UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Brittany R. Tovar and Reid Olson,

Plaintiffs,

-v-

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

Defendants.

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

REPLY IN FURTHER SUPPORT OF HEALTHPARTNERS, INC. AND HPAI'S MOTION TO DISMISS

INTRODUCTION

Plaintiffs Brittany R. Tovar and Reid Olson have identified no authority to support their claims against HealthPartners/HPAI.[1] They completely ignore the Constitutional requirements for bringing their claims and have attempted to expand Section 1557 beyond its terms and implementing regulations.

Plaintiffs do not dispute that, apart from Section 1557, a self-insured health plan sponsor, such as Essentia, would be solely liable for what is covered or not covered under the health plan it offers. 29 U.S.C. § 1002(16)(B); *Aetna Health Inc. v. Davila*, 542 U.S. 200, 213 n.3 (2004). Plaintiffs argue that Section 1557 changes this legal framework and creates at least partial liability for third-party administrators ("TPAs"), such as HPAI.

[1] For ease of reference, this Reply refers to HealthPartners, Inc. as "HealthPartners," HealthPartners Administrators, Inc. as "HPAI" and Essentia Health as "Essentia."

Plaintiffs have no authority for this dramatic change in the law, and the text of Section 1557 does not support their argument.

The lack of authority is particularly important here, because Section 1557 was passed under the Spending Clause. As such, there should be no mystery about whether Congress radically changed the law and created TPA liability for health plan coverage. If Congress did so, it would have provided the Constitutionally-required clear notice to TPAs that the law had changed and would have instructed TPAs how to comply. Plaintiffs' inability to identify any such clear notice shows that Section 1557 did not create brand new liability for TPAs.

Put differently, Section 1557 does not define what roles various covered entities play in the health care system. It did not change what plan sponsors do or what TPAs do. Section 1557 merely states that, when carrying out those various roles, covered entities may not discriminate. It therefore matters a great deal how Plaintiffs claim they were harmed.

Here, Plaintiffs are complaining about the coverage afforded under their former health plan. They are not complaining about how their former health plan was administered. As such, Plaintiffs' claim regarding Essentia's 2015 health plan (the "2015 Plan") must be directed at Essentia, the plan sponsor, not HealthPartners or HPAI. The Court should grant HealthPartners/HPAI's motion to dismiss.

ARGUMENT

A. Tovar Does Not Have Article III Standing.

Absent a concrete and particularized injury in fact, Tovar's claim against HealthPartners and HPAI must be dismissed for lack of standing. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014). The Eighth Circuit found a potential injury to the extent Tovar had unreimbursed out-of-pocket expenses: "We conclude that Tovar has alleged an injury cognizable under Article III because she contends that the defendants' discriminatory conduct denied her the benefits of her insurance policy **and** forced her to pay out of pocket for some of her son's prescribed medication. The record is silent on whether Tovar has been fully reimbursed for these out of pocket payments ...." *Tovar v. Essentia Health*, 857 F.3d 771, 778-79 (8th Cir. 2017) (emphasis added). The record is no longer silent. Tovar was reimbursed for such costs. (Amended Complaint at ¶¶ 66-67; Court Document 65, transcript at 6, 17.) In fact, she almost certainly received their reimbursement before filing this lawsuit. As a result, she lacks standing under Article III. *Tovar*, 857 F.3d at 778-79.

Tovar incorrectly asserts that HealthPartners and HPAI have "over-interpreted" the Eighth Circuit's decision. According to Tovar, it did not really matter to the Eighth Circuit whether Tovar had been reimbursed for alleged out of pocket payments. That argument does not account for the Eighth Circuit's clear reasoning that Tovar had standing because her injury ("an injury") was caused by the denial of benefits **and** paying out-of-pocket. *Tovar*, 857 F.3d at 778-79.

The cases relied upon by the Eighth Circuit further underscore this fact. *Id.* at 779. In *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), the Supreme Court found Article III standing because plaintiff lost sales and suffered damage to its reputation, actual injury in fact. *Id.* at 1386. In *Geissal v. Moore Med. Corp.*, 524 U.S. 74 (1998), the Court found standing because "nothing in the record indicates one way or the other whether Aetna has fully reimbursed [plaintiff] for ... medical bills." *Id.* at 78 n.3. Reimbursement of expenses determines whether a plaintiff has suffered an injury in fact. *See Pakovich v. Verizon LTD Plan*, 653 F.3d 488, 492 (7th Cir. 2011) (plaintiff's "benefit claim became moot when the Plan paid it in full"); *Harrison v. United Mine Workers of Am. 1974 Ben. Plan & Tr.*, 941 F.2d 1190, 1193 (11th Cir. 1991) ("The Plan … has paid all benefits in full. There is no case or controversy between these appellants and the Plan"). Because Tovar has no such injury, her claim should be dismissed.

B. Plaintiffs' Section 1557 Claim Fails as a Matter of Law.

The Eighth Circuit remanded this case so that this Court could determine whether Plaintiffs' claim against HealthPartners and HPAI "should be dismissed for failure to state a claim under the ACA." *Tovar*, 857 F.3d at 779. Among other things, the Court is to consider statutory standing and whether a third-party administrator can be liable for "administering a plan whose alleged discriminatory terms were under the sole control of another organization." *Id.*

1. Plaintiffs' Request For Declaratory and Injunctive Relief Fails.

Plaintiffs made no effort to save their request for declaratory and injunctive relief. (Court Document 75 at 29-32.) Because Plaintiffs are no longer covered under any Essentia health plan or HPAI administered plan, their request for declaratory and injunctive relief is moot. *McFarlin v. Newport Special Sch. Dist.*, 980 F.2d 1208, 1210 (8th Cir. 1992). Plaintiffs have not even attempted to argue "that the event complained of will recur." *McFarlin*, 980 F.2d at 1211. The Court should, at a minimum, dismiss Plaintiffs' request for declaratory and injunctive relief.

2. Tovar Does Not Claim To Have Experienced Sex Discrimination.

Tovar herself does not claim that she was "excluded from participation in, ... denied the benefits of, or ... subjected to discrimination under, any health program or activity." 42 U.S.C. §18116(a). Federal courts across the country have found that Title IX does not provide relief to parents of children who allege they have been discriminated against:

> [N]othing in the statutory language provides [a parent] with a personal claim under title IX. Even assuming that title IX protects persons other than students and employees, [the parent] has failed to assert that she was excluded from participation, denied the benefits of, or subjected to discrimination under any education program or activity. Absent, such a claim, the plain language of title IX does not support a cause of action by [the parent].

Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1010 n.4 (5th Cir. 1996), *distinguished on other grounds Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 637-38 (1999). This is true even where parents have paid their children's medical expenses. *See, e.g., Haines v. Metro. Gov't of Davidson Cty., Tenn.,*

32 F. Supp.2d 991, 1000 (M.D. Tenn. 1998) ("the parents of a child suing under Title IX cannot bring an action to recoup such expenses unless suing on behalf of their daughter or son"). Because Tovar was not "excluded from participation in, ... denied the benefits of, or ... subjected to discrimination under, any health program or activity," her Section 1557 claim fails.

3. Section 1557 Did Not Unambiguously Require HealthPartners or HPAI To Disregard the 2015 Plan.

The two-sentence non-discrimination provision of Section 1557(a) says nothing about specific health plan exclusions. 42 U.S.C. §18116(a). It states that "an individual shall not, on the ground prohibited under ... title IX of the Education Amendments of 1972 … be subjected to discrimination under, any health program or activity ...." *Id.* Title IX prohibits discrimination "on the basis of sex ...." 20 U.S.C. §1681(a).

Title IX was passed under Congress' spending power. *See Davis*, 526 U.S. at 637. As such, Title IX requires funding recipients to receive notice that, by accepting funding, they assume specific liabilities. *Barnes v. Gorman*, 536 U.S. 181, 185-86 (2002). Money damages are not available under Title IX absent: 1) prior notice to an official with authority to address the complaint; and 2) a response demonstrating deliberate indifference. *Grandson v. Univ. of Minnesota*, 272 F.3d 568, 576 (8th Cir 2001).[2]

In *Grandson*, the defendant had received numerous complaints about funding for women's sports. *Id.* at 575. But that "vigorous public debate" was insufficient to sustain Grandson's claim for money damages. *Id.* The Eighth Circuit held that the plaintiff

[2] HealthPartners and HPAI relied on *Grandson* in their opening memorandum. Plaintiffs ignored that binding authority.

could not recover damages because she had not complained to the University and given it an opportunity to cure the discrimination against her. *Id.* at 576.

Plaintiffs have not shown that HealthPartners or HPAI were deliberately indifferent to a notice of discrimination that either had authority to address. Plaintiffs claim that, through a March 2015 "to whom it may concern" letter they sought "clarification" regarding the gender reassignment exclusion. (Amended Complaint at ¶ 35.) Plaintiffs had not requested or been denied treatment at that time, but requested "removal of the exclusion." HealthPartners and HPAI had no ability to remove the exclusion, and Plaintiffs do not claim otherwise. *See* 29 U.S.C. §1104(a)(1)(D). And Olson's prescription for Androderm was ultimately approved by Essentia under the 2015 Plan. (Amended Complaint at ¶ 67.) The March letter and Androderm prescription obviously do not advance Plaintiffs' claim of deliberate indifference.

That leaves Plaintiffs' allegations regarding Lupron. Plaintiffs allege that Lupron was denied as a result of the gender reassignment exclusion.[3] Plaintiffs do not allege that HealthPartners/HPAI required that the exclusion be included in the 2015 Plan. They merely allege HealthPartners/HPAI suggested a plan design that included the exclusion and that Essentia adopted the 2015 Plan.

Under the scenario alleged, Essentia is solely responsible for its coverage decision. 29 U.S.C. § 1002(16)(B); *Aetna Health,* 542 U.S. at 213. For plan participants like

[3] To prevail on such a claim, Plaintiffs must show that Essentia was prohibited from having the exclusion in its 2015 Plan, which Essentia vigorously disputes. It is not necessary for the Court to decide that issue in order to conclude that HealthPartners and HPAI are not liable for gender reassignment exclusion in the 2015 Plan.

Plaintiffs, this means that the buck stops with the plan sponsor. This framework benefits plan participants: if the plan sponsor is solely liable for coverage decisions, then plan participants will not be placed in the difficult and expensive position of litigating who is "responsible" for the exclusion they are challenging. Plan participates may simply sue the plan itself or the plan sponsor, which under ERISA, are responsible for the plan.

Plaintiffs cite no legal authority for their assertion that, "if an entity suggests coverage options to a plan sponsor, that entity becomes at least partially liable for the plan sponsor's coverage decision." Section 1557 says nothing remotely like that. If Section 1557 created that standard -- and that new liability -- then Congress was required to provide clear notice.

Plaintiffs' supplement to the record further underscores these facts. (Court Document No. 83.) According to those materials, Essentia's self-insured plan included the gender reassignment exclusion since at least February 2001, more than a decade before Section 1557. (Court Document 83-1 at pp. 15-16, Carlin ¶¶ 1, 13.) Essentia received no complaints about that exclusion until Tovar's letter in March 2015. (*Id.* at ¶ 14.) Essentia then reviewed the exclusion, removed it from the 2016 Plan and waived the exclusion for Olson's Androderm prescription. (*Id.* at ¶ 15.) Far from deliberate indifference, the record (as supplemented by Plaintiffs) shows no prior notice from Tovar or Olson to Essentia (much less to HealthPartners or HPAI) before March 2015 and no deliberate indifference following that notice. *Grandson*, 272 F.3d at 576.

Plaintiffs seem to agree that, as spending power legislation, Section 1557 requires all funding recipients to receive notice that, by accepting funding, they assume specific

liabilities. (*See* Court Document 84 at 6-8.) But Plaintiffs cannot identify where in Section 1557 TPAs are placed on notice that, if they suggest plan coverage options (i.e., design a draft summary plan description for a plan sponsor to review, revise, and approve), then they are liable for the plan sponsor's coverage decision. And, even if Plaintiffs could identify such authority, TPAs would still be required to follow the terms of plan documents while that plan was were in effect. 29 U.S.C. §1104(a)(1)(D).

Plaintiffs do not dispute that Essentia removed the exclusion the very next time it issued a plan document. Nothing in Section 1557(a) could be read to put HealthPartners or HPAI on notice that, during 2015, a third-party administrator was required to ignore the text of a health plan document (in violation of ERISA) and commit a self-insured employer to pay for something expressly excluded under its health plan. *Barnes*, 536 U.S. at 186 ("if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously"). HealthPartners and HPAI were not deliberately indifferent by complying with federal law. 42 U.S.C. § 1104(a)(1)(D); *Grandson*, 272 F.3d at 575-76.

4. Plaintiffs' Section 1557 Claim Fails Under The Regulations.

This Court has found Section 1557 ambiguous and has looked to federal regulations for guidance in interpreting Section 1557. *Rumble v. Fairview Health Servs.*, No. 14-CV-2037 SRN/FLN, 2015 WL 1197415, at *10 (D. Minn. Mar. 16, 2015).

Congress granted the Secretary of Health and Human Services ("HHS") authority to develop implementing regulations. 42 U.S.C. §18116(c). On August 1, 2013, HHS issued a request for information regarding nondiscrimination in health programs. 81 Fed.

Reg. 46558-560. Two years later, after the 2015 Plan had been issued, HHS issued proposed regulations. 81 Fed. Reg. 54172-221 (Sept. 8, 2015). In May 2016, after the 2015 Plan year expired, and after Essentia had removed the gender reassignment exclusion, HHS issued regulations concerning Section 1557. *See* 81 Fed. Reg. 31376; *see also* Court Document 75 at 8-9.

Plaintiffs assert that, under HHS' regulations, it is "perfectly clear" that TPAs may be liable for alleged discrimination in a health plan. (Court Document 85 at 12-14.) But Section 1557 itself does not make such liability clear. And, regardless of whether the regulations are "perfectly clear," they did not become effective until after the 2015 Plan year had expired. 81 Fed. Reg. 31376.[4]

Plaintiffs' reliance on a 2012 letter from the HHS Office of Civil Rights does not lead to a different result. That letter is not entitled to *Chevron* deference, makes no mention of liability for TPAs under self-insured plans and provides none of the detailed guidance (and notice) contained in the final regulations. And, the letter was obviously superseded by the much more detailed regulations.

As Judge Benton carefully explained, a TPA is not liable for another entity's discrimination under a health plan, any more than a plan sponsor could be responsible for a TPA's discrimination in denying benefits that were expressly covered under a health

[4] Plaintiffs misleadingly suggest that, under HHS' regulations, a third-party administrator "could be held responsible for plan features over which it has no control." (Court Document 85 at 13.) In fact, HHS was responding to "commenters' arguments" about such a concern and HHS clarified that where "alleged discrimination relates to the benefit design of a self-insured plan …. [the Office of Civil Rights] will typically address the complaint against that [self-insured] employer." 81 Fed. Reg. at 31432.

plan. *Tovar,* 857 F.3d at 780 (Benton, J., dissenting). Rather, each entity is only responsible for its own actions. *Id.* at 780-81 (Benton, J., dissenting).

Plaintiffs' argument to the contrary would lead to absurd results. Imagine that Olson presented a prescription for Lupron to a pharmacy that received federal dollars. That pharmacy would have correctly notified Olson that the prescription was not covered under the 2015 Plan and that he would need to make arrangements to pay for the prescription himself. In doing so, the pharmacy is not "enforcing" an exclusion or engaging in discrimination. It is merely conveying accurate information about the relevant health plan.

In sharp contrast, imagine the same pharmacy during 2016 refused to fill a transgender customer's prescription even though the customer's health plan covered it. In that case, the pharmacy may have violated Section 1557, but no one would believe that the health plan that covered the prescription, or the TPA that processed the prescription, violated Section 1557.

Section 1557 and its implementing regulations make clear that responsibility for alleged discrimination rests with the entity that engaged in the discriminatory conduct. When the claim concerns a categorical exclusion, as Plaintiffs contend this case concerns, that claim must be asserted against the health plan that contains the exclusion or against the plan sponsor of that health plan. Plaintiffs may not assert their claim about coverage under a health plan against a TPA obligated under federal law to follow the plan.

Plaintiffs' reliance on *Williams v. Grimes Aerospace Co.,* and staffing agency cases does not change this result. In *Williams*, the plaintiff sued a manufacturing

company and a temporary employment service under Title VII alleging that she was denied a full-time position due to her race.[5] 988 F. Supp. 925, 932 (D.S.C. 1997). The court rejected the plaintiff's effort to hold both defendants liable for each other's actions under an agency theory because neither had the right to control the other. *Id.* at 933. The staffing agency was not liable because it "was nothing but a payroll service that cut Plaintiff's paycheck." *Id.* at 938.

While HPAI provided certain services for the 2015 Plan, it did not determine or control the coverage provided and was never financially responsible for payments. (Court Document 14-1 at pp. 25-26 of 149; Court Document 83-1 at pp. 15-16, Carlin ¶¶ 8, 11.) Plaintiffs have not identified any independent discriminatory act by HealthPartners or HPAI that caused damage; rather, they simply challenge the terms of the plan itself -- terms that had changed even before they filed suit. Like a payroll company that merely "cuts a paycheck," HealthPartners and HPAI had no control over the coverage provided under Essentia's self-insured 2015 Plan. *See Williams*, 988 F. Supp. at 934 ("liability hinges on who is in control").

5. Dismissing Plaintiffs' Claim Against HealthPartners and HPAI Is Consistent With ERISA.

To the extent Plaintiffs contend that HealthPartners and HPAI should have refused to serve as TPA for the 2015 Plan because of the gender reassignment exclusion, such a

[5] Title VII was passed under Congress' Commerce Clause authority, which is broader than its Spending Clause authority. "[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. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1028 (7th Cir. 1997).

claim cannot be reconciled with Title IX's requirement that a plan member complain about alleged discrimination and that the federal contractor be afforded an opportunity to remedy the discrimination. *Grandson*, 272 F.3d at 575-76. And, to the extent Plaintiffs contend that HealthPartners/HPAI should have refused to apply the 2015 Plan as written, such an argument runs afoul of ERISA. 42 U.S.C. §1104(a)(1)(D).

While ERISA does not preempt Plaintiffs' section 1557 claims, it provides compelling guidance to resolving this motion. ERISA cases have long distinguished between liability for TPAs and plan sponsors based upon the nature of the claim being asserted. For example, when "a [TPA] correctly concluded that, under the relevant plan, a particular treatment was not covered, the [TPA's] denial of coverage would not be a proximate cause of any injuries arising from the denial. Rather the failure of the plan itself to cover the requested treatment would be the proximate cause." *Aetna Health*, 542 U.S. 200, 213 (2004) (footnote omitted). Thus, for example, "if the terms of the health plan specifically exclude from coverage the cost of an appendectomy, then any injuries caused by the refusal to cover the appendectomy are properly attributed to the terms of the plan itself, not the managed care entity that applied those terms." *Id.* at n.3.

The Court should apply Section 1557 as set forth in the implementing regulations and in a manner consistent with ERISA. In other words, a covered entity TPA must perform third-party administration services as defined by ERISA in a nondiscriminatory manner as defined by Section 1557. In this case, that means that Essentia is responsible for the plan itself and HPAI would be responsible if it denied a covered claim due to discriminatory reasons. *Aetna Health*, 542 U.S. at 213 n.3; *Tovar*, 857 F.3d at 780-81

(Benton, J., dissenting). That is not what happened according to Plaintiffs' Amended Complaint. Plaintiffs' Section 1557 claim should be dismissed.

CONCLUSION

For each of the reasons set forth above, as well as those set forth in HealthPartners' and HPAI's opening brief, the Court should dismiss Plaintiffs' claim under Section 1557.

Date: February 20, 2018

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 DEFENDANTS HEALTHPARTNERS, INC. and HEALTHPARTNERS ADMINISTRATORS, INC.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Brittany R. Tovar and Reid Olson,

Plaintiffs,

-v-

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

Defendants.

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

LR 7.1(f) AND (h) WORD COUNT COMPLIANCE CERTIFICATE REGARDING REPLY IN FURTHER SUPPORT OF HEALTHPARTNERS, INC. AND HPAI'S MOTION TO DISMISS

I, David M. Wilk, certify that the Reply in Further Support of HealthPartners, Inc. and HPAI'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 3,498 words.

Date: February 20, 2018

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 DEFENDANTS HEALTHPARTNERS, INC. and HEALTHPARTNERS ADMINISTRATORS, INC.

1695318