THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

E.S., by and through her parents, R.S. and J.S., and JODI STERNOFF, both on their own behalf, and on behalf of all similarly situated individuals,

Plaintiffs,

v.

REGENCE BLUESHIELD; and CAMBIA HEALTH SOLUTIONS, INC., f/k/a THE REGENCE GROUP,

Defendants.

No. 2:17-cv-01609-RAJ

DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT

NOTE ON MOTION CALENDAR:
May 20, 2022

Oral Argument Requested

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

TABLE OF CONTENTS

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

TABLE OF ATHORITIES

Page

CASES

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

STATUTES

RULES

REGULATIONS

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

OTHER AUTHORITIES

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

I. MOTION

Defendants Regence BlueShield ("Regence") and Cambia Health Solutions, Inc. f/k/a The Regence Group ("Cambia") (collectively "Defendants") respectfully move the Court for an order dismissing Plaintiffs' Second Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6) on the grounds that it fails to state a claim for relief.

II. INTRODUCTION

This is Plaintiffs' third attempt to plead a claim for disability discrimination under Section 1557 of the Affordable Care Act ("ACA") based on their insurance plans' exclusion of all testing and treatment for hearing loss other than cochlear implants. And Plaintiffs' Second Amended Complaint fares no better than their previous attempts. None of the three theories advanced by Plaintiffs—proxy discrimination, disparate impact, or intentional discrimination—states a claim.

Plaintiffs' primary theory is proxy discrimination, a claim that the Court dismissed on the grounds that the asserted proxy was too overinclusive to create an inference of discrimination. (Dkt 41.) Plaintiffs now try to remedy that defect by alleging, contrary to their prior complaints, that Regence *does*, in fact, provide coverage for routine hearing screenings and diagnostic hearing treatment. Thus, Plaintiffs' new interpretation of the Exclusion is:

- Hearing screening and diagnostic evaluations: Covered for all insureds;
- Hearing aids: Not covered for all insureds; and
- Cochlear implants: Covered for all insureds.

In that way, Plaintiffs attempt to ***create*** a statistical or qualitative "fit" that does not exist by asking the Court to focus only on the part of the Exclusion—hearing aids—that is allegedly more likely to be needed by the disabled.

Plaintiffs' effort to manufacture a proxy theory fails for at least two reasons. First, the plain text of Plaintiffs' policies and Plaintiffs' own prior allegations refute their conclusory and unsupported allegations that Regence somehow covers all routine or diagnostic hearing

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

treatment.[1] The Court's task is to analyze the policies as a whole, which necessarily includes the exclusions of routine hearing examinations and other hearing treatments, as well as the *inclusion* of cochlear implants, which are provided exclusively to disabled insureds.

Second, even if one accepted Plaintiffs' factual premise, it would not lead to the conclusion that Regence intentionally discriminated against the disabled by covering all hearing treatment and cochlear implants, except for non-cochlear hearing aids. On the one hand, the alleged coverage for non-hearing-aid-related testing and treatment benefits both the disabled and the non-disabled alike. Put simply, if all insureds are able to receive hearing testing (including diagnostic testing) as Plaintiffs now argue, then there is no basis on which to conclude that only non-disabled persons would take advantage of that coverage. And nowhere do Plaintiffs allege in the Second Amended Complaint that persons with disabling hearing loss would not receive, and equally benefit from, diagnostic or other testing associated with their disabling condition, particularly given the progressive nature of hearing loss. On the other hand, Plaintiffs do not demonstrate (statistically or otherwise) that hearing aids treat only disabling hearing loss, such that excluding coverage for hearing aids supports a proxy theory. In fact, the Second Amended Complaint shows even less of a fit between the excluded coverage and the disabled because Plaintiffs now admit that more than a quarter of people who wear hearing aids are not disabled.

Analyzed in the appropriate framework, the result here is the same as it was for Plaintiffs' prior two complaints. They cannot change the statistics showing that more individuals have non-disabling hearing loss than have disabling hearing loss, and they cannot change the plain language of the Exclusion stating that all treatment for hearing loss, including routine hearing examinations, are excluded for both disabled and non-disabled insureds.

The fatal flaws in Plaintiffs' proxy discrimination claim, as well as the problems previously identified by the Court, also bar Plaintiffs' other theories. Plaintiffs' disparate impact

---

[1] The language of the excluded coverage has changed slightly since Plaintiffs first purchased their policies, but they acknowledge that the scope of coverage has not changed. (Dkt. 42 ¶ 23.)

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

claim is simply a restatement of the claim in their initial Complaint, which this Court rejected because the policy exclusions applied equally to the disabled and non-disabled. Because Plaintiffs cannot even show a discriminatory effect on the disabled, then *a fortiori* they cannot show intentional discrimination. And Plaintiffs' state law claims fail for the additional reason that Regence's plan, including the exclusions at issue, fully comply with regulations implementing state discrimination law.

Plaintiffs have been unable to state a claim for discrimination in three tries. This is because Regence's policy does not discriminate against the disabled. All of its provisions apply to all insureds regardless of disability, and the exclusions at issue predominately affect the non-disabled while providing coverage for insureds with the most severe disabilities. Just like Medicare,[2] health benefit plans that exclude most, but not all, hearing-related-treatment are not intentionally discriminating against individuals with disabilities. Defendants respectfully request that the Court grant their Motion to Dismiss and deny leave to amend as futile.

III. BACKGROUND

A. The Amended Complaint and the Court's Dismissal

Given the procedural history, Regence does not repeat, and assumes familiarity with, the background of the ACA, Plaintiffs' Complaint, and the Ninth Circuit's decision. *Schmitt v. Kaiser Found. Health Plan of Wash.*, 965 F.3d 945, 954 (9th Cir. 2020); *see also* Dkt 37 (outlining history of ACA and procedural history). In response, Plaintiffs' Amended Complaint focused on the proxy discrimination theory discussed by the Ninth Circuit. (Dkt. 32.) Plaintiffs alleged that the Exclusion "predominately affects disabled persons" because those with non-disabling hearing loss rarely seek treatment, and any treatment they do seek is not covered because it is not medically necessary. (*Id.* ¶¶ 55, 60.) Plaintiffs further cited statistics that they

[2] *See* 42 U.S.C.A. § 1395y(a)(7) (excluding coverage for "hearing aids or examinations therefor"); *see also Zells v. U.S. Sec'y of Health & Hum. Servs.*, 414 F. App'x 917, 917 (9th Cir. 2011) ("[U]nder the plain language of the statute, hearing aids are not covered by Medicare.").

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

claimed demonstrate the "fit" between the Exclusion and disability sufficient to support a proxy discrimination claim. (*Id.* ¶¶ 66-72.)

This Court granted Defendants' motion to dismiss (the "Second Motion to Dismiss," Dkt. 37), holding that Plaintiffs failed to demonstrate a close enough fit between the Exclusion and disability to support a discrimination claim. The Court considered Plaintiffs' allegations that insureds with non-disabled hearing loss do not seek treatment to be "conclusory" and "devoid of 'underlying facts.'" (Dkt. 41 at 12.) The Court further disputed the inferences Plaintiffs drew from the statistical evidence, finding instead that the Exclusion "'predominately' or 'primarily' affects non-disabled persons" because at least "66.5% of the hearing loss population . . . would not be disabled under the ADA and would also [be] excluded by Regence's policy." (*Id.* at 15.) The Court, however, granted Plaintiffs leave to amend their complaint again.

B. The Second Amended Complaint.

1. The Parties.

Plaintiff E.S. is the nine-year-old daughter and dependent of R.S. and J.S. She is insured under a Regence BlueShield insured health plan. (Dkt. 42 ¶ 8.) Plaintiff Jodi Sternoff is an adult who is also insured under a Regence BlueShield insured health plan. (*Id.* ¶ 9.) Plaintiffs allege that they and other members of the putative class "have been diagnosed with hearing loss . . . that limits a major life activity so substantially as to require medical treatment." (*Id.* ¶ 42.) Plaintiffs allege that they "require and/or will require hearing aids for their hearing loss, excluding treatment with cochlear implants." (*Id.* ¶ 43.) Plaintiffs also allege that they have paid out-of-pocket for medically necessary treatment for their hearing loss, including hearing aids and associated care. (*Id.* ¶ 48.)[3]

[3] Plaintiffs' counsel has filed a Fourth Amended Complaint raising similar claims on behalf of different plaintiffs against several entities affiliated with Kaiser Permanente. *See Schmitt v. Kaiser Found. Health Plan of Wash.*, No. 2:17-cv-01611 (W.D. Wash. Dec. 15, 2020), ECF No. 65.

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

Defendant Regence is an authorized health carrier based in King County and is engaged in the business of insurance in the State of Washington, including King County. (*Id.* ¶ 10.) Cambia is the nonprofit sole member and corporate owner of Regence. (*Id.* ¶ 11.)

2. The Exclusion.

At the time the lawsuit was filed, Regence's insured health plans in Washington contained the following benefit exclusion:

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

(Id. ¶ 23 (quoting Plaintiffs' Regence Policy, Group No. 10018298).) Regence's 2020 health plan purchased by Plaintiffs contains a similar provision, which provides: "Hearing aids (externally worn or surgically implanted) and other hearing devices are excluded. This exclusion does not apply to cochlear implants." (Dkt. 32-1 at 50-51.) The provision further excludes "Routine Hearing Examination." (*Id.* at 52.) Plaintiffs acknowledge in the Second Amended Complaint that the exclusions from the original and current policies are "worded differently but ha[ve] the same effect." (Dkt. 42 ¶ 23.)[4]

Consistent with the text of the policies, Plaintiffs previously interpreted the Exclusion to apply to all treatment for hearing loss except cochlear implants. (*See* Am. Compl. ¶¶ 104-11.) Furthermore, on their face, these policy provisions apply to all insureds under the plans at issue. Thus, a non-disabled person will not have coverage for a routine hearing examination, just as a disabled person would not have coverage for the same examination.

3. New Claims in Second Amended Complaint.

Plaintiffs assert three different theories in support of Count 1, which alleges that the Exclusion violates Section 1557 of the ACA: proxy discrimination, disparate impact, and intentional discrimination. (Dkt. 42 ¶¶ 60-99.) Furthermore, in addition to the state-law claim

[4] Defendants herein refer to the quoted provisions of Plaintiffs' prior and current policies, collectively, as the "Exclusion."

under RCW 48.43.0128 that was asserted in their prior complaints, Plaintiffs assert claims under Washington's Consumer Protection Act, RCW 19.86 *et seq.*, and claims for declaratory and injunctive relief. (Dkt. 42 ¶¶ 100-11.)

IV. STANDARD OF REVIEW

"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, 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)). A claim is facially plausible "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.* "[D]ismissal for failure to state a claim under [Rule] 12(b)(6) is proper if there is a 'lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.'" *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011) (quoting *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988)).

V. ARGUMENT

A. Plaintiffs Fail to State a Claim for Proxy Discrimination.

1. Plaintiffs Assert an Incorrect Standard for Proxy Discrimination.

As discussed more fully in Defendants' Motion to Dismiss Amended Complaint (Dkt. 37), 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). A proxy discrimination claim addresses the use of "a technically neutral classification as a proxy to evade the prohibition of intentional discrimination." *McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir. 1992). As the Ninth Circuit noted in *Schmitt*, the issue for the Court is whether the alleged proxy classification

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

matches the protected class closely enough that the Court can infer intentional discrimination. 965 F.3d at 959 ("[T]he crucial question is whether the proxy's 'fit' is 'sufficiently close' to make a discriminatory inference plausible." (citing *Davis v. Guam*, 932 F.3d 822, 838 (9th Cir. 2019)). For a sufficiently close "fit," the neutral criteria must be "*almost exclusively* indicators of membership in the disfavored group." *Pac. Shores Props.*, 730 F.3d at 1160, n.23 (emphasis added); *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.").

Plaintiffs' Second Amended Complaint attempts to rewrite this standard by taking a footnote from *Schmitt* out of context. They allege that "[p]roxy discrimination exists where 'the needs of hearing disabled persons differ from the needs of persons whose hearing is merely impaired such that the exclusion is likely to predominately affect disabled persons.'" (Dkt. 42 ¶ 60 (quoting *Schmitt*, 965 F.3d at 959, n.8).) Footnote 8, however, does not state the standard for proxy discrimination. Instead, it provides an example of how Plaintiffs might attempt to plead a proxy discrimination claim without the use of statistics, which the Court acknowledged may not always be available at the pleading stage. *Schmitt*, 965 F.3d at 959 at n.8. The Court noted that Plaintiffs may be able to allege a fit between the Exclusion and the disabled based on a logical rather than statistical correlation.[5] As this Court noted, "Plaintiffs tried that approach [in their Amended Complaint] but failed" because their allegations were conclusory. (Dkt. 41 at 17.) While this approach represents an alternative means of alleging the required "fit," it does not change the applicable standard, which is that the challenged policy or restriction—here, the Exclusion—must be so closely identified with a protected class that the Court can infer intentional discrimination on that basis alone.

[5] A hypothetical example of this type of logical "fit" would be if Regence covered all treatment and testing for hearing loss *except* for cochlear implants, which are needed exclusively by insureds with profound hearing loss and are, by definition, disabled. Even without statistics showing the precise numbers of those affected, such an exclusion would create an inference of discrimination for purely logical reasons.

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

2. Plaintiffs' New Proxy Theory Attempts to Manufacture the Required "Fit."

Plaintiffs attempt to establish a fit between the Exclusion and disabled insureds as a class in three moves. First, Plaintiffs rewrite the Exclusion by claiming that Regence provides coverage for "screenings" and "diagnostic tests," while not providing coverage for hearing aids. (Dkt. 42 ¶¶ 60-73.) Second, Plaintiffs allege that the needs of non-disabled insureds are met with screenings and diagnostic tests, based on the assumption that non-disabled insureds only need those services (and not hearing aids), while disabled insureds do not benefit from that alleged partial coverage. Third, Plaintiffs aver that excluding coverage for hearing aids is proxy discrimination because, while most persons with disabling hearing loss require hearing aids, all non-disabled insureds are unaffected by the Exclusion because they do not require hearing aids. In this way, Plaintiffs attempt to create a proxy discrimination claim by arguing that the Exclusion covers nearly all the treatment that non-disabled insureds would require but does not cover—from a "needs-based" or statistical perspective—the treatment that only disabled insureds would seek.

As discussed below, neither Plaintiffs' "needs-based" allegations nor their statistical allegations are sufficient to state a claim for proxy discrimination for several reasons. At the outset, the premise of both theories is wrong. Plaintiffs' new interpretation of the Exclusion is inconsistent with the Policy language, the sources cited in the Second Amended Complaint, and their own allegations.

In addition, Plaintiffs fail to support their needs-based theory with plausible, non-conclusory allegations. Even as interpreted by Plaintiffs, the Exclusion would cover treatment benefitting non-disabled and disabled insureds alike (screening and testing) and would exclude treatment benefitting both groups. The Exclusion does not support an inference of intentional discrimination by drawing the clear dividing line required for a proxy discrimination claim.

Finally, the statistical grounds for proxy discrimination fail for the same reasons that the Court explained in its Order dismissing the Amended Complaint. The statistics cited by

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

Plaintiffs confirm (with common sense and case law) that a significant portion of non-disabled insureds benefit from, and wear, hearing aids, such that the Exclusion cannot be considered proxy discrimination from a statistical perspective, even under Plaintiffs' erroneous interpretation.

3. The Premise of Plaintiffs' Proxy Theory Is Unsupported, Contrary to the Policy Language, and Inconsistent with Their Prior Allegations.

a. The Policy Does Not Cover Routine Hearing Screening and, Even if It Did, It Would Do So for All Insureds.

Plaintiffs contend that, despite the Policy's clear exclusion of "Routine Hearing Examinations," the Policy actually covers "screening examinations designed to determine whether an insured's hearing is functioning properly." (*Id.* ¶ 68.) They arrive at this assertion by alleging that Regence covers routine physical examinations, and "an evaluation of the ability of the patient to hear is . . . one of the required elements of a physical examination." (*Id.*) The two sources they cite, however, do not support the proposition that hearing tests are required components of routine physical examinations.

The first is a document from the website of the Centers for Medicare and Medicaid Services ("CMS") titled, "1997 Documentation Guidelines for Evaluation and Management Services" (the "Guidelines"). (*Id.* ¶ 68(c).) The Guidelines address, among other things, content and documentation requirements for "general multi-system examinations," which address 14 body areas and systems, including cardiovascular; ears, nose, mouth, and throat; eyes; genitourinary (female); genitourinary (male); hematologic/lymphatic/immunologic; musculoskeletal; neurological; psychiatric; respiratory; and skin. (Guidelines at 13-16.) Nothing in the Guidelines indicates that specific tests for hearing loss are required as part of the general examination. Rather, as indicated in the Guidelines, the level of exams varies and only includes some of the elements identified under each system. (*Id*. at 17.) For example, a "Detailed" general examination requires "at least two" bulleted elements "from each of six areas/systems," none of which must include the ear, nose, or throat. (*Id*.) And even a "Comprehensive"

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

examination does not require an examining professional to perform an ear, nose, and throat examination. (*Id*. (requiring performance of all elements in "at least nine" organ systems).)

The second source is an online excerpt from a 1990 book titled, Clinical Methods: The History, Physical, and Laboratory Examinations, of which Chapter 4 addresses physical examinations generally.[6] Table 4.3 of that volume refers to a portion of the exam focusing on the head and includes the ears, but provides no other details. Neither of these sources provide any information about the scope or requirements of a "routine physical examination" performed by a primary care physician and covered by the Policy. Most importantly, neither source identifies the distinction between what may be examined as part of an overall physical examination and a specific, though routine, hearing examination.

Furthermore, even if a routine physical examination does sometimes include a basic check for signs of hearing loss, Plaintiffs' allegation that Regence provides this coverage to "insureds with no hearing loss, or hearing loss that is not disabling," is misleading. (Dkt. 42 ¶ 68(d).) Routine physicals are covered for ***all*** insureds, regardless of their disability status, and there is nothing inherent in a screening test that makes it more or less useful to disabled vs. non-disabled insureds.[7] Thus, covering certain hearing screening tests does not create an inference of discriminatory intent—an intent to benefit non-disabled insureds or impose particular burdens on disabled insureds.[8]

[6] *Available at* https://www.ncbi.nlm.nih.gov/books/NBK361/.

[7] Similarly, Plaintiffs' allegation that screening tests for hearing loss are available "free of charge in schools, community centers, and social service agencies" is irrelevant to whether the Exclusion is a close enough fit with hearing disability to infer discrimination. (Dkt. 42 ¶ 69.) Potential coverage from third parties says nothing about the scope of the Exclusion's application, which is the proper test for proxy discrimination.

[8] Indeed, under the Guidelines, which offer flexibility as to which body systems to examine, a treating physician would likely choose a more thorough hearing evaluation for a person with some demonstrated hearing loss or trouble communicating.

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

b. The Policy Does Not Cover Diagnostic Hearing Examinations and, Even if It Did, It Would Do So for All Insureds.

Plaintiffs' initial Complaint alleged that Regence excluded coverage for all hearing-related services and that Plaintiffs had "paid out-of-pocket for medically necessary treatment for their Hearing Loss, *including audiology examinations*." (Dkt. 1 ¶ 31 (emphasis added).)[9] Since then, Plaintiffs have not alleged that the scope of coverage has changed. Instead, faced with the Court's determination that the Exclusion is not a fit with disability in part because it excludes examinations for non-disabled insureds, Plaintiffs offer a completely different interpretation of the Policy, now claiming that the Policy's inclusion of coverage for "Diagnostic Procedures" *includes* hearing examinations. (Dkt. 42 ¶¶ 70-72.)

This allegation, however, is unsupported and is directly contrary to the Policy language, and the Court should reject it as conclusory and lacking underlying facts. Plaintiffs do not allege that they or any other insured received coverage for hearing examinations under the "diagnostic procedure" inclusion. Instead, they allege that this coverage theoretically exists as a matter of contract interpretation. But the provision relied upon by Plaintiffs does not mention hearing tests at all: "We cover services for diagnostic procedures including services to diagnose infertility, cardiovascular testing, pulmonary function studies, stress tests, sleep studies and neurology/neuromuscular procedures." (Dkt 32-1 at 27.) The Exclusion, however, specifically excludes hearing examinations. (*See id.* at 52.) "Under well-settled contract principles, specific provisions control over more general terms." *Feibusch v. Integrated Device Tech., Inc. Emp. Ben. Plan*, 463 F.3d 880, 885 (9th Cir. 2006) (quoting *Chan v. Society Expeditions, Inc.,* 123 F.3d 1287, 1296 (9th Cir. 1997)); *see also Wright v. Safeco Ins. Co. of Am.*, 124 Wash. App. 263, 277, 109 P.3d 1 (2004) (citing *Foote v. Viking Ins. Co. of Wis.*, 57 Wash. App. 831, 834, 790

[9] The inconsistency of Plaintiffs' prior admission that they were denied coverage for audiology examinations cannot be considered on a motion to dismiss, but if Plaintiffs survive the pleading stage based on this allegation, the prior inconsistent allegation is admissible as contrary evidence on summary judgment or at trial. *See W. Run Student Hous. Assocs., LLC v. Huntington Nat. Bank*, 712 F.3d 165, 172–73 (3d Cir. 2013).

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

P.2d 659 (1990)) ("In insurance contracts, as in other contracts, specific provisions control over general provisions."). Plaintiffs rely on a general statement of coverage for a broad category of services—"diagnostic services"—but the exclusion for "routine hearing examinations" is more specific to the particular ailment and the type of service being provided. It therefore controls, and Plaintiffs' Policy, as they previously alleged, does not cover hearing examinations.

Indeed, Plaintiffs admit as much in the Second Amended Complaint. The original Policy language clearly excluded "routine hearing examinations, programs or treatment for hearing loss, including but not limited to non-cochlear hearing aids." (Dkt 42 ¶ 23.) Plaintiffs allege that the current Exclusion "is worded differently but has the same effect" and is "functionally identical." (*Id*. ¶ 23.) Plaintiffs' own allegations do not support their sudden about face with respect to the scope of the Exclusion.

4. Plaintiffs' Needs-Based Allegations Do Not Support a Claim of Proxy Discrimination.

Plaintiffs' needs-based proxy theory should be rejected for two reasons. First, it is based on a faulty premise. For the reasons outlined above, under the Exclusion Regence does not cover hearing screening, care, or examinations for any insureds. For that reason, the Exclusion is not tailored to meet the needs of non-disabled insured while denying benefits only to disabled insureds. Therefore, this Court's prior analysis of Plaintiffs' proxy discrimination claim remains applicable, and Plaintiffs' Second Amended Complaint has failed to state a proxy discrimination claim based on the particular needs of the disabled.

Second, even accepting Plaintiffs' view of the Exclusion, it does not satisfy the standard for proxy discrimination. Plaintiffs base their claim on two conclusory assumptions about the needs of non-disabled and disabled insureds. On the one hand, they allege that only non-disabled insureds—even insureds with mild to moderate hearing loss—will seek and benefit from screening and testing but will not be impacted at all by the lack of coverage for hearing aids. But Plaintiffs offer no plausible support for that assumption. Common sense and case law

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

confirm that not every person who wears or would benefit from a hearing aid (including persons with unilateral hearing loss) is disabled. *See Crabbe v. Nakayama*, No. 18-CV-00418-DKW-KJM, 2018 WL 5986740, at *5 (D. Haw. Nov. 14, 2018) ("In the Complaint, Crabbe alleges that she wears hearing aids. Wearing hearing aids alone does not necessarily mean that Crabbe is disabled, as her hearing without aids must still be substantially limited."); *Allen v. St. James Par. Hosp.*, No. CIV.A. 12-1619, 2013 WL 6017931, at *5 (E.D. La. Nov. 13, 2013) ("While the plaintiff testified that she wears a hearing aid in her left ear, she admits that she can hear out of her right ear. She has not alleged that her hearing issues in her left ear have affected any of her major life activities as defined by the ADA."); *Rodriguez v. Alcoa Inc.*, 805 F. Supp. 2d 310, 316 (S.D. Tex. 2011) ("There is no dispute that Rodriguez has a hearing impairment. However, merely having an impairment does not make one disabled for purposes of the ADA."). Although they may not require hearing aids with the same frequency, non-disabled insureds' "needs" are not qualitatively different from those of disabled insureds.

On the other hand, disabled insureds' need for hearing treatment is not limited to hearing aids. For a variety of plausible reasons, disabled insureds would seek and benefit from screening and diagnostic testing, particularly given the progressive nature of some hearing loss. *See* Lin et al., *Hearing Loss Prevalence in the United States*, Archives of Internal Medicine Vol. 14, No. 20 at pp. 1831-32, Nov. 14 (2011) (noting increasing prevalence of hearing loss with age), cited at Dkt 42 ¶ 27. And this is before considering cochlear implants, which are needed by some disabled insureds and clearly covered under any interpretation of the Exclusion. Thus, as interpreted by Plaintiffs, the Exclusion and Policy cover some treatment that benefits both non-disabled and disabled insureds, but do not cover other treatment that would benefit both groups, while covering some treatment that benefits only those who are disabled. From a needs-based perspective, that patchwork of coverage is not nearly a sufficiently close "fit" to infer that Defendants intentionally discriminated against the disabled in the design of their benefit plan.

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

5. Plaintiffs' Statistical Allegations Fail to Support a Proxy Discrimination Claim.

Plaintiffs' statistical theory should be rejected on similar grounds. Plaintiffs rely on their unsupported allegations about screening tests and diagnostic examinations again in an attempt to avoid the statistics that failed to establish a proxy discrimination claim in their Amended Complaint. In the decision dismissing the Amended Complaint, this Court noted that the Exclusion predominately affects non-disabled persons because Plaintiffs' statistics show that 66.5% of the hearing loss population is not disabled—without even considering the exclusion of routine hearing examinations on people with no hearing loss at all. (Dkt. 41 at 14-15.)

Plaintiffs now try to reframe the Exclusion as being only for coverage of "hearing aids" in order to allege a closer statistical fit between that exclusion and insureds with disabling hearing loss. (Dkt. 42 ¶¶ 86-87.) But the Exclusion, by its plain terms, is not limited to hearing aids; it excludes all non-cochlear "programs [and] treatment for hearing loss," as well as "routine hearing examinations." (*Id.* ¶ 23.) As discussed above, even ignoring Plaintiffs' prior allegation that they paid out of pocket for hearing examinations, they make no allegation that Regence has actually provided such coverage, and the Policy's plain language excludes coverage for such examinations. Therefore, a proper examination of the Exclusion's "fit" with the disabled must consider the full Exclusion, not just the part related to hearing aids. The statistics cited by Plaintiffs are the same as they were in the Amended Complaint, and as this Court has already found, they do not support a proxy discrimination claim.

Even with Plaintiffs' focus on hearing aids alone, the statistics do not show proxy discrimination. As Plaintiffs outline, based on their summary of Dr. Lin's analysis, at least a quarter of persons who self-report wearing a hearing aid did not have disabling hearing loss. (Dkt 42 ¶ 88.) Furthermore, the cited data does not distinguish between non-cochlear or cochlear hearing aids, so the percentage of insureds who (1) have disabling hearing loss and (2) require a hearing aid is likely lower.

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

B. Plaintiffs' Disparate Impact Theory Again Fails.

After abandoning the theory in their Amended Complaint, Plaintiffs now reassert their allegation that they were denied "meaningful access to the coverage that they require to treat their disability—hearing aids." (Dkt. 42 ¶ 90.) Although they did not label it a disparate impact theory as they do here, Plaintiffs made the same allegation in their initial Complaint. (*See* Dkt. 1 ¶ 37 ("Under the exclusion, only people with Hearing Loss, a qualifying disability, are denied access to the benefits that they require."). Both this Court and the Ninth Circuit held that this allegation in Plaintiff's initial Complaint failed to state a claim for relief, and Plaintiffs provide no additional allegations that would differentiate this claim from the one that previously failed. It should be dismissed for the same reasons.

As discussed in Defendants' First Motion to Dismiss, the U.S. Supreme Court, in *Alexander v. Choate*, "reject[ed] the boundless notion that all disparate-impact showings constitute prima facie cases under § 504 [of the Rehabilitation Act]" and "assume[d] without deciding that § 504 [of the Rehabilitation Act] reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped." 469 U.S. 287, 299, 105 S. Ct. 712, 83 L. Ed. 2d 661 (1985). The Court struck this balance by adopting the standard that "an otherwise qualified handicapped individual must be provided with meaningful access to the benefit" being offered. *Id.* at 300-01.

After *Choate*, the Ninth Circuit began applying this standard to disparate impact claims under the ADA and the Rehabilitation Act. *See, e.g.*, *Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996) (holding that Hawaii's facially-neutral quarantine requirements denied persons with guide dogs meaningful access to state services that were more accessible to others). This Court cited *Choate* and *Crowder* in ruling that Plaintiffs' initial Complaint failed to state a claim, finding that the Exclusion applied to the disabled and non-disabled and therefore did not deny disabled insureds meaningful access to benefits that were available to others. (Dkt. 22 at 5.)

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

Since Defendants' first Motion to Dismiss was granted, the Ninth Circuit has further addressed the availability of a disparate impact claim under the ACA and Rehabilitation Act. First, in *Doe v. CVS Pharmacy, Inc.*, the Court held that Section 1557 of the ACA "does not create a new healthcare-specific anti-discrimination standard" and that to state an ACA claim for "discrimination on the basis of their disability," the plaintiffs "must allege facts adequate to state a claim under Section 504 of the Rehabilitation Act." 982 F.3d 1204, 1210 (9th Cir. 2020). After discussing the Supreme Court's opinion in *Choate*, the Ninth Circuit reaffirmed that standard: "We assess Section 504 claims under the standard articulated in *Choate*." *Id.* The Court engaged in the *Choate* analysis by first identifying the benefit at issue as being the policy's "prescription drug benefit as a whole" because "the ACA requires that health plans cover prescription drugs as an 'essential health benefit.'" *Id.*

Next, in *Payan v. Los Angeles Community College District*, the Ninth Circuit analyzed whether disparate impact claims under the Rehabilitation Act (and, by extension, the ACA) survived the Supreme Court's decision in *Alexander v. Sandoval*. 11 F.4th 729, 734 (9th Cir. 2021). After discussing *Choate* and *Crowder*, the Court held that *Sandoval* had not disturbed those cases' holdings and that "disparate impact disability discrimination claims remain enforceable through a private right of action." *Id.* at 737. It then reaffirmed the standard applicable to such claims: "To assert a disparate impact claim, a plaintiff must allege that a facially neutral . . . policy or practice has the 'effect of denying meaningful access to public services' to people with disabilities." *Id.* at 738.

These cases demonstrate that the standard for disparate impact claims under the ACA remains the same as it is for such claims under the Rehabilitation Act, and that is the meaningful access standard articulated in *Choate*. This Court already rejected Plaintiffs' claim under that theory when it dismissed Plaintiffs' first Complaint:

> Here, the hearing loss coverage exclusion is applied to all insureds, whether disabled or not. All routine hearing examinations and programs and treatments for hearing loss are excluded from

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

> coverage. These services and treatments are specifically related to hearing loss, and are not, as Plaintiffs claim, otherwise available to other plan participants who seek the same services or treatments in relation to a different health condition. The exclusion does not then deny Plaintiffs meaningful access to services that are easily accessible by others.

(Dkt. 22 at 5 (citing *Crowder*, 81 F.3d at 1484).)

Plaintiffs seek a different result in the Second Amended Complaint by alleging that the "nature of the benefit at issue in this case is access to medical treatment necessary to address the needs of Regence's insureds who are hearing disabled." (Dkt. 42 ¶ 89.) But that was the same way they sought to frame the benefit in the first Complaint, alleging they were "denied access to the benefits that they require." (Dkt. 1 ¶ 37.) This Court specifically rejected that framing:

> Plaintiffs' definition of these services is overly broad, and in turn, would require insurers to offer coverage for all doctor's appointments or all durable medical devices regardless of the health condition, injury, or illness. This result would not be the type of "reasonable modification" contemplated by *Alexander* and there is nothing in the statute or its legislative history to suggest that this type of expansion was Congress' intent when enacting the ACA.

(Dkt. 22 at 5.)

The Ninth Circuit, in *Schmitt*, also noted that the ACA "does not guarantee individually tailored health care plans," and it analyzed Plaintiffs' claim under a proxy discrimination theory rather than evaluating whether Plaintiffs had meaningful access to specific coverage based on their particular needs. 965 F.3d at 955. In doing so, the Court sought to determine whether the scope of the Exclusion *as a whole* was a fit for disabled insureds as a class, not whether disabled insureds had access to any specific treatment like hearing aids.

Nothing in the *CVS*, *Payan*, or any other post-*Schmitt* decision changes this analysis, and Plaintiffs' disparate impact claim fails for the same reason it did in their first Complaint: Plaintiffs and other disabled insureds have the same access to the benefits Regence provides that all insureds do. (Dkt. 22 at 5.)

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

C. Regence Did Not Frame the Exclusion with the Intent to Discriminate Against Disabled Insureds.

Plaintiffs' final theory under the ACA is that Regence intentionally discriminated against disabled insureds when it included the Exclusion in its policies. (Dkt. 42 ¶¶ 93-99.) They again focus on an alleged "decision to exclude *hearing aids*" rather than the full Exclusion, which also excludes coverage for routine hearing examinations and other hearing treatments. (*Id.* ¶ 96 (emphasis added).) Plaintiffs further allege that Regence excludes coverage for hearing aids even though they would pass a "technology assessment process" that allegedly determines eligibility for coverage. (*Id.* ¶ 93.) Plaintiffs allege that Regence intentionally discriminated against the hearing disabled in order to save money. (*Id.* ¶ 96.)

These allegations fail to state a claim for intentional discrimination. "To show intentional discrimination, [the Ninth C]ircuit requires that the plaintiff show that a defendant acted with 'deliberate indifference,' which requires 'both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that . . . likelihood.'" *Updike v. Multnomah Cty.*, 870 F.3d 939, 950–51 (9th Cir. 2017) (quoting *Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001)). Here, Plaintiffs' have not alleged any discriminatory conduct, and even if they had, they have not alleged any facts that plausibly suggest an intent to discriminate against the disabled.

First, there can be no intentional discrimination without discriminatory conduct, and the Exclusion is not discriminatory. As this Court has held, the Exclusion "'predominately' or 'primarily' affects non-disabled persons" because it bars routine hearing examinations and other treatments for insureds with mild hearing loss or no hearing loss at all. (Dkt. 41 at 15 (quoting *Schmitt*, 965 F.3d at 959 n.8).) Regence also covers the insureds with the most severe forms of hearing loss by providing cochlear implants. Finally, as Plaintiffs allege in their Second Amended Complaint, not even everyone who wears a hearing aid is disabled. (Dkt. 42 ¶ 86(c).) Plaintiffs cannot avoid these facts by focusing only on the one part of the Exclusion more likely

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

to impact the disabled. The Exclusion as a whole is not discriminatory and cannot form the basis of an intentional discrimination claim.

Second, the "technology assessment process" Plaintiffs rely on does not support their allegations. Plaintiffs cite to a page on Regence's website that is the Introduction section to a manual addressing the "Medical Policy Development and Review Process." (Dkt. 42 ¶ 93.)[10] This manual, by its terms, does not determine what products or services are covered; instead, it addresses the development of medical policies, which "provide guidelines for determining coverage criteria for specific medical and behavioral health technologies, including procedures, equipment, and services."[11] This manual therefore discusses the creation of the *policies* that will later determine eligibility for coverage of certain products or services. The "technology assessment process" cited by Plaintiffs is merely one part of this broader effort to create medical policies for new areas of care. Nowhere does the manual state that technologies that meet it or any other criteria should or will be covered. To the contrary, it specifically states that the policies created pursuant to the manual are "not intended to override the health insurance contract that defines the insured's benefits."

This Court should reject Plaintiffs' intentional discrimination claim because Plaintiffs' own statistics show that the Exclusion is not discriminatory, and even if it were, Plaintiffs have alleged no facts that would support a plausible claim that Regence intentionally discriminated against the disabled.

D. Plaintiffs Fail to State a Claim for Violation of RCW 48.43.0128.

In addition to their ACA claim, Plaintiffs also reprise part of their prior state law claim under RCW 48.43.0128. (Dkt. 42 ¶¶ 100-103.) This time, they do not allege that a violation of this statute constitutes a breach of contract but instead seek to assert only a direct claim for

---

[10] Citing https://blue.regence.com/trgmedpol/intro/index.html.

[11] The Table of Contents page of the manual includes links to medical policies in several areas of care. *See* https://blue.regence.com/trgmedpol/contents/index.html.

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

violation of the statute itself. This Court dismissed that claim in Plaintiffs' Amended Complaint and should do so again here for the same reasons.

RCW 48.43.0128 took effect in June 2020 and 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 that the Exclusion discriminates against them on the basis of disability in violation of the statute. (Dkt. 42 ¶ 102.) This claim should be dismissed for three independently sufficient reasons.

First, the Exclusion is not discriminatory under state law for the same reasons discussed in Part V.A-C, *supra*. 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 ADA, as Plaintiffs allege, the Exclusion is still not a proxy for disability because it bars coverage of routine hearing examinations for insureds with no hearing loss at all, as well as all other forms of treatment for all degrees of hearing loss severity. Plaintiffs' inclusion of their new allegations regarding purported coverage for diagnostic tests does not change the analysis. As discussed above, these allegations are unsupported and contrary to the plain language of the Policy, and in any event, such coverage, if it existed, would apply equally to disabled and non-disabled insureds.

Second, the regulations implementing RCW 48.43.0128 explicitly state that insurers "must 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

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

hearing aids, and the surgery and services necessary to implant them." WAC 284-43-5642(1)(b)(vii).

This regulation amounts to a determination by OIC that exclusion of treatment for hearing loss is not discriminatory, and courts "give substantial weight and deference to an agency's interpretation of the statutes and regulations it administers." *Pitts v. State, Dep't of Soc. & Health Servs.*, 129 Wash. App. 513, 523, 119 P.3d 896, 902 (2005). Defendants cannot have violated a state statute by following the directives of its implementing regulations.

Third, Plaintiffs have not demonstrated that RCW 48.43.0128 is enforceable via a private right of action.[12] In order to determine whether a statute supports an implied right of action, the court must determine "(1) whether the plaintiff is within the class for whose benefit the statute was enacted, (2) whether legislative intent, explicitly or implicitly, supports creating or denying a remedy, and (3) whether 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 with respect to a separate provision of the Insurance Code, RCW 48.01.030, 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 that 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.*

[12] Defendants raised this argument in their Motion to Dismiss Amended Complaint, and Plaintiffs responded that they did "not allege that RCW 48.43.0128 provides a private cause of action, implied or otherwise." (Dkt. 38 at 25, n.11.)

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

Physicians Ins., No. 03-cv-879-HA, 2004 WL 1661989, at *3-4 (D. Or. July 26, 2004) (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 Section 1557, which incorporates existing anti-discrimination standards related to defined groups. Instead, it applies incredibly broadly, including, inter alia, "expected length of life," "quality of life," or "other health conditions." It also does not contain an express cause of action and, unlike Section 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 this subsection."). To the contrary, the legislature made clear that the Insurance Commissioner would be charged with determining any violations of, 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). For those reasons, 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.

E. Plaintiffs Fail to State a Claim Under the Washington Consumer Protection Act.

Plaintiffs' Second Amended Complaint alleges, for the first time, a claim for violation of Washington's Consumer Protection Act ("CPA"), RCW 19.86 *et seq.* (Dkt. 42 ¶¶ 104-108.) Washington law provides that violation of the Insurance Code is a *per se* violation of the CPA but exempts conduct that is expressly allowed by the Code:

> Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state . . . : PROVIDED, HOWEVER, That actions and transactions prohibited or regulated under the laws administered by the insurance commissioner shall be subject to the provisions of RCW 19.86.020 and all sections of chapter 216, Laws of 1961 and chapter 19.86 RCW which provide for the implementation and enforcement of RCW 19.86.020 except that nothing required or permitted to be done pursuant to Title 48 RCW shall be construed to be a violation of RCW 19.86.020 . . . .

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

RCW 19.86.170.

Count III of Plaintiffs' Second Amended Complaint fails to state a claim for two reasons. First, as discussed in Part V.D, *supra*, the Exclusion does not violate RCW 48.43.0128 or any other provision of Title 48 RCW, so it is not an action made subject to the CPA by RCW 19.86.170. To the extent Plaintiffs allege that the Exclusion constitutes a violation of the CPA separate and apart from a violation the Insurance Code, that argument fails for the reasons discussed in Part V.A-C, *supra*. In short, conduct that is not discriminatory under the ACA or the Insurance Code cannot be an unfair or deceptive practice for purposes of the CPA.

Second, Defendants are exempt from any CPA claim based on the Exclusion because its use is specifically permitted by RCW 19.86 and its implementing regulations. RCW 19.86.170 ("[N]othing required or permitted to be done pursuant to Title 48 RCW shall be construed to be a violation of RCW 19.86.020 . . . ."). As discussed in Part V.D, *supra*, the regulations implementing RCW 48.43.0128 expressly provide 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). Because this regulation explicitly permits the exclusion of the services at issue here, Defendants are exempt from Plaintiffs' CPA claim.

F. Plaintiffs Fail to State Claims for Declaratory and Injunctive Relief.

Counts IV and V of Plaintiffs' Second Amended Complaint, for Declaratory Relief and Injunctive Relief, respectively, do not assert any grounds for relief independent of the other claims. (Dkt. 42 ¶¶ 109-11.) Because the declaratory and injunctive relief claims are dependent on Plaintiffs successfully pleading another claim for relief, Counts IV and V should be dismissed for the reasons discussed above.

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

G. The Court Should Deny Leave to Amend.

Although Federal Rule of Civil Procedure 15(a) provides that leave to amend should be freely granted "when justice so requires," a district court should deny leave when "it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (citing *Doe v. United States,* 58 F.3d 494, 497 (9th Cir. 1995). However, "when a district court has already granted a plaintiff leave to amend, its discretion in deciding subsequent motions to amend is 'particularly broad.'" *Chodos v. W. Publ'g Co.*, 292 F.3d 992, 1003 (9th Cir. 2002) (quoting *Griggs v. Pace Am. Group, Inc.,* 170 F.3d 877, 879 (9th Cir. 1999)). This is particularly true where the court has notified the plaintiff "of the deficiencies in his pleadings, advis[ed] him how to correct them, and afford[ed] him multiple opportunities to amend." *McKinney v. Baca*, 250 F. App'x 781 (9th Cir. 2007) (denying leave to amend after dismissal of second amended complaint).

Here, Plaintiffs have now been notified of the deficiencies in three complaints and have been advised by this Court and the Ninth Circuit of how those deficiencies might be corrected. Plaintiffs' inability to state a claim on their third try after specific direction from two courts leads to the conclusion that the deficiencies in their claims cannot be cured by the allegation of additional facts. The Court should deny leave to amend as futile.

VI. CONCLUSION

For the reasons above, Defendants respectfully request that the Court grant their Motion to Dismiss Plaintiffs' Second Amended Complaint.

///

///

///

///

///

///

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

DATED: April 22, 2022.

STOEL RIVES LLP

/s/Maren Norton

Maren R. Norton, WSBA No. 35435
maren.norton@stoel.com
Brad S. Daniels, WSBA No. 46031
brad.daniels@stoel.com

STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
Telephone: 206.624.0900
Facsimile: 206.386.7500

Attorneys for Defendants

THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

E.S., by and through her parents, R.S. and J.S., and JODI STERNOFF, both on their own behalf, and on behalf of all similarly situated individuals,

Plaintiffs,

v.

REGENCE BLUESHIELD; and CAMBIA HEALTH SOLUTIONS, INC., f/k/a THE REGENCE GROUP,

Defendants.

No. 2:17-cv-01609-RAJ

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT

This matter came before the Court on the Motion to Dismiss Second Amended Complaint filed by defendants Regence BlueShield and Cambia Health Solutions, Inc. (collectively, "Defendants"). The Court has reviewed the Motion, papers filed in response and in support thereof, and the records and files herein. Being fully informed, the Court hereby ORDERS that:

1. Defendants' Motion to Dismiss Second Amended Complaint is GRANTED in its entirety for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

/ / /

/ / /

/ / /

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

2. Plaintiffs' Second Amended Complaint and all claims therein are DISMISSED with prejudice.

IT IS SO ORDERED.

Dated this __ day of _____, 2022.

THE HONORABLE RICHARD A. JONES
UNITED STATES DISTRICT JUDGE

Presented By:

STOEL RIVES LLP

s/Maren R. Norton

Maren R. Norton, WSBA No. 35435
Brad S. Daniels, WSBA No. 46031
600 University Street, Suite 3600
Seattle, WA 98101
Phone: (206) 624-0900
Facsimile: (206) 386-7500
Email: maren.norton@stoel.com
Email: brad.daniels@stoel.com

Attorneys for Defendants