

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

SKYLER MUSGROVE,)	Civil Action No.
)	
Plaintiff,)	3:18-cv-00080-CDL
)	
v.)	JURY TRIAL DEMANDED
)	
THE BOARD OF REGENTS OF THE)	
UNIVERSITY SYSTEM OF GEORGIA,)	
JAMES HULL, UNIVERSITY OF GEORGIA,)	
JERE MOREHEAD, KARIN ELLIOTT, BLUE)	
CROSS BLUE SHIELD HEALTHCARE PLAN)	
OF GEORGIA, INC., METROPOLITAN LIFE)	
INSURANCE COMPANY, and METLIFE, INC.)	
)	
<u>Defendants.</u>)	

**PLAINTIFF’S SUPPLEMENTAL BRIEF PROVIDING AUTHORITY
CITED AT FEBRUARY 6, 2019 ORAL ARGUMENT AND PROPOSITIONS
FOR WHICH AUTHORITIES WERE CITED, AND CLARIFYING ITS
POSITION REGARDING ELEVENTH CIRCUIT AUTHORITY**

At oral argument in this case on February 6, 2019 (“Oral Argument”) regarding the Partial Motion to Dismiss on behalf of Defendants Board of Regents of the University System of Georgia, James Hull, Jere Morehead, and Karin Elliott, each in their official capacities, and the Defendant Blue Cross Blue Shield Healthcare Plan of Georgia, Inc.’s (BCBS) Motion to Dismiss, this Court invited the parties to provide a list of any authorities that were discussed at Oral Argument but not briefed prior to Oral Argument, and a brief description of the propositions for which those authorities were cited.

Accordingly, Plaintiff Skyler Musgrove (“Mr. Musgrove” or “Plaintiff”), by and through the undersigned counsel, hereby files this supplemental brief, which provides the relevant authorities discussed at Oral Argument and the propositions for which they were cited,¹ and clarifies the Plaintiff’s position regarding three Eleventh Circuit cases.

I. BCBS is a Recipient of Federal Financial Assistance Under Section 504 of the Rehabilitation Act

A. *Austin v. Blue Cross and Blue Shield of Alabama*, No. 4:09-1647-VEH, 2009 WL 10703738, at *1 (N.D. Ala. 2009) (permitting Plaintiff to amend complaint to include Rehabilitation Act claim and concluding that such a claim was not futile based on, *inter alia*: (1) the Eleventh Circuit’s conclusion in *Arline v. School Bd. of Nassau County*, 772 F.2d 759, 762 n.9 (11th Cir. 1985), *aff’d* 480 U.S. 273 (1987), that the term “federal financial assistance” must be interpreted broadly “in order to give effect to the broad legislative intent expressed in section 504”; and (2) the Southern District of New York’s conclusion in *Bernard B. v. Blue Cross and Blue Shield of Greater New York*, 528 F. Supp. 125, 132 (S.D.N.Y. 1981) that “Blue Cross ha[d not] established that no genuine issues of material fact remain on this point [of federal financial assistance] and that it is entitled to judgment as a matter of law. Blue Cross acts as a conduit for Medicare funds,

¹ At Oral Argument, Plaintiff’s counsel submitted to the Court and to Defendants’ counsel an appendix containing the documents listed below at II.B-D and IV.A-B.

performing various functions and ultimately distributing the funds. Blue Cross additionally receives payment for administrative expenses. Plaintiffs have raised a genuine issue of material fact concerning the intermingling of Medicare and other Blue Cross funds and lumping of expenses such that federal Medicare funds may play a part in enabling Blue Cross to carry on both Medicare and non-Medicare activities.”).

B. *Arline v. School Bd. of Nassau County*, 772 F.2d 759, 762 & n.9 (11th Cir. 1985), *aff'd* 480 U.S. 273 (1987) (“Congress intentionally gave broad scope to the term ‘federal financial assistance’ in section 504. As this court pointed out in *Jones*, ‘the legislative history to the 1974 amendments is replete with notations indicating that Section 504 was intended to encompass programs receiving federal financial assistance of any kind.’”) (citations omitted).

C. 45 C.F.R. § 92.4 (“Federal financial assistance the Department [of Health and Human Services] provides or otherwise makes available includes Federal financial assistance that the Department plays a role in providing or administering, including all tax credits under Title I of the [Affordable Care Act], as well as payments, subsidies, or other funds extended by the Department to any entity providing health-related insurance coverage for payment to or on behalf of an individual obtaining health-related insurance coverage from that entity or extended by the Department directly to such individual for payment to any entity providing health-related insurance coverage.”). BCBS indicated at the Oral Argument that it

participates in the health insurance Exchange. As such, it receives payments (not tax credits) from the federal government related to individual consumers who receive tax credits or cost-sharing reductions in order to help them purchase BCBS's insurance plans. This is pursuant to 42 U.S. Code § 18082(a)(3) ("the Secretary of the Treasury makes advance payments of such credit or reductions *to the issuers of the qualified health plans* in order to reduce the premiums payable by individuals eligible for such credit.") (emphasis added).

II. Gender Dysphoria is Not Excluded from the ADA or Section 504

A. *Edmo v. Idaho Dept of Corrections*, No. 1:17-cv-00151-BLW, 2018 WL 2745898, at *8 (D. Idaho, June 7, 2018) ("[T]he issue of whether Edmo's diagnosis falls under a specific exclusion of the ADA presents a genuine dispute of material fact in this case. Therefore, Edmo's ADA claim will not be dismissed.>").

B. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 20, 451-59, 685-86, 704, 814-15 (5th ed. 2013) (excerpting relevant portions of DSM-5 discussing diagnosis of gender dysphoria).

C. Christine Michelle Duffy, *The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973*, in GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE: A PRACTICAL GUIDE ch. 16, Exhibits 16.1 to 16.6 (Christine Michelle Duffy ed. Bloomberg BNA 2014)

(providing charts depicting changes to DSM from first edition (1952) to fifth edition (2013)).

D. Excerpts from Congressional Record: 135 Cong. Rec. S10753 – S10755, 1989 WL 183115 (daily ed. Sept. 7, 1989); 135 Cong. Rec. S10765 – S10803, 1989 WL 183216 (daily ed. Sept. 7, 1989); 135 Cong. Rec. S11173 – S11178, 1989 WL 183785 (daily ed. Sept. 14, 1989) (excerpting legislative history showing moral animus behind Congress’ exclusion of (now obsolete) medical diagnoses of gender identity disorders and transsexualism).

III. Mr. Musgrove’s Claims Against the Board of Regents et al. for Money Damages Under Titles I and II of the ADA are Not Barred by Sovereign Immunity Pursuant to *United States v. Georgia*’s “Actual Violation” Theory

A. SAMUEL R. BAGENSTOS,² *DISABILITY RIGHTS LAW: CASES AND MATERIALS* 453-54 (2d ed. 2014) (stating that, pursuant to *United States v. Georgia*, “[w]hen a plaintiff alleges that the state violated Title II in a way that also violated her Fourteenth Amendment rights (including her rights under the Bill of Rights provisions incorporated into the Fourteenth Amendment), the statute will be valid enforcement legislation as applied to her case,” and distinguishing *Tennessee v. Lane* and *Bd. of Trs. of the Univ. of Ala. v. Garrett*) (emphasis added).

B. At Oral Argument, this Court asked whether Mr. Musgrove alleged, in separate counts of the Complaint, actual violations of equal protection based on

² Professor Samuel Bagenstos is the former Principal Deputy Assistant Attorney General for Civil Rights at the U.S. Department of Justice and represented the petitioner in *U.S. v. Georgia*, 546 U.S. 151 (2006).

disability, sex, and transgender status. Mr. Musgrove has done so. *See* Compl. ¶¶ 158 (Count VII - disability), 167 (Count VIII - sex), 171 (Count IX - transgender status).

IV. BCBS Can be Held Liable Under Title III of the ADA

A. *Fletcher v. Tufts University*, 367 F. Supp. 2d 99, 115 (D. Mass. 2005) (denying motion to dismiss and holding that employee of Tufts University could sue the Metropolitan Life Insurance Company for its discriminatory employer-sponsored disability benefits plan under Title III of the ADA).

B. *Boots v Nw. Mut. Life. Ins. Co.*, 77 F. Supp. 2d 211, 214-16 (D.N.H. 1999) (denying motion to dismiss and holding that employee could sue Northwestern Mutual Life Insurance Company for its discriminatory employer-sponsored disability benefits plan under Title III of the ADA); *see also id.* at 215-16 (distinguishing Seventh Circuit's decision in *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999) (Posner, C.J.) on grounds that its reasoning was inconsistent with, *inter alia*, the Supreme Court's decision in *Bragdon v. Abbott*, 524 U.S. 624 (1998), the First Circuit's decision in *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994), the ADA's plain language, and Department of Justice guidance).

Additionally, Judge Posner's decision in *Doe* is inapplicable here for several reasons. First, it applied to an *insurance* policy rather than an administrative services-only contract—the third-party administrator services provided by BCBS

that are at issue here. Unlike insurance, where there are perhaps complex actuarial considerations, BCBS has emphasized repeatedly that it is not responsible for paying claims under the plan, so it has no actuarial dogs in this fight. To the extent that BCBS is doing the work of providing vital actuarial advice to its clients, that weighs in favor of liability under Title I. But it has also repeatedly said that its advice is optional, indicating it is not in any way related to the sound actuarial functioning of the plan and amounts to little more than advising employers, “if you want to save some money on claims, do it at the expense of people diagnosed with gender dysphoria.” Second, *Doe* justified the practice of capping AIDS-related care on the fact that in 1999 it was standard for most health-insurance policies to contain benefits caps as well as outright exclusions for pre-existing conditions. *Doe*, 179 F.3d at 559. The Affordable Care Act has significantly changed the field of health insurance by mostly eliminating pre-existing condition bans, 45 C.F.R. § 147.108, as well as annual- and lifetime-coverage caps, 45 C.F.R. § 147.126, and Judge Posner’s analysis would necessarily be very different today. Third, Judge Posner was very concerned about preemption by the McCarran-Ferguson Act and the displacement of regulation of the insurance industry into the federal courts. Since this is a self-funded plan and not an insurance plan, McCarran-Ferguson simply does not apply. Finally, Judge Posner made much of the idea of regulating the “content” of goods and services. He would suggest that a blind individual could not sue a bookstore for refusing to sell audiobooks, therefore an individual cannot

sue an insurance provider for failing to cover a particular disease. But the more analogous situation is a bookstore that sells audiobooks to sighted customers but refuses to sell them to a blind customer—the services of a place of public accommodation absolutely are covered under Title III. In this case, BCBS sells administrative-services-only contracts, and rooted in its contract is a disability-based refusal to serve people with gender dysphoria that is no different than the bookstore refusing to serve blind customers. The plan offered by BCBS covers all medically necessary mastectomies for people without gender dysphoria—such as for women who have been diagnosed with breast cancer—yet denies medically necessary mastectomies where the person’s diagnosis is gender dysphoria. This is precisely the type of disability discrimination by places of public accommodation that Title III is designed to remedy.

V. Clarification of Three Eleventh Circuit Cases

A. At Oral Argument, the Court inquired into the holding of *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011). In *Glenn*, the Eleventh Circuit held that “discrimination against a transgender individual because of h[is] gender-nonconformity”—that is, because his “behavior transgresses gender stereotypes”—“is sex discrimination” in violation of equal protection.³ *Id.* at 1316-17, 1320; *see*

³ Although *Glenn* involved the discharge of an employee, the case was decided under the equal protection clause. Its equal protection analysis is not limited to sex discrimination in the workplace, but rather applies broadly to all government sex-based classifications.

also id. at 1316 (“A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. ‘[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.’ . . . There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms.”).

Consistent with *Glenn*, Mr. Musgrove has alleged that the Defendants have violated Title VII, Title IX, and the equal protection clause by discriminating against him “on the basis of,” *inter alia*, “nonconformity with sex- or gender-based stereotypes.” Compl. ¶¶ 131 (Title VII), 149 (Title IX), 166 (equal protection). According to the Complaint, “transitioning sexes is the ultimate violation of sex stereotypes. It is assumed that people born with typical female sex characteristics are physically and mentally female and will live as women. Plaintiff, being a man who was born with typical female sex characteristics, does not conform to the stereotype that one’s sex matches one’s sex-based external anatomy at birth.” *Id.* ¶ 145. The insurance exclusion “is . . . therefore sex discrimination on the basis of sex stereotyping, which has long been prohibited under Title VII.” *Id.* “[T]here is no legitimate, nondiscriminatory basis for providing [Mr. Musgrove] with substandard benefits other than his status as someone who does not conform to the stereotypes associated with his external sex characteristics at birth.” *Id.* ¶ 146.

In addition to alleging discrimination based on sex stereotypes, Mr. Musgrove has alleged that the Defendants' insurance exclusion "is literally discrimination *because of sex*." *Id.* ¶ 138 (emphasis in original). "[T]he denial is stemming from a reluctance to let people change sex characteristics where the *purpose* of the treatment is to change sex characteristics." *Id.* ¶ 139 (emphasis in original); *see also* Compl. ¶¶ 131 (Title VII), 149 (Title IX), 166 (equal protection).

B. In briefing and at Oral Argument, BCBS cited the Eleventh Circuit's decision in *Cramer v. State of Fla.*, 117 F.3d 1258, 1263 (11th Cir. 1997) for the proposition that Plaintiff's Title I ADA claim against BCBS is "patently frivolous." Given the gravity of this statement and its repeated assertion, Mr. Musgrove wishes to clarify the response he provided in his opposition brief. *See* Pl.'s Br. Opp. BCBS's Mot. Dismiss at 7. *Cramer* is easily distinguishable from this case both factually and legally. The plaintiffs in *Cramer* sued their employers and their employers' worker's compensation insurance carriers under the ADA for merely following a state statutory scheme that mandated the amount of benefits that an injured worker could receive based on an impairment rating schedule. The question in that case was "[w]hether the Florida law's use of impairment ratings violates Title I of the ADA." *Id.* at 1261. This case is very different. There is no state statute that requires BCBS to provide fewer benefits to employees because they have gender dysphoria. There is no law that requires BCBS to discriminate.

Here, the Defendants are not following a mandatory, non-discriminatory state statutory scheme; they are *choosing* to discriminate.

Cramer is also distinguishable on legal grounds. Throughout the opinion, the court harshly criticized the plaintiffs' counsel for inadequate, "practically incomprehensible . . . shotgun" briefing and "reprehensible" lawyering and ordered the plaintiffs' attorneys to show cause why sanctions should not issue against them for their unethical conduct. *Id.* at 1261 n.5, 1263, 1265. According to the court, the plaintiffs "pled no facts" to support their theory of a supposed "conspiracy" among the employers and the insurance carriers, and the plaintiffs also "cited no authority which holds, or even hints at the possibility," that the defendants could be held liable under the ADA. *Id.* at 1263-65. Here, by contrast, Mr. Musgrove has pled facts to support his claim that BCBS's conduct was discriminatory under Title I of the ADA, and he has cited authority that demonstrates that BCBS can be held liable as an agent of the employer under Title I. *See* Pl.'s Br. Opp. BCBS's Mot. Dismiss at 7-9. Critically, the Eleventh Circuit in *Cramer* never addressed any of this authority—indeed, the court's two-sentence conclusion is entirely bereft of analysis—because the plaintiffs' counsel provided no authority.

C. At Oral Argument, the Court did not inquire into BCBS's argument, raised for the first time in its supplemental brief filed on January 23, 2019, that BCBS is an "arm of the state." BCBS's Supp'l Br. Regarding Eleventh Amdt. Immunity at 3. No party addressed the argument at Oral Argument. Because Mr.

Musgrove did not have the opportunity to brief the issue, he wishes to clarify that he vigorously disagrees with BCBS's argument. As Mr. Musgrove stated at Oral Argument, this case is not about whether BCBS merely "fail[ed] to award benefits" provided for under a health plan, as BCBS argues. *Id.* at 5. As Mr. Musgrove states in his Complaint, the particular function at issue in this case is BCBS's "offering a healthcare policy" that contains a discriminatory blanket exclusion of treatment for gender dysphoria. BCBS cites no case holding that BCBS was an arm of the state for purposes of immunity from suit for discrimination under Title I of the ADA, and Mr. Musgrove could find none. In any event, a decision regarding whether BCBS is an arm of the state is inappropriate at this stage of the litigation given unresolved predicate factual questions, as the Eleventh Circuit has implicitly acknowledged. *See Rosario v. Am. Corrective Counseling Servs.*, 506 F.3d 1039, 1044-46 (11th Cir. 2007) (refusing to extend Eleventh Amendment immunity to private, for-profit company at summary judgment stage based on, *inter alia*, deposition testimony and contract terms), *cited in* BCBS's Supp'l Br. Regarding Eleventh Amdt. Immunity at 4.

Respectfully submitted this 8th day of February, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Plaintiff's Supplemental Brief Providing Authority Cited at February 6, 2019 Oral Argument And Propositions For Which Authorities Were Cited, and Clarifying Its Position Regarding Eleventh Circuit Authority was filed using the CM/ECF system, which will send electronic notification to all attorneys of record.

Respectfully submitted this 8th day of February, 2019.

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