UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
Case No. 16-3186

BRITTANY R. TOVAR,

Plaintiff-Appellant,

vs.

ESSENTIA HEALTH; INNOVIS HEALTH, LLC, DBA ESSENTIA HEALTH WEST; HEALTHPARTNERS, INC.; AND HEALTHPARTNERS ADMINISTRATORS, INC.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Minnesota
The Honorable Richard H. Kyle, Presiding

BRIEF OF APPELLEES HEALTHPARTNERS, INC. AND HEALTHPARTNERS ADMINISTRATORS, INC.

David M. Wilk (#222860)
Stephanie L. Chandler (#0395303)
LARSON • KING, LLP
2800 Wells Fargo Place
30 East Seventh Street
St. Paul, Minnesota 55101
Telephone: (651) 312-6500
Facsimile: (651) 312-6618

Counsel for Appellees HealthPartners, Inc. and HealthPartners Administrators, Inc.

SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Essentia Health is the self-insured plan sponsor for a health plan offered to Essentia Health and Innovis Health, LLC ("Essentia") employees in which Tovar, an employee, elected to participate. Essentia's 2015 health plan contained an exclusion for gender reassignment services and surgery. HealthPartners, Inc. ("HealthPartners") is the parent corporation of HealthPartners Administrators, Inc. ("HPAI"). HPAI is the third-party administrator for the Essentia health plan. HPAI is not financially responsible for claims under the Essentia health plan. Only Essentia is financially responsible for paying any claims.

Tovar alleged that HealthPartners violated Section 1557 of the Patient Protection and Affordable Care Act. No Title VII or Minnesota Human Rights Act claims were asserted against HealthPartners, although Tovar asserted such claims against Essentia. HealthPartners moved to dismiss the Complaint on the grounds that Tovar lacked standing and failed to state a claim upon which relief can be granted. By Order dated May 11, 2016, the District Court granted the motion to dismiss. After entry of judgment, Tovar's Complaint was amended to add HPAI as a defendant to the Section 1557 claim. The District Court dismissed with prejudice the Amended Complaint for the reasons stated in its prior Order.

HealthPartners and HPAI join in Tovar's request that the Court grant oral argument, but believe that 15 minutes per party is sufficient.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, appellees HealthPartners, Inc. and HealthPartners Administrators, Inc., state the following:

1. HealthPartners Administrators, Inc. is a wholly-owned subsidiary of HealthPartners, Inc.
2. HealthPartners, Inc. is a non-profit corporation and has no parent corporation.
3. No publicly-held corporation owns 10% or more of HealthPartners, Inc.

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JURISDICTIONAL STATEMENT

HealthPartners, Inc. and HealthPartners Administrators, Inc. do not disagree with Tovar's Jurisdictional Statement as a general statement of the law. As discussed *infra*, however, because Tovar does not have Article III standing, the District Court and this Court lack subject matter jurisdiction. *See McClain v. Am. Econ. Ins. Co.*, 424 F.3d 728, 731 (8th Cir. 2005).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW[1]

1. Did the District Court err in granting HealthPartners, Inc.'s Motion to Dismiss, finding Tovar did not have standing to sue under Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116(a), when it was undisputed that HealthPartners Administrators, Inc. and not HealthPartners, Inc., was the third-party administrator?[2]

   Apposite Case

   - *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 801 F.3d 927 (8th Cir. 2015)

2. Did the District Court err in granting HealthPartners, Inc.'s and HealthPartners Administrators, Inc.'s Motion to Dismiss, finding that Tovar did not have standing to sue under Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116(a), because her alleged injuries were not traceable or redressable by HealthPartners, Inc. or HealthPartners Administrators, Inc.?

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[1] HealthPartners, Inc. and HealthPartners Administrators, Inc. take no position concerning Tovar's Statement of the Issues Presented for Review Numbers 1 and 2, which relate to Tovar's claims against Essentia Health and Innovis Health, LLC.

[2] Tovar's Statement of the Issues Presented for Review Number 3 incorrectly references a Title VII claim against HealthPartners, Inc. To be clear, Tovar did not bring a Title VII claim against HealthPartners, Inc. or HealthPartners Administrators, Inc.

Apposite Cases

- *McClain v. Am. Econ. Ins. Co.*, 424 F.3d 728 (8th Cir. 2005)
- *Arkansas ACORN Fair Hous., Inc. v. Greystone Dev. Co.*, 160 F.3d 433 (8th Cir. 1998)

Apposite Statute & Rule

- 29 U.S.C. § 1104(a)(1)(D)
- 81 Federal Register 31432

3. Did the District Court err in determining, in the absence of discovery, that HealthPartners Administrators, Inc. was the third-party administrator of Tovar's employer-provided, self-insured health plan when Tovar conceded that the Essentia health plan document was properly before the District Court and that document made clear that HealthPartners Administrators, Inc., was the third-party administrator?

Apposite Cases

- *Brown v. Ameriprise Fin. Servs., Inc.*, 276 F.R.D. 599 (D. Minn. 2011)

CONCISE STATEMENT OF THE CASE

The parties to this case are all committed to ensuring that underserved communities -- including the transgender community -- have access to high quality and affordable healthcare. The amici curiae even concede as much, lauding HealthPartners, Inc.'s "broad and inclusive coverage guidelines." (Amici Brief at 11.) In fact, the Essentia health plan in effect when Appellant Brittany Tovar filed this lawsuit contained no exclusion whatsoever concerning gender reassignment services or surgery.

But this case is not about achieving expanded healthcare, as important as that is. Rather, this case is about basic questions of Article III standing and, if standing were achieved, how a provision of the Patient Protection and Affordable Care Act operates in the context of a self-insured health plan. Those matters were carefully considered by the District Court in light of the roles that health plan sponsors and third-party administrators play in self-insured plans. The District Court determined on several grounds that there is no viable case or controversy against HealthPartners, Inc. or HealthPartners Administrators, Inc.

A. The Essentia Plan.

During 2015, Brittany Tovar and her son were covered under an employer-sponsored health insurance plan. (J.A. 5 at ¶¶ 22, 26.)[3] Tovar's employer

[3] Citations to the Joint Appendix are designated as "J.A. _____."

(Essentia Health or Innovis Health, LLC ("Essentia")) provided this coverage through a self-insured plan (the "Essentia Plan" or the "Plan"). (*See* J.A. 55 at ¶ 2; J.A. 58-121.)

Essentia was the Plan Sponsor of the Plan, meaning that it had "all powers and discretion necessary" to administer the Plan, including all powers to change the Plan. (J.A. 81-82.) Essentia was "solely responsible for 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 was responsible for "determining eligibility and enrollment, and for funding claims and all related activities and responsibilities under the Plan." (J.A. 81.)

The Essentia Plan contained an exclusion for gender reassignment services and surgery. (J.A. 110 at ¶ 15.) Tovar is not transgender and has never sought gender reassignment services or surgery for herself. Tovar alleges that her son, who was assigned the female gender at birth but now identifies as male, has sought (or may seek) such services. (J.A. 5-6 at ¶¶ 27-31.)

B. HealthPartners, Inc. and HealthPartners Administrators, Inc.

HealthPartners, Inc. ("HealthPartners") is a non-profit corporation and managed care organization. (J.A. 82.) It is the parent corporation of HealthPartners Administrators, Inc. ("HPAI"). Tovar's lawsuit purported to assert a claim against the third-party administrator of the Essentia Plan. (J.A. 2 at ¶ 7.)

The Essentia Plan document, which Tovar agreed was properly before the District Court, makes clear that HealthPartners was not the third-party administrator. (J.A. 81-82; J.A. 223 at n.2.)

HPAI is the third-party administrator for the Essentia Plan. (J.A. 82.) 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. (*Id.*) *See also* 2 Health L. Prac. Guide § 18:8 (2016) (recognizing there is no single definition for third-party administration, but noting TPAs generally receive claims, "verify beneficiary coverage, review the accuracy of claims, and collect money . . . from the self-insured plan to pay the claims.") HPAI is not financially responsible for claims under the Essentia Plan. (J.A. 81-82.) To the contrary, only Essentia, the Plan sponsor, is financially responsible for paying any claims. (*Id.*)

C. Tovar's Objection To The Essentia Plan.

In March 2015, Tovar sought clarification from Essentia and HPAI regarding an exclusion in the Essentia Plan for gender reassignment services and surgery. (J.A. 6 at ¶ 32.) On April 9, 2015, HPAI notified Tovar that Essentia was the sponsor of the Essentia Plan and that HPAI did not have authority to remove the exclusion. (*Id.* at ¶ 33; J.A. 55 at ¶ 3; J.A. 123-27.)

On June 9, 2015, HPAI responded to another letter from Tovar. (J.A. 55 at ¶ 4; J.A. 129-31.) HPAI again noted that Essentia's "plan does not include coverage for services and/or surgery for gender reassignment." (J.A. 129.) HPAI further stated that it was "obligated to follow the terms of the plan" and had no authority to "make an exception" for gender reassignment services or surgery. (J.A. 130.) HPAI notified Tovar that, if she was dissatisfied with the response, she could bring a claim under ERISA, the Employee Retirement Income Security Act. (*Id.*)

D. The Lupron Claim.

In late May 2015, Tovar's son was prescribed Lupron, a drug that temporarily suspends menstruation. (J.A. 7 at ¶¶ 35, 37.) HPAI notified Tovar that Lupron would not be covered under the Essentia Plan. (*Id.* at ¶ 38.) Tovar elected not to purchase Lupron and, as a result, has not incurred any out-of-pocket loss. (*See id.* at ¶ 40.) Tovar had the opportunity to appeal the denial of coverage for Lupron. (J.A. 56 at ¶ 5; J.A. 133-36.) Tovar has not alleged that she exercised that right, or that Lupron was covered under the Essentia Plan. (*See* J.A. 135 (outlining the appeals process for a pharmacy pre-authorization denial); J.A. 7 at ¶¶ 35-40.)

E. The Androderm Claim.

During late 2015, Tovar's son was prescribed Androderm, a form of testosterone. (J.A. 8 at ¶ 42.) The claim for that prescription was initially denied, but shortly thereafter, the denial was reversed and the prescription was eligible for coverage under the Essentia Plan. (*Id.* at ¶ 45.) While Tovar 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 Tovar has unreimbursed medical expenses for covered services, Essentia would be responsible for those costs. (J.A. 82.)

F. Essentia's 2016 Health Plan.

Effective January 1, 2016, Tovar and her son received health coverage under an amended Essentia health plan (the "2016 Plan"). (J.A. 56 at ¶ 6; J.A. 138-205.) As with the Essentia Plan at issue in this case, the 2016 Plan is self-insured by Essentia. HPAI is the third-party administrator of the 2016 Plan. (J.A. 161-62.) The 2016 Plan does not contain an exclusion for gender reassignment services or surgery. (J.A. 204-05.) Tovar has not alleged that she or her son have been denied any service or surgery under the 2016 Plan. (*See generally* J.A. 1-13.)

Shortly before the 2016 Plan became effective, Tovar inquired about obtaining a future pre-authorization for gender reassignment surgery. (J.A. 8 at ¶ 46.) In response, HealthPartners provided accurate information about the then-

existing gender reassignment services and surgery exclusion in the Essentia Plan. (*Id.*) Shortly thereafter, the 2016 Plan went into effect with no such exclusion. (JA. 204-05.)

Tovar filed this lawsuit after the 2016 Plan became effective. (*See* J.A. 1, 13; J.A. 56 at ¶ 6; J.A. 161.) The District Court considered the 2016 Plan in the context of HealthPartners' argument that Tovar's lawsuit was moot because the exclusion at issue had been removed before she filed suit. (J.A. 311.) The District Court agreed that Tovar's claim was moot, but was not required to reach that issue because of other defects in Tovar's Complaint. (J.A. 315 at n.7.)

SUMMARY OF THE ARGUMENT

Tovar does not have standing to assert a claim against HealthPartners or HPAI under Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116(a). Section 1557 prohibits certain types of discrimination by certain entities that receive federal funding. Tovar herself has not been discriminated against by HealthPartners or HPAI. Tovar's son was allegedly discriminated against, but he never asserted a claim in this case, despite the fact that HealthPartners (and later, the District Court) pointed out that Tovar herself lacked standing. Because Tovar has no standing to pursue a claim under Section 1557 against HealthPartners or HPAI, the Court can affirm the District Court's dismissal without reaching any other issues concerning Section 1557.

Tovar's Section 1557 claim would fail even if she had standing to assert the claim. Tovar alleges that the Essentia Plan itself is discriminatory, not that HPAI (the third-party administrator) improperly administered the Essentia Plan according to its terms. Tovar concedes that HPAI accurately notified her about an exclusion under the Essentia Plan for gender reassignment services or surgery. To the extent Tovar takes issue with the Essentia Plan itself, she must direct that claim against the Essentia Plan, or against Essentia as the Plan Sponsor. Tovar declined to bring a Section 1557 claim against the Essentia Plan or against the Plan Sponsor, and the District Court properly dismissed Tovar's Section 1557 claim.

ARGUMENT

A. Standard For Determining 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 jurisdiction to hear a case. *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990). Tovar has the burden of proof to establish that jurisdiction exists. *Id.* This Court reviews *de novo* whether a case was properly dismissed for lack of subject matter jurisdiction. *Taxi Connection v. Dakota, Minnesota & E. R.R. Corp*., 513 F.3d 823, 825 (8th Cir. 2008).

B. The District Court Properly Dismissed This Case For Lack Of Subject Matter Jurisdiction.

The Court should affirm dismissal of Tovar's single cause of action against HealthPartners and HPAI consistent with Federal Rules of Civil Procedure 12(b)(1) and 12(h)(3). Tovar purports to assert a claim against the third-party administrator under the Essentia Plan. (J.A. 2 at ¶ 7.) The Plan document itself makes clear that HPAI is the third-party administrator. (J.A. 82; *see also* 29 U.S.C. § 2520.102-3.) For that reason alone, the District Court properly dismissed Tovar's claim against HealthPartners.

Tovar's claim against HPAI fails for lack of standing. Tovar herself was not denied any service or surgery by HPAI or anyone else. And, because Essentia's 2016 Plan does not contain an exclusion for gender reassignment services or surgery, any claim by Tovar would be moot.

1. Tovar's Claim Against HealthPartners Fails.

Tovar's Complaint purports to assert a claim against HealthPartners as the third-party administrator for the Essentia Plan. (J.A. 2 at ¶ 7.) In response, HealthPartners provided the District Court with a copy of the Essentia Plan document, which plainly shows that HPAI, not HealthPartners, is the third-party administrator. (J.A. 82.) Tovar agreed that the Essentia Plan document was properly before the District Court and could be considered in resolving HealthPartners' motion to dismiss. (J.A. 223 at n.2.) Because the District Court

properly found that HealthPartners was not the third-party administrator under the Essentia Plan, its decision as to HealthPartners should be affirmed. (J.A. 315.)

In response, Tovar argues that she needs discovery to determine "whether HealthPartners, Inc., or HPAI is the correct third-party administrator defendant." (Appellant's Brief at 26.) But HPAI consented to be added to this case as a defendant so that the Court could determine whether Tovar has alleged a viable claim under Section 1557. No discovery is necessary for the Court to make that determination. Below, HPAI explains why Tovar has no standing to assert her claim against HPAI and why her claim against HPAI would fail even if she had standing. These same arguments would also apply to HealthPartners if it were a third-party administrator, but, for ease of reference, are addressed only as to HPAI.

2. Tovar Lacks Standing To Sue HPAI.

Standing to sue is a threshold jurisdictional question. *McClain v. Am. Econ. 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.* Tovar has not alleged facts to show that she has standing to bring a claim against HPAI.

a. Tovar Has Not Been Injured by HPAI.

Tovar's only claim against HPAI 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).

Tovar 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.* Tovar does not allege that HPAI somehow excluded her from participating in the Essentia Plan or withheld benefits that otherwise exist under the Plan. Indeed, it appears that Tovar participated in the Essentia Plan at all times relevant to this case. As such, Tovar has not alleged that ***she*** suffered any injury that would confer standing to pursue a Section 1557 claim.

Tovar cannot avoid this result by claiming that she is bringing this action on behalf of her son or, as she states on appeal, on behalf of those similarly situated.[4]

[4] Appellant's Brief at 26.

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"). Tovar's son is not a party to this case, and nothing in the Complaint alleges that Tovar is pursuing this case on his behalf. Because Tovar has not alleged that she was discriminated against, much less that HPAI took any action or failed to take any action with respect to her, Tovar lacks standing to pursue a claim against HPAI. *Id.* at 1301.

b. Tovar's Alleged Injuries Are Not Traceable To HPAI.

Tovar's claim against HPAI would fail even if she could identify a compensable injury that she experienced because any such injury is not traceable to HPAI. To establish standing, Tovar 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).

Tovar's claim against HPAI fails for lack of a traceable injury. If Tovar's alleged injury is traceable to anyone, it is to Plan Sponsor Essentia, not HPAI. Tovar's only claim against HPAI is that it accurately reported that the 2015 Essentia Plan included an express exclusion for "[s]ervices and/or surgery for gender reassignment." (J.A. 2, 11 at ¶¶ 7, 63.) This term is contained in the 2015 Essentia Plan document provided to Tovar by Essentia, and HPAI answered

Tovar's inquiries by quoting from the actual Plan document. HPAI had no discretion or ability to do otherwise: under ERISA and the Essentia Plan, Essentia retained "all powers and discretion necessary to administer the Plan," including the power to "change the Plan." (J.A. 82.) Tovar appears to recognize this fact by alleging that, "***Essentia later agreed to provide*** Tovar with coverage for Androderm . . ." and by asserting (repeatedly) in her Brief on Appeal that this was "***Essentia's*** categorical exclusion" and "***Essentia's*** discriminatory healthcare plan." (J.A. 8 at ¶ 45; Appellant's Brief at 40, 47 (emphasis added.)) Because HPAI did not have authority to change the Essentia Plan, any injury alleged by Tovar is not fairly traceable to HPAI.

In an effort to avoid this outcome, Tovar asserts (without citation to any allegation in her Complaint), that HPAI was the "designer, marketer, and administrator of the plan." (Appellant's Brief at 25.) But Tovar's alleged injury was caused by the Essentia Plan itself, not the marketing or administration of the Plan. She does not claim that HPAI misleadingly represented the coverage available under the Essentia Plan or falsely told her that a claim was not covered. Instead, Tovar claims that HPAI administered the Plan as written and correctly notified her that gender reassignment services and surgery were excluded from the coverage that Essentia had agreed to provide. Tovar's remedy for that injury, if any, must be obtained from the Plan itself or from the Plan Sponsor, the entities

that supposedly caused the harm. Tovar's decision not to assert a Section 1557 claim against the Plan Sponsor does not create standing to sue HPAI, particularly when Tovar was provided an opportunity to amend her Complaint.

Tovar further confuses the standing question by raising a parent-subsidiary argument for the first time on appeal. *See Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 734 (8th Cir. 1993) (this Court does "not consider arguments raised for the first time on appeal.") But the Court is not "required to pretend that certain facts exist in order to foresee a theory of recovery not actually raised or reasonably inferred by the pleader." *Id.* (internal quotation omitted). Tovar made no allegations in her Complaint regarding common ownership or control between HealthPartners and HPAI so as to impose parent-subsidiary liability or to pierce the corporate veil. Tovar's reference to tests used to determine when a parent company is liable for a subsidiary's actions is entirely irrelevant here because she did not allege any of the factors in her Complaint and did not raise this issue before the District Court. (Appellant's Brief at 29, citing *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1240-42 (2d Cir. 1995); *see also Papa v. Katy Indus., Inc.*, 166 F.3d 937, 939 (7th Cir. 1999)). Tovar's attempt to raise these issues for the first time on appeal should be rejected. *See Dorothy J.* 7 F.3d at 734 ("While complaints are to be liberally construed, an attempt to amend one's pleadings in an appellate brief comes too late" (internal quotation omitted)).

Because Tovar did not plead parent-subsidiary liability, her request for discovery also fails. "A plaintiff must adequately plead a claim before obtaining discovery, not the other way around. Discovery is not to be used to find a cause of action." *Brown v. Ameriprise Fin. Servs., Inc.*, 276 F.R.D. 599, 605 (D. Minn. 2011) (internal quotation omitted). "Plaintiffs are not permitted to assert first, without basis, and discover later." *Id.*, citing *Micro Motion, Inc. v. Kane Steel Co.*, 894 F.2d 1318, 1327 (Fed. Cir. 1990) ("The discovery rules are designed to assist a party to prove a claim it reasonably believes to be viable *without discovery*, not to find out if it has any basis for a claim.") (emphasis in original). Tovar's Complaint does not contain any claims or allegations regarding the relationship between HealthPartners and HPAI, and Tovar should not be permitted to seek discovery to "find a cause of action."

c. Even If Tovar Received A Favorable Decision, Her Claim Would Not Be Redressed By HPAI.

Standing requires Tovar 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).

Tovar is unable to show a redressable injury concerning HPAI for two reasons. First, Tovar's purported injuries have already been redressed. Tovar's 2016 health plan sponsored by Essentia does not contain an exclusion for gender reassignment services or surgery. (J.A. 204-05.) As such, there is nothing that HPAI can redress.

Second, even if the Court determines that the Essentia Plan caused a compensable injury to Tovar, HPAI cannot redress that injury. Essentia's 2015 Plan was self-insured. (J.A. 81-82.) "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), *cert. granted, judgment vacated sub nom., on other grounds, Dept. of H&HS. v. CNS Int'l Ministries*, No. 15-775, 2016 WL 2842448 (U.S. May 16, 2016) (unpublished opinion). *See also Dordt Coll. v. Burwell*, 801 F.3d 946, 947 n.2 (8th Cir. 2015) (internal citation omitted), *cert. granted, judgment vacated on other grounds,* 136 S. Ct. 2006 (2016), (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.")

HPAI did not decide what benefits were available under the Essentia Plan. (J.A. 82.) Essentia made that decision. (*Id.*) Tovar does not and cannot avoid the fact that HPAI is not financially responsible for claims under the Essentia Plan. Essentia pays those costs. (*Id*.) Therefore, as the District Court correctly held, and Tovar did not dispute on appeal, even if Tovar prevailed, any purported injuries would not and could not be redressed by HPAI, but would need to be redressed by Essentia in its capacity as Plan Sponsor. Tovar's failure to address this fact at the District Court or on appeal demonstrates a fatal flaw to her case – her claim cannot be redressed by HPAI because under no circumstances is HPAI financially responsible for claims made under Essentia's Plan.

The amici curiae brief fails to address Tovar's standing to bring a claim, even though standing is a threshold Article III question. *McClain*, 424 F.3d at 731. Rather, the amici curiae spend much of their brief either arguing about something

everyone in the case already agrees on -- namely, that transgender individuals should have access to quality healthcare -- or making policy arguments that, as the District Court found, are better directed to the legislature. (J.A. 320-21.) None of this has to do with the question of standing, which must always be addressed before a federal court takes up any issue. As the District Court properly found, Tovar does not have standing to raise her son's purported claims because her son is not a party to the action and the claim is not traceable to or redressable by HPAI.

3. Tovar's Section 1557 Claim Is Moot.

In addition to the fact that Tovar lacks standing, the Court also lacks subject matter jurisdiction because Tovar's Section 1557 claim against HPAI is 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 Tovar filed the lawsuit rendered her claim moot. The exclusion for gender reassignment services and surgery was removed by Essentia effective January 1, 2016, prior to Tovar filing this case and, as discussed below, prior to the January 1, 2017 implementation date for regulations concerning Section 1557. (J.A. 204-05; 42 C.F.R. § 92.1.)

Tovar's allegations regarding Lupron and Androderm do not change this result. Tovar never purchased Lupron. (J.A. 7 at ¶ 40.) She concedes that Androderm was covered even during 2015, before she filed suit. (J.A. 8 at ¶ 45.) Tovar experienced no economic harm as a result of either prescription, and any claim for economic harm would need to be directed to Essentia as Plan Sponsor. *Sharpe Holdings*, 801 F.3d at 934 n.6 ("A self-insured employer bears the financial risk of paying its employees' health-insurance claims . . . ").

Nor does Tovar have standing to seek damages for emotional distress that she allegedly suffered as a result of discrimination against a family member. As the District Court correctly held, a party ordinarily may not recover for emotional distress because another individual's statutory rights were allegedly violated. (J.A. 322-23); *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) (parent has no standing to sue for alleged violation of child's statutory rights).

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.* Here, even prior to Tovar commencing this lawsuit, the exclusion that Tovar intended to challenge was removed from the Essentia Plan. There is no further relief that the Court can award Tovar.[5]

Tovar's call for an advisory opinion as to "similarly situated employees" only underscores the mootness. Despite this Court's direction that federal lawsuits are not "an arena for public policy debates," *Mausolf*, 85 F.3d at 1301, Tovar is using this case not to remedy a present harm to herself, but as a platform for an abstract debate about how transgender persons should receive healthcare. While HPAI shares many of Tovar's broad goals, it is also mindful of Article III's

[5] HPAI is aware that the *Engelhardt* court also noted in that case there may be a danger of a recurrent violation. *Id.* at 1235. Here, however, the exclusion has been removed entirely from Essentia's 2016 Plan and there is no danger of recurrence. Tovar's Complaint, which was filed after the 2016 Plan became effective, alleges nothing to the contrary.

requirements. In this case, not only does Tovar lack standing, but there is no live case or controversy. For that additional reason, Tovar's claim fails.[6]

C. Standard For Determining Whether A Complaint Fails To State A Claim Upon Which Relief May Be Granted.

The District Court will dismiss a Complaint that fails to state a claim for which relief can be granted. Fed. R. Civ. P. 12(b)(6). This Court reviews such dismissal *de novo*. *Taxi Connection*, 513 F.3d at 825. While the District 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).

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[6] Any claim by Tovar regarding future medical treatment would not be ripe. While Tovar alleges she was told in late 2015 that her son's gender reassignment surgery "would not be authorized," Tovar does not allege that her son ever in fact submitted a claim for gender reassignment surgery. (J.A. 8 at ¶ 46). And nothing in the Complaint indicates that Tovar or her son have been denied coverage under Essentia's 2016 Plan. Any allegation that Tovar or her son ***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. There is no ripe, concrete controversy for judicial determination as for any claim as to future benefits. *See Pub. Water Supply Dist. No. 10 of Cass Cty., Mo. v. City of Peculiar, Mo.,* 345 F.3d 570, 572 (8th Cir. 2003). And again, even if such a claim were ripe, the claim should be directed toward Essentia, as the Plan Sponsor, not HPAI.

D. The District Court Properly Found That Tovar's Complaint Against HPAI Failed To State A Claim Upon Which Relief May Be Granted.[7]

Tovar alleges a claim under Section 1557 based upon the notion that HPAI discriminated against her because her son is transgender. (J.A. 11 at ¶ 63.) Tovar contends that HPAI violated Section 1557 because it did not disregard the exclusion for gender reassignment services and surgery in the Essentia Plan. If HPAI had done that, it would have violated ERISA, contradicted HPAI's authority under the Essentia Plan, and breached its contract with Essentia. *See* 29 U.S.C. §§ 1104(a)(1)(D), 1140.

HPAI did not discriminate against Tovar by accurately reporting the terms of that Essentia Plan. While Tovar relies heavily on the Health and Human Services Department Office for Civil Rights' ("OCR") rules implementing Section 1557, those rules did not become effective until after Tovar filed this case. They also make clear that HPAI did not discriminate against Tovar, or her son. Third-party administrators of self-insured plans are only liable under Section 1557 for discrimination in the administration of the plan, i.e., when the third-party administrator itself acted in a discriminatory manner. *See* 81 Federal Register at 31432. Tovar has not alleged that HPAI administered the Plan in a discriminatory

[7] HealthPartners moved to dismiss under both Rules 12(b)(1) and 12(b)(6). The District Court granted HealthPartners' motion on 12(b)(1) grounds, but found Tovar's claims against the third-party administrator of the Essentia Plan would also fail on the merits. (J.A. 314-15.)

manner, rather she alleges that the Plan itself is discriminatory. HPAI had no control over the alleged discrimination because it had no control over the Essentia Plan. HPAI simply administered the Plan in accordance with its terms, which it was required to do under ERISA. *See* 29 U.S.C. § 1104(a)(1)(D).

1. Tovar Has Not Alleged A Plausible Section 1557 Claim.

HPAI did not discriminate against Tovar because Essentia -- not HPAI -- is responsible for exclusions in the Essentia 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.*; *see also 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 discrimination and to institute corrective measures on the recipient's behalf." *Plamp*, 565 F.3d at 456.

As a condition of Congress' power to legislate under its spending power, Title IX requires a funding recipient to be placed on notice that, by accepting

federal funding, it becomes exposed to certain liabilities. *Barnes v. Gorman*, 536 U.S. 181, 185-86 (2002). Because each of the statutes incorporated into Section 1557 flow from Congress' spending power, that standard undoubtedly applies under Section 1557. Seeming to recognize this notice requirement, the Office of Civil Rights set an implementation date for altering covered entity health plans to include coverage for gender reassignment services on January 1, 2017, or the next time the plan is renewed after January 2017. *See* 42 C.F.R. § 92.1.

Moreover, a recipient of federal funds may be liable for damages under Title IX "only for its own misconduct. The recipient itself must 'exclud[e] [persons] from participation in, . . . den[y] [persons] the benefits of, or . . . subjec[t] [persons] to discrimination under' its 'program[s] or activit[ies]' in order to be liable under Title IX." *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 640-41 (1999); *see also id.* at 644-46. Tovar and the amici curiae ignore that the legal frame work of Section 1557 (including the Spending Clause of the United States Constitution) prohibits the kind of joint employer analysis they ask the Court to adopt.

Because Tovar mistakes the Essentia Plan for a fully-insured plan, she fails to recognize that there are two programs or activities here. As Plan Sponsor, Essentia owns the Essentia Plan. As third-party administrator, HPAI owns its specific services provided to that Plan. Under *Davis*, federal funding recipients

can only be liable for their own misconduct within their own program. 526 U.S. at 640. Tovar alleges that the Essentia Plan itself violates Section 1557, but conceded before the District Court that she only sought to hold HPAI "liable for its own actions." (J.A. 231-32, 241.) She does not allege that HPAI administered the Essentia Plan in a discriminatory manner.

Tovar's Section 1557 claim fails because Tovar has not alleged a viable discrimination claim against HPAI.[8] 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 HPAI.

Tovar does not -- and cannot -- allege that HPAI engaged in any conduct other than notifying her that, under its plain language, the Essentia Plan did not cover gender reassignment services or surgery. Tovar does not allege that HPAI had any option but to convey accurate information about the Essentia Plan, or any ability to force Essentia to change the Plan or any discretion whatsoever about whether gender reassignment surgery and services could be covered regardless of the express exclusion.

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[8] Tovar's Complaint also does not allege that HPAI is a covered entity under Section 1557. HPAI and HealthPartners do not concede that they are covered entities under Section 1557, but this issue is not before the Court on appeal. Should this matter be remanded to the District Court or continue on appeal, HPAI and HealthPartners reserve the right to make all arguments regarding whether either entity is a covered entity under Section 1557.

As the District Court held, ERISA requires a third-party administrator to apply a self-insured health plan according to its terms. 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 breaches 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 also, 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"). 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.

Tovar has provided 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, federal courts have repeatedly held that a third-party administrator may not be held liable under ERISA for merely administering a self-insured plan in accordance with its terms. *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.2d 451, 454-55 (6th Cir. 1991). HPAI "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 all final determinations about the design of the Essentia Plan or changes to its Plan, and HPAI cannot be held liable for those decisions. *Skilstaf*, 66 F. Supp.2d at 1215-16; *Baxter*, 941 F.2d at 454-55.

Tovar's effort to avoid *Reid v. BCBSM, Inc.*, is particularly ironic because she suggested that the District Court rely on that decision. (J.A. 238-39.) The *Reid* court rejected the notion that the Minnesota Department of Commerce and its Commissioner violated the ADA by merely approving "the contract exclusion" at issue in that case. 984 F. Supp.2d 949, 955 n.6 (D. Minn. 2013). The plaintiff failed to allege any facts to indicate the agency's review of the denial of coverage was discriminatory, as she only alleged that the "*plan* it reviewed was discriminatory." *Id.* (emphasis in original). Similarly here, despite the contentions in her brief, Tovar has not alleged that HPAI itself discriminated against her. She argues that HPAI administered a health plan that Essentia offered and that Tovar

selected. Under *Reid*, Tovar's allegation about the Essentia Plan is not sufficient to state a plausible claim against HPAI.[9]

Holding that a third-party administrator could be liable under Section 1557 for failing to disregard 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. ERISA requires HPAI to administer Essentia's Plan according to its terms. If Section 1557 requires HPAI to approve a claim that is expressly excluded under Essentia's Plan (to the extent HPAI, an entity with no financial responsibility, could "approve" any claim), HPAI would be forced to either violate ERISA and its administrative contract with Essentia or violate Section 1557. Surely, Congress did not intend to force a third-party administrator to choose between violating ERISA and a self-insured plan or violating Section 1557. The Court should interpret Section 1557 consistent with ERISA, read the two together, and find that if the terms of a self-insured plan violate Section 1557, then the remedy is to bring a claim against the entity that has control over the plan -- the plan sponsor.

The amici curiae incorrectly assert that HPAI seeks an "exception" or "safe harbor" under which third-party administrators "are given a free pass to

[9] The plaintiff in *Reid* brought suit individually and on behalf of her minor child. In sharp contrast to this case, the minor child was a party to the action. The standing issues that are present in this matter were not present in *Reid*, and the defendants were insurers, not third-party administrators.

discriminate." (Amici Brief at 36-37.) To the contrary, as was argued before the District Court, third-party administrators who are covered entities can (and should) be liable under Section 1557 when they discriminate in the administration of health care benefits in an area over which they have control. This is consistent with the Title IX requirement that an entity is liable for discrimination "under its control." *Plamp*, 565 F.3d 456. Thus, for example, if a third-party administrator who is a covered entity wrongly notified a plan participant that a particular service was not covered, and did so for a discriminatory reason, and the plan participant then brought the issue before someone at the third-party administrator who had the power to change that decision, and if the third-party administrator still refused to cover the service, then Section 1557 would almost certainly apply. None of that happened in this case. To the contrary, HPAI correctly notified Tovar about the coverage provided under the Essentia Plan (consistent with its obligations under ERISA) and further notified her that it had no ability to control that coverage (consistent with its role as a third-party administrator). Far from seeking a "free pass" to discriminate, HPAI simply seeks a plain reading of Section 1557, which does not impose liability on one entity for the actions of another.

Next the amici curiae attempt to patch together a legal framework for third-party administrator liability under Title VII and the Minnesota Human Rights Act ("MHRA"). But, Tovar never alleged that HPAI violated Title VII or the MHRA.

(*See* J.A. 2 at ¶ 7; J.A. 9 at Count I.) Tovar's Statement of Issues Presented for Review Number 3 wrongly suggests that this case involves her standing to sue HealthPartners or HPAI "under Title VII," but no such theory was alleged in the Complaint or argued before the District Court. (*Compare* Appellant's Brief at 3 *with* J.A. 2 at ¶ 7 and J.A. 9 at Count I.) For that reason alone, Tovar may not advance such a theory in this appeal. *Dorothy J.*, 7 F.3d at 734.

Likewise, the amici curiae's newly created Title VII and MHRA theories concerning HPAI should also be rejected. *Id.* Simply put, the amici curiae's effort to impose liability on third-party administrators under Title VII and the MHRA was never raised below and should not have been raised in this appeal. (Amici Brief at 30-34.) This flaw is demonstrated by the amici curiae's reliance on Title VII case law, such as *Ariz. Governing Comm. For Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, where the plaintiffs brought a Title VII claim against their employer. 463 U.S. 1073, 1078 (1983). The *Norris* plaintiffs did not bring suit against the insurers, and to be clear, HPAI is not an insurer here. *Norris* does not hold that an insurer, or third-party administrator, is a joint-employer under

Title VII. *Id.* at 1089-90.[10] HPAI is not Tovar's employer, and no Title VII claim has been asserted against it.

While Tovar did not allege a violation of Title VII or the MHRA against HPAI, she did attempt to analogize the relationship between a Plan Sponsor and third-party administrator to a joint employer relationship. The District Court properly relied upon *Williams v. Grimes Aerospace Co.*, 988 F. Supp. 925, 934 (D.S.C. 1997), a case first cited by Tovar, to reject such an analogy on the facts set forth in the Complaint.

In *Williams*, the plaintiff sued a manufacturing company and a temporary employment service under Title VII alleging she was denied a full-time position due to her race. 988 F. Supp. 925, 932 (D.S.C. 1997). The court rejected the plaintiff's effort to hold one defendant liable for another's actions under an agency theory because that defendant had no right to control the other. *Id.* at 933. Although the companies were related through a series of contracts, neither company exercised the control necessary to impose liability under *respondeat superior*. *Id.* at 936 (applying *respondeat superior* only where the person or entity is able to exercise control). As such, the temporary employment service was not

[10] *Norris* also holds that retroactive relief is inappropriate where there is no notice that an allegedly discriminatory act was unlawful. 463 U.S. at 1093-94. And, as stated above herein, Title IX requires a funding recipient to be placed on notice that, by accepting federal funding, it becomes exposed to certain liabilities. *Barnes*, 536 U.S. at 185-86 (2002). Without such notice, there can be no liability under Section 1557.

responsible for the manufacturing company's discrimination because it "was nothing but a payroll service that cut Plaintiff's paycheck." *Id.* at 938; *see also Watson v. Adecco Employment Servs., Inc.*, 252 F. Supp.2d 1347, 1358 (M.D. Fla. 2003). In the rare circumstance in which two entities are liable for discrimination, a Title VII plaintiff must still show, among other things, that "each defendant . . . failed to take . . . corrective measures within its control." *Williams*, 988 F. Supp. at 937.[11]

Applying that reasoning here, while HPAI provided certain services under the Essentia Plan, HPAI did not determine or control the coverage provided under that Plan and was never financially responsible for payments. (J.A. 81-82.) Even Tovar's Complaint does not suggest otherwise, contrary to the amici curiae's position. (*See, e.g.,* Amici Brief at 31-33.)

HPAI is not the equivalent of a joint employer under the Essentia Plan. And, tellingly, Tovar has not identified any independent discriminatory act by HPAI that caused her damage. To overcome this deficiency, Tovar speculates that,

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[11] Incidentally, Tovar should be very careful when attempting to apply Title VII employment law principles to Section 1557, which is based upon Title IX. "[A]gency principles cannot be applied to a Title IX suit [because] Congress passed Title VII under the auspices of the Commerce Clause, while Title IX was passed pursuant to Congress' Spending Clause power." *Smith v. Metropolitan School Dist. Perry Tp.*, 128 F.3d 1014, 1028 (7th Cir. 1997). Moreover, courts have explicitly rejected the *respondeat superior* theory under Title IX. *See id.* at 1030; *see also, Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285, 288 (1998).

"TPAs seem to play a large role in the frequency with which employers choose to include discriminatory exclusions." (Appellant's Brief at 24.) Tovar provides no authority for that assertion, and cannot cite to any allegation in her Complaint to support her speculation. (*Id.*) If the analogy were to be used, under the Essentia Plan, HPAI would be like a payroll company that merely "cuts a paycheck" and has no control over the coverage provided by Essentia.

In addition to attempting to create a theory against HPAI under Title VII and the MHRA that Tovar herself never asserted, the amici curiae rely on cases that are easily distinguishable. In *Sprit v. Teachers Ins. & Annuity Ass'n*, the Second Circuit held that retirement annuity plans could be deemed "employers" for purposes of Title VII, where they were "so closely intertwined" with a university employer. 691 F.2d 1054, 1063 (2d Cir. 1982), *cert. granted, judgment vacated sub nom. Teachers Ins. & Annuity Ass'n v. Spirt*, 463 U.S. 1223 (1983), and *cert. granted, judgment vacated sub nom. Long Island Univ. v. Spirt*, 463 U.S. 1223 (1983). However, the court focused on the fact that participation in the retirement plans was mandatory and the university employer shared in the administrative responsibilities that resulted from its employee's participation in the retirement plans. *Id.; c.f. Carparts Distribution Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.,* 37 F.3d 12, 17 n.5 (1st Cir. 1994), relied upon by the amici curiae, ("insurance companies which merely sell a product to an employer but do not

exercise control over the level of benefits provided to employees could not be deemed 'employers' under this rationale"). Here, HPAI did not exercise control over the benefits provided to Essentia's employees, it was only Essentia, as the Plan Sponsor, that had control.

The amici curiae's reliance on *Sibley Memorial Hospital v. Wilson* is also misplaced. (Amici Brief at 34.) In *Wilson*, the plaintiff, a private duty nurse, brought suit under Title VII against a hospital where he worked. 488 F.2d 1338, 1339 (D.C. Cir. 1973). Although not directly employed by the hospital, the hospital communicated the need for a private duty nurse to a registry who matched the request with a nurse available to work that day, and after matching, the plaintiff worked as a nurse within the hospital. *Id.* There are no similar allegations here. Not only is there no Title VII claim against HPAI, but Tovar did not work within HPAI and HPAI did not coordinate her employment. *Wilson* is simply inapplicable here.

In the end, Tovar does not allege that HPAI treated Tovar or her son differently under the Essentia 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, Tovar does not contend that HPAI disregarded

exclusions in the Essentia Plan for conditions other than gender reassignment surgery, but then refused to disregard the exclusion at issue here. And Tovar does not allege that gender reassignment surgery really was covered under the Essentia Plan, but that HPAI said otherwise in order to discriminate against Tovar's son.

In contrast to cases where a covered entity plausibly engaged in actual discrimination under the ACA, HPAI followed the Essentia 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. 137 F. Supp.3d 817 (D.S.C. 2015). The pharmacy denied the plaintiff's request to shop after hours (something within its power to allow), but allowed a white female customer to do so. *Id.* at 830-31. 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 853.

Similarly, in *Rumble v. Fairview Health Services*, 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. No. 14-cv-2037

(SRN/FLN), 2015 WL 1197415 at *18 (D. Minn. Mar. 16, 2015) (unpublished opinion). In other words, the plaintiff in *Rumble* specifically alleged that he was treated unfairly by the defendant 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, a matter within its control, discriminated against persons with disabilities and had a disparate impact on racial minorities. *Id.* at 696. The court found that even if the 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. Similarly here, Tovar does not and cannot allege HPAI could or did waive an exclusion for a cisgender individual but refused to do so for a transgender individual.

Callum and *Rumble* differ greatly from this case. Tovar does not allege that HPAI treated her differently from any other Essentia employee concerning administration of the Essentia Plan. Tovar does not even suggest that HPAI has waived or can waive exclusions in the Essentia 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 the Essentia Plan but for some discriminatory act by HPAI. Because nothing in the Complaint suggests that HPAI treated Tovar differently from any other participant in the Essentia Plan, Tovar's claim was properly dismissed.

2. Tovar's Section 1557 Claim Also Fails Because Tovar Did Not Notify HPAI Of Any Allegedly Discriminatory Conduct By HPAI That HPAI Had The Authority To Address.

Tovar's Section 1557 claim would fail even if Tovar had alleged a plausible theory of discrimination by HPAI. Tovar may not recover damages under Title IX, and thus Section 1557, unless an official who had the authority to institute corrective measures had actual notice of the discrimination and was deliberately indifferent to it. *Gebser*, 524 U.S. at 285, 291. Tovar does not allege (because she cannot) that HPAI had any control over whether the exclusion remained in the Essentia Plan. Further, it is undisputed that Essentia removed the gender reassignment exclusion the next time it offered a health plan to Tovar. (J.A. 204-05.)

In order to assert a plausible Section 1557 claim against HPAI, Tovar must allege facts that show that HPAI had the authority to institute corrective measures to eliminate alleged discrimination. *Gebser*, 524 U.S. at 277, 290 ("we hold that 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.") *Gebser* explains why a third-party administrator cannot be liable for merely administering an allegedly discriminatory self-insured plan in accordance with its terms. 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 and is not financially responsible for payment of claims under a self-insured plan. Thus, there is no individual at a third-party administrator to whom Tovar could give the notice required by *Gebser*. Tovar cannot maintain a Section 1557 claim against HPAI when she does not and cannot allege facts to establish that HPAI had any "authority to address the alleged discrimination" or "to institute corrective measures." *Id.* at 290.

3. The Newly Implemented Federal Regulations Further Demonstrate That HPAI Did Not Discriminate.

Tovar's reliance on the federal regulations and implementing rules is also misplaced. Those authorities do not change the result of this case, and in fact, support the District Court's dismissal.

As an initial matter, HPAI could not be bound by the rules and regulations in this case because the rules and regulations were not released until after this case was dismissed and after Essentia had already removed the gender reassignment

services and surgery exclusion. Here, HPAI had no notice of proposed rules that might alter the responsibilities of some third-party administrators until after this case was dismissed. *See, e.g., Barnes*, 536 U.S. at 186-87 (requiring notice before liability may be imposed).

The Department did not even propose the rules and regulations, let alone implement them, until after HPAI had notified Tovar's son that Lupron was not covered under the Essentia Plan. Nothing in the regulations should alter the District Court decision because the regulations do not apply retroactively:

> The effective date of this part shall be July 18, 2016, except to the extent that provisions of this part require changes to health insurance or group health plan benefit design (including covered benefits, benefits limitations or restrictions, and cost-sharing mechanisms, such as coinsurance, copayments, and deductibles), such provisions, as they apply to health insurance or group health plan benefit design, have an applicability date of the first day of the first plan year (in the individual market, policy year) beginning on or after January 1, 2017.

42 C.F.R. § 92.1.

Implementation date aside, the new rules and regulations do not advance Tovar's case. Tovar is wrong when she states that the OCR's interpretation of Section 1557 would make a third-party administrator liable even when it has no control over a health plan. (Appellant's Brief at 13.) To support this misstatement Tovar has cherry-picked language from the OCR's final rules' summary without regard to its context, and without acknowledging that the OCR was merely addressing commentators' concerns about third-party administrator liability. Tovar

misleadingly quoted only the italicized language below without explaining that, under the final rules, claims concerning benefit design of a self-insured plan are addressed with the self-insured employer, not the third-party administrator:

> In response to commenters' arguments on this point, however, OCR [Office of Civil Rights] recognizes that third party administrators are generally not responsible for the benefit design of the self-insured plans they administer and that ERISA (and likely the contracts into which third party administrators enter with the plan sponsors) requires plans to be administered consistent with their terms. *Thus, if a plan has a discriminatory benefit design under Section 1557, a third party administrator could be held responsible for plan features over which it has no control.*
>
> Based on these comments, OCR is adjusting the way in which it will process claims that involve alleged discrimination in self-insured group health plans administered by third party administrators that are covered entities. Fundamentally, OCR will determine whether responsibility for the decision or other action alleged to be discriminatory rests with the employer or with the third party administrator. Thus, where the alleged discrimination is related to the administration of the plan by a third party administrator that is a covered entity, OCR will process the complaint against the third party administrator because it is that entity that is responsible for the decision or other action being challenged in the complaint. Where, for example, a third party administrator denies a claim because the individual's last name suggests that she is of a certain national origin or threatens to expose an employee's transgender or disability status to the employee's employer, OCR will proceed against the third party administrator as the decision-making entity. Where, by contrast, the alleged discrimination relates to the benefit design of a self-insured plan–for example, where a plan excludes coverage for all health services related to gender transition–and where OCR has jurisdiction over a claim against an employer under Section 1557 because the employer falls under one of the categories in § 92.208, OCR will typically address the complaint against that employer.

81 Federal Register at 31432 (emphasis added). The final rules address this exact case. The OCR made clear that where a self-insured plan contains an exclusion related to gender transition, OCR will address the complaint against the employer, *not* the third-party administrator. *Id.*

Both the rules and regulations are given *Chevron* deference. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). At least one circuit court has accorded *Chevron* deference to language in the explanatory rules to a regulation, where, as here, the agency received commentary on the relevant issues. *See Cooper Techs. Co. v. Dudas*, 536 F.3d 1330, 1337 (Fed. Cir. 2008) ("An agency's interpretive rule of a statute relating to matters of procedure, subject to notice and comment if required, need not be published in the Code of Federal Regulations to be entitled to deference.") Although the OCR's summary of the final rules was not published in the Code of Federal Regulations, it should still be afforded *Chevron* deference. *See Citizens Exposing Truth about Casinos v. Kempthorne,* 492 F.3d 460, 466 (D.C. Cir. 2007) (where publication in Federal Register "reflects a deliberating agency's self-binding choice, as well as a declaration of policy, it is further evidence of *Chevron*-worthy interpretation")*; cf. McLean v. Crabtree*, 173 F.3d 1176, 1184 (9th Cir. 1999), *as amended on denial of reh'g and reh'g en banc* Apr. 17, 1999) (statement published in Federal Register, but not published in Code of Federal Regulations, was "not owed full *Chevron*

deference," but was "owed at least 'some deference.'") Tovar agrees that this commentary should receive *Chevron* deference. (Appellant's Brief at 21.)

Tovar did not allege that HPAI did anything other than administer the coverage provided by Essentia. HPAI did not improperly refuse to process a covered claim for discriminatory reasons. As such, the regulations and implementing commentary confirm that Tovar failed to allege a plausible discrimination claim against HPAI.

To be clear, none of this means that a third-party administrator could never have Section 1557 liability. The final rules make clear that a third-party administrator may be liable if it denies benefits that are otherwise available and does so for discriminatory reasons. *See* 81 Federal Register at 31432. However, it is under the exact scenario presented in this case that OCR indicates it will address a Section 1557 complaint against the employer, not the third-party administrator: "[w]here, by contrast, the alleged discrimination relates to the benefit design of a self-insured plan—for example, where a plan excludes coverage for all health services related to gender transition . . . OCR will typically address the complaint against that employer." *Id.* If there was a need for a remedy here, which there is not because Tovar lacks standing and any claim is moot, Tovar has a remedy available, but that remedy is not available from HPAI or HealthPartners – it is

available from the self-insured plan sponsor. The District Court's dismissal should be affirmed.

CONCLUSION

The parties to this case are all committed to ensuring that underserved communities have access to high quality and affordable healthcare. But this case concerns Tovar's lack of Article III standing and Tovar's failure to allege a viable claim under Section 1557. The Constitution, Congress, OCR, and District Court all agree that Tovar does not have a claim against HPAI or HealthPartners under these alleged facts. For each of the reasons set forth above, HealthPartners and HPAI respectfully request that the Court affirm the District Court's dismissal.

Date: November 4, 2016

LARSON • KING LLP

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

ATTORNEYS FOR APPELLEES HEALTHPARTNERS, INC. and HEALTHPARTNERS ADMINISTRATORS, INC.

CERTIFICATE OF COMPLIANCE

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,602 words, excluding portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) (table of contents, table of authorities, statement with respect to oral argument and certificates of counsel).

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