(a); (c). Such regulations are an "important source of guidance" on the meaning of Section 1557. *See Choate*, 469 U.S. at 304 n.24. Where, as here, OCR was entrusted to apply traditional discrimination principles to a new subject area, considerable deference to OCR's rulemaking and guidance is proper. *Chevron,* 467 U.S. at 844; *see also Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 413, 99 S. Ct. 2361 (1979) (identification of examples of disability discrimination is an "important responsibility" of federal regulators).

Section 1557's implementing regulations and OCR commentary confirm that the ACA expanded the scope of anti-discrimination law to apply to the content of health insurance contracts. Under the federal rules, a benefit design that uses categorical exclusions based solely upon an individual's disability is a form of illegal discrimination:

> ***A covered entity shall not***, in providing or administering health-related insurance or other health related coverage … ***have benefit designs that discriminate on the basis of … disability.***

45 C.F.R. §92.207(b)(2) (emphasis added). OCR provided examples of some forms of benefit design discrimination. For example, OCR concluded that "an explicit, categorical (or automatic) exclusion or limitation of coverage for all health services related to ***gender transition*** is unlawful ***on its face***." 81 Fed. Reg. 31429 (emphasis added); *see* 45 C.F.R. §92.207(b)(4).[5] OCR explained that the specific rules related to gender transition merely reflect the same basic anti-discrimination principles to be applied to exclusions based upon other protected classes:

> We clarify that ***OCR's approach in applying basic nondiscrimination principles***, as discussed in the proposed rule under § 92.207(b)(5) relating

[5] *Franciscan Alliance, Inc. v. Burwell,* 227 F. Supp.3d 660, 669 (N.D. Tex. 2016) stayed Section 1557 rulemaking related to ***only*** transgender health and termination of pregnancy. The injunction was issued based on legal claims unrelated to OCR's determination that categorical exclusions of health coverage based upon a protected class, without support in scientific or medical evidence, may be illegal discrimination. *Id.; see* 81 Fed. Reg. 31433. OCR's rules related to disability discrimination are in full effect.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER
701 FIFTH AVENUE, SUITE 2560
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

> to coverage for specific health services related to gender transition, ***is the same general approach that OCR will take when evaluating denials or limitations of coverage for other types of health services***.

81 Fed. Reg. 31433 (emphasis added); *see also, id.* at 31429. OCR commented that it singled out coverage issues related to gender transition to provide "additional guidance in areas for which application of these principles may not be as familiar."[6]

Thus, the same basic principle of non-discrimination holds true if the words "hearing loss" are substituted for "gender transition." An explicit, categorical (or automatic) exclusion or limitation of coverage for all health services related to ***[hearing loss]*** is unlawful on its face. *See* 81 Fed. Reg. 31429. A categorical exclusion of coverage for outpatient office visits and durable medical equipment for hearing loss is illegal when insureds without hearing loss have full coverage for medically necessary outpatient office visits and durable medical equipment, as well as meaningful access to external review.

The Exclusion also discriminates because it provides insureds with hearing loss "with an aid, ***benefit*** or service ***that is not as effective as that provided to others.***" 45 C.F.R. §92.101(b)(2)(i) (incorporating 45 C.F.R. §84.4(b)(1)(iii)). Insureds with hearing loss are provided a durable medical equipment benefit that excludes all medically necessary equipment for their health condition. That benefit is not "as effective" a benefit as the durable medical equipment benefit provided to all other insureds. This is particularly true when considering that blanket Exclusion prohibits insureds with hearing loss meaningful access to mandated independent review procedures. *See* RCW 48.43.535(6). Equally effective ***access to benefits*** is required. 81 Fed. Reg. 31407.

This basic principle of non-discrimination is confirmed by the two examples of discriminatory exclusions described by OCR:

---

[6] "Section 1557: Frequently Asked Questions," U.S. Department of Health & Human Services, FAQ 14, https://www.hhs.gov/civil-rights/for-individuals/section-1557/1557faqs/index.html, (last visited 01/27/18).

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER
701 FIFTH AVENUE, SUITE 2560
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

> In the proposed rule, we did not propose to require plans to cover any particular benefit or service, but we provided that ***a covered entity cannot have coverage that operates in a discriminatory manner***. For example, the preamble stated that [1] ***a plan that covers inpatient treatment for eating disorders in men but not women*** would not be in compliance with the prohibition on discrimination based on sex. Similarly, [2] ***a plan that covers bariatric surgery in adults but excludes such coverage for adults with particular developmental disabilities would not be in compliance*** with the prohibition on discrimination based on disability.

81 Fed. Reg. 31429 (emphasis and brackets added). In both examples, an insurance plan contains an illegal categorical exclusion that is based upon an insured's protected status, including disability. Other examples of possible benefit design discrimination include "placing most or all prescription medications that are used to treat a specific condition on the highest cost formulary tiers," and "applying age limits to services that have been found clinically effective to all ages." 81 Fed. Reg. 31434, n. 258.[7] Just as health insurance coverage for bariatric surgery cannot arbitrarily exclude persons with developmental disabilities, so too is it impermissible for durable medical equipment to be generally covered when medically necessary for all insureds except when equipment is needed to treat an insured's hearing loss.

At the very least, the existence of this kind of categorical exclusion merits the factual inquiry described by OCR:

> [I]f a plan limits or denies coverage for certain services or treatment for a specific condition, ***OCR will evaluate whether coverage for the same or a similar service or treatment is available to individuals outside of that protected class*** or those with different health conditions ***and will evaluate the reasons for any differences in coverage.*** Covered entities will be expected to provide a ***neutral nondiscriminatory reason*** for the denial or limitation that is not a pretext for discrimination.

[7] *See also* https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/2016-Letter-to-Issuers-2-20-2015-R.pdf, pp. 36-37 (last visited 2/1/18). Federal regulators concluded that health insurers likely discriminate when they design coverage that categorically excludes benefits for hearing aids for insureds who are age six and older. *Id.*

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER
701 FIFTH AVENUE, SUITE 2560
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

81 Fed. Reg. 31433 (emphasis added). "[D]etermining whether a particular benefit design results in discrimination will be a fact-specific inquiry."[8] 81 Fed. Reg. 31434.

Regence's reasons for imposing the Exclusion are important. OCR indicated that categorical exclusions based upon a disability may be permissible if justified by scientific or medical reasons. 81 Fed. Reg. 31405. However, an insurer's reasons cannot be arbitrary or a pretext for discrimination. 81 Fed. Reg. 31408. It is important to consider whether this is an "across-the-board categorization [that] is now recognized as outdated and not based upon the current standard of care." *See* 81. Fed. Reg. 31429 (referring to gender dysphoria exclusions, but applicable to exclusions related to other protected classes). An exclusion that is simply "historical" or due to "industry practice" rather than based upon scientific or medical justification is likely the kind of arbitrary rationale that is a pretext for discrimination.

Regence goes so far as to argue that the federal guidance described above shows that the "final rule only changed the law with respect to one issue: sex discrimination as applied to gender dysphoria and transgender individuals." Dkt. No. 11, p. 23:3-7. As a matter of law, Regence is wrong. Section 1557 expanded the scope of anti-discrimination law to apply to private health benefits, without the "safe harbor" or other limitations present in the ADA. The federal rulemaking reflected this expansion when it promulgated 45 C.F.R. §92.207(b)(2). OCR's commentary applies to disability discrimination, just as it does to other protected classes.

There can be no doubt that OCR intended its rules and commentary to apply beyond transgender health coverage. When the rules were promulgated, OCR

---

[8] Regence implies that the Exclusion exists due to state law. *See* Dkt. No. 11, p. 3, *citing to* WAC 284-43-5640(7)(b)(i), (c)(iv). That regulation merely codified Regence's existing Exclusion. *See* WAC 284-43-5600(1) (Regence plan selected as the "benchmark" plan). The fact that the state regulation codified the Exclusion is not dispositive of its legality under federal anti-discrimination law. *See O.S.T. v. Regence Blueshield,* 181 Wn.2d 691, 700 n.9, 335 P.3d 416 (2014).

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER
701 FIFTH AVENUE, SUITE 2560
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

recognized "that some covered entities will have to make changes to their health insurance coverage or other health coverage to bring that coverage into compliance with this final rule." 81 Fed. Reg. 31430. OCR delayed its enforcement of the benefit design regulation to give health insurers time to bring their coverage into compliance:

> [T]o the extent that provisions of this rule require changes to health insurance or group health plan benefit design (***including covered benefits, benefit limitations or restrictions and cost-sharing mechanisms, such as coinsurance, copayments and deductibles***) such provisions, as they apply to health insurance or group health plan benefit design have an applicability date of the first day of the first plan year (in the individual market, policy year) beginning on or after January 1, 2017.

Id. (emphasis added); *see also* 81 Fed. Reg. 31378 (same).[9] The parenthetical about the benefit changes that may be required is not limited to just those changes related to gender transition. OCR anticipated that Section 1557 would require a significant change in how health benefits are structured related to all protected classes. The reason for federal regulators' delayed enforcement is obvious and explicit: Section 1557 imposed broad new requirements on insurers with respect to benefit design.

E. *Alexander v. Choate* Supports Plaintiffs' Claim

Alexander v. Choate, heavily relied upon by Regence, actually supports the plaintiffs' claim. *Id.*, 469 U.S. at 287. In *Choate,* persons with disabilities challenged a plan to reduce in-patient hospitalization benefits in Tennessee's Medicaid program from 20 days to 14 days, alleging that it had a disparate impact on people with disabilities in violation of Section 504. *Id.,* at 290. The Supreme Court issued several key holdings in the case: ***First,*** it concluded that no proof of "discriminatory animus" was required for

[9] Regence points to OCR's commentary on the potential cost of the rule changes to justify its argument that Section 1557 did nothing new. Dkt. No. 11, p. 22, *citing* 81 Fed. Reg. 31446. That provision merely states that the "great majority" of health entities (such as hospitals and medical providers) had been covered by anti-discrimination law for years, while recognizing that the law represents a change for others, in this case health insurers.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER
701 FIFTH AVENUE, SUITE 2560
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

a disability discrimination claim under Section 504, since disability discrimination could be the result of "thoughtlessness and indifference." *Id.* at 294-297. ***Second,*** the Supreme Court also concluded that a claim for disability discrimination may sometimes be demonstrated based upon disparate impact. *Id.* at 298-299.[10] *Id.* ***Third,*** the Supreme Court articulated a test for determining disability discrimination when a facially neutral policy is applied: A benefit itself "cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled." *Id.* at 301.

Applying those holdings to the 14-day inpatient hospitalization limit, the Supreme Court concluded that the disputed benefit was "neutral on its face" because it was not disability-based. *Id.* at 302. It then found that the same benefit, although limited, was provided to all enrollees, and that enrollees with disabilities were not denied "meaningful access" to their Medicaid benefits. *Id.*

Regence's exclusion of all "programs and treatments for hearing loss" is a far cry from being a neutral, across-the-board benefit. On its face, Regence's exclusion calls out a particular disability – hearing loss – and limits the benefits provided. Only insureds with hearing loss have their contractual Durable Medical Equipment and Office Visit benefits (among others) limited. Regence's assumption that the Hearing Loss Exclusion is "neutral" since it appears in plans issued to insureds with and without hearing loss should be roundly rejected. "[I]t is well established that federal statutes prohibiting discrimination are violated when adverse action is taken against an individual ***on the basis of the protected trait***." *Boots v. Nw. Mut. Life Ins. Co.*, 77 F. Supp. 2d 211, 218

[10] Regence's assertion that a facially neutral exclusion that disproportionately impacts insureds with a particular disability can ***never*** be illegal discrimination, is not the law. *See* Dkt. No. 11, p. 12:16-18.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER
701 FIFTH AVENUE, SUITE 2560
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

(D.N.H. 1999) (emphasis added).[11] Since the Hearing Loss Exclusion is disability-based, it discriminates against insureds with hearing loss, denying them the coverage available to insureds without hearing loss.

F. Regence's Hearing Loss Exclusion Burdens Insureds with Hearing Loss and Denies Them Meaningful Access to Benefits

Even if the Hearing Loss Exclusion were facially neutral – and it is not – it is still discriminatory because it denies Plaintiffs and other insureds "meaningful access" to benefits. In *Crowder*, the Ninth Circuit considered whether a facially-neutral law, a quarantine rule for dogs, discriminated against visually-impaired persons who rely upon guide dogs. *Id.*, 81 F.3d at 1481. On summary judgment, Plaintiffs presented evidence that showed that the quarantine denied them "meaningful access" to benefits:

> Although Hawaii's quarantine requirement applies equally to all persons entering the state with a dog, ***its enforcement burdens visually-impaired persons in a manner different and greater than it burdens others***. Because of the unique dependence upon guide dogs among many of the visually-impaired, Hawaii's quarantine effectively denies these persons - the plaintiffs in this case - meaningful access to state services, programs, and activities while such services, programs, and activities remain open and easily accessible by others. The quarantine, therefore, discriminates against the plaintiffs by reason of their disability.

Id. at 1484 (emphasis added). When an entity disproportionately burdens people with disabilities, but not the general population, "meaningful access" is denied. *Cal. Found. for Indep. Living Ctrs. v. Cty. of Sacramento*, 142 F. Supp. 3d 1035, 1063-64 (E.D. Cal. 2015).

Regence's exclusion burdens persons with hearing loss in at least three ways: ***First,*** the exclusion cuts insureds with hearing loss off from one of the most critical treatments they need, burdening them far more and differently than the few, if any, non-

---

[11] *Traynor v. Turnage* does not assist Regence either. *Id.*, 485 U.S. 535 (1988). In *Traynor,* the Supreme Court concluded that the plaintiffs were not denied benefits due solely to their disability. *Id.*, at 549-550. Instead, the Court concluded that the benefit was denied due to some degree of "willful misconduct" that lead them to become disabled, not the disability itself. *Id.*

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER
701 FIFTH AVENUE, SUITE 2560
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

disabled insureds who are denied "routine hearing examinations." The loss of medically necessary treatment for hearing loss may lead to other health problems, as well as excluding and isolating hearing impaired insureds. *See* https://www.asha.org/articles/untreated-hearing-loss-in-adults/ (last visited 2/22/18). For children, like E.S., the lack of treatment can have significant developmental impact. *See* https://www.asha.org/public/hearing/effects-of-hearing-loss-on-development/ (last visited 2/22/18). Regence's insureds with hearing loss are denied meaningful access to benefits that would cover clinically effective treatment to ameliorate their disability.

Second, the Exclusion applies without any consideration of medical necessity. It applies solely because of the insured's diagnosis with hearing loss. Insureds with hearing loss have no opportunity to have present evidence of their medical need for the treatment and have that information actually considered by Regence. Other insureds are routinely provided this opportunity.

Third, insureds with hearing loss are denied meaningful access to external review when they seek coverage for their hearing aids. *See* RCW 48.43.535(6). When insureds with hearing loss like E.S. seek external review, there is no hope that the decision will be overturned. Even if the external reviewer concludes that the durable medical equipment sought is medically necessary, the blanket Hearing Loss Exclusion blocks all coverage. In sum, the Hearing Loss Exclusion not only excludes all coverage, but renders any appeal – to Regence or even to the mandated independent review process – futile. There is nothing "evenhanded" about the exclusion.

G. Regence's ADA caselaw Does Not Apply to Section 1557

Regence relies on ***pre-ACA caselaw*** in which courts decided that private health or disability coverage did not discriminate on the basis of disability under the ***ADA*** when

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER
701 FIFTH AVENUE, SUITE 2560
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

imposing various exclusions on benefits.[12] *See* Dkt. No. 11, pp. 13-16, *citing to Krauel v. Iowa Methodist Medical Ctr.*, 95 F.3d 674 (8th Cir. 1996); *Micek v. City of Chi.*, 1999 U.S. Dist. LEXIS 16263, at *22 (N.D. Ill., Sep. 30, 1999); *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 558 (7th Cir. 1999); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 608 (3d Cir. 1998); *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1101-02 (10th Cir. 1999); *Modderno v. King*, 82 F.3d 1059, 1061 (D.C. Cir. 1996); *P.C. v. McLaughlin*, 913 F.2d 1033, 1041 (2d Cir. 1990). These cases do not apply to ***Section 1557*** disability discrimination claims.

Regence claims that *Krauel* is "most on point." Dkt. No. 11, p. 14:7. In *Krauel*, a plaintiff ***without a qualifying disability*** challenged a private insurance plan's exclusion of infertility treatment as discriminatory under the ADA. *Id.*, 95 F.3d at 677. The Eighth Circuit concluded that it must first determine whether the challenged exclusion is "disability based," relying on EEOC guidance that if the plan "singles out a particular disability (*e.g.*, ***deafness,*** AIDS, schizophrenia), a discrete group of disabilities (*e.g.*, cancers, muscular dystrophies, kidney diseases), or disability in general (*e.g.*, non-coverage of all conditions that substantially limit a major life activity)" then it is disability-based. *Id.* (emphasis added) Based upon EEOC guidance, the *Krauel* court concluded that challenged exclusion of all treatment for infertility was not disability-based. *Id.* Instead, it found that the exclusion was facially-neutral, applying to persons with and without disabilities. *Id.* at 678. In contrast, here, Regence's exclusion of all "programs and treatment for hearing loss" is disability-based. It singles out a particular condition, hearing loss, which is a qualifying disability under Section 504. 28 C.F.R. §39.103. The exclusion significantly limits the contractual benefits for durable medical

[12] Neither case cited by Regence for its reliance on ADA caselaw addressed the fact that the ADA has a "safe harbor" for insurers, while Section 504 does not. *See* Dkt. No. 11, p. 11:4-5, *citing Vinson v. Thomas*, 288 F.3d 1145, 1152 n.7 (9th Cir. 2002), and *Zukle v. Regents of the University of California*, 166 F.3d 1041, 1045 n.11 (9th Cir. 1999).

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER
701 FIFTH AVENUE, SUITE 2560
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

equipment and office visits for insureds with hearing loss, while providing full benefits for insureds without hearing loss. This case is not the same as *Krauel.*

In addition, *Krauel* relies upon the ADA's insurance "safe harbor" to reach the conclusion that unless the plaintiff can demonstrate that the exclusion is part of a "subterfuge to evade the purposes of the ADA," no disability discrimination can be found. *Krauel,* 95 F.3d at 679; *see also Modderno,* 82 F.3d at 1064-1065; *Doe*, 179 F.3d at 561; *Micek,* 1999 U.S. Dist. LEXIS 16263 at *22; *Ford,* 145 F.3d at 611; *Kimber,* 196 F.3d at 1101-1102. But, as described above, Section 504 has no insurance "safe harbor." *See* 29 U.S.C. §794. Under Section 1557, an insurer may not justify a disability-based exclusion as a legally acceptable form of "underwriting, classifying or administering risk." *See* 42 U.S.C. §12201(c)(1). Nor must a plaintiff demonstrate that the exclusion is a "subterfuge" before discrimination can be found. *See id.* None of these cases inform whether, under Section 1557, a categorical disability-based exclusion is illegal.

Regence's reliance on ***long-term disability benefits*** cases is similarly misplaced. *See e.g., Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1107-08 (9th Cir. 2000); *Parker v. Metropolitan Life Ins. Co.,* 121 F.3d 1006, 1015-16 (6th Cir. 1997); *Rogers v. Dep't of Health & Envtl. Control,* 174 F.3d 431 (4th Cir. 1999); *EEOC v. CNA Ins. Cos.,* 96 F.3d 1039 (7th Cir. 1996); *Ford,* 145 F.3d at 611; *Kimber,* 196 F.3d at 1102.[13] Caselaw about ***long-term disability policies*** is inapplicable to post-ACA claims of ***health insurance*** discrimination, because Section 1557 only applies to "health programs or activities" of covered entities. In *Weyer,* the Ninth Circuit concluded that since Congress did not

[13] Regence's long-term disability benefits cases are not universally followed. *See Tompkins v. United Healthcare of New Eng., Inc.,* 203 F.3d 90, 95 n.4 (1st Cir. 2000) (discriminatory denial of health coverage benefits because of a disability may state a claim under the ADA); *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association, Inc.*, 37 F.3d 12, 19-20 (1st Cir. 1994) (same); *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 30 (2d Cir. 1999) (denial of life insurance coverage due to a disability may state a claim under the ADA).

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER
701 FIFTH AVENUE, SUITE 2560
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

include language in the Americans with Disabilities Act that prohibited long-term disability insurers from treating individuals with mental disabilities differently, the court would not read such a requirement into that Act:

> [H]ad Congress intended to control which coverages had to be offered by employers, it would have spoken more plainly because of the well-established marketing process to the contrary. Insurers have historically and consistently made distinctions between mental and physical illness in offering health and disability coverage….

Id. at 1117 (internal quotations omitted); *see also* Dkt. No. 11, p. 19. With the ACA, Congress has now "spoken more plainly" to outlaw insurers' methods of excluding coverage for people with disabilities with respect to ***health*** insurance benefits. Insurers, like Regence, can no longer exclude benefits for health insurance coverage based upon an insured's disability.

Regence relies on a third category of cases involving state public assistance programs, not private health insurers. *See Rodrigues v. City of New York*, 197 F.3d 611, 618 (2d Cir. 1999); *Cohon v. State Dep't of Health*, 646 F.3d 717, 721 (10th Cir. 2011); and *P.C. v. McLaughlin*, 913 F.2d 1033, 1041 (2d Cir. 1990). None involved a blanket exclusion based solely upon a disability: Both *Rodrigues* and *Cohon* involved facially neutral, across-the-board limits on Medicaid benefits, that were provided evenhandedly to all Medicaid recipients. *Rodrigues,* 197 F.3d at 618 ("safety monitoring" was not offered as a covered benefit to any Medicaid enrollee); *Cohon*, 646 F.3d at 726 (all enrollees in the Medicaid program were subject to the same financial limits). *P.C. v. McLaughlin,* involving an Olmstead-like claim, was criticized as inconsistent with *Choate,* because the Second Circuit required evidence of "discriminatory animus" to survive a motion to dismiss. *See I.D. v. Westmoreland Sch. Dist.,* 788 F. Supp. 634, 640 n.10 (D.N.H. 1992). In any event, it is superseded by *Olmstead v. L.C.,* 527 U.S. 581 (1999); *see also* 81 Fed. Reg. 31407 ("[S]ince Section 1557 explicitly incorporates Section 504's prohibitions against

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER
701 FIFTH AVENUE, SUITE 2560
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

disability-based discrimination, it therefore encompasses a ban on the unnecessary segregation of individuals with disabilities").

IV. CONCLUSION

Section 1557 represents an expansion of anti-discrimination law to reach discrimination in the design of health insurance coverage. Categorical exclusions of coverage based solely on an insured's disability that are not based on scientific or medical evidence, are discriminatory. For that reason, Plaintiff has adequately pled a claim for discrimination under Section 1557 to challenge Regence's Hearing Loss Exclusion, a blanket exclusion of all coverage for hearing loss, except for cochlear implants. Regence's Motion to Dismiss should be denied in full.

DATED: February 23, 2018.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER

/s/ Eleanor Hamburger
Eleanor Hamburger (WSBA #26478)
Richard E. Spoonemore (WSBA #21833)
701 Fifth Avenue, Suite 2560
Seattle, WA 98104
Tel. (206) 223-0303; Fax (206) 223-0246
Email: ehamburger@sylaw.com
rspoonemore@sylaw.com
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2018, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

- **Brad S. Daniels**
  brad.daniels@stoel.com, darise.holland@stoel.com, steve.galloway@stoel.com
- **Eleanor Hamburger**
  ehamburger@sylaw.com, matt@sylaw.com, theresa@sylaw.com
- **Maren Roxanne Norton**
  maren.norton@stoel.com, sea_ps@stoel.com, docketclerk@stoel.com, heidi.wilder@stoel.com, sherry.toves@stoel.com
- **Richard E Spoonemore**
  rspoonemore@sylaw.com, matt@sylaw.com, rspoonemore@hotmail.com, theresa@sylaw.com

I further certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants:

- (No manual recipients)

DATED: February 23, 2018, at Seattle, Washington.

/s/ Eleanor Hamburger
Eleanor Hamburger (WSBA #26478)

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER
701 FIFTH AVENUE, SUITE 2560
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246