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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' SECOND MOTION TO DISMISS

Noted for Consideration: January 29, 2021

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

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SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

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SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

STATUTES

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

REGULATIONS

OTHER AUTHORITIES

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

I. INTRODUCTION

In *Schmitt v. Kaiser Health Plan of Washington*, 965 F.3d 945, 949 (9th Cir. 2020), the Ninth Circuit held that disabled insureds may challenge health benefit designs that discriminate on the basis of disability. This decision, the sister appeal linked to this case, was ground-breaking. In a case of first impression, the Ninth Circuit held that "[t]he ACA specifically prohibits discrimination in plan benefit design, and a categorical exclusion of treatment for hearing loss would raise an inference of discrimination against hearing disabled people, notwithstanding that it would also adversely affect individuals with non-disabling hearing loss." *Id.* The holding was extended when, just last month, the Ninth Circuit further held that the unique impact of certain health benefit designs on disabled insureds may result in disability discrimination ***even when the program also burdens many non-disabled insureds.*** *Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 2020 U.S. App. LEXIS 38333, at *17-18 (9th Cir., Dec. 9, 2020) (*citing Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996)).[1]

Concluding that insurers may be liable for discriminatory benefit design, the Ninth Circuit reversed and remanded *Schmitt* and this case. The Court directed Plaintiffs to amend their complaints because the Hearing Loss Exclusion in *Schmitt* (similar to the Exclusion in this case) was not a "categorical exclusion." Since the plans included coverage for cochlear implants, the Court was unable to determine under the existing allegations whether that limited benefit adequately served the needs of disabled hearing-impaired insureds. The Ninth Circuit directed Plaintiffs to amend their complaint to include allegations that the insurers' "coverage of cochlear implants is inadequate to serve the health needs of hearing disabled people as a group" and that "the [Hearing

[1] On January 15, 2021, shortly before filing this responsive briefing, an Order was issued in *Doe* denying CVS's motion for panel rehearing and rehearing en banc. *See Doe v. CVS*, Case No. 19-15074, Dkt. No. 140.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

Loss E]xclusion is likely to predominately affect disabled persons." *Schmitt*, 965 F.3d at 959, n.8.

Plaintiffs followed the Ninth Circuit's instructions. In the Amended Complaint, Plaintiffs included all the additional allegations identified by the Ninth Circuit. Plaintiffs allege that Regence's Hearing Loss Exclusion does not meet the needs of the most hearing disabled insureds, and that coverage offered for cochlear implants was inadequate to meet the needs of hearing disabled insureds as a group. As described in the Amended Complaint, only approximately 5% of people with disabling hearing loss are potentially eligible for treatment with cochlear implants. *See* Dkt. No. 32, ¶¶66-73, 72, 107. Thus, cochlear implant coverage fails to provide meaningful access to treatment for all but a tiny portion of the hearing disabled population. *Id.*

Plaintiffs also specifically allege that the Hearing Loss Exclusion eliminates coverage that would meet the needs of the vast majority of hearing disabled insureds. Dkt. No. 32, ¶¶51-65, 104-110. Plaintiffs allege that they are denied coverage of medically necessary hearing treatment and equipment, the precise coverage they need to effectively and meaningfully treat their condition. Dkt. No. 32, ¶¶62-63, 84-88, 90-92. That is all that is necessary to plead a claim of disability discrimination under Section 1557. *Schmitt*, 965 F.3d at 959.

Regence, nonetheless, moves a second time to dismiss this litigation. Its objections are twofold: ***First,*** Regence argues that Plaintiffs fail to allege "discriminatory intent or animus" necessary for this legal theory. Dkt. No. 37, p. 2. ***Second,*** it claims that the "fit" between persons with disabling hearing loss and the treatment subject to the hearing loss exclusion is both over- and under-inclusive. *Id.* Like Goldilocks, Regence claims that only a perfect fit can result in discrimination, and anything that is too big or too small will not do. Both arguments are simply an attempt re-litigate issues that were decided by the Ninth Circuit in *Schmitt* and *Doe*.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

In *Schmitt,* the Court concluded that an allegation that a benefit design is discriminatory is necessarily an allegation of an intentional act. "The claim at issue here – that Kaiser designed its plan benefits in a discriminatory way – inherently involves intentional conduct." *Schmitt,* 965 F.3d at 954, *citing Mark H. v. Lemahieu,* 513 F.3d 922, 936 (9th Cir. 2008). It also provided guidance as to the allegations necessary to proceed to discovery in this matter. *Id.,* at 959-960. It also directly addressed Regence's over- and under-inclusive arguments in holding that an overinclusive exclusion (*i.e.,* one that applies to some or even many non-disabled insureds) may still be discriminatory. *Id.,* at 958, *citing to Pac. Shores Props., Ltd. Liab. Co. v. City of Newport Beach* ("*Pacific Shores*"), 730 F.3d 1142, 1160 (9th Cir. 2013). It further held that allegations to show that cochlear implants do not "serve the needs of most individuals with hearing disability" would tend to support a claim of discrimination. *Schmitt,* 965 F.3d at 959. ***All of those allegations are made in Plaintiffs' Amended Complaint.*** Any further proof of the alleged "fit" between the Hearing Loss Exclusion and the treatment needed by hearing disabled insureds must wait until after discovery. *Id.,* at 959, n. 8.

Finally, Regence argues that Plaintiffs' breach of contract claim for violation of RCW 48.43.0128, Washington's recently-enacted health insurance anti-discrimination law, cannot be pursued because there is no private cause of action under the statute. Dkt. No. 37, p. 2. Regence is simply wrong. Both Washington law and Regence's own contracts specifically incorporate the non-discrimination requirements of RCW 48.43.0128 as additional contractual terms. *See* Dkt. No. 32-1, p. 77 of 91; RCW 48.18.510. Indeed, Regence has been subject to similar breach of contract claims many times before. *See e.g., O.S.T. v. Regence BlueShield*, 181 Wn.2d 691, 695, 335 P.3d 416 (2014) (State Mental Health Parity Act enforced through a breach of contract claim); *K.M. v. Regence BlueShield*, 2014 U.S. Dist. LEXIS 27685, at *22 (W.D. Wash., Feb. 27, 2014)

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

(same). Regence's violation of RCW 48.43.0128 is properly pursued as a breach of contract claim.

The Ninth Circuit has clearly spoken, both in *Schmitt* and *Doe*, and Plaintiffs here have more than plausibly alleged violations of Section 1557 of the ACA and RCW 48.43.0128. Regence's motion should be denied.

II. FACTS

A. Plaintiffs' Amended Complaint Adequately Pled All Required Facts

The Amended Complaint sets forth all the facts necessary for relief:

- Plaintiffs E.S., a nine year-old child, and Sternoff are enrolled in a Regence BlueShield insured plan. Dkt. No. 32, ¶¶6-7.
- Plaintiffs are qualified individuals with a disability, whose hearing loss limits a major life activity, hearing. *Id.*, ¶¶6-7, 74-93, 95; 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.*, ¶¶24, 104, 109.
- Plaintiffs' Regence insured health plan is a "health program or activity" part of which receives federal financial assistance. *Id.*, ¶¶8-9, 16, 97. 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. 32, ¶109.
- 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.*, ¶14, Dkt. No. 32-1, pp. 50-52 of 91; Dkt. No. 12-1, p. 65 of 110.
- Plaintiffs alleged that Regence's Hearing Loss Exclusion was a "deliberate discriminatory action" because Regence specifically designed the Hearing Loss Exclusion to exclude most of the health care needs of hearing disabled insureds as a group. *Id.*, ¶¶15, 17, 104-110.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

- Plaintiffs alleged that Regence's Hearing Loss Exclusion affects mostly insureds with disabling hearing loss. *Id.*, ¶¶51-65, 104-110. Most non-disabled insureds with hearing loss do not seek treatment, since the hearing loss does not interfere with their major life activities. *Id.*, ¶55. To the extent any non-disabled insureds with hearing loss seek treatment for their hearing loss, most if not all, would not meet Regence's definition of "medical necessity." *Id.*, ¶56.

- Plaintiffs also alleged that the Hearing Loss Exclusion eliminates meaningful access to coverage for most disabled insureds with hearing loss. *Id.*, ¶¶66-73. Regence's coverage related to cochlear implants only meets the needs of approximately 5% of hearing disabled insureds. *Id.*, ¶¶72, 107.

- Plaintiffs alleged that any submission of a claim or appeal would have been futile. *Id.*, ¶112. 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 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"); Dkt. No. 32-1, pp. 27, 29 of 91. These services are covered when medically necessary to treat an illness or injury, as defined by the plan. Dkt. No. 12-1, pp. 105-106 out of 110; Dkt. No. 32-1, pp. 84-85 of 91. ("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,

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

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. 32, ¶¶24, 104, 109. 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 and RCW 48.43.0128

Regence's plan bars it from discriminating against insureds on the basis of disability. Regence contractually promised to comply with Section 1557 and its implementing regulations, as well as RCW 48.43.0128:

> **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; Dkt. No. 32-1, p. 77 of 91. Regence further bound itself as follows: "Regence complies with applicable Federal civil rights laws and does not discriminate on the basis of … disability…. Regence does not exclude people or treat them differently because of … disability…." Dkt. No. 12-1, p. 19 of 110; Dkt. No. 32-1, p. 6 of 91. These representations were required (at least through August 18, 2020) when an insurer receives federal financial assistance that subjects it to Section 1557. *See former* 45 C.F.R. § 92.8.[2]

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

Despite its representations, Regence designed, marketed and administered a standard exclusion that discriminates on the basis of disability. When this lawsuit was

[2] This rule was repealed effective August 18, 2020. 85 Fed. Reg. 37160, 37245 (June 19, 2020).

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

filed in 2017, Regence's insured health plans in Washington contained the following exclusion:

> ***We do not cover routine 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, p. 65 of 110 (emphasis added). In Regence's 2020 contract issued to the named plaintiffs, the Exclusion is worded differently, but has the same effect:

> **SPECIFIC EXCLUSIONS**
>
> **…**
>
> **Hearing Aids and Other Hearing Devices**
>
> Hearing aids (externally worn or surgically implanted) and other hearing devices are excluded. This exclusion does not apply to cochlear implants.
>
> …
>
> **Routine Hearing Examination**

See Dkt. No. 32-1, pp. 50-52 of 91. On the face of the 2017 health plan, 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. The differently worded 2020 plan has the same effect. All coverage for hearing loss, including hearing examinations, hearing aids and other devices, are excluded, except for cochlear implants.

E. Procedural Facts

This case was filed on October 30, 2017. *See* Dkt. No. 1. Regence brought its first Motion to Dismiss on January 19, 2018. Dkt. No. 11. The Court decided the Motion on the papers and without oral argument, dismissing Plaintiffs' claims with prejudice. Dkt. Nos. 22, 23.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

Plaintiffs appealed along with the *Schmitt* plaintiffs, who had been dismissed on identical grounds in a case against Kaiser. The appeals were briefed on a similar schedule and oral argument occurred on the same date before the same panel. The Ninth Circuit reversed both decisions, holding that Plaintiffs' theory under Section 1557 was correct, but that they need to amend their complaints to properly allege those claims. Dkt. No. 26. A mandate was issued on September 4, 2020, remanding this case. Dkt. No. 29. Plaintiffs' Amended Complaint was filed on October 13, 2020. Dkt. No. 32. Regence moved to dismiss the Amended Complaint on December 11, 2020.[3] Dkt. No. 37.

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 "if there is any set of facts consistent with the allegations in the complaint that would entitle the plaintiff to relief." *D.T. v. NECA/IBEW Family Med. Care Plan*, 2017 U.S. Dist. LEXIS 195186, at *3 (W.D. Wash., Nov. 28, 2017), *citing to Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563, 127 S. Ct. 1955 (2007).

B. Plaintiffs Adequately Alleged Disability Discrimination

Under Section 1557, Plaintiffs must allege the following: (1) they are individuals with disabilities, in this case disabling hearing loss, (2) they are otherwise qualified to

[3] To date, Kaiser has not filed a second Motion to Dismiss in the *Schmitt* case.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

receive the benefit in dispute (coverage for outpatient office visits and durable medical equipment/prosthetics for treatment of hearing loss), (3) they were/are denied the benefit solely by reason of their disability, and (4) Regence is a covered entity that receives federal financial assistance. *See Schmitt,* 965 F.3d at 954. Regence only disputes the third requirement: Plaintiffs' allegation that they were denied benefits solely by reason of their disability. *See* Dkt. No. 37, p. 1.

For purposes of Section 1557, the pertinent definition of "disability" comes from the Americans with Disabilities Act ("ADA"), which is incorporated, via Section 504 of the Rehabilitation Act ("Section 504"), into the ACA. 45 C.F.R. § 92.102(c); *Schmitt*, 965 F.3d at 954. Under the ADA, "the term 'disability' means, with respect to an individual, a physical or mental impairment that substantially limits one or more major life activities ***of such individual***," 42 U.S.C. § 12102(1)(A) (emphasis added). "Major life activities" include hearing, learning, communicating and working. 42 U.S.C. § 12102(2)(A).

Congress amended the ADA in 2008 to expand the definition of disability and "substantially limit" so that both would be "construed in favor of broad coverage of individuals," 42 U.S.C. § 12102(4)(A)-(B). "The primary purpose of the [amendment] is to make it easier for people with disabilities to obtain protection under the ADA." 29 C.F.R. § 1630.1(c)(4). Consistent with those directives, the term "substantially limit" is not meant to be a demanding standard. 29 C.F.R. § 1630.2(j)(1).

"Disability," as presently defined, requires two elements: ***First,*** there must be a measurable impairment. *See* Dkt. No. 32, ¶¶42-44. As plead by Plaintiffs, all class members meet this requirement. All insureds who are "subject to" the Hearing Loss Exclusion do as well.

Second, the impairment must "substantially limit" (as defined by the ADA/Section 504) the major life activities of the individual in question. Since this case addresses only the needs of people ***who seek medical treatment and equipment*** for their

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

hearing impairments, few, if any, insureds do so unless their life activities have become "substantially limited" by their hearing impairments. When those two factors, impairment and limitation, both exist, the individual meets the federal definition of disability.[4]

While not every insured with a hearing impairment may be disabled, Plaintiffs allege most if not all such insureds ***who seek medically necessary hearing treatment*** are disabled. Dkt. No. 32, ¶¶51-65, 104-110. Plaintiffs alleged that most non-disabled hearing-impaired individuals do not seek treatment – not even routine hearing examinations -- since their hearing loss does not interfere with their major life activities. *Id.*, ¶55. This comports with common sense. People do not seek hearing aids for aesthetic or non-medical reasons, and few if any people seek hearing aids unless their ability to function is significantly impacted, due to the stigma associated with hearing loss. As a result, those hearing-impaired insureds who seek medically necessary treatment are very likely to be "disabled" under federal law, because their hearing loss is substantially interfering with their daily activities. *See id.* Thus, it is quite plausible that all or most insureds who are subject to the Exclusion are "disabled" under Section 1557. Dkt. No. 32, ¶¶53-55. As pled, the "fit" between the Hearing Loss Exclusion and the proposed class of hearing disabled insureds is sufficiently close to infer that Regence's design and administration of the Hearing Loss Exclusion is facially discriminatory. *Pac. Shores Props., Ltd. Liab. Co. v. City of Newport Beach*, 730 F.3d 1142, 1160, n. 23 (9th Cir. 2013).

[4] Regence raises a straw man argument when it asserts that Plaintiffs pled a "subjective" definition of disability. Dkt. No. 37, p. 14, referring to Dkt. No. 32, ¶53. Like any other disability, both impairment and limitation are verifiable. Rather, the point of the Amended Complaint was simply that even when hearing impaired insureds meet the federal definition of "disability," they still do not typically seek ***treatment*** for their hearing loss. And, relatedly, when hearing impaired insureds finally decide to seek treatment for their hearing loss, their impairment is generally so significant that they easily meet the federal definition of "disability." Dkt. No. 32, ¶¶53-55.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

Plaintiffs also alleged that Regence's coverage of cochlear implants only meets the needs of a tiny portion of hearing disabled insureds, approximately just 5% of the group of hearing disabled insureds. *Id.*, ¶¶66-73, 107. Thus, about 95% of hearing disabled insureds are excluded from the essential treatment to ameliorate their condition. This is more than sufficient to allege that Regence's Hearing Loss Exclusion results in disability discrimination. *Schmitt,* 965 F.3d at 958-960.

Since Plaintiffs filed their Amended Complaint, the Ninth Circuit has clarified that, under Section 1557, claims alleging disparate impact disability discrimination are permitted. *Doe,* 2020 U.S. App. LEXIS 38333, *9-18. In that case, the Court considered whether the health plan provided "meaningful access" to prescription medication benefits governed by the ACA.[5] "Consistent with *Choate*, the district court in this case should have looked to the ACA to determine whether Does adequately alleged they were denied meaningful access to an ACA-provided benefit." *Doe,* 2020 U.S. App. LEXIS 38333, *15. As alleged here, Plaintiffs require outpatient office visits and durable medical equipment/prosthetics, both categories of ACA-provided benefits, in order to effectively ameliorate their conditions. Dkt. No. 37, ¶¶14, 24, 108-109. Under *Doe* and its predecessors, when Regence denied Plaintiffs coverage for these benefits to treat their hearing loss, it denied them "meaningful access" to benefits. *See id.; Crowder v. Kitigawa,* 81 F.3d 1480, 1484 (9th Cir. 1996).

Regence significantly mischaracterizes the relevant inquiry to be undertaken by the Court. It argues that "the relevant inquiry … is not which insureds actually seek out treatment for hearing loss" and therefore are subject to the Hearing Loss Exclusion. Dkt.

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[5] The Ninth Circuit also took the trial court to task for improperly narrowing the scope of the benefit at issue from that alleged by the plaintiffs. *See Doe,* 2020 U.S. App. LEXIS 38333, *14 ("The district court's definition unduly narrowed the benefit to obtaining specialty drugs at favorable prices from certain pharmacies, when Does' characterization of the benefit tracks the ACA, asserting more than just cost-related differences").

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

No. 37, p. 13. Rather, Regence claims that the Court should consider which insureds are theoretically "entitled" to a service that is barred by the Exclusion, ***even if they do not actually seek or need such treatment***. *Id.* Regence simply recasts its losing argument before the Ninth Circuit that insurers do not discriminate when they apply the same benefit design to all insureds, disabled and non-disabled alike. *See Schmitt,* 965 F.3d at 955 (rejecting similar arguments and holding that Section 1557 imposes an "affirmative obligation" on insurers "to consider the ***needs*** of disabled people and not design plan benefits in a way that discriminates against them") (emphasis added); *Doe,* 2020 U.S. App. LEXIS 38333, *18 ("[T]he meaningful access standard … does not require [Plaintiffs] to allege that their deprivation was unique to those [with disabilities], nor that the deprivation was severe – only that they were not provided meaningful access to the benefit.").

C. Section 1557 Does Not Require a Pleading of Discriminatory Animus

Regence complains that Plaintiffs did not allege any facts supporting discriminatory animus. Dkt. No. 37, pp. 2, 12. Such pleading is not necessary when addressing disability discrimination. *Crowder,* 81 F.3d at 1484 ("Congress intended to protect disabled persons from discrimination arising out of both discriminatory animus and thoughtlessness, indifference or benign neglect"). As the Ninth Circuit concluded in *Schmitt,* disability discrimination in benefit design is not dependent upon a showing of discriminatory motive. "The claim at issue here – that [the insurer] designed its plan benefits in a discriminatory way – inherently involves intentional conduct." *Id.,* 965 F.3d at 954, *citing Mark H. v. Lemahieu*, 513 F.3d 922, 936 (9th Cir. 2008) ("To 'design' something to produce a certain, equal outcome involves some measure of intentionality"). Under Section 504, intentional discrimination may be demonstrated by showing "deliberate indifference" to a protected right, without any allegation of discriminatory animus. *Mark H.,* 513 F.3d at 938.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

The Ninth Circuit previously addressed this issue in a Section 504 disability discrimination case involving a Medicaid program. *See Lovell v. Chandler*, 303 F.3d 1039, 1056 (9th Cir. 2002). In *Lovell,* Hawaii designed and established a Medicaid managed care program that excluded individuals who were blind or disabled from enrollment. *Id.,* at 1045. Plaintiffs were disabled individuals who sought enrollment in the managed care program, even though some blind and disabled Medicaid enrollees had access to other state Medicaid coverage. *Id.,* at 1046. The Ninth Circuit concluded that Hawaii's design of the program to exclude certain disabled Medicaid enrollees was a form of intentional disability discrimination:

> This case involves ***facial discrimination***, in the form of a categorical exclusion of disabled persons from a public program. In such a case, the public entity is, at the very least, "deliberately indifferent"; by its very terms, facial discrimination is "intentional."

Id., at 1056. Regence's Hearing Loss Exclusion is, at best, the result of deliberate indifference. A claim for facial discrimination is properly pled.[6]

D. Regence's Hearing Loss Exclusion Applies Only or Overwhelmingly to Insureds with Disabling Hearing Loss

Regence's Second Motion to Dismiss argues that Plaintiffs have not adequately alleged that the Hearing Loss Exclusion is targeted at hearing-disabled insureds. Dkt. No. 37, pp. 9-17. Specifically, Regence claims that the Hearing Loss Exclusion is targeted largely at insureds with ***non-***disabling hearing impairment such that it cannot be discriminatory. *Id.*, p. 16 ("[B]ased on Plaintiffs' own allegations, the Exclusion prevents non-disabled insureds from receiving coverage for routine examinations or treatment of hearing loss").

[6] In *Doe,* the Ninth Circuit determined that allegations of overt discriminatory animus are unnecessary. What matters is whether the pleading demonstrates that the plaintiffs were denied "meaningful access" to ACA-regulated benefits. *Doe,* 2020 U.S. App. LEXIS 38333, *15.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

First, Regence is wrong as a matter of law. Over-discrimination is prohibited under *Schmitt*. *Id.*,965 F.3d at 958 ("That the hearing loss exclusion also affects some non-disabled individuals does not doom [Plaintiffs'] claim per se"). Even if some non-disabled insureds with hearing loss theoretically could be subject to Regence's Hearing Loss Exclusion, Plaintiffs' claims are properly pled. *See Rice v. Cayetano*, 528 U.S. 495, 514, 120 S. Ct. 1044 (2000) (facially neutral voting requirement based on ancestral classification, rather than race, may be racial proxy discrimination even though it impacts individuals of different races). This issue was addressed directly in *Pacific Shores:*

> According to the district court's theory, Plaintiffs in anti-discrimination suits would be unable to demonstrate the discriminatory intent of a defendant that openly admitted its intent to discriminate, so long as the defendant (a) relies on a facially neutral law or policy and (b) is willing to "overdiscriminate" by enforcing the facially neutral law or policy even against similarly-situated individuals who are not members of the disfavored group. Such a rule presents the "grotesque scenario where a[] [defendant] can effectively immunize itself from suit if it is so thorough in its discrimination that all similarly situated [entities] are victimized." *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 468 (2d. Cir. 2001).
>
> ***This "grotesque scenario" is not the law.*** A willingness to inflict collateral damage by harming some, or even all, individuals from a favored group in order to successfully harm members of a disfavored class does not cleanse the taint of discrimination; it simply underscores the depth of the defendant's animus.

Pac. Shores Props., Ltd. Liab. Co. v. City of Newport Beach, 730 F.3d 1142, 1159 (9th Cir. 2013) (emphasis added). Instead, the Court must consider whether Plaintiffs have plausibly alleged sufficient discriminatory impact to create an inference of discriminatory intent. If Regence's Hearing Loss Exclusion, as actually implemented, denies treatment largely to hearing disabled insureds, sufficient discriminatory intent is present. *See Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 705 (9th Cir. 2009).

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

Plaintiffs allege that all or nearly all of the insureds who are actually subject to the Hearing Loss Exclusion are disabled. That is sufficient to state a plausible claim of proxy discrimination. Regence's "over-discrimination" argument fails.

Second, Regence falsely claims that Plaintiffs offer no "allegation, fact or cogent argument" to support the claim that many non-disabled hearing-impaired insureds do not seek treatment for their condition. *See* Dkt. No. 37, p. 15. To the contrary, Plaintiffs offer both hard data and specific allegations to this effect:

- According to the Census Bureau, only **25%** of people under the age of 65 who report "serious" hearing difficulties use hearing aids. Dkt. No. 32, ¶51.
- "Non-disabled insureds rarely seek treatment for hearing loss." *Id.*, ¶106.
- Consumers generally avoid hearing treatment and hearing aids because they consider them to be "uncomfortable, unattractive and embarrassing, and because they believe that their hearing is adequate." *Id.*, ¶52.
- Many consumers with hearing loss do not even realize that they have an impairment, since they do not notice what they do not hear. *Id.*, ¶¶52-53.
- Many non-disabled insureds with hearing loss "do not generally seek formal treatment" and "rarely if ever seek hearing instruments." *Id.*, ¶55.

Non-disabled hearing impaired insureds who do not seek treatment are wholly unaffected by Regence's Hearing Loss Exclusion because their actions are unchanged by whether or not they have coverage. They simply are not the target of Regence's Exclusion.

Regence's Exclusion is ***only*** targeted at those individuals with hearing loss who actually seek treatment or equipment. Only when treatment or equipment are sought, do insureds have a need for coverage under the Regence Plan. *See e.g.*, Dkt. No. 32-1,

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

p. 26 of 91. Only when they seek treatment are insureds "subject to" the Hearing Loss Exclusion. As Plaintiffs allege, the hearing-impaired insureds who are seek treatment and are subject to the Exclusion are entirely, or overwhelmingly disabled. *See id.*, ¶¶53-55, 104-106. After all, the whole purpose of an exclusion is to bar the payment of benefits to people who seek and need treatment.

At this stage of the litigation, Plaintiffs do not need to demonstrate any more.[7] As Regence concedes, whether the Hearing Loss Exclusion primarily impacts insureds who are "disabled" requires a factual determination by the Court. *See* Dkt. No. 37, p. 16, *citing Bosket v. Long Island R.R.*, 2004 U.S. Dist. LEXIS 10851, *13 (E.D.N.Y., June 4, 2004) ("Fact-intensive inquiries such as this often require resolution at trial"). At this stage, Plaintiffs only need to plausibly allege a claim for proxy discrimination. The resolution of whether those insureds who require coverage under Regence's Hearing Loss Exclusion are predominantly "disabled" under the law must wait until after discovery.

Third, Regence argues that because the Hearing Loss Exclusion applies to "routine hearing examinations," it is applied to all insureds, not just those that are hearing disabled, such that it is non-discriminatory. *See* Dkt. No. 37, p. 13. But, as alleged by Plaintiffs, most hearing-impaired insureds do not seek ***any*** treatment, including "routine" hearing examinations for their hearing loss.[8] Dkt. No. 32, ¶¶51-55. At the very least, Regence's unsupported claim in a brief that "[i]nsureds with no hearing loss at all are denied coverage for routine hearing examinations that may be part of their

---

[7] Regence does not cite to ***any*** case in which a claim for proxy disability discrimination was dismissed at the pleading stage. Regence's cases are irrelevant since they were decided after summary judgment and based on the more limited pre-2008 definition of "disability." *See* Dkt. No. 37, p. 16, *citing to Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 566 (1999) and *Clemente v. Exec. Airlines, Inc.*, 213 F.3d 25, 31 (1st Cir. 2000).

[8] Regence is required to provide children with hearing screenings as preventative services under the ACA at certain points in their development. See https://www.healthcare.gov/preventive-care-children/ (last visited 01/10/21). Whether adults receive hearing examinations as a part of Regence-covered annual check-ups or are denied such coverage, cannot be determined without discovery.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

regular checkups," cannot be relied upon by the Court in a motion to dismiss.[9] *See D.T.*, 2017 U.S. Dist. LEXIS 195186, at *3 (defendants' claim that they never covered any treatment for autism spectrum disorder cannot defeat plaintiff's allegations to the contrary). "The problem with Defendant's motion is that it relies on factual allegations that controvert Plaintiff's allegations." *Carr v. United Healthcare Servs.*, 2016 U.S. Dist. LEXIS 182561, at *7 (W.D. Wash., May 31, 2016).

Fourth, Regence argues that its "medical necessity" definition broadly "cover[s] all treatment for an illness and its symptoms" so long as the treatment is prescribed, including, presumably, all claims for hearing treatment and equipment, regardless of the extent of the insured's hearing impairment. Dkt. No. 37, p. 15. Regence ignores the plain terms of its "medical necessity" definition, which is far more restrictive than Regence claims:

> "Medical Necessity" means health care services or supplies that a Physician or other health care Provider, exercising prudent clinical judgment would provide to a patient to prevent, evaluate, diagnose or treat an illness, injury, disease or its symptoms and that are:
>
> - In accordance with generally accepted standards of medical practice;
> - Clinically appropriate in terms of type frequency extent site and duration and considered effective for the patient's illness, injury or disease; and
> - Not primarily for the convenience of the patient, physician or other health care provider and not more costly than an alternative service or sequence of services or supply at least as likely to produce equivalent therapeutic or diagnostic results as to the diagnosis or treatment of that patient's illness, injury or disease.

[9] *Mack v. CGI Fed.*, 2018 U.S. Dist. LEXIS 220513, at *3 (E.D. Va., Sep. 26, 2018), cited by Regence, was an individual employment discrimination case dismissed after summary judgment, which did not involve proxy discrimination, class action litigation or a dispute over health benefits. *See id.* It has no relevance here.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

Dkt. No. 32-1, p. 85 of 91.[10] Indeed, Regence's litigation-driven claim that the medical necessity definition covers "all treatment for an illness and its symptoms" will come as a great surprise to any insured who has been denied coverage under it. *See, e.g., H.N. v. Regence BlueShield*, 2016 U.S. Dist. LEXIS 178182, at *28 (W.D. Wash., Dec. 23, 2016). In any event, to the extent the Court concludes it is necessary to determine whether non-disabled hearing-impaired insureds would seek treatment considered "medically necessary" under Regence's plan, that is a factual matter that can only be decided after discovery. *Carr,* 2016 U.S. Dist. LEXIS 182561, at *7.

E. Regence Does Not Avoid Liability for Disability Discrimination Because it provides Coverage for Cochlear Implants

Regence claims that since it offers coverage for cochlear implants, Plaintiffs' disability discrimination claim cannot succeed. Dkt. No. 37, p. 17-18. Regence ignores *Schmitt* again. In that case, the Ninth Circuit directed the plaintiffs to identify what proportion of insureds with hearing disabilities were able to have their needs met by coverage of cochlear implants. *Id.,* 965 F.3d at 959. "If cochlear implants serve the needs of most individuals with hearing disability, that fact would tend to undermine a claim of proxy discrimination." *Id.* Conversely, if cochlear implants only meet the needs of a small percentage of hearing disabled insureds, then that fact tends to support a claim for proxy discrimination. *See id.* That is precisely what Plaintiffs alleged.

Regence also misreads Plaintiffs' Amended Complaint. Plaintiffs alleged that only 5% of the 9.2 million people who self-reported ***"serious"*** hearing difficulties sought treatment with cochlear implants, ***not***, as Regence asserts, all people with any hearing

[10] Plaintiffs do not allege that Regence would nefariously deny "every single claim" for coverage for non-disabled hearing-impaired insureds as a matter of "convenience." *See* Dkt. No.37, p. 15. To the contrary, Plaintiffs alleged that most hearing-impaired insureds do not seek treatment (and therefore submit claims) because they feel that they do not need it, or the discomfort or stigma associated with hearing aids discourages them from seeking treatment. Dkt. No. 32, ¶¶53-55. As a result, those who do seek treatment and therefore coverage are people whose daily lives are substantially impaired by their hearing loss. *Id.* Those individuals meet the broad federal definition of "disability."

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

impairment. *Compare* Dkt. No. 32, ¶¶47, 68-69 *with* Dkt. No. 37, p. 17. Based upon this mistake, Regence quibbles about Plaintiffs' math, asserting that the correct number is 18% not 5%. *Id.* Regardless of the precise amount, Plaintiffs adequately alleged that only a small percentage of hearing disabled insureds can have their needs met by cochlear implant coverage. And, as the Ninth Circuit concluded in *Lovell,* the fact that Regence's health plans provide "appropriate treatment of some disabled persons does not permit it to discriminate against other disabled people under any definition of 'meaningful access.'" *Id.*, 303 F.3d at 1054.

Doe fully disposes of Regence's argument. In that case, the Ninth Circuit rejected classifications of disability discrimination under Section 1557 as either intentional or disparate impact. *Id.,* 2020 U.S. App. LEXIS 38333, *13. Instead, the focus is on "whether disabled persons had been denied 'meaningful access' to [ ] services." *Id.* Thus, the Court must consider whether the coverage of only cochlear implants provides "meaningful access" to ACA-mandated benefits needed by the hearing disabled. *Id.* at *15. Where, as here, a plaintiff alleges that "they cannot receive effective treatment under the Program because of their disability" a claim for Section 1557 disability discrimination is adequately pled, even though some insureds receive benefits related to cochlear implants. *Id.,* at *15-16. *See* Dkt. No. 32, ¶¶ 66-73, 107.

Regence claims that since Washington's Benchmark plan required coverage of cochlear implants and permits it to exclude other treatment for hearing loss, it cannot be held liable for disability discrimination when it excludes all other coverage. Dkt. No. 37, p. 18. The Ninth Circuit rejected this argument. *See Schmitt,* 965 F.3d at 955. The Washington benchmark plan "is only the starting point" for determining ACA compliance, including with Section 1557's non-discrimination requirements. *Id.* The Court held that "compliance with federal and state law regarding essential health benefits did not guarantee compliance with the ACA's nondiscrimination requirement."

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

Id., at 956. The fact that Regence's plan complied with the Washington benchmark or was not disapproved by the Insurance Commissioner is irrelevant. *Id.*, at 956-57 ("[W]hether or not [defendants] complied with section 1557 is a question of federal law on which we owe the state no deference."); *accord, O.S.T. v. Regence BlueShield*, 181 Wn.2d 691, 700, n. 9, 335 P.3d 416 (2014). The Court may not dismiss Plaintiffs' claims on this basis.

F. Plaintiffs Adequately Allege a Breach of Contract Claim for Regence's Violation of RCW 48.43.0128

To demonstrate liability for breach of the insurance contract, Plaintiffs must show (1) a valid contractual duty; (2) breach of that duty; and (3) the breach was a proximate cause of Plaintiffs' injuries. *Nw. Mfrs. v. Dep't of Labor*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995). Since June 2020, Regence had the contractual duty to comply with RCW 48.43.0128, which, upon enactment, entered into and modified Plaintiffs' insurance contracts as an additional term, eliminating all non-conforming terms.[11]

First, Regence specifically promised, in the contract, to comply with all governing state law provisions, including RCW 48.43.0128. *See* Dkt. No. 32-1, p. 77 of 91. Regence's breach of RCW 48.43.0128 is a breach of this promise. Regence ignores this.

Second, as a matter of state law, Regence's contract must comply with RCW 48.43.0128. Under RCW 48.18.510, should the Court conclude that Regence's Hearing Loss Exclusion does not comply with RCW 48.43.0128, the Exclusion in Plaintiffs' contract (and that of other class members) must be "construed and applied" in accordance with the state non-discrimination statute. *See also* RCW 48.18.200(2). Regence also ignores this statutory requirement.

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[11] Plaintiffs do not allege that RCW 48.43.0128 provides a private cause of action, implied or otherwise. As a result, Defendants' cases – *Keodalah v. Allstate Ins. Co.*, 194 Wn.2d 339, 346, 449 P.3d 1040, 1045 (2019) and *Cameron v. Physicians Ins.*, 2004 U.S. Dist. LEXIS 15268, at *5-6 (D. Or., July 26, 2004) – are unavailing. *See* Dkt. No. 37, pp. 19-20.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

Third, it is "Insurance Law 101" that all relevant state insurance requirements are incorporated into the insurance contract. *Brown v. Snohomish Cty. Physicians Corp.*, 120 Wn.2d 747, 753, 845 P.2d 334 (1993); *O.S.T.*, 181 Wn.2d at 707; *see also UNUM Life Ins. v. Ward*, 526 U.S. 358, 376-77, 119 S. Ct. 1380 (1999). The "terms of" an insurance contract include any applicable law:

> It is fundamental insurance law that existing and valid statutory provisions enter into and form a part of all contracts of insurance to which they are applicable, and, together with settled judicial constructions thereof, become a part of the contract as much as if they were actually incorporated therein.

Plumb v. Fluid Pump Serv., Inc., 124 F.3d 849, 861 (7th Cir. 1997). As Regence knows well, Washington law permits a challenge under a state insurance law to be brought as a breach of contract claim. *See e.g., O.S.T.,* 181 Wn.2d at 695 (breach of contract claim brought to enforce Washington's Mental Health Parity Act, RCW 48.44.341).

Regence argues that a 2011 U.S. Supreme Court decision overturns this long-standing feature of state insurance law. *See* Dkt. No. 37, p. 21, *citing Astra USA, Inc. v. Santa Clara Cty.*, 563 U.S. 110, 114 (2011). The case simply does not stand for the proposition that Regence asserts. In *Astra USA*, a federal statute did not create a private right of action for non-insurance entities that contracted with the federal government. *Id.* The Supreme Court held that "If 340B entities may not sue under the statute, it would make scant sense to allow them to sue on a form contract implementing the statute, setting out terms identical to those contained in the statute." *Id.*

In stark contrast, Washington's Legislature has decided that insurance contracts automatically incorporate the relevant provisions of the Insurance Code – even if the literal terms of the health plan conflict. RCW 48.18.510; RCW 48.18.200(2). That incorporation would be meaningless if insureds could not enforce the relevant state statutory provisions pursuant to a breach of contract claim.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

Fourth, Regence refers to the wrong rule when it claims that WAC 284-43-5622(1) implements RCW 48.43.0128 and prohibits anyone other than the Insurance Commissioner from enforcing it. *See* Dkt. No. 37, p. 19. The recently amended WAC 284-43-***5940*** implements RCW 48.43.0128. *See* WSR 20-24-040, p. 21.[12] In the latest rulemaking, the OIC changed the regulation's language from "will" to "may" to clarify that the OIC has not approved plans like that of Regence as "non-discriminatory" if it takes no action. *See id.,* p. 22, WAC 284-43-5940(5); Concise Explanatory Statement, p. 12.[13] This change also makes it clear that the OIC is not the sole entity that may enforce the requirements of the regulation.

Fifth, Regence assumes, without any substantive argument, that RCW 48.43.0128 must be applied according to the same legal standards as Section 1557. Dkt. No. 37, p. 19. The language of RCW 48.43.0128 is substantially different from Section 1557. *Compare* 42 U.S.C. § 18116(a) *with* RCW 48.43.0128. Importantly, RCW 48.43.0128 does not reference or incorporate Section 504. *See* RCW 48.43.0128. And, since Washington anti-discrimination law related to disability is broader than federal law, RCW 48.43.0128 prohibits disability discrimination in benefit design in circumstances that may not be prohibited under federal law. *See e.g.,* RCW 49.60.040(7)(a); *Taylor v. Burlington N. R.R. Holdings, Inc.*, 193 Wn.2d 611, 618-627, 444 P.3d 606 (2019). Under Washington law, any medically cognizable hearing impairment is a "disability" subject to state anti-discrimination protection – no showing of "substantial impairment" is required. *See id.* Plaintiffs have more than adequately pled a breach of contract claim pursuant to RCW 48.43.0128.

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[12] Found at: https://www.insurance.wa.gov/sites/default/files/documents/cr-103-r-2020-13.pdf (last visited 1/8/21).

[13] Found at: https://www.insurance.wa.gov/sites/default/files/documents/r2020-13-ces.pdf (last visited 1/8/21).

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

IV. CONCLUSION

Regence's Second Motion to Dismiss should be denied. According to Regence, ***only*** exclusions that do not overdiscriminate or under-discrimination may be pursued – leaving Plaintiffs no redress unless the alleged fit of the exclusion is "just right." In *Schmitt* and *Doe,* the Ninth Circuit rejected Regence's "Goldilocks" theory. Consistent with long-standing anti-discrimination law, "a more comprehensive view of the concept of discrimination" is required under Section 1557. *See Olmstead v. L. C. by Zimring*, 527 U.S. 581, 598, 119 S. Ct. 2176 (1999). Plaintiffs have more than adequately pled disability discrimination under Section 1557 and breach of contract pursuant to RCW 48.43.0128.

DATED: January 15, 2021.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC

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

/s/ Richard E. Spoonemore
Richard E. Spoonemore (WSBA #21833)
3101 Western Avenue, Suite 350
Seattle, WA 98121
Tel. (206) 223-0303; Fax (206) 223-0246
Email: ehamburger@sylaw.com
rspoonemore@sylaw.com

Of Counsel:

/s/ John F. Waldo
John F. Waldo, *Pro Hac Vice*
LAW OFFICE OF JOHN F. WALDO
2108 McDuffie St.
Houston, TX 77019
Tel. (206) 849-5009
Email: johnfwaldo@hotmail.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2021, 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
- **Eleanor Hamburger**
  ehamburger@sylaw.com, matt@sylaw.com, theresa@sylaw.com, stacy@sylaw.com
- **Maren Roxanne Norton**
  maren.norton@stoel.com, sea_ps@stoel.com, docketclerk@stoel.com, heidi.wilder@stoel.com
- **Richard E Spoonemore**
  rspoonemore@sylaw.com, matt@sylaw.com, rspoonemore@hotmail.com, theresa@sylaw.com, stacy@sylaw.com
- **John F. Waldo**
  johnfwaldo@hotmail.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: January 15, 2021, at Seattle, Washington.

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

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

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-01609-RAJ **[PROPOSED] ORDER DENYING DEFENDANTS' SECOND MOTION TO DISMISS** **NOTED FOR CONSIDERATION: JANUARY 29, 2021**

THIS MATTER came before the Court on Defendants' Second Motion to Dismiss. The Court has considered the Defendants' Motion, Plaintiffs' Response, the Defendants' reply briefing, and any declarations or exhibits submitted in support of Defendants' reply briefing. The Court has also considered the other pleadings and records on file, and: _____

_____

_____

_____.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC
3101 WESTERN AVENUE, SUITE 350
SEATTLE, WASHINGTON 98121
TEL. (206) 223-0303 FAX (206) 223-0246

Based upon the foregoing, the Court hereby DENIES Defendants' Second Motion to Dismiss.

DATED: January _____, 2021.

RICHARD A. JONES
United States District Judge

Presented by:

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC

s/ Eleanor Hamburger
Eleanor Hamburger (WSBA #26478)
Richard E. Spoonemore (WSBA #21833)
3101 Western Avenue, Suite 350
Seattle, WA 98121
Tel. (206) 223-0303; Fax (206) 223-0246
Email: ehamburger@sylaw.com
rspoonemore@sylaw.com

Of Counsel:

s/ John F. Waldo
John F. Waldo, *Pro Hac Vice*
LAW OFFICE OF JOHN F. WALDO
2108 McDuffie St.
Houston, TX 77019
Tel. (206) 849-5009
Email: johnfwaldo@hotmail.com

Attorneys for Plaintiffs

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  ehamburger@sylaw.com, matt@sylaw.com, theresa@sylaw.com, stacy@sylaw.com
- **Maren Roxanne Norton**
  maren.norton@stoel.com, sea_ps@stoel.com, docketclerk@stoel.com, heidi.wilder@stoel.com
- **Richard E Spoonemore**
  rspoonemore@sylaw.com, matt@sylaw.com, rspoonemore@hotmail.com, theresa@sylaw.com, stacy@sylaw.com
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DATED: January 15, 2021, 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