

**U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
OFFICE FOR CIVIL RIGHTS
HEADQUARTERS**

Jocelyn Samuels, Director
c/o Centralized Case Management Operations
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Room 509F HHH Bldg.
Washington, D.C. 20201
Email: OCRComplaint@hhs.gov

**U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
OFFICE FOR CIVIL RIGHTS
MIDWEST REGION**

Celeste Davis, Regional Manager
233 N. Michigan Ave., Suite 240
Chicago, IL 60601

ADMINISTRATIVE COMPLAINT

COMPLAINANT

Ms. Melanie Jones
c/o Lorie Chaiten and Jenna Prochaska
Roger Baldwin Foundation of ACLU, Inc.
180 North Michigan Ave., Suite 2300
Chicago, Illinois 60601

American Civil Liberties Union of Illinois
c/o Lorie Chaiten and Jenna Prochaska
Roger Baldwin Foundation of ACLU, Inc.
180 North Michigan Ave., Suite 2300
Chicago, Illinois 60601

COMPLAINANTS' COUNSEL

Lorie Chaiten
Jenna Prochaska
Roger Baldwin Foundation of ACLU, Inc.
180 North Michigan, Suite 2300
Chicago, Illinois 60601

RECIPIENT

Mercy Hospital and Medical Center
2525 South Michigan Avenue
Chicago, IL 60616

PRELIMINARY STATEMENT

1. This complaint is filed by the Roger Baldwin Foundation of the ACLU, Inc. (“RBF”) on behalf of Melanie Jones and the American Civil Liberties Union of Illinois (“ACLU of Illinois”). Ms. Jones and the ACLU of Illinois file this complaint against Mercy Hospital and Medical Center (“Mercy”) based on Mercy’s discriminatory policies and practices of denying women medical care relating to contraceptive devices, in violation of Section 1557 of the Patient Protection and Affordable Care Act (“ACA”), § 1557, codified at 42 U.S.C. § 18116 (2012) (“Section 1557”).
2. On January 7, 2016, Ms. Jones sought care at a Mercy facility. She was experiencing vaginal bleeding and pain after a fall and feared that her intrauterine device (“IUD”) had become dislodged. A Mercy physician confirmed that Ms. Jones’ IUD was dislodged, partially expelled and needed to be removed. However, the Mercy physician refused to remove the IUD because of Mercy’s “Catholic initiative,” which, she explained, prevented her from providing Ms. Jones any care relating to the contraceptive device. Ms. Jones was turned away from Mercy, still bleeding and in pain and at risk for infection, cervical and uterine lacerations and scarring, and pregnancy. In addition, she felt stigmatized and distraught as a result of Mercy’s discriminatory policies and practices that resulted in the denial of the care she needed.
3. Mercy requires that all of its facilities abide by the Ethical and Religious Directives for Catholic Health Care Services (“Directives”), which were written and promulgated by the United States Conference of Catholic Bishops. The Directives demand that all Catholic health care providers adopt the Directives as policy and require adherence to them as a condition of medical privileges and employment. Among numerous other restrictions and limitations on health care, the Directives include a broad prohibition against providing services that “promote or condone” contraception.
4. Mercy has implemented this prohibition by instituting policies that prevent physicians and other health care professionals who practice in Mercy facilities from offering women with medically prescribed devices that are used to prevent pregnancy *any* care related to those products, even when adhering to this policy requires refusing care to women who are bleeding and in pain, at risk for further complications, and in need of immediate treatment. Mercy’s categorical denial of this type of contraception-related care to women denies members of one sex equality of access to the benefits of the health program in violation of Section 1557.

5. Complainants request that the Department of Health and Human Services Office of Civil Rights (“OCR”) investigate Mercy’s policies governing the treatment of women seeking care relating to contraceptive devices—specifically IUDs—and the training Mercy conducts for its health care professionals on these policies, to ensure that Mercy’s policies and practices comport with the requirements of Section 1557. To the extent OCR finds that Mercy has discriminatory policies and practices, complainants request that OCR take all steps necessary to bring Mercy into compliance with the law. Ms. Jones also requests the relief listed in Paragraph 51 below.

JURISDICTION

6. OCR is responsible for ensuring compliance with Section 1557 and receiving information about, investigating, and remedying violations of Section 1557. The Midwest Region OCR is responsible for investigating and remedying violations of Section 1557 for violations in Illinois, where Mercy is located.

7. This complaint is timely. Mercy committed the alleged discriminatory action against Ms. Jones on January 7, 2016, less than 180 days before the filing of this administrative complaint. *See* 45 C.F.R. § 92.302 (stating that the “procedural provisions applicable to Title VI apply with respect to administrative enforcement actions concerning discrimination on the basis of . . . sex . . . under Section 1557”); 45 C.F.R. § 80.7 (stating that Title VI complaints may be filed within 180 days of the date of the alleged discrimination by an aggrieved party or a representative). In addition, on information and belief, Mercy’s discriminatory policies and practices are ongoing.

FACTUAL ALLEGATIONS

8. Complainant, Ms. Jones, is a 28-year-old woman who resides in Chicago, Illinois. She works part-time for a non-profit organization called the Chicago Area Runners Association (CARA), where she provides media and communications support.

9. Complainant, ACLU of Illinois is a statewide, nonprofit, nonpartisan organization, with thousands of members and supporters throughout Illinois, dedicated to the defense and promotion of civil liberties. The ACLU of Illinois has an extensive tradition of supporting religious freedom, women’s equality, and the rights of individuals to make and effectuate decisions related to medical care and reproductive choice.

10. Recipient, Mercy, is a health care provider with 18 separate locations throughout the

Chicago area. Mercy provides a range of health care services, including obstetrics and gynecology. *See* Mercy Hospital and Medical Center, Hospitals and Locations, <http://www.mercy-chicago.org/body.cfm?id=302&action=list&view=all> (last visited Jun. 29, 2016).

11. Mercy receives federal financial assistance through its acceptance of Medicaid and Medicare funding. *See* Illinois Department of Public Health, Illinois Hospital Report Card and Consumer Guide to Health Care, Mercy Hospital and Medical Center, <http://www.healthcarereportcard.illinois.gov/hospitals/view/101232> (last visited Jun. 29, 2016) (42.23% of Mercy's inpatient insurance is Medicaid, and 40.31% of its inpatient insurance is Medicare. 38.55% of its outpatient insurance is Medicaid, and 22.23% of its outpatient insurance is Medicare).

Mercy's Imposition of Religious Health Care Restrictions

12. Mercy operates under religious directives known as the Ethical and Religious Directives for Catholic Health Care Services ("the Directives"), promulgated by the United States Conference of Catholic Bishops. *See* United States Conference of Catholic Bishops, Ethical and Religious Directives for Catholic Health Care Services, 5th Ed. (Nov. 17, 2009), <http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf>.

13. Directive 5 states: "Catholic health care services must adopt these Directives as policy, require adherence to them within the institution as a condition for medical privileges and employment, and provide appropriate instruction regarding the Directives for administration, medical and nursing staff, and other personnel."

14. Directive 9 states: "Employees of a Catholic health care institution must respect and uphold the religious mission of the institution and adhere to these Directives."

15. Together, Directives 5 and 9 require Mercy to implement the Directives internally and impose them on all Mercy practitioners. The Directives do not provide Mercy with guidance as to how to implement and impose the Directives to ensure that they do not cause discriminatory treatment or other harm to Mercy patients.

16. Directive 52 states: "Catholic health institutions may not promote or condone contraceptive practices, but should provide, for married couples and the medical staff who counsel them, instruction about the Church's teaching on responsible parenthood and in methods of natural family planning."

17. Directive 52 does not specify what types of medical treatment constitute “promot[ing] or condon[ing] contraceptive practices.”

18. Mercy’s internal policy implementing Directive 52 requires physicians to deny women with medically prescribed devices that are used to prevent pregnancy, including IUDs, *any* treatment related to these products, even when compliance with this requirement requires turning women away who are bleeding, in pain, and in need of immediate care.

19. IUDs are small devices inserted into a woman’s uterus to prevent pregnancy. They work by preventing the fertilization of the egg by the sperm. *See* American College of Obstetricians and Gynecologists, Frequently Asked Questions 184: Contraception (May 2016), <http://www.acog.org/Patients/FAQs/Long-Acting-Reversible-Contraception-LARC-IUD-and-Implant#iud> (“ACOG FAQ”).

20. Because of the manner in which IUDs work to prevent pregnancy, only women use and are able to use them. There are no medically prescribed contraceptive devices available to men. *See* Food and Drug Administration, Office of Women’s Health, Birth Control Guide, *available at* <http://www.fda.gov/downloads/ForConsumers/ByAudience/ForWomen/FreePublications/UCM356451.pdf> (last visited, Jun. 29, 2016).

21. There are two primary types of IUDs available to women: hormonal IUDs, which release progestin, and copper IUDs, which have no hormones. Both types are highly effective. *See* ACOG FAQ (IUDs are the most effective form of reversible birth control. During the first year of typical use, fewer than 1 in 100 women using an IUD will become pregnant).

22. Because of their effectiveness, the use of IUDs among women in the United States is increasing. *See* Amy Branum & Jo Jones, *Trends in Long-acting Reversible Contraception Use Among U.S. Women Aged 15-44*, Center for Disease Control National Center for Health Statistics Data Brief No. 188 (2015), <http://www.cdc.gov/nchs/products/databriefs/db188.htm> (IUD use among women in the United States is steadily increasing, and increased 83% from 2006–2010 to 2011–2013).

Mercy’s Denial of Health Care to Melanie Jones

23. In 2008, when Ms. Jones was 20 years old, she had a transient ischemic attack (TIA, often referred to as a “mini-stroke”). After this incident, Ms. Jones learned from her doctor that continuing to take hormonal contraception could lead to blood clots and increase the risk of a repeat TIA or a full stroke in the future. Following her doctor’s advice, Ms. Jones stopped taking hormonal contraception.

24. After relying on condoms for birth control for a number of years, Ms. Jones learned about the copper IUD, a more reliable method of non-hormonal birth control. Because it would not present the same health risks that oral contraception and hormonal IUDs posed for her, Ms. Jones had a copper IUD inserted in 2012.

25. Ms. Jones moved to Chicago, Illinois in 2013 and began working for CARA in July 2015. Because CARA does not provide health insurance for part-time employees such as Ms. Jones, Ms. Jones purchased an insurance plan from Blue Cross Blue Shield of Illinois (“BCBS-IL”) in August 2015. She chose an HMO plan from BCBS-IL with high co-pays and low premiums, which was a plan she could afford and which she believed would serve her health care needs.

26. On December 30, 2015, Ms. Jones slipped on water and fell hard onto the ground into a partial split position. Soon afterwards, Ms. Jones felt a sharp pain in her back and right abdomen. The next morning, she saw bright red clots of blood in the toilet. She experienced heavy vaginal bleeding and pain, which continued over the next several days.

27. On January 2, 2016, Ms. Jones contacted a friend who is a nurse and told her what had happened. Ms. Jones’ friend informed her that, while this was not her area of expertise, the symptoms seemed to be consistent with a dislodged IUD, which could have been caused by the fall. She suggested that Ms. Jones contact a physician.

28. That afternoon, Ms. Jones searched her BCBS-IL insurance network for a provider. She contacted a number of other health care providers before reaching the office of Dr. Judy Sun, an obstetrician-gynecologist at Mercy, with whom she was able to make an appointment on short notice. Ms. Jones explained her circumstances to the person scheduling the appointment—including the fact that she suspected her non-hormonal, copper IUD had become dislodged. She scheduled an appointment to see Dr. Sun at Mercy’s Dearborn Station office, located at 47 W. Polk Street Chicago, Illinois, 60605 on January 7, 2016.

29. When Ms. Jones arrived for her appointment, she was still experiencing pain and bleeding from the fall. She checked in for her appointment with the receptionist, paid a \$50 co-pay, and filled out a form, which included the reason for her visit—that she suspected her IUD had become dislodged, as she had been experiencing heavy vaginal bleeding and ongoing pain.

30. After checking in, Ms. Jones met first with a nurse and then with the obstetrician-gynecologist. Each time, Ms. Jones explained what had happened to her and the nature of her ongoing symptoms, including that she had been experiencing pain and vaginal bleeding. She also explained that she believed her non-hormonal, copper IUD had become dislodged. Dr. Sun

conducted a full examination before confirming that the IUD had, in fact, become dislodged and was partially expelled from Ms. Jones' uterus.

31. Dr. Sun told Ms. Jones that her IUD needed to be removed but that she could not remove it because of religious restrictions that bound her practice—which she referred to as Mercy's "Catholic initiative." She then offered to check with colleagues to verify her understanding that Mercy's policy would not permit her to provide Ms. Jones the care she needed. Dr. Sun left Ms. Jones alone in the examination room for approximately 10 minutes. When she returned, she stated that her "hands [were] tied" by Mercy's restrictions and that she would not be able to remove Ms. Jones' partially expelled IUD.

32. Dr. Sun told Ms. Jones that her refusal to remove Ms. Jones' IUD was based on a "new rule" at Mercy under the "Catholic initiative." Under this rule, none of Mercy's providers could provide treatment related to copper IUDs—meaning she could no longer insert *or remove* them from patients—even if the IUD was dislodged and causing "excruciating pain" and heavy bleeding.

33. Dr. Sun told Ms. Jones that if she had a hormonal IUD, she could provide her with medical care, because she could attribute the use of the IUD to a purpose other than preventing pregnancy—such as reducing menstrual cramps. However, because the only purpose of the copper IUD was to "prevent pregnancy," Dr. Sun told Ms. Jones that there was nothing she or any other Mercy provider could do to help.

34. Understanding for the first time that Mercy planned to send her home without providing her any medical care to address the partially expelled IUD despite the continued pain and bleeding, Ms. Jones asked whether she could at least be referred to another provider who could remove the IUD. In response, Dr. Sun told her that her network was comprised solely of providers bound by the same Catholic restrictions. She told Ms. Jones that her only option was to switch to a new insurance network—one that included providers who are not bound by the religious restrictions imposed on Mercy providers. However, she told Ms. Jones that that process would take her a month, and that she should feel fortunate because sometimes switching networks takes up to six months or even a year.

35. Ms. Jones asked Dr. Sun if she would be able to run while the IUD was still dislodged. Dr. Sun told her she could, but that there was a risk that the IUD might "fall out" while she was running. She did not warn Ms. Jones about any other potential harms of leaving the partially expelled IUD in place. She did not inform Ms. Jones that leaving the IUD in place could result in

increased pain, bleeding, physical limitations, and heightened risks of infection, cervical and uterine lacerations and scarring, and pregnancy.

36. Even without fully appreciating these risks, Ms. Jones was distraught about Mercy's refusal to treat her. In addition to her concern about her physical condition, Ms. Jones felt singled out and stigmatized by Mercy's policies.

37. Ms. Jones also left experiencing continued pain and bleeding from the partially expelled IUD, and believing, based on the information Mercy had provided, that she had no option for getting care without going through the process of changing insurance networks. Ms. Jones considered going to an emergency room, but the emergency room co-pay under her policy was \$1,000, which she could not afford. An urgent care facility was also not an option, since her policy provided no coverage for treatment at any facility outside the established network, and she had been informed at Mercy that every provider within her network was limited by the "Catholic initiative."

38. After speaking with friends and family, Ms. Jones contacted RBF attorneys who advised her to contact BCBS-IL and demand that they expedite the process of switching her to a new insurance network, so that she could quickly obtain the care she needed.

39. Between January 8 and January 11, 2016, Ms. Jones spent approximately five hours on the phone speaking with health care providers and customer service representatives at BCBS-IL in an effort to expedite her ability to obtain the care she needed.

40. BCBS-IL ultimately switched Ms. Jones to a new network, effective January 12, 2016. However, even as of the morning on January 12, Ms. Jones did not know whether the network change would be effective in time for her to attend an appointment that day with a new obstetrician-gynecologist. Fortunately, the network change was effective in time for Ms. Jones to keep her new appointment.

41. When she arrived for her appointment, Ms. Jones paid another \$50 co-pay and met with a nurse before meeting with the physician. She told the nurse and the physician both about her fall, the pain and the bleeding. She also told them what the Mercy physician had told her.

Specifically, she explained that the Mercy physician had told her that her IUD had become dislodged when she fell and needed to be removed, but that Mercy would not remove the IUD because of Mercy's Catholic restrictions on care.

42. The new physician verified that Ms. Jones' IUD was dislodged and partially expelled from her uterus. She then removed the IUD with ring forceps.

43. The new physician recommended that Ms. Jones not have a new IUD inserted right away, because there was a risk that she had suffered lacerations from the dislodged IUD, which would need time to heal fully. She recommended that Ms. Jones monitor her symptoms for any continued pain and bleeding, and return for a check-up and re-insertion at a later date.

44. By refusing to remove Ms. Jones' partially expelled IUD, Mercy subjected Ms. Jones to an ongoing risk of lacerations to her cervix and uterus. In addition, Mercy's refusal also subjected Ms. Jones to continued vaginal bleeding and pain, as well as physical limitations, and heightened risks of infection, pregnancy, and damage or scarring to the cervix and uterus.

45. Mercy's policies subjected Ms. Jones to physical harm as well as stigmatization and discrimination because of her need for care relating to her non-hormonal IUD—the safest and most reliable method of birth control available to her.

LEGAL ALLEGATIONS

46. Section 1557 of the ACA prohibits discrimination on the basis of sex in any health care program or activity receiving federal funds. *See* 42 U.S.C. § 18116(a). Specifically, it states that:

[A]n individual shall not, on the ground prohibited under Title IX of the Education Amendments of 1972 . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments).

42 U.S.C. § 18116(a).

47. Because Mercy is a recipient of Medicaid and Medicare funding, it is a “covered entity” subject to the obligations of Section 1557 of the ACA. *Id. See also* 81 Fed. Reg. at 31383 (explaining that “there are numerous ways in which health services providers are recipients in their own right,” including through “Medicare payments [or] Medicaid payments”).

48. The religious restrictions that Mercy places on its facilities discriminate against women on the basis of their sex. Mercy denied Ms. Jones essential health care because she used an IUD, the sole purpose of which was to prevent pregnancy. Mercy's treatment of Ms. Jones as well as its policy of denying patients such as Ms. Jones care constitutes discrimination on the basis of sex under Section 1557. Discrimination on the basis of sex is defined to include “discrimination on the basis of pregnancy . . . [and] childbirth or related medical conditions.” 45 C.F.R. § 92.4. This definition mirrors the definition of sex discrimination under the Pregnancy Discrimination

Act (“PDA”), which is incorporated into Title VII. 42 U.S.C. § 2000e(k) (“The terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions . . .”). *See also* 45 C.F.R. § 86.40 (Title IX regulations) (“Pregnancy and related conditions: A recipient shall not discriminate against any student, or exclude any student from its education program or activity . . . on the basis of . . . pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom. . .”).

49. Contraception is a means by which a woman can control her capacity to become pregnant, and therefore prohibitions on discrimination based on potential pregnancy “necessarily include[] a prohibition on discrimination related to a woman’s use of contraceptives.” Equal Employment Opportunity Commission, *Enforcement Guidance: Pregnancy Discrimination and Related Issues* (2015) (interpreting Title VII pregnancy discrimination protections, which mirror the protections in Title XI and Section 1557). Mercy’s categorical denial of this type of contraception-related care to women, as manifested here by its refusal to remove Ms. Jones’ dislodged and partially expelled IUD, denies members of one sex equality of access to the benefits of the health program. This policy and practice of the institution thus constitutes intentional sex discrimination under Section 1557.

50. Mercy’s policy and practice of refusing all care relating to an IUD used to prevent pregnancy also constitutes disparate impact sex discrimination in violation of Section 1557. *See* 45 C.F.R. § 92.101(b)(3)(ii) (prohibiting covered entities from “directly or through contractual or other arrangements, utiliz[ing] criteria or methods of administration that have the effect of subjecting individuals to discrimination on the basis of sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals on the basis of sex”). Medically prescribed contraceptive devices, including IUDs, are used by women alone to prevent pregnancy. Thus, Mercy’s categorical denial of basic health care related to these devices, including the removal of Ms. Jones’ dislodged IUD, has a disproportionate and harmful impact on members of one sex—in violation of the non-discrimination protections of Section 1557.

RELIEF REQUESTED

51. Ms. Jones and the ACLU of Illinois request that:

- a. OCR investigate Mercy’s policy and practice of refusing to provide any medical care relating to a device used to prevent pregnancy, including removal of

dislodged and partially expelled IUDs, and its policy and practice of training employees to comply with these policies;

- b. OCR take all necessary steps to remedy Mercy's unlawful conduct and obtain Mercy's assurance that it will comply with the non-discrimination requirements of Section 1557; and
- c. OCR award Ms. Jones compensatory damages for all violations of Section 1557.

Respectfully Submitted,



Lorie Chaiten

Jenna Prochaska

Roger Baldwin Foundation of ACLU, Inc.

180 North Michigan Ave., Suite 2300

Chicago, Illinois 60601

lchaiten@aclu-il.org

jprochaska@aclu-il.org

Date: June 30, 2016