

VIA ELECTRONIC SUBMISSION ONLY

September 20, 2016

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9931-NC
P.O. Box 8010
Baltimore, MD 21244-1850

RE: CMS-9931-NC; Coverage for Contraceptive Services

Dear Secretary Burwell:

Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) appreciates the opportunity provided by the Department of Health and Human Services, the Department of Labor, and the Department of the Treasury (collectively, “the Departments”) to offer comments in response to the Request for Information, Coverage for Contraceptive Services, published in the Federal Register on July 22, 2016, at 81 FR 47741 *et seq.* (“RFI”). Lambda Legal is the oldest and largest national legal organization dedicated to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender (“LGBT”) people and people living with HIV through impact litigation, policy advocacy, and public education. For decades, Lambda Legal has been a leader in the fight to ensure access to quality health care for LGBT people and people living with HIV. Many people in the communities Lambda Legal serves, like many in the general population, need contraceptive services for a range of health reasons and insurance coverage for these services is essential.

Lambda Legal agrees with the Departments that the existing accommodation offered by the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (March 23, 2010), and the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (March 30, 2010) (collectively, “ACA”) to eligible non-profit employers that object on religious grounds to the contraceptive coverage requirements of the ACA is consistent with the Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (Nov. 16, 1993) (“RFRA”). Further modification of the accommodation therefore is unwarranted. Lambda Legal specifically agrees that the existing accommodation does not substantially burden employers’ exercise of religion, and that the accommodation constitutes the least restrictive means necessary to further the government’s compelling interest in ensuring full and equal health coverage for employees regardless of gender. Indeed, Lambda Legal briefed these points at length as *amicus curiae* in *Zubik v. Burwell*, in addition to cautioning about negative consequences for LGBT people and people living with HIV, among others, if religiously-affiliated non-profits are permitted to impose religious beliefs on workers.¹

¹ Brief of Amici Curiae Lambda Legal Defense and Education Fund, Inc., *et al.*, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191), *available at* http://www.lambdalegal.org/in-court/legal-docs/zubik_us_20160217_amicus.

Lambda Legal submits these comments in response to the Departments' questions in B2 and B4 of the RFI to oppose the specific modification proposed by the petitioners in *Zubik* to the existing accommodation (hereafter "Proposed Modification"). The Proposed Modification would interfere with the ability of employees and other insureds to seamlessly receive full and equal health coverage, would impose a barrier to access to medically necessary health services, and would impermissibly stigmatize these employees and other insureds for their health needs. Additionally, because the Proposed Modification would permit eligible employers to require their employees affirmatively to seek out and enroll in separate health insurance plans to obtain coverage for health care needs to which their employers object on religious grounds, Lambda Legal provides comments below to highlight the negative impact such a scheme could have on LGBT people and people living with HIV.

B(2): What impact would [the Proposed Modification] have on the ability of women enrolled in group health plans established by objecting employers to receive seamless coverage for contraceptive services?

B(4): Relying on the record developed in the prior rulemaking proceedings, the government's supplemental reply brief in *Zubik* explained that contraceptive-only insurance policies would be inconsistent with state laws regulating insurance and that an affirmative enrollment requirement would impose a barrier to access to preventive services. Gov't Supp. Reply Br. 3-6. The Departments seek further comment on those issues in this RFI.

Recommendation: The Proposed Modification to the existing accommodation should be rejected as unworkable and stigmatizing. Specifically, the Proposed Modification would interfere with the ability of employees to receive seamless health care coverage, stigmatize employees in need of contraception services, and invite further demands for similarly discriminatory modifications with respect to other employees' health care needs apart from contraception services. Lambda Legal agrees with the Departments that the Proposed Modification is unworkable and would impose barriers to the delivery of contraceptive services. *See, e.g.*, Supplemental Brief of Respondents Sylvia Burwell, Secretary of Health and Human Services, *et al.*, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191) at 3-6.

First, requiring employees and other insureds affirmatively to enroll in a separate contraceptive-only insurance plan would create an additional layer of confusion, potential for miscommunication, and deterrent to treatment or delay in treatment for some patients. This is particularly true for employees and their family members who do not realize at the time of initial enrollment that they may develop a medical need for contraceptive-related care in the future. For example, an insured person who has not previously used contraceptives to prevent pregnancy may not anticipate that a physician later will determine based on the individual's specific medical history that pregnancy prevention is important for health reasons and that contraceptives constitute the best method for doing so. Additionally, contraceptives are a common form of treatment for health conditions unrelated to pregnancy prevention. An insured person who is not sexually active or of reproductive age may not anticipate being prescribed contraceptives until the patient is diagnosed with a condition such as polycystic ovary syndrome, or the discovery of risk factors for developing certain types of cancer. Employees and other insureds should not be

required to seek out information and affirmatively enroll in a contraceptives-only plan, particularly given the potential for delay and confusion about whether such enrollment is possible if the primary health care plan is not permitting open enrollment at the time of an unexpected diagnosis necessitating contraceptive coverage.

Second, the Proposed Modification would create an unnecessary barrier to care because contraceptive-coverage-only policies may not have the same network of providers as the primary health plan offered by the employer. Employees should not be required to switch doctors or see two physicians once the need for contraceptive-related care arises, which would create the potential for delays in treatment. Third, relegating patients who need contraceptive-related care to a separate plan, and requiring these employees to take steps to obtain care that other employees need not take, would stigmatize these employees on the basis of their health care needs, and deter them from seeking out medically necessary treatment. Fourth, the Proposed Modification leaves undetermined how, without written notice to covered employees and to the federal government, there would be meaningful oversight.

The Proposed Modification concerns Lambda Legal because many members of the LGBT community need contraceptive services, and the modification would impede their access to necessary care. A majority of lesbian and bisexual women use contraceptives at some point over the course of their lifetimes. Transgender men also may need contraceptive-related care. *See* C. Taylor, “Why This Year’s Reproductive Freedom Supreme Court Cases are Important for LGBT People and Those Living with HIV,” *available at* http://www.lambdalegal.org/blog/20160301_reproductive-freedom-scotus-cases-matter-for-lgbt-hiv (citing studies). The need for seamless contraceptive coverage is of deep concern to the communities we represent.

Lambda Legal opposes the Proposed Modification for the additional reason that permitting such a modification would invite religious non-profits to demand creation of separate health insurance policies for health needs other than contraception, such as for medical care relating to sexual orientation, gender identity and HIV. LGBT people and people living with HIV too often experience discrimination in the workplace and in health care contexts by those who attempt to justify such discrimination on the basis of religion. Lambda Legal previously cited numerous examples of such discrimination in response to a prior request for information. *See* Lambda Legal Response to Request for Information Regarding Nondiscrimination in Certain Health Programs or Activities, 1557 RFI (RIN 0945-AA02 & 0945-ZA01) (submitted Sept. 30, 2013) (“Lambda Legal 1557 Response”), *available at* http://www.lambdalegal.org/in-court/legal-docs/ltr_hhs_20130930_discrimination-in-health-services. Just a few examples include the following:

- A counseling student challenged her expulsion from a counseling program due to her refusal to counsel patients in same-sex relationships. *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011).
- A visiting nurse argued that she had a free-exercise right to engage in anti-gay proselytizing to a home-bound AIDS patient. *Knight v. Connecticut Dep’t of Pub. Health*, 275 F.3d 156 (2d Cir. 2001).

- A physician argued that his religious beliefs justified refusing to employ gay people. *Hyman v. City of Louisville*, 132 F. Supp. 2d 528 (W.D. Ky. 2001), vacated on other grounds by 53 Fed. Appx. 740 (6th Cir. 2002).
- A physician withheld infertility treatment from a lesbian patient, citing religious justifications. *North Coast Women's Care Med. Grp., Inc. v. San Diego Cty. Superior Court (Benitez)*, 189 P.3d 959 (Cal. 2008).
- A lab technician refused to do tests on specimens labeled with HIV because he believed “AIDS is God’s plague on man and performing the tests would go against God’s will.” *Stapp v. Review Bd. of Indiana Emp. Sec. Div.*, 521 N.E.2d 350 (Ind. 1988).
- A religiously-affiliated hospital cited religious justifications for refusing to allow a physician to perform a hysterectomy on a transgender man. See A. Littlefield, “Catholic Hospital Denies Transgender Man a Hysterectomy on Religious Grounds,” available at <https://rewire.news/article/2016/08/31/catholic-hospital-denies-transgender-man-hysterectomy-on-religious-grounds/>.

Although courts routinely have rejected such religious objections to treating LGBT people and people living with HIV as impermissible discrimination, distressing examples of discriminatory treatment in the health care context continue to occur with regularity. See Lambda Legal Comments on Proposed Rule 1557 Re: Nondiscrimination in Health Programs and Activities, 1557 NPRM (RIN 0945-AA02) (submitted Nov. 9, 2015) (“Lambda Legal 1557 Comments”), available at http://www.lambdalegal.org/in-court/legal-docs/hhs_dc_20151117_letter-re-1557 (detailing examples and describing precedent rejecting religious objections as justification for discrimination); Brief of Amici Curiae Lambda Legal, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016). This discrimination contributes to persistent health disparities for LGBT people and people living with HIV.² As we previously explained in our September 30, 2013 submission in response to a Request for Information,³ preventing discrimination in the provision of health care services can have significant ameliorative effects on the health of LGBT people and people living with HIV.

² See Inst. of Med., *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding* (2011) (“IOM Report”) (undertaken at the request of the National Institutes of Health, and providing an overview of the public health research concerning health disparities for LGBT people and the adverse health consequences of anti-LGBT attitudes), available at <http://www.iom.edu/Reports/2011/The-Health-of-Lesbian-Gay-Bisexual-and-Transgender-People.aspx>. Additionally, in 2010, Lambda Legal conducted the first-ever national survey to examine the refusals of medical care, other barriers to care, and substandard treatment confronting LGBT people and those living with HIV. The report, *WHEN HEALTH CARE ISN’T CARING* (“Lambda Legal, Health Care”), is available at <http://www.lambdalegal.org/publications/when-health-care-isnt-caring>. Because LGBT people and those living with HIV too often do experience discrimination in health care services, and are especially vulnerable to breaches of confidentiality in medical settings, and to violations of their personal autonomy regarding reproductive decisions, sexual health, gender expression, transition-related care, HIV care and other matters, Lambda Legal works to address this discrimination nationally with litigation, policy advocacy, community education, and education to ensure that medical professionals and healthcare facilities understand their responsibility to treat LGBT and HIV-positive patients fairly. See Lambda Legal, *Health Care*, available at <http://www.lambdalegal.org/issues/health-care-fairness>.

³ See, *supra*, Lambda Legal 1557 Response, 1557 RFI (RIN 0945-AA02 & 0945-ZA01).

Given this landscape, Lambda Legal is concerned that permitting the Proposed Modification context would invite religious non-profit employers to demand similar modifications in contexts involving sexual orientation, gender identity, or HIV. Past examples of religiously-based discrimination suggest that such employers may demand that the following employees and other insureds affirmatively seek out and enroll in separate insurance policies:

- Employees and other insureds who have a same-sex spouse or are in a same-sex relationship, including with respect to bereavement counseling after the loss of a same-sex partner or other mental health care that involves affirmation of an employee’s sexual orientation or gender identity.⁴
- Employees and other insureds with health care needs relating to HIV, including with respect to pre-exposure prophylaxis (PrEP), a highly effective medication that dramatically reduces the risk of HIV infection among those who are otherwise at high risk, including people who are in sexual relationships with HIV-positive partners.
- Employees and other insureds who need hormone replacement therapy, gender confirmation surgeries, or other treatments for gender dysphoria.⁵
- Employees and other insureds who are unmarried or in a same-sex relationship and who require infertility treatment.⁶

To force such employees and other insureds affirmatively to enroll in separate policies would not only constitute discrimination, but would harm them by interfering with their ability to obtain medically necessary health care and also by stigmatizing them. The Departments would give

⁴ See, e.g., *Keeton, supra*, 664 F.3d 865.

⁵ Such a scenario unfortunately is not far-fetched. Transgender patients frequently encounter religious objections to medically necessary care for gender dysphoria, and religious non-profit hospitals have refused medically necessary treatment to transgender patients on religious grounds—despite routinely providing such treatment to patients whose medical need for it is unrelated to gender dysphoria. For example, Lambda Legal client, Naya Taylor, a transgender woman in Mattoon, Illinois, sought hormone replacement therapy (HRT), a treatment for gender dysphoria, from the health clinic where she had received care for more than a decade. Ms. Taylor’s primary care physician not only refused to treat her, but also refused to provide ongoing blood work to monitor her hormone levels. When Ms. Taylor protested to the clinic that she was being denied transition-related care, she was told that because of the religious beliefs of the clinic’s doctors, they do not have to treat “people like you.” In April 2014, Lambda Legal filed a claim of sex discrimination on Ms. Taylor’s behalf under Section 1557 of the ACA, however, Ms. Taylor subsequently passed away and her case was voluntarily dismissed. See Complaint, *Taylor v. Lystila*, 2:14-cv-02072-CSB-DGB (C.D. Ill., April 15, 2014), available at http://www.lambdalegal.org/in-court/legal-docs/taylor_il_20140416_complaint. In addition to secular medical providers such as the defendants in *Taylor* that permit individual health professionals to discriminate on religious grounds, some religiously affiliated medical providers refuse medically necessary care to transgender patients as a matter of institutional policy. See, e.g., *Franciscan Alliance, Inc., et al. v. Burwell, et al.*, Case 7:16-cv-00108-O, U.S. Dist. Ct., W.D. Tex., Wichita Falls Div. (complaint filed Aug. 23, 2016) (objecting on religious grounds to ACA’s gender identity nondiscrimination requirement), available at <https://assets.documentcloud.org/documents/3033562/Franciscan-Alliance-v-Burwell.pdf>; Comments of U.S. Conference of Catholic Bishops, *Nondiscrimination in Health Programs and Activities*, RIN 0945-AA02, p. 9, fn. 17 (Nov. 6, 2015) (quoting Pope Francis, *General Audience on Man and Woman* (Apr. 15, 2015), which rejects gender transition as an improper elimination of “the sexual difference between males and females” and as forbidden sterilization), available at <http://www.usccb.org/about/general-counsel/rulemaking/upload/Comments-Proposal-HHS-Reg-Nondiscrimination-Federally-Funded-Health.pdf>.

⁶ See *Benitez, supra*, 189 P.3d 959.

unnecessary encouragement to such efforts if it were to grant the unnecessary and discriminatory Proposed Modification requested by the *Zubik* petitioners here.

Accordingly, we strongly urge the Departments to reinforce the principle that religion cannot be used to discriminate, and to reject efforts to weaken an accommodation process that already respects religious freedom and the autonomy of religious non-profit employers, while guaranteeing seamless access to the reproductive health care to which employees are entitled under the law.

Lambda Legal has historically been a strong supporter of the ACA and applauds the Departments for their work in ensuring that all people can receive affordable and high quality health care. We are especially grateful for the Departments' work to increase access to care for LGBT people and those living with HIV because barriers to care—specifically including discrimination based on gender identity, gender expression, sexual orientation, and HIV status—have been and remain serious problems in our health care system. At Lambda Legal, we have made these problems a primary focus of our work spanning the last four decades.

We would be pleased to respond to any questions the Department may have regarding these comments.

Sincerely,

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EDUCATION FUND, INC.

s/ Camilla B. Taylor

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