

JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

August 15, 2016

Centers for Medicare and Medicaid Services
Department of Health and Human Services
Attn: CMS-3295-P
7500 Security Boulevard
Baltimore, MD 21244-1850

Re: CMS-3295-P Hospital and Critical Access Hospital Changes to Promote Innovation, Flexibility, and Improvement in Patient Care

Justice in Aging is pleased to submit these comments on the above referenced proposed rule. Our comments are limited to proposed Section 482.13(i) related to non-discrimination.

Justice in Aging is an advocacy organization with the mission of improving the lives of low income older adults. We have decades of experience with Medicare and Medicaid, with a focus on the needs of low-income beneficiaries, including those dually eligible for both programs.

Gender identity and sexual orientation discrimination. Justice in Aging strongly supports the non-discrimination provisions in proposed Section 482.13(i). We believe it particularly important that the agency explicitly include gender identity discrimination within the definition of sex discrimination, an inclusion that builds on the regulatory framework in the recently released regulations implementing Section 1557 of the Affordable Care Act. We further support the explicit prohibition of discrimination based on sexual orientation. The need for these protections is well documented, as demonstrated by the authorities cited in the commentary to the proposed rule. In addition to those authorities, additional support for the need for such a regulation is found in a report by Justice in Aging, *LGBT Older Adults in Long-Term Care Facilities: Stories from the Field*.¹ The report surveyed both the kinds of discrimination experienced by LGBT older adults in long-term health care settings and the impact of that discrimination. Many respondents reported discrimination based on gender identity and sexual orientation and its serious impact on their access to health care. Although the report focused on individuals in assisted living facilities and nursing homes, the issues highlighted appear in all settings, including hospitals.

Limited English proficient patients. We appreciate the proposed requirement that notice of non-discrimination must be communicated in a language that the individual understands and that such notice also be communicated to support persons and patient representatives. It is important that every hospital patient, whatever language he or she speaks, can understand these basic rights.

Persons with disabilities. We ask that the regulation be modified to ensure that persons with disabilities that affect communication also can understand these rights. To achieve this, we ask that CMS amend subsection (3) as follows: Inform each patient (and or support person, where appropriate), in a language *and/or format* that he or she can understand. . . . ”

¹ Available at <http://www.justiceinaging.org.customers.tigertech.net/wp-content/uploads/2015/06/Stories-from-the-Field.pdf>

WASHINGTON

1444 Eye Street, NW, Suite 1100
Washington, DC 20005
202-289-6976

LOS ANGELES

3660 Wilshire Boulevard, Suite 718
Los Angeles, CA 90010
213-639-0930

OAKLAND

1330 Broadway, Suite 525
Oakland, CA 94612
510-663-1055

Support persons. The requirement in the proposed regulation to include the patient's representative or support person is important in a hospital setting where individuals often arrive under extreme stress and/or are not fully able to understand what is happening or to fully participate in care decisions. Because, especially in emergency situations, a patient representative or support person may not arrive at the hospital simultaneously with the patient, we also ask that CMS clarify that such delays do not absolve the hospital from its obligations to communicate the patient's rights with an appropriate support person.

Importance of a hospital-focused non-discrimination regulation. More generally, we strongly endorse promulgating a regulation that specifically addresses hospital practices. Although Section 1557 and its accompanying regulations cover much of the same territory, they are necessarily broad in scope because they apply to all types of health care providers receiving federal funds from the Department of Health and Human Services. On a day-to-day basis, hospitals look to CMS regulations to guide them in establishing policies and procedures. We believe that CMS, as the HHS entity that primarily regulates hospitals, has an obligation to both provide strong and specific regulatory guidance on non-discrimination to those it regulates and to enforce those regulations, both independently and in conjunction with the HHS Office of Civil Rights. While OCR is likely to rely primarily on complaints to address deficiencies in compliance with Section 1557 regulations, CMS can exercise its oversight functions to monitor compliance with and enforce its own regulations.

We ask, however, that CMS make it very clear to hospitals that compliance with this hospital rule does not relieve them of the additional obligations found in the Section 1557 regulations, including the obligation to post notices in the 15 most prevalent languages in the state and to include a multi-language insert and notice of rights with all significant communications with patients.

Thank you for the opportunity to submit these comments. If any questions arise or if we can provide further information, please do not hesitate to contact us. I can be reached at gburke@justiceinaging.org.

Sincerely,

A handwritten signature in cursive script that reads "Georgia Burke".

Georgia Burke
Directing Attorney