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To Share or Not to Share (Space) – That is STILL the Question

As we rapidly approach the fifth month of the year, the Center for Medicare and Medicaid Services (CMS) has yet to issue its much-awaited “fresh look” guidance on shared space arrangements between hospitals and other entities, such as physician practices and ambulatory surgery centers. David Wright, deputy director of CMS’s Center for Clinical Standards and Quality, talked about CMS’s new direction at the American Health Lawyers Association (AHLA) conference in March 2018 and again during an AHLA webinar in November, indicating that the guidance was in the final stages of development and could be released any day.^[1] But so far, nothing.

Mr. Wright provided much hope to cash-strapped hospitals that have struggled to operate efficiently while still complying with the previously rigid CMS stance prohibiting space sharing by a hospital in any way, shape or form. Though no formal regulation was ever issued, CMS regional offices have taken a hard line when asked what is permissible. The answer has always been a resounding “no” – a hospital may not share space with anyone else. Period. No shared entrances, waiting rooms, hallways, bathrooms. Nothing.

And to punctuate that directive, the Office of Inspector General and Justice Department sniffed out offenders and slapped on exorbitant fines. A hospital in NY paid \$3.7 million for non-compliance with the provider-based requirements in its hyperbaric oxygen therapy program;^[2] and another hospital in Montana was hit with revocation of provider-based status and a demand for repayment of \$1.5 million for services provided in “shared” clinic space.^[3]

For years hospitals have begged CMS for substantive guidance on this issue, but the response was always the same – evaluation will be done by the regional office on a case-by-case basis.^[4]

Whether that focused assessment ever occurred is questionable, at best, given the fact that CMS has steadfastly disapproved of any shared space arrangements involving hospitals and other entities.

The rationale behind the need for complete separation has always been to ensure that patients are keenly aware that they are entering and receiving services at a hospital facility and will be billed accordingly. CMS's "fresh look," however, focuses on whether space-sharing arrangements negatively affect patient health or safety. If CMS thinks infection control, quality or privacy are compromised, space sharing will be deemed problematic.

But what may be truly problematic is the gray area the new guidance could create. While hospitals have not been pleased with CMS's position on shared space, at least they knew where the agency stood. And many went to great lengths (and expense) to satisfy the separation requirements, purchasing separate equipment and building walls, separate entrances and waiting rooms. The new guidance may present hospitals with a Humpty Dumpty scenario, trying to put all the pieces back together again to increase efficiencies and reduce costs and patient inconvenience.

The delay in issuance of the new guidance has some wondering whether CMS has thought it through in more detail and decided to leave well enough alone. Or maybe, just maybe, the agency is spending the extra time to ensure that what it produces is meaningful and manageable. We can always hope. But, for now, the question is still hanging out there – to share or not to share?

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[1] "Survey and Certification Issues for Co-Located Clinics – Provider-Based and Freestanding," American Health Lawyers Association (Nov. 27, 2018).

[2] "Our Lady of Lourdes Memorial Hospital Has Paid More Than \$3.37 Million To Resolve Self-Disclosed Billing Improprieties," Department of Justice, U.S. Attorney's Office, Northern District of NY (Oct. 16, 2014).

[3] "Denial of Hospital On-campus Location," CMS MIS PB 3200 (Sept. 29, 2015).

[4] 65 Fed. Reg. 18,434, 18,504, 18,515 (Apr. 7, 2000).

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