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CITY BAR

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August 23, 2010

BY ELECTRONIC SUBMISSION

Secretary Kathleen Sebelius and Staff
Department of Health and Human Services
Centers for Medicare & Medicaid Services
Attention: CMS-3228-P
P.O. Box 8010
Baltimore, MD 21244-1850

Re: File Code CMS-3228-P
RIN 0938-AQ06
Proposed Rules 42 CFR 482.13(h) and 42 CFR 485.635(f)

Dear Secretary Sebelius and Health and Human Services Department Staff:

We are writing on behalf of the Lesbian, Gay, Bisexual and Transgender Rights Committee and the Health Law Committee of the New York City Bar Association to submit comments on the proposed regulations 42 CFR 482.13(h) and 42 CFR 485.635(f) regarding hospital (including Critical Access Hospitals) visitation rights for same-sex domestic partners and other non-related visitors of hospital patients.

The formulation of new rules expressly requiring that hospital patients have the right to receive designated visitors (such rules, in their eventual final form, the "New Rules") is surely a very welcome and important development in the law. The proposed rules as currently drafted (the "Draft Rules"), however, are limited in scope, as they make no provision for the many patients who lack capacity to make a specific designation of visitors upon admission to a hospital. This significant limitation will prevent many patients from enjoying the intended expansion of visitation rights. It will also give many individuals a false sense of security in the expectation of a fuller scope of rights.

We write with particular concern for the rights of domestic partners under the New Rules. Because domestic partnership is a vague concept in U.S. law, and does not exist as a status under federal law, we feel that the Draft Rules will require significant improvement in order to secure the rights of domestic partners, as intended by the President.

I. Anticipated Problems with the Proposed Rules

The Draft Rules require that the patient or the patient's personal representative proactively designate the patient's permitted visitors. In many cases, however, patients are admitted to hospitals under emergency circumstances in which they lack capacity to take such action. Similarly, in many such cases, a personal representative has not been designated (or the documentation of such designation is not readily available), making it impossible for such designation of visitors to be made.

A prime example of this problem is the very case that President Obama cited in his announcement of his order for the adoption of the New Rule. In that case, Janice Langbehn was tragically kept from visiting her dying partner, who, because she was admitted to a hospital under emergency circumstances with a brain aneurysm, would not have been able to designate Janice as a visitor in the manner that the Draft Rules require.

It would be a perverse result indeed if the New Rules failed to provide relief to exactly those couples whose plight apparently inspired these new rules. Such rules would dangerously mislead the great many people who are expecting such relief, in line with the clear implication of the President's announcement.

II. Proposed Solutions.

In light of the potential problems identified above, we respectfully propose the following changes to the Draft Rules:

1. Domestic Partners Should Have Visitation Rights Without Specific Designation.

The New Rules should state expressly that a patient's domestic partner is entitled to visitation rights. The visitation right should arise by virtue of the domestic partner status, without the requirement that the patient specifically designate the domestic partner as a visitor. Such a provision would ensure that a patient who lacks the capacity to make a personal designation of his or her domestic partner (e.g., a patient admitted to a hospital under emergency conditions or in an unconscious state) would not be deprived of visitation by the domestic partner. The Draft Rules would deprive such a patient of visitation by the domestic partner.

The rules allowing a patient to designate specific visitors is highly appropriate and helpful with respect to visitors whose identity or relationship to the patient would be unknown in the absence of a specific designation. It can be strongly anticipated, however, that a patient has either a spouse or a domestic partner, and that a patient having a domestic partner would wish to be visited by the domestic partner just as a patient having a spouse would wish to be visited by the spouse. For a visitor who can demonstrate that he or she is the patient's domestic partner, then, no specific designation should be required.

a. The New York Visitation Statute as an Example.

While the status of spouse is a legal status, that of domestic partner, in most jurisdictions and under federal law, is not. Therefore, it would be necessary for the New Rules to define “domestic partner” so that the domestic partner status of a visitor can be readily verified if necessary. A number of statutes in New York contain just such a definition.

The New York law mandating hospital visitation for domestic partners (N.Y. Public Health Law §2805-q, the “New York Visitation Statute”, quoted in full at Exhibit A below) provides a very good example of such a definition. We respectfully propose that the language of this statute be adopted verbatim in the New Rules.

The New York Visitation Statute has three particularly salient features that the New Rules should emulate:

First, it provides a clear definition of “domestic partner,” based on a number of facts, such as the maintenance of a common household, financial interdependence, and common ownership of property. This allows hospitals to make a definitive determination in identifying a patient’s domestic partner. It also allows couples to take advance action to aid hospitals in making this determination – for example, by gathering materials evidencing the facts that constitute the domestic partner relationship, or by executing affidavits attesting to such facts. If a clear definition exists, such advance actions could become a common emergency-preparation practice, much like the execution of health care proxies and directives. For these reasons, the grant of rights to domestic partners as a category, coupled with a clear definition of “domestic partner,” would help to ensure the most reliable extension and exercise of visitation rights to and by domestic partners.

Second, one of the facts that constitutes the domestic partner relationship under the New York Visitation Statute is that the individual “is formally a party in a domestic partnership or similar relationship with the other person, entered into pursuant to the laws of the United States or of any state, local or foreign jurisdiction, or registered as the domestic partner of the other person with any registry maintained by the employer of either party or any state, municipality, or foreign jurisdiction.” N.Y. P.H.L. §2805-q(2)(a). With this language, the statute recognizes a relationship status conferred by another jurisdiction or entity for the limited purpose of hospital visitation, without implying or requiring recognition of such status for any other purpose. If the New Rules included such language, the existence of a marriage, civil union or other formal status from a jurisdiction that grants such status could be acknowledged as a relevant fact, in a manner consistent with current federal law, including the so-called Defense of Marriage Act, which prohibits the recognition of such status. To wit, acknowledgement of such status as a fact in defining “domestic partner” would not alter the definition of “spouse” for the purpose of federal legislation as provided in 1 U.S.C. §7, and would not entail the extension of full faith and credit to the solemnization of any such status, as prohibited by 28 U.S.C. §1738C. Indeed, such a situation would parallel that existing in New York, where same-sex marriages may not be performed.

Third, the New York Visitation Statute supplements an existing New York regulation that allows patients to “[a]uthorize those family members and other adults who will be given priority to visit consistent with [one’s] ability to receive visitors.” 10 NYCRR 405.7(c)(18). It therefore demonstrates that the rule defining domestic partners as a category is (a) compatible with visitor-

designation provisions such as those contained in the Draft Rules, and (b) a separate provision that is necessary in order to ensure the full rights of patients' domestic partners.

b. Alternative Verification of Domestic Partner Status.

The New York Visitation Statute takes the very helpful step of defining "domestic partner" so that the status of a domestic partner can be confidently ascertained. That said, the definition places a considerable evidentiary burden on the domestic partner, which may be difficult to meet, especially in the intensely stressful circumstances that are often involved in hospital visitation, which may also occur far from the location of the documents and records that would be used to make the evidentiary demonstrations.

Therefore, the New Rules should go further than the New York Visitation Statute by also allowing the domestic partner to substantiate his or her claim to such status by: (i) affidavit as to the required factual demonstrations, possibly with a significant penalty for perjury; (ii) the affirmation of the claim by other persons familiar with the patient, or (iii) lack of contradiction by persons familiar with the patient. Patients' friends, family members, and physicians who are present or can be readily contacted will often be able to provide such affirmation. In cases where they are not familiar with the relationship, cannot be contacted, or have hostile relations with the domestic partner, the evidentiary demonstrations would prevail.

2. Visitation Rights for Domestic Partners Should Be Equal to that of Spouses.

The personal and emotional role of an individual's domestic partner (as differentiated from to the legal role) is identical to that of a spouse. Since the purpose of hospital visitation is to allow a patient to receive the personal and emotional connection and support from people involved in his or her personal and emotional life, the visitation rights of domestic partners should be identical to those of a spouse.

Again, the New York Visitation Statute sets a clear example, specifying that "No domestic partner shall be denied any rights of visitation of his or her domestic partner when such rights are accorded to spouses and next-of-kin at any hospital, nursing home or health care facility." This provision acknowledges that the role of one patient's domestic partner is equivalent to that of another patient's spouse. And again, the existence of this provision in the laws of the State of New York is entirely compatible with laws within the same jurisdiction that do not permit the solemnization of same-sex marriages.

Of course, any rules that restrict the scope of a spouse's visitation rights – e.g., where there is a history of domestic violence – should apply equally to the rights of domestic partners as well.

3. The New Rule Should Honor Advance Directives for the Purposes of Visitation.

a. The New Rule should require hospitals to honor the visitor designations that patients may have made prior to admission to the hospital, such as on emergency information cards or in health care proxies and other directives.

b. Provide Visitation Rights for Designated Health Care Agents.

Any person named as a patient's health care proxy, as a representative for the purposes of HIPAA, or named in any other capacity in a patient's related health-care directives should be deemed a designated visitor for that patient. Individuals whom a patient has named as his or her health care agent are, by definition, persons with whom the patient feels an intimate and trusting relationship and therefore can be presumed to be among the people the patient most wishes to have nearby during a hospitalization. Moreover, in order for the agent to discharge his or her duty responsibly, it is surely necessary for him or her to have direct contact with the patient.

c. The President's Memorandum Requires that Advance Directives Be Honored.

Recognition of pre-designated visitors and health care agents appears to be required by the Presidential Memorandum that ordered the drafting of the New Rules (the "Memorandum", www.whitehouse.gov/the-press-office/presidential-memorandum-hospital-visitation). The Memorandum specifically states: "It should be made clear that designated visitors, including individuals designated by legally valid advance directives (such as durable powers of attorney and health care proxies), should enjoy visitation privileges that are no more restrictive than those that immediate family members enjoy."

This statement can be understood to require recognition as designated visitors either for those individuals named as designated visitors in such documents, or for all agents named in such documents. The Draft Rules offers neither kind of recognition and therefore fails to respond fully to the President's mandate.

III. Conclusion.

The New Rules present an opportunity for the extension of vital rights to same-sex domestic partners of hospital patients. Indeed, the Memorandum and President Obama's discussion of the relevant issues in his announcement of the Memorandum, indicate his intention that these rights be extended as comprehensively as possible, to ensure that patients not be deprived of the companionship of their life partners in their time of greatest need and vulnerability. The background text accompanying the Draft Rules appropriately notes that such contact is vital for optimal patient care as well, since patients' loved ones often have knowledge and information that is vital in determining the patient's medical treatment.

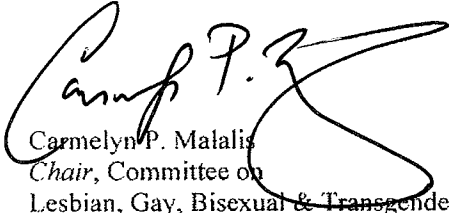
Finally, because the Memorandum was announced with the clear intention to communicate to lesbian, gay, bisexual and transgender communities that the longtime denial of these vital rights would be rectified, the adoption of truly comprehensive and effective rules is essential. Many couples believe that the New Rules are intended to secure their rights fully and are likely to rely on it to do so without further inquiry. Accordingly, many will fail to take the further action that would in fact be needed to secure their rights if the Draft Rules were adopted. In sum, if the New Rules fail to address the issue comprehensively, it will create greater confusion and hair-splitting as to the specific rights granted, and will surely create a false sense of confidence among those affected, thereby harming the very population it is intended to help.

Comments by the Lesbian, Gay, Bisexual and Transgender Rights Committee
and the Health Law Committee of the New York City Bar Association on
Proposed Regulations 42 CFR 482.13(h) and 485.635(f) Regarding Hospital Visitation Rights
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For all these reasons, we urge you to revise the Draft Rules in the ways we have suggested herein, so that patients will be assured of their partners' visitation rights in all circumstances.

We thank you for your consideration of these comments. Please do not hesitate to contact us for any further discussion.

Very truly yours,



Carmelyn P. Malalis
Chair, Committee on
Lesbian, Gay, Bisexual & Transgender Rights



Samuel J. Setzello
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September 15, 2010

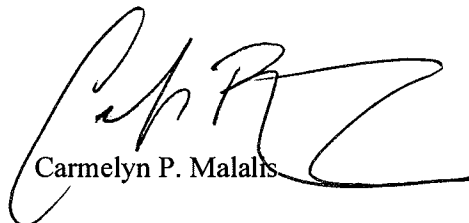
Via U.S. Mail

Ron L. Meyers, Esq., PLLC
515 Madison Avenue
40th Floor
New York, NY 10022

Dear Ron:

Thank you for being the primary drafter of comments submitted on behalf of our Committee and the Health Law Committee regarding proposed regulations 42 CFR 482.13(h) and 42 CFR 485.635(f) concerning hospital visitation rights for same-sex domestic partners and other non-related visitors of hospital patients. Your hard work on this collaborative effort is very much appreciated.

Sincerely,


Carmelyn P. Malalis

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