

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

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

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ADMINISTRATIVE COMPLAINT

COMPLAINANTS

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Detroit, MI 48201

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RESPONDENT

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PRELIMINARY STATEMENT

1. This complaint is filed by [REDACTED] [REDACTED] and the American Civil Liberties Union Fund of Michigan (“ACLU”) on behalf of itself and its members, and all similarly situated people who can become pregnant. Ms. [REDACTED] and the ACLU (collectively, “Complainants”) bring this complaint against Ascension Health (“Ascension”), a non-profit and Catholic health system that operates more than 2,600 sites of care in 19 states and the District of Columbia.¹ Complainants challenge Ascension’s discriminatory policies and practices denying people tubal sterilizations at the time of childbirth, in violation of Section 1557 of the Patient Protection and Affordable Care Act, codified at 42 U.S.C. § 18116 (2012) (“Section 1557”).
2. Ms. [REDACTED] has been under the care of the same OB/GYN practice since approximately 2013. The practice safely delivered her two prior children via C-section at what is now Ascension Providence Hospital in Southfield (“Ascension Providence”). Her most recent C-section was in May of 2017. That is when her OB/GYN discovered that she had a significant amount of scarring from her prior C-section, which caused her bladder to fuse to her uterus. Ms. [REDACTED] OB/GYN advised her that, due to these conditions, it was not safe for her to become pregnant in the following year, and only once more following that year.
3. Ms. [REDACTED] is now 30 weeks pregnant. She knows this must be her last pregnancy because of her OB/GYN’s advice in 2017. Ms. [REDACTED] is scheduled to deliver her third child at Ascension Providence by C-section in October of this year. As such, she inquired with her OB/GYN about having a tubal ligation following the C-section. Ms. [REDACTED] doctor informed her that a tubal ligation is not an option available to her if she delivers at Ascension Providence because the hospital banned tubal sterilizations beginning January 1, 2021. Her OB/GYN further advised her that tubal sterilizations were permitted prior to the implementation of the new policy on January 1, 2021 with a valid medical reason, and that a tubal ligation is the recommended procedure for someone with Ms. [REDACTED] conditions. But, Ms. [REDACTED] OB/GYN informed her that after Ascension Providence implemented the new policy, the hospital will now revoke admitting privileges for physicians who perform tubal ligations.
4. As a result of Ascension’s refusal to allow Ms. [REDACTED] OB/GYN to provide medical care that is the standard practice for someone with Ms. [REDACTED] condition, she is forced to choose from three unacceptable options. She can:
 - 1) Deliver her baby at Ascension Providence with her current OB/GYN, wait until she is healed from that procedure, and then go to a different doctor at a different hospital for a *second* surgery for the tubal ligation;
 - 2) Find a new OB/GYN and healthcare system, weeks before her baby is due; or

¹ Ascension, <https://www.ascension.org/About/History> (last visited Aug. 5, 2021).

- 3) Forego the procedure altogether, which puts her at risk of becoming pregnant again and having an unsafe pregnancy.
5. Ascension, which receives billions of dollars each year in federal funding, requires that all of its facilities abide by the Ethical and Religious Directives for Catholic Health Care Services (“Directives”), a set of policy prescriptions written and promulgated by the United States Conference of Catholic Bishops. The Directives demand that all Catholic health care facilities adopt the Directives as policy and require that their employees adhere to them as a condition of medical privileges and employment. Among numerous other restrictions on health care, the Directives prohibit “direct sterilization” – i.e., sterilization for the purpose of preventing pregnancy.²
6. Accordingly, Ascension has a policy prohibiting physicians that practice at its facilities from providing tubal sterilization, including to pregnant people at the time of delivery (i.e., immediately postpartum). This runs directly contrary to the medical standard of care for a pregnant person seeking a tubal sterilization: the procedure is safest and most effective at the time of delivery, and forcing a person to later undergo a second, unnecessary surgery under general anesthesia exposes her to serious health risks. The immediate postpartum period after delivery provides technical ease for the physician and convenience for the patient. As such, nearly half of sterilization procedures are performed during the postpartum period.³
7. Upon information and belief, Ascension does not have a similar policy that requires male patients with a serious medical condition to forego medical treatment. Further, it is Complainants’ understanding that Ascension Providence still allows its physicians to perform vasectomies.
8. Ascension’s policy and practice banning tubal ligations violates Section 1557’s prohibition on discrimination on the basis of sex by (1) denying patients a fundamental component of pregnancy and childbirth-related care, and (2) denying women, but not men, the medical standard of care, and subjecting women to a heightened risk of unintended pregnancy.
9. Complainants request that the Department of Health and Human Services Office of Civil Rights (“OCR”) investigate Ascension’s policies and practices relating to the treatment of patients seeking postpartum tubal ligations to ensure that their policies and practices comport

² U.S. Conference of Catholic Bishops, Ethical and Religious Directives for Catholic Health Care Services (6th ed. 2018), available at <https://www.usccb.org/about/doctrine/ethical-and-religious-directives/upload/ethical-religious-directives-catholic-health-service-sixth-edition-2016-06.pdf>.

³ See Am. Coll. of Obstet. & Gynec., *Committee Opinion No. 827: Access to Postpartum Sterilization* (2021), <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2021/06/access-to-postpartum-sterilization> [hereinafter *Committee Opinion No. 827*].

with the requirements of Section 1557. To the extent OCR finds that Ascension has discriminatory policies or practices, Complainants request that OCR take all steps necessary to bring them into compliance with the law, including requiring Ascension to provide medical services to patients according to the highest standards of medical care regardless of the patient's sex.

JURISDICTION

10. OCR is responsible for ensuring compliance with Section 1557, including receiving information about, investigating, and remedying violations. The Midwest Region OCR is responsible for investigating and remedying violations of Section 1557 in Missouri, where Ascension is headquartered, and in Michigan, where Ascension Providence is located.

FACTUAL ALLEGATIONS

A. The Parties

11. Complainant [REDACTED] is a [REDACTED] Michigan, [REDACTED]. She is pregnant with her third child, which is due at the end of October, 2021. Prior Cesarean section ("C-section") deliveries have caused her significant scarring, and her bladder has fused to her uterus. Her doctors have advised her that her condition creates substantial risks to her health if she were to deliver any more children after the one she is already scheduled to deliver.
12. Complainant American Civil Liberties Union of Michigan is a nonprofit organization that engages in litigation, public education, and lobbying about civil rights and civil liberties in the state of Michigan, including women's health and reproductive rights. Members of the ACLU support its mission to ensure that all individuals are equally protected by the nation's Constitution and laws. The ACLU is extensively involved in a variety of projects and coalitions related to promoting gender equality and access to reproductive rights, and to ensuring that religious exemptions to generally applicable laws are not used to harm third parties. The ACLU has more than 25,000 members, including people who are currently pregnant and desire a postpartum tubal ligation, people who have sought postpartum tubal ligations at Ascension hospitals in the past, and people who will seek postpartum tubal ligations at Ascension hospitals in the future. The ACLU is headquartered in Detroit, Michigan.
13. Respondent Ascension Health is a Catholic healthcare organization that operates more than 2,600 sites of care across the country.⁴ 82,000 births have occurred at Ascension facilities.⁵

⁴ Ascension, <https://www.ascension.org/About> (last visited Aug. 5, 2021).

⁵ Ascension, <https://www.ascension.org/About/Facts-and-Stats> (last visited Aug. 5, 2021).

In a 2016 cost report filed with the Centers for Medicare and Medicaid Services, Ascension reported over \$53 billion in patient charges, including more than \$6 billion in patient charges to Medicaid and more than \$17 billion in patient charges to Medicare.⁶ Together, Medicare and Medicaid accounted for 43.5% of Ascension’s patient charges that year.⁷ In a 2020 audit, 37.1% of its patient service revenue was from Medicare and 13.1% from Medicaid for the year ending June 30, 2020.⁸ Ascension is headquartered in St. Louis, Missouri.⁹ Ascension Providence Hospital – Southfield is a full-service hospital that is part of the Ascension healthcare system. It is located in Southfield, Michigan.¹⁰

B. Ascension’s Imposition of Discriminatory Health Care Restrictions

14. The Directives are written and promulgated by the United States Conference of Catholic Bishops.¹¹
15. 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.”¹²
16. 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. . . .”¹³

⁶ Lois Utley & Christine Khaikin, MergerWatch, Growth of Catholic Hospitals and Health Systems: 2016 Update of the Miscarriage of Medicine Report at 10 (May 2016), available at www.mergerwatch.org.

⁷ *Id.*

⁸ Ernst & Young, LLP, Ascension Consolidated Financial Statements and Supplementary Information, Years Ended June 30, 2020 and 2019 With Reports of Independent Auditors at 18 (Sept. 16, 2020), available at <https://ascension.org/-/media/Files/Ascension/About/Community-Investor-Relations/2020/Consolidated-Ascension-Financial-Statements-Q4-FY20-updt.pdf?la=en&hash=83394A82F76D24CF069CF2ECD2388F24AE8747B2>.

⁹ Ascension, <https://www.ascension.org/About/Contact-Information> (last visited Aug. 5, 2021).

¹⁰ Ascension, <https://healthcare.ascension.org/Locations/Michigan/MIDET/Southfield-Ascension-Providence-Hospital-Southfield-Campus> (last visited Aug. 5, 2021).

¹¹ *Directives*, *supra* note 2.

¹² *Directive 5*, *supra* note 2.

¹³ *Directive 9*, *supra* note 2.

17. Together, Directives 5 and 9 require Ascension to implement the Directives internally and impose them on all practitioners at their facilities to maintain their designation as a Catholic health care institution.
18. Directive 53 states: “Direct sterilization of either men or women, whether permanent or temporary, is not permitted in a Catholic health care institution. Procedures that induce sterility are permitted when their direct effect is the cure or alleviation of a present and serious pathology and a simpler treatment is not available.”¹⁴
19. Ascension requires its subsidiary health systems and hospitals to operate in a manner consistent with the Directives.¹⁵ Because of this, Ascension has banned almost all tubal ligations, despite the exception contained in the Directives themselves, which states, “[p]rocedures that induce sterility are permitted when their direct effect is the cure or alleviation of a present and serious pathology and a simpler treatment is not available.”¹⁶ However, it is Complainant’s understanding that Ascension still permits physicians to perform vasectomies, a sterilization procedure, for men at their facilities.
20. While Ascension’s Catholic identity is highlighted as a central component of its mission,¹⁷ its website nowhere states that Ascension and its subsidiary facilities adhere to the Directives, or that, as a result, Ascension and its subsidiary facilities do not provide certain kinds of medically necessary reproductive health care.
21. The ACLU has received complaints from multiple women affected by Ascension’s policy. On July 26, 2021, the ACLU submitted a complaint to the Michigan Department of Licensing and Regulatory Affairs (“Michigan LARA”) requesting an investigation into the ban’s serious implications for the health of people who can become pregnant.¹⁸ On the same day, the ACLU

¹⁴ *Directive 53, supra* note 2.

¹⁵ Kristen Jordan Shamus, *ACLU Intervenes After Pregnant Oakland County Woman is Denied Tubal Ligation*, Detroit Free Press (July 27, 2021), <https://www.freep.com/story/news/local/michigan/oakland/2021/07/27/aclu-michigan-ascension-providence-sterilization-oakland-county/8071126002/>.

¹⁶ *Directive 53, supra* note 2.

¹⁷ See Ascension, *Mission, Vision and Values*, <http://ascension.org/living-the-mission/mission-vision-values> (last visited Aug. 5, 2021).

¹⁸ Letter from Syeda F. Davidson and Bonsitu Kitaba, ACLU, to Kim Gaedeke, Mich. Dep’t of Licensing & Reg. Affairs (July 26, 2021), attached as Ex. A.

sent a letter to Ascension directly, asking that Ms. ██████ be exempted from its policy banning tubal ligations.¹⁹ To date, the ACLU has not received a response to either communication.

C. Postpartum Tubal Ligation

22. Tubal ligation is an extremely safe and highly effective form of birth control, and is the contraceptive method of choice for approximately 18 percent of women using contraception in the United States.²⁰ By closing off or removing a woman’s fallopian tubes, the procedure prevents an egg from moving down the fallopian tube into her uterus, which means that sperm will not be able to reach the egg.²¹
23. Performing the tubal ligation immediately postpartum has many advantages because of a woman’s anatomy immediately after giving birth. At that point, her fallopian tubes and still-enlarged uterus are located just under the abdominal wall.²² Moreover, she is already in the hospital and often already under anesthesia.
24. If the woman has had a cesarean delivery, the fallopian tubes can be accessed by her physician and brought through the same abdominal incision that was created to deliver the baby. They are then cut and closed with special thread or removed completely.²³ The tubal ligation does not usually add to the patient’s hospital stay or require any additional anesthesia.²⁴
25. There are similar benefits to performing and receiving a tubal ligation after a vaginal delivery. Only one small incision in the abdomen is needed (called a “minilaparotomy”).²⁵ The tubal ligation can be performed within a few hours or during the following days after delivery while

¹⁹ Letter from Syeda F. Davidson and Bonsitu Kitaba, ACLU, to Christine Kocot McCoy and Timothy Glover, Ascension Health (July 26, 2021), attached as Ex. B.

²⁰ Kimberly Daniels, Ph.D. and Joyce C. Abma, Ph.D., U.S. Dep’t of Health & Human Servs., Ctrs. for Disease Control & Prevention, Nat’l Ctr. for Health Statistics, *Current Contraceptive Use Among Women Aged 15 – 49: United States, 2017 – 2019* (Oct. 2020), <https://www.cdc.gov/nchs/products/databriefs/db388.htm>.

²¹ Am. Coll. of Obstet. & Gynec., FAQ052: Postpartum Sterilization (May, 2016), <https://www.acog.org/womens-health/faqs/postpartum-sterilization> [hereinafter FAQ 52].

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

the person is recovering in the hospital. The procedure generally does not lengthen the patient's hospital stay.²⁶

26. If a woman does not receive a tubal ligation at the time of delivery, she must wait six weeks before having the procedure.²⁷ When a tubal ligation is performed separately from pregnancy, it generally must be performed with laparoscopy (i.e., using an instrument called a laparoscope).²⁸
27. A laparoscopic tubal ligation typically requires that the laparoscope be inserted through a small incision made in or near the navel. Another small incision may be made for an instrument to close off or remove the fallopian tubes.²⁹ Laparoscopic procedures carry risks of bowel, bladder, or major vessel injury, and if an electric current is used to seal the fallopian tubes, there is a risk of burn injury to the skin or bowel.³⁰
28. During an interval laparoscopic procedure, because the fallopian tubes typically are not as easily accessible as they are immediately after childbirth, a physician is more likely to close the tubes using a band, a clip, or an electric current.³¹ The effectiveness of the procedure depends on the method used to close the fallopian tubes.³²
29. Postpartum sterilization is a standard component of perinatal care. Nearly half of sterilization procedures are performed during the postpartum period.³³ It is the standard of care for obstetricians to discuss contraceptive options, including sterilization, with their patients as a routine part of the overall perinatal care plan, and to assist their patients in effectuating their decision.

²⁶ *Id.*

²⁷ Kate Marple and Layan Alrahmani, M.D., Babycenter, Tubal ligation: Female Sterilization (Feb. 12, 2021), https://www.babycenter.com/baby/postpartum-health/female-sterilization-tubal-ligation_1282183.

²⁸ *Id.*

²⁹ Am. Coll. of Obstet. & Gynec., FAQ045: Sterilization by Laparoscopy (Aug. 2019), <https://www.acog.org/womens-health/faqs/sterilization-by-laparoscopy> [hereinafter FAQ 45].

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Committee Opinion No. 827, supra* note 3.

30. A postpartum tubal ligation also has the practical advantage of ensuring that a woman receives her desired form of contraception before she leaves the hospital. Some women find it difficult to overcome the logistical hurdles to obtain a tubal ligation weeks or months after discharge from the hospital when they are recovering from the delivery and caring for a newborn baby and often other children as well.
31. People who are unable to receive a desired tubal ligation are at a higher risk for unintended pregnancy.³⁴ Unintended pregnancy is associated with poorer maternal and fetal outcomes than planned pregnancies, including low birth weight, infant mortality, and maternal mortality.³⁵ Pregnancies that occur too closely in time to one another can also have adverse effects on the woman and the baby.³⁶
32. The American College of Obstetricians and Gynecologists, the nation’s leading group of women’s health care providers, observes that “[f]ailure to provide desired sterilization may result in considerable consequences.”³⁷ For patients receiving Medicaid, pregnancy-related eligibility ends shortly after delivery, which makes the ability to obtain sterilization beyond the postpartum period difficult.³⁸ 40% of women do not return for a postpartum visit due to childcare obligations, inability to get time off from work, lack of transportation, unstable housing, and communication barriers.³⁹ The American College of Obstetricians and Gynecologists also recommends that physicians must “resist[] the inclination to deny postpartum sterilization to patients because of physician ideals and values, rather than appropriate clinical concerns.”⁴⁰

D. Ascension’s Denial of Health Care to [REDACTED] [REDACTED]

33. When Ms. [REDACTED] became pregnant with her third child, she had been an Ascension patient for many years. Both of her other children had been delivered at Ascension Providence by the

³⁴ *Id.*

³⁵ Megan L. Kavanaugh & Ragnar M. Anderson, Guttmacher Institute, *Contraception and Beyond: The Health Benefits of Services Provided at Family Planning centers* 6, 8, 10 (July 2013), https://guttmacher.org/sites/default/files/report_pdf/health-benefits.pdf.

³⁶ *Id.* at 8, 10.

³⁷ *Committee Opinion No. 827, supra* note 3.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

same OB/GYN practice. Ascension Providence is the only hospital at which Ms. [REDACTED] OB/GYN has admitting privileges. Ms. [REDACTED] C-section is scheduled for October of 2021.

34. Ms. [REDACTED] second child was delivered by C-section in May of 2017. During the procedure, her OB/GYN discovered that she had significant scarring from her prior C-section, and that her bladder and uterus had fused together. As Ms. [REDACTED] recovered from the procedure, her OB/GYN told her about the scarring and fusion, and advised her that carrying more than one additional pregnancy would put her health at risk.
35. Early in 2021, Ms. [REDACTED] learned that she was pregnant again. Based on the advice of her OB/GYN in 2017, she knew that she would deliver via C-section and that this would have to be her last pregnancy. As such, when she saw her OB/GYN to confirm her pregnancy, she inquired about a postpartum tubal ligation.
36. Ms. [REDACTED] OB/GYN advised her that a tubal ligation was not an option if she delivered at Ascension Providence, because Ascension adopted a policy banning tubal ligations, effective January 1, 2021. Her OB/GYN further advised her that tubal sterilizations were permitted prior to January 1, 2021 with a medical reason, and that a tubal ligation is the recommended procedure for someone with Ms. [REDACTED] conditions. Finally, the OB/GYN told Ms. [REDACTED] that she could not even request an exception for her, and that doctors who perform tubal ligations at Ascension will lose their admitting privileges.
37. On July 26, 2021, the ACLU sent a letter to Ascension requesting an exception for Ms. [REDACTED] and filed a complaint with Michigan LARA, asking it to investigate Ascension's policy.⁴¹ To date, the ACLU has not received a response.
38. Ascension's refusal to allow physicians to perform tubal ligations will result in significant harm for Ms. [REDACTED]. Dr. Timothy Johnson, a professor of obstetrics and gynecology at the University of Michigan observed that Ms. [REDACTED] "health and life are at risk because she's going to have to have to procedures instead of just one."⁴² Dr. Johnson also noted that Ms. [REDACTED] scarring and adhesions that have formed in her abdomen makes every additional procedure that she endures more dangerous. He explained that "[h]er uterus is now going to be scarred three times, so her risk of uterine rupture is going up. The risk of complications are going up and because she's had those adhesions, every time she has a Cesarean section operation, its technically more difficult. So the risks of damage to her bladder or damage to her bowel because of those adhesions are increased . . . [Ascension is] forcing her to have a

⁴¹ Letter to Kim Gaedeke; Letter to Christine Kocot McCoy and Timothy Glover, *supra* notes 17 and 18.

⁴² *ACLU Intervenes After Pregnant Oakland County Woman is Denied Tubal Ligation*, *supra* note 14.

second procedure, undergo a second anesthetic that she doesn't need to have, and there's a risk of death with any surgical procedure."

39. Ms. [REDACTED] limited options are as follows:
- a. Deliver her baby at Ascension Providence with her current OB/GYN, wait until she is healed from that procedure, and then go to a different doctor at a different hospital for a *second* surgery for the tubal ligation, which is contrary to the medical standard of care;
 - b. Find a new OB/GYN and health care system, weeks before her baby is due; or
 - c. Forego the procedure altogether, which puts her at risk of becoming pregnant again and undergoing a potentially dangerous pregnancy because of her preexisting conditions.
40. Similarly situated people are likely to experience similar harm, or far worse. If people who can become pregnant cannot find a new doctor at a new hospital to perform a tubal ligation at the time of delivery, they must either undergo a second, less safe and effective surgery under general anesthesia, or forgo the tubal sterilization they need and face a heightened risk of unintended pregnancy.
41. The ACLU has also received information that Ascension continues to allow its physicians to perform vasectomies, a sterilization procedure commonly for men, while denying tubal ligations for women. Thus, Ascension only enforces the Directives, which purports to ban sterilization procedures for all patients, to deny critical healthcare only to people who can become pregnant, primarily women.
42. Ascension continues to be deliberately indifferent to the harmful effects that its policies and practices have on people who can become pregnant. The ACLU has been urging Ascension to rescind its harmful policies as far back as 2013, when the ACLU and MergerWatch jointly released a report decrying the impact of policies prohibiting sterilization. The report dedicated an entire section to Ascension.⁴³ Additionally, the recently submitted Michigan Licensing and Regulatory Affairs complaint is not the first that the ACLU has filed. In 2014, the ACLU submitted a complaint to LARA, explaining that Ascension's sterilization ban denies people the appropriate standard of care, will subject pregnant people to the risks of an additional surgery under general anesthesia, and was forcing people to use less-effective contraceptive methods, thus increasing the risk of unintended pregnancy.⁴⁴ A spokesperson for the Ascension

⁴³ MergerWatch & Am. Civil Liberties Union, *Miscarriage of Medicine: The Growth of Catholic Hospitals and the Threat to Women's Health and Lives* 3, 7-8, 19 (Dec. 2013), *available at* <https://www.aclu.org/files/assets/growth-of-catholic-hospitals-2013.pdf>.

⁴⁴ Letter from Brooke A. Tucker and Michael J. Steinberg, ACLU, to Mich. Dep't of Licensing & Reg. Affairs (Dec. 4, 2014), attached as Ex. C.

subsidiary at issue at the time responded publicly and seemed amenable to reconsidering its decision and policies in follow-up communications with the ACLU.⁴⁵ Yet Ascension has failed to take action to correct the discrimination, and has persisted in implementing and enforcing its harmful policies.

LEGAL ALLEGATIONS

A. Sex-Based Discrimination

43. Section 1557 of the Patient Protection and Affordable Care Act prohibits discrimination on the basis of sex in any health care program or activity receiving federal funds.⁴⁶ 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).⁴⁷

44. Because Ascension is a recipient of Medicaid and Medicare funding, it is subject to the obligations of Section 1557.⁴⁸

45. Ascension’s policy discriminates on the basis of pregnancy—and thereby, on the basis of sex—by requiring its facilities to abide by rules that prohibit postpartum tubal ligations. Further, Ascension’s policy allowing vasectomies to be performed while banning tubal ligations, both

⁴⁵ Sarah Schuch, *Your Questions on Michigan Woman Denied Tube-Tying at Catholic Hospital Answered*, MLive (Sept. 17, 2015, updated Apr. 3, 2019), https://www.mlive.com/news/flint/2015/09/questions_answered_about_michi.html; Letter from Brooke A. Tucker, ACLU, to Andrew Kruse, Genesys Health System (Sept. 11, 2015), attached as Ex. D; Letter from Brooke A. Tucker, ACLU, to Andrew Kruse, Genesys Health System (Sept. 23, 2015), attached as Ex. D.

⁴⁶ See 42 U.S.C. 18116(a).

⁴⁷ *Id.*

⁴⁸ *Id.*; see also 81 Fed. Reg. 31376, 31383 (May 18, 2016) (explaining that “there are numerous ways in which health services providers are recipients in their own right,” including through “Medicare payments [or] Medicaid payments”).

sterilization procedures, discriminates against women on the basis of sex in violation of Section 1557.

B. Pregnancy/Childbirth Discrimination

46. Ascension’s policies are discriminatory bans on pregnancy- and childbirth-related care. OCR has explained that the sex discrimination prohibited by Section 1557 encompasses women’s health issues including pregnancy, uterine cancer, and prenatal and postpartum services because of the ordinary and biological meaning of “sex.”⁴⁹ Commenters to the 2019 proposed regulations on Section 1557 were concerned that the new rule could have implications for other women’s health services like tubal ligations. But in response, the Department of Health and Human Services affirmed its commitment to vigorously enforcing the prohibition on discrimination on the basis of sex, through its implementation of regulations, which include provisions on termination of pregnancy, consistent with Title IX. The anti-discrimination protections under Section 1557 mirror those under the pregnancy Discrimination Act, which is incorporated into Title VII,⁵⁰ as well as the definition applied under Title IX.⁵¹
47. Postpartum tubal ligations are a standard part of pregnancy and childbirth care for people who, for health reasons or otherwise, want to avoid future pregnancies. For a C-section, the procedure is performed at the same time as the delivery, through the same abdominal incision that was created to deliver the baby, while the patient is under the same anesthesia used for delivery. For a vaginal delivery, the procedure is performed during the same hospital stay. Critically, in both cases, the unique anatomical changes effected by pregnancy—including the enlargement and placement of the uterus—directly impact how the procedure is performed, rendering it safer and more effective than tubal sterilizations performed outside of the childbirth context. Because postpartum tubal ligation relies on aspects of female physiology that are affected by pregnancy and childbirth and is routinely discussed and performed as part of the perinatal care plan, it is pregnancy- and childbirth-related care.⁵² Ascension’s systematic

⁴⁹ 45 C.F.R. 92.

⁵⁰ 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 . . .”).

⁵¹ 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. . .”).

⁵² *Cf., e.g., E.E.O.C. v. Houston Funding II, Ltd.*, 717 F.3d 425, 429–30 (5th Cir. 2013) (“[A]s both menstruation and lactation are aspects of female physiology that are affected by pregnancy, each seems readily to fit into a reasonable definition of ‘pregnancy, childbirth, or related medical conditions.’”); *Hall v. Nalco Co.*, 534 F.3d 644, 645 (7th Cir. 2008) (“Although infertility affects both men and women, Hall claims she was terminated for undergoing a medical procedure—a particular form of surgical

denial of this pregnancy- and childbirth-related care is disparate treatment sex discrimination violative of Section 1557.

48. Additionally, because contraception is a means by which a woman can control her capacity to become pregnant, Ascension's policy banning the most effective method of contraception, at the moment when the procedure is safest and most effective, amounts to a denial of pregnancy-related care. This systematic denial of pregnancy-related care is disparate treatment sex discrimination violative of Section 1557.

C. Disparate Impact Discrimination

49. Ascension's policies and practices prohibiting postpartum tubal ligations have a disparate impact on women in violation of Section 1557,⁵³ because they deny women—but not men—the medical standard of care. Ascension only bans tubal ligations, but vasectomies are still permitted, giving most men the opportunity to undergo sterilization procedures at Ascension while closing the door to most women.
50. But even if Ascension banned vasectomies as well, which is not a policy of other health care facilities, Ascension's policy as applied to women would still have more of a disparate impact on people who can become pregnant than on men. Pregnant people who seek medical care from Ascension facilities must decide whether to find a new doctor and a new hospital covered by their insurance, undergo a second surgery requiring general anesthesia, involving a less safe and less effective sterilization procedure, or forgo the tubal ligation they need. By contrast, if Ascension banned all sterilization procedures, including vasectomies, this would not deny men the standard of care, because vasectomies typically are not performed concurrently with another procedure that would make the vasectomy safer and more effective. Ascension's policies systematically and disproportionately harm people who can become pregnant in violation of Section 1557.
51. Ascension's sterilization ban also has a disparate impact on people who can become pregnant because it subjects them to a heightened risk of unintended pregnancy. While all bans on contraception disproportionately harm those who can become pregnant, the risk of unintended pregnancy is particularly high for those whose requests for postpartum tubal sterilization are denied. Indeed, in one study, nearly one half of women with unfulfilled postpartum sterilization requests became pregnant within one year—twice the rate of women who did not

impregnation—performed only on women on account of their childbearing capacity. Because adverse employment actions taken on account of childbearing capacity affect only women, Hall has stated a cognizable sex-discrimination claim under the language of the PDA.”).

⁵³ See 45 C.F.R. 92.101(b)(3)(ii).

request sterilization.⁵⁴ In addition to the physical burdens of pregnancy and childbirth, “the adverse economic and social consequences of unintended pregnancy fall most harshly on women and interfere with their choice to participate fully and equally in the marketplace and the world of ideas.”⁵⁵

RELIEF REQUESTED

52. Ms. [REDACTED] and the ACLU request that:

- a. OCR investigate Ascension’s policies and practices prohibiting physicians from performing tubal ligations in their facilities; and
- b. OCR take all necessary steps to remedy Ascension’s unlawful conduct and obtain Ascension’s assurance it they will comply with the non-discrimination requirements of Section 1557.

Respectfully Submitted,

/s/ Syeda Davidson

Syeda Davidson

Date: August 26, 2021

⁵⁴ *Committee Opinion No. 827, supra* note 3.

⁵⁵ *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1273 (W.D. Wash. 2001) (internal quotation marks and citation omitted).

INDEX OF EXHIBITS

- Exhibit A Letter from Syeda F. Davidson and Bonsitu Kitaba, ACLU, to Kim Gaedeke, Mich. Dep't of Licensing & Reg. Affairs (July 26, 2021)
- Exhibit B Letter from Syeda F. Davidson and Bonsitu Kitaba, ACLU, to Christine Kocot McCoy and Timothy Glover, Ascension Health (July 26, 2021)
- Exhibit C Letter from Brooke A. Tucker and Michael J. Steinberg, ACLU, to Mich. Dep't of Licensing & Reg. Affairs (Dec. 4, 2014)
- Exhibit D Letters from Brooke A. Tucker, ACLU, to Andrew Kruse, Genesys Health System (Sept. 11, 2015 and Sept. 23, 2015)

EXHIBIT A

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July 26, 2021

Kim Gaedeke
Chief Deputy Director
Department of Licensing and Regulatory Affairs
Bureau of Community and Health Systems – Health Facility Complaints
611 W. Ottawa Street – Central Office
P.O. Box 30664
Lansing, MI 48909

BCHS-Complaints@michigan.gov

Dear Ms. Gaedeke:

The American Civil Liberties Union of Michigan (ACLU) submits this complaint on behalf of [REDACTED] [REDACTED] a pregnant, [REDACTED] woman who has significant scarring and whose bladder and uterus have fused together as a result of prior pregnancies delivered via cesarian section. Due to her medical condition, her physician advised that her health will be at risk if she delivers more than one additional child. Despite her doctor's recommendation, Ascension Providence Hospital is preventing her from undergoing a safe sterilization procedure during her upcoming delivery. We request that you take immediate action to stop Ascension Providence from continuing to prohibit their physicians from providing appropriate medical care to Ms. [REDACTED] and others.

Factual Background

The only way to protect [REDACTED] [REDACTED] health is for her to avoid future pregnancies. She has significant scarring caused by prior Cesarean sections, and her bladder has fused to her uterus. Her doctors have advised her that her condition creates substantial risks to her health if she were to deliver any more children after the one she is already scheduled to deliver. Because of this, she wishes to have a tubal ligation at the time of her scheduled C-section. This is the appropriate standard of care if a woman seeks a tubal ligation while pregnant. When Ms. [REDACTED] learned of her current pregnancy, aware that it would have to be her last in order to protect her health, she discussed the procedure with her doctors. She was shocked when her doctors informed her that, although they are willing to perform the procedure, Ascension Providence will revoke their admitting privileges if they do. Her doctors further informed her that this is because Ascension Providence is part of a Catholic health system that requires all of its hospitals to adhere to a religious policy promulgated by the U.S. Conference of Catholic Bishops, called the Ethical and Religious Directives for Catholic Health Care Services ("Directives"). Ms. [REDACTED] doctors explained that, based on these Directives, Ascension has implemented a ban on almost all tubal ligations.

Ms. [REDACTED] is 26 weeks pregnant. Her current doctors have safely delivered her other children at Ascension Providence. They have admitting privileges only at Ascension Providence, and therefore cannot provide Ms. [REDACTED] with the care that she needs in another hospital. As such, if Ascension Providence does not provide Ms. [REDACTED] with an exemption from its policy so that she can receive a tubal ligation at the time of her currently-scheduled C-section, she will be forced to choose from three options, none of them being optimal. One option would be to search for a new doctor and new hospital in the middle of her pregnancy. Because she already trusts her doctors and has safely delivered at Ascension Providence, and because it is difficult to develop a relationship with a new doctor with so little time left in her pregnancy, this would be a highly stressful situation, and therefore not a good option. The other option would be to have the C-section at Ascension Providence, wait to heal, and then schedule the tubal ligation as a subsequent surgery at another hospital. Not only would this still require her to find a new physician, but it would also require her to incur the risks associated with a second surgery, and wait to heal a second time, thus extending the amount of time that she will be unable to work or care for her family. Finally, delaying the procedure puts her at risk of becoming pregnant again, which is a danger to her health. These options are all unnecessary and contrary to medical standards, as well as state and federal law.

Ascension Providence's ban on tubal ligations has no medical basis of which we are aware. **If a patient seeks a tubal ligation for *any* reason, and there is no medical reason that a tubal ligation cannot be performed, it is an accepted medical practice for the doctor to deem the tubal ligation medically indicated. Here, Ms. [REDACTED] has a serious medical condition that increases the risk of carrying another pregnancy. Refusing to provide her with a tubal ligation represents a serious threat to her well-being and is medically unjustified.**

Ascension Providence is Failing to Comply with State and Federal Law

Hospital patients are "entitled to receive adequate and appropriate care...unless medically contraindicated as documented in the medical record by the attending physician..." M.C.L. § 333.20201. Additionally, a patient "shall not be denied appropriate care on the basis of...sex..." *Id.*

Ascension Providence receives Medicaid and Medicare funds. Facilities receiving such funds are required to abide by the Conditions of Participation, which state that a "patient...has the right to make informed decisions regarding his or her care [including]...being able to request or refuse treatment." 42 C.F.R. § 482.13(b)(2).

"Adequate and appropriate care" for Ms. [REDACTED] is for her to have a tubal ligation to prevent further surgeries. The standard of care dictates that the safest time for her to have this procedure is at the time of her C-section delivery. Instead of providing Ms. [REDACTED] with the care that she needs and requests, her doctors have informed her that Ascension Providence has chosen to abide by a policy that substantially departs from accepted medical standards.

As noted above, this leaves Ms. [REDACTED] with three options that are all hazardous to her health. The decision to deny a patient adequate and appropriate care for her medical condition falls below the appropriate standard of care.

There is no adequate justification for Ascension Providence to force patients to endure such treatment. Ascension Providence's ban on tubal ligations is not only contrary to the standard of care and grossly negligent, it is also discriminatory. To our knowledge, Ascension Providence does not have a similar policy that requires male patients with a serious medical condition, such as Ms. [REDACTED] to choose a riskier treatment that falls well below the standard of care or be forced to find an alternate hospital. It is our understanding that Ascension Providence is still allowing its physicians to perform vasectomies. If this is the case, then banning tubal ligations is an arbitrary, discriminatory policy. Only women and those with female reproductive organs are forced to make this choice.

Request for Relief

Under M.C.L. § 333.20165,

[LARA] may deny, limit, suspend, or revoke the license or certification or impose an administrative fine on a licensee if 1 or more of the following exist:

(d) Negligence or failure to exercise due care....

...

(f) Evidence of abuse regarding a patient's health, welfare, or safety or the denial of a patient's rights.

Ascension Providence's refusal to provide Ms. [REDACTED] with the treatment that she needs to safeguard her health and life constitutes negligence, a failure to exercise due care, evidence of abuse regarding her safety, and a denial of her right to appropriate care.

Hospitals should not be permitted to choose a policy that has no medical basis over patient safety and welfare. We urge LARA to immediately investigate Ascension Providence, and take appropriate action to ensure that nobody who seeks care at its facilities are subjected to this medically dangerous and unnecessary policy. Due to the time-sensitive nature of this request, please be aware that simultaneously with this complaint, we sent a letter to Ascension Providence requesting that it reconsider its decision regarding Ms. [REDACTED]. We have attached it here. We look forward to a prompt response by your agency and request that you confirm receipt of this complaint by August 6, 2021 and provide notification of the steps you intend to take to investigate this issue.

Very truly yours,



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EXHIBIT B

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July 26, 2021

Christine Kocot McCoy
Executive Vice President and General Counsel

Timothy Glover
Executive Vice President and Chief Mission Integration Officer

Ascension Health
4600 Edmundson Rd
St. Louis, MO 63134

Via e-mail: Christine.McCoy@ascensionhealth.org

Re: Medical Exception to Ban on Tubal Ligation Procedure for Patient

Dear Ms. McCoy and Mr. Glover;

We write to you on behalf of [REDACTED] [REDACTED] a pregnant woman expected to deliver via cesarian section (C-section) at Ascension Providence Hospital in Southfield, Michigan in late October, 2021, asking for an exception to Ascension Providence's ban on a tubal ligation procedure for Ms. [REDACTED]. During Ms. [REDACTED] last delivery, her OB/GYN discovered that scarring from a prior C-section had caused her bladder to fuse to her uterus. As she was recovering, Ms. [REDACTED] OB/GYN advised her of these conditions and told her that having more than one additional child may put her health at risk. Under current medical standards of care for women seeking surgical sterilization, having a tubal ligation immediately after a C-section delivery is the safest time to undergo the procedure, as the patient is already open and under anesthesia. Because the tubal ligation procedure would cure or alleviate a known pathology and there is no simpler treatment available, Ms. [REDACTED] requests an exception under the Ethical and Religious Directives for Catholic Services to have a tubal ligation during her C-section at the time of her delivery in October 2021.

Ms. [REDACTED] OB/GYN recently informed her that she cannot have a tubal ligation while delivering at Ascension Providence. In order to undergo this procedure at the same time as her C-section – the safest time to do so – Ms. [REDACTED] would have to find a different doctor to perform the two procedures at a different hospital, undergo the tubal ligation as a second surgery at a later date, or forego the procedure altogether. Ms. [REDACTED] doctors have informed her that Ascension Providence has refused to allow this routine and safe medical procedure solely because of its

adherence to the Ethical Religious Directives for Catholic Health Care Services – a set of health care policies promulgated by the U.S. Conference of Catholic Bishops that prohibits all forms of contraception, temporary or permanent, including tubal ligations at Catholic hospitals.

Ms. [REDACTED] was advised by her physician that doctors with admitting privileges at Ascension Providence were permitted to perform tubal ligations on women seeking surgical sterilizations until late 2020, when Ascension Providence leadership prohibited these procedures. We are unaware of any medical reason for such a policy. In light of Ascension Providence's duty to abide by medical standards of care in the treatment of its patients, and given the serious nature of Ms. [REDACTED] condition, we urge you to immediately consider an exemption from your policy, giving Ms. [REDACTED] the ability to undergo a tubal ligation during the time when it is safest for her to do so. Refusing to consider an exemption will result in unnecessary health risks for Ms. [REDACTED]

Background

[REDACTED] [REDACTED] is a [REDACTED] woman who has been under the care of the same OB/GYN practice since approximately 2013. The practice safely delivered her two prior children via C-section. Ms. [REDACTED] most recent C-section was in May of 2017. That is when her OB/GYN discovered that she had a significant amount of scarring from her prior C-section, which had caused her bladder to fuse to her uterus. Her OB/GYN advised Ms. [REDACTED] that, due to these conditions, it was not safe for Ms. [REDACTED] to become pregnant in the following year, and only once more following that year.

When Ms. [REDACTED] learned that she was pregnant earlier this year, she knew that this would have to be her last pregnancy because of her physician's advice in 2017. As such, she inquired with her OB/GYN about having a tubal ligation following the C-section she is anticipating having in October of this year. She was shocked and dismayed when her doctor informed her that this option is not available to her if she delivers at Ascension Providence, which will revoke the admitting privileges of physicians who perform tubal ligations.¹ Ms. [REDACTED] OB/GYN advised her that Ascension Providence had banned tubal sterilizations beginning January 1, 2021, and that prior to that, tubal ligations would have been the recommended procedure for someone with Ms. [REDACTED] conditions. If Ms. [REDACTED] wants to remain under the care of the same physicians, she would have to deliver at Ascension Providence via C-section, wait to heal from that surgery, and then schedule a *second* surgery with different physicians at a different hospital. A second surgery (and ensuing recovery time) will cause unnecessary disruption to her life and needlessly put her health at risk.

¹ Although we understand that Ascension Providence cites the Ethical and Religious Directives for Catholic Health Care Services as its rationale for disallowing tubal sterilizations, we believe that it still permits its physicians to perform vasectomies. If this is true, banning tubal sterilizations is an arbitrary, discriminatory policy.

Relevant Law

Failure to allow Ms. [REDACTED] to obtain a tubal ligation immediately after her C-section not only unnecessarily places Ms. [REDACTED] health at risk, it also subjects the hospital to investigation and discipline by state licensing authorities. Ms. [REDACTED] is also entitled to an exception to Ascension Providence's ban on tubal ligations pursuant to the Ethical and Religious Directives for Catholic Services.

Under Michigan law, the department of licensing may revoke the license of a medical doctor if they fail to exercise due care, are negligent, or if evidence of abuse regarding their health exists. M.C.L. § 333.20165:

[T]he department may deny, limit, suspend, or revoke the license or certification or impose an administrative fine on a licensee if 1 or more of the following exist:

(d) Negligence or failure to exercise due care...

...

(f) Evidence of abuse regarding a patient's health, welfare, or safety or the denial of a patient's rights.

In construing a related provision, the Michigan Court of Appeals has explained that negligence is "conduct that falls below a standard of reasonable or due care" and "[a] failure to exercise due care contemplates an abdication of responsibilities or carelessness in executing one's duties." *Sillery v. Bd. of Medicine*, 145 Mich. App. 681, 686 (1985).

Additionally, all Michigan patients, regardless of where they are being treated, are entitled "to receive adequate and appropriate care...unless medically contraindicated as documented in the medical record by the attending physician." M.C.L. § 333.20201(2)(e). Further, "[a] patient...is entitled to adequate and appropriate pain and symptom management as a basic and essential element of his or her medical treatment." M.C.L. § 333.20201(2)(o). Finally, "[a] patient...shall not be denied appropriate care on the basis of...sex." M.C.L. § 333.20201(2)(a).

If a patient has a serious medical condition that would increase the risk of carrying a future pregnancy, it is an accepted medical practice for her doctor to explain this risk to her. The doctor may also recommend that the patient avoid future pregnancy. It is then accepted medical practice for the doctor to describe various methods of contraception, including tubal ligation. While that is the case here, if a patient seeks a tubal ligation for *any* reason, and there is no medical reason that a tubal ligation cannot be performed, then it is an accepted medical practice for the doctor to deem the tubal ligation medically indicated.

Even the Ethical and Religious Directives for Catholic Services themselves provide an exception to the ban on sterilization methods. They provide that "[p]rocedures that induce sterility are permitted when their direct effect is the cure or alleviation of a present and serious pathology and

a simpler treatment is not available.”² Providing exceptions to the sterilization ban is not unprecedented. In 2015, a hospital in San Francisco that also adheres to the Ethical and Religious Directives granted a medical exception to one of its pregnant patients after initially refusing. It did so out of recognition of the risk to the patient’s health, including the risk of a second surgery.³

Here, to prevent future pregnancies that could put her life at risk, the Michigan standards of medical care dictate that Ms. [REDACTED] receive a tubal ligation following her C-section. Her physicians have stated that it is unsafe for her to become pregnant after delivering her child in October of 2021, and the Ethical and Religious Directives recognize that this creates an exception to the general ban on tubal ligations. Prohibiting Ms. [REDACTED] from obtaining the procedure and forcing her to either risk becoming pregnant again, which will place her life at risk, or have a subsequent procedure to obtain a tubal ligation, falls well below the standard of care. Finally, if it is true that Ascension Providence allows physicians to perform vasectomies, then Ms. [REDACTED] is only being denied appropriate care because she is a woman.

Request

We are aware of no medical reason to prevent Ms. [REDACTED] from obtaining a tubal ligation at Ascension Providence. Medical standards of care indicate that a tubal ligation procedure should be allowed for Ms. [REDACTED]. The only basis on which Ms. [REDACTED] is being denied appropriate care is Ascension Providence’s adherence to religious directives, but even those directives create an exception in cases like Ms. [REDACTED]. Further, at this stage in Ms. [REDACTED] pregnancy, she should not have to endure the stress of pleading with Ascension Providence administrators to obtain a routine medical procedure that she needs to protect her life. We hope that you will review Ascension Providence’s policy and allow Ms. [REDACTED] physicians to perform this procedure, which is in the best interests of the patient and comports with the medical standard of care.

Finally, due to the time-sensitive nature of the request, we are filing a complaint with the Bureau of Community and Health Systems for the Michigan Department of Licensing and Regulatory Affairs (LARA) simultaneously with this letter. Should you reconsider the decision regarding Ms. [REDACTED] procedure and grant her an exception, we will withdraw the complaint. To that end, we hope that you issue a response to Ms. [REDACTED] request no later than August 6, 2021. Please do not hesitate to contact us if you should have any questions.

² U.S. Conference of Catholic Bishops, Ethical and Religious Directives for Catholic Health Care Services (6th ed. 2018), available at <https://www.usccb.org/about/doctrine/ethical-and-religious-directives/upload/ethical-religious-directives-catholic-health-service-sixth-edition-2016-06.pdf>.

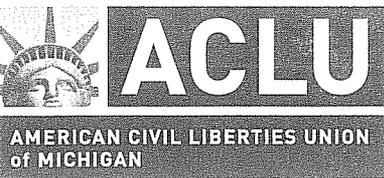
³ Bob Egelko, Catholic Hospital Backs Down on Tubal Ligation Refusal, SFGATE (Aug. 24, 2015), <https://www.sfgate.com/health/article/Catholic-hospital-backs-down-on-tubal-ligation-6463205.php>.

Very truly yours,

A handwritten signature in black ink, appearing to be 'Bonsitu Kitaba', with a long horizontal flourish extending to the right.A handwritten signature in blue ink, appearing to be 'Syeda F. Davidson', with a large, circular flourish.

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EXHIBIT C



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December 4, 2014

Department of Licensing and Regulatory Affairs
Bureau of Health Care Services
Health Facilities Division
PO Box 30664
Lansing, MI 48909

Re: Ban on Tubal Sterilizations at Genesys Health System

To Whom It May Concern:

The American Civil Liberties Union of Michigan has received multiple complaints about a new policy at Genesys Health System (“Genesys”) in Grand Blanc that is severely compromising women’s health care. Genesys is a Catholic hospital that adheres to the Ethical and Religious Directives for Catholic Health Care Services (“Directives”) promulgated by the United States Conference of Catholic Bishops (“USCCB”). Following these Directives, Genesys recently declared that its physicians will be forbidden from performing tubal sterilizations beginning November 1, 2014. As a result, a patient who was nine months pregnant and, in accordance with the appropriate standard of care, had planned with her physician several months ago to obtain a tubal sterilization immediately following her Cesarean section, was informed twelve days before her scheduled delivery that she could not obtain a tubal sterilization at Genesys. Rather, she was told that she would be forced to obtain a tubal sterilization at a later time, in a different facility, and unnecessarily endure the uncertainty and peril of another surgery. Because this policy is contrary to the appropriate standard of care, as well as Michigan and federal regulations, and has needlessly exposed this patient and others to increased risk of harm, we urge you to require Genesys to stop further implementation of the tubal sterilization ban.

According to the American College of Obstetricians and Gynecologists, tubal sterilization is the most common form of permanent birth control in the world.¹ A pregnant woman who delivers her child through a C-section can undergo a tubal sterilization immediately afterward without receiving more anesthesia or having additional surgery. Obtaining a tubal sterilization at the time of delivery generally adds less than thirty minutes to the C-section procedure and is overwhelmingly a safe and effective form of contraception.

Since Genesys’ policy has taken effect, women who now deliver their children via C-section will no longer be able to avail themselves of this quick and safe procedure. Instead, women who desire tubal sterilization, and who have to undergo a C-section surgery at Genesys, will have to wait six weeks for their uterus to heal before undergoing another surgery at a different location that will require further healing time.

¹ See <http://www.acog.org/-/media/For-Patients/faq035.pdf?dmc=1&ts=20141030T1541281722>.

The only other alternative for these women is to attempt to convince Genesys' Vice President of Mission Integration, a non-medical administrator named Andrew Kruse, that their individual circumstance warrants an exception to this policy. However, the situation faced by one pregnant woman who contacted the ACLU of Michigan highlights the impracticability of this option. This woman, who for privacy concerns will be referred to as Mrs. B, was recently scheduled to have a C-section at Genesys in November, 2014, and had planned to have a tubal sterilization performed at that time. Only twelve days before her C-section, this woman was informed by her physician -- who has admitting privileges only at Genesys, and therefore could not deliver the baby at another hospital -- that she would be unable to have a tubal sterilization because of Genesys' new policy.

With her baby due in less than two weeks, Mrs. B should not have been forced to plead with Mr. Kruse about whether she could have this procedure simply because the hospital decided to make health care decisions based on religious directives rather than the appropriate standard of medical care. But before Mrs. B could even contact Mr. Kruse, her water broke and she delivered a week early. Because she did not have the requisite permission from Mr. Kruse, Mrs. B was unable to have the tubal sterilization despite the fact that her doctor was able and willing to perform the procedure.

Mrs. B has had the same OB/GYN for several years. Until the implementation of Genesys' policy, Mrs. B was unaware that the only hospital where her doctor had admitting privileges would require her to receive substandard medical care because of the hospital's adherence to religious directives. In the same vein, Mrs. B.'s physician, who has long held admitting privileges at Genesys, did not know that the hospital's religious beliefs could trump his medical obligation to provide quality patient care.

Frustrated over the inability to properly treat their patients, two Genesys physicians have informed the ACLU of Michigan that they will now counsel C-section patients desiring tubal sterilization to obtain a non-surgical form of sterilization called Essure² at their respective offices rather than risk the danger that will accompany a subsequent surgery. There is serious ongoing debate in the medical community about whether Essure sterilization is as effective as a traditional surgical tubal sterilization.³ However, even assuming Essure sterilization has the same effectiveness as the traditional procedure, patients who undergo C-sections must wait at least six weeks after that surgery to undergo Essure sterilization. In addition, the Essure protocol cautions that the sterilization process can take twelve weeks or longer to become effective. This 18-week process is in marked contrast to a post-Cesarean tubal sterilization which is effective

² The U.S. Food and Drug Administration describes the Essure sterilization process as "placing soft, flexible inserts into the fallopian tubes . . . Over a period of about three months, tissue forms around the inserts. The build-up of tissue creates a barrier that keeps sperm from reaching the eggs, thus preventing conception."
<http://www.fda.gov/medicaldevices/productsandmedicalprocedures/implantsandprosthetics/ucm371014.htm>

³ See, e.g.,
<http://www.contraceptionjournal.org/pb/assets/raw/Health%20Advance/journals/contra/CON-8309-FINAL.pdf>.

immediately. The risk of unintended pregnancy during this four-and-a-half month period not only significantly interferes with a woman's ability to control the size of their family, but in the case of women for whom pregnancy poses severe health risks, also unnecessarily subjects them to harm.⁴

Under Michigan law, patients are "entitled to receive adequate and appropriate care . . . unless medically contraindicated as documented in the medical record by the attending physician or a physician's assistant to whom the physician has delegated the performance of medical care services." M.C.L. § 333.20201(e). Additionally, as a hospital that receives Medicaid and Medicare funds, Genesys is required to comply with the Conditions of Participation for these programs which provides that a "patient . . . has the right to make informed decisions regarding his or her care [including] . . . being able to request or refuse treatment." 42 C.F.R. § 482.13(b)(2). In violation of these regulations, Genesys has taken away the ability of its patients to request and obtain tubal sterilization at the hospital, even when performance of the procedure elsewhere increases the risk of harm to the patient.

The decision to allow religious beliefs to supersede safe and appropriate patient care is not limited to Genesys. In 2010, Mercy Health Partners, a Catholic hospital in Muskegon, Michigan that also adheres to USCCB's Directives, failed to provide appropriate information and treatment to a woman named Tamesha Means who was miscarrying because the hospital considered such care to be an improper facilitation of abortion prohibited by its religious rules. As a result, Ms. Means was turned away from the hospital on three separate occasions and incurred unnecessary bleeding, fever, and infection. After being turned away from the hospital on her third visit, Ms. Means began to deliver in the waiting room as she prepared to leave the hospital. It was only at this point that Mercy Health Partners -- the sole hospital in the county -- began to provide the necessary assistance to Ms. Means. This tragic and wholly avoidable situation is currently the subject of a lawsuit brought by the ACLU of Michigan on Ms. Means's behalf.⁵

Similarly, in 2012, the Center for Medicare and Medicaid Services determined that St. John Hospital and Medical Center in Detroit had failed to comply with federal health care certification requirements after the hospital denied a woman treatment for her miscarriage. Although the woman came to the hospital with vaginal bleeding and was diagnosed with an "inevitable abortion," the hospital refused to follow standard medical procedure and complete the termination of the pregnancy because of its adherence to USCCB's Directives. As a result, the woman had to leave the hospital in the middle of her miscarriage, while bleeding heavily, to seek out another facility for treatment.

To ensure patient safety, hospitals that are open to the public and participate in government programs must be held to the same quality medical standards regardless of their religious affiliation. Genesys' ban on tubal sterilization is contrary to the standard of care and Michigan and federal regulations, and subjects women to unnecessary health and pregnancy risk, as well as increased cost. Your department must promptly investigate this matter and take the requisite

⁴ Obtaining Essure sterilization also requires women to schedule more visits with their physician and pay additional deductibles and other out-of-pocket costs.

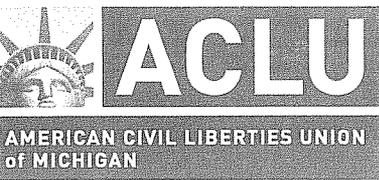
⁵ https://www.aclu.org/sites/default/files/assets/complaint_final_1.pdf

steps to ensure this policy does not further prevent doctors from providing appropriate care to their patients and does not further prevent C-section patients such as Mrs. B. from having their previously scheduled tubal sterilization procedure.

Sincerely,

Brooke A. Tucker, Staff Attorney
Michael J. Steinberg, Legal Director
ACLU of Michigan
2966 Woodward Avenue
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(313) 578-6823
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EXHIBIT D



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September 11, 2015

Andrew Kruse
Vice President of Mission Integration
Genesys Health System
One Genesys Parkway
Grand Blanc, MI 48439

Re: Medical Exception to Ban on Tubal Ligations for Brain Tumor Patient

Dear Mr. Kruse:

We are writing on behalf of Jessica Mann, a pregnant woman expected to deliver via Cesarean section (C-section) at your hospital, Genesys Regional Medical Center, on October 24, 2015. Ms. Mann has brain tumors that place her health at great risk during her current pregnancy and make a subsequent pregnancy potentially fatal. Due to these risks, Ms. Mann, after consulting with both her primary OB/GYN and a maternal fetal medicine specialist, decided to obtain a tubal ligation at the time of her C-section to prevent future pregnancy. Having a tubal ligation immediately after a C-section delivery is the safest time to undergo the procedure and is the standard of care for women who seek surgical sterilization.

However, Genesys recently informed Ms. Mann that she could not have a tubal ligation at Genesys and would instead have to either find a different hospital to deliver her baby and have a tubal ligation, or undergo the tubal ligation, a second surgery, at a later date. Genesys has refused to allow this routine medical procedure solely because of its adherence to the Ethical and Religious Directives for Catholic Health Care Services - - a set of health care policies promulgated by the U.S. Conference of Catholic Bishops that prohibit tubal ligations at Catholic hospitals in most situations.

In light of the hospital's duty to abide by medical standards of care in the treatment of its patients, rather than religious directives, and given the serious nature of Ms. Mann's condition, we urge you to immediately reconsider your denial and approve Ms. Mann's medical request to have the tubal ligation immediately following her C-section at your hospital. Not doing so will result in Ms. Mann facing unnecessary health risks and force us to take further action on her behalf.

Background

Jessica Mann is a 33-year-old woman with pilocytic astrocytoma brain tumors. Because of these tumors, Ms. Mann is unable to deliver naturally due to the risk of seizure while pushing during labor. These tumors also prevent Ms. Mann from receiving an epidural or spinal anesthetic during a C-section. Thus, when Ms. Mann delivers her child next month, she will have to

undergo full anesthesia that will render her unconscious. Because of the dangers involved in administering this type of anesthesia, and the risks that another pregnancy will pose to Ms. Mann's health, Ms. Mann's physicians strongly recommend that she not become pregnant again.

After Ms. Mann decided that a tubal ligation was the best course of action to protect her health, her OB/GYN, Dr. Bonita Wang, submitted a request on Ms. Mann's behalf in May 2015 to have the procedure at Genesys following her C-section.¹ Over three months later, in September 2015, Genesys informed Dr. Wang that the request was denied. In refusing the request, a hospital administrator recommended that Ms. Mann deliver her child at Genesys and have the tubal ligation at a later time in a different hospital. This option is highly disfavored by Ms. Mann's physicians because it would require Ms. Mann to undergo a second surgery under full anesthesia, which would pose risks to Ms. Mann's health, including the same risks that Ms. Mann would face if she were to become pregnant again.

Relevant Law

Failure to allow Ms. Mann to obtain a tubal ligation immediately following her C-section, when it is the safest for her to obtain the procedure, not only unnecessarily places Ms. Mann's life at risk, it also subjects the hospital to investigation and discipline by state licensing authorities.

Under M.C.L. § 333.20165:

[T]he department may deny, limit, suspend, or revoke the license or certification or impose an administrative fine on a licensee if 1 or more of the following exist:

(d) Negligence or failure to exercise due care

...

(f) Evidence of abuse regarding a patient's health, welfare, or safety or the denial of a patient's rights.

In construing a related provision, the Michigan Court of Appeals has explained that negligence is "conduct that falls below a standard of reasonable or due care" and "[a] failure to exercise due care contemplates an abdication of responsibilities or carelessness in executing one's duties." *Sillery v. Bd. of Medicine*, 145 Mich. App. 681, 686 (1985).

Additionally, a Michigan statute sets forth the rights to which hospital patients are entitled. Among the rights listed are:

- A patient is entitled to receive adequate and appropriate care . . . unless medically contraindicated as documented in the medical record by the attending physician . . .

¹ Although Ms. Mann's OB/GYN is willing and able to perform the tubal ligation, she has admitting privileges only at Genesys. As a result, she can neither deliver Ms. Mann's child nor perform the tubal ligation procedure at another hospital.

- A patient . . . is entitled to adequate and appropriate pain and symptom management as a basic and essential element of his or her medical treatment.

M.C.L. § 333.20201(e)(o).

Here, to prevent Ms. Mann's brain tumors from causing her harm, the standard of care dictates that Ms. Mann receive a tubal ligation following her C-section. Ms. Mann's own physicians have stated that a tubal ligation is essential to protect Ms. Mann's life. Prohibiting Ms. Mann from obtaining the procedure and forcing her to either risk becoming pregnant again, which will place her life at risk during the pregnancy and/or at the time of delivery, or have a subsequent procedure to obtain a tubal ligation, which will require another episode of full anesthesia, falls well below the standard of care.

Allowing a patient such as Ms. Mann to have a tubal ligation at Genesys is not unprecedented. Last year, Genesys granted a pregnant patient's request for a medical exception to the hospital's tubal ligation ban. This woman, who had to deliver via C-section for medical reasons, was informed by her doctor that she was at severe risk of uterine rupture if she became pregnant again. She therefore made the decision to have a tubal ligation at the time of her C-section to protect her health and life. Although Genesys initially prohibited her from having the procedure at the time of delivery, it subsequently reversed course and allowed her to have the tubal ligation.

Further, in January, 2015, you informed the Grand Blanc View newspaper that:

Under church teaching, procedures that induce sterility are permitted when their direct effect and immediate purpose is the cure or alleviation of a present and serious pathology, and a simpler treatment is not available. Accordingly, tubal ligations performed for medical purposes, such as prophylactic salpingectomies for reducing the risk of cancer, are not directly contraceptive in their purpose, and could be permissible, depending on prudent medical judgment and the informed consent of the patient.²

Your statement makes clear that Genesys allows tubal sterilizations to be performed in situations where there are grave health risks to the patient absent the procedure. This is precisely the situation here. Ms. Mann's maternal fetal medicine specialist explained in a letter to Genesys in support of Ms. Mann's request to have the tubal ligation at the time of delivery that:

Pregnancy places this patient at significant risk of morbidity and even mortality. She should not become pregnant. Anesthesia is also a risk for this patient. To undergo a separate procedure requiring an additional episode of anesthesia when the tubal ligation can be performed with the anesthesia required for the cesarean delivery does not appear to make any sense in regard to patient safety.

Recently, Mercy Medical Center in Redding, California, another Catholic hospital that adheres to the Ethical and Religious Directives for Catholic Health Care Services, granted a medical

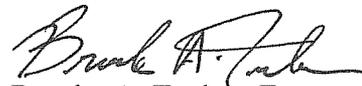
² See http://grandblancview.mihomepaper.com/news/2015-01-08/News/ACLU_urges_state_to_investigate_Genesys_ban_on_tub.html

exception to its tubal ligation ban for one of its pregnant patients after initially refusing. Mercy reversed its decision out of recognition of the risk to the patient's health if it did not provide the procedure, including because she would have to undergo further anesthesia in a second surgery.³

Request

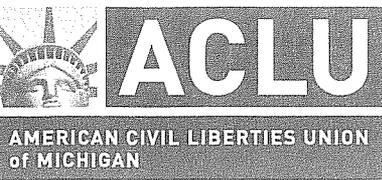
In sum, there is simply no medical reason to prevent Ms. Mann from obtaining a tubal ligation at Genesys. To the contrary, there are multiple medical and legal reasons to allow the procedure. In fact, the only basis on which Ms. Mann is being denied appropriate care is the hospital's adherence to religious directives that forbid the necessary treatment. Religious beliefs should not impede Ms. Mann from obtaining safe medical care at your hospital. Moreover, at 33 weeks pregnant, Ms. Mann should not have to endure the stress of pleading with Genesys administrators to obtain a routine medical procedure that she needs to protect her life. We hope and expect that you will take a second look at the documents Ms. Mann and Dr. Wang submitted in support of obtaining an exemption from Genesys' tubal ligation ban, and decide to allow the procedure that is in the best interests of the patient and comports with the medical standard of care. Please do not hesitate to contact me if you have further questions. Because of the time-sensitive nature of this request, we ask that you issue a response to Ms. Mann's renewed request no later than September 18, 2015. I hope no further action is necessary to ensure Ms. Mann obtains the medical treatment that she needs.

Very truly yours,



Brooke A. Tucker, Esq.
Staff Attorney, ACLU of Michigan

³ See <http://www.sfgate.com/health/article/Catholic-hospital-backs-down-on-tubal-ligation-6463205.php>



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September 23, 2015

Andrew Kruse
Vice President of Mission Integration
Genesys Health System
One Genesys Parkway
Grand Blanc, MI 48439

Re: Refusal to Allow Medically Necessary Tubal Ligation for Brain Tumor Patient

Dear Mr. Kruse:

We are writing in response to your decision on September 21, 2015, to continue denying Jessica Mann with the physician-recommended medical care that she requires at your facility solely for religious reasons. Your decision did not explain why Mrs. Mann does not qualify for the medical exception to Genesys' tubal sterilization ban that has been granted to other patients. Accordingly, we request that you immediately provide detailed reasons about why Mrs. Mann's condition, wherein her brain tumor places her at high risk of death in the event of a subsequent pregnancy, is not sufficiently serious to warrant this exception. Mrs. Mann is expected to deliver in less than four weeks and it is important that she understand precisely why at this late stage of her pregnancy, your hospital is refusing to provide her with the treatment that she needs.

Until it implemented a policy banning tubal sterilizations on November 1, 2014, Genesys provided its pregnant patients with medically appropriate treatment. Within a time span of less than a year, Genesys has transformed from being a hospital that pregnant women could rely on to obtain safe treatment to one that intentionally places such women in harm's way. Mrs. Mann has been a patient of Genesys for several years and delivered two other children at that hospital. She did not suspect that with fewer than four weeks remaining on her pregnancy, and while she is suffering from a serious medical condition, that the hospital would deny her critical medical care. Nor did she suspect that one of the largest healthcare systems in the country, Ascension Health, would enshrine this denial in official hospital policy. This discrimination by your hospital is not only unlawful, it is intentional and callous. We seriously hope that you will reconsider your decision by this Friday, September 25, 2015. Failure to do so will result in Mrs. Mann and the ACLU of Michigan seeking full investigation of your acts of medical negligence and discrimination with the Michigan Department of Licensing and Regulatory Affairs and the Michigan Department of Civil Rights, and, possibly, court intervention.

Very truly yours,

Brooke A. Tucker, Esq.
Staff Attorney, ACLU of Michigan

