

# Report on Medicare Compliance Volume 33, Number 4. January 29, 2024

## Excerpt of New FAQs on Patient and Resident Visitation Under Non-Discrimination Regulations

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CMS and the HHS Office for Civil Rights on Jan. 25 released FAQs to help facilities comply with nondiscrimination regulations on patient or resident visitation at hospitals, critical access hospitals and long-term care facilities participating in Medicare and Medicaid. Find the entire FAQs here: <https://bit.ly/48N9iGU>.

### **FAQs on Patient Visitation at Certain Federally Funded Entities and Facilities**

The HHS Office for Civil Rights (OCR) and the Centers for Medicaid and Medicare Services (CMS) share jurisdiction over certain nondiscrimination regulations regarding patient or resident visitation at hospitals, critical access hospitals, and long term care facilities participating in Medicare and Medicaid.<sup>[1]</sup> (For simplicity, any reference to “patient visitation” in this document also includes resident visitation at long term care facilities participating in Medicare and Medicaid.) These regulations bar discrimination in visitation policies on the basis of race, color, national origin, religion, sex, gender identity, sexual orientation, or disability.<sup>[2]</sup> OCR enforces the prohibition on religious discrimination in these regulations, and CMS enforces these regulations as they relate to other bases of discrimination.<sup>[3]</sup>

OCR received numerous complaints and questions during the Coronavirus Disease 2019 (COVID-19) pandemic regarding an individual’s right to receive visitors free from discrimination on the basis of religion. OCR provides these FAQs to the public to ensure that patients, residents, families, and caregivers are aware of their rights regarding patient visitation, as well as their rights under other federal civil rights laws enforced by OCR that could apply to visitation. These FAQs are meant to ensure that facilities covered by CMS’s regulations and health care entities covered by OCR’s civil rights authorities are aware of their obligations and are better able to serve people, including during any future public health emergency.

#### **1. What constitutes patient visitation under CMS regulations?**

Patients and residents have the right to receive the visitors whom the patient or resident designates. These visitors can include, but are not limited to, a spouse or a domestic partner (including a same-sex spouse or domestic partner), another family member, or a friend. Additional examples may include a member of the clergy, chaplain, minister, or faith leader. Facilities subject to the CMS patient visitation regulations must ensure their policies do not discriminate on the basis of race, color, national origin, religion, sex, gender identity, sexual orientation, or disability. The patient or resident also has the right to withdraw or deny consent to any such visitors at any time. These rights are protected under CMS regulations at 42 C.F.R. Section 482.13(h) (hospitals), 483.10(f)(4) (long-term care facilities), and 485.614(h)(critical access hospitals).

In addition, individuals with disabilities have a right to be accompanied by a support person in specific situations. This is made clear in civil rights laws enforced by OCR, including Section 1557 of the Affordable Care Act (42 U.S.C. 18116 and implementing regulation at 45 CFR part 92) and Section 504 of the Rehabilitation Act (hereafter referred to as “Section 504”) (29 U.S.C. § 794 and implementing regulation at 45 C.F.R. 84). The right to a

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support person under federal civil rights laws is separate from the right to visitors and infection control requirements under CMS regulations. Despite this difference, during the COVID-19 public health emergency, some facilities did not differentiate visitation from the right of a person with a disability who needs a support person as a reasonable modification to have that person present. For more information, see OCR guidance on the right to be accompanied by a support person.<sup>[4]</sup>

## **2. Why is patient visitation important?**

People receiving institutional care often derive value<sup>[5]</sup> from the physical, emotional, and spiritual support they receive through visitation from family, caregivers, friends, clergy, and others. Physical separation from family and other significant others can take a physical and emotional toll on people receiving care and their loved ones, especially in long term care or end of life settings. This can lead to feelings of social isolation,<sup>[6]</sup> leading to increased risk for depression, anxiety, and expressions of distress, including for people living with cognitive impairment or other disabilities.<sup>[7]</sup> Patient visitation rights reflect this reality and help to ensure that people can benefit from interaction with individuals they have a significant relationship with in a reasonable and safe manner.

## **3. What facilities have patient and resident visitation obligations?**

Medicare and Medicaid-certified facilities including hospitals (as set forth in 42 C.F.R. Section 482.13(h)), long term care facilities (as set forth in 42 C.F.R. Section 483.10(f)(4)), and critical access hospitals (as set forth in 42 C.F.R. Section 485.614(h)) that participate in Medicare and Medicaid have certain nondiscrimination obligations regarding patient visitation that OCR has jurisdiction over.

## **4. What entities have other civil rights obligations that may require them to admit other individuals to visit a patient?**

All entities that receive federal financial assistance from the Department, including those that are not long term care facilities, hospitals, or critical access hospitals are separately obligated to comply with federal civil rights laws that prohibit recipients of federal financial assistance from excluding an individual from participating in, denying an individual the benefits of, or otherwise discriminating against an individual in their programs and activities. These obligations, enforced by OCR, come from Section 504 of the Rehabilitation Act, which prohibits discrimination on the basis of disability, and Section 1557 of the Affordable Care Act, which prohibits discrimination on the basis of race, color, national origin, sex (including gender identity and sexual orientation), age, and disability.<sup>[8]</sup> In instances where the presence of a support person is necessary to provide an individual with a disability an equal opportunity to participate in or benefit from the aids, benefits, or services a facility provides, visitation policies and practices that deny access for support persons may violate federal civil rights laws, such as Section 1557, Title VI, Title IX, the Age Discrimination Act, and Section 504. In addition, the entity has a responsibility of providing, when necessary for effective communication, appropriate auxiliary aids and services to the individual with a disability. This may include in-person interpreters and readers. A policy of only providing video remote interpreting or other type of remote auxiliary aids and services may violate the effective communication provisions of Section 504 and Section 1557, if an in-person interpreter or reader is necessary for effective communication.

Whether a covered entity must allow a support person to be physically present as a reasonable modification depends on a number of factors, including safety issues<sup>[9]</sup> and whether remote participation would be effective. For more information, please see OCR guidance released during the COVID-19 pandemic for providers regarding access for individuals with disabilities.<sup>[10]</sup> Additionally, covered entities may be required to provide interpreters

and/or translated documents for limited English proficient (LEP) persons. See guidance on the right for individuals with limited English proficiency to an interpreter<sup>[11]</sup> and general guidance for individuals with limited English proficiency<sup>[12]</sup> for information on interpreters, both in-person and virtual.

#### **5. Do I have to be a Medicare or Medicaid beneficiary to have patient visitation rights under the CMS regulations?**

No. The CMS regulations at 42 C.F.R. Sections 482.13(h), 483.10(f)(4), and 485.614(h) provide the patient or resident with rights for visitation at a hospital, long term care facility, or critical access hospital that participates in Medicare or Medicaid programs, regardless of whether an individual patient or resident is covered by Medicare or Medicaid. Likewise, federal civil rights laws protect individuals from discrimination in a covered entities' health programs and activities, regardless of whether the individual is a Medicare or Medicaid beneficiary.

#### **6. Do facilities have to notify patients or residents of their right to patient visitation?**

Yes. Under 42 C.F.R. Sections 482.13(h), 483.10(f)(4), and 485.614(h), all facilities must have written policies and procedures regarding the visitation rights of patients. Those written policies and procedures must include:

- any clinically necessary or reasonable restriction or limitation that the entity may need to place on the visitation rights of patients, and
- the reasons for the clinical restriction or other limitation.

Hospitals and critical access hospitals are obligated under CMS regulations to inform each patient of their visitation rights, including any clinical limitation or restriction on such rights, in advance of furnishing or discontinuing patient care whenever possible. Long term care facilities are obligated to inform each resident of their visitation rights, including any clinical or safety restriction or limitation on such rights, when the resident is informed of their other rights under 42 C.F.R. Section 483.10. As visitation policies change to adapt to current health risks, facilities should provide patients the most up to date version of visitation policies, for example, by keeping up to date policies provided on paper, verbally, or listed on the facility website.

Under 42 C.F.R. Sections 482.13(h)(3) (hospitals), 483.10(f)(4)(vi)(C) (long term care facilities), and 485.614(h)(3) (critical access hospitals), and under federal civil rights laws enforced by OCR, facilities covered by CMS regulations and entities covered by civil rights laws enforced by OCR must also ensure that all patients, regardless of race, color, national origin, religion, sex, gender identity, sexual orientation, age, or disability, enjoy visitation privileges in a nondiscriminatory manner. This may include, for example, providing people receiving care with limited English proficiency notice of the right to have visitors in a language other than English.

#### **7. Are facilities allowed to limit patient visitation?**

Yes. Under 42 C.F.R. Sections 482.13(h), 483.10(f)(4), and 485.614(h), hospitals, critical access hospitals, and long term care facilities respectively may limit access to their facilities so long as: the restrictions are clinically necessary or otherwise reasonable (for example, limiting visitation hours or the number of visitors at a time); they inform patients in advance of furnishing or discontinuing patient care, whenever possible, of the facility's policies and procedures (in the case of hospitals and critical access hospitals) or residents at the same time the resident is informed of their other rights (in the case of long term care facilities); they maintain their policy in writing; and they do not restrict, limit, or otherwise deny visitation privileges on the basis of race, color, national origin, religion, sex, gender identity, sexual orientation, or disability.

Additionally, under federal civil rights laws, including Section 1557, clinically necessary visitation restrictions may be permissible for safety reasons based on objective risks. Section 504 and Section 1557 allow covered

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entities to have legitimate requirements necessary for the safe operation of their programs and activities. However, covered entities must ensure that their safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities.<sup>[13]</sup>

The following is an example of a permissible legitimate safety requirement: During the COVID-19 pandemic, some facilities limited the number of patient visitors who could be inside a building or room at a given time. Some facilities also limited visitation by screening all visitors for COVID-19, restricting entry by those people who tested positive, and in a manner that complied with the above requirements. Under Section 504 and Section 1557, recipients must also make reasonable modifications to such policies and procedures when necessary to avoid discrimination based on disability, unless they can demonstrate that making the modifications would fundamentally alter the nature of the health program or activity or impose an undue financial and administrative burden.

## **8. Can facilities limit patient visitation during infectious disease outbreaks?**

Yes. During infectious disease outbreaks such as COVID-19, 42 C.F.R. Sections 482.13(h), 483.10(f)(4), and 485.614(h) allow hospitals, long term care facilities, and critical access hospitals to limit patient visitation if the covered facility determines that the limitation is clinically necessary or otherwise reasonable and does not restrict, limit, or otherwise deny visitation privileges on the basis of race, color, national origin, religion, sex, gender identity, sexual orientation, or disability. As with any other reason for limiting visitation, if a facility limits visitation in response to a public health emergency or disease outbreak, it must still comply with applicable regulatory requirements, including maintaining a written visitation policy or procedure and informing patients or residents of that policy or procedure. For long term care facilities CMS guidance<sup>[14]</sup> notes that if a visitor, resident, or their representative is aware of the risks associated with visitation, and the visit occurs in a manner that does not place other residents at risk (e.g., in the resident's room), the resident must be allowed to receive visitors as they choose. Compassionate care visits, which include visits for a resident whose health has sharply declined or is experiencing a significant change in circumstances,<sup>[15]</sup> are to be allowed at all times.<sup>[16]</sup>

Additionally, under federal civil rights laws that HHS enforces, including Section 1557, clinically necessary visitation restrictions may be permissible for safety reasons based on objective risks. Section 504 and Section 1557 allow covered entities to have legitimate requirements necessary for the safe operation of their services, programs, or activities. However, covered entities must ensure that their safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities.

## **9. What types of policies or procedures might constitute a discriminatory denial of visitation privileges?**

A covered entity's or facility's policy or procedure may discriminate in violation of federal civil rights laws or CMS regulations if it subjects certain classes of visitors to additional screening or if it prohibits certain classes of visitors and not others on the basis of race, color, national origin, religion, sex, gender identity, sexual orientation, or disability. The following examples might constitute discrimination:

Hospitals prevent family members from bringing patients kosher food or halal food that meet the patient's religious dietary restrictions while allowing other visitors to bring patients other non-religious food items.

Members of certain religious groups are subjected to more rigorous screening processes and/or are denied opportunities for visitation based on the patient's and/or visitor's religious affiliation.

Hospitals adopt policies during a pandemic that allow patients to visit with family members or friends but prohibit them from visiting with clergy.

OCR received complaints during the COVID-19 public health emergency that certain hospitals enforced visitor prohibitions that did not account for support persons whose physical presence was necessary to assist patients with disabilities with effective communication and decision-making. Policies that do not allow reasonable modifications for individuals with disabilities who require the presence of support persons likely violate disability rights laws.<sup>[17]</sup> These are select examples of the types of policies or procedures that may constitute a discriminatory denial of visitation privileges in violation of federal civil rights laws and regulations.

**10. Our facility has a chaplaincy program. Is the facility still required to allow clergy visitation?**

Yes, if the facility policy allows visitation with other types of visitors. Patients and residents of hospitals, critical access hospitals, and long term care facilities have a right to receive visitors of their choosing, including clergy, ministers, chaplains, or faith leaders, and facilities may only limit that right for clinically necessary or reasonable restrictions. Facilities subject to the CMS regulations discussed in this FAQ should likewise ensure that chaplains, clergy, ministers, faith leaders, or other spiritual support persons from particular faiths are not discriminated against by, for example, being subjected to additional requirements or restrictions. Facilities should additionally be aware that CMS regulations protect the right of patients and residents to withdraw or deny consent for a visitor at any time, including a visit from a chaplain.

Facilities subject to the CMS regulations discussed in this document should not equate the religious needs of different religious patients, even if a facility believes the patients belong to the same or related religious organizations or communities. OCR received complaints during the COVID-19 pandemic alleging that certain hospitals that provided chaplain services nonetheless declined to allow patients access to a rabbi who could appropriately serve Orthodox and Hasidic Jewish patients, including by providing religious services in the appropriate language. OCR also received a complaint alleging that a hospital staff member insisted that allowing a Catholic priest to visit a patient by standing on the other side of the door and in the hallway was sufficient because it was sufficient for other faith traditions.

**11. Can a facility maintain a separate patient visitation policy or procedure for visitors and individuals receiving care who come from communities with high levels of communicable disease outbreak?**

A covered entity or facility generally may not base a patient visitation policy or procedure on assumptions or stereotypes about the likelihood of individuals from certain religious or other minority communities transmitting a communicable disease because this type of policy or procedure may discriminate against patients and visitors on a legally protected basis. However, in many states, facilities varied their visitation policies based on objective information about the prevalence of COVID-19 in the county in which each facility was located while complying with federal civil rights laws and CMS regulations.

Under 42 C.F.R. Sections 482.13(h), 483.10(f)(4), and 485.614(h), any restrictions or limitations on patient visitation must be based on clinical necessity or otherwise be a reasonable limitation that does not restrict, limit, or otherwise deny visitation privileges on the basis of race, color, national origin, religion, sex, gender identity, sexual orientation, or disability.

**12. Are there any patient visitors who might warrant special access to individuals receiving care in a facility or covered entity for whom an otherwise reasonable visitation restriction should not necessarily apply?**

Yes. Under 42 C.F.R. § 483.10(f)(4), long term care facilities must provide immediate access to a resident's immediate family members, individual physician, certain representatives, (including representatives of the Office of the State Long-Term Care Ombudsmen) and certain other individuals in a manner that does not impose on the rights of another resident. Facilities must also provide reasonable access to a resident by any entity or individual that provides health, social, legal, or other services to the resident, in a manner that does not impose

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on the rights of another resident and subject to the resident's right to deny or withdraw consent at any time.

42 C.F.R. § 483.10(f)(4) also requires long term care facilities to allow immediate access to a resident by any representative of the protection and advocacy systems, as designated by the state, and as established under the Developmental Disabilities Assistance and Bill of Rights Act of 2000 and the Protection and Advocacy for Mentally Ill Individuals Act of 2000.

In addition, in some cases Section 504 of the Rehabilitation Act (29 U.S.C. 794 and implementing regulation at 45 CFR part 84) and Section 1557 of the Patient Protection and Affordable Care Act (42 U.S.C. 18116 and implementing regulation at 45 CFR part 92) may require a covered entity to reasonably modify its policies and procedures for people with disabilities who may need a support person present with them. For more information, please see the guidance OCR previously released on this issue.<sup>[18]</sup>

### **13. Can a facility restrict how a patient or resident interacts with their visitors?**

Yes. Under 42 C.F.R. Sections 482.13(h), 483.10(f)(4), and 485.614(h), a facility may require a clinically necessary or reasonable restriction or limitation on patient visitation so long as it otherwise complies with the requirements of these federal regulations, including that the policy or procedure not restrict, limit, or otherwise deny visitation privileges on the basis of race, color, national origin, religion, sex, gender identity, sexual orientation, or disability. For example, a covered entity may be allowed to require that during a communicable disease outbreak, visitors wear protective gear while visiting the patient or resident or maintain a certain distance from the individual they are visiting.

### **14. Can a facility restrict virtual visitation?**

Yes. A hospital, long term care facility, or critical access hospital must comply with the same CMS regulatory requirements in restricting virtual visitation as it would for in-person visitation. CMS regulations state that a clinically necessary or reasonable restriction or limitation may be placed on visitation if it otherwise complies with the requirements of applicable federal regulations, including that the policy or procedure not restrict, limit, or otherwise deny visitation privileges on the basis of race, color, national origin, religion, sex, gender identity, sexual orientation, or disability. For example, OCR has received numerous complaints regarding restricted access to electronic kosher communication devices, potentially in violation of CMS patient visitation regulations. Facilities should ensure that any restriction placed on devices used to facilitate patient visitation does not discriminate on the basis of religion.

Note that long term care facilities must, at a minimum, facilitate any request for an alternative communication based on a request for such a communication in lieu of an in-person visit, such as by phone or through the use of other technology. This obligation applies whether the request is made by a resident; the Long-Term Care Ombudsman program; a protection and advocacy agency, including a religious or religiously affiliated one; or other entity with a legal right of access to communication with a resident.

### **15. Where do I file a complaint if I believe my patient visitation rights have been violated by a covered entity?**

The Office for Civil Rights enforces laws that prohibit discrimination and require covered entities to provide individuals an equal opportunity to participate in a program or activity, regardless of race, color, national origin, sex (including gender identity and sexual orientation), age, disability, or religion. This includes violations of the requirement under CMS regulations at 42 C.F.R. §§ 482.13(h)(3), 483.10(f)(4)(vi)(C), and 485.614(h)(3) that a covered entity may not restrict, limit, or otherwise deny visitation privileges on the basis of religion. Individuals who believe that a facility has violated their, or someone else's, patient visitation rights against discrimination on the basis of religion in these CMS regulations, or other nondiscrimination rights under federal civil rights

laws, such as Section 1557, Title VI, Title IX, the Age Discrimination Act, and Section 504, may file a complaint with OCR at the OCR complaint portal.

CMS investigates and enforces the Conditions of Participation for covered healthcare entities with respect to patient and resident rights, including patient visitation rights against discrimination on the basis of race, color, national origin, sex, gender identity, sexual orientation, or disability (42 C.F.R. §§ 482.13, 483.10, and 485.614). If you believe your visitation rights have been violated or an entity is not in compliance with these regulations, you can file a complaint with your respective CMS Regional Office, which can be found at <https://www.cms.gov/Medicare/Coding/ICD10/CMS-Regional-Offices> or with your respective State Survey Agency, which can be found at <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/ContactInformation>.

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