UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Brittany R. Tovar, Plaintiff, -v- Essentia Health, Innovis Health, LLC, dba Essentia Health West, and HealthPartners, Inc., Defendants.	Case No.: 0:16-cv-00100-RHK/LIB **MEMORANDUM IN SUPPORT OF DEFENDANT HEALTHPARTNERS, INC.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

INTRODUCTION

Defendant HealthPartners, Inc. and its related companies have long advocated in favor of expanding access to health care, particularly for underserved communities. While HealthPartners, Inc. is sensitive to the issues Plaintiff has raised, Plaintiff's Complaint suffers from a variety of fatal defects and should be dismissed. Significantly, dismissal of this action will have no impact whatsoever on the health coverage currently available to Plaintiff and her family because gender reassignment services and surgery – the issue at the center of Plaintiff's Complaint – are not excluded in Plaintiff's current health plan sponsored by her employer Defendant Essentia Health.

As discussed below, Plaintiff does not have standing to assert a discrimination claim under Section 1557 of the Affordable Care Act ("ACA") against HealthPartners, Inc.[1] Plaintiff does not claim that ***she*** was "excluded from participation in, ... denied the benefits of, or ... subjected to discrimination under, any health program or activity." 42 U.S.C. § 18116(a). Indeed, Plaintiff continues to participate in a health care plan sponsored by her employer, for which HealthPartners serves as third-party administrator.[2] Plaintiff has been covered under an Essentia health plan at all times relevant to this action. While the Complaint alleges that the health plan offered by Essentia contained an exclusion for "services and/or surgery for gender reassignment," Plaintiff does not (and cannot) allege that she sought and was denied gender reassignment services or surgery. As a result, Plaintiff does not have standing to assert a claim against HealthPartners. Beyond that, Plaintiff's Complaint fails to assert a claim against HealthPartners for which relief can be granted. HealthPartners did not discriminate against Plaintiff by conveying to Plaintiff the terms of Essentia's plan, which at the time excluded gender reassignment services and surgery. HealthPartners respectfully requests that the Court grant its motion, and dismiss Plaintiff's Complaint with prejudice.

---

[1] Contrary to Plaintiff's Complaint, HealthPartners Administrators, Inc., (rather than HealthPartners, Inc.) is the entity that serves as a third-party administrator for the Essentia Health health plan at issue in this case. This motion should be granted even if Plaintiff amends her Complaint and properly identifies HealthPartners Administrators, Inc. ("HealthPartners"), as a defendant.

[2] Innovis Health, LLC, is Plaintiff's actual employer. Plaintiff's Complaint alleges that Essentia and Innovis were her employer. HealthPartners takes all of the allegations in Plaintiff's Complaint as true for purposes of this motion. HealthPartners refers to Essentia Health and Innovis Health, LLC, collectively as "Essentia."

FACTUAL BACKGROUND

A. HealthPartners.

HealthPartners is a third-party administrator for employer-sponsored self-insured health plans. (Declaration of Julie Bunde, Exhibit A at 23.)[3] A third-party administrator provides administrative services such as assessing whether claims fall within the terms of an employer sponsored health plan and facilitating payment for covered claims. A self-insured plan is one in which the scope of coverage is determined by the employer plan sponsor (in this case, Essentia) and all costs for covered health care are paid by that plan sponsor. (*Id.*) In other words, HealthPartners is not financially responsible for paying a claim under a self-insured plan – the plan sponsor is responsible for the payment. (*Id.*)

B. Essentia.

Plaintiff alleges that Essentia, the self-insured entity in this case was her employer. (Court Document 1 ("Complaint") at ¶21.) During 2015, Essentia was the plan sponsor for a health plan offered to Essentia employees in which Plaintiff elected to participate (the "2015 Plan"). (*Id.* at ¶22.)

As plan sponsor under the 2015 Plan, Essentia had "all powers and discretion necessary" to administer the Plan, including all powers to change the Plan. (Exhibit A at 22-23.) Because the 2015 Plan was self-insured, Essentia was "solely responsible for

[3] Exhibits A-E cited in the memorandum are attached to the Declaration of Julie Bunde filed herewith. The Court may consider the Bunde Declaration and its Exhibits because those materials do not contradict the Complaint and are necessarily embraced by the pleadings. *Minnesota Majority v. Mansky*, 708 F.3d 1051, 1056 (8th Cir. 2013).

payment of [any] eligible claims" and paid such "claims from its own funding as expenses for covered services" when those expenses were incurred. (*Id.*)

Essentia's 2015 Plan contained an exclusion for gender reassignment services and surgery. (*Id.* at 51, ¶15.) Plaintiff does not claim to have sought such services or surgery for herself, but alleges that her son, who was assigned the female gender at birth, has sought (or may seek) such services. (Complaint at ¶¶27-31.)

C. Plaintiff's Objection To Essentia's Plan.

In March 2015, Plaintiff sought clarification from Essentia and HealthPartners regarding the exclusion for gender reassignment services and surgery. (Complaint at ¶32.) On April 9, 2015, HealthPartners notified Plaintiff that Essentia was the sponsor of her plan and that HealthPartners does not have the authority to remove the exclusion. (Exhibit B; Complaint at ¶33.)[4] HealthPartners also stated it would continue to provide coverage for gender dysphoria. (Exhibit B.)

On June 9, 2015, HealthPartners responded to another letter from Plaintiff. (Exhibit C.) Once again, HealthPartners pointed out that Essentia's "plan does not include coverage for services and/or surgery for gender reassignment." (*Id.* at 1.) HealthPartners further stated that it was "obligated to follow the terms of the plan" and could not "make an exception" for gender reassignment services or surgery. (*Id.* at 2.)

[4] In order to address concerns about privacy and to comply with federal and state privacy laws, HealthPartners has provided redacted copies of certain letters that it wrote. HealthPartners also has not filed Plaintiff's letters regarding the exclusion for the same reason. Plaintiff has unredacted copies of all of these letters. HealthPartners will file unredacted copies of these letters under seal if the Court would permit HealthPartners to do so.

Finally, HealthPartners explained that Plaintiff could bring a lawsuit under ERISA if she was dissatisfied with the response. (*Id.*)

D. The Lupron Claim.

In late May 2015, Plaintiff's son was prescribed Lupron. (Complaint at ¶35.) HealthPartners responded by explaining that Lupron would not be covered under Essentia's 2015 Plan. (*Id.* at ¶38.) Plaintiff elected not to purchase Lupron for her son and, as a result, has not incurred any out-of-pocket costs concerning Lupron. (*See id.* at ¶40.) Plaintiff had the opportunity to appeal the denial of coverage for Lupron but does not allege that she exercised that right. (*See* Exhibit D at 3 (outlining the appeals process for a pharmacy pre-authorization denial); Complaint.)

E. The United States Department Of Health And Human Services Proposes New Rules.

On September 8, 2015, the United States Department of Health and Human Services (the "Department") proposed new rules for certain health programs.[5] The proposed rules, which have not yet been finalized or become effective, enumerated for the first time requirements related to gender transition under certain health plans. (Federal Register at 54189-90, 54205-06, 54219-20.) The Department made clear, however, that as proposed, the rules would not require health plans "to cover any particular procedure or treatment for [gender] transition-related care; nor [would] they preclude a covered entity from applying neutral standards that govern the circumstances

[5] *See* https://www.gpo.gov/fdsys/pkg/FR-2015-09-08/pdf/2015-22043.pdf (referred to in this memorandum as "Federal Register.")

in which it will offer coverage to all its enrollees in a non-discriminatory manner." (*Id.* at 54190.)

F. The Androderm Claim.

During late 2015, Plaintiff's son was prescribed Androderm, a form of testosterone. (Complaint at ¶42.) The claim for that prescription was initially rejected, but shortly thereafter, the denial was reversed and the prescription was eligible for coverage under Essentia's 2015 Plan. (*Id.* at ¶45.) While Plaintiff alleges that she was "forced to pay for Androderm out of pocket," she does not indicate whether any such amounts have yet to be reimbursed by Essentia. (*Id.* at ¶44.) If Plaintiff has unreimbursed medical expenses for covered services, Essentia would be responsible for those costs. (Exhibit A at 23.)

G. Essentia's 2016 Health Plan.

Effective January 1, 2016, Plaintiff was covered under an amended Essentia health plan (the "2016 Plan"). (Bunde Declaration at ¶6; Exhibit E.) As was the case with the 2015 Plan, the 2016 Plan is self-insured by Essentia. HealthPartners is the third-party administrator. (Exhibit E at 22-23.) Significantly, Essentia's 2016 Plan does not contain an exclusion for gender reassignment services or surgery. (Exhibit E at Amendment.) Plaintiff does not contend that she or her son have been denied any service or surgery under Essentia's 2016 Plan. (*See* Complaint.)

H. The Surgery Inquiry.

Shortly before Essentia's 2016 Plan became effective, Plaintiff contacted HealthPartners to inquire about pre-authorization for gender reassignment surgery for her

son. (Complaint at ¶46.) HealthPartners provided information regarding the exclusion in effect at the time of the call. (*Id.*) But, as discussed above, beginning on January 1, 2016, Essentia's health plan contains no exclusion for gender reassignment services or surgery. (Exhibit E at Amendment.)

ARGUMENT

Plaintiff's Complaint against HealthPartners should be dismissed for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

A. Standard For Granting A Motion To Dismiss For Lack Of Subject Matter Jurisdiction.

Under Federal Rule of Civil Procedure 12(b)(1), the Court "must" dismiss an action when it lacks subject matter jurisdiction. Fed. R. Civ. P. 12(h)(3). A district court may weigh evidence to determine whether it has power to hear a case. *Osborn v. U.S.*, 918 F.2d 724, 730 (8th Cir. 1990). The Plaintiff has the burden of proof to establish that jurisdiction exists. *Id.*

B. The Court Lacks Subject Matter Jurisdiction.

For two reasons, the Court lacks subject matter jurisdiction over Plaintiff's single cause of action against HealthPartners. First, Plaintiff does not have standing to bring this claim. Second, the claim is either moot or not ripe.

1. Plaintiff Lacks Standing To Sue HealthPartners.

Standing to sue is a threshold jurisdictional question. *McClain v. Am. Economy Ins. Co.*, 424 F.3d 728, 731 (8th Cir. 2005). "To satisfy Article III's standing

requirements, a plaintiff must show (1) [she] has suffered an injury-in-fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* "An injury-in-fact is a direct injury resulting from the challenged conduct." *Id.* Plaintiff has not alleged facts to show that she has standing to bring a claim against HealthPartners.

a. Plaintiff Has Not Been Injured.

Plaintiff's only claim against HealthPartners alleges discrimination in violation of Section 1557 of the ACA, which provides:

> [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 794 of title 29, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity.

42 U.S.C. § 18116(a).

Plaintiff does not allege that ***she*** was "excluded from participation in, ... denied the benefits of, or ... subjected to discrimination under, any health program or activity." *Id.* Indeed, Plaintiff is currently participating in an Essentia health plan and has done so at all relevant times. Plaintiff does not even suggest that she has been denied benefits under any health plan or that HealthPartners somehow excluded her from participating in a health plan or withheld benefits that otherwise exist under a health plan. As such,

Plaintiff has not alleged that she suffered any injury that would confer standing to pursue a Section 1557 claim.

Plaintiff cannot avoid this result by claiming that she is bringing this action on behalf of her son. *See Mausolf v. Babbitt*, 85 F.3d 1295, 1301 (8th Cir. 1996) (holding a lawsuit is not for discussing "an interested onlookers' concerns, nor an arena for public-policy debates"). Plaintiff's son is not a party to this case, and nothing in the Complaint alleges that Plaintiff is pursuing this case on his behalf. Because Plaintiff has not alleged that she was discriminated against, much less that HealthPartners took any action or failed to take any action with respect to her, Plaintiff lacks standing to pursue a claim against HealthPartners. *Mausolf*, 85 F.3d at 1301.

b. Plaintiff's Alleged Injuries Are Not Traceable To HealthPartners.

Plaintiff's claim against HealthPartners would fail even if she could identify a compensable injury that she experienced because any such injury is not traceable to HealthPartners. To establish standing, Plaintiff must show that, among other things, her purported injuries are "traceable to some act of the defendant." *See Arkansas ACORN Fair Hous, Inc.. v. Greystone Dev. Co.*, 160 F.3d 433, 434-35 (8th Cir. 1998). If Plaintiff's alleged injury is traceable to anyone, it is to plan sponsor Essentia, not HealthPartners.

Plaintiff's only claim against HealthPartners is that it accurately reported that Essentia's 2015 Plan included an express exclusion for "[s]ervices and/or surgery for gender reassignment." (Complaint at ¶¶7, 63.) This term is contained in Essentia's 2015

Plan documents provided to the Plaintiff by her employer and HealthPartners answered her inquiries by quoting from it. HealthPartners had no discretion or ability to do otherwise: under ERISA and the Plan, Essentia retained "all powers and discretion necessary to administer the Plan," including the power to "change the Plan." (Exhibit A at 23.) Plaintiff appears to recognize this fact by alleging that, "***Essentia*** later agreed to provide Tovar with coverage for Androderm ...." (Complaint at ¶45, emphasis added.) Because HealthPartners did not have the authority to change Essentia's 2015 Plan, any injury alleged by Plaintiff is not fairly traceable to HealthPartners.

c. Even If Plaintiff Receives A Favorable Decision, Plaintiff's Claim Will Not Be Redressed By HealthPartners.

Standing requires Plaintiff to show that her alleged injuries "will likely be redressed by a favorable decision." *Pucket v. Hot Springs Sch. Dist. No. 23-2*, 526 F.3d 1151, 1157 (8th Cir. 2008). "An injury is not redressable ... when the injury is already being redressed." *In re Oil Spill by Oil Rig Deepwater Horizon*, 792 F. Supp. 2d 926, 930 (E.D. La. 2011), *aff'd in part, rev'd in part sub nom. Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co*., 704 F.3d 413 (5th Cir. 2013).

Plaintiff is unable to show a redressable injury concerning HealthPartners for two reasons. First, Plaintiff's purported injuries have already been redressed. The exclusion for gender reassignment services or surgery is not included in Essentia's 2016 Plan, based on Essentia's decision to change the terms of its Plan. (Exhibit E at Amendment.)

Second, even if the Court determines that Essentia's 2015 Plan caused a compensable injury to Plaintiff, HealthPartners cannot redress that injury. Essentia's

2015 Plan was self-insured. (Exhibit A at 22-23.) "A self-insured employer bears the financial risk of paying its employees' health-insurance claims rather than contracting with a separate insurance company to provide the coverage and bear the financial risk. A self-insured employer often hires a third-party administrator to manage administrative functions like processing claims." *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 801 F.3d 927, 934 n.6 (8th Cir. 2015), citing 1A Steven Plitt, et al., Couch on Insurance § 10:1 n.1 (3d ed. 2013). *See also Dordt Coll. v. Burwell*, 801 F.3d 946, 947 n.2 (8th Cir. 2015) (internal citation omitted) (describing the dynamic as, "[a] self-insured employer bears the financial risk of paying its employees' health-insurance claims and often hires a third-party administrator to manage administrative functions like processing insurance claims. An insured employer, by contrast, contracts with a separate insurance company to provide healthcare coverage, bear the financial risk of insurance claims, and manage related administrative functions."). ERISA requires a third-party administrator to administer a self-insured health plan according to its terms. *See* 29 U.S.C. § 1104(a)(1)(D) (benefit plan decisions are required to be made "in accordance with the documents and instruments governing the plan").

HealthPartners did not decide what benefits were available in the 2015 Plan sponsored by Essentia. (Exhibit A at 23.) Essentia made that decision. (*Id.*) HealthPartners did not pay for claims under Essentia's self-insured plan. Essentia paid those costs. (*Id.*) Therefore, even if Plaintiff prevailed, any purported injuries would not and could not be redressed by HealthPartners.

2. Plaintiff's Claim Is Moot Or Not Yet Ripe.

Standing issues aside, the Court also lacks subject matter jurisdiction because Plaintiff's single claim against HealthPartners is moot or not ripe.

a. Plaintiff's Requests Under Essentia's 2015 Plan Are Moot.

"A claim is properly dismissed as moot if it has lost its character as a present, live controversy of the kind that must exist if [courts] are to avoid advisory opinions on abstract questions of law." *Roubideaux v. N. Dakota Dep't. of Corr. & Rehab.*, 570 F.3d 966, 976 (8th Cir. 2009) (internal quotation omitted). Courts lack "jurisdiction over cases in which, due to the passage of time or a change in circumstances, the issues presented will no longer be live or the parties will no longer have a legally cognizable interest in the outcome of the litigation." *Id.* (internal quotation omitted); *see also Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992) (holding a federal court does not have authority to render opinions on moot questions).

Here, a change in circumstances that occurred even before Plaintiff filed the lawsuit has rendered Plaintiff's claim moot. The exclusion at issue was removed by Essentia effective January 1, 2016, prior to Plaintiff filing this case. (Exhibit E at Amendment.)

Plaintiff's allegations regarding Lupron and Androderm do not change this result. Plaintiff admits that she never purchased Lupron. (Complaint at ¶40.) She also concedes that the Androderm was covered even during 2015. (*Id.* at ¶45.) Plaintiff has no economic harm as a result of either prescription.

Plaintiff's late 2015 inquiry about pre-authorization does not constitute a live controversy. As an initial matter, Plaintiff never actually submitted a formal pre-authorization request for coverage, and does not allege otherwise. (*See* Complaint at ¶46.) In response to a verbal inquiry concerning gender reassignment surgery, HealthPartners correctly described Essentia's then-current health plan, which contained an exclusion. (*Id.*) That exclusion has since been removed by Essentia and Plaintiff has not alleged that she was ever denied any specific surgical procedure under either Essentia's 2015 Plan or 2016 Plan. (*See* Complaint; Exhibit E at Amendment.)

This case is similar to *Engelhardt v. Paul Revere Life Ins. Co.*, an ERISA case, where the plaintiff's claim for benefits was moot because, after the lawsuit was commenced, the plaintiff qualified for coverage and received all past benefits owed under that plan. 77 F. Supp. 2d 1226, 1234 (M.D. Ala 1999). The court held that "because there is no further relief that the court can award plaintiff on his claim for past benefits," his claims were moot. *Id.* In this case, prior to the commencement of this lawsuit, the exclusion Plaintiff is challenging was removed from Essentia's 2016 Plan. There is no further relief that the Court can award Plaintiff because Essentia's 2016 Plan does not have the exclusion.

b. Plaintiff's Claims Regarding Future Gender Reassignment Surgery Are Not Ripe.

Any claim by Plaintiff regarding future medical treatment is not ripe. Nothing in the Complaint indicates that Plaintiff or her son have been denied coverage under Essentia's 2016 Plan. The Eighth Circuit has held that "[t]he ripeness doctrine flows

both from the Article III cases and controversies limitation and also from prudential considerations for refusing to exercise jurisdiction." *Pub. Water Supply Dist. No. 10 of Cass Cnty., Mo. v. City of Peculiar, Mo.*, 345 F.3d 570, 572 (8th Cir. 2003) (internal quotation omitted). The ripeness inquiry requires a court to analyze both "the fitness of the issues for judicial decision and the hardship to parties of withholding court consideration." *Id.* at 572-73. A party seeking judicial relief must satisfy both the fitness for judicial decision prong and the hardship prong. *Id.* at 573. Here, Plaintiff cannot satisfy either requirement.

To determine whether an issue is fit for judicial decision, courts evaluate whether the case would benefit from further factual development. *Id.* A case is more likely to be ripe if it is not contingent on future possibilities. *Id.*; *Texas v. United States*, 523 U.S. 296, 300 (1998). Here, Plaintiff makes no allegations in her Complaint that either she (or anyone else) has been denied coverage of any kind under Essentia's 2016 Plan. Any allegation that Plaintiff ***will be*** denied coverage for treatment related to gender reassignment is purely hypothetical, and is not ripe for purposes of subject matter jurisdiction, particularly when Essentia's 2016 Plan contains no exclusion for gender reassignment surgery or services.

Nor can Plaintiff assert that allowing her claim to ripen will create a hardship. To satisfy the hardship requirement, an "[a]bstract injury is not enough. It must be alleged that the Plaintiff has sustained or is immediately in danger of sustaining some direct injury ...." *City of Peculiar*, 345 F.3d at 573 (internal quotation omitted). A case is not

ripe if the plaintiff does not make a showing that "the injury is direct, immediate, or certain to occur." *Id.*

Plaintiff has not been denied coverage for any gender reassignment surgery or service under Essentia's 2016 Plan. After exhausting Essentia's internal appeal process, if a request is denied despite the absence of an exclusion, Plaintiff will then be able to present a fully ripened, concrete controversy for judicial determination and the Court will be able to assess why that claim was denied, and whether any actual denial was unlawful. Until then, there simply is no justiciable controversy.

C. Standard For Granting A Motion To Dismiss For Failure To State A Claim Upon Which Relief May Be Granted.

The Court will dismiss a complaint that fails to state a claim for which relief can be granted. Fed. R. Civ. P. 12(b)(6). While the Court "accept[s] the factual allegations of the complaint as true," those "allegations must supply sufficient 'facts to state a claim to relief that is plausible on its face.'" *O'Neil v. Simplicity, Inc*., 574 F.3d 501, 503 (8th Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009).

D. Plaintiff's Complaint Against HealthPartners Fails To State A Claim Upon Which Relief May Be Granted.

Plaintiff alleges a claim under Section 1557 of the ACA based upon the notion that HealthPartners discriminated against her because her son is transgender. (Complaint at ¶63.) The sole basis for Plaintiff's claim is that HealthPartners violated Section 1557 because it did not disregard the exclusion for gender reassignment services and surgery in

Essentia's 2015 Plan, an act that would have violated ERISA and HealthPartners's authority under the 2015 Plan. *See* 29 U.S.C. §§ 1104(a)(1)(D), 1140. There is no support for Plaintiff's Section 1557 claim even assuming the Court concludes that it has subject matter jurisdiction.

First, Plaintiff cannot bring her claim against HealthPartners because she has not satisfied ERISA's exhaustion requirements and because a third-party administrator such as HealthPartners does not determine which plan benefits are provided under a self-insured plan. Second, Plaintiff has not alleged a viable Section 1557 claim – separate and apart from ERISA – because she has not alleged that HealthPartners had the authority to alter Essentia's 2015 Plan or that HealthPartners actually discriminated against her. To the contrary, Essentia – not HealthPartners – was responsible for the type of coverage under the 2015 Plan as a matter of law and fact. Third, Plaintiff cannot obtain damages for alleged discrimination against her son.

1. Plaintiff's Claim Does Not Comply With ERISA.

Plaintiff has failed to exhaust her administrative remedies as required by ERISA, and her claim against HealthPartners fails. To the extent Plaintiff is alleging that the gender reassignment exclusion in Essentia's 2015 Plan was discriminatory, she must direct that claim to Essentia. And, to the extent Plaintiff is alleging that she (or her son) was wrongfully denied coverage for a specific claim under Essentia's 2015 Plan, she was required to first exhaust her administrative remedies under ERISA, which she has not done. *Burds v. Union Pac. Corp.*, 223 F.3d 814, 817 (8th Cir. 2000) ("It is well-established that when exhaustion is clearly required under the terms of an ERISA benefits

plan, the plan beneficiary's failure to exhaust her administrative remedies bars her from asserting any unexhausted claims in federal court").

ERISA imposes a single, uniform standard governing employee benefit plans. *See, e.g., New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 657 (1997) (the purpose of ERISA is "to permit the nationally uniform administration of employee benefit plans"); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990) (holding that in enacting ERISA Congress intended "to ensure that plans and plan sponsors would be subject to a uniform body of benefits law").

ERISA Section 510 prohibits discrimination against plan participants "for the purpose of interfering with the attainment of any right to which such participant may become entitled." 29 U.S.C. § 1140. ERISA's civil-enforcement provision, Section 502(a), is the "exclusive remedy for rights guaranteed under ERISA, including those provided by Section 510." *McClendon*, 498 U.S. at 144 (internal citation omitted). Despite discussing ERISA within the ACA, Congress did not modify ERISA's exclusivity provision when it enacted Section 1557 of the ACA. Moreover, the Department's Proposed Rules specifically reference ERISA but say nothing about eliminating ERISA exclusivity. (Federal Register at 54174, 54216.) Thus, to read ERISA and Section 1557 as consistent with each other, a plaintiff asserting a health plan related Section 1557 claim should exhaust their administrative remedies under ERISA and then commence a lawsuit pursuant to ERISA that asserts the plaintiff's substantive rights under Section 1557.

Plaintiff should not be permitted to bring suit under Section 1557 against a third-party administrator without exhausting her remedies as required by ERISA. The exhaustion requirements allow ERISA-governed plans the opportunity to resolve claims without judicial intervention. Permitting plaintiffs to litigate disputes prematurely will increase litigation costs and delay resolution of disputes.

Plaintiff has not exhausted her administrative remedies under ERISA. Nothing in Plaintiff's Complaint suggests that Plaintiff exhausted her administrative remedies as to any specific treatment or surgery. Lupron is the only treatment that Plaintiff alleges was denied and Plaintiff does not allege, as she must, that she exhausted her (or her son's) administrative remedies for that claim. And, Plaintiff's generalized objections concerning the gender reassignment exclusion in Essentia's then-existing health plan fall woefully short of satisfying ERISA's exhaustion requirements. *See, e.g., Reindl v. Hartford Life & Acc. Ins. Co.*, 705 F.3d 784, 788 (8th Cir. 2013) (claimant's letter did not exhaust ERISA's appeal requirement); *Piecznski v. Dril-Quip, Inc. Long Term Disability Plan*, No. 09-20187, 2009 WL 4034796 at *210-11 (5th Cir. Nov. 23, 2009); *Borland v. Qwest Corp.*, No. 04-35693, 2006 WL 1028785 at *1 (9th Cir. Apr. 17, 2006).

The Court should reject any effort to suggest that Section 1557 eliminated ERISA's exhaustion requirements. Section 1557 prohibits discrimination in a health program receiving federal financial assistance on the grounds of race, sex, age or disability. While this language is ambiguous, "insofar as each of the four statutes [identified in Section 1557] utilize different standards for determining liability, causation,

and a plaintiff's burden of proof,"[6] Section 1557 says nothing about eliminating or modifying the body of law developed under ERISA, including ERISA's exhaustion requirement. And where Congress meant to modify ERISA through the ACA, it explicitly stated it.

Because Section 1557 does not alter Plaintiff's obligations and remedies under ERISA, Plaintiff's claim against HealthPartners is barred by her failure to exhaust her administrative remedies.

2. Plaintiff Has Not Alleged A Plausible Section 1557 Claim Even Without Regard To ERISA's Exhaustion Requirements.

HealthPartners did not discriminate against Plaintiff's son (or Plaintiff) because Essentia – not HealthPartners – is responsible for the exclusions in Essentia's Plan. Section 1557 is enforced through various statutes, including Title IX of the Education Amendments of 1972. 42 U.S.C. § 18116(a). In fact, Section 1557 uses language almost identical to Title IX. *Compare* 42 U.S.C. § 18116(a) *with* 20 U.S.C. § 1681(a). To incur liability under Title IX, an entity "must be (1) deliberately indifferent (2) to known acts of discrimination (3) [that] occur under its control." *Plamp v. Mitchell Sch. Dist. No. 17-2*, 565 F.3d 450, 456 (8th Cir. 2009). Thus, entities are not liable under Title IX unless an "appropriate person has actual knowledge of discrimination and fails to adequately respond." *Id.*; *Grandson v. Univ. of Minnesota*, 272 F.3d 568, 571 (8th Cir. 2001). An "appropriate person" is one "who at a minimum has authority to address the alleged

[6] *Rumble v. Fairview Health Servs.*, No. 14-cv-2037 (SRN/FLN), 2015 WL 1197415, *10 (D. Minn. March 16, 2015).

discrimination and to institute corrective measures on the recipient's behalf." *Plamp*, 565 F.3d at 456.

Plaintiff may not recover damages under Title IX unless an official who had the authority to institute corrective measures had actual notice and was deliberately indifferent to the conduct. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 & 291 (1998).

a. Plaintiff's Section 1557 Claim Fails Because Plaintiff Did Not Notify HealthPartners Of Any Allegedly Discriminatory Conduct By HealthPartners.

Plaintiff's single count against HealthPartners alleges discrimination based solely upon Essentia's exclusion for "[s]ervices and/or surgery for gender reassignment." (Complaint at ¶ 63.) But, as HealthPartners has consistently made clear, HealthPartners was the third-party administrator for Essentia's 2015 Plan. HealthPartners did not provide health insurance to Plaintiff or her son. In response to Plaintiff's March 2015 letter "seeking clarification for the exclusion," HealthPartners responded that it was required to "apply the terms of your Plan consistent with the benefits, provisions, limitations, and exclusions described in your [health Plan]." (Exhibit B at 2.) In response to Plaintiff's second letter, HealthPartners reiterated this fact: "[a]s the administrator of the Essentia Health Plan […] HealthPartners is obligated to follow the terms of the Plan documents and cannot make an exception to provide coverage for gender reassignment and related services." (Exhibit C at 2.)

Plaintiff's Complaint challenges the existence of the exclusion itself, not any decision or action by HealthPartners. (Complaint at ¶63.) Plaintiff does not allege

(because she cannot) that HealthPartners had any control over whether the exclusion remained in Essentia's 2015 Plan. "Title IX contains important clues that Congress did not intend to allow recovery in damages where liability rests solely on principles of vicarious liability or constructive notice. Title IX's express means of enforcement – by administrative agencies – operates on an assumption of actual notice to officials of the funding recipient." *Gebser*, 524 U.S. at 288. Plaintiff's Complaint says nothing about any decision that HealthPartners could remedy and that HealthPartners has had a "reasonable opportunity to rectify." *See Grandson*, 272 F.3d 568 at 575.

Further, it is undisputed that Essentia removed the gender reassignment exclusion the next time it offered a health plan to Plaintiff. (Exhibit E at Amendment.) As such, the relief that Plaintiff sought in her letters to Essentia and HealthPartners – elimination of the exclusion – has now been provided by Essentia. *See Grandson*, 272 F.3d a 574 (finding that plaintiffs lacked standing to obtain relief under Title IX because they were no longer students at University).

Moreover, with regard to the one prescription Plaintiff's Complaint alleges was denied to her son, Plaintiff failed to notify HealthPartners or Essentia of alleged discrimination or allow HealthPartners or Essentia an opportunity to rectify any alleged discrimination. Plaintiff does not allege that she appealed when HealthPartners notified her that Lupron was not covered under Essentia's 2015 Plan. (Complaint at ¶40.) As a result, Plaintiff cannot now use the Lupron decision as the basis for a damages claim. *Gebser*, 524 U.S. at 290; *Grandson*, 272 F.3d at 571 (affirming the denial of a motion to amend a complaint to add a damages claim because Plaintiff failed to provide notice to

the University of the alleged discrimination and an opportunity to rectify the alleged discrimination so the amendment would be futile). Count III fails as a matter of law.

b. Plaintiff's Section 1557 Claim Fails Because HealthPartners Did Not Discriminate.

Beyond a failure to comply with Title IX's notice requirements, Plaintiff's Section 1557 claim fails because Plaintiff has not alleged a viable discrimination claim against HealthPartners. Nothing in the Complaint even remotely suggests that gender reassignment services or surgery would have been covered and paid by Essentia but for some action or decision by HealthPartners.

Plaintiff does not – and cannot – allege that HealthPartners engaged in any conduct other than notifying her that, under its plain language, Essentia's 2015 Plan did not cover gender reassignment services or surgery. Plaintiff does not allege that HealthPartners had any option but to convey an accurate statement about Essentia's Plan's coverage, or any ability to force Essentia to change its 2015 Plan or any discretion whatsoever about whether gender reassignment surgery and services could be covered regardless of the express exclusion. In fact, ERISA requires a third-party administrator to administer a self-insured health plan according to its terms. *See* 29 U.S.C. § 1104(a)(1)(D) (benefit plan decisions are required to be made "in accordance with the documents and instruments governing the plan"). Thus, a third-party administrator may breach its fiduciary duty to a plan and all the plan participants if it fails to comply with the express terms of the plan. *See id.*; *see, e.g., Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985) ("It is of course true that the fiduciary obligations of

plan administrators are to serve the interest of participants and beneficiaries and, specifically, to provide them with the benefits authorized by the plan" (emphasis added)). A third-party administrator may also be liable under ERISA for discriminating against other plan participants by approving some, but not all, expressly excluded claims. *See* 29 U.S.C. § 1140.

HealthPartners has located no authority for the notion that a third-party administrator may be held liable for a self-insured employer's health plan design decisions. In fact, courts have repeatedly held that a third-party administrator may not be held liable under ERISA for merely administering a self-insured plan. *See, e.g.*, *Samaritan Health Ctr. v. Simplicity Health Care Plan*, 459 F. Supp. 2d 786 (E.D. Wis. 2006); *Lampen v. Albert Trostel & Sons Co. Employee Welfare Plan*, 832 F. Supp. 1287 (E.D. Wis. 1993); *Skilstaf, Inc. v. Adminitron, Inc.*, 66 F. Supp. 2d 1210 (M.D. Ala. 1999); *Baxter v. C.A. Muer Corp,* 941 F.d 451, 454-55 (6th Cir. 1991). HealthPartners "was merely doing all that the TPA [third party administrator] was allowed to do – implementing policies of the plan, be they correct or not." *Lampen,* 832 F. Supp. at 1291. Essentia made any final determinations about design of its 2015 Plan or changes to its 2015 Plan, and HealthPartners cannot be held liable for those decisions. *Skilstaf*, 66 F. Supp.2d at 1215-16; *Baxter*, 941 F.2d at 454-55. Holding that a third-party administrator could be liable under Section 1557 for failing to violate the terms of a self-insured plan would create a catch-22 for the third-party administrator and require it to violate ERISA to avoid Section 1557 liability. Instead, the Court should interpret Section 1557 consistent with ERISA and find that if the terms of a self-insured plan are deemed to be

in violation of Section 1557, then the remedy is with the entity that has control over the plan – the plan sponsor. Such a ruling would be consistent with Title IX's requirement that a plaintiff prove that the alleged discrimination occurred under the defendant's control. *See Plamp*, 565 F.3d at 456.

Plaintiff's Complaint does not allege that HealthPartners treated Plaintiff or her son differently under the 2015 Plan from any similarly-situated person. *See Rodgers v. U.S. Bank, N.A.*, 417 F.3d 845, 853 (8th Cir. 2005) (discussing concept of similarly-situated comparators in the context of Title VII discrimination matter), *abrogated on other grounds by Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011). For example, Plaintiff does not contend that HealthPartners disregarded exclusions in Essentia's 2015 Plan for conditions other than gender reassignment surgery, but then refused to disregard the exclusion at issue here. And Plaintiff does not allege that gender reassignment surgery really was covered under Essentia's 2015 Plan, but that HealthPartners said otherwise in order to discriminate against Plaintiff's son.

In contrast to cases where a covered entity plausibly engaged in actual discrimination under the ACA, HealthPartners followed Essentia's 2015 Plan in a non-discriminatory manner. In *Callum v. CVS Health Corp.*, for example the court held that the plaintiff, a black male who had PTSD, alleged a plausible claim for discrimination under Section 1557 against a pharmacy that denied his request to shop after hours. No. 4:14-cv-3481-RBH, 2015 WL 5782077, --- F. Supp. 3d --- (D. S.C. Sept. 29, 2015). The pharmacy denied the plaintiff's request to shop after hours (something within its power to allow), but allowed a while female customer to do so. *Id.* at **4-5. The *Callum* court

found that CVS was a covered entity under Section 1557, and that the plaintiff had stated a plausible claim for race and disability discrimination. *Id.* at *23.

Similarly, in *Rumble*, the court determined that a transgender plaintiff alleged a plausible claim for discrimination under Section 1557 where the defendant medical providers asked inappropriate questions and made inappropriate comments about the plaintiff's hormone use, the physician used an inappropriate tone during his questioning of the plaintiff, and the physician allegedly assaulted the plaintiff during a physical exam. 2015 WL 1197415 at *18. In other words, the plaintiff in *Rumble* specifically alleged that he was treated unfairly because of his status as a transgender male.

In *Se. Pennsylvania Transp. Auth. v. Gilead Scis., Inc.*, the Eastern District of Pennsylvania granted a Hepatitis C drug manufacturer's motion to dismiss a claim alleging discrimination in violation of Section 1557. 102 F. Supp. 3d 688, 702 (E.D. Pa. 2015). The plaintiffs argued that the drug manufacturer's pricing discriminated against persons with disabilities and had a disparate impact on racial minorities. *Id.* at 696. The court found that even if plaintiffs were considered to be disabled, they failed to show that the drug manufacturer's actions discriminated on the basis of disability: "[t]here are no allegations that [the manufacturer] changes the prices of its drugs depending upon whether the potential consumer has Hepatitis C." *Id.* at 700.

Callum, *Rumble*, and *Gilead Scis.* differ greatly from this case. Plaintiff does not allege that HealthPartners treated her differently from any other Essentia employee concerning administration of Essentia's 2015 Plan. Plaintiff does not even suggest that HealthPartners has waived or can waive exclusions in Essentia's 2015 Plan but elected

not to do so here for discriminatory reasons. Nor is there any allegation that gender reassignment surgery or services would have been covered by Essentia's Plan but for some discriminatory act by HealthPartners. Because nothing in the Complaint suggests that HealthPartners treated Plaintiff differently from any other participant in Essentia's Plan, Plaintiff's claim fails.

The Department's proposed rules do not change this result. First, the proposed rules have not yet been finalized or become effective and are not entitled to *Chevron*[7] deference. *Callum*, 2015 WL 5782077 at *20. The rules may be modified before they are finalized and when finalized, the rules are proposed to take effect "60 days after the publication of the final rule in the Federal Register." (Federal Register at 54172.)

Second, HealthPartners could not be bound to rules in March-June of 2015 before it had notice of them (proposed rules released in September 2015). "[T]he legitimacy of Congress' power to legislate under the spending power ... rests on whether the [recipient] voluntarily and knowingly accepts the terms of the 'contract' ... Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (internal quotation omitted). Therefore, a remedy is only available "if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature." *Id.* at 187 (emphasis in original). Here, HealthPartners had no notice of proposed rules that might alter the responsibilities of some third-party administrators from those enumerated in ERISA.

[7] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

The Department did not even propose the rules until ***after*** HealthPartners had notified Plaintiff's son that Lupron was not covered under the 2015 Plan. (Federal Register at Cover (indicating publication date of September 8, 2015).) And, after the rules were proposed, Plaintiff's son sought and received coverage for Androderm. (Complaint at ¶45.) Because the proposed rules will not apply retroactively (even after they are finalized), and because the gender reassignment exclusion is not present in Plaintiff's current health plan (even though the rules are not finalized), the proposed rules are largely irrelevant to this motion.

Third, even the proposed rules do not require a health plan "to cover any particular procedure or treatment for [gender] transition-related care; nor [would] they preclude a covered entity from applying neutral standards that govern the circumstances in which it will offer coverage to all its enrollees in a nondiscriminatory manner." (Federal Register at 54190.) Because Plaintiff does not allege that HealthPartners did anything other than administer the coverage provided by Essentia, her Section 1557 claim fails.

c. Plaintiff's Section 1557 Claim Fails Because HealthPartners Did Not Have Control Over The Alleged Discrimination.

In order to assert a plausible Section 1557 claim against HealthPartners, Plaintiff must allege facts that show that HealthPartners had the authority to institute corrective measures to eliminate alleged discrimination. *Gebser*, 524 U.S. at 277; *see also id*. at 290 ("we hold a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination"). The U.S.

Supreme Court's *Gebser* decision explains why a third-party administrator cannot be liable for an allegedly discriminatory self-insured plan. Under Section 1557, which is nearly identical to Title IX, a plaintiff must show that she gave notice to an official at the defendant who had "authority to address the alleged discrimination and to institute corrective measures." *Id.* As thoroughly explained above, a third-party administrator has no control over the self-insured plan terms. Thus, there is no individual at a third-party administrator to whom a plaintiff could give the notice required by *Gebser*. Plaintiff cannot maintain a Section 1557 claim against HealthPartners when she does not and cannot allege facts to establish that HealthPartners had any "authority to address the alleged discrimination" or "to institute corrective measures." *Gebser*, 524 U.S. at 290. Count III must fail as a matter of law.

3. Plaintiff's Claim Fails For Lack Of Recoverable Damages.

Plaintiff's lawsuit against HealthPartners would fail even if Plaintiff could show that HealthPartners engaged in some discriminatory act because Plaintiff herself was not harmed by any such act. As discussed above, Plaintiff did not incur any out-of-pocket costs associated with Lupron and her son's claim for Androderm was ultimately approved and paid for under Essentia's 2015 Plan. As such, Plaintiff has no economic damages.

Nor is Plaintiff able to recover damages for emotional distress in this case. Courts "have not been anxious to expand the availability of damages for emotional distress." *Navarre v. S. Washington Cnty. Sch.*, 652 N.W.2d 9, 30 (Minn. 2002). Generally, a party may not recover for emotional distress because another individual's statutory rights were allegedly violated. *See, e.g., Pierzynowski v. Police Dep't City of Detroit*, 941 F. Supp.

633, 640 (E.D. Mich. 1996) (allowing family members to bring emotional distress claims would "open the floodgates" of . . . litigation); *Pierce v. Stinson*, 493 F. Supp. 609, 610 (E.D. Tenn. 1996). Even assuming that Plaintiff's son's rights were violated under Section 1557, Plaintiff cannot recover for her own emotional distress arising from that violation.

CONCLUSION

HealthPartners has great respect for Plaintiff's devotion to seeking open access to health care for her son. In this lawsuit, however, Plaintiff does not have standing to assert a legal claim and, even if she had standing, the exclusion to which Plaintiff objects has already been removed by Essentia from its 2016 Plan. HealthPartners did not have discretion to disregard the exclusion in Essentia's 2015 Plan. Nor did HealthPartners discriminate in the administration of the Plan in regard to Plaintiff's son's claims.

Ultimately, Plaintiff's Complaint asks the Court for injunctive relief to remove the exclusion at issue and for monetary damages to place her in the same position she would have been in were it not for the exclusion. No injunctive relief is required because Essentia has already removed the exclusion. And no monetary relief is warranted because the only claim that was denied because of the exclusion – the Lupron – did not cause Plaintiff to incur any out of pocket costs. Plaintiff never purchased it. Moreover, Plaintiff and her son did not appeal the denial of the Lupron and thus did not exhaust their administrative remedies under ERISA or meet the requirement for providing notice of the alleged discrimination and an opportunity to rectify under Title IX and Section 1557. Thus, their damages claim cannot proceed. Accordingly, and for each of the

reasons set forth above, HealthPartners respectfully requests that the Court dismiss Plaintiff's Complaint against HealthPartners.

Date: March 3, 2016

LARSON • KING, LLP

By: *s/ David M. Wilk*
David M. Wilk (#222860)
Stephanie Chandler (#0395303)
2800 Wells Fargo Place
30 East Seventh Street
St. Paul, Minnesota 55101
Telephone: (651) 312-6500
dwilk@larsonking.com
schandler@larsonking.com

ATTORNEYS FOR DEFENDANT HEALTHPARTNERS, INC.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Brittany R. Tovar,

Plaintiff,

-v-

Essentia Health,
Innovis Health, LLC,
dba Essentia Health West, and
HealthPartners, Inc.,

Defendants.

Case No.: 0:16-cv-00100-RHK/LIB

LR 7.1(f) and (h) WORD COUNT COMPLIANCE CERTIFICATE REGARDING MEMORANDUM IN SUPPORT OF DEFENDANT HEALTHPARTNERS, INC.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

I, David M. Wilk, certify that the Memorandum in Support of Defendant HealthPartners, Inc.'s Motion to Dismiss Plaintiff's Complaint complies with Local Rule 7.1(f) and (h).

I further certify that, in preparation of this memorandum, I used Microsoft Word 2010, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count and I also certify that this Memorandum has been prepared in 13 pt. font.

I further certify that the above-referenced Memorandum contains 7,541 words.

Date: March 3, 2016

LARSON • KING, LLP

By: *s/ David M. Wilk*
David M. Wilk (#222860)
Stephanie Chandler (#0395303)
2800 Wells Fargo Place
30 East Seventh Street
St. Paul, Minnesota 55101
Telephone: (651) 312-6500
dwilk@larsonking.com
schandler@larsonking.com

ATTORNEYS FOR DEFENDANT HEALTHPARTNERS, INC.

1507325