HON. ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANDREA SCHMITT, on her own behalf, and on behalf of all similarly situated individuals,

Plaintiff,

v.

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

Defendants.

NO. 2:17-cv-01611-RSL

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

NOTED FOR CONSIDERATION: February 9, 2018

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STATUTES

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I. INTRODUCTION

The Affordable Care Act provided ground-breaking, comprehensive health care reform aimed at ensuring 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, ensure that people with disabilities, many of whom had been historically excluded from health insurance benefits, would finally be able to obtain coverage for their medical conditions. Congress eliminated the use of pre-existing condition limitations, lifetime and annual caps on coverage, required guaranteed issue of health coverage to all, guaranteed renewability of that coverage, and established ten broad categories of required benefits, among other consumer protections. But the ACA did more than just expand ***access*** to insurance. Section 1557, the ACA's anti-discrimination law, ensured that people with disabilities would have real coverage for their conditions. For the very first time, Congress extended anti-discrimination law to health benefits provided under contracts of insurance:

> ***[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); *see also* 45 C.F.R. §92.207(b)(2) ("***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***.") (emphasis added). Section 1557 ends the historic practice of insurer's designing health benefits that exclude coverage for persons with disabilities. After the ACA, categorical exclusions of coverage based solely on a disability are no longer permissible. People with disabilities now not only have access to insurance, they have real coverage.

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Kaiser's exclusion of benefits due to hearing loss is a textbook example of a discriminatory benefit design. The plain language of the exclusion reveals that the sole basis for denying coverage is the mere fact that treatment is provided for hearing loss:

> ***Exclusions:*** ***Programs or treatments for hearing loss*** or hearing care including, but not limited to, externally worn hearing aids or surgically implanted hearing aids and the surgery and services necessary to implant them other than for cochlear implants; hearing screening tests required under Preventive Services.

Dkt. No. 18-1, pp. 29 of 66, (emphasis added) (hereinafter, the condition is referred hereafter to as "Hearing Loss" and Kaiser's exclusion as the "Hearing Loss Exclusion."). The Hearing Loss Exclusion is broadly applied to all treatment for hearing loss, including ***but not limited to,*** hearing aids, surgery, hearing tests, etc. *Id.* In the Kaiser insurance policy, there is only one exception to the Hearing Loss Exclusion, treatment for cochlear implants, which are appropriate only for a relatively small number of people with hearing loss. *Id.* All other treatment for Hearing Loss is excluded. Kaiser excludes coverage based not on scientific or medical evidence, but based on the presence of a disability. On its face, thi9s is a form of deliberate disability discrimination. *See* 81 Fed. Reg. at 31429 ("[A]n explicit, categorical (or automatic) exclusion or limitation of coverage for all health services related to [a disability] is unlawful ***on its face***.").

Kaiser argues that Section 1557 is nothing new. Dkt. No. 17, p. 9 ("ACA §1557 was not creating new discrimination standards for disability discrimination in health plans."). It ignores the expansion of anti-discrimination law under Section 1557, because it relies on ***pre-ACA*** cases for the proposition that insurers can apply disability-based exclusions so long as the same discriminatory exclusion is offered to both disabled and non-disabled insureds. *Id.,* pp. 11-17. It also tries to shift its liability under Section 1557 to Schmitt's employer which did not purchase an additional Hearing Loss rider that Kaiser designed and marketed (likely for additional premium payments), in addition to

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the Kaiser standard policy. *Id.*, pp. 2, 23. In addition, Kaiser claims that f Schmitt lacks standing. *Id.,* pp. 21-23.

Each of these arguments is easily refuted. Kaiser's Hearing Loss Exclusion is illegal discrimination, pure and simple:

First, Section 1557 of the ACA extended anti-discrimination law to the content of health insurance coverage for the very first time. 42 U.S.C. §18116(a); 45 C.F.R. §92.207(b)(2). Authorities before the ACA did not provide this protection – that is why Section 1557 was enacted.

Second, Kaiser's Hearing Loss Exclusion is a textbook example of a discriminatory exclusion. All coverage (with one exception for cochlear implants) is eliminated solely because the treatment is provided for a disability. Insureds with hearing loss find their out-patient medical office visits, surgeries, and durable medical equipment excluded when provided to treat their disability. At the same time, other non-hearing-impaired insureds have full access to outpatient medical office visits, surgeries and durable medical equipment for their conditions. This is not "evenhanded treatment." Kaiser insureds with hearing loss are denied meaningful access to the clinically-effective health benefits they need and that, but for the Hearing Loss Exclusion, would be covered. That is the very definition of discrimination.

Third, Kaiser cannot shift its liability to the employer. Under Section 1557, only "covered health entities" like Kaiser are liable for discrimination. *See* 45 C.F.R. §92.101(a)(2); 45 C.F.R. §92.208.

Fourth, Schmitt has standing to pursue this litigation because it would be futile for her to submit claims for her ongoing outpatient medical office visits to her audiologist in light of Kaiser's Hearing Loss Exclusion. *Taniguchi v. Schultz*, 303 F.3d 950, 957 (9th Cir. 2002) ("[S]tanding does not require exercises in futility"); Dkt. No. 21, *Exh. B.* Not

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only is the exclusion clear on its face, Schmitt was specifically told by Kaiser's customer service representative that there was no coverage.

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

II. FACTS

A. Schmitt's Complaint Adequately Pled All Required Facts

The Complaint sets forth all the facts necessary for relief:

- Schmitt is enrolled in a Kaiser health plan. Dkt. No. 12, ¶¶1, 13, 18.
- Schmitt is a qualified individual with a disability, whose hearing loss limits a major life activity, hearing. *Id.*, ¶¶1, 13, 18; 29 U.S.C. §705(20)(B).
- Schmitt requires outpatient office visits with her audiologist and durable medical equipment in the form of hearing aids, in order to treat her hearing loss. *Id.*, ¶¶13, 20; s*ee* Dkt. No. 21, *Exh. A*.
- Schmitt's Kaiser health plan is a "health program or activity" part of which receives federal financial assistance. Dkt. No. 12, ¶21; 42 U.S.C. §18116; 45 C.F.R. §92.4. As a result, Kaiser is a "covered entity" and bound to comply with Section 1557, 42 U.S.C. §18116(a).
- Schmitt's Kaiser health plan covers outpatient medical/surgical office visits and durable medical equipment. Dkt. No. 12, ¶¶6, 13.
- Schmitt's Kaiser 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.*, ¶¶13, 23-28.
- Schmitt alleged that Kaiser's Hearing Loss Exclusion was a "deliberate discriminatory action" because it is a categorical exclusion of coverage based upon a disability. *Id.*, ¶26.
- Schmitt inquired as to whether Kaiser would cover her office visits with her audiologist and her hearing aids, but was informed by Kaiser, consistent with its Plan, that there was no coverage. *Id.*, ¶13.
- Given the unambiguous language of the Hearing Loss Exclusion and the representations of Kaiser's customer service representative, any submission of a claim or appeal by Schmitt would have been futile. *Id.*, ¶30; *See* Dkt. No. 21, *Exh. B*.

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B. But For Kaiser Hearing Loss Exclusion, Schmitt's Treatment For Hearing Loss Would Be Covered

Schmitt's Kaiser policy covers outpatient medical office visits and durable medical equipment. *See* Dkt. No. 18-1, p. 40 out of 66 ("Covered outpatient medical and surgical services in a provider's office, including chronic disease management."); p. 22 out of 66 ("Durable medical equipment: Equipment which can withstand repeated use, is primarily and customarily used to service a medical purpose, is useful only in the presence of an illness or injury and is used in the member's home."). Schmitt alleged that she requires coverage of medically necessary outpatient medical office visits to an audiologist and needed medical equipment, in the form of hearing aids, to treat her chronic medical condition and disability of hearing loss. Dkt. No. 12, ¶13.

Kaiser's policy confirms that it may not discriminate on the basis of disability in its services, including the design and administration of benefits. *See* Dkt. No. 18-1, p. 14 out of 66, ¶E, p. 65-66 out of 66. Kaiser contractually promised to follow both Section 1557 ***and*** its implementing federal regulations:

> **8. Compliance with Law.**
>
> The Group and Group Health [now Kaiser] ***shall comply with all applicable*** state and ***federal laws and regulations*** in performance of this Agreement.

Id., p. 3 out of 66 (emphasis added). Kaiser further represented that it "does not discriminate on the basis of…disability. Group Health [now Kaiser] does not exclude people or treat them differently because…disability…." *Id.*, p. 65-66 out of 66. These representations are required when an insurer, such as Kaiser, receives federal financial assistance that subjects it to Section 1557. *See* 45 C.F.R. §92.8.

Despite these representations, Kaiser designed, marketed and administered a standard exclusion that discriminates on the basis of disability: Hearing Loss. Specifically, all "programs or treatments for hearing loss" are excluded, with one exception, treatment related to cochlear implants:

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Hearing Examinations and Hearing Aids	Preferred Provider Network	Out of Network
Cochlear implants when in accordance with Group Health clinical criteria Covered services for cochlear implants include implant surgery, pre-implant testing, post-implant follow-up, speech therapy, programming and associated supplies (such as transmitter cable and batteries) Hearing exams for hearing loss and evaluation and diagnostic testing for cochlear implants.	**Hospital-Inpatient:** After Deductible, Member pays 10% plan Coinsurance Hospital-Inpatient: After Deductible, Member pays 10% plan Coinsurance **Outpatient Services:** After Deductible, Member pays 10% Plan Coinsurance Enhanced Benefit: After Deductible Member pays 5% Plan Coinsurance	**Hospital-Inpatient:** After Deductible, Member pays 30% plan Coinsurance Hospital-Inpatient: After Deductible, Member pays 30% plan Coinsurance **Outpatient Services:** After Deductible, Member pays 30% Plan Coinsurance
Hearing aids including hearing aid examinations.	Not covered; ***Member pays 100%*** of all charges	Not covered; ***Member pays 100%*** of all charges
Exclusions: ***Programs or treatments for hearing loss*** or hearing care ***including***, but not limited to, ***externally worn hearing aids or surgically implanted hearing aids and the surgery and services necessary to implant them other than for cochlear implants***; hearing screening tests required under Preventive Services.		

Dkt. No. 18-1, pp. 29 of 66 (emphasis in original and added). On its face, the language does not simply exclude "Class 1" hearing aids as asserted by Kaiser. *See* Dkt. No. 17, pp. 4-5. All coverage for "programs or treatment" (surgeries, outpatient medical visits, durable medical equipment, programs, etc.) for a specific disability, hearing loss, is excluded (with one exception, treatment related to cochlear implants). In sum, the only reason P Schmitt and other Kaiser insureds with hearing loss are denied coverage for needed outpatient medical treatment by an audiologist and/or hearing aids, a type of

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durable medical equipment is Kaiser's standard Hearing Loss Exclusion, a categorical exclusion based on a specific disability.

III. ARGUMENT

A. Motion To Dismiss Legal Standard

Under FRCP 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. 17, p. 2. To achieve this goal, the ACA took aim at two types of discrimination in health insurance.

> 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.

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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 limitation, 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 applies anti-discrimination law to "contracts of insurance" for the very first time. 42 U.S.C. §18116(a) (Anti-discrimination prohibitions extended to "any health program or activity, any part of which is receiving Federal financial assistance, ***including*** … ***contracts of insurance.***") (emphasis added). In addition, Congress also mandated a standard benefit design with ten categories of Essential Health Benefit categories and ended annual and lifetime caps on coverage. *See* 42 U.S.C. §§18022; 300gg-11.[1] These

[1] 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. *Compare* Dkt. No. 17, p.13:8-12 (Kaiser implies that Congress would not have intended to end discrimination in benefit design because it would "destabilize the insurance industry" *citing to Conway v. Standard Ins. Co.,* 23 F. Supp. 2d 1199, 1202 (E.D. Wash. 1998)).

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ACA requirements, taken together, ensure that covered entities like Kaiser 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; *see also Rumble v. Fairview Health Servs.*, 2015 U.S. Dist. LEXIS 31591, at *29 (D. Minn., March 16, 2015) ("[L]ooking at Section 1557 and the Affordable Care Act as a whole, it appears that Congress intended to create a new, health-specific anti-discrimination cause of action") *see also id.*, n.6 ("Congress likely intended to create a new right and remedy in a new context without altering existing laws.").

C. The Legal Standard For Pleading A Claim Of Disability Discrimination Under Section 1557

Schmitt and Kaiser agree on the basic legal framework. Kaiser 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.

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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. *SEPTA v. Gilead Scis., Inc.*, 102 F. Supp. 3d 688, 699 (E.D. Pa. 2015); *Esparza v. Univ. Med. Ctr. Mgmt. Corp.*, 2017 U.S. Dist. LEXIS 142944, at *21 (E.D. La., Sep. 5, 2017); *see also e.g., Tovar v. Essentia Health*, 187 F. Supp. 3d 1055, 1059 (D. Minn. 2016) (an allegation that a covered health program or activity gave a plaintiff fewer benefits ***because of*** a protected status under Section 1557 "would clearly be discrimination under the ACA") (emphasis added). Kaiser also agrees that this is the proper test. Dkt. No. 17, p. 11:3-7.

Kaiser does not dispute the first two prongs of the Section 1557 disability discrimination test are met here:

First, Schmitt alleges that she is a qualified individual with a disability due to her hearing loss under Section 504 of the Rehabilitation Act and therefore Section 1557. Dkt. No. 1, ¶¶1, 13, 18; 29 U.S.C. §705(20)(B); *see Esparza,* 2017 U.S. Dist. LEXIS 142944, at *40 (individual with hearing loss adequately pled claims under Section 1557 and Section 504 for deliberate discrimination on the basis of that disability); Dkt. No. 18-3 (Schmitt required treatment with audiology examination and hearing aids).

Second, it is also undisputed that Kaiser is a "covered entity" subject to Section 1557 by reason of federal financial participation. *See* 42 U.S.C. §18116(a); 45 C.F.R. §92.4. Plaintiff Schmitt alleged it, *see* Dkt No. 1, ¶¶8, 21-22, and Kaiser's obligation to comply with Section 1557 and its implementing regulations is reflected in Kaiser's health plan. Dkt. No. 18-1, pp. *Id.,* pp. 3, 65-66, out of 66; 45 C.F.R. §92.8.

The only issue in dispute, apart from Kaiser's objection to Schmitt's Article III standing (addressed in Section III.E below), is whether Schmitt has plausibly pled a claim

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that Kaiser's Hearing Loss Exclusion denies Schmitt and similarly situated others benefits based upon their disability.

D. Section 1557 And Its Implementing Regulations Prohibit Categorical Exclusions Of Coverage Based Upon Disability

The ACA directed health insurers to comply with federal anti-discrimination law in the design of health benefits. 42 U.S.C. §18116(a) (anti-discrimination requirements are expressly applied to "contracts of insurance"). Section 1557's implementing regulations and related federal regulators' commentary confirm that the ACA expanded anti-discrimination law to apply to the content of health insurance contracts.[2] Under the federal rules, a benefit design that uses categorical exclusions based 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). Federal regulators identified various forms of benefit design discrimination. For example, the federal regulators 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. at 31429 (emphasis added); *see* 45 C.F.R. §92.207(b)(4). The regulators 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."[3] Thus, the same basic principle

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[2] Both parties agree that the Court must give effect to the "unambiguously expressed intent of Congress" as well as consideration of the federal regulations and commentary. *See* Dkt. No. 17, pp. 18-19, *citing Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 845, 104 S.Ct. 2778 (1984).

[3] "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). Although Kaiser complains that the commentary is unrelated to hearing loss, (Dkt. No. 17, pp. 10-11), there is nothing in the ACA to indicate that Congress intended non-discrimination in benefit design to apply just to gender discrimination. Instead, the federal regulators indicated that the rules addressing transgender health care were nothing more than the application of the basic non-discrimination principles in 45 C.F.R. §92.207(b)(2) to a particular type of health exclusion. *See* 81 Fed. Reg. at 31429.

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of non-discrimination holds true if the words "hearing loss" are substituted for "gender transition." *See* Dkt. No. 12, ¶6. A categorical exclusion of coverage for outpatient office visits, surgery, durable medical equipment for hearing loss is similarly illegal when insureds without hearing loss have full coverage for outpatient office visits, surgery, durable medical equipment.

This basic principle of non-discrimination is revealed by the other examples of discriminatory exclusions described by the regulators:

> 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 ***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, ***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. at 31429 (emphasis added); *see also* 81 Fed. Reg. at 31434, n.258 (identifying other examples of benefit design that might be discriminatory, including "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.").[4] Similarly, when a plan covers outpatient medical office visits and durable medical equipment treatment for its non-hearing impaired insureds but excludes most coverage for office visits and durable medical equipment treatment when provided for hearing loss, that exclusion is prohibited. An exclusion based upon and explicitly tied to a disability can never be a "neutral, non-discriminatory standard." *See*

[4] These examples are also found in the Final 2016 Letter to Issuers in the Federally-facilitated Marketplace (Feb. 20, 2015), in which the Center for Medicaid and Medicare Services ("CMS") described hearing aids as a treatment intervention that is "clinically effective at all ages." *See* 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). CMS concluded that health insurers likely discriminate when they design coverage that limits benefits for hearing aids to only insureds who are age six and under. *Id.*

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81 Fed. Reg. at 31434. The Hearing Loss Exclusion, based solely on a disability, operates in a patently discriminatory manner.

As described above, Kaiser argues that Section 1557 does not apply to its Hearing Loss Exclusion for the following reasons:

1. Kaiser claims that Section 1557 was never intended to change the "scope" of existing disability discrimination law to reach the design of health benefits. *See* Dkt. No. 17, pp. 6-11, 18-20;

2. Even if Section 1557 applies to benefit design, the Hearing Loss Exclusion is a facially neutral non-discriminatory benefit. *See id.*, pp. 11-18; and

3. Even if the Hearing Loss Exclusion is a form of disability discrimination, the blame for the discrimination rests with Schmitt's employer, which Kaiser claims failed to purchase a Hearing Loss rider. *Id.*, pp. 21-23.

As explained below, Kaiser is wrong on all three grounds.

1. Section 1557 significantly expanded anti-discrimination law.

Section 1557 and its federal regulations apply anti-discrimination law to health insurance benefit design. 42 U.S.C. §18116(a). Federal regulators were explicit about this intended expansion: "Section 1557 ***extends*** the grounds for discrimination found in the nondiscrimination laws cited in the statute … to certain health programs and activities." 81 Fed. Reg. at 31387 (emphasis added).

Kaiser and other health insurers were well aware that Section 1557 would require changes in the design of health benefits within their health insurance plans. Several commenters complained in 2016 that the effective date of the final Section 1557 rulemaking was not enough time to "revise their health insurance coverage or other health coverage to comply with the regulation." 81 Fed. Reg. at 31430. The federal regulators countered that health insurers were already subject to the anti-discrimination law, which took effect six years earlier: "Section 1557 has been in effect since its passage as part of the ACA in March 2010 and covered entities have been subject to its

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requirement since that time." *Id.* Nonetheless, the federal regulators 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. at 31430. To address the insurers' concerns, the regulators delayed their enforcement of the benefit design regulation until January 1, 2017 or the renewal of the covered entity's health plan thereafter:

> ***[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. at 31378 (same).[5] The reason for this delay is obvious and explicit: Section 1557 imposed new requirements on insurers with respect to benefit design.

Since Section 1557 expands anti-discrimination law to include the content of health insurance plans, Kaiser's pre-ACA cases rejecting anti-discrimination claims related to the design of health benefits are unavailing. *See e.g., Kraul v. Iowa Methodist Medical Ctr.*, 95 F.3d 674 (8th Cir. 1996);[6] *Micek v. City of Chi.*, 1999 U.S. Dist. LEXIS 16263,

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[5] Kaiser claims that the federal regulators "unequivocally stated" that "the same preexisting requirements existent under the enumerated civil rights laws … apply to ACA §1557." Dkt. No. 17, p. 9:18-22. But the section it quotes, while stating that "the great majority" of covered entities were already subject to anti-discrimination laws, indicated that Section 1557 reached some new entities (such as health insurers and health insurance coverage).

[6] *Kraul* is additionally unhelpful to Kaiser because the case did not involve an exclusion that "singles out a particular disability (e.g., ***deafness,*** aids, schizophrenia)" but rather excluded all treatment for infertility, which it determined was not a disability. *Id.* at 677 (emphasis added). It recognized that exclusions based upon specific, federally-recognized disabilities may be illegal discrimination. *Id.*

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at *22 (N.D. Ill., Sep. 30, 1999); *Doe v. Mut. of Omaha Ins. Co.,* 179 F.3d 557, 558 (7th Cir. 1999).[7] These pre-ACA cases have been superseded.

Other cases cited by Kaiser are simply irrelevant. For example, Kaiser references a line of cases involving the question of whether the Americans with Disabilities Act prohibits discrimination on the basis of mental disability in the provision of ***long-term disability benefits*** by employers. *See e.g., Parker v. Metropolitan Life Ins. Co.,* 121 F.3d 1006, 1015-16 (6th Cir. 1997); *Conway v. Standard Ins. Co.,* 23 F. Supp. 2d 1199, 1202 (E.D. Wash. 1998); *Ford v. Schering-Plough Corp.,* 145 F.3d 601 (3rd Cir. 1998); *Wilson v. Globe Specialty Prods.,* 117 F. Supp. 2d 92, 95-96 (D. Mass. 2000) (citing other cases); *Modderno v. King,* 82 F.3d 1059, 1065-66 (D.C. Cir. 1996). Of course, the legal analysis applied to ***long-term disability policies*** in those cases is inapplicable to post-ACA claims of ***health insurance*** discrimination, because Section 1557 only applies to "health programs or activities" of covered entities. For example, in a pre-ACA case, *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1107-08 (9th Cir. 2000), the Ninth Circuit concluded that since Congress did not 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. With the ACA, Congress has now "spoken more plainly" with respect to the benefit design of ***health*** insurance benefits. Insurers, like Kaiser, can no longer exclude benefits for health insurance coverage based upon an insured's disability.

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[7] In *Micek* and *Doe,* both courts conclude that the benefit design of private health insurance policies was not regulated by the ADA. *Micek v. City of Chi.,* 1999 U.S. Dist. LEXIS 16263 at *22 (N.D. Ill., Sept. 30, 1999); *Doe,* 179 F.3d at 558. In contrast, the later-enacted ACA, including Section 1557, directly regulates the content of health insurance policies administered by covered entities. 42 U.S.C. §18116(a).

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Moreover, past cases interpreting the Americans with Disabilities Act may not be applicable to Section 1557. Congress specifically acted to eliminate discrimination in health insurance coverage in Section 1557 by invoking the protections of Section 504 of the Rehabilitation Act, ***not*** the Americans with Disabilities Act. 42 U.S.C. §18116(a). That distinction is important here. *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 may not be interpreted interchangeably). This was not an oversight. Section 504, unlike the ADA, has no "safe harbor" that would allow insurers to continue to use discriminatory underwriting or disability-based exclusions. *See* 42 U.S.C. §12201(c)(1). Linking the anti-discrimination duty to Section 504, rather than the ADA ensured that benefit design would be subject to scrutiny, just as the federal regulators concluded.

Kaiser also relies upon *SEPTA v. Gilead* to support its argument that Section 1557 did nothing new. Dkt. No. 17, p. 15. That case involved a lawsuit by an employer and two insureds against a pharmaceutical company for price-gouging related to Hepatitis C medication. *SEPTA*, 102 F. Supp. 3d at 695. *SEPTA* did not involve a challenge to a health insurance exclusion based upon a federally-recognized disability. *See id.* Indeed, the *SEPTA* court concluded that a claim for discrimination might have been plausible if the plaintiffs had pled that "Gilead is excluding individual plaintiffs from purchasing its drugs on the basis of membership in a protected class." *Id.* at 700. Even the *SEPTA* court would have likely concluded that an exclusion based solely on a disability, like the Hearing Loss Exclusion, violates Section 1557.

2. The Hearing Loss Exclusion is a form of deliberate discrimination.

Disability discrimination can be demonstrated in two ways: intentional discrimination and discrimination as a result of a facially neutral policy, typically referred to as "disparate impact." *See Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996). Both types of disability discrimination can and do occur. *Id., citing to Helen L. v.*

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DiDario, 46 F.3d 325, 335 (3d Cir. 1995) ("[A]lthough discrimination against the disabled normally results from thoughtlessness and indifference, not invidious animus, such animus did exist.") (internal quotations omitted). Intentional discrimination under Section 504 may be demonstrated by showing that "the policymaker acted with at least deliberate indifference to the strong likelihood that a violation of federally protected rights will result from the implementation of the [challenged] policy, training, protocol or custom." *Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001).

Kaiser's Hearing Loss Exclusion eliminates all coverage for "programs or treatments for hearing loss," including (but not limited to) outpatient medical office visits, surgery, tests and assessments and durable medical equipment related to hearing loss, apart from cochlear implants.[8] Dkt. No. 18-1, p. 29 out of 66. Based upon the plain language of Kaiser's standard exclusion, these treatments and programs are excluded based solely on a disability—hearing loss. Medical necessity, appropriateness of treatment and clinical efficacy are not considered at all. Only the disability of the insured is relevant. For example, if outpatient office visits with licensed providers are medically necessary to treat hearing loss, the treatment is excluded. If outpatient office visits with licensed providers are medically necessary to treat another health condition, the service is covered. This is, on its face, discriminatory. Kaiser, in fact, concedes that a denial of coverage of a service to persons with a disability while offering coverage of the same service to those without that disability, is discrimination. *See* Dkt. No. 17, p. 20:6-9. Yet this is exactly what Kaiser's Hearing Loss Exclusion does.

To avoid this logical conclusion, Kaiser rewrites its plan language, claiming that it merely excludes coverage of "Class 1" hearing aids and needed treatment related to

[8] This is a broad and sweeping exclusion. Treatment for hearing loss is not limited to just hearing aids and examinations related to procuring hearing aids. Some patients need surgery, prescription medications, outpatient procedures, etc. to treat their hearing loss. *See* http://www.hearingloss.org/content/types-causes-and-treatment (last visited 2/1/18) (describing the range of treatment that can be provided for hearing loss).

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those hearing aids.[9] *See* Dkt. No. 17, p. 4:22-24. Accordingly, Kaiser claims that the exclusion is a "facially neutral" benefit limitation that is applied equally to all insureds, regardless of their disability. *Id.* pp. 17-18. With Kaiser's rewritten plan language, it argues that Class 1 hearing aids and related treatment are denied to all enrollees, whether or not they have hearing loss.

First, as a factual matter, Kaiser's Hearing Loss Exclusion does not exclude only "Class 1" hearing aids and treatment related to those hearing aids. That language appears nowhere in the plan. Whether or not Kaiser could redraft its Hearing Loss Exclusion to only exclude "Class 1" hearing aids without violating Section 1557 is not at issue here. This case is about whether Kaiser can use the existing Hearing Loss Exclusion to eliminate nearly all coverage for otherwise covered services, solely because those services are sought to treat an insured's disability.[10]

Second, as written, the Hearing Loss Exclusion is not a "facially neutral policy." Rather, it is a textbook example of an explicit, categorical exclusion based solely upon an insured's disability. 45 C.F.R. §92.207(b)(2); *see* 45 C.F.R. §92.207(b)(4); 81 Fed. Reg. at

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[9] In an effort to recast the exclusion as only eliminating coverage of Class 1 hearing aids, Kaiser asserts that it also covers Bone Anchored Hearing Aids in its clinical coverage policy for cochlear implants. Dkt. No. 17, pp. 4-5; Dkt. No. 18-2. BAHAs are significantly different from cochlear implants, although they are also surgically implanted. *See* https://www.swedish.org/blog/2012/07/what-is-the-difference-between-a-cochlear-implant-and-a-bone-anchored-implant (last visited 01/26/2018). Of course, even if true, Kaiser insureds who need BAHAs and who review the standard Kaiser plan language are informed that ***surgically implanted hearing aids other than cochlear implants are excluded***. *See* Dkt. No. 18-1, p. 29 of 66. Insureds have no notice from the plan language that BAHA coverage is even available. In another case, Kaiser's predecessor, Group Health Cooperative, was taken to task for administering coverage in a manner that deviated from the actual exclusionary language of the insurance plan. *See Z.D. v. Grp. Health Coop.*, 2012 U.S. Dist. LEXIS 76503, at *41 (W.D. Wash. June 1, 2012). Kaiser cannot use its alleged hidden grant of coverage for BAHAs to rewrite its Hearing Loss Exclusion.

[10] Of course, even if Kaiser were to change its Plan to exclude "Class 1" hearing aids and all related treatment, it would need to demonstrate a valid scientific or medical basis for that exclusion. *See* 81 Fed. Reg. at 31405 ("Scientific or medical reasons can justify distinctions based on the grounds enumerated in Section 1557."); 31407 (covered entities may not provide qualified individuals with disabilities with benefits that are "not as effective as that provided to others."); 45 C.F.R. §92.101(b)(2)(i), *citing to* 45 CFR §84.4(b)(1)(iii); 81 Fed. Reg. at 31408 ("[A]rbitrary age, visit or coverage limitations could constitute discrimination…. [W]here differential treatment is justified by scientific or medical evidence, such treatment will not be considered discriminatory.").

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31429; Dkt. No. 12, ¶7. An exclusion of nearly all treatment for a particular, federally-recognized disability, is never a "neutral, non-discriminatory standard." 81 Fed. Reg. at 31434; *see also* 81 Fed. Reg. at 31435 (Exclusions of a particular treatment must be "evidence-based and nondiscriminatory."). To be sure, there may be difficult cases to adjudicate about the scope and enforcement of Section 1557. This is not one of them.

Third, Kaiser may argue that since it provides for some (albeit very limited) coverage of Hearing Loss treatment when it comes to cochlear implants, its Exclusion is not "categorical." The problem for Kaiser is that the plain language of the insurance plan excludes all other treatment solely because of an insured's disability. Excluding coverage based upon a disability, rather than a scientific or medical justification, is facially discriminatory, even if a limited exception is made. *See* 81 Fed. Reg. at 31434, n.258 ("[P]lacing ***most*** or all prescription medications that are used to treat a specific condition on the highest cost formulary tiers" may be discriminatory) (emphasis added). *See also Crowder*, 81 F.3d at 1484-85 (State discriminated on the basis of disability against individuals with vision impairment by imposing a 120-day quarantine on dogs, including guide dogs, even when limited access was provided to guide dogs during the quarantine period). At this stage, Schmitt and the Court have no information as to Kaiser's justifications for coverage of cochlear implants or the exclusion of all other coverage. 81 Fed. Reg. at 31405 (A scientific or medical reason is required to justify an exclusionary practice). It is plausible that Kaiser has retained the exclusion simply due to "thoughtlessness and indifference," which is a form of deliberate discrimination. *Crowder*, 81 F.3d at 1484. Even if Kaiser had such a medical justification for benefit exclusion of Class 1 hearing aids, it was required to draft the exclusion in a non-

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discriminatory fashion. As presently written, the Hearing Loss Exclusion is a categorical exclusion based solely upon disability, and Kaiser's motion to dismiss must be denied.[11]

3. Even under a "disparate impact" analysis, dismissal is improper.

Even if the Court concludes that the Hearing Loss Exclusion is a "facially neutral policy"—and it is not—Schmitt has still sufficiently pled a case of discrimination. The line of Section 504 cases cited by Kaiser, starting with *Alexander v. Choate,* 469 U.S. 290, 105 S.Ct. 712 (1985), hold that under Section 504 a plaintiff may demonstrate disability discrimination based upon evidence of disparate impact. *Id*. at 295-97. Specifically, *Choate* concluded that where facially neutral conduct has an "unjustifiable disparate impact on the handicapped," illegal discrimination occurs. *Id.* at 299.

Thus, when applying Section 504 to determine whether a facially neutral claim results in discrimination, courts consider whether disabled persons were denied "meaningful access" to benefits as a result of a facially neutral policy, taking into account evidence related to the impact of the policy on persons with disabilities and the defendants' justification for the policy or conduct. *See Crowder,* 81 F.3d at 1484. Such inquiry is fact-intensive: "[D]iscrimination based on health status, claims experience, medical history or genetic information can, ***depending on the facts***, have a disparate impact that results in discrimination on a basis prohibited by Section 1557…." 81 Fed. Reg. at 31405 (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.

[11] Kaiser argues that Plaintiff must demonstrate a *prima facie* case for intentional discrimination to avoid FRCP 12(b)(6) dismissal. *See* Dkt. No. 17, p. 20, n.10. Not true. Even the case cited by Kaiser, *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817 (1973), holds that plaintiffs must be afforded a "fair opportunity" to obtain discovery to show that the disputed action or policy was deliberate discrimination. And, whether the *McDonnell Douglas* standard (based upon the ADA) or another test applies here, is a matter to be addressed by the Court after further briefing. *See* Restoring Civil Rights, 95 NEB. L. REV. at 1119 *citing to* 81 Fed. Reg. at 31433 (identifying different factors advanced by federal regulators for determining discrimination in the design or administration of health insurance benefits).

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2015). Even the *Choate* court relied upon factual evidence of the disparate impact the disputed policy would have on disabled individuals. *Choate,* 469 U.S. at 290-91, n.3 and n.4. Kaiser'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. 17, p. 11:14-16. If the Court concludes that Kaiser's Hearing Loss Exclusion is a "facially neutral" policy, this case must proceed to discovery related to the disparate impact of the policy on persons with hearing loss, and Kaiser's justifications for the policy, among other issues.

4. Kaiser, not Schmitt's employer, is liable for discrimination.

Kaiser does not dispute that it designed, marketed and sold the health insurance coverage under which Schmitt receives benefits. Yet, it points the finger at Schmitt's employer, Columbia Legal Services, claiming (based upon hearsay) that the law firm's broker knew that a special rider could have been purchased for hearing loss coverage, but Columbia failed to buy it. *See* Dkt. No. 17, pp. 22-23; Dkt. No. 19.

Kaiser's attempt to shift its liability to Columbia fails for at least three reasons:

First, Section 1557 only applies to "covered entities" like health insurers. Liability for designing, marketing and administering a discriminatory health insurance policy rests with the insurer that sold the policy. Employers like Columbia are not liable for an insurer's discriminatory health benefit plan, unless the employer receives Federal financial assistance in order to fund employee health benefits, or the employer is in the business of health care or health coverage. *See* 45 C.F.R. §92.101(a)(2); 45 C.F.R. §92.208. As the federal regulators explained:

> [U]nless the primary purpose of the Federal financial assistance is to fund employee health benefits, we proposed that ***Section 1557 would not apply to an employer's provision of employee health benefits***, where the provision of those benefits is the only health program or activity operated by the employer.

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80 Fed. Reg. at 31437. The regulators anticipated that an insurer might make the exact argument offered by Kaiser here. 80 Fed. Reg. at 31438. They concluded that the insurer, as the "covered entity," is the party subject to enforcement under Section 1557.

Second, in the contract between Columbia and Kaiser, Kaiser acknowledged that it must comply with all relevant state and federal laws and regulations. Dkt. No. 18-1, p. 3 out of 66. It also assured Columbia and its employees that it would not "treat people differently" based upon their disability. *Id.,* pp. 65-66 out of 66. As a matter of law and contract, Kaiser was responsible to design, market and administer a health insurance policy that does not discriminate. It breached that contractual and statutory duty.

Third, Kaiser's segregation of Hearing Loss coverage into a separate rider sold for an addition fee is just another form of disability discrimination. The federal regulators suggested that "placing most or all prescription medications that are used to treat a specific condition on the highest cost formulary tiers" may be a form of benefit design discrimination. 81 Fed. Reg. at 31434, n.258. So too would be excluding Hearing Loss coverage from the standard health policy, while offering the coverage to only those employers who were willing to pay extra for such a rider. In any event, whether the Hearing Loss rider is an additional form of disability discrimination cannot be addressed at this stage of the litigation. Kaiser's attempt to defeat a claim with the submission of an untested declaration on a motion to dismiss is improper. *Carr v. United Healthcare Servs.*, 2016 U.S. Dist. LEXIS 182561, at *7 (W.D. Wash., May 31, 2016) ("[A] motion to dismiss is not the vehicle by which to raise factual allegations to defeat a claim.").

E. Plaintiff Schmitt Has Standing

To demonstrate Article III standing:

> [A] plaintiff must show (1) [she] has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the

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> defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 180-81, 120 S.Ct. 693 (2000).

Plaintiff Schmitt has pled sufficient facts for Article III standing. She is an individual with hearing loss who needs both outpatient medical visits with an audiologist and hearing aids to treat her condition. Dkt. No. 12, ¶¶1, 13, 18, 20. She is enrolled in the Kaiser plan. *Id*. Based upon the plain language of her Kaiser health insurance coverage, there is no coverage for her audiology examinations (including annual examinations and ongoing visits for cleaning and fitting of her hearing aids) or her hearing aids.[12] Dkt. 18-1, p. 29 out of 66. She also contacted a Kaiser customer service representative who confirmed that no coverage was available. Dkt. No. 12, ¶13.

Kaiser complains that Schmitt does not have standing because she did not first submit a futile claim to Kaiser to review. Dkt. No. 17, pp. 21-23. The Ninth Circuit has "consistently held that standing does not require exercises in futility." *Taniguchi v. Schultz*, 303 F.3d 950, 957 (9th Cir. 2002). Where a plaintiff challenges a standard exclusion that unambiguously applies to the plaintiff, there is no need for the plaintiff to submit a futile claim for the excluded benefit. *See id., citing Desert Outdoor Adver., Inc. v. City of Moreno Valley,* 103 F.3d 814, 818 (9th Cir. 1996). This is true even when the plaintiff challenges a standard health insurance exclusion as violating federal law. *See e.g., J.T. v. Regence BlueShield*, 291 F.R.D. 601, 611 (W.D. Wash. 2013). In *J.T.*, the court concluded that the plaintiff, a child challenging a health insurer's blanket exclusion of coverage for certain mental health treatments, provided evidence that she was a member of the putative class and had been prescribed the disputed treatment. *Id.* The fact that she had not presented a claim for coverage of the treatment to the insurer did not bar standing.

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[12] Schmitt has required ongoing outpatient office visits with her audiologist while she has been enrolled with Kaiser to adjust the hearing aids and earmolds, etc. *See* Dkt. No. 21, *Exh. A*. In addition, her hearing aids could be broken, lost or need replacement at any time. She has a present, live need for coverage to treat her hearing loss.

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Id. "Under the circumstances of this case, the court finds that [plaintiff's] lack of action is not evidence that she is disinterested in treatment or that the harm she faces is purely speculative." *Id.* Article III standing was confirmed in that case.

In any event, Kaiser's recent denial of coverage for a hearing aid requested by a putative class member, Elizabeth Mohundro, shows the futility of submitting any such claim. Dkt. No. 21, *Exh. B.* Any concerns that the Court may have about Ms. Schmitt's standing are addressed by Plaintiff's Motion to Amend the complaint to add Ms. Mohundro as a second named plaintiff. *See* Dkt. No. 20.

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 are, on their face, discriminatory. For that reason, Plaintiff has adequately pled a claim for discrimination under Section 1557 to challenge Kaiser's Hearing Loss Exclusion, a blanket exclusion of nearly all coverage for hearing loss, except for cochlear implants. Kaiser's Motion to Dismiss should be denied in full.

DATED: February 2, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on February 2, 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:

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