IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

SKYLER MUSGROVE, Plaintiff, v. THE BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, JAMES HULL, in his official capacity as Chair of the Board of Regents of the University System of Georgia, UNIVERSITY OF GEORGIA, JERE MOREHEAD, in his official capacity as President of the University of Georgia, KARIN ELLIOT, in her official capacity as Interim Vice Chancellor of Human Resources of the University System of Georgia, BLUE CROSS BLUE SHIELD HEALTHCARE PLAN OF GEORGIA, INC., METROPOLITAN LIFE INSURANCE COMPANY, and METLIFE, INC., Defendants.	)	CASE NO. 3:18-00080-CDL

DEFENDANT BLUE CROSS BLUE SHIELD HEALTHCARE PLAN OF GEORGIA, INC.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

COMES NOW, Defendant Blue Cross Blue Shield Healthcare Plan of Georgia, Inc. ("BCBSHP"), by and through its undersigned counsel, in accordance with Rule 12 of the Federal Rules of Civil Procedure and Rule 7 of this Court's Local Rules, and hereby files its Motion to Dismiss Plaintiff's Complaint, stating as follows:

1. Plaintiff filed his Complaint on June 28, 2018. (Doc. 1.) After being served with a copy of the Summons and Complaint, BCBSHP timely filed its Stipulation to Extend Time to Respond to Complaint, extending the time to respond to the Complaint to August 24, 2018. (Doc. 18.) This Motion is thus timely filed.

2. BCBSHP moves to dismiss Plaintiff's Complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiff's Complaint should be dismissed under Rule 12(b)(1) because Plaintiff lacks Article III standing as to BCBSHP. Plaintiff's Complaint should be dismissed under Rule 12(b)(6) because Plaintiff fails to state any viable claims for relief against BCBSHP.

3. Accordingly, as set forth in greater detail in BCBSHP's Brief in Support of this Motion, this Court should dismiss all of Plaintiff's claims against BCBSHP by granting this Motion.

Respectfully submitted this 24th day of August 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2018, I filed the foregoing Defendant Blue Cross Blue Shield Healthcare Plan of Georgia's Motion to Dismiss Plaintiff's Complaint via the Court's CM/ECF system, which will serve a copy on all counsel of record.

/s/ James A. Washburn

Counsel for Blue Cross Blue Shield
Healthcare Plan of Georgia, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

SKYLER MUSGROVE, Plaintiff, v. THE BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, JAMES HULL, in his official capacity as Chair of the Board of Regents of the University System of Georgia, UNIVERSITY OF GEORGIA, JERE MOREHEAD, in his official capacity as President of the University of Georgia, KARIN ELLIOT, in her official capacity as Interim Vice Chancellor of Human Resources of the University System of Georgia, BLUE CROSS BLUE SHIELD HEALTHCARE PLAN OF GEORGIA, INC., METROPOLITAN LIFE INSURANCE COMPANY, and METLIFE, INC., Defendants.	)	CASE NO. 3:18-00080-CDL

DEFENDANT BLUE CROSS BLUE SHIELD HEALTHCARE PLAN OF GEORGIA, INC.'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S COMPLAINT

COMES NOW, Defendant Blue Cross Blue Shield Healthcare Plan of Georgia, Inc. ("BCBSHP"), by and through its undersigned counsel, in accordance with Rule 12 of the Federal Rules of Civil Procedure and Rule 7 of this Court's Local Rules, and hereby files its Brief in Support of its Motion to Dismiss Plaintiff's Complaint, stating as follows:

INTRODUCTION

Plaintiff Skyler Musgrove alleges that certain federal statutes mandate that his employer's self-insured employee health insurance plan cover treatment for gender dysphoria.[1] Plaintiff is a transgender person who has been in the process of transitioning from female to male. He is employed by the University of Georgia and participates in a health benefits plan offered by the Georgia Board of Regents ("BOR"). The health benefits plan in which Plaintiff participates contains an exclusion for sex change services, surgeries, or for drugs related to such services, and when Plaintiff sought reimbursement under the health benefits plan for those services, his claim was denied. Plaintiff contends this exclusion violates his rights under the Americans with Disabilities Act (the "ADA"), Title VII, Title IX, and the United States Constitution.

Plaintiff has asserted four claims against BCBSHP. All should be dismissed. First and fundamentally, BCBSHP has no responsibility for the health benefits plan offered by the BOR. Rather, a different company, Blue Cross and Blue Shield of Georgia, Inc. ("BCBSGA"), serves as the claims administrator for the BOR health benefits plan about which Plaintiff complains, as reflected in the documents Plaintiff attaches to the Complaint. Even if Plaintiff had named the right party, however, he could not state a claim against BCBSGA under Title VII and Title I of the

[1] The Complaint explains that the American Psychiatric Association included a diagnosis of gender identity disorder ("GID") in 1980 in the third edition of its Diagnostic and Statistical Manual of Mental Disorders ("DSM-III"), but that the DSM-5, published in 2013, removed the diagnosis of GID and replaced it with a fundamentally different diagnosis of gender dysphoria, which is based on an incongruence between a person's brain sex and physical sex. (Doc. 1 at 7 ¶¶ 33–34.)

ADA because BCBSGA is not Plaintiff's employer within the scope of those statutes, or under Section 504 of the Rehabilitation Act because BCBSGA is not a recipient of federal funds. BCBSGA would not be liable under Title III of the ADA because it applies to public spaces, not the substance of health benefits plans. And even if Plaintiff could pursue claims under Title VII, the ADA, or Section 504 against BCBSGA, those statutes do not require that health benefits plans provide coverage for gender dysphoria, and the ADA establishes a safe harbor for insurers offering coverage consistent with state law. Finally, as reflected in the Complaint, BCBSGA was not responsible for selecting the terms and exclusions of BOR's self-funded health benefits plan, and consequently Plaintiff does not have standing to sustain a claim against BCBSGA. The Complaint should be dismissed in its entirety as to BCBSHP.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

I. The BOR Has Established a Self-Funded Health Benefits Plan, for Which BCBSGA Serves as Claims Administrator.

The BOR "has exclusive power over '[t]he government, control, and management of the University System of Georgia.'" (Doc. 1 ¶ 14 (quoting Ga. Const. art. VIII, § 4, para. 1(b).) The BOR has contracted with BCBSGA to serve as a claims administrator for a health benefits plan for the University System of Georgia called the Consumer Choice HSA Healthcare Plan (the "Plan"). Plaintiff alleges that BOR contracted with BCBSHP, but the documents Plaintiff has attached to the Complaint establish that BCBSGA, not BCBSHP, provides claims administration services for the Plan. The Plan states, "Blue Cross and Blue Shield of Georgia, Inc. was chosen to administer this Plan. The Claims Administrator provides administrative claims payment and does not assume any financial risk or obligation with respect to claims." (Doc. 1-2 at 87.) The communications Plaintiff attaches to the Complaint also reflect that BCBSGA, not BCBSHP, is the Plan's claims administrator. (Doc. 1-4, 1-5, 1-6, and 1-7.)

Under the terms of the Plan, the University System of Georgia is "the legal entity that has adopted the Plan and has authority regarding its operation, amendment, and termination. ***The Plan Sponsor is not the Claims Administrator.***" (Doc. 1-2 p. 92, emphasis in original.) Thus, the Plan's terms are chosen "by the Plan Sponsor to fund and provide delivery of the Employer's health benefits." (*Id.*)[2] Under the Plan, as recognized by Plaintiff, as set forth in the Plan documents, and as is common with self-funded plans, BCBSGA is only the claims administrator and has no authority to change the Plan's coverage or exclusions. (Doc. 1 ¶ 55; Doc. 1-2 p. 92; Doc. 1-6 p. 2.)

II. Plaintiff's Employment and Health Insurance Coverage.

Plaintiff began working for the University of Georgia in 2013. (*Id.* ¶ 28.) He became a full-time employee of the University in September 2015 (*id.* ¶ 40), and he currently works as a Catering and Banquets Manager for the University. (*Id.* ¶ 1.) Plaintiff is eligible for health insurance benefits as a full-time University employee. (*Id.* ¶ 2, 43.) As such, he elected coverage under the Plan in 2017 and is currently covered under the 2018 version of same. (*Id.* ¶ 43.)

The Plan, as determined by BOR, defines the benefits that are offered to its participants and specifically excludes certain services. Specifically, the Plan excludes: "'Sex Change – Services or supplies for a sex change and/or the reversal of a sex change,' and 'Sex Change Drugs – Drugs for sex change surgery.'" (*Id.* ¶ 44; Doc. 1-2 at 53, 98.)

Plaintiff was diagnosed with gender dysphoria in approximately 2009. (Doc. 1 ¶ 27.) Plaintiff then began the transition from female to male, starting hormone therapy in 2012. (*Id.* ¶

[2] This is a common arrangement. "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)).

47.) As part of his transition, Plaintiff asserts that he reached the decision to undergo chest reconstruction surgery "to establish a flat, typically male chest." (*Id.* ¶ 46.) It is unclear from the Complaint when Plaintiff reached this decision, but he eventually underwent the surgery in May 2017. (*Id.* ¶ 50.)

III. Plaintiff's Surgery and Associated Expenses.

Plaintiff's surgeon applied to BCBSGA for preauthorization for Plaintiff's surgery on or about April 19, 2017. (Doc. 1 ¶ 49.) As the Plan's claims administrator, BCBSGA denied coverage because breast removal surgery was excluded under the terms of the Plan. (*Id.*; Doc. 1-4 p. 2.) Without appealing the decision, Plaintiff underwent the surgery on May 30, 2017. (Doc. 1 ¶ 50–51.) Plaintiff nevertheless submitted the $8,333.32 claim after the surgery and was told on October 10, 2017, that the costs of his surgery were not covered under the Plan. (*Id.* ¶ 50.) He later appealed that decision on April 24, 2018; his appeal was denied. (*Id.* ¶ 51; Doc. 1-6 p. 2.)

The letter from BCBSGA denying Plaintiff's appeal explains that BCBSGA is merely the claims administrator of the Plan. (Doc. 1-6 p. 2.) Importantly, the letter explains that the Plan is self-funded by the BOR and, as such, BCBSGA had "a fiduciary responsibility to administer their contract benefits and ha[d] no flexibility in overriding the benefits they have chosen for their members." (*Id.*)

ARGUMENT AND CITATIONS OF AUTHORITY

I. Plaintiff's Claims Should Be Dismissed Pursuant to Rule 12(b)(6).

A. The Rule 12(b)(6) Dismissal Standards.

In ruling on a motion to dismiss for failure to state a claim, the analysis "is limited primarily to the face of the complaint and attachments thereto." *Med South Health Plans, LLC v. Life of the South Ins. Co.*, 2008 WL 2119915, *2 (M.D. Ga. May 19, 2008) (quoting *Brooks v. Blue Cross &*

Blue Shield of Fla., Inc., 116 F.3d 1364, 1368 (11th Cir. 1997)). "However, where the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff's claim, then the Court may consider the documents part of the pleadings." *Id.* (quoting *Brooks*, 116 F.3d at 1369).

Here, Plaintiff's claims against BCBSHP—and BCBSGA—do not survive a motion to dismiss under Rule 12(b)(6) because the allegations of his Complaint, combined with the documents incorporated and referenced therein, establish conclusively that Plaintiff is not entitled to the relief he seeks as a matter of law. Therefore, even when Plaintiff's allegations are accepted as true, Plaintiff has failed to raise claims that could support relief.

B. Plaintiff's Claims Should Be Dismissed Because BCBSHP Has No Contractual or Other Relationship to Plaintiff.

Plaintiff's Complaint should be dismissed as to BCBSHP because the documents incorporated into the Complaint establish that BCBSHP (as opposed to BCBSGA) was not the claims administrator for Plaintiff's health benefits plan and is thus not properly a defendant in this case. Dismissal is the appropriate remedy where the defendant has no relation to the health benefits plan at issue. *Ward v. Auto Owner's Ins. Co.*, 2016 WL 9450456, at *2 (N.D. Ga. Mar. 15, 2016) (dismissing complaint against insurer because insurer did not issue relevant policy and therefore was not a proper defendant); *see also Citizens Ins. Co. of the Midwest for deWitt v. Stone*, 2016 WL 9275409, at *2 (N.D. Fla. Nov. 30, 2016) ("It is axiomatic that an action may survive only if the plaintiff named the appropriate defendant in its complaint."). BCBSGA and BCBSHP are separate companies, separately regulated by the Georgia Department of Insurance. *See, e.g., Northeast Georgia Cancer Care, LLC v. Blue Cross and Blue Shield of Georgia, Inc.*, 726 S.E.2d 714 (Ga. App. 2012) (distinguishing between regulations applicable to BCBSGA and those

applicable to BCBSHP). BCBSHP, as opposed to BCBSGA, cannot be shown to have participated in the Plan. Plaintiff's claims against BCBSHP should therefore be dismissed.

C. Plaintiff's ADA and Title VII Employment Claims Should Be Dismissed Because BCBSGA is Not Plaintiff's Employer.

Even if it had included BCBSGA as a party to the case in its capacity as a claims administrator to the Plan, Plaintiff's Complaint would fail to state any viable claims for relief against BCBSGA. Accordingly, even assuming Plaintiff had sued BCBSGA, all of his claims would be subject to dismissal under Rule 12(b)(6) of the Federal Rules.[3]

Plaintiff's putative employment-based claims against BCBSGA under Title I of the ADA (Count One) and Title VII (Count Five) should be dismissed because BCBSGA has never been Plaintiff's employer. Whether a defendant is a plaintiff's employer under the ADA and Title VII is a threshold jurisdictional issue in the Eleventh Circuit. *Lyes v. City of Riviera Beach, Fla.*, 166 F.3d 1332, 1340 (11th Cir. 1999) (*en banc*). Under both the ADA and Title VII, an employee-employer relationship must exist between the plaintiff and defendant to satisfy this requirement. *Walters v. Metro. Educ'l Enter., Inc.*, 519 U.S. 202, 206–07 (1997) (holding that there must be an "employment relationship" between a plaintiff and defendant for liability under Title VII); *Nelson v. Jackson*, 2015 WL 13545487, at *4 (N.D. Ga. Mar. 31, 2015) (explaining that "the ADA's definition [of employer] mirrors the definition of employer under Title VII . . . accordingly, [t]he ADA adopts in large part the Title VII case precedent[,] and courts have used the Title VII cases as a guide for determining employer liability under the ADA). The two statutes are thus analyzed together on this threshold issue.

[3] For purposes of addressing the remaining arguments for dismissal pursuant to Rule 12(b)(6), the brief assumes that the Complaint had named BCBSGA, and not BCBSHP, as a defendant.

1. The Eleventh Circuit and Other Courts Have Consistently Held That an Insurer Is Not an "Employer" Under these Statutes.

The Eleventh Circuit, joined by other courts around the United States, has held that a plaintiff's employer's insurer or claims administrator is not a plaintiff's "employer" under Title VII and the ADA as a matter of law. In fact, Eleventh Circuit has taken the position that an argument to the contrary is "patently frivolous":

> **We dispose of appellants' claims against the employers' insurers and insurance servicing agents . . . by holding that such claims are patently frivolous** . . . Appellants have not alleged, and could not allege without running afoul of Fed. R. Civ. P. 11, that the employers' insurers and/or insurance servicing agents . . . were covered entities under the ADA.

Cramer v. State of Fla., 117 F.3d 1258, 1263–64 (11th Cir. 1997) (emphasis added); *see also Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1113 (9th Cir. 2000) (noting that an insurance company was not a "covered entity" because "[i]t was simply the administrator of the employer's disability policy"); *Rance v. D.R. Horton, Inc.*, 2009 WL 10669296, at *1 (S.D. Fla. Apr. 20, 2009) ("employers' insurers . . . are not covered entities under the ADA").

A recent decision from the Northern District of Texas with strikingly analogous facts is particularly instructive. In *Baker v. Aetna Life Ins. Co.*, 228 F. Supp. 3d 764 (N.D. Tex. 2017), the plaintiff alleged that she had gender dysphoria and that she was denied short-term disability insurance benefits for costs associated with her breast augmentation surgery. *Id.* at 766. She sued her employer and the employer's insurer, Aetna, under several different federal statutes including Title VII. *Id.* at 766–67. The plaintiff argued—as Plaintiff does here—that the insurer was her employer's "agent" because it had the authority to approve or deny her claims, relying solely on the Equal Employment Opportunity Commission's ("EEOC") Compliance Manual to support her argument that an insurer can be liable under Title VII. *Compare id.* with Doc. 1 ¶ 76.

The court flatly rejected the plaintiff's argument, first pointing out that "the EEOC Compliance Manual does not have the force of law." *Id.* The court then found that the authority to approve or deny claims did not make an insurer an employer's "agent" for purposes of Title VII liability. *Id.* The Court thus dismissed the Title VII claim against Aetna with prejudice. *Id.* This result is in keeping with other cases against insurers around the country. *See generally Klassy v. Physicians Plus Ins. Co.*, 276 F. Supp. 2d 952, 959 (W.D. Wis. 2003), *aff'd*, 371 F.3d 952 (7th Cir. 2004) (insurance carrier not an "employer" under Title VII); *Pappas v. Bethesda Hosp. Ass'n*, 861 F. Supp. 616, 619 (S.D. Ohio 1994) (same); *McMillan v. Gen. Elec. Co.*, 2010 WL 3672243, at *5 (E.D.N.C. July 12, 2010) (same under the ADA); *Riggs v. CUNA Mut. Ins. Soc'y*, 171 F. Supp. 2d 1210, 1212 (D. Kan. 2001), *aff'd*, 42 F. App'x 334 (10th Cir. 2002) (same under Title VII and ADA); *Reigel v. Kaiser Foundation Health Plan of North Carolina*, 859 F. Supp. 963, 966 (E.D.N.C. 1994) (no liability against health plan because it was a separate entity from the plaintiff's employer). Dismissal of Plaintiff's Title VII and ADA claims against BCBSGA with prejudice is compelled by precedent from the Eleventh Circuit and other courts.

2. BCBSGA Is Not the Employer's Agent for Purposes of Liability Under Title VII and the ADA.

Plaintiff will likely argue in response that BCBSGA should be considered an agent of Plaintiff's employer and that BCBSGA is therefore subject to Title VII and ADA liability. (Doc. 1 ¶ 76.) That argument is unsupportable. As explained by the Southern District of Florida when examining this very issue: "The Eleventh Circuit has stated that 'the 'agent' language [in the definition of 'employer' in the ADA] was included to ensure *respondeat superior* liability of the employer for the acts of its agents." *Rance, supra*, 2009 WL 10669296, at *2. Further, "for a corporation to qualify as an 'agent' of another corporation under the ADA, an agency relationship which establishes an 'employment nexus' must exist." *Id.* (quoting *Fike v. Gold Kist, Inc.*, 514 F.

Supp. 722, 728 (N.D. Ala. 1981), *aff'd*, 664 F.2d 295 (11th Cir. 1981)). "In other words, [one] corporation must [be] the agent of the other with respect to employment practices." *Id.* (citations omitted).

To determine whether an alleged agent should be considered an "employer" under Title VII or the ADA, courts have considered whether the alleged agent/"employer" paid the employee's salary, withheld taxes, provided benefits, and set terms and conditions of employment. *Ojelade v. Liberty Mut.*, 2007 WL 809787, at *4 (N.D. Fla. Mar. 15, 2007). "The fewer economic connections that exist, the more tenuous the case for having established an 'employment' relationship is considered to be." *Id.* If another entity—for example, the BOR in this case—interviewed, hired, paid wages, set the work schedule, and provided daily supervision, the putative agent cannot be considered the plaintiff's employer subject to suit under Title VII or the ADA. *Id.* (holding that plaintiff's employer's workers' compensation carrier could not be liable under Title VII because it did not employ the plaintiff); *see also Deal v. State Farm Cty. Mut. Ins. Co. of Texas*, 5 F.3d 117, 119 (5th Cir. 1993) (same).

Plaintiff does not and cannot allege that BCBSGA performed these employment functions; they were performed by the University. Plaintiff has alleged only that BCBSGA administered the University System of Georgia's self-insured Plan (Doc. 1 ¶ 17) and that BCBSGA denied Plaintiff's request for coverage of his surgery costs as the Plan's claims administrator. (*Id.* ¶¶ 49–52.) Plaintiff recognizes that the scope of coverage under the Plan is determined solely by the BOR (*id.* ¶¶ 41, 55) and that by serving only as the Plan's claims administrator, BCBSGA had "no flexibility to override" the Plan's coverage exclusions. (*Id.* ¶ 51; Doc. 1-6 p. 2.) The Complaint is bereft of any allegations that an "employment nexus" exists between BCBSGA and Plaintiff,

and Plaintiff's putative agency argument therefore would not save his Complaint from dismissal as to BCBSGA.

D. BCBSGA Cannot Be Liable Under Title III of the ADA.

Count Three of Plaintiff's Complaint should be dismissed as to BCBSGA because Title III does not apply to the substance or administration of health benefits plans offered to employees like Plaintiff. Title III is public accommodation statute designed to regulate physical public spaces, *i.e.*, buildings, offices, and the like. It has no application to health benefits plans or insurance policies. *See* 42 U.S.C. §§ 12182(b)(1)(A)(i)-(iii). More specifically, it is designed to regulate "all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located." 28 C.F.R. § 36.104. Indeed, the Technical Assistance Manual to which Plaintiff cites in the Complaint makes clear that Title III applies to "places of public accommodation" and "commercial facilities." U.S. Dep't of Justice, ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities III-3.11000, available online at: http://www.ada.gov/taman3.html.

Plaintiff alleges that BCBSGA violated Title III by offering to administer an allegedly discriminatory health benefits plan. (Doc. 1 ¶ 109.) This is not a cognizable claim under Title III. While the Eleventh Circuit has not yet specifically ruled on the issue of whether the content of insurance policies fall within the purview of Title III, "'[i]n interpreting the plain and unambiguous language of the ADA, and its applicable federal regulations, the Eleventh Circuit has recognized Congress' clear intent that Title III of the ADA governs solely access to physical, concrete places of public accommodation.'" *Petrano v. Nationwide Mut. Fire Ins. Co.*, 2013 WL 1325045, at *7 (N.D. Fla. Jan. 24, 2013) (quoting *Access Now, Inc. v. Southwest Airlines Co.*, 227 F. Supp. 2d

1312, 1318 (S.D. Fla. 2002)) (other citations omitted), *report and recommendation adopted sub nom. Petrano v. Old Republic Nat. Title Ins. Co.*, 2013 WL 1325030 (N.D. Fla. Mar. 27, 2013), *aff'd*, 590 F. App'x 927 (11th Cir. 2014).

The recognition by the Northern District of Florida that the contents of insurance policies are not properly the subject of Title III claims aligns with the Third, Sixth, and Eighth Circuits, which have all specifically ruled on this issue. *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1014 (6th Cir. 1997) (long-term disability insurance policies offered by employer did not fall under the purview of Title III); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114–15 (9th Cir. 2000) (rejecting Title III claim when plaintiff attempted to sue an insurance company for disability discrimination); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612–13 (3d Cir. 1998) (same).[4] Plaintiff's Title III claim should be dismissed.

E. Plaintiff Cannot State a Claim Against BCBSGA Under Section 504 of the Rehabilitation Act.

Plaintiff's claim pursuant to Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (Count Four), should be dismissed as to BCBSGA because Section 504 applies to recipients of federal funds. While Plaintiff has conclusorily alleged that all Defendants receive federal funds (Doc. 1 ¶ 121), he has made no allegation regarding BCBSGA's receipt of federal funds sufficient to defeat a motion to dismiss. "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions; and a formulaic recitation of the elements of a cause of

[4] Other circuits that have adopted a broader view of Title III have nevertheless concluded that health benefits plans offered by employers, rather than insurance policies offered to the public, are not subject to Title III. *See Morgan v. Joint Admin. Bd., Ret. Plan of the Pillsbury Co. and Am. Fed. of Grain Miller*s, 268 F.3d 456, 459 (7th Cir. 2001) (Posner, J.) ("No one could walk in off the street and ask to become a plan participant. The plan was a private deal, not a public offering, and so the plaintiffs' public accommodations claim fails as well."); *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 32 n.3 (2d Cir. 1999) (noting that "plaintiffs must have a nexus to a place of public accommodation in order to claim the protections of Title III").

action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations and quotations omitted).

Absent such a showing, Plaintiff's claim must fail. Even if the BOR receives federal funds, the fact that BCBSGA provides claims administration services for the Plan is insufficient to support a claim under Section 504. *Dunlap v. Ass'n of Bay Area Gov'ts*, 996 F. Supp. 962, 968 (N.D. Cal. 1998) (dismissing Section 504 claim against insurer that contracted with entities that received federal funds); *Dodd v. Blue Cross and Blue Shield Assoc.*, 835 F. Supp. 888, 891 (E.D. Va. 1993) (holding same and stating, "when a government procurement contract is involved, it is the procuring agency . . . , and not the contractor . . . , that is responsible for compliance" with the Rehabilitation Act). Plaintiff's Section 504 claim should be dismissed.

F. Transsexualism and Gender Dysphoria Are Not Protected Under the ADA, Section 504, or Title VII.

Plaintiff's claims pursuant to Titles I and III of the ADA, Section 504 of the Rehabilitation Act, and Title VII should all be dismissed because Plaintiff's transsexualism and gender dysphoria are not protected under any of those statutes.

1. Plaintiff's ADA and Rehabilitation Act Claims Should Be Dismissed.

Plaintiff's claims under the ADA and Section 504 of the Rehabilitation Act should be dismissed because his alleged disability is not protected under those statutes. The ADA expressly provides that gender identity disorders are not considered disabilities under the statute. 42 U.S.C. § 12211(b)(1). As the Middle District of Georgia has expressly recognized, "'transsexualism . . . [and] gender identity disorders not resulting from physical impairments' are not considered disabilities under the ADA.'" *Diamond v. Allen*, 2014 WL 6461730, at *4 (M.D. Ga. Nov. 17, 2014) (citing 42 U.S.C. § 12211(b)(1)); *see also* 29 U.S.C. § 705(20)(F) ("the term 'individual

with a disability' does not include an individual on the basis of . . . transsexualism . . . [and] gender identity disorders not resulting from physical impairments").[5] Plaintiff's claims falls under these statutory exclusions because his claims are made exclusively on the basis of his transsexualism and gender identity disorder not resulting from physical impairments.

This case is about the denial of insurance benefits for Plaintiff to undergo gender transition surgery as a means of treating gender dysphoria, which, as Plaintiff alleges, is a diagnosis that replaced gender identity disorder in the DSM. The ADA and the Rehabilitation Act unequivocally exclude such claims. *See, e.g.*, *Johnson v. Fresh Mark, Inc.*, 98 F. App'x 461, 462 (6th Cir. 2004) (affirming dismissal of complaint alleging discrimination under the ADA on the explicit exclusion of transsexualism); *James v. Ranch Mart Hardware, Inc.*, 1994 WL 731517, at *2 (D. Kan. Dec. 23, 1994) (dismissing plaintiff's transsexualism discrimination claim under the ADA).

Notwithstanding the express statutory language and precedent, Plaintiff contends that his gender dysphoria does not fall within the exclusion, relying on *Blatt v. Cabela's Retail, Inc.*, 2017 WL 2178123 (E.D. Pa. May 18, 2017). (Doc. 1 ¶¶ 81–84.) To reach the result sought by Plaintiff here, the court in *Blatt* effectively wrote the exclusion out of the text of the statute; its reasoning should not be followed. The court held that while the ADA excluded "gender identity disorders not resulting from physical impairments" from the definition of "disability," Congress did not intend "to exclude from ADA coverage of disabling conditions that persons who identify with a different gender may have—such as Blatt's gender dysphoria, which substantially limits her major life activities of interacting with others, reproducing, and social and occupational functioning." *Id.*

[5] The same standards govern discrimination under Section 504 and the ADA. *Moore v. Chilton Cty. Bd. of Educ.*, 1 F. Supp. 3d 1281, 1292 (M.D. Ala. 2014) (citing *T.W. ex rel. Wilson v. Sch. Bd. of Seminole Cnty.*, 610 F.3d 588, 604 (11th Cir. 2010). Accordingly, the cases above in the ADA context apply equally to Plaintiff's Section 504 claim.

at *3. Thus, because the plaintiff in *Blatt* had alleged that her gender dysphoria substantially limited her life activities, the court concluded that her disorder was not included within Section 12211(b)(1) exclusion. *Id.* at *4.

What the court in *Blatt* overlooked—or disregarded—is that *all* "disabilities," as defined under the ADA, must substantially limit one or more major life activities in order to qualify as a disability in the first place. 42 U.S.C. § 12102(1)(A). Thus, gender identity disorders that do not substantially limit a major life activity are *already excluded from coverage* under the statute's definition of "disability." The *Blatt* court's determination that an express exclusion from the definition of disability must be limited to any conditions not substantially limiting a major life activity would render the exclusion itself a nullity and entirely superfluous. Courts should "avoid interpreting a provision in a way that would render other provisions of the statute superfluous." *Black Warrior Riverkeeper, Inc. v. Black Warrior Minerals, Inc.*, 734 F.3d 1297, 1303 (11th Cir. 2013).

The court in *Parker v. Strawser Constr., Inc.*, 307 F. Supp. 3d 744 (S.D. Ohio 2018), recognized *Blatt*'s flawed logic and strongly disagreed. "This Court can find no support, textual or otherwise, for the *Blatt* court's interpretation. The exclusion plainly applies to all 'gender identity disorders not resulting from physical impairments,' without any regard to whether the gender identity disorder is disabling." *Id.* at 754. Further, "[t]he clear result is that Congress intended to exclude from the ADA's protection both disabling and non-disabling gender identity disorders that do not result from a physical impairment." *Id.* The *Parker* Court held that the plaintiff's gender dysphoria was excluded from coverage under the ADA. *Id.* at 755.

The *Parker* court's holding is bolstered by a significant body of case law reaching the same result. The clear weight of authority from other federal courts is that Plaintiff's claim is not a

protected disability under the ADA and the Rehabilitation Act.[6] *Williams v. Daley*, 2018 WL 1937339, at *2 (E.D. Ky. Apr. 24, 2018) (gender identity disorders "are not 'disabilities' under the ADA"); *Gulley-Fernandez v. Wisconsin Dep't of Corr.*, 2015 WL 7777997, at *3 (E.D. Wis. Dec. 1, 2015) ("gender identity disorder is not a 'disability' under the Americans with Disabilities Act or the Rehabilitation Act"); *Mitchell v. Wall*, 2015 WL 10936775, at *2 (W.D. Wis. Aug. 6, 2015) ("[gender identity disorder] is specifically excluded as a disability under the ADA and Rehabilitation Act"); *Michaels v. Akal Security, Inc.*, 2010 WL 2573988 at *6 (D. Colo. June 24, 2010) ("[g]ender dysphoria . . . is specifically exempted as a disability by the Rehabilitation Act").

2. Plaintiff's Title VII Claim Should Be Dismissed.

Plaintiff's claim under Title VII similarly fails because transgender status, standing alone, is not protected under that statute. Title VII provides that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's . . . sex." 42 U.S.C. § 2000e–2(a)(1). The Supreme Court has made it clear that this provision means what it says: it protects against "discrimination *because of sex*." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (emphasis added). Preliminarily, the coverage exclusion in the Plan is not discriminatory because of sex in the sense that it treats men and women in the same manner; the coverage exclusion does not differentiate because of sex in any manner. Moreover, courts addressing direct allegations of discrimination in the workplace due to an employee's transsexual status have found such claims not to be actionable under Title VII. "Title VII does not protect transsexuals as a class." *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1266 (11th Cir. 2017) (Rosenbaum, J., concurring); *see also Etsitty v. Utah Transit Auth.*, 502 F.3d

[6] State courts have reached the same result. *Arledge v. Peoples Servs., Inc.*, 2002 WL 1591690, at *2 (N.C. Super. Apr. 18, 2002); *Conway v. City of Hartford*, 1997 WL 78585, at *5 (Conn. Super. Ct. Feb. 4, 1997).

1215, 1221 (10th Cir. 2007) ("This Court agrees with . . . the vast majority of federal courts to have addressed this issue and concludes discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII."); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984) (plaintiff who was allegedly discriminated against as a transsexual, rather than as a woman or a man, was not afforded to protection under Title VII); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) ("Because Congress has not shown an intention to protect transsexuals, we hold that discrimination based on one's transsexualism does not fall within the protective purview of [Title VII].").

Plaintiff may erroneously cite decisions such as *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), to argue that transsexualism is protected under Title VII. In *Glenn*, the plaintiff was diagnosed with gender identity disorder and began her transition to a female while working for the Georgia General Assembly's Office of Legislative Counsel. *Id.* at 1313–14. She was fired after informing her supervisor that she was changing her name and would begin presenting as a female. *Id.* at 1314. The Eleventh Circuit, following the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), held that alleged discrimination based on gender-nonconformity is a form of proscribed discrimination. *Id.* at 1317.

The critical distinction between Plaintiff's Title VII claim against BCBSGA and *Glenn*, *Hopkins*, and their progeny is that gender-nonconformity is not alleged to have been the basis for the purported discrimination here. Instead, Plaintiff's allegations of discrimination are based on his *status* as a transgendered individual, which is not actionable under Title VII, and not an allegation of failing to conform to gender stereotypes, as in *Glenn*. (Doc. 1 ¶ 135.) *See Evans*, *supra*, 850 F.3d at 1260-61 (Pryor, J. concurring) (addressing distinction between status-based claims and gender-conformity claims).

Finally, Plaintiff's Complaint cites *Tovar v. Essentia Health*, 857 F.3d 771, 778 (8th Cir. 2017), for the proposition that "a third-party administrator can be the source of a discriminatory plan document and be held liable under Section 1557" where an employer adopts a plan received from the administrator. (Doc. 1 ¶ 135 n. 10.) *Tovar* is inapposite. First, the *Tovar* court permitted an Affordable Care Act claim to proceed, but the court affirmed the dismissal of the plaintiff's Title VII claim. *Id.* at 777. A second issue in *Tovar* was whether the plaintiff-employee had Article III standing against her employer and her employer's claims administrator for the denial of benefits for her son's gender dysphoria treatments. *Id.* at 773–74, 777–79. The plaintiff specifically asserted in her complaint that her employer adopted a plan and policy documents originally created by the third-party administrator. *Id* at 773. The Eighth Circuit held that the plaintiff had Article III standing against the third-party administrator because the alleged discriminatory policy allegedly *originated with the third-party administrator*. *Id.* at 778. Plaintiff makes no such factual allegations here. He expressly states in his Complaint that the Board of Regents was "the body responsible for determining coverage." (Doc. 1 ¶ 55.) Accordingly, Plaintiff's reliance on *Tovar* is misplaced, and his Title VII claim against BCBSGA should be dismissed.

F. Plaintiff's Title VII Claim Is Pled Inappropriately in "Shotgun" Fashion.

If this Court does not dismiss Plaintiff's Title VII claim against BCBSGA for the various reasons explained above, Count Five of Plaintiff's Complaint should also be dismissed because it is an inappropriate "shotgun" pleading. Specifically, Plaintiff pleads theories of both disparate impact and disparate treatment in the same count. (Doc. 1 ¶¶ 128–46.) The manner in which the claims are pled makes it impossible to discern whether both claims are alleged against all Defendants or not. (*Id.* ¶¶ 142–46.) This is inappropriate and is grounds for dismissal. *Popham v. Cobb Cty.*, 2009 WL 2425954, at *2 (N.D. Ga. Aug. 5, 2009) ("Shotgun pleadings have been

actively condemned in this Circuit.") (citing *Davis v. Coca–Cola Bottling Co. Consol.*, 516 F.3d 955, 979 (11th Cir. 2008)); *see also Davis v. Infinity Ins. Co.*, 2016 WL 4507122, at *20 (N.D. Ala. Aug. 29, 2016) (dismissing the plaintiff's complaint for, *inter alia*, shotgun pleading claims of disparate impact and disparate treatment). Plaintiff's Title VII claim should therefore be dismissed for this separate and independent reason.

G. The ADA's Safe Harbor Provision for Plan Administrators Precludes Plaintiff's ADA Claims.

Plaintiff's ADA claims fail for the separate reason that the ADA's safe harbor provision specifically shields insurers and health benefit plan administrators from liability as long as their administration of risks "are based on or not inconsistent with State law." 42 U.S.C. § 12201(c); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 608 (3d Cir. 1998) ("The ADA does not require equal coverage for every type of disability; such a requirement, if it existed, would destabilize the insurance industry in a manner definitely not intended by Congress when passing the ADA."); *Ross v. Hartford Life & Accident Ins. Co.*, 2015 WL 5680329, at *2–3 (D. Mass. Sept. 25, 2015) (granting insurer's motion to dismiss where insurance policy was offered to all eligible employees and commenting "the ADA itself acknowledges that insurance companies may make rational distinctions between different ailments"); *Mugno v. Societe Int'l de Telecommunications Aeronautiques, Ltd.*, 2007 WL 316572, at *4–5 (E.D.N.Y. Jan. 30, 2007) (dismissing plaintiff's ADA claim because the insurer's actions fell within the safe harbor provision and plaintiff failed to sufficiently allege an exception). Plaintiff's claims are based entirely on the terms of the Plan, and even if BCBSGA were responsible for the terms of the Plan (which it is not, *see infra* Section II.), Plaintiff has made no allegation that the terms of the Plan are inconsistent with Georgia law. Nor has Plaintiff made a showing that the safe harbor provision does not apply. Absent such an

allegation or showing, the safe harbor established by the ADA applies to these claims, and dismissal of the ADA claims is warranted.

II. Plaintiff Lacks Article III Standing to Sue BCBSGA.

This Court lacks subject matter jurisdiction over Plaintiff's claims against BCBSGA under Article III of the U.S. Constitution, warranting dismissal of all claims against BCBSGA under Rule 12(b)(1). Article III standing requires Plaintiff to show an "injury in fact" that is "fairly traceable" to BCBSGA's conduct and "that is likely to be redressed by a favorable judicial decision." *Bank of Am. Corp. v. City of Miami, Fla.*, 137 S. Ct. 1296, 1302 (2017). As reflected in the Complaint, Plaintiff's alleged injuries are not fairly traceable to the challenged actions of BCBSGA, and it is at best speculative that his alleged injuries could be redressed by a favorable decision against BCBSGA.

A. Plaintiff's Injuries Are Not Traceable to BCBSGA.

Article III standing requires that the injuries complained of be "fairly traceable" to the challenged action of the defendant, and not the result of the independent action of a third party. *Hollywood Mobile Estates Ltd. v. Seminole Tribe of Fla.*, 641 F.3d 1259, 1265 (11th Cir. 2011) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Here, the Plan documents incorporated into the Complaint by reference specifically provide that BCBSGA is solely the claims administrator for the Plan and that the Plan's terms are chosen "by the Plan Sponsor to fund and provide delivery of the Employer's health benefits." (Doc. 1-2 p. 92.) Consistent with that allocation of responsibility, BCBSGA's letter denying Plaintiff's benefits appeal explains that while BCBSGA is the claims administrator of the Plan, the BOR funds the Plan and, as such, BCBSGA had no flexibility in overriding the benefits the BOR chose for Plan participants. (Doc. 1-6 p. 2.) Plaintiff acknowledges in the Complaint that BCBSGA does not control the terms of

the Plan, noting that he petitioned the BOR to change the terms of the Plan as "the body responsible for determining coverage." (Doc. 1 ¶ 55.) *Cf. Tovar*, *supra*, 857 F.3d at 773 (concluding plaintiff had standing because claims administrator was alleged to have created terms of plan). Because his alleged injuries are not fairly traceable to BCBSGA, Plaintiff lacks Article III standing as to BCBSGA.

B. Plaintiff's Injuries Are Not Redressable By BCBSGA.

The element of redressability requires that "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561. "Redressability is established when a favorable decision would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered." *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1290 (11th Cir. 2010). The Court must be able "to ascertain from the record whether the relief requested is likely to redress the alleged injury." *Steele v. Nat'l Firearms Act Branch*, 755 F.2d 1410, 1413–14 (11th Cir. 1985).

Plaintiff seeks, *inter alia*, equitable relief in the form of preliminary and permanent injunctions against BCBSGA to prevent it from enforcing or applying the Plan's exclusion for any treatments or procedures for gender dysphoria. (Doc. 1 p. 43.) As recognized by Plaintiff and as set forth in the Plan documents, BCBSGA is only the claims administrator of the Plan and has no authority to change the Plan's coverage. (Doc. 1 ¶ 55; Doc. 1-2 p. 92; Doc. 1-6 p. 2.) Accordingly, even if Plaintiff were successful, the relief to address his claims directly is unavailable from BCBSGA. For this separate reason, Plaintiff thus lacks Article III standing to sue BCBSGA.

CONCLUSION

For these reasons, the Court should thus dismiss all of the claims against BCBSHP with prejudice and not permit Plaintiff to re-plead its claims against BCBSGA.

Respectfully submitted, this 24th day of August 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2018, I filed the foregoing Brief in Support of Defendant Blue Cross Blue Shield Healthcare Plan of Georgia's Motion to Dismiss Plaintiff's Complaint via the Court's CM/ECF system which will serve a copy on all counsel of record.

/s/ James A. Washburn

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