The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

ANDREA SCHMITT; ELIZABETH MOHUNDRO; and O.L. by and through her parents, J.L. and K.L., each on their own behalf, and on behalf of 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.	CASE NO. 2:17-cv-1611-RSL DEFENDANTS' 12(b)(6) MOTION TO DISMISS FOURTH AMENDED COMPLAINT NOTE ON MOTION CALENDAR: FRIDAY, APRIL 16, 2021 ***ORAL ARGUMENT REQUESTED***

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants (collectively "Kaiser") respectfully move this Court for an order dismissing Plaintiffs' Fourth Amended Complaint ("FAC"), which alleges claims for: (1) intentional proxy disability discrimination under the Patient Protection and Affordable Care Act §1557, codified at 42 U.S.C. §18116 ("ACA §1557"); and (2) breach of contract and violation of RCW § 48.43.0128, which prohibits discrimination under Washington's Insurance Reform Act. Both claims are based solely on the language of the Kaiser group health benefit plans selected by Plaintiffs' employers[1] (hereafter, the "Plan"), which exclude coverage for hearing care, routine hearing exams and certain types of hearing aids and related services, while expressly *covering* other hearing related services and devices, including cochlear implants and bone anchored hearing aids ("BAHAs"). *See* FAC ¶¶13-14. While acknowledging the Plan exclusion is facially neutral as it applies equally to all persons with hearing loss without regard to whether the hearing loss is disabling, Plaintiffs contend the exclusion is a "proxy" for hearing disability and therefore the exclusion is intentionally discriminatory on its face under ACA §1557.[2]

Plaintiffs fail to state a plausible claim for relief under Fed. R. Civ. P. 12(b)(6) because their own allegations show that the majority of people with hearing loss (all of whom are subject to the exclusion) are not disabled. The exclusion is thus widely overinclusive (applying predominantly to non-disabling hearing loss). Plaintiffs' alleged proxy is simultaneously greatly underinclusive. The FAC admits the Plan cover categories of services applicable to the hearing disabled, including cochlear implants, which treat severe and profound hearing loss, and BAHAs, which treat middle ear hearing loss. FAC ¶¶ 48, 66. And, Plaintiffs' definition of the hearing disabled applies only to those individuals who have sought the specific type of hearing aid excluded by the Plan, while their disability definition *excludes* 75% of those who report serious

[1] Defendants offer coverage for the specific type of hearing aids Plaintiffs seek under Benefit Riders. Plaintiffs' employers chose not to purchase the hearing aid rider. *See* Declaration of Natalie Bell, Dkt. # 19, ¶ 3.

[2] Plaintiffs do not assert discrimination claims based on disparate impact; nor could they. *See Schmitt v. Kaiser Found. Health Plan of Wash.*, 965 F.3d 945, 954 (9th Cir. 2020) ("it is unclear whether a disparate impact theory remains permissible under the Rehabilitation Act"); *see also Doe v. BlueCross BlueShield of ten., Inc.*, 926 F.3d 235, 241 (6th Cir. 2020) (no disparate impact claim under ACA § 1557 because of the "solely" causation standard).

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hearing difficulty, but have not sought hearing aid treatment. FAC ¶¶ 48, 66. Plaintiffs cannot show differential treatment "solely" by reason of disability, as required under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a) ("RA § 504"). *See Doe v. CVS Pharm., Inc.*, 982 F.3d 1204, 1209-10 (9th Cir. 2020) (disability discrimination claims under ACA § 1557 must meet the "solely" causation standard of RA § 504).

In 2018, this Court dismissed Plaintiffs' Second Amended Complaint for failure to state an ACA § 1557 claim, ruling the Plan was not discriminatory under RA § 504 precedent because it excluded treatment for "hearing loss," a condition that is not necessarily disabling, and thus applied equally to the disabled and non-disabled Plan participants alike. Plaintiffs appealed and modified their theory, arguing for the first time that the Plan constituted facial discrimination by "proxy." Discrimination "by proxy" exists where a seemingly neutral exclusion is so closely aligned with a protected class that discriminatory intent can be inferred. The Ninth Circuit affirmed this Court's dismissal of the Second Amended Complaint and confirmed that ACA §1557 incorporates the test for discrimination under RA § 504 as the law of the case. *Schmitt*, 965 F.3d at 954. But the Ninth Circuit remanded to grant Plaintiffs' leave to further amend their claims and try to state a plausible proxy discrimination claim. *Id*.

Now, in their Fourth Amended Complaint, Plaintiffs have pled new allegations and statistics in an attempt to support their proxy discrimination theory, but they still cannot articulate a plausible claim. Plaintiffs fail to meet the exacting burden to show a close fit between the excluded services and the hearing disabled, or any other facts allowing a plausible inference that discrimination was Kaiser's sole purpose in adopting the Exclusion in the Plan.

Plaintiffs' new state law claims should also be dismissed. RCW § 48.43.0128 contains no express or implied private right of action, and in any event, the Plan's coverage exclusion is not discriminatory because it is not a proxy for disability. Moreover, state regulations provide that insurers may limit coverage for hearing treatment to cochlear implants only, so by definition, Kaiser's Plan does not violate state law.

In short, Plaintiffs have alleged no facts, other than the terms of the Plan itself, that would

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support a plausible inference of discrimination by proxy. And because Plaintiffs cannot cure these deficiencies or plausibly allege that discriminatory intent was Kaiser's sole reason for adopting the exclusion, the Fourth Amended Complaint should be dismissed with prejudice.

II. BACKGROUND AND PROCEDURAL HISTORY

A. The Affordable Care Act and Hearing Aid Coverage in the Health Care Industry

Congress enacted the ACA in 2010 in an effort to provide *affordable*, universal healthcare for every American. It includes a mandate for individual and small group plans to cover ten categories of essential health benefits ("EHBs"), including "[r]ehabilitative and habilitative services and devices." *See* 42 U.S.C. §18022(b)(1)(G). The HHS Secretary left it to each state to articulate the scope of essential health benefits in that state's "benchmark" plan. Washington's EHB benchmark plan covers cochlear implants but not hearing aids. W.A.C. § 284-43-5640(7)(b)(1)&(c)(4). State regulations provide that a health benefit plan must include cochlear implants as rehabilitative services, and may, but is not required to, include hearing aids other than cochlear implants. *Id.* The ACA did not include hearing aids or services as an essential health benefit, and most states' approved EHB benchmark plans exclude or limit coverage for hearing aids. *See* Dkt. # 17, p.8.

B. The Ninth Circuit Ruling

On appeal of this Court's previous dismissal order (Dkt. # 42), the Ninth Circuit affirmed that the Second Amended Complaint failed to state a claim. In so holding, the court considered Plaintiffs' new proxy discrimination argument explained:

> "[Proxy discrimination] arises when the defendant enacts a law or policy that treats individuals differently on the basis of seemingly neutral criteria that are **so closely associated** with the disfavored group that discrimination on the basis of such criteria is, constructively, facial discrimination against the disfavored group." *Davis v. Guam*, 932 F.3d 822, 837 (9th Cir. 2019) (quoting *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1160 n.23 (9th Cir. 2013)).
> . . .
> Schmitt and Mohundro contend that hearing loss is a proxy for hearing disability. All individuals with hearing disability have hearing loss because "disability" is defined in part as "a physical or mental impairment that substantially limits one or

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> more major life activities," 42 U.S.C. § 12102(1)(A), including "hearing," *id.* § 12102(2)(A). But since not all hearing loss is substantial, at least some—and potentially most—individuals with that condition are not deemed disabled.
>
> * * *
>
> **Here, Schmitt and Mohundro allege no facts giving rise to an inference of intentional discrimination besides the exclusion itself. Thus, the crucial question is whether the proxy's "fit" is "sufficiently close" to make a discriminatory inference plausible.** *Davis*, 932 F.3d at 838 (quoting *Pac. Shores Props.*, 730 F.3d at 1160 n.23). The second amended complaint sheds no light on the answer.
>
> The complaint does not make clear to what extent the proxy is **overinclusive**. Schmitt and Mohundro allege that "[u]nder the Exclusion, only people with Hearing Loss, a qualifying disability, are excluded from the benefits that they require." However, they define "people with Hearing Loss" to include all persons with hearing loss that cannot be treated with cochlear implants—not just those with disabilities—so it is impossible to infer whether the exclusion primarily affects disabled persons. Schmitt and Mohundro claim in their brief that "few, if any, non-disabled insureds had claims denied under the Hearing Loss Exclusion," but this allegation is not in their second amended complaint and in any event requires further explanation to be plausible.
>
> At the same time, Schmitt and Mohundro's alleged proxy is **underinclusive** because it excludes hearing disabled individuals who "require or will require treatment . . . associated with cochlear implants." Just as "[t]he benefit . . . cannot be defined in a way that effectively denies otherwise qualified [disabled] individuals the meaningful access to which they are entitled," *Choate*, 469 U.S. at 301, a section 1557 plaintiff cannot define the benefit so narrowly as to require an insurer to curate coverage for each individual's health care needs. Kaiser covers cochlear implants and related services, and some proportion of hearing disabled insureds can meet their treatment needs through cochlear implants alone. We are left to guess what that proportion might be. The district court asserted that cochlear implants are "medically appropriate only when the hearing loss is significant and therefore disabling," but that assertion is not in the complaint. Still, nothing in the complaint suggests otherwise. If cochlear implants serve the needs of most individuals with hearing disability, that fact would tend to undermine a claim of proxy discrimination.

Schmitt, 965 F.3d at 958-60 (emphasis added). The panel remanded so Plaintiffs could amend their complaint to attempt to state a plausible claim for "proxy" discrimination, *i.e.* by alleging facts showing "that the exclusion is likely to predominantly affect disabled persons." *Id*. at 960 & n.8.

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C. Plaintiffs and the Kaiser Plan

Plaintiffs allege they have been diagnosed with disabling hearing loss and are insured under Kaiser Plans. FAC, ¶¶ 6-8. They further allege their hearing loss substantially limits the "major life activity" of hearing and they are therefore "qualified individuals with a disability" protected by ACA § 1557's antidiscrimination provisions. FAC ¶ 90. The Plan excludes coverage for:

> Hearing care, routine hearing examinations, programs or treatments for hearing loss including but not limited to, externally worn hearing aids or surgically implanted hearing aids, and the surgery and services necessary to implant them except as described above, and hearing screening tests required under Preventive Services.

FAC ¶ 14. Thus, the exclusion at issue applies to a variety of hearing care services, not just externally worn hearing aids. Conversely, the Plan covers:

> Hearing exams for hearing loss and evaluation and diagnostic testing for cochlear implants. Cochlear implants or Bone Anchor Hearing Aids (BAHA) when in accordance with KFHPWAO clinical criteria. Covered services for cochlear implants and BAHA include implant surgery, pre-implant testing, post implant follow-up, speech therapy, programming and associated supplies (such as transmitter cable and batteries).

FAC ¶ 14. The Plan thus follows the Washington benchmark plan in covering cochlear implants, and also offers additional base benefits such as hearing examinations and coverage for BAHAs. The Plan is designed to cover treatments and services for hearing loss (such as cochlear implants and BAHAs) at an affordable price. This basic plan excludes coverage for hearing aids, as well as prosthetics, dental services, and glasses, among other things.

D. Plaintiffs' "Proxy" Allegations

In an attempt to make the alleged proxy "fit" with disability, Plaintiffs allege an extremely implausible definition for "disabled" hearing loss, which is whether the individual with a hearing loss "seek[s] treatment from hearing care professionals" for hearing aids, specifically those who "require treatment other than with cochlear implants or BAHAs." FAC ¶¶ 4, 53. Their circular reasoning is only the disabled will seek hearing aids, so the exclusion only applies to the disabled. This definition runs afoul of the Ninth Circuit's admonition that "a section 1557 plaintiff cannot define the benefit so narrowly as to require an insurer to curate coverage for each individual's

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health care needs." *Schmitt*, 965 F.3d at 959. It is also untethered from whether the individual's hearing loss is "substantial," as required under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12102(4).

Plaintiffs then proceed to allege various statistics which do not support and indeed directly contradict their definition. First, they allege 48 million individuals over the age of 12 in the U.S. experience some hearing loss, from mild to profound. FAC ¶¶ 1, 43-45. The FAC asserts that 520,000 people in the U.S. under age 65 have severe or profound hearing loss (*i.e.* 1% of those with hearing loss). FAC 67. The FAC concedes the percentage of individuals in the mild hearing loss category is 79% of individuals with bilateral hearing loss.[3] The FAC is silent as to which category would include "substantial" hearing loss, so as to be a disability; and whether those with "serious" hearing loss,[4] who are likely disabled, suffer from "sensorineural hearing loss," the form of hearing loss that Plaintiffs allege benefit from the type of hearing aids excluded by the Plan. *See* FAC ¶ 47; *see also* FAC ¶ 66 (cochlear implants are "only available to people with severe to profound hearing loss who cannot be adequately treated with hearing aids").

Second, Plaintiffs allege 9.2 million people under age 65 self-report "serious" difficulty hearing, and 3.6% of those self-report as "deaf" (FAC ¶46). According to the FAC's statistics, therefore, 19% of those with hearing loss have a "serious" (presumably disabling) hearing loss. FAC ¶¶ 1, 43, 46. Plaintiffs then allege that of the 9.2 million who report "serious" hearing difficulty, only 25% of them (*i.e.* 2.3 million) have sought treatment through the use of hearing aids. FAC ¶ 50. Accordingly, only 4.7% of the 48 million people who experience some hearing loss seek treatment for hearing aids. Yet Plaintiffs allege a total of 8.3 million Americans use hearing aids, which represents 17% of the 48 million people with any hearing loss. FAC ¶ 73.

[3] This is derived from Plaintiffs' Appx. B, Dkt 65-2, p.3 which reports a total of 11.11m people age 12-65 with mild bilateral hearing loss out of a total of 14.02m people age 12-65 with bilateral hearing loss.

[4] FAC ¶50.

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Taken together, Plaintiffs' allegations establish that 72% of Americans who use hearing aids do not report having serious hearing loss [5]

Plaintiffs further allege that individuals who believe their hearing is adequate, even if impaired, are not hearing disabled, regardless of their degree of impairment. FAC ¶ 52. Plaintiffs' formulation of the hearing disabled *excludes* those who have substantial limitations in hearing if they believe their hearing is adequate or they have not sought the type of hearing aids excluded by the Plan. Accordingly, Plaintiffs' circular definition of the hearing disabled *excludes* up to 75% of those with a self-reported "serious" hearing difficulty but did not seek hearing aids (as set forth in FAC ¶50). Meanwhile, Plaintiffs' definition of hearing disabled *includes* up to 72% of external hearing aid users who have only mild or moderate hearing loss. FAC ¶¶50, 73.

Flying in the face of these statistical facts, Plaintiffs implausibly allege that "virtually all people who seek or obtain hearing aids" are disabled. FAC ¶ 52. They claim people with non-disabling hearing loss "do not generally seek formal treatment from medical professionals." FAC ¶ 54. And they assert that "[e]xcluding coverage for hearing aids and hearing treatment almost exclusively affects people with disabling hearing loss." FAC ¶ 57. As to cochlear implants, which are covered and which Plaintiffs acknowledge to be available to "people with severe to profound hearing loss," Plaintiffs simply claim that not enough people – 5.6% by their estimation – are eligible for cochlear implants to make a difference. FAC ¶¶ 67, 70. Similar allegations are made regarding BAHAs. *See* FAC ¶¶71-73.

Aside from the language of the exclusion, statistics and inferences drawn therefrom, Plaintiffs do not allege any facts to support a finding that Kaiser intended to discriminate against the disabled solely because of their disability.

III. ARGUMENT AND AUTHORITIES

To survive a motion to dismiss, a complaint "must contain sufficient factual matter,

[5] The FAC alleges that 2.3m people who report serious hearing difficulty use hearing aids, while the total number of hearing aid users is 8.3m; thus 72% of the hearing aid users have only mild or moderate hearing loss. See FAC ¶¶ 50, 73.

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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, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L. Ed. 2d 929 (2007)). This requirement is met where the complaint "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Sufficient factual matter" necessary to avoid dismissal of a complaint does not include allegations that are conclusory or speculative or that require the Court to draw unreasonable or unwarranted factual inferences. *See Manufactured Home Cmtys., Inc. v. City of San Jose*, 420 F.3d 1022, 1035 (9th Cir. 2005).

A. Plaintiffs Have Failed to State a Plausible ACA § 1557 Claim for Intentional Proxy Discrimination Solely Because of Disability.

Plaintiffs' intentional proxy discrimination theory is implausible and fails because, according to their own statistics, the "fit" between hearing loss exclusion and disability is not "sufficiently close" to warrant a reasonable inference of discriminatory intent, and they offer no other allegation of discriminatory intent aside from the exclusion itself. First, according to Plaintiffs' own data, the Exclusion is significantly overinclusive because 79% of people with bilateral hearing loss age 12-65 have only mild loss and 72% of hearing aid users have only mild or moderate hearing loss. Second, it is also grossly underinclusive because it covers treatment for insureds with the most severe hearing disability, through coverage for cochlear implants and BAHAs and 75% of those who reported "serious" hearing loss did not seek treatment with the type of hearing aid excluded under the plan. With such substantial discrepancies between the scope of the Exclusion's application and the pool of disabled insureds, the Exclusion cannot provide a reasonable basis for inferring intentional discrimination, much less that Kaiser's sole purpose, with no other reason, was simply to discriminate against disabled Plan participants.

1. Under Plaintiffs' Proxy Discrimination Theory, Discriminatory Intent Can Be Inferred Only if the "Fit" Between a Classification and a Protected Trait is "Sufficiently Close."

The proxy doctrine prevents the pretextual use of "a technically neutral classification as a proxy to evade the prohibition of intentional discrimination." *McWright v. Alexander*, 982 F.2d

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222, 228 (7th Cir. 1992). Proxy discrimination "arises when the defendant enacts a law or policy that treats individuals differently on the basis of seemingly neutral criteria that are so closely associated with the disfavored group that discrimination on the basis of such criteria is, constructively, facial discrimination against the disfavored group." *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1160, n.23 (9th Cir. 2013) (emphasis added). Kaiser's Plan does not treat any individuals differently, but even if it did, the issue for the Court is whether the alleged proxy classification matches the protected class closely enough that the Court can infer intentional discrimination. *Schmitt*, 965 F.3d at 959, citing *Davis v. Guam*, 932 F.3d 822, 838 (9th Cir. 2019) ("the crucial question is whether the proxy's 'fit' is 'sufficiently close' to make a discriminatory inference plausible").

The mere existence of some correlation or overlap between classification and class is not enough; there must instead be near unanimity between the two groups for a court to be able to infer that the classification is used because of disability. In *Hazen Paper Co. v. Biggins*, the Supreme Court rejected the plaintiff's theory that the vesting of pension benefits was a proxy for age under the Age Discrimination in Employment Act. 507 U.S. 604, 611, 113 S.Ct. 1701, 123 L. Ed. 2d 338 (1993). There, a 62-year-old employee who had been fired weeks before his pension vested claimed intentional age discrimination under the ADEA because age had been a determinative factor. *Id.* at 606. The Court explained that classifications based on factors other than age are not discriminatory, "even if the motivating factor is correlated with age." *Id.* While acknowledging there was likely to be a significant correlation between the two groups, the Court held that the vesting of a pension plan cannot be a proxy for age because "an employee's age is analytically distinct from his years of service." *Id.*

The Supreme Court in *Hazen* went on to explain that when the correlation between a facially neutral classification and a protected class is not necessarily equivalent, some evidence of intent aside from the classification itself is necessary to state a viable disparate treatment claim. So while factors such as pension status, seniority and years of service are "empirically correlated with age[,]" reliance on such factors standing alone does not support a finding of discriminatory

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intent. *Id*. at 608-09. "Because age and years of service are *analytically distinct*, an employer can take account of one while ignoring the other, and it is thus incorrect to say that a decision based on years of service is *necessarily* 'age based.'" *Id*. at 611. Thus, firing an employee in order to prevent pension benefits from vesting "would not, without more, violate the ADEA." *Id*. at 612. "Pension status may be a proxy for age, not in the sense that the ADEA makes the two factors equivalent . . . (using 'proxy' to mean statutory equivalence), but . . . an employer does not violate the ADEA just by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service. *Id*. at 613, *citing Metz v. Transit Mix, Inc.*, 828 F.2d 1201, 1208 (7th Cir. 1987). The Court remanded the case, but only because there was "additional evidentiary support" (aside from the years of service classification itself) to support a finding of discrimination because of age.

In *Pacific Shores*, the Ninth Circuit similarly held that the facially neutral criteria must be "almost exclusively indicators of membership in the disfavored group." 730 F.3d at 1160, n.23 (emphasis added). In that case, the defendant city wanted to eliminate all "group homes"—homes in which recovering alcoholics and drug users mutually support each other's recovery. *Id*. at 1147-48. Those persons qualified as disabled under the FHA. *Id*. at 1156-57. The plaintiffs presented evidence of various actions and public statements showing that the city's intent to eliminate housing for recovering alcoholics and drug addicts. *Id*. at 1151-52. Coupled with the "almost exclusive" correlation between the classification and the protected class, that evidence supported an inference that the city purposefully made its law facially neutral to insulate itself from a discrimination claim, and thereby affecting some, but very few, housing other than group homes. *Id*. at 1163-64: *see also Guam*, 932 F.3d at 838 ("Although proxy discrimination does not involve express racial classifications, the fit between the classification at issue and the racial group it covers is so close that a classification on the basis of race can be inferred without more").

Other courts have adopted similarly stringent and exacting requirements for the closeness of the "fit" between classification and class necessary to infer discriminatory intent without more. In *Community Services, Inc. v. Wind Gap Municipal Authority*, the plaintiff claimed the defendant

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discriminated on the basis of handicap under the Fair Housing Amendments Act when it classified a "personal care home" for the disabled as a "commercial facility" for purposes of water and sewer rates. 421 F.3d 171 (3d Cir. 2005). The Court rejected the plaintiff's proxy discrimination claim, distinguishing cases in which such a proxy had been found: "[I]n the above-cited cases the challenged classification was used to 'single out' *only* facilities for the disabled for different treatment with the only possible explanation being that it was 'because of' the disabled status of their residents." *Id.* at 181 (emphasis in original). The Court found that "[t]he term 'personal care home'—the alleged proxy for disabled status—was not used to 'single out' facilities for assessment of increased fees." *Id.* Instead, those homes were part of a larger group that was deemed to be comprised of commercial facilities. *Id.*

Therefore, where the "fit" between a facially neutral classification and a protected class is not "inextricably linked," some evidence of discriminatory intent beyond the language of the challenged policy is required. *Wind Gap*, 421 F.2d at 182 (summary judgment in favor of defendant was appropriate because "personal care homes" was not clearly a proxy for disabled housing, and there was no evidence of intent aside from the language used on the face of the challenged policy). When there is merely a correlation, something more is needed to support a finding of intent.

Erie County Retirees Association v. County of Erie, Pennsylvania, 220 F.3d 193 (3d Cir. 2000), provides a useful contrast to the above cases. There, the county provided Medicare-eligible retirees (*i.e.*, those aged 65 and older) a different and inferior health plan than the one available to retirees who had not reached the age of Medicare eligibility. *Id.* at 196. The court explained that the plaintiffs had a viable claim for age discrimination because eligibility "follows ineluctably upon attaining age 65" and therefore Medicare status is a "direct proxy for age." *Id.* at 211. Given the inextricable link between Medicare eligibility and age, the court could infer that the classification intentionally targeted persons in a protected group for differential treatment.

One court has defined the contours of a proxy discrimination claim using the "proxy-correlation distinction." *See Bowers v. NCAA*, 563 F. Supp.2d 508, 518, n.4 (D. N.J. 2008). It ruled that the classification of "students enrolled in special education course" was a proxy for "students

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with disabilities" because the IDEA expressly defined "special education" to mean instruction designed "to meet the unique needs of a child with a disability." *Id*. at 519, citing 20 U.S.C. 1401(29). The determination of proxy was made because special education is "necessarily tied to disability status; it is impossible to take account of the former while ignoring the latter." *Bowers*, 563 F. Supp.2d at 519. After discussing cases like *Hazen Paper* where proxy discrimination was evident from the face of the challenged policy alone, the court stated:

> As these cases make clear, the standard for evaluating claims that a neutral classification is a "proxy" for a facially discriminatory classification is rigorous, and even a strong correlation between the two categories will not alone suffice to show that the classification is facially discriminatory. Compare *Erie County Retirees Ass'n v. County of Erie*, 220 F.3d 193, 211 (3d Cir. 2000) ("Medicare status is a direct proxy for age," since eligibility "follows ineluctably upon attaining age 65") (emphasis added), with *Hazen Paper*, 507 U.S. at 613 (correlation exists between age and vesting of pension plans, but one is not necessarily tied to the other).

Bowers, 563 F. Supp.2d at 518, n.4.

The closeness of the "fit" based on the language of a facially neutral classification is an issue that courts can and have decided as a matter of law. One example is *Hollonbeck v. United States Olympic Comm.*, 513 F.3d 1191 (10th Cir. 2008). Paralympic athletes appealed the dismissal of their RA § 504 claims that the U.S. Olympics Committee discriminated against the disabled under a policy to provide Athlete Support Program benefits (including grants, tuition assistance and health insurance) only to Olympic team members. *Id*. at 1193. The court affirmed the dismissal of these claims (for failure to state a claim and, in the case of one appellant, on summary judgment). It held "the classification is facially neutral and is not 'directed at an effect or manifestation of handicap' as required for proxy discrimination." *Id*. at 1197, *citing McWright*, 982 F.2d at 228. It reasoned, as a matter of law, that "the designation of 'Olympic athlete' as a requirement for Athlete Support Programs is not a proxy for non-disabled athletes because there is no fit between being an Olympic athlete and not being disabled." *Hollonbeck*, 513 F.3d at 1196. The court held that without more, discriminatory intent could not be found and the appellants' claims amounted to only disparate impact claims, which are not actionable under RA § 504. *Id*. at 1197. Conversely, a policy excluding service dogs from a school or banning wheelchairs could be considered facially

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discriminatory, even though the policy itself does not mention a protected class, because proxy is inextricable linked with a disability. *McWright*, 982 F.2d at 228. Here, the "fit" between the affected group and the protected class is not remotely close.

2. Plaintiffs Have Failed to State Facts that Create a Plausible Inference of Proxy Discrimination.

Plaintiffs acknowledge (as they must) that non-disabled persons are affected by the Plan's exclusion for certain hearing services and, conversely, hearing disabled persons are not affected by the exclusion and receive coverage for cochlear implants or BAHAs to address their hearing needs. To adequately allege a plausible proxy discrimination claim, Plaintiffs must allege facts – not assumptions – showing that both of these groups are so small that the Court can reasonably infer the intentional targeting of disabled persons by proxy. The Ninth Circuit noted a potential problem with Plaintiffs' theory that hearing loss is a proxy for hearing disability: "since not all hearing loss is substantial, at least some – and probably most – individuals with hearing loss are not deemed disabled." *Schmitt*, 965 F.3d at 958. Plaintiffs' FAC allegations prove just that. According to their statistics, 79% of people with hearing loss have "mild" hearing loss and only 1% have severe or profound loss. FAC ¶¶1, 43-45, 67; Appx. B, p. 3. Meanwhile, 75% of those who report "serious" hearing loss have not sought hearing aids, and under Plaintiff's definition are therefore not disabled. Therefore, Plaintiffs' conclusory claim that "virtually everyone" who seeks hearing aids or related treatments is disabled is simply not plausible. Plaintiffs cannot plausibly allege the Exclusion applies "almost exclusively" to the disabled or that that it "single[s] out *only*" disabled insureds, such that the Court could infer discriminatory intent from the Exclusion alone.

a. Plaintiffs Allege No Facts Supporting Intentional Discrimination Other Than the Exclusion Itself.

The Ninth Circuit noted that Plaintiffs "allege no facts giving rise to an inference of intentional discrimination besides the exclusion itself. Thus, without allegations of discriminatory motivation, the crucial question is whether the proxy's 'fit' is 'sufficiently close' to make a discriminatory inference plausible." *Schmitt*, 965 F.3d at 959. The FAC suffers from the same deficiency because Plaintiffs fail to allege any independent facts or data that would support an

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inference of intentional discrimination. The FAC adds new conclusory allegations suggesting Kaiser adopted the Exclusion specifically for the *purpose* of discriminating against the disabled. Such conclusory allegations were rejected in *Iqbal*, 556 U.S. at 679-83. Unlike the public statements and other facts alleged in *Pacific Shores*, Plaintiffs provide no facts in support of these implausible allegations, and Plaintiffs fail to nudge their claim of purposeful discrimination "across the line from conceivable to plausible." *Id*. at 682-83, *quoting Twombly*, 550 U.S. at 570.

The FAC and its supporting data also contain facts fundamentally inconsistent and directly contrary to Plaintiffs' intentional discrimination claim. Kaiser's Plan was designed consistent with Washington's EHB-benchmark plan, which expressly provides coverage is not required for "[h]earing care, routine hearing examinations, programs or treatment for hearing loss including, but not limited to, externally worn or surgically implanted hearing aids, and the surgery and services necessary to implant them." WAC 284-43-5642(1)(b)(vii). Furthermore, the statistics relied upon by Plaintiffs demonstrate that the Exclusion applies to more than twice as many non-disabled than disabled insureds. An insurer's decision to follow state insurance regulations that exclude coverage predominantly for non-disabled insureds cannot plausibly create an inference of intentional discrimination solely because of disability.

b. The Exclusion Is Overinclusive Because It Applies to Non-Disabled Insureds with Moderate, Mild, or No Hearing Loss.

By its terms, the Exclusion is plainly not limited in application to insureds with disabling or even significant hearing loss. It excludes coverage for certain hearing-related services for ***everyone***: people with minimal, non-disabling hearing loss as well as those with no hearing loss at all. The Ninth Circuit recognized as much:

> All individuals with hearing disability have hearing loss because "disability" is defined in part as "a physical or mental impairment that substantially limits one or more major life activities," including "hearing." But since not all hearing loss is substantial, at least some—and potentially most—individuals with that condition are not deemed disabled.

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965 F.3d at 958 (quoting 42 U.S.C. § 12102(1)(A), (2)(A)); *see also Mack v. CGI Fed., Inc.*, No. 1:17CV297, 2018 WL 7138861, at *1 n.1 (E.D. Va. Sept. 26, 2018) (plaintiff pled insufficient facts to show tinnitus was disabling hearing condition under ADA). It makes sense that many, if not most, people with hearing loss are not disabled because their hearing impairment does not "substantially" limit a major life activity. To be substantially limited, a plaintiff must be "significantly restricted as to condition, manner or duration under which he can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.2(j). As Kaiser extensively briefed in its previous motion to dismiss, insurance distinctions that are applied evenhandedly to the disabled and non-disabled alike do not amount to "discrimination." *E.g., Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 677–78 (8th Cir. 1996) (exclusion of infertility treatments for all is not disability discrimination).

Plaintiffs attempt to minimize the Exclusion's over inclusiveness by asserting: (1) only hearing disabled insureds would seek excluded treatments; and (2) hearing treatment for non-disabled insureds would be barred by the Plan's requirement of medical necessity. FAC ¶¶ 52-57. Both allegations are implausible.

First, the relevant inquiry when analyzing the applicability of the Exclusion is not which insureds actually seek out hearing treatment, which anyone could do for a host of hearing related issues. Instead, it is which insureds would be otherwise *entitled* to a service that is barred by the Exclusion. Insureds with no hearing loss at all are denied coverage for routine hearing examinations that may be part of their regular checkups, particularly as they age, and insureds with mild forms of hearing loss are also denied coverage for treatment whether they ever actually seek it. The Court should reject Plaintiffs' implausible assertion that an individual's subjective belief regarding the level of his or her impairment is the deciding factor in whether he or she is disabled, and therefore, those who do not seek treatment are *per se* not disabled. FAC ¶ 52. This is also contradicted by Plaintiffs' allegation that 75% who report serious hearing difficulty do not seek treatment for the hearing aids at issue. FAC ¶50. Disability is determined by objective standards,

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not by subjective complaints. *See, e.g., Smith v. Masterson*, 353 F. App'x 505, 507 (2d Cir. 2009) (prisoner's subjective complaints of hearing loss failed to establish disability without corroboration by objective test). The Exclusion therefore applies equally to insureds with disabling hearing loss, moderate hearing loss, mild hearing loss, and no hearing loss at all.

Second, Kaiser's medical necessity requirement does not limit the applicability of the Exclusion to disabled insureds. Plaintiffs allege that if "any non-disabled enrollees with hearing loss seek coverage for hearing examinations and/or hearing aids, and they meet Kaiser's medical necessity standards but are still subject to denial of their claims under Kaiser's Hearing Loss Exclusion, the number of those enrollees is extremely small, if they exist at all." FAC ¶ 56. Kaiser's definition of "medically necessary," however, does not support that assumption:

> In order to be Medically Necessary, services and supplies must meet the following requirements: (a) are not solely for the convenience of the Member, his/her family or the provider of the services or supplies, including exercise equipment and home modifications such as ramps and walkways; (b) are the most appropriate level of service or supply which can be safely provided to the Member; (c) are for the diagnosis or treatment of an actual or existing Medical Condition unless being provided under KFHPWAO's schedule for preventive services; (d) are not for recreational, life-enhancing, relaxation or palliative therapy, except for treatment of terminal conditions; (e) are appropriate and consistent with the diagnosis and which, in accordance with accepted medical standards in the State of Washington, could not have been omitted without adversely affecting the Member's condition or the quality of health services rendered; ….

Dkt. # 65-1 at 75. Under the Exclusion, "preventive services" such as routine examinations could further "diagnosis and treatment" under the medical necessity definition for those with non-disabling hearing loss, but are not covered under the Exclusion. Those with mild hearing loss (79% of the total population age 12-65 with bilateral hearing loss) may benefit from a hearing test and thus comply with medical necessity. Plaintiffs offer no allegation, fact, or cogent argument supporting an inference that any person with hearing loss—but not so severe that they are disabled—would, but for the Exclusion, receive treatment considered medically necessary particularly given the vast numbers of people that, by Plaintiffs' own admission, have some degree of hearing loss.

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Furthermore, the research paper attached to the FAC as Appendix B—and upon which Plaintiffs rely for statistics regarding the demand for cochlear implants—shows that cases of mild hearing loss outnumber moderate, severe, and profound cases *combined* by a factor of almost two-to one: "An estimated 25.4 million, 10.7 million, 1.8 million, and 0.4 million US residents aged 12 years or older, respectively, have mild, moderate, severe, and profound better-ear hearing loss." Dkt. 65-2 at 2. When the numbers are calculated for ages 12-65 with bilateral hearing loss they show 79% of that total population has only mild loss. Dkt 65-2, p. 3. If these percentages are generally applicable to Kaiser's Plan participants, as Plaintiffs allege it is, *more than four times* as many non-disabled insureds would be denied coverage under the Exclusion as compared to disabled insureds. This is without even considering the much larger pool of insureds with no hearing loss who are denied coverage for routine hearing examinations.

This point is even more significant given Plaintiffs' failure to distinguish between bilateral and unilateral hearing loss. When both unilateral and bilateral hearing loss are taken into account, the total number of persons with mild hearing loss swells. FAC Appendix B at 3. *See Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 566, 119 S.Ct. 2162, 144 L. Ed. 2d 518 (1999) (plaintiff's monocular vision was, without more, insufficient to establish disability); *Santiago Clemente v. Exec. Airlines, Inc.*, 213 F3d 25, 31 (1st Cir. 2000) (plaintiff with unilateral hearing loss not disabled). Plaintiff's statistics belie their allegation that only hearing disabled persons would be motivated to seek hearing exams or treatment for their condition. Plaintiffs offer no rationale or explanation for why: (1) a person with non-disabling but noticeable hearing loss in one ear would not seek any type of treatment, even a routine examination; or (2) why such treatment would otherwise be denied if the Exclusion did not exist.

In sum, on its face and based on Plaintiffs' own allegations, the Exclusion unquestionably prevents non-disabled insureds from receiving coverage for routine examinations or treatment of hearing loss. The FAC's contrary allegations—suggesting that the Exclusion only applies to disabled insureds— are not plausible. By defining the hearing disabled based on their use of the specific hearing services excluded, Plaintiffs simultaneously *include* 72% of people with only mild

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or moderate (non disabling) hearing loss, and *exclude* 75% of people with serious hearing difficulty (hearing disabled). Because the Exclusion is substantially overinclusive and underinclusive its exclusion of hearing treatment other than for cochlear implants and BAHAs cannot be rationally inferred to be a proxy for disability.

c. The Exclusion Is Underinclusive Because It Covers Treatment for Insureds with the Most Severe Hearing Loss.

The Exclusion's over inclusiveness is alone enough to render it an insufficient proxy for disability. But the Exclusion is also underinclusive of disabled insureds because it expressly allows coverage for cochlear implants and BAHAs, which treat the most severe hearing loss. *See* FAC ¶ 66 (cochlear implants are "only available to people with severe to profound hearing loss who cannot be adequately treated with hearing aids"). Plaintiffs attempt to minimize this lack of fit by alleging that only a small percentage of people with hearing loss need cochlear implants or BAHAs, but this does nothing to support Plaintiffs' claims.

According to Plaintiffs, 520,000 people under age 65 would be eligible for cochlear implants, which they allege equates to 5.6% of people under 65 with self-reported serious hearing loss. FAC ¶ 67. But using the figures in Dkt. #65-2 at p.1, there are 2.23 million people between 12 and 65 who have severe to profound bilateral hearing loss (who are undoubtedly disabled under the ADA), and 520,000 of them (23%) would be eligible for cochlear implants. Then almost one out of four disabled people are eligible for cochlear implants and outside the scope of the Exclusion. These facts come nowhere close to the level of "fit" needed to allow an inference of discriminatory intent.

B. Plaintiffs' Claim Fails Because They Cannot Plausibly Allege that They Were Discriminated Against "Solely" Because of Their Disability.

Plaintiffs' claim also fails under the applicable causation standard for disability discrimination under RA § 504 (the discrimination is done *solely* because of disability), which now unquestionably applies to Plaintiffs' ACA § 1557 claim.

As has been previously briefed to this Court in detail, ACA § 1557 adopts the grounds and enforcement mechanisms of four other civil rights statutes, including RA § 504 for prohibiting

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disability discrimination. *See Huffman v. Univ. Med. Ctr. Mgmt. Corp.*, No. 17-4480, 2017 WL 4960268 (E.D. La., Oct. 31, 2017)(finding Section 1557 of the ACA has the same meaning and same protections as RA §504 and the ADA, with respect to disability discrimination); *SEPTA v. Gilead Sciences, Inc.*, 102 F. Supp. 3d 688, 697-670 (E.D. Pa. 2015) (ACA §1557 manifests an intent to import the various standards and burdens of proof of the four referenced civil rights statutes, depending upon the protected class as issue).

The Ninth Circuit recently affirmed this interpretation, and held that to state a claim for disability discrimination under ACA § 1557, a plaintiff "must allege facts adequate to state a claim under Section 504 of the Rehabilitation Act." *Doe v. CVS Pharm., Inc.*, 982 F.3d 1204, 1210 (2020). The Court noted that the *Schmitt* opinion had "left open the question of whether the ACA created a healthcare-specific anti-discrimination standard that allowed plaintiffs to choose standards from a menu provided by other antidiscrimination statutes." *Id*. at 1209; *citing Schmitt*, 965 F.3d at 954. The *Doe* Court rejected that proposition: "We answer now in the negative." *Doe*, 982 F.3d at 1209. This consistent with the only other circuit court to have addressed the issue to date. *See Doe v. BlueCross BlueShield of Tennessee, Inc.*, 926 F.3d 235 (6th Cir. 2019); *accord, SEPTA*, 102 F. Supp. 3d at 699.

The import of the Ninth Circuit's holding in *Doe* is that, in order to state a claim for disability discrimination under ACA § 1557, Plaintiffs "must show differential treatment 'solely by reason of' disability, 29 U.S.C. § 794(a), not some other standard of care." *Doe*, 982 F.3d at 1209 (emphasis added); *quoting Doe v. BlueCross*, 926 F.3d at 238; *see also Bax v. Doctors Med. Ctr. of Modesto, Inc.*, 393 F. Supp. 3d 1000, 1012 (E.D. Cal. 2019) ("A claim under the ACA is enforced through Section 504 of the Rehabilitation Act and is subject to the same standards"). In other words, a health plan runs afoul of ACA § 1557 only if its allegedly discriminatory provisions are adopted with intent to discriminate against the disabled, and for no other reason. The additional word "solely" in RA § 504 is a meaningful difference from the causation requirements of other anti-discrimination statutes; it means that plaintiffs must show that no other factor besides disability played a role in the challenged decision or policy. *See, e.g., Norcross v. Sneed*, 755 F.2d

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113, 117 & n.5 (8th Cir. 1985). Several courts have similarly found that to establish a prima facie case of a violation of RA § 504, the plaintiff must show that the disability was the sole reason for the unfavorable or discriminatory treatment. *Buko v. American Medical Lab., Inc.*, 830 F. Supp. 899, 905 (E.D. Va. 1993), *aff'd*, 28 F.3d 1208 (4th Cir. 1994); *Assa'ad-Faltas v. Virginia*, 738 F. Supp. 982, 987 (E.D. Va. 1989), *aff'd*, 902 F.2d 1564 (4th Cir. 1990).

The Fourth Circuit has noted that RA § 504 imposes a "stricter standard" of causation than Section II of the ADA and other anti-discrimination statutes' "motivating factor" test because of the requirement that discrimination must be "solely" because of disability:

> The ADA's Title II and the Rehabilitation Act "differ only with respect to the third element, causation." *Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 461 (4th Cir. 2012). "To succeed on a claim under the Rehabilitation Act, the plaintiff must establish he was excluded 'solely by reason of' his disability; the ADA requires only that the disability was 'a motivating cause' of the exclusion." *Id.* at 461-62 (quoting *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 468-69 (4th Cir. 1999)).

Wicomico Nursing Home v. Padilla, 910 F.3d 739, 750 (4th Cir. 2018).

Plaintiffs' FAC does not allege that discrimination against the disabled was the sole reason why Kaiser adopted the hearing aid exclusion its Plan, and fails to state a claim for that reason alone. Nor could it plausibly make such a far-fetched allegation in another amended complaint. Regulations acknowledge that nothing in ACA § 1557 "prevent[s] an issuer from appropriately utilizing reasonable medical management techniques[.]" 45 C.F.R. § 156.125(a). "The final rule does not . . . require covered entities to cover any particular procedure or treatment. It also does not preclude a covered entity from applying neutral, nondiscriminatory standards that govern the circumstances in which it will offer coverage to all its enrollees in a nondiscriminatory manner." *Schmitt*, 965 F.3d at 958, *quoting* 81 Fed. Reg. at 31,434.

The Ninth Circuit was correct when it logically surmised it was "possible that Kaiser has a reasonable, nondiscriminatory reason for its blanket exclusion of treatment for hearing loss other than cochlear implants." *Schmitt*, 965 F.3d at 958. If any such reason is plausible, then Plaintiff's claim must fail under the "solely" requirement enunciated in *Doe*. Plaintiffs acknowledge, though

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crudely, that the cost of coverage for hearing aids was at least one factor motivating the exclusion of hearing aid treatment:

> This discriminatory decision directly resulted in Kaiser retaining money that it would otherwise would [sic] have been required to pay to cover services and equipment for disabled insureds. Kaiser made this calculus as part of its underwriting, and decided that its desire to retain money outweighed the medically necessary needs of its insureds with disabling hearing loss.

FAC ¶ 118. The inescapably conclusion is that one of Kaiser's motivations for adopting the Exclusion was a desire to keep premium costs down, and this acknowledgement dooms Plaintiffs' claim. The fact that Kaiser does offer hearing aid coverage in a rider for extra premiums (see footnote 1 above), precludes any doubt that cost was a reason for the Exclusion. If Kaiser were forced to cover all types of hearing aids in all plans, employers would be forced to pay higher premiums, a result antithetical to the ACA's goal of providing affordable health care to all.

In the end, Plaintiffs offer nothing more the language of the exclusion, and statistics to show a loose correlation between hearing loss and disability. But statistics do not warrant an inference that a facially neutral policy was motivated by discriminatory intent, because they do not show a "clear pattern unexplainable on grounds other than" discriminatory ones. *Pacific Shores*, 730 F.3d at 1148-59, *quoting Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 266-68, 7 S.Ct. 555, 50 L. Ed.2d 450 (1977). This Court previously ruled that the Exclusion is both underinclusive and overinclusive, precluding a finding of discriminatory intent on the face of the Exclusion alone:

> [T]he policy at issue provides a specified hearing service for disabled participants while excluding coverage for other hearing services regardless of whether the participant is disabled or not-disabled by their hearing loss. In these circumstances, plaintiffs have failed to raise a plausible inference that the benefit design or coverage denial was motivated by their disability.

Dkt. # 42, p. 8. Plaintiffs still make no plausible allegation that Kaiser acted with actual discriminatory animus, and their ACA § 1557 claim should therefore be dismissed.

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C. Plaintiffs Also Fail to State a State Law Claim.

Plaintiffs allege a new, second cause of action for "breach of contract and violation of RCW § 48.43.0128." FAC ¶¶ 120-24. Enacted in June 2020, this insurance reform statute has not yet been interpreted by any court. It provides, in relevant part, as follows:

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

RCW § 48.43.0128(1)(a). Plaintiffs claim the Exclusion discriminates against them on the basis of disability in violation of the statute, and that because the statute voids the Exclusion, Kaiser breached its contract with Plaintiffs by relying on a void provision in denying coverage for Plaintiffs' hearing treatment. FAC ¶¶ 123-24. This claim should be dismissed for three independently sufficient reasons.

First, the Exclusion is not discriminatory under state law for the same reasons discussed above in the context of ACA § 1557. Its application is not limited to the disabled because it also excludes coverage for insureds with non-disabling hearing loss. Even if the definition of disability under state law is broader than under the ACA, as Plaintiffs allege, the Exclusion is still not a proxy for disability because it bars coverage of routine hearing examinations for all insureds, regardless of whether they have an impairment.

Second, the regulations state that insurers must only "provide coverage that is substantially equal to the EHB-benchmark plan, as described in WAC 284-43-5642." WAC 284-43-5622(1). The plan described in WAC 284-43-5642 provides that "[a] health benefit plan . . . is not required to, include the following services as part of the EHB-benchmark package: . . . Hearing care, routine hearing examinations, programs or treatment for hearing loss including, but not limited to, externally worn or surgically implanted hearing aids, and the surgery and services necessary to implant them." WAC 284-43-5642(1)(b)(vii). This is a determination by a state agency that exclusion of treatment for hearing loss is not discriminatory under the Insurance Reform Act, and courts should "give substantial weight and deference to an agency's interpretation of the statutes

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and regulations it administers." *Pitts v. State, Dep't of Soc. & Health Servs.*, 129 Wash. App. 513, 523, 119 P.3d 896, 902 (2005). Kaiser cannot have violated a statute by explicitly following the directives of its implementing regulations.

Third, RCW § 48.43.0128 does not create a private right of action, and Plaintiffs cannot run an end-around by dressing a statutory claim in a breach-of-contract disguise. Under Washington law, statutes can be interpreted to create an implied right of action if: (1) the plaintiff is within the class for whose benefit the statute was enacted, (2) legislative intent, explicitly or implicitly, supports creating or denying a remedy, and (3) implying a remedy is consistent with the underlying purpose of the legislation." *Keodalah v. Allstate Ins. Co.*, 194 Wash. 2d 339, 449 P.3d 1040, 1045 (2019) (citing *Bennett v. Hardy*, 113 Wash. 2d 912, 784 P.2d 1258 (1990)).

In *Keodalah*, the court examined each one of those factors and concluded that no factor supported implying a private right of action. 449 P.3d at 1045-47. First, the statute benefited the general public and served the general public welfare rather than an "identifiable class of persons." *Id*. at 1045. Next, in the absence of an express cause of action and with the presence of several specific enforcement mechanisms in the insurance code, the court concluded that the overall statutory context suggested the legislature did not intend to imply a cause of action. *Id*. at 1046. With respect to the third factor, the implication of creating broad liability throughout the insurance regime ran counter to the legislature's apparent purpose. *Id*. *See also Cameron v. Physicians Ins.*, No. 03-cv-879-HA, 2004 WL 1661989, at *3-4 (D. Or. July 26, 2004) (holding that Oregon anti-discrimination provision for health insurance contains no private right of action).

The Court should reach the same result here. RCW § 48.43.0128 is not like ACA § 1557v. *Hardy*, 113 Wash. 2d 912, 784 P.2d 1258 (1990), which incorporates existing anti-discrimination standards related to defined groups. Instead, it applies incredibly broadly to various traits, including "expected length of life," "quality of life," or "other health conditions." It does not contain an express cause of action and, unlike ACA § 1557, makes no mention of enforcement. *Cf*. 42 U.S.C. § 18116 ("The enforcement mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act shall apply for purposes of violations of

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this subsection"). To the contrary, the state legislature made clear that the Insurance Commissioner would be charged with determining violations and enforcing RCW § 48.43.0128's mandate. RCW § 48.43.0128(3). And the commissioner has done so. Pursuant to the implementing regulations, the commissioner determines whether health benefit plans comply with the statute. WAC 284-43-5622(9); WAC 284-43-5940(2). Each of the *Bennett* factors support the conclusion that the legislature did not intend RCW § 48.43.0128 to be enforceable in a private lawsuit.

Plaintiffs couch their claim as one for breach of contract. But neither RCW § 48.18.200(2) nor *Brown v. Snohomish County Physicians Corp.*, 120 Wash. 2d 747, 753, 845 P.2d 334, 337 (1993), stand for the proposition that all "relevant requirements" of the Insurance Code are deemed terms of every insurance contract. *See* FAC ¶ 121. Instead, RCW § 48.18.200(2) prohibits the inclusion of certain provisions in an insurance contract, and provides that such specifically banned provisions are void. Similarly, *Brown* indicates that limitations or provisions in insurance contracts that are contrary to statute or public policy will not be enforced. 845 P.2d at 337. *See also Astra USA, Inc. v. Santa Clara County*, 563 U.S. 110, 114, 118, 131 S.Ct. 1342, 179 L. Ed. 2d 457 (2011) (the absence of a private right of action to enforce the statute "would be rendered meaningless" if a plaintiff could simply sue to enforce the contract instead.)

IV. CONCLUSION

For all of the foregoing reasons, this Court should dismiss Plaintiffs' Fourth Amended Complaint with prejudice.

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Respectfully submitted this 18th day of March, 2021.

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CERTIFICATE OF SERVICE

I, Jan Likit, affirm and state that I am employed by Karr Tuttle Campbell in King County, in the State of Washington. I am over the age of 18 and not a party to this action. My business address is: 701 Fifth Avenue, Suite 3300, Seattle, Washington 98104.

On this day, I caused the foregoing DEFENDANTS' MOTION TO DISMISS FOURTH AMENDED COMPLAINT to be served on the parties listed below in the manner indicated.

Eleanor Hamburger
Richard E. Spoonemore
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☐ Via U.S. Mail
☐ Via Hand Delivery
☐ Via Electronic Mail
☐ Via Overnight Mail
☒ CM/ECF via court's website

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

Executed on this 18th day of March, 2021, at Seattle, Washington.

/s/Jan Likit
Litigation Legal Assistant

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The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

ANDREA SCHMITT; ELIZABETH MOHUNDRO; and O.L. by and through her parents, J.L. and K.L., each on their own behalf, and on behalf of all similarly situated individuals,, Plaintiffs, v. KAISER FOUNDATION HEALTH PLAN OF WASHINGTON; KAISER FOUNDATION HEALTH PLAN OF WASHINGTON OPTIONS, INC.; KAISER FOUNDATION HEALTH PLAN OF THE NORTHWEST; and KAISER FOUNDATION HEALTH PLAN, INC., Defendants.	CASE NO. 2:17-cv-1611-RSL [PROPOSED] ORDER GRANTING DEFENDANTS' 12(b)(6) MOTION TO DISMISS FOURTH AMENDED COMPLAINT

This matter came on regularly for hearing upon Defendants' 12(b)(6) Motion to Dismiss Fourth Amended Complaint. The Court has reviewed the pleadings, files and records herein, including the submissions of the parties, and considered the arguments of counsel. The Court finds that the Fourth Amended Complaint (Class Action), filed by Plaintiffs on December 15, 2020 (Dkt. 65), fails to state a claim for: (1) disability discrimination under Section 1557 of the Patient

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Protection and Affordable Care Act §1557, codified at 42 U.S.C. §18116, as required by Fed. R. Civ. P. 12(b)(6); and (2) breach of contract and violation of RCW § 48.43.0128.

NOW, THEREFORE, it is hereby ORDERED that Defendants' 12(b)(6) Motion to Dismiss Fourth Amended Complaint is GRANTED, and Plaintiff's Fourth Amended Complaint is hereby DISMISSED WITH PREJUDICE.

Dated this _____ day of _____, 2021.

_____
The Honorable Robert S. Lasnik
United States District Court Judge

Presented by:

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