UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Brittany R. Tovar,

Plaintiff,

vs.

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

Defendants.

Court File No.: 16-cv-00100 (RHK/LIB)

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT HEALTHPARTNERS, INC.'S MOTION TO DISMISS

INTRODUCTION

Plaintiff has not identified any authority for her contention that a third-party administrator that had nothing to do with a self-insured employer's decision to exclude coverage for "[s]ervices and/or surgery for gender reassignment," can be held liable under Section 1557 of the Affordable Care Act. 42 U.S.C. § 18116(a). Nor has Plaintiff demonstrated that ***she*** was "excluded from participation in, … denied the benefits of, or … subjected to discrimination under, any health program or activity." *Id.* HealthPartners Administrators, Inc.,[1] did not discriminate when it accurately told Plaintiff that, under Essentia's self-insured plan, Essentia would not pay for gender reassignment services or surgery. Because Plaintiff lacks standing to assert a claim against HealthPartners and has

[1] Again, HealthPartners Administrators, Inc. ("HealthPartners") (not HealthPartners, Inc.) was the third-party administrator for the Essentia Health ("Essentia") health plan at issue in this case. Plaintiff's failure to sue the proper entity does not prevent the Court from granting this motion.

failed to state a viable claim, HealthPartners respectfully requests that the Court grant its motion, and dismiss Plaintiff's Complaint with prejudice.

ARGUMENT

Plaintiff does not dispute the essential facts of this case and no discovery is necessary for the Court to reach the legal issues raised in HealthPartners's motion. Specifically:

- Essentia's 2015 self-insured plan that Plaintiff selected, ("2015 Plan") contained an exclusion for gender reassignment services and surgery. (Exhibit A at 51, ¶15.)[2]
- HealthPartners was not an insurer under Essentia's 2015 Plan, and merely provided "claims processing," and "other Plan administration services." HealthPartners did not design or sell a plan. HealthPartners sold services to Essentia. (*Id.* at 22-23.)
- Plan participants remained responsible for their own healthcare expenses unless the 2015 Plan covered them. As to covered expenses, Essentia was "solely responsible for payment." (*Id.*)
- Because it was solely responsible for its 2015 Plan, Essentia retained "all powers and discretion necessary to administer the Plan." (*Id.*)
- Plaintiff does not claim that she sought and was denied health benefits of any kind under Essentia's 2015 Plan.
- Rather, Plaintiff claims that her son (a plan beneficiary) sought and was denied gender reassignment services (Lupron) consistent with the 2015 Plan.
- Plaintiff's son is not a party to this case and no effort has been made to add him.
- Plaintiff agrees that gender reassignment services and surgery were excluded under the 2015 Plan, but claims that Essentia's exclusion was unenforceable.

[2] Exhibits A and E cited in this memorandum are attached to the Declaration of Julie Bunde (Court Document 14) submitted with HealthPartners' Opening Memorandum.

- While Essentia contends that it did not agree to pay for gender reassignment services or surgery, and Plaintiff claims that Essentia is required to pay for them, both agree that HealthPartners would never be responsible to pay any claims under the 2015 Plan.

- Essentia's 2016 health plan that Plaintiff selected ("2016 Plan"), went into effect before Plaintiff filed this lawsuit and does not contain an exclusion for gender reassignment services or surgery. (Exhibit E.)[3]

Based upon these undisputed facts, the Court should dismiss Plaintiff's Complaint. First, Plaintiff does not have standing to bring this action against HealthPartners. She was not excluded from participation in or denied any benefits under a health plan. Second, Plaintiff's claim against HealthPartners fails because HealthPartners did not discriminate against Plaintiff's son. HealthPartners had no ability to force Essentia to pay for excluded services or to reimburse Plaintiff for medication she did not purchase. Plaintiff has not alleged that HealthPartners treated her son differently from any other plan beneficiary.

A. Plaintiff Has Failed To Establish Standing.

Unable to establish standing, Plaintiff encourages the Court to adopt a state court's finding that "[s]tanding is not a technical rule." (Opposition at 9.) To the contrary, standing is a "threshold inquiry" and a "jurisdictional prerequisite that must be resolved before reaching the merits of a suit." *Medalie v. Bayer Corp.*, 510 F.3d 828, 829 (8th Cir.

[3] Plaintiff denies that Exhibits B-E are "necessarily embraced" by the Complaint. (Plaintiff's Opposition Brief, Court Document 16 ("Opposition") at 3.) Plaintiff's Complaint, however, specifically references Exhibit B, the April 9 letter (Complaint at ¶33), generally references other communications from HealthPartners (Complaint at ¶38), and specifically states that Plaintiff is continuing to suffer financial and emotional harm due to the Plan's exclusion, which necessarily implicates Essentia's 2016 Plan (Complaint at ¶48). These documents may be considered by the Court. *See Gorog v. Best Buy Co.*, 760 F.3d 787, 791-92 (8th Cir. 2014).

2007) (internal quotation omitted). "Since [the standing elements] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Id.* at 829-30 (internal quotation omitted). The constitutional minimum requirements of standing are "an injury in fact," "a causal connection between the injury and the conduct complained of," and a likelihood "the injury will be redressed by a favorable decision." *Id.* at 829 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). Plaintiff cannot satisfy these requirements.

1. Plaintiff Has Not Been Injured.

While Plaintiff contends that Section 1557 is "notoriously hard to parse," that statute (at a minimum) requires Plaintiff to demonstrate 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). Plaintiff does not allege that she was "excluded from participation" in the Essentia 2015 plan. Nevertheless, Plaintiff argues that she experienced a "**personal** injury" because of "**her son** not obtaining necessary medical care." (Opposition at 10-11 (emphasis added.)) But Plaintiff is not her son, Plaintiff's son is not a party and Plaintiff did not bring this lawsuit on his behalf.

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

Plaintiff has not demonstrated a causal connection between her alleged injury and HealthPartners' conduct. *See Lujan*, 504 U.S. at 560. Plaintiff admits that

HealthPartners accurately notified her of the exclusion and that doing so was not discrimination. (Opposition at 12.)

The alleged economic and emotional injury for which Plaintiff seeks damages flows from the existence of Essentia's 2015 Plan exclusion. HealthPartners would never have paid for such services or surgery regardless of whether Essentia's plan contained an exclusion because third-party administrators do not pay for services under self-insured plans. (Exhibit A at 23.) *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 801 F.3d 927, 934 n.6 (8th Cir. 2015) ("A self-insured employer bears the financial risk of paying its employees' health-insurance claims").

Plaintiff relies on *Williams v. Grimes Aerospace Co.*, for the proposition that HealthPartners could be liable under a theory akin to "joint employer" liability. 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 both the defendants liable for each other's actions under an agency theory because neither had the 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).

While HealthPartners provided certain services under the 2015 Plan, it did not determine or control the coverage provided and was never financially responsible for payments. Moreover, *respondeat superior* is not available in Section 1557 cases. *See*

Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 288 (1998) (holding no Title IX liability for "vicarious liability").

In *Williams*, the temporary staffing agency also had no direct liability because it did not exercise control over the discriminatory decision. *Williams*, 988 F. Supp. at 938. When an individual claims discrimination under Title VII, she must demonstrate, among other things, that "each defendant ... failed to take ... corrective measures within its control." *Id.* at 937 (internal quotation omitted). The staffing agency was not liable 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).

Plaintiff misunderstands the staffing agency cases just as she misunderstands self-insured health plans. While Plaintiff mistakenly argues that an employer and a staffing agency are each independently liable "regardless of whether the facts would demonstrate that either had the ability to control the other" (Opposition at 23), the law requires control in order to impose liability. *See Williams*, 988 F. Supp. at 934 ("liability hinges on who is in control").

HealthPartners was not a "joint-insurer" under Essentia's 2015 Plan. Plaintiff has not identified any independent discriminatory act by HealthPartners that caused her damage. Like a payroll company that merely "cuts a paycheck," HealthPartners had no control over the coverage provided under Essentia's self-insured 2015 Plan.

Plaintiff's reliance on *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60 (1992), for the proposition that emotional distress damages are available under Title IX adds nothing

to this analysis. In that case the plaintiff sought damages because she -- not a family member -- was subjected to discrimination. *Id.* at 63-65. *Franklin* is entirely consistent with the rule that an individual may not obtain damages resulting from an alleged violation of another's rights. *See, e.g., Pierzynowski v. Police Dep't City of Detroit*, 941 F. Supp. 633, 640 (E.D. Mich. 1996). Plaintiff's injuries are not traceable to HealthPartners.

3. Plaintiff's Alleged Injuries Cannot Be Redressed By HealthPartners.

Plaintiff concedes that Essentia -- not HealthPartners -- bore the risk of loss under its 2015 Plan. (Opposition at 13.) As HealthPartners explained in its Opening Memorandum (Court Document 13), courts have repeatedly held that a third-party administrator may not be held liable 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. 1997); *Skilstaf, Inc. v. Adminitron, Inc.*, 66 F. Supp. 2d 1210 (M.D. Ala. 1999); *Baxter v. C.A. Muer Corp.*, 941 F.2d 451 (6th Cir. 1991). Unable to distinguish these cases (or pursue her claim in light of this legal principle), Plaintiff simply ignores them and (ironically) accuses HealthPartners of failing to cite authority. (Opposition at 13.)

A third-party administrator is required to follow a self-insured plan's terms. 29 U.S.C. § 1104(a)(1)(D). While Plaintiff argues that her damages are "more than merely the cost of insurance claims that were denied," her alleged damages all arise from

Essentia's decision not to cover gender reassignment services or surgery and Plaintiff's decision not to purchase those services directly. Removing HealthPartners from Essentia's 2015 Plan altogether would have done nothing about the exclusion Plaintiff is challenging. Plaintiff and Essentia each contend that the other should pay for gender reassignment services/surgery, but neither claims that HealthPartners was ever (or could ever be) financially responsible for such services. Even if Plaintiff prevailed on her claim, her alleged injury could not be redressed by HealthPartners because HealthPartners is the third-party administrator, not the insurer.

Because her 2016 Plan contains no exclusion for gender reassignment services, Plaintiff claims she is seeking injunctive relief to prevent HealthPartners from administering other plans for different employers with a similar exclusion. (Opposition at 14.) In *Williams*, the court rejected the notion that a plaintiff could maintain a discrimination claim against a staffing agency based on the theory that it may have paid black workers less than white workers. *See Williams*, 988 F. Supp. at 938-39. Those allegations did not concern the plaintiff directly, and even if the allegations could be substantiated, "allegations of discrimination against others are not determinative of an employer's reason for the action taken against the individual grievant." *Id.* at 939 (internal quotation omitted). Simply put, Plaintiff does not have standing to pursue a claim based upon a theoretical past or future denial of benefits to non-parties. The Court should dismiss Plaintiff's Complaint for lack of subject matter jurisdiction.

B. Plaintiff Has Failed To State A Claim.

Plaintiff's claim against HealthPartners also fails under Rule 12(b)(6). Plaintiff misunderstands the difference between an insurance company that sells fully-insured health plans and a third-party administrator that provides services to a self-insured plan. HealthPartners did not "design" or "sell" Essentia's 2015 Plan. HealthPartners is a third-party administrator. (Complaint at ¶7.) It provided administration services to Essentia. (Exhibit A at 23.) Plaintiff's misunderstanding leads her to incorrectly dismiss an entire body of relevant ERISA law that defines the responsibilities of plan sponsors and third-party administrators.[4] It also causes her to overlook the fact that this case concerns two distinct programs or activities: Essentia's 2015 Plan and HealthPartners' administration services.

Plaintiff is also incorrect that the law has been clear with regard to health plans since 2010, when Section 1557 was enacted as part of the ACA. In 2012, the U.S. Department of Health & Human Services (the "Department") stated that, although "sex" in Section 1557 included gender identity, Section 1557 did not require health plans to

[4] Plaintiff's claim must also be dismissed because she failed to exhaust her administrative remedies under ERISA. Plaintiff's request for injunctive relief is really a request to reform the 2015 Plan under 29 U.S.C. §1132(a)(3), which is moot anyway because the 2015 Plan expired and was replaced by the 2016 Plan and the 2016 Plan has no exclusion. Plaintiff's reliance on *Burds v. Union Pac. Corp.*, 223 F.3d 814 (8th Cir. 2000), is misplaced. There, the defendant was sued as both an employer (under Title VII) and a health plan sponsor (under ERISA). Here, HealthPartners is only a third-party administrator, not an employer. Moreover, *Reid v. BCBSM, Inc.*, 984 F. Supp.2d 949 (D. Minn. 2013), does not advance plaintiff's argument either. There, the Court correctly found that it could not modify an ERISA plan under 29 U.S.C. §1132(a)(1)(B) and apparently was not asked to reform the plan under 29 U.S.C. §1132(a)(3).

cover gender transition surgery.[5] Then, in September 2015, the Department proposed regulations that, for the first time, would require covered entities to cover certain gender reassignment services in their health plans.[6] The proposed regulations were released after Essentia's 2015 Plan went into effect.

These factual and legal misunderstandings have led Plaintiff to the incorrect conclusion that she has stated a claim under Section 1557.

1. Plaintiff Has Not Alleged A Plausible Section 1557 Claim Against HealthPartners.

Section 1557 is enforced through various statutes, including Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. 42 U.S.C. § 18116. All of the statutes enumerated in Section 1557 are modeled after Title VI. *See, e.g., Barnes*, 536 U.S. at 185; *Meagley v. City of Little Rock*, 639 F.3d 384, 389 (8th Cir. 2011); *NAACP v. Med. Ctr., Inc.*, 657 F.2d 1322, 1331 (3rd Cir. 1981).

While Plaintiff argues that the Title IX cases HealthPartners cites should not be applicable here, she fails to recognize that the principles set forth in these cases are based on Title VI and overarching principles underlying Congress' spending power.[7]

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[5] *See* http://www.employmentlawdaily.com/index.php/news/hhs-addresses-application-of-aca-nondiscrimination-rules-to-gender-identity-sex-stereotyping/; http://us.practicallaw.com/9-520-8062#null; http://benefitslink.com/links/20120810-096643.html (The Department's Q&A has since been removed from the internet).

[6] The Parties agree that the proposed regulations are not relevant to the interpretation of Section 1557. HealthPartners does not concede that it is a "covered entity" under Section 1557 or the proposed regulations such that the finalized regulations will apply to HealthPartners.

[7] Plaintiff argues the Title IX standard should not govern here because, unlike under Title IX case law, she is not asking HealthPartners to "detect and correct a third party's discrimination." (Opposition at 21.) But that is *exactly* what Plaintiff is

Moreover, Section 1557 and Title IX use identical operative language. *Compare* 42 U.S.C. § 18116(a) *with* 20 U.S.C. § 1681(a) ("be excluded from participation in, be denied the benefits of, or be subjected to discrimination under…"). Plaintiff presents no authority to support her assertion that this Court should not follow binding precedent regarding Congress' spending power. And she presents no alternative standard for the Court to use in this case.

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. Significantly, the recipient of federal funds may be liable in 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 v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 640-41 (1999) (emphasis added); *see also id.* at 644-46.

Because Plaintiff mistakes Essentia's 2015 plan for a fully-insured plan, she fails to recognize that there are two programs or activities here. As Plan Sponsor, Essentia owns the 2015 Plan. As third-party administrator, HealthPartners owns specific services

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asking HealthPartners to do. Essentia retained "all powers and discretion necessary to administer the [2015] Plan," including the power to "change the Plan." (Exhibit A at 22-23.) Moreover, the Title IX standard set forth in HealthPartners' brief is not only applicable to harassment cases. *See Grandson v. Univ. of MN*, 272 F.3d 568 (8th Cir. 2001).

under that Plan. Under *Davis*, federal funding recipients can only be liable for their own misconduct within their own program. Plaintiff alleges that the Plan itself violates Section 1557, but only seeks to hold HealthPartners "liable for its own actions." (Opposition at 11-12, 21.) She does not allege that HealthPartners administered the Plan in a discriminatory manner.

ERISA confirms that HealthPartners is not responsible for the Plan itself. 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.*, *Lampen*, 832 F. Supp. at 1287; *Skilstaf*, 66 F. Supp.2d at 1210; *Baxter*, 941 F.2d at 451. Plaintiff did not dispute this or present any contrary authority.

In *Reid v. BCBSM, Inc.*, this 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, Plaintiff has not alleged that HealthPartners itself discriminated against her. She argues that HealthPartners administered a health plan that Essentia offered and that she selected. Under *Reid*, her allegation is not sufficient to state a plausible claim.[8]

[8] 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.

Plaintiff argues that HealthPartners should be liable under Section 1557 because it agreed to administer Essentia's 2015 Plan, which Plaintiff alleges is discriminatory. But this argument fails for several reasons. First, it is a roundabout way of avoiding *Davis*, under which HealthPartners cannot be liable for someone else's program or activity. *Davis*, 526 U.S. at 640-41. Nothing in Section 1557 puts third-party administrators on notice that if they accept federal funding, they will now be responsible for the contents of the self-insured plans they administer. Without prior notice of this new liability, a third-party administrator cannot be held liable for the contents of a self-insured plan. *See Barnes*, 536 U.S. at 185-86.

Second, such a holding would violate the requirement that HealthPartners be put on notice that it could be liable for such a claim, and that Plaintiff give HealthPartners notice that she believed she had been discriminated against with an opportunity to rectify the alleged discrimination. Under Section 1557, a statute enacted with Congress' spending power, the plaintiff must put the defendant on notice of alleged discrimination and give the defendant an opportunity to rectify the discrimination before the plaintiff may bring an action for damages. *See Gebser*, 524 U.S. at 285. Here, HealthPartners had no actual notice and no authority to institute corrective measures. (*See* Opening Memorandum at 20-22.)

In *Grandson v. University of Minnesota*, 272 F.3d 568 (8th Cir. 2001), one plaintiff sought monetary damages for scholarship and financial aid she should have received as a member of the University's soccer team absent discrimination against female athletes. *Id.* at 575. The plaintiff failed to provide actual notice to the University

until after she had quit the women's soccer team. *Id.* at 576. She argued that the University had notice of the funding issues because it received numerous complaints over the years, and knew of its unequal expenditures for its men's and women's athletic teams. *Id.* at 575-76. The court rejected this argument because the allegations were not sufficient to put UMD on notice for purposes of Title IX. *Id.* at 576. Title IX violations require "prior notice to a[n] ... official with authority to address the complaint and a response demonstrating deliberate indifference to the alleged violation." *Id.*

Plaintiff did not put HealthPartners on notice of alleged discrimination prior to the 2015 Plan year when HealthPartners decided to administer Essentia's Plan. The fact that some HealthPartners employees may have been generally aware of Essentia's 2015 Plan exclusion does not meet the notice requirement under Title IX. *See Grandson*, 272 F.3d at 576. HealthPartners had no authority to address any complaint made by Plaintiff and cannot have liability for alleged discrimination. Under *Grandson*, general notice to one who has no authority to modify the discriminatory practice is insufficient to impose liability.

Plaintiff first objected to Essentia's 2015 Plan in March 2015. That generalized objection did not relate specifically to any action by HealthPartners, and occurred after HealthPartners had entered into the 2015 Plan, which it was obligated to administer as written. 29 U.S.C. §1104(a)(1)(D). Even if the Court were to consider Plaintiff's March 2015 generalized objection as notice required by Title IX, by the time HealthPartners received that notice, it had no authority to administer the Plan in any way other than in accordance with its terms. And, as remains undisputed, the very next Essentia plan

offered to Plaintiff that HealthPartners administered contained no exclusion for gender reassignment services or surgery. (Exhibit E at Amendment.) Moreover, Plaintiff does not allege in her Complaint, as she must, that she ever appealed the Lupron denial to put someone in authority at HealthPartners (or Essentia) on notice of the denial.

Plaintiff also entirely misunderstands the catch-22 in which she is trying to place third-party administrators. ERISA requires third-party administrators to administer self-insured health plans according to their terms. *See* 29 U.S.C. § 1104(a)(1)(D). Plaintiff does not deny this. If HealthPartners, as the third-party administrator, were to approve an excluded claim under Essentia's 2015 Plan (whatever it may mean for an entity with no spending authority to "approve" a claim), HealthPartners would violate ERISA, breach its contract with Essentia, and could be liable to other Plan members for whom it did not waive other exclusions. Thus, a ruling for Plaintiff here would force HealthPartners into a catch-22: either violate ERISA and the 2015 Plan or violate Plaintiff's reading of Section 1557. Surely, Congress meant for ERISA and Section 1557 to be read together.

None of this means that a third-party administrator could never have Section 1557 liability. It only means that, for a third-party administrator to be liable, it must have denied benefits that were otherwise available and have done so for discriminatory reasons. Section 1557 simply holds accountable the entity that actually made the decision not to provide a particular service or surgery.

The cases in which a covered entity plausibly discriminated under the ACA reinforce this rule. In *Callum*, *Rumble*, and *Gilead Scis., Inc.*,[9] the relevant covered entity itself treated the plaintiff differently. Plaintiff does not suggest that HealthPartners treated her in a discriminatory manner by conveying the terms of Essentia's 2015 Plan to her. In fact, Plaintiff asserts that the only alleged discriminatory act by HealthPartners was doing business with Essentia in the first place. (Opposition at 11-12.)

Plaintiff's theory has far-reaching implications. Under her theory, the pharmacy where Plaintiff's son sought Lupron is liable under Section 1557 for following the 2015 Plan. The pharmacy is a covered entity and it failed to charge Plaintiff's son only a co-pay for Lupron after it learned that Essentia declined to cover it due to the gender reassignment exclusion. Because Plaintiff's theory leads to this absurd result Plaintiff's theory must fail. *See, e.g., Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available"). Instead, Section 1557 must (consistent with Title IX) extend only to entities that actually have control over the allegedly discriminatory decision. An entity is only liable for "its" "program or activity."

CONCLUSION

Despite the Eighth Circuit's direction that federal lawsuits are not "an arena for public policy debates," *Mansolf v. Babbitt*, 85 F.3d 1295, 1301 (8th Cir. 1996), Plaintiff is

[9] *Callum v. CVS Health Corp.*, No. 4:14-cv-3481-RBH, 2015 WL 5782077, --- F. Supp.3d --- (D.S.C. Sept. 29, 2015); *Rumble v. Fairview Health Servs.*, No. 14-cv-2037 (SRN/FLN), 2015 WL 1197415 (D. Minn. March 16, 2015); *Se. Pennsylvania Transp. Auth. v. Gilead Scis., Inc.*, 102 F. Supp.3d 688 (E.D. Pa. 2015).

using this case not to remedy a legally recognized harm to Plaintiff, but as a platform for debating how transgender persons should receive healthcare. While HealthPartners shares many of Plaintiff's broad goals -- not least, expanded healthcare for transgender persons -- it is also mindful of Article III's standing requirements and its own inability to control coverage decisions under self-insured plans. Because of those standing requirements, the mootness of Plaintiff's injunctive relief claim, her inability to recover monetary damages due to her failure to provide notice to HealthPartners, and HealthPartners' lack of control over the Plan, Plaintiff's claim against HealthPartners fails. For each of the reasons set forth above and in its Opening Memorandum, HealthPartners, Inc. respectfully requests that the Court dismiss Plaintiff's lawsuit with prejudice.

Date: March 31, 2016

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ATTORNEYS FOR DEFENDANT HEALTHPARTNERS, INC.

UNITED STATES DISTRICT COURT
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Brittany R. Tovar,

Plaintiff,

-v-

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

I, David M. Wilk, certify that the Reply Memorandum in Support of Defendant HealthPartners, Inc.'s Motion to Dismiss 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 4,411 words.

Date: March 31, 2016

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