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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

C. P., by and through his parents, Patricia Pritchard and Nolle Pritchard, individually and on behalf of others similarly situated; and PATRICIA PRITCHARD,

Plaintiff,

v.

BLUE CROSS BLUE SHIELD OF ILLINOIS,

Defendant.

CASE NO. 3:20-cv-06145-RJB

ORDER REGARDING DRAFT ORDERS

This matter comes before the Court on the parties cross motions for summary judgment (Dkts. 87 and 96) and the Order Certifying Class. The Court has considered the pleadings filed regarding the motions and order and is fully advised.

Oral argument on the motions for summary judgment is set for Dec. 12, 2022 at 11:00 a.m. by Zoom. Attached are draft orders on both the motions for summary judgment and on the amended order certifying class. THESE ARE DRAFT ORDERS ISSUED FOR DISCUSSION PURPOSES ONLY.

1 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
2 to any party appearing pro se at said party's last known address.

3 Dated this 7th day of December, 2022.

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6 ROBERT J. BRYAN
7 United States District Judge

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C. P., by and through his parents, Patricia Pritchard and Nolle Pritchard, individually and on behalf of others similarly situated; and PATRICIA PRITCHARD,

Plaintiff,

v.

BLUE CROSS BLUE SHIELD OF ILLINOIS,

Defendant.

CASE NO. 3:20-cv-06145-RJB

**DRAFT AMENDED ORDER
CERTIFYING CLASS**

This matter comes before the Court *sua sponte* on review of the record. The Court has reviewed the record and is fully advised.

On November 9, 2022, a class was certified in this case. Dkt. 113. The Court issued an order noting that orders on class certifications can be amended before final judgment under Fed. R. Civ. P. 23(c)(1)(C) and that the one entered in this case should have included the “class claims, issues and defenses.” Dkt. 119. The Plaintiffs were ordered to file a proposed amended

1 order. *Id.* On November 29, 2022, the Plaintiffs filed a proposed order recommending that the
2 Court adopt the claims and relief sought as they appear in the Amended Complaint. Dkt. 131.

3 The order certifying a class in this case should be amended (with the newly added
4 provisions in bold) and read as follows:

5 The class is composed of all individuals who:

6 (1) have been, are, or will be participants or beneficiaries in an
7 ERISA self-funded “group health plan” (as defined in 29 U.S.C. §
8 1167(1)) administered by Blue Cross Blue Shield of Illinois during
the Class Period and that contains a categorical exclusion of some
or all Gender-Affirming Health Care services; and

9 (2) were, are, or will be denied pre-authorization or coverage of
10 treatment with excluded Gender Affirming Health Care services

11 DEFINITIONS:

12 “Class Period” means November 23, 2016 through the termination
of the litigation.

13 “Gender-Affirming Health Care” means any health care service—
14 physical, mental, or otherwise—administered or prescribed for the
treatment of gender dysphoria; related diagnoses such as gender
15 identity disorder, gender incongruence, or transsexualism; or
gender transition. This includes but is not limited to the
16 administration of puberty delaying medication (such as
gonadotropin-releasing hormone (GnRH) analogues); exogenous
17 endocrine agents to induce feminizing or masculinizing changes
 (“hormone replacement therapy”); gender-affirming or “sex-
18 reassignment” surgery or procedures; and other medical services or
preventative medical care provided to treat gender dysphoria
19 and/or related diagnoses, as outlined in World Professional
Association for Transgender Health, Standards of Care for the
20 Health of Transsexual, Transgender, and Gender Nonconforming
People, 7th Version (2012).

21 **The class asserts claims that Blue Cross Blue Shield of Illinois violated the**
22 **anti-discrimination provision of the Affordable Care Act, 42 U.S.C. § 18116,**
23 **when it administered discriminatory exclusions of gender-affirming care in a**
24 **self-funded health care plans governed by the Employee Retirement Income**
Security Act of 1974.

1 **The class seeks declaratory relief. They seek an order enjoining Blue Cross**
2 **Blue Shield of Illinois from administering or enforcing health benefit plans**
3 **that exclude coverage for gender-affirming health care, including applying or**
4 **enforcing the plans’ exclusions of services for, or leading to, gender**
5 **reassignment surgery,’ and other similar exclusions during the class period,**
6 **now and in the future. The class seeks an order requiring Blue Cross Blue**
7 **Shield of Illinois to reprocess denied pre-authorizations and claims for**
8 **gender affirming care under the relevant self-funded health care plans**
9 **without applying the discriminatory exclusions, and when medically**
10 **necessary and meeting the other terms and conditions of the relevant plans,**
11 **provide coverage (payment) for those denied pre-authorizations and claims**
12 **that were based solely on exclusions for gender affirming care.**

13 **Blue Cross Blue Shield of Illinois raises several defenses, including that the**
14 **anti-discrimination provision of the Affordable Care Act, 42 U.S.C. § 18116**
15 **does not apply to it, and even if it did, its third-party administration of the**
16 **exclusions was not discriminatory. Blue Cross Blue Shield also contends that**
17 **it is protected by the Religious Freedom Restoration Act.**

18 Plaintiff C.P., by and through his parents, is appointed as class representative, and

19 Eleanor Hamburger and Daniel Gross of Sirianni Youtz Spoonemore Hamburger,
20 as well as Jennifer Pizer and Omar Gonzalez-Pagan of the Lambda Legal Defense
21 and Education Fund are appointed as class counsel.

22 The reasoning from the prior order (Dkt. 119) applies.

23 **IT IS SO ORDERED.**

24 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
to any party appearing pro se at said party’s last known address.

Dated this __ day of December, 2022.

DRAFT

Robert J. Bryan
United States District Judge

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

C. P., by and through his parents, Patricia Pritchard and Nolle Pritchard, individually and on behalf of others similarly situated; and PATRICIA PRITCHARD,

Plaintiff,

v.

BLUE CROSS BLUE SHIELD OF ILLINOIS,

Defendant.

CASE NO. 3:20-cv-06145-RJB

DRAFT ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the Court on the Defendant Blue Cross Blue Shield of Illinois’ (“Blue Cross”) Motion for Summary Judgment (Dkt. 87) and the Plaintiffs’ Cross Motion for Summary Judgment (Dkt. 96) and Plaintiffs’ motion to strike (Dkt. 126). The Court has considered the pleadings filed in support of and in opposition to the motions and the file herein.

In this case, Plaintiffs C.P., a transgender male, and his mother, Patricia Pritchard, claim that Blue Cross violated the anti-discrimination provision of the Affordable Care Act (“ACA”), 42 U.S.C. § 18116, when it administered discriminatory exclusions of gender-affirming care in a

1 self-funded health care plans governed by the Employee Retirement Income Security Act of
2 1974 (“ERISA”). Dkt. 1. The Plaintiffs’ motion to certify a class of similarly situated people
3 was granted on November 9, 2022. Dkt. 113.

4 Blue Cross moves for summary judgment on Plaintiffs C.P. and Ms. Pritchard’s claims.
5 Dkt. 87. Plaintiffs C.P. and Ms. Pritchard cross move for summary judgment on their claims as
6 well as the class claims. Dkt. 96. For the reasons provided below, Blue Cross’s Motion for
7 Summary Judgment (Dkt. 87) should be denied and Plaintiffs’ Motion for Summary Judgment
8 (Dkt. 96) and motion to strike (Dkt. 126) should be granted.

9 **I. RELEVANT FACTS, PROCEDURAL HISTORY, AND STATUTORY**
10 **BACKGROUND**

11 **A. FACTS**

12 Named Plaintiffs are C.P., a boy of seventeen, and his mother, Ms. Pritchard. Dkt. 38. C.P.
13 is a transgender male, which means that he has a male gender identity even though the sex
14 assigned to him at birth was female. *Id.* C.P. has been living as a male since around 2015. Dkt.
15 94-1 at 135.

16 Ms. Pritchard receives health care coverage through her employer under the Catholic Health
17 Initiatives (“CHI”) Medical Plan (“the Plan”) and C.P. is enrolled in that Plan as her dependent.
18 Dkts. 81; 97-12 at 8. The Plan is “self-funded” - Ms. Pritchard’s employer directly assumes
19 financial responsibility for employees and their dependents’ health care costs. Dkt. 88-1 at 11.

20 Defendant, Blue Cross, acts as the third-party claims administrator for the Plan. Dkt. 85-10.
21 As a third-party administrator, it “assemble[s] a network of providers, process[es] claims, and
22 handle[s] provider billing.” Dkt. 88-1 at 11. Blue Cross is a division of Health Care Services
23 Corporation and is one of the largest administrators of insured and self-funded health plans in the
24 nation. *Id.* at 206. It does not receive Federal financial assistance for its administration of self-

1 funded plans, but does receives Federal financial assistance for other of its “products, such as
2 Medicare supplemental coverage, Medicaid, Medicare Advantage and Prescription Drug
3 insurance coverage, and Medicare/Medicaid dual eligibility.” *Id.*

4 C.P. has gender dysphoria. Dkts. 38; 97-3 at 2. Gender dysphoria is a feeling of clinically
5 significant stress and discomfort that can result from being transgender, or, more specifically,
6 from having an incongruence between one’s gender identity and the sex assigned to that person
7 at birth. Dkt. 38. The American Psychiatric Association’s Diagnostic and Statistical Manual of
8 Mental Disorders, Fifth Edition recognizes gender dysphoria as a medical condition that can be
9 extremely serious, resulting in anxiety, depression, or even death. Dkt. 38 at 6.

10 C.P. sought coverage for his first Vantas Implant (hormone therapy) in 2016. Dkt. 94-1
11 at 139. Blue Cross initially approved the treatment but later informed C.P.’s mother that it had
12 made a mistake; it stated that the treatment was not covered under the Plan. Dkt. 94-1 at 137.
13 Blue Cross paid for the treatment however, but indicated that later claims would be denied. *Id.* at
14 139. A few years later, in 2019, C.P. filed a claim for a second Vantas Implant and for chest
15 reconstruction surgery; his claim was denied by Blue Cross because “[t]ransgender services
16 [were] not covered under the terms of the Plan.” *Id.*; 88-1 at 197; 94-3 at 2-10.

17 The relevant exclusionary language in the Plan in 2019 provided: “Transgender
18 Reassignment Surgery Not Covered: Benefits shall not be provided for treatment, drugs, therapy,
19 counseling services and supplies for, or leading to, gender reassignment surgery” (“Exclusion”).
20 Dkt. 88-1 at 120. The Plan generally covers care for hormone treatments, mastectomies and
21 chest reconstruction if that care is considered medically necessary for diagnosis other than for
22 gender affirming care (like for breast cancer). Dkt. 85-8 at 12-13. The condition that triggers
23 Blue Cross to apply the Exclusion is the diagnosis of gender dysphoria. *Id.* at 14.

24

1 After his claim was denied, C.P. received treatment – Ms. Pritchard paid \$12,122.50 for the
2 uncovered chest surgery and Vantas Implant. Dkt. 88-1 at 299.

3 **B. PROCEDURAL HISTORY**

4 Plaintiffs, including the class, bring a claims for violation the antidiscrimination provision of
5 the ACA. Dkt. 38. This provision is referred to in the case law and HHS regulations as “Section
6 1557” (although codified as 42 U.S.C. § 18116(a)), and this order will refer to it in the same
7 manner. All Plaintiffs seek a declaration that Blue Cross violated Plaintiffs’ rights under Section
8 1557 when it administered the Exclusion and other similar exclusions in other plans. Dkt. 38 at
9 21. They seek an order enjoining Blue Cross from “administering or enforcing health benefit
10 plans that exclude coverage for gender-affirming health care, including applying or enforcing the
11 Plan’s Exclusion of services ‘for, or leading to, gender reassignment surgery,’ and other similar
12 exclusions . . . during the class period, now and in the future.” *Id.* at 21-22. The Plaintiffs seek
13 an order requiring Blue Cross to reprocess, “and when medically necessary and meeting the
14 other terms and conditions under the relevant plans, provide coverage (payment) for all denied
15 pre-authorizations and denied claims” that were based solely upon exclusions for gender
16 affirming care. *Id.* at 22.

17 Ms. Pritchard brings a claim for financial harm. *Id.* C.P. and Ms. Pritchard bring claims for
18 emotional distress damages, attorneys’ fees, costs and expenses. *Id.*

19 On November 9, 2022, the class was certified as:

20 All individuals who:

21 (1) have been, are, or will be participants or beneficiaries in an ERISA
22 self-funded “group health plan” (as defined in 29 U.S.C. § 1167(1))
23 administered by [Blue Cross] during the Class Period and that contains a
24 categorical exclusion of some or all Gender-Affirming Health Care
services; and

1 (2) were, are, or will be denied pre-authorization or coverage of treatment
2 with excluded Gender Affirming Health Care services

3 DEFINITIONS:

4 “Class Period” means November 23, 2016 through the termination of the
5 litigation.

6 “Gender-Affirming Health Care” means any health care service—
7 physical, mental, or otherwise—administered or prescribed for the
8 treatment of gender dysphoria; related diagnoses such as gender identity
9 disorder, gender incongruence, or transsexualism; or gender transition.
10 This includes but is not limited to the administration of puberty delaying
11 medication (such as gonadotropin-releasing hormone (GnRH) analogues);
exogenous endocrine agents to induce feminizing or masculinizing
changes (“hormone replacement therapy”); gender-affirming or “sex-
reassignment” surgery or procedures; and other medical services or
preventative medical care provided to treat gender dysphoria and/or
related diagnoses, as outlined in World Professional Association for
Transgender Health, Standards of Care for the Health of Transsexual,
Transgender, and Gender Nonconforming People, 7th Version (2012).

12 Dkt. 113. An amended order adding the “class claims, issues and defenses” has been issued in a
13 draft form.

14 **C. SECTION 1557, REGULATIONS AND LITIGATION BACKGROUND**

15 This case takes place in the midst of sharply divided regulatory and litigation background. A
16 quick review of the statute, the U.S. Department of Health and Human Services (“HHS”)
17 regulations, and related litigation is helpful in understanding the parties’ positions.

18 The starting point is the text of the antidiscrimination provision of the ACA. Again, this
19 provision is referred to in the case law and HHS regulations as “Section 1557” (although
20 codified as 42 U.S.C. § 18116(a)). Section 1557 provides:

21 “[A]n individual shall not, on the ground prohibited under . . . title IX of the
22 Education Amendments of 1972 (20 U.S.C. 1681 et seq.) . . . be excluded from
23 participation in, be denied the benefits of, or be subjected to discrimination under,
24 any health program or activity, any part of which is receiving Federal financial
assistance, including credits, subsidies, or contracts of insurance The

1 enforcement mechanisms provided for and available under such . . . title IX . . .
2 shall apply for purposes of violations of this subsection.”

3 42 U.S.C. § 18116(a). Title IX provides that “[n]o person . . . shall, on the basis of sex, be
4 excluded from participation in, be denied the benefits of, or be subjected to discrimination under
5 any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681.

6 1. 2016 Regulations

7 After passage of the ACA in 2010, HHS proposed, and then finalized, Section 1557
8 regulations on May 18, 2016 (“2016 Rule”). Non-Discrimination in Health Programs and
9 Activities, 81 FR 31,375. While this order substantially complies with the 2016 Rule, a
10 nationwide injunction banning HHS from enforcing it is in place. *Franciscan All., Inc. v.*
11 *Burwell*, 227 F.Supp.3d 660 (N.D. Tex. 2016) *as affirmed Franciscan All., Inc. v. Burwell*, 47
12 F.4th 368 (2022).

13 2. 2020 Regulations

14 Meanwhile, on June 12, 2020, under the Trump administration, HHS finalized regulations
15 (2020 Rule), effective on August 18, 2020, that rescinded significant portions of the 2016 Rule.
16 Non-Discrimination in Health Programs and Activities, 85 FR 37,178. Various cases have been
17 filed to prohibit enforcement of the 2020 Rule and to reinstate portions of the 2016 Rule, in
18 particular, challenging the definition of discrimination “on the basis of sex.” *See e.g. Whitman-*
19 *Walker Clinic, Inc. v. U.S. Dep't of Health & Human Servs.*, Case No. 1:20-cv-01630, 2020 WL
20 3444030 (D.D.C. June 22, 2020); *Walker v. Azar*, Case No. 1:20-cv-02834 (E.D.N.Y. June 26,
21 2020); *Boston All. of Gay, Lesbian, Bisexual & Transgender Youth v. U.S. Dep't of Health &*
22 *Human Servs.*, Case No. 1:20-cv-11297, 2020 WL 3891426 (D. Mass. July 9, 2020). Injunctions
23 prohibiting HHS from enforcing certain portions of the 2020 Rule’s repeal of the 2016 Rule’s
24

1 burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue
2 of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find
3 for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586
4 (1986) (nonmoving party must present specific, significant probative evidence, not simply “some
5 metaphysical doubt.”). Conversely, a genuine dispute over a material fact exists if there is
6 sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve
7 the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986);
8 *T.W. Elec. Serv. Inc. v. Pacific Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

9 The determination of the existence of a material fact is often a close question. The court
10 must consider the substantive evidentiary burden that the nonmoving party must meet at trial,
11 which is a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W.*
12 *Elect.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the
13 nonmoving party only when the facts specifically attested by that party contradict facts
14 specifically attested by the moving party. The nonmoving party may not merely state that it will
15 discredit the moving party’s evidence at trial, in the hopes that evidence can be developed at trial
16 to support the claim. *T.W. Elect.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at
17 255). Conclusory, non-specific statements in affidavits are not sufficient, and “missing facts”
18 will not be “presumed.” *Lujan v. Nat’l Wildlife Fed.*, 497 U.S. 871, 888–89 (1990).

19 **C. PLAINTIFFS’ SECTION 1557 CLAIM**

20 The Plaintiffs’ motion and Blue Cross’s response raise issues of law. There are no serious
21 fact issues before the Court.

22 Again, Section 1557 of the ACA provides:

23 “[A]n individual shall not, on the ground prohibited under . . . title IX of the
24 Education Amendments of 1972 (20 U.S.C. 1681 et seq.) . . . be excluded from

1 participation in, be denied the benefits of, or be subjected to discrimination under,
2 any health program or activity, any part of which is receiving Federal financial
3 assistance, including credits, subsidies, or contracts of insurance The
4 enforcement mechanisms provided for and available under such . . . title IX . . .
5 shall apply for purposes of violations of this subsection.”

6 42 U.S.C. § 18116(a). Title IX prohibits discrimination “on the basis of sex” in education. 20
7 U.S.C. § 1681.

8 To make a claim for sex discrimination under Title IX and by extension, under 1557, of the
9 ACA, the Plaintiffs must show that: (1) Blue Cross operates “a health program or activity, any
10 part of which is receiving Federal financial assistance;” (2) the Plaintiffs were excluded from
11 participation in, denied the benefits of, or subjected to discrimination in the provision of that
12 “health program or activity;” and (3) the latter occurred on the basis of sex. *See Schwake v. Ariz.*
13 *Bd. of Regents*, 967 F.3d 940, 946 (9th Cir. 2020).

14 1. Provision of Any Health Program or Activity, Any Part of Which Receives
15 Federal Financial Assistance

16 Under the plain language of Section 1557, Blue Cross’s third party administrator activities
17 constitute the operation of a “health program or activity.” The phrase “any health program or
18 activity,” is not defined in the ACA but it is clearly broader in scope than only the provision of
19 healthcare. The phrase is further defined in the next the clause in the text “including . . .
20 contracts of insurance.” The plain language of 1557 indicates that a health insurance contract
21 and the administration of a health insurance contract is a “health program or activity.” *Schmitt v.*
22 *Kaiser Found. Health Plan of Washington*, 965 F.3d 945, 951 (9th Cir. 2020)(holding that
23 Section 1557 prohibits discrimination in the health care system which includes discrimination in
24

1 health insurance contracts); *Kadel v. Folwell*, 2022 U.S. Dist. LEXIS 218104 *9 (M.D. N.C.
2 Dec. 5, 2022).¹

3 Further, while Blue Cross does not receive Federal financial assistance for its administration
4 of self-funded plans, it receives Federal financial assistance for some of its other products
5 including “Medicare supplemental coverage, Medicaid, Medicare Advantage and Prescription
6 Drug insurance coverage, and Medicare/Medicaid dual eligibility.” Dkt. 88-1 at 206. Section
7 1557’s phrase “any health program or activity any part of which is receiving Federal financial
8 assistance” plainly includes “all the operations of a business” principally engaged in providing
9 health programs and activities. *T.S. by & through T.M.S. v. Heart of CarDon, LLC*, 43 F.4th
10 737, 743 (7th Cir. 2022); *Kadel* at *9-10.

11 Accordingly, Blue Cross’s third party administration activities are “health program[s] or
12 activit[ies], . . . part of which receives Federal financial assistance.” The Plaintiffs are entitled to
13 summary judgment on this element of their claim and Blue Cross’s motion for summary
14 judgment on this element should be denied.

15 2. Plaintiffs were Excluded from, Denied the Benefits of, or Subjected to
16 Discrimination in the Provision of a “Health Program or Activity”

17 Parties do not dispute that Blue Cross denied C.P.’s claim for gender affirming surgery or
18 that C.P.’s mother was “denied the benefits” her employer’s sponsored health plan. Parties do
19 not dispute that Blue Cross denied other class members gender affirming care under exclusions
20 in other self-funded plans. This element is met. The Plaintiffs are entitled to summary judgment
21 on this element and Blue Cross’s motion on this element should be denied.

22 3. Discrimination Occurred on Basis of Sex

23 _____
24 ¹ *Kadel* mirrors many of the thoughts in this order.

1 Section 1557 forbids sex discrimination based on transgender status. *Doe v. Snyder*, 28 F.4th
2 103, 114 (9th Cir. 2022). This holding from the Ninth Circuit is consistent with the Supreme
3 Court’s determination in *Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731, (2020) which held
4 that firing a person based on their transgender status is sex discrimination.

5 In its administration of the Plan, the trigger for application of the Exclusion and a denial of
6 coverage was a diagnosis of “gender dysphoria” for C.P. and the other class members. Dkt. 85-
7 8. “Gender dysphoria cannot be understood without referencing sex or a synonym.” *See Kadel*
8 *v. Folwell*, 2022 WL 11166311, at *4 (M.D.N.C. Oct. 19, 2022)(*internal quotation marks and*
9 *citations omitted*). “[A] person cannot suffer from gender dysphoria without identifying as
10 transgender.” *Fain v. Crouch*, 2022 WL 3051015, at 6 (S.D. West Virginia August 2, 2022).

11 Accordingly, the administration of the Exclusion based on transgender status was discrimination
12 “on the basis sex” contrary to Section 1157. The Plaintiffs’ motion for summary judgment on
13 this element should be granted and Blue Cross’s cross motion for summary judgment on this
14 element denied.

15 4. Conclusion on Plaintiffs’ Section 1557 Claim

16 Blue Cross, as a third party administrator is engaged in a “health care program or activity”
17 and receives Federal financial assistance. It is subject to Section 1557. Its denial of benefits
18 under the Plaintiffs’ plans based on their transgender status was discrimination on the basis of
19 sex. Each of the elements of the claim are met and the Plaintiffs are entitled to summary
20 judgment on liability.

21 **D. BLUE CROSS’S DEFENSES**

22 Blue Cross contends that it is entitled to summary judgment based on various defenses. Each
23 will be addressed.

1 **Covered Entity Defense.** Blue Cross contends that Section 1557 does not apply to its third
2 party administrator activities because those actions are not “healthcare activities” and because it
3 does not receive any federal financial assistance for its third party administrator activities. Dkt.
4 87 at 18. It points to the 2020 Rule and argues that the Court should give HHS deference to its
5 interpretation of 1557 in the 2020 Rule based on the deference doctrine announced in *Chevron*,
6 *USA Inc. v. NRDC, Inc.*, 467 U.S. 837 (2014). *Id.*

7 None of the HHS rules - the 2016 Rule, 2020 Rule or Proposed 2022 Rule, are entitled to
8 deference in this case. In considering whether to accord an agency’s interpretation of a statute
9 deference under *Chevron*, a two-part analysis is required. *Chevron* at 842. First, “is the question
10 whether Congress has directly spoken to the precise question at issue.” *Id.* If the intent of
11 Congress is clear, the “unambiguously expressed intent of Congress” must be given effect by
12 both the agency and the courts. *Id.* at 843. “If a statute is ambiguous, and if the implementing
13 agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's
14 construction of the statute, even if the agency's reading differs from what the court believes is the
15 best statutory interpretation.” *Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 556 (9th Cir.
16 2016).

17 In making the threshold determination under *Chevron* step one, whether statutory language is
18 ambiguous or not “is determined by reference to the language itself, the specific context in which
19 the language is used, and the broader context of the statute as a whole.” *Corrigan v. Haaland*, 12
20 F.4th 901, 907 (9th Cir. 2021)(*cert. denied*, 211 L. Ed. 2d 607, 142 S. Ct. 901 (2022)). “[T]he
21 starting point is the statutory text.” *Tohono* at 556. As stated above, the plain language of the
22 text includes insurance contracts and their administration as “health program[s] or activit[ies].”
23
24

1 Moreover, “[i]n making the threshold determination under *Chevron* step one, a reviewing
2 court should not confine itself to examining a particular statutory provision in isolation. Rather,
3 the meaning – or ambiguity – of certain words or phrases may only become evident when placed
4 in context.” *Corrigan* at 910. “Congress enacted the ACA to increase the number of Americans
5 covered by health insurance and decrease the costs of health care.” *Schmitt* at 949. It enacted
6 Section 1557 to prohibit discrimination in the health care system to increase access to services
7 and insurance coverage. *Id.* at 951. “By extending nondiscrimination protections to individuals
8 under ‘any health program or activity,’ Congress clearly intended to prohibit discrimination by
9 any entity acting within the health system.” *See Fain v. Crouch*, 545 F.Supp.3d 338, 342
10 (S.D.W. Va. 2021). Logically, this includes third party administrators of health insurance plans.
11 To hold otherwise would thwart Congress’s intent to prohibit discrimination in the provision of
12 “health programs and activities.” “In interpreting a statute, a court must also account for that
13 statute’s history and purpose.” *Corrigan* at 912. !

14 Blue Cross argues that even if its third party administration of the Plan is providing a
15 “health program or activity,” it does not receive Federal financial assistance for that activity, so it
16 is not covered under Section 1557. Blue Cross’s argument is unpersuasive. “When the ACA
17 was enacted in 2010, ‘program or activity’ was already a term of art with a clear meaning and a
18 broad scope established by the provisions cited in section 1557 that ban discrimination in
19 connection with Federal financial assistance.” *Heart of CarDon* at 742. The words “program or
20 activity” must be read “in accordance with the prevailing understanding the term had under the
21 law that Congress relied on when codifying section 1557.” *Id.* Section 504 of the Rehabilitation
22 Act, which is also incorporated into Section 1557, “defines ‘program or activity’ as ‘all of the
23 operations of’- among other entities - ‘an entire corporation, partnership, or other private
24

1 organization, ... which is principally engaged in the business of providing ... health care... any
2 part of which is extended Federal financial assistance.” *Id.* (citing 29 U.S.C. § 794(b)). “The
3 meaning of ‘program or activity’ in section 1557’s other antidiscrimination provisions is
4 materially identical.” *Id.* (citing 20 U.S.C. § 1687; 42 U.S.C. § 6107(4); 42 U.S.C. § 2000d-4a).
5 Section 1557’s phrase “health programs or activities” plainly includes “all the operations” of
6 Blue Cross. *Id.* at 743; *Kadel* at 10.

7 Blue Cross’s motion for summary judgment based on the defense that it is not a covered
8 entity should be denied. It operates “health program[s] or activit[ies]” and receives Federal
9 financial assistance and so Section 1557 applies.

10 **Plan Design Defense.** Blue Cross maintains that it is entitled to summary judgment because
11 it did not design the allegedly discriminatory Exclusion applicable to C.P. Dkt. 87. It points to
12 comments to the 2016 Rules, 2020 Rules and 2022 Proposed Rules and maintains that under
13 each iteration of these rules, it is “only where the discriminatory terms of the group health plan
14 originated with the third party administrator rather than with the plan sponsor [that] the third
15 party administrator could be liable for the discriminatory design feature under Section 1557.”
16 Dkt. 87 at 10. There is no *Chevron* deference owed here to the various iterations of the rules or
17 proposed rules because the statutory text is clear as is Congressional intent – there is no
18 exclusion for third party administrators who did not draft the exclusion at issue.

19 Blue Cross contends that it is entitled to summary judgment because it is obligated under
20 ERISA’s command at 29 U.S.C. § 1104(a)(1)(D) to administer the Exclusion as written. Dkt.
21 87. Under ERISA, benefit plan decisions are required to be made in “accordance with the
22 documents and instruments governing the plan.” 29 U.S.C. § 1104(a)(1)(D). This provision of
23 ERISA does not end the inquiry.

1 The Plaintiffs properly contend that whether Blue Cross provided the Exclusionary language
2 or not is immaterial because Blue Cross has an independent duty to comply with Section 1557.
3 Dkt. 96. The Plaintiffs point to ERISA’s 29 U.S.C. § 1144(d) and argue that ERISA does not
4 supplant Section 1557’s antidiscrimination provisions. *Id.*

5 ERISA’s Section 1144(d) provides that “[n]othing in this subchapter shall be construed to
6 alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any
7 rule or regulation issued under any such law.” Accordingly, ERISA expressly provides that it is
8 not to be construed to impair laws like Section 1557. Harmonizing these provisions of ERISA, a
9 third party administrator must make decisions in “accordance with the documents and
10 instruments governing the plan,” 29 U.S.C. § 1104(a)(1)(D), but that this requirement must not
11 be construed to “invalidate or impair” Section 1557, 29 U.S.C. § 1144(d).

12 Blue Cross’s third-party administration of the Plan and other self-funded plans are “health
13 programs or activities” and it receives “Federal financial assistance” and so is covered by Section
14 1557. ERISA specifically provides that its requirements are not to be construed to invalidate or
15 impair laws like Section 1557 and so ERISA’s requirement that Blue Cross follow the
16 Exclusion’s language is no defense. Section 1557 supplements the ERISA requirements.

17 Even if Blue Cross did not have an independent duty to comply with Section 1557, which it
18 does, third party administrators can be liable under Section 1557 based on discriminatory terms
19 in a self-funded plan if the third party administrator provided the plan document
20 “notwithstanding the fact that the [plan sponsor] subsequently adopted the plan and maintained
21 control over its terms.” *See, e.g., Tovar v. Essentia Health*, 857 F.3d 771, 778 (8th Cir. 2017).

22 There are issues of fact as to whether the plan design originated with Blue Cross. Blue Cross
23 points to testimony that CHI drafted the gender reassignment surgery exclusion in the Plan. Dkt.
24

1 88-1 at 3. Plaintiffs points to the testimony of Laura Malec, another Blue Cross 30(b)(6)
2 witness, who testified that of the 398 plans at issue, 378 (including the CHI Plan) contain the
3 same or similar exclusionary language that is the “standard language” that Blue Cross “offers to
4 employers when they want a gender affirming care exclusion.” Dkt. 85-8 at 7. There are issues
5 of fact as to whether the Exclusion’s language originated from Blue Cross, but those issues need
6 not be decided to justify denial of Blue Cross’s motion for summary judgment on this issue.

7 **Medical Consensus Defense.** Blue Cross argues that the Exclusion does not discriminate
8 “on the basis of sex” because “there is no medical consensus regarding gender-affirming
9 treatment.” Dkt. 87. Blue Cross’s argument is unavailing. It did not base the decision to deny
10 care on medical necessity but on C.P.’s and the other class members’ transgender status.
11 Further, it concedes that under its own medical necessity policy, C.P.’s request for hormone
12 therapy and chest reconstruction would be considered “medically necessary.” Dkt. 85 at 23, 25-
13 26. Whether there is medical consensus about transgender care in general is immaterial as to
14 whether Blue Cross discriminated against the Plaintiffs based on sex.

15 **Religious Freedom Restoration Act.** Blue Cross argues that it is entitled to summary
16 judgment because it is protected by the Religious Freedom Restoration Act (“RFRA”). Dkt. 87.
17 It maintains that RFRA exempts CHI’s Plan based on CHI’s sincerely-held religious beliefs. *Id.*
18 Blue Cross argues that it does not violate Section 1557 if it administers an exempt plan. *Id.*

19 Under RFRA, “[g]overnment shall not substantially burden a person’s exercise of religion
20 even if the burden results from a rule of general applicability” unless the Government
21 “demonstrates that application of the burden to the person – (1) is in furtherance of a compelling
22 government interest; and (2) is the least restrictive means of furthering that compelling
23 interest.” 42 U.S.C. § 2000bb-1(a), (b). RFRA continues, “[a] person whose religious exercise
24

1 has been burdened in violation of this section may assert that violation as a claim or defense in a
2 judicial proceeding and obtain appropriate relief against a government.” 42 U.S.C. § 2000bb-
3 1(c)(*emphasis added*).

4 Blue Cross’s motion for summary judgment based on RFRA should be denied. RFRA
5 provides relief against the government and does not apply to disputes between private
6 parties. *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 839 (9th Cir. 1999);
7 *See>Listecki v. Off. Comm. of Unsecured Creditors*, 780 F.3d 731, 736 (7th Cir. 2015)(“Based
8 on RFRA’s plain language [and] its legislative history . . . RFRA is not applicable in cases where
9 the government is not a party”). The government is not a party here.

10 Blue Cross’s citation to *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014) and other similar
11 cases are unavailing. *Hobby Lobby* involved a challenge by employers to HHS rules requiring
12 insurance coverage for birth control despite religious objection by employer. The government
13 was a party in all of these cases – for example, *Burwell* was the Secretary of HHS. Blue Cross
14 also acknowledges that it is not an entity with a “sincerely-held religious belief” (Dkt. 118). The
15 Court need not reach Blue Cross’s arguments regarding its standing to assert CHI’s religiously
16 held beliefs. It is not entitled to summary judgment on this issue.

17 **E. BLUE CROSS’S MOTION FOR SUMMARY JUDGMENT ON NAMED**
18 **PLAINTIFFS’ CLAIM FOR EMOTIONAL DISTRESS DAMAGES**

19 Blue Cross moves for summary judgment on Plaintiffs C.P. and Patricia Prichard’s emotional
20 distress damages claim. Dkt. 87. That portion of the motion should be granted. Emotional
21 distress damages are not recoverable in private actions to enforce the antidiscrimination
22 provisions of the ACA. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562 (2022).

23 **F. CONCLUSION**
24

1 Blue Cross, as a third party administrator, is a covered entity under 1557 and has
2 discriminated against the Plaintiffs. This order addresses Blue Cross's liability under Section
3 1557 only. The appropriate relief due will be addressed when, and if, the parties place those
4 issues before the Court.

5 **III. ORDER**

6 Therefore, it is hereby **ORDERED** that:

- 7
- 8 • The Plaintiffs' motion to strike (Dkt. 126) **IS GRANTED**;
 - 9 • Defendant Blue Cross's Motion for Summary Judgment (Dkt. 87) **IS GRANTED**
10 as to the Plaintiffs' emotional distress claims and **DENIED** in all other respects;
11 and
 - 12 • The Plaintiffs' Cross Motion for Summary Judgment (Dkt. 96) **IS GRANTED**.

13 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
14 to any party appearing pro se at said party's last known address.

15 Dated this __ day of December, 2022.

16 **DRAFT**

17 _____
18 Robert J. Bryan
19 United States District Judge
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