The Honorable Ricardo S. Martinez

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
Seattle Division

CHERYL ENSTAD; PAXTON ENSTAD, by and through his next friend and mother, CHERYL ENSTAD, *Plaintiffs*, v. PEACEHEALTH, a Washington nonprofit corporation, *Defendant*.	No. 2:17-cv-01496-RSM **PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COMPLAINT** **NOTE ON MOTION CALENDAR: February 9, 2018**

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901 FIFTH AVE, SUITE 630
SEATTLE, WA 98164
T: (206) 624-2184

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INTRODUCTION

For 20 years, Cheryl Enstad and her family—including her teenage son, Paxton ("Pax")—relied on PeaceHealth and its Medical Benefits Plan ("Plan") to provide them with coverage for medically necessary healthcare. In accordance with widely accepted standards of care for treating gender dysphoria, Pax's physician prescribed him medically necessary chest reconstruction surgery, but PeaceHealth refuses to cover *any* medical care for gender dysphoria, no matter how medically necessary. PeaceHealth's blanket exclusion of "transgender services" and its denial of medically necessary care to Pax constitute discrimination on the basis of sex is a violation of Section 1557 of the Affordable Care Act and discrimination on the basis of gender identity, in violation of the Washington Law Against Discrimination (the "WLAD").

PeaceHealth attempts to contradict the Complaint's well-pleaded allegations and argues that, because Pax is a minor, his surgery did not qualify as medically necessary under accepted standards of care. Those arguments are procedurally improper on a motion to dismiss and, in any event, based on a misreading of the applicable standards. Although patients must be over 18 to have genital surgery, the standards of care expressly authorize chest-reconstruction surgery for minors.

PeaceHealth's legal arguments are equally flawed. This Court is bound by Ninth Circuit precedent, not the district court opinion in *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016). Although PeaceHealth relies on *Franciscan Alliance* and other out-of-circuit cases to draw a distinction between discrimination on the basis of sex and discrimination based on transgender status, all of its arguments are

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foreclosed by Ninth Circuit precedent. *See Schwenk v. Hartford*, 204 F.3d 1187, 1200 (9th Cir. 2000); *Karnoski v. Trump*, No. 17-1297, 2017 WL 6311305, at *7 (W.D. Wash. Dec. 11, 2017), *appeal docketed*, No. 17-36009 (9th Cir. Dec. 15, 2017). Similarly, PeaceHealth's arguments that Cheryl lacks standing are foreclosed by Supreme Court precedent, which already holds that Title IX (and, by extension, Section 1557) protects employees from discrimination, *see North Haven Bd. of Ed. v. Bell*, 456 U.S. 512 (1982), and that those protections extend to all discrimination "on the basis of sex" even if the discrimination is based on the sex of a third party, *see Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005). Moreover, the effective date of the implementing regulations is irrelevant here because Plaintiffs' claims are based on the underlying statutory text. *See Prescott v. Rady Children's Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1105 (S.D. Cal. 2017).

Finally, under Washington Supreme Court precedent, the WLAD's exemption for religiously affiliated institutions does not apply to Cheryl's claims because she was employed in a non-ministerial capacity. *See Ockletree v. Franciscan Health Sys.*, 317 P.3d 1009 (Wash. 2014). The broad language of the statutory text—like the broad language of Section 1557—also protects Cheryl from all sex discrimination, including discrimination based on the sex of a third party. And the broad language of the statute also gives Pax standing in his own right to sue for discrimination in the formation and performance of contracts, even though such claims are not enumerated as an example of discrimination the statutory text. *See Marquis v. City of Spokane*, 922 P.2d 43 (Wash. 1996).

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Plaintiffs believe that the Court is able to deny PeaceHealth's Motion to Dismiss with regard to state law claims based on existing state law precedents and the statutory language of the WLAD. Should the Court be in doubt as to the clarity of that precedent, however, Plaintiffs have filed an accompanying Motion to Certify Questions to the Washington Supreme Court and request that the Court provide the Washington Supreme Court with the opportunity to consider the state law issues.

STATEMENT OF FACTS

For over 20 years, Plaintiff Cheryl Enstad was employed as a medical social worker at PeaceHealth St. Joseph Medical Center (the "medical center"), owned and operated by PeaceHealth. Dkt. #1 at ¶ 37 ("Compl."). As a hospice social worker, Cheryl neither performed any religious functions nor served as a messenger of PeaceHealth's religious faith. Compl. ¶ 38. The Enstads relied on PeaceHealth's Medical Benefits Plan to provide them with coverage for medically necessary healthcare. Compl. ¶ 3.

Pax is a boy who is transgender, which means he has a male gender identity even though the sex assigned to him at birth was female. Compl. ¶ 4. He was diagnosed with gender dysphoria, which is a serious medical condition codified in the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) and International Classification of Diseases (ICD-10). *Id.* ¶¶ 4, 28, 53. Gender dysphoria is marked by persistent and clinically significant distress caused by incongruence between a person's gender identity and that person's sex designated at birth. *Id.* ¶¶ 4, 28. If left untreated, gender dysphoria can lead to debilitating anxiety, depression, self-harm, and even suicide.

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When Pax turned 16 years old—in accordance with widely accepted standards of care for treating gender dysphoria published by the World Professional Association for Transgender Health ("WPATH") (attached as Ex. A)—his doctors concluded that chest-reconstruction surgery was medically necessary to treat his gender dysphoria and its negative effect on his life functioning, including sleep, recreation, and emotional well-being. Compl. ¶¶ 29, 53.

On September 6, 2016, Pax's surgeon requested preauthorization for the Plan to cover his medically necessary chest reconstruction surgery. Compl. ¶ 55. The next day, the Plan's third-party administrator denied preauthorization with the following message: "This member has no coverage for any transgender services under their health plan. Thank you." *Id.* ¶ 56. Cheryl was shocked to discover that PeaceHealth's Plan categorically excludes coverage "for gender change or for procedures to change one's physical characteristics to those of the opposite gender," and coverage for "services, supplies and medications related to preparation for sex change operations and medical or psychological counseling or hormonal therapy in preparation for, or subsequent to, any such procedure." Compl. Ex. A at 120, 123. Because the Plan has a separate, general exclusion for procedures that are "not medically necessary," (Compl. Ex. A at 122) the only function of the categorical exclusions for "gender change" is to exclude coverage for transition-related care that would otherwise have been covered as medically necessary.

The consensus within the medical community is that these types of categorical exclusions of transition-related healthcare have no basis in medical science. The American Medical Association, the American Psychiatric Association, the American

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Psychological Association, and the American Academy of Pediatrics have all issued resolutions opposing categorical exclusions of coverage for treatment of gender dysphoria. Such categorical exclusions of transition-related healthcare are so far outside the bounds of accepted medical practice that they constitute deliberate indifference to a serious medical need when used as a justification for denying healthcare to prisoners. *See, e.g., Rosati v. Igbinoso*, 791 F.3d 1037 (9th Cir. 2015).

ARGUMENT

I. The WPATH Standards Do Not Support Defendant's Attempt to Rebut the Complaint's Allegations Regarding Medical Necessity.

PeaceHealth concedes that the WPATH Standards of Care should determine the standard of care in this case, but disputes the Complaint's allegation that Pax's surgery was prescribed in accordance with those standards. Dkt. #25 at 7 ("Def.'s Mem."). "In making a Rule 12(b)(6) assessment," however, "the Court accepts all facts alleged in the complaint as true, and makes all inferences in the light most favorable to the non-moving party." *Johnson v. Metro-Goldwyn-Mayer Studios Inc.*, No. 17-541, 2017 WL 3313963, at *2 (W.D. Wash. Aug. 3, 2017).

In any event, PeaceHealth has misread the WPATH Standards, which plainly distinguish between genital surgery and chest-reconstruction surgery for transgender adolescents. The WPATH Standards for adolescents explains that the requirement of reaching the age of majority applies only to "genital surgery." WPATH Standards at 21. In contrast, "[c]hest surgery in [boys who are transgender] could be carried out earlier." *Id.* There is also no requirement that transgender men undergo 12 months of living in a

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congruent gender role or 12 months of hormone therapy before having chest reconstruction surgery. *See id.* (no requirement for adolescents); *id.* at 59 (no requirement for adults). Those requirements apply only to certain genital surgeries. *Id.* at 60.

II. PeaceHealth's Exclusion of Medically Necessary Care for "Transgender Services" Violates Section 1557.

"Under section 1557 of the ACA, health programs or activities receiving federal financial assistance are prohibited from discriminating against individuals on the basis of any ground listed under four different civil rights statutes including Title IX, which prohibits discrimination on the basis of sex." *Prescott v. Rady Children's Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1098 (S.D. Cal. 2017).

A. Discrimination Based on a Person's Transgender Status and Gender Nonconformity Is Discrimination "On the Basis of Sex" Under Section 1557.

Because a person's transgender status is an inherently sex-based characteristic, discrimination based on transgender status is inherently discrimination on the basis of "sex" under Section 1557. "[D]iscrimination … on the basis of being transgender, or intersex, or sexually indeterminate, constitutes discrimination on the basis of the properties or characteristics typically manifested in sum as male and female—and that discrimination is literally discrimination 'because of sex.'" *See Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016).[1]

[1] "[I]n evaluating Title IX claims, federal courts regularly look to Title VII cases for guidance." *Prescott*, 265 F. Supp. 3d at 1098.

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Discriminating against people because they are transgender is also sex discrimination under Section 1557 because it inherently rests on sex stereotypes and gender-based assumptions. *See* Compl. ¶¶ 66-70. As the Supreme Court recognized in *Price Waterhouse v. Hopkins*, "assuming or insisting that [individual men and women] match[] the stereotype associated with their group" is discrimination because of sex. 490 U.S. 228, 251 (1989) (plurality opinion). Applying *Price Waterhouse*, the Ninth Circuit held in *Schwenk* that discrimination "because of [a person's] transsexuality" is discrimination on the basis of sex under *Price Waterhouse*. *See Schwenk v. Hartford*, 204 F.3d 1187, 1200 (9th Cir. 2000). The Ninth Circuit explained that transgender individuals are people "whose outward behavior and inward identity do not meet social definitions" associated with the sex assigned to them at birth, *id.* at 1201, and "[d]iscrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII," *id.* at 1202.

Schwenk thus established in the Ninth Circuit that, under *Price Waterhouse*, "discrimination against transgender individuals is a form of gender-based discrimination." *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015); *accord Latta v. Otter*, 771 F.3d 456, 495 n.12 (9th Cir. 2014) (Berzon, J., concurring) (citing *Schwenk* for proposition that "discrimination on the basis of transgender status is also gender discrimination"); *see Karnoski v. Trump*, No. 17-1297, 2017 WL 6311305, at *7 (W.D. Wash. Dec. 11, 2017) (applying *Schwenk*), *appeal docketed*, No. 17-36009 (9th Cir. Dec. 15, 2017); *Prescott*, 265 F. Supp. 3d at 1098-99 (same); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1012 (D. Nev. 2016) (same).

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Although PeaceHealth contends that discrimination based on a person's transgender status is not a form of discrimination on the basis of sex, all of its arguments are foreclosed by Ninth Circuit precedent, which indisputably governs. *See United States v. AMC Entm't, Inc.*, 549 F.3d 760, 771 (9th Cir. 2008) ("[I]t goes without saying that we expect our pronouncements will be the final word within the Ninth Circuit's geographical area, subject only to en banc or Supreme Court review."); *Carcano v. McCrory*, 203 F. Supp. 3d 615, 635 (M.D.N.C. 2016) (following binding Fourth Circuit precedent instead of nationwide injunction issued by district court in Texas).

First, PeaceHealth urges this Court follow *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016), in which a district court in the Northern District of Texas erroneously concluded that discrimination against a transgender individual is not a form of sex discrimination under Section 1557. *See* Def.'s Mem. 12 n.12. Although the court in *Franciscan Alliance* issued a preliminary injunction prohibiting the United States from enforcing portions of section 1557's implementing regulations, this lawsuit is based on the statute itself, not the implementing regulations and "remains unaffected by the injunction in *Franciscan Alliance*." *Prescott*, 265 F. Supp. 3d at 1105.

The district court's reasoning in *Franciscan Alliance* is incompatible with binding Ninth Circuit precedent. The court in *Franciscan Alliance* expressly refused to interpret Section 1557 in accordance with *Price Waterhouse* because the court erroneously concluded that *Price Waterhouse* applies only to sex discrimination under Title VII—not sex discrimination under Title IX or section 1557. *Franciscan Alliance*, 227 F. Supp. 3d at 689 n.28. The Ninth Circuit, however, has instructed courts in this Circuit to rely on

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Title VII precedents "to define the critical concept of discrimination on the basis of sex" under Title IX and—by extension—section 1557. *Oona ex rel. Kate S. v. McCaffrey*, 143 F.3d 473, 476 (9th Cir. 1998); *see Prescott*, 265 F. Supp. 3d at 1098-99 (applying *Price Waterhouse* to section 1557).

Second, PeaceHealth cites outdated precedents from other circuits to draw a distinction between discrimination based on a person's gender nonconforming mannerisms and appearance (which, PeaceHealth concedes, is a form of sex discrimination) and discrimination based on a person's transgender status (which, PeaceHealth contends, is *not* sex discrimination). *See* Def.'s Mem. 12-14. That arbitrary distinction cannot be reconciled with *Schwenk*'s statement that transgender individuals are gender nonconforming in both their "outward behavior *and inward identity*." *Schwenk*, 204 F.3d at 1201 (emphasis added). Indeed—as the Sixth, Seventh, and Eleventh Circuits have all explained—"a person is defined as transgender precisely because" that person "transgresses gender stereotypes." *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *accord Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1048 (7th Cir. 2017); *Dodds v. United States Dep't of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016). "[A]ny discrimination against transsexuals (as transsexuals)—individuals who, by definition, do not conform to gender stereotypes—is … discrimination on the basis of sex as interpreted by *Price Waterhouse*." *Finkle v. Howard Cty., Md.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014).

Third, PeaceHealth contends that sex discrimination against transgender people is implicitly excluded from Section 1557 because Congress has failed to pass proposed bills

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that would have explicitly protected employees from discrimination based on "gender identity." Def.'s Mem. 11-12. But "failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *United States v. Craft*, 535 U.S. 274, 287 (2002) (internal quotation marks omitted). "A bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170 (2001). "[A]nother reasonable interpretation of that legislative non-history is that some Members of Congress believe that . . . the statute requires, not amendment, but only correct interpretation." *Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2018); *cf. Massachusetts v. E.P.A.*, 549 U.S. 497, 529-30 (2007) ("That subsequent Congresses have eschewed enacting binding emissions limitations to combat global warming tells us nothing about what Congress meant . . . in 1970 and 1977.").

There was no need for Congress to explicitly mention "gender identity" when it passed Section 1557, because lower courts had already held that transgender individuals are protected by existing statutes prohibiting sex discrimination. *See Glenn*, 663 F.3d at 1317-19 (collecting cases). Section 1557 prohibits discrimination "on the ground prohibited by . . . Title IX," and when "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978).

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B. PeaceHealth's Categorical Exclusion of Medically Necessary Care for "Transgender Services" Facially Discriminates on the Basis of Transgender Status and Gender Nonconformity.

On its face, PeaceHealth's exclusion of all health care related to "transgender services" discriminates against transgender employees on the basis of sex. Under the exclusion, the same procedures that are covered as medically necessary treatments for non-transgender employees are excluded from coverage when related to "sex transformation." *See Denegal v. Farrell*, No. 15-01251, 2016 WL 3648956, at *7 (E.D. Cal. July 8, 2016) (holding that plaintiff stated equal protection claim based on allegation that prison "discriminate[s] against transgender women by denying surgery (vaginoplasty) that is available to cisgender women"); *Norsworthy*, 87 F. Supp. 3d at 1120 (holding that plaintiff stated claim for sex discrimination because, "considering her need for medically necessary surgery, and vaginoplasty in particular, Defendants treated her differently from a similarly situated non-transgender woman in need of medically necessary surgery"); *Cruz v. Zucker*, 195 F. Supp. 3d 554, 581 (S.D.N.Y. 2016) (holding that "categorical exclusion on treatments of gender dysphoria" discriminates on the basis of "sex" under Section 1557).

PeaceHealth's exclusion explicitly targets transition-related healthcare based on its gender nonconformity. The Plan categorically excludes coverage "for gender change or for procedures to change one's physical characteristics to those of the opposite gender," and coverage for "services, supplies and medications related to preparation for sex change operations and medical or psychological counseling or hormonal therapy in preparation for, or subsequent to, any such procedure." The exclusion reflects the

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assumption that people assigned a female sex at birth should have typically female anatomy and that people assigned a male sex at birth should have typically male anatomy. *Doe 1 v. Trump*, No. 17-1597, 2017 WL 4873042, at *28 (D.D.C. Oct. 30, 2017) ("The defining characteristic of a transgender individual is that their inward identity, behavior, and possibly their physical characteristics, do not conform to stereotypes of how an individual of their assigned sex should feel, act and look.").

Because medical transition from one sex to another inherently violates gender stereotypes, denying medically necessary coverage for such healthcare constitutes impermissible discrimination based on gender nonconformity. *Glenn*, 663 F.3d at 1314 (firing employee because of her "intended gender transition" is sex discrimination); *Dawson v. H&H Elec., Inc.*, No. 14-00583, 2015 WL 5437101, at *3 (E.D. Ark. Sept. 15, 2015) (firing employee based on "gender transition" is sex discrimination). By excluding coverage for this medically necessary care, PeaceHealth is "insisting that [beneficiaries] match[] the stereotype associated with their group." *Price Waterhouse*, 490 U.S. at 251; *cf. Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, No. 02-1531, 2004 WL 2008954, at *2 (D. Ariz. June 3, 2004) ("[N]either a woman with male genitalia nor a man with stereotypically female anatomy, such as breasts, may be deprived of a benefit or privilege of employment by reason of that nonconforming trait.").

In light of the "transgender services" exclusion's plain text, PeaceHealth's attempt to characterize its exclusion as "a facially neutral policy" with merely a "disparate impact" is difficult to understand. *See* Def.'s Mem. 15-16. The policy does not

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have a disparate impact on transgender individuals; the policy targets transgender individuals with laser precision.

C. Religiously Affiliated Hospitals Are Not Exempt from Section 1557's Prohibition on Sex Discrimination.

There is no exception in Section 1557 for religiously affiliated employers. Relying on *Franciscan Alliance*, PeaceHealth contends that Section 1557's prohibition on sex discrimination does not apply to religiously affiliated hospitals because (according to *Franciscan Alliance*) Section 1557 incorporates "the entire statutory structure" of Title IX, including its exemption for religiously affiliated schools. *See* Def.'s Mem. 9 (quoting *Franciscan Alliance*, 227 F. Supp. 3d at 690).

That argument conflicts with Section 1557's plain text, which provides that:

> [A]n individual shall not, ***on the ground prohibited under*** title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance[.]

42 U.S.C. § 18116(a) (emphasis added). The plain text of Section 1557 does not incorporate each and every subsection of Title VI, Title IX, the ADEA, and the Rehabilitation Act; it prohibits health programs from discriminating "on the ground prohibited by" those statutes, *i.e.* because of race, ethnicity, national origin, sex, age, and

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disability. *See* Garner's Modern English Usage 100, 442 (4th ed. 2016) (phrase "on the grounds" is synonym for "because").[2]

The plain text of the statute is reinforced by common sense. The numerous exemptions in Title IX are tailored to educational institutions, not hospitals and insurance policies. The main provision of Title IX, 20 U.S.C. § 1681(a) provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:"—followed by subsections 1681(a)(1)-(9), which provide exceptions for vocational schools, schools transitioning from single-sex to coeducational institutions, educational institutions controlled by a religious organization, military academies, single-sex colleges, fraternities and sororities, boys and girls conferences, father-son or mother-daughter activities, and beauty pageants. Congress plainly did not intend to incorporate all of these various exemptions into Section 1557's prohibition on discrimination by healthcare entities.

D. Section 1557 Prohibits Covered Entities from Using Employee Health Benefit Programs that Discriminate on the Basis of Sex.

Section 1557—like Title IX—prohibits covered entities from engaging in employment discrimination. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be

[2] If, as Peace Health argues, Section 1557 incorporated each and every subsection of Title VI, Title IX, the ADEA, and the Rehabilitation Act, then there would have been no reason for Section 1557 to explicitly state that: "[t]he enforcement mechanisms provided for and available under" the four civil rights statutes "shall apply for purposes of" Section 1557. 42 U.S.C. § 18116.

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subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Over 35 years ago, the Supreme Court held that this broad statutory language prohibits a covered entity from discriminating against its employees. The Supreme Court explained that "employees [of education programs], like other 'persons,' may not be 'excluded from participation in,' 'denied the benefits of,' or 'subjected to discrimination under' education programs receiving federal financial support." *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 520 (1982). The Court also specifically noted that, "a female employee who works in a federally funded education program is 'subjected to discrimination under' that program if she is paid a lower salary for like work." *Id.* at 521.

The plain text of Section 1557 is equally broad. Section 1557 provides that "an individual shall not," on the basis of sex "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance." 42 U.S.C. § 18116(a). As in *Bell*, employees, like other "individuals" may not be "subjected to discrimination under" health programs receiving federal financial support. And, as in *Bell*, an individual who works in a federally funded health program is subjected to discrimination under that program when her employer provides wages and compensation in the form of fringe benefits that discriminate on the basis of sex.[3]

[3] It is well-settled that employer-provided fringe benefit plans, including health insurance, are part of an employee's wages and compensation for purposes of antidiscrimination claims. *See Ariz. Governing Comm. for Tax Deferred Annuity &*

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Consistent with the plain text of the statute and the Supreme Court's decision in *Bell*, Section 1557's implementing regulations provide that "[a] covered entity that provides an employee health benefit program to its employees and/or their dependents shall be liable for violations of [Section 1557] in that employee health benefit program" if "[t]he entity is principally engaged in providing or administering health services." 45 C.F.R. § 92.208(a). This implementing regulation was not—as PeaceHealth wrongly alleges—enjoined by the district court in *Franciscan Alliance*. *See* Def.'s Mem. 8. The preliminary injunction applies only to the regulations' "prohibition of discrimination on the basis of 'gender identity' and 'termination of pregnancy." *Franciscan Alliance*, 227 F. Supp. 3d at 695. "Because the Rule includes a severability provision, none of the unchallenged provisions are enjoined." *Id.*

In any event, the implementing regulation simply reiterates what is already clear from the statutory text, which protects all persons—including employees—from discrimination at a healthcare entity receiving federal financial assistance.

E. Section 1557 Provides Standing for Employees Who Suffer Discrimination on the Basis of Their Dependents' Sex.

PeaceHealth wrongly claims that Cheryl Enstad lacks standing under Section 1557. Def.'s Mem. 14. But the Supreme Court held in *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005), that Title IX (and, by extension, Section 1557)

Deferred Comp. Plans v. Norris, 463 U.S. 1073, 1082 (1983); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983). "A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion." *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984).

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provides standing for employees who suffer discrimination "on the basis of sex" even if the discrimination is based on the sex of a third party.[4] The Court distinguished between Title VII's narrower protection of individuals from discrimination on the basis of "'such individual's . . . sex'" and Title IX, which "contains no such limitation." *Id.* at 179 (quoting 42 U.S.C. § 2000e–2(a)(1)). Thus, "[i]f the male captain of the boys' basketball team and the female captain of the girls' basketball team together approach the school principal to complain about discrimination against the girls' team, and the principal retaliates by expelling them both from the honor society, then both the female and the male captains have been 'discriminated' against 'on the basis of sex.'" *Id.* at 179 n.3.

The same principles apply here. PeaceHealth provides compensation to its employees in the form of a health plan that covers medically necessary care for themselves and their dependents. But PeaceHealth refuses to cover the medically necessary care for Cheryl's dependent solely because he is transgender. As a result, other PeaceHealth employees receive coverage for dependents who have medically necessary chest reconstruction surgery for other conditions, but Cheryl must pay out of pocket for the same procedure simply because it has been classified as a form of "transgender

[4] Section 1557 explicitly provides that "[t]he enforcement mechanisms provided for and available under" the four civil rights statutes "shall apply for purposes of" Section 1557. 42 U.S.C. § 18116. Accordingly, Section 1557—like Title IX—provides a private right of action for sex-discrimination claims. *See Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979) (recognizing implied private right of action to enforce Title IX).

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services." Cheryl has thus been subjected to different and worse terms and conditions of employment than similarly situated employees "on the basis of sex."[5]

F. The Effective Date of the Implementing Regulations Does Not Affect Cheryl's Statutory Claim.

Finally, PeaceHealth argues that because the implementing regulations for Section 1557 regarding plan-benefit design did not become effective until January 1, 2017, PeaceHealth is shielded from liability for discrimination that occurred in 2016. Def.'s Mem. 16-17. But Cheryl's claims are based on the statute itself, not the implementing regulations. Even before the regulations were issued, states were already issuing insurance bulletins alerting that Section 1557 (in addition to applicable state laws) prohibited categorical exclusions in health care plans. *See* Nondiscrimination in Health Programs & Activities, 80 Fed. Reg. 54172, 54189-90 (proposed Sept. 8, 2015) (to be codified at 45 C.F.R. pt. 92); *see also Cruz*, 195 F. Supp. 3d at 581 (holding that "categorical exclusion on treatments of gender dysphoria" violated Section 1557 before regulations went into effect).

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[5] In arguing that Cheryl lacks standing, PeaceHealth relies upon cases dismissing (a) Title VII claims, *see Tovar v. Essentia Health*, 857 F.3d 771 (8th Cir. 2017), and (b) Title IX and Section 1557 claims brought by parents who were not themselves the victims of discrimination, *see Prescott*, 265 F. Supp. 3d at 1100; *Lopez v. Regents of Univ. of Cal.*, 5 F. Supp. 3d 1106, 1114-15 (N.D. Cal. 2013). The Title VII cases are not relevant here because, as discussed above, Title VII protects an individual only from discrimination "because of ***such individual's*** . . . sex." 42 U.S.C. § 2000e–2(a)(1) (emphasis added). And the Title IX and Section 1557 cases are not relevant here because the parents in those cases were not employees of the institution and did not allege that they personally were discriminated against based on their children's sex. By contrast, Cheryl is an employee of PeaceHealth and has, on the basis of her son's sex, been discriminated against in her wages and compensation.

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When HHS issued implementing regulations prohibiting discrimination in plan-benefit design it made explicit what the statute already prohibited. *Jackson*, 544 U.S. at 178 (explaining that the Court need not "rely on the Department of Education's regulation [prohibiting retaliation] at all, because the statute *itself* contains the necessary prohibition"); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 647 (1999) (holding that text of Title IX holds schools liable for deliberate indifference to sexual harassment by other students even though agency first issued guidance on issue after harassment of student had already taken place).

As part of its *own* enforcement discretion, HHS set January 1, 2017, as the effective date, but the regulations did not immunize covered entities from liability. As part of its memorandum accompanying the final regulations, HHS emphasized that "Section 1557 has been in effect since its passage as part of the ACA in March 2010, and covered entities have been subject to its requirements since that time." Nondiscrimination in Health Programs & Activities, 81 Fed. Reg. 31376, 31430 (May, 18, 2016). HHS stated that "[t]o delay implementation of the final rule would delay *the existing and ongoing protections* that Section 1557 *currently provides* and has provided since enactment." *Id.* (emphases added). The regulations thus provided clarity by explicitly stating that categorical exclusions of transition-related care are prohibited, but did not change the underlying requirements of Section 1557—or immunize covered entities for discrimination that occurred before 2017.

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III. PeaceHealth's Exclusion of Medically Necessary Care for "Transgender Services" Violates the WLAD.

The stated purpose of the WLAD is to protect the people of Washington from discrimination, as "discrimination threatens not only the rights and proper privileges of [the State's] inhabitants but menaces the institutions and foundation of a free democratic state." RCW 49.60.010. The statute explicitly includes "gender identity" as part of the definition of "sexual orientation." RCW 49.60.040(26). And the WLAD is to be interpreted broadly: "a statutory mandate of liberal construction requires that [courts] view with caution any construction that would narrow the coverage of the law." *Marquis v. City of Spokane*, 922 P.2d 43, 49 (Wash. 1996).

For the reasons stated below, PeaceHealth's motion to dismiss Plaintiffs' state law claims should be denied. In the alternative, as discussed in Plaintiffs' Motion to Certify (filed concurrently with Plaintiff's Opposition to the Motion to Dismiss), this Court should certify for the Washington Supreme Court to decide whether Cheryl and Pax have stated claims under the WLAD.

A. The WLAD Exemption for Religiously Affiliated Employers Does Not Extend to Discrimination Against Non-Ministerial Employees.

The WLAD does not allow religiously affiliated employers to discriminate against employees who are employed in a non-ministerial capacity. Although RCW 49.60.040(11), states that a "religious or sectarian organization not organized for private profit" is not an "employer" for purposes of the WLAD, the Washington Supreme Court has held that the exemption violates the Washington State Constitution as applied to non-ministerial employees. *Ockletree v. Franciscan Health Sys.*, 317 P.3d 1009

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Seattle, WA 98164
T: (206) 624-2184

(Wash. 2014). Although the *Ockletree* court was divided 4-1-4, a majority of Justices held that the "religious employer" exemption is invalid when "there is no relationship between [an employee's] duties and religion or religious practices." *Id.* at 789 (Stephens, J.) (on behalf of four justices); *id.* at 806 (Wiggins, J.).[6]

As a medical social worker, Cheryl's job duties were non-ministerial. Compl. ¶38. PeaceHealth is therefore prohibited from discriminating against her under the WLAD.

B. Cheryl Enstad Has Standing Under WLAD.

For the same reasons that Cheryl has standing under Section 1557, she also has standing under the WLAD, which prohibits discrimination against "*any person* in compensation or in other terms or conditions of employment *because of … sexual orientation*." RCW 49.60.180(3) (emphasis added). The statute does not limit the WLAD's scope to employees only; it prohibits differentiating among terms and conditions of employment on the basis of sexual orientation.[7] Under the plain language of the WLAD, Cheryl may bring discrimination claims arising out of PeaceHealth's facially discriminatory employment benefits.

Nothing in *Sedlacek v. Hillis*, 36 P.3d 1014 (Wash. 2001), undermines Cheryl's standing. The court in *Sedlacek* was not asked to determine whether the plaintiff had a

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[6] Defendant's citation to *Mills v. PeaceHealth*, 31 F. Supp. 3d 1099, 104 n.4, 1105 (D. Or. 2014) is unavailing. That case only describes PeaceHealth's religious mission and does not hold that PeaceHealth has been "found [to satisfy] the exemption requirements." Def. Mem. 21.

[7] The Plan is no less discriminatory by virtue of the fact that its terms were forced upon all PeaceHealth employees. *See* Def.'s Mem. 18.

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T: (206) 624-2184

viable cause of action for employment discrimination under the WLAD, but rather whether federal law should supersede the WLAD as an expression of public policy pursuant to the state common law claim of wrongful discharge. *Id.* at 385, 389-90. Unlike claims brought directly under the WLAD, "the wrongful discharge tort is narrow and should be 'applied cautiously.'" *Danny v. Laidlaw Transit Servs.*, 193 P.3d 128, 131 (Wash. 2008) (citing *Sedlacek*, 36 P.3d at 1019).

Defendant's reliance upon *Galbraith v. TAPCO Credit Union*, 946 P.2d 1242 (Wash. 1997), is similarly misplaced. The *Galbraith* court held that even though Galbraith was not discriminated against because of *his* age or gender, he experienced unlawful discrimination because he assisted employees of his credit union with *their* claims. *Id.* at 949. Citing the statute's mandate of liberal construction and the strong public policy against discriminatory practices, the court determined that the WLAD's protections applied to Galbraith—he did not need to be an employee, or have any type of specific relationship with the defendant in order to be protected. *Id.* Similarly, "the right to obtain and hold employment without discrimination" expresses no intent on the part of the legislature to preclude claims brought by employees who are seeking to protect their children from their employer's discrimination. *See* RCW 49.60.030(1)(a).

C. Pax Has Standing Under the WLAD.

As a beneficiary of an employment contract containing an explicitly discriminatory term, Pax has the right to "be free from discrimination because of" gender identity and "a civil action" to gain relief. RCW 49.60.030(2). Even though the WLAD does not explicitly enumerate the right to be free from discriminatory contracts, the

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SEATTLE, WA 98164
T: (206) 624-2184

Washington Supreme Court held in *Marquis v. City of Spokane*, 922 P.2d 43, 48-49 (Wash. 1996), that because its protections "shall include, but not be limited to" the examples of discrimination enumerated in the statute, RCW 49.60.030(1), the WLAD includes a civil right to engage in "the making and performance" of contracts free of discrimination, *id.* at 112. The court also explained that the existence of an enumerated right to be free from employment discrimination did not implicitly bar independent contractors from bringing claims based on discriminatory contracts. *See Marquis*, 922 P.2d at 50. ("[W]e find that the statute does not foreclose a cause of action to an independent contractor because, by its own terms, RCW 49.60.030(1) does not limit the actions which may be brought to those listed in the statute.").

It is well-established that employment benefit plans can create contractual relationships. *Storti v. Univ. of Wash.*, 330 P.3d 159, 163-164 (Wash. 2014) (holding that employer's policy with respect to implementation of raises created an enforceable unilateral contract); *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1088 (Wash. 1984) ("[A]n employee and employer can contractually obligate themselves concerning provisions found in an employee policy manual and thereby contractually modify the terminable at will relationship."). A beneficiary of a contract holds the same right to enforcement of the contract as the contracting party themselves. *See J.T. v. Regence BlueShield*, 291 F.R.D. 601, 609 (2013) (finding a beneficiary has standing to pursue relief for plan exclusions which violate the Mental Health Parity Act).

PeaceHealth's assertion that the WLAD is limited to the specific protections enumerated in the statute, Def.'s Mem. 21-23, is the same argument that was considered

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SEATTLE, WA 98164
T: (206) 624-2184

and rejected in *Marquis*.[8] Like the plaintiff in *Marquis*, Pax—as a beneficiary of a contract made between Cheryl and her employer—brings his claim under the WLAD's non-exclusive list of rights. Although the WLAD's enumerated right to be free from insurance discrimination does not apply to PeaceHealth's self-funded health plan, *see* Def.'s Mem. 22, the enumerated protections for insurance coverage do not foreclose Pax from bringing a separate cause of action based on a discriminatory contract. Indeed, Pax's claims fall even more squarely under the WLAD's prohibitions against discrimination than the contract at issue in *Marquis*: there, the contract was discriminatory only as compared to those negotiated with similarly situated male contractors, but here, the Plan is discriminatory on its face.

CONCLUSION

For all these reasons, Defendants' motion to dismiss should be denied.

Dated: 2/5/2018

/s/Lisa Nowlin

Lisa Nowlin, WSBA No. 51512
AMERICAN CIVIL LIBERTIES UNION of WASHINGTON FOUNDATION
901 Fifth Avenue, Suite 630
Seattle, Washington 98164
T: (206) 624-2184 / F: (206) 624-2190
lnowlin@aclu-wa.org

J. Denise Diskin, WSBA No. 41425
Beth Touschner, WSBA No. 41062
TELLER & ASSOCIATES, PLLC
1139 34th Avenue, Suite B
Seattle, Washington 98122

[8] In support of its narrow construction, PeaceHealth relies exclusively on a case brought by a *pro se* plaintiff who never briefed the issue. *See Matter v. Wash. Dep't of Corr.*, No. 13-CV-05213 BJR-KLS, 2014 WL 4449925 (W.D. Wash. Sept. 10, 2014). Without the benefit of adversary briefing, the court in *Matter* engaged in exactly the narrow construction and preclusion of remedies that *Marquis* rejected.

T: (206) 324-8969 / F: (206) 860-3172
denise@stellerlaw.com
beth@stellerlaw.com

Joshua A. Block*
Leslie Cooper*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, New York 10004
T: (212) 549-2627 / F: (212) 549-2650
jblock@aclu.org;
lcooper@aclu.org
* *Admitted Pro Hac Vice*

Attorneys for Plaintiffs.

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2018, I caused to be electronically filed the foregoing PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COMPLAINT and the attached exhibit and proposed order with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the Defendants through the following attorneys of record:

Defendants' counsel:

MANATT, PHELPS & PHILLIPS, LLP
BARRY S. LANDSBERG
Email: blandsberg@manatt.com
CRAIG S. RUTENBERG
Email: crutenberg@manatt.com
11355 West Olympic Boulevard
Los Angeles, CA 90064-1614
Telephone: (310) 312-4000
Facsimile: (310) 312-4224

DAVIS WRIGHT TREMAINE LLP
HARRY J.F. KORRELL, WSBA No. 23173
Email: harrykorrell@dwt.com
JOSEPH P. HOAG, WSBA No. 41971
Email: josephoah@dwt.com
1201 Third Ave., Suite 2200
Seattle, WA 98101
Telephone: (206) 757-8080
Facsimile: (206) 757-7080

DATED this 5th day of February, 2018.

J. Denise Diskin, WSBA No. 41425
Teller & Associates, PLLC
Attorneys for Plaintiffs

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON
FOUNDATION
901 Fifth Ave, Suite 630
Seattle, WA 98122
T: (206) 624-2184