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Meet

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Equal visitation rights for all hospital patients: CMS finalizes rules

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On November 17, 2010, the Centers for Medicare and Medicaid Services (CMS) released the final rule on hospital visitation that allows patients to designate their own visitors during a hospital stay (the Rule). The Rule, which will apply to any hospital that participates in Medicare or Medicaid, went into effect January 18, 2011. The Rule will trump previous practices in many American hospitals that restricted visitors for some patients to spouses and immediate family – even in emergency rooms and intensive care units. The Rule requires hospitals to notify a patient or "support person" (as defined in the Rule) of his/her visitation rights, and requires all hospitals to establish non-discriminatory visitation policies. CMS administrator Donald Berwick, MD, explained that the new Rule "makes it easier for hospitals to deliver on some of the fundamental tenets of patient care—care that recognizes and respects the patient as an individual with unique needs, who should be treated with dignity and granted the power of informed choice."[1]

The new Rule implements an April 15, 2010 Presidential Memorandum, in which President Obama tasked CMS with developing proposed requirements for hospitals, including Critical Access Hospitals (CAHs), that would address the right of patients to choose who may and may not visit during a hospitalization.[2] The Memorandum emphasized the problem that restricted or limited visitation may cause for patients. Specifically, when a patient cannot have a visitor because there is not a legal relationship between the patient and visitor, physicians and hospital staff miss an opportunity to gain valuable patient information regarding the patient's medical history and condition from those who may know the patient best. In the Memorandum, President Obama pointed out the plight of individuals who are denied the comfort of a loved one, family member, or a close friend after they are admitted to the hospital. The Memorandum indicated that these individuals are often denied the most basic of human needs, simply because the loved ones who provide them comfort and support do not fit into a traditional concept of "family."

The final rule revises the Medicare Conditions of Participation for hospitals and CAHs. Specifically, Medicare and Medicaid hospitals will be required to have written policies and procedures detailing visitation rights, including the specific circumstances under which a hospital can restrict a patient's access to visitors, based on reasonable clinical needs. The rule requires hospitals to inform incoming patients of their right to choose their visitors, regardless of whether the visitor is a family member, a spouse, a domestic partner (including a same-sex domestic partner), or friend, as well as their right to withdraw such consent to visitation at any time. The Rule also addresses the right for a "support person" to be identified for incapacitated persons. The support person can make the visitation decisions given to patients under the Rule. The Rule instructs all Medicare and Medicaid participating hospitals to not "restrict, limit, or otherwise deny visitation privileges on the basis of race, color, national origin, sex, sexual orientation, gender identity, or disability." In addition, the Rule requires hospitals to ensure that all visitors designated by the patient (or support person, where appropriate) enjoy visitation privileges that are no more restrictive than those that immediate family members would enjoy.

The Rule creates a new concept of a "support person" who is not a legal representative per se, but is the one who can make decisions regarding visitors for incapacitated patients. In the final rule, the term "support person" was substituted for the term "representative" used in the proposed rule published on June 28, 2010. CMS changed the term in response to many commentators who expressed confusion concerning the use of the term "representative." Commentators were unclear about whether the patient's representative for visitation purposes needed to be the patient's legal

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representative for decision-making purposes. CMS clarified that the individual responsible for exercising the patient's visitation rights does not need to be the same individual who is legally responsible for making medical decisions on the patient's behalf, though it is possible for both roles to be filled by the same individual. Further, the designation of a support person for purposes of exercising the patient's visitation rights generally does not need to be in writing; however, when the patient is incapacitated and there is a clear dispute between two or more people over whether a particular person should be the support person, hospitals and CAHs can require written documentation to establish support person status. In the absence of a verbal support person designation, hospitals should look to their established policies and procedures for the purpose of exercising a patient's visitation rights.

CMS strongly encourages individuals to establish written advance directives that document the selection of a designated legal representative and the support person for purposes of making visitation decisions, along with the patient's choices about specific medical conditions and treatments. Such documentation will help ensure that the patient's wishes are honored.

Under the final rule, a hospital must meet the following requirements:

- Inform each patient (or support person, where appropriate) of his/her visitation rights, including any clinical restriction or limitation on such rights, at the same time the patient is informed of his/her other rights.
- Inform each patient (or support person, where appropriate) of the right, subject to his/her consent, to receive the visitors whom he/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 the patient's right to withdraw or deny such consent at any time.
- Not restrict, limit, or otherwise deny visitation privileges on the basis of race, color, national origin, religion, sex, gender identity, sexual orientation, or disability.
- Require proof of a relationship between a patient and a visitor only when the patient is incapacitated and there is a clear dispute between two or more people over whether a particular person is the support person. The following forms of proof are suggested: an advance directive naming the individual support person, approved visitor, or designated decision maker; shared residence; shared ownership of a property or business; financial interdependence; marital/relationship status; existence of a legal relationship recognized in any jurisdiction; and acknowledgment of a committed relationship (i.e., an affidavit). This list of proof and documentation is not intended to be exhaustive of all potential sources of information regarding proof of a relationship to allow patient visitation or support person preferences.
- Develop restrictions on visitation privileges only if clinically appropriate. Examples of clinically appropriate reasons upon which hospitals and CAHs might impose restrictions or limitations on visitors include: when the patient is undergoing care interventions; when there may be infection control issues; or when visitation may interfere with the care of other patients. There are other, similarly obvious areas where restriction or limitation of visitation may also be appropriate: existing court orders restricting contact of which the hospital or CAH is aware; disruptive, threatening, or violent behavior of any kind; the patient's need for rest or privacy; limitations on the number of visitations for clinical reasons during a specific period of time; minimum age requirements for child visitors; and inpatient substance abuse treatment programs that have clinical necessary protocols limiting visitation.
- Ensure that all visitors enjoy full and equal visitation privileges consistent with patient preferences.

CMS finalized the Rule based on thousands of comments from patient advocates, the hospital community, and other stakeholders. Because of the new Rule, hospitals should develop visitation policies and procedures if they do not have them, or review and revise existing policies and procedures if they do. In doing so, hospitals need to evaluate and identify explicitly those clinically appropriate reasons to allow the hospital to restrict visitation under the Rule. Hospitals also should review and, if necessary, revise admission and advanced directive procedures to address the new requirements of the Rule. It is also advised that hospitals educate their staff on the hospitals' new policies and procedures regarding the Rule, because a failure to adopt and implement visitor policies in accordance with the Rule could provide new bases for hospital liability. ■

1 CMS News Release, Medicare Finalizes Rules to Require Equal Visitation Rights for All Hospital Patients. November 17, 2010. Available at http://www.hhs.gov/news/press/2010pres/11/20101117a.html.
2 The White House, Office of the Press Secretary, Presidential Memorandum- Hospital Visitation. April 15, 2010. Available at http://www.whitehouse.gov/the-press-office/presidential-memorandum-hospital-visitation.