

# Opening the Hospital Door: Medicare and New York Set Standards for Non-Discrimination in Visitation Policies

By Paul Knag and Christina Hage

New Conditions of Participation (“CoPs”) issued by the Centers for Medicare and Medicaid Services (“CMS”) require hospitals to revise visitation policies. The CoPs are the federal health and safety standards that all Medicaid and Medicare participating hospitals and critical access hospitals (“CAHs”) must meet in order to participate in federal health care programs. The additions to the CoPs address the scope and inclusiveness of hospital visitation policies. The Joint Commission has revised its standards to conform to the new CoPs.

This article will provide guidance for hospitals reviewing visitation policies to ensure compliance with the CoPs. Additionally, it will provide an overview of New York laws and regulations enacted to protect hospital visitation rights.

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## I. Federal Hospital Visitation Conditions of Participation

On April 15, 2010, President Obama issued a Presidential Memorandum on hospital visitation that discussed patients who had been denied visitation with a loved one as a result of a hospital visitation policy.<sup>1</sup> In response, CMS published: “Changes to the Hospital and Critical Access Hospital Conditions of Participation to Ensure Visitation Rights for All Patients” (the “Final Rule”).<sup>2</sup>

In the Final Rule, CMS amended the CoPs to require hospitals to have written policies and procedures regarding patients’ visitation rights, including those setting forth any clinically necessary restrictions that may be imposed by the hospital. In the Commentary to the Final Rule,<sup>3</sup> CMS expressed its support for clinically necessary restrictions: (i) if the patient is undergoing care interventions; (ii) for infection control; (iii) to avoid interfering with the care of other patients; (iv) where a court order

restricts contact; (v) to control disruptive, threatening or violent behavior; (vi) when the patient needs privacy or rest; (vii) to limit the number of visitors; (viii) to set a minimum age requirement; and (ix) where inpatient substance abuse treatment program protocols limit visitation.<sup>4</sup> The Final Rule, which applies to all patients regardless of payment source,<sup>5</sup> is set forth at 42 C.F.R. § 482.13:<sup>6</sup>

(h) *Standard: Patient visitation rights.* A hospital must have written policies and procedures regarding the visitation rights of patients, including those setting forth any clinically necessary or reasonable restriction or limitation that the hospital may need to place on such rights and the reasons for the clinical restriction or limitation. A hospital must:

- (1) Inform each patient (or support person, where appropriate) of his or her visitation rights, including any clinical restriction or limitation.
- (2) Inform each patient (or support person, where appropriate) of the right subject to his or her consent, to receive the visitors whom he or she designates, including, but not limited to, a spouse, a domestic partner (including a same-sex domestic partner), another family member, or a friend, and his or her right to withdraw or deny such consent at any time.
- (3) Not restrict, limit, or otherwise deny visitation privileges on the basis of race, color, national origin, religion, sex, gender identity, sexual orientation, or disability.
- (4) Ensure that all visitors enjoy full and equal visitation privileges consistent with patient preferences.<sup>7</sup>

In the preamble to the Final Rule, CMS concluded that some existing hospital visitation policies can effectively eliminate advocates for many patients, potentially to the detriment of the patient’s health and safety.<sup>8</sup> In the commentary to the Final Rule, CMS identified grievance procedures for patients<sup>9</sup>: (1) the patient may file a griev-

ance through the hospital's internal grievance resolution process; (2) a Medicare beneficiary may file a complaint with the appropriate Quality Improvement Organization (QIO) in that state;<sup>10</sup> (3) the patient or visitor may file a complaint with the State Survey Agency responsible for oversight of the facility<sup>11</sup> or the facility accrediting body. Noncompliance with the visitation provisions of the CoPs "could result in the provider's termination from the Medicare program."<sup>12</sup>

## II. New York Laws Regarding Visitation in Hospitals

In 2003, New York State enacted the Sexual Orientation Non-Discrimination Act (SONDA). SONDA prohibits discrimination on the basis of actual or perceived sexual orientation at any place of public accommodation.<sup>13</sup> Hospitals cannot directly or indirectly refuse, withhold or deny accommodations, advantages, facilities or privileges because of a person's actual or perceived sexual orientation.<sup>14</sup>

New York also has specific enumerated rights regarding hospital visitation. All hospitals licensed in New York are required to abide by the requirements set forth in New York Public Health Law 2805-q, which states: "no domestic partner or surrogate may be denied any rights of visitation of his or her domestic partner or the patient for whom he or she is the surrogate, when such rights are accorded to spouses and next-of-kin at any hospital, nursing home, or health care facility." Same-sex spouses and domestic partners have the same rights as other married couples or next-of-kin.

Hospitals risk civil liability if they violate state laws prohibiting discrimination.<sup>15</sup> Additionally, hospitals can potentially be held liable by patients or other interested parties for failing to comply with hospital visitation requirements.<sup>16</sup>

## III. Conclusion

Any New York hospital participating in the Medicare and/or Medicaid program(s) must comply with the requirements of the CoPs, SONDA and the Public Health Law. The hospital must specifically inform the patient or the patient's representative of the right to receive designated visitors, including same-sex domestic partners and non-family members. Additionally, hospitals must have policies and procedures on patient visitation rights that address clinically necessary restrictions or limitations that the hospital may place on visitation. Hospitals may not restrict patient visitation rights based on race, color, national origin, religion, sex, gender identity, sexual orientation, or disability. Finally, hospitals must ensure that all visitors have the same visitation privileges consistent with patient preferences.

## Endnotes

1. See Presidential Memorandum on Respecting the Rights of Hospital Patients to Receive Visitors and to Designate Surrogate Decision Makers for Medical Emergencies, 75 Fed. Reg. 20511 (Apr. 20, 2010).
2. See U.S. Dep't of Health and Human Serv., Centers for Medicare & Medicaid Serv., Medicare and Medicaid Programs: Changes to the Hospital and Critical Access Hospital Conditions of Participation to Ensure Visitation Rights for All Patients, 75 Fed. Reg. 70831 (Nov. 19, 2010) (Final Rule).
3. *Id.* at 70838, 70839.
4. This is not a complete list and other conditions meriting reasonable restrictions may be applicable.
5. 75 Fed. Reg. 70831, 70835.
6. The visitation rights provisions of the Conditions of Participation for CAHs (which are identical to the visitation rights provisions for hospitals) are found at 42 C.F.R. § 485.635(f) (2011).
7. 42 C.F.R. § 482.13(h). In the commentary to the Final Rule, CMS emphasized that hospitals and CAHs must ensure "that patient rights information is provided in a language and manner the patient understands." 75 Fed. Reg. at 70834 (citing Guidance Related to Title VI of the Civil Rights Act of 1964).
8. 75 Fed. Reg. 70831, 70832.
9. *Id.* at 70835.
10. In the preamble to the Final Rule CMS noted that "information regarding the Medicare beneficiary patient's right to file a grievance or complaint with a QIO may be found at the HHS Centers for Medicare & Medicaid Services Web site: <http://www.cms.gov/QualityImprovementOrgs/>." *Id.* at 70832.
11. Additional information regarding the right to file a complaint with the state survey agency may be found at: <http://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/ContactInformation.html>.
12. 75 Fed. Reg. at 70833.
13. N.Y. Exec. Law § 296(2)(a).
14. *Id.*
15. N.Y. Exec. Law § 298.
16. The New York Code of Public Health does not regulate hospitals discriminating against patients on the basis of sexual orientation. The Code states: "[Hospital] shall not discriminate because of race, color, creed, national origin or sponsor in admission or retention of patients." NY Pub. Health § 2801-a(9)(b).

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