Survey Finds Many U.S. Hospitals Do Not Have Same-Sex Nondiscrimination Policies Despite Recent Media Attention

By Craig A. Conway, J.D., LL.M. (Health Law)
caconway@central.uh.edu

Approximately two months ago President Obama issued a memorandum that will require hospitals accepting Medicare or Medicaid funds to provide visitation rights to gay and lesbian couples.1 This mandate stemmed, in part, from the widespread media publicity2 surrounding a Miami, Florida hospital that refused to allow Janice Langbehn to see her dying partner, Lisa Pond, along with the couple’s adopted children.3 Despite this move by the Obama Administration, a recent survey concluded that many health care facilities have not changed their policies to include equal treatment for same-sex couples.

Background

In issuing the directive that hospitals must have a nondiscriminatory visitation policy directed toward gay and lesbian couples, President Obama was inspired and moved by the case of Janice Langbehn who lost her partner of nearly 20 years, Lisa Pond, in Miami, Florida.4

Before the couple could leave on a cruise with their four adopted children in 2007, Pond suffered a massive stroke in the early morning and was taken to nearby Jackson Memorial Hospital.5 Shortly thereafter, Langbehn arrived at the hospital’s trauma center with the children and informed personnel that she was Pond’s life partner. Langbehn asked that she and the children be allowed to see Pond as soon as possible. The hospital admitting clerk denied Langbehn and the children access to see Pond for the next eight hours.6 A social worker with the hospital later spoke with Langbehn and informed her

---

4 See Shear, supra note 1.
5 Langbehn v. Public Health Trust of Miami-Dade Cty., 2009 WL 3247185 at *1 (S.D.Fla.).
6 Id.
that because she was in an “anti-gay state,” she was not going to be allowed to see Pond or know about her medical condition.\(^7\)

Although the hospital had receipt of Pond’s power of attorney which authorized Langbehn to act as her guardian and make medical decisions on her behalf, the admitting clerk refused to acknowledge its legal effect and denied Langbehn the ability to sign admission and consent for treatment forms, as well as refused her access to Pond’s medical records.\(^8\) Langbehn and the children remained isolated from Pond until later that night when a priest escorted her into the trauma area where he administered last rites to Pond, who was in restraints “for her own protection and because no family members were allowed to provide care and supervision.”\(^9\) At approximately 10:30 p.m., Pond was transferred to a neurosurgery intensive care unit; however, Langbehn was never told. An hour later, Pond’s sister arrived and was immediately informed of the transfer and her room number. Ms. Langbehn and the children were subsequently able to visit Pond, who was then unconscious, in the new room around midnight. Ms. Pond was declared brain dead at 10:45 a.m., the following morning.

Langbehn unsuccessfully sued the Public Health Trust of Miami-Dade County for a variety of claims—all arising out of the improper treatment she received by Jackson Memorial personnel. For the most part, Langbehn’s claims alleged that the healthcare facility acted negligently in some respect or another – whether it failed to provide her access to Ms. Pond, failed to recognize Langbehn as Pond’s surrogate, or failed to furnish Langbehn with Pond’s medical condition or documentation. Each, it was alleged, resulted in Langbehn suffering emotional distress, exacerbation of her multiple sclerosis, trauma, nausea, etc.

In specifically addressing Langbehn’s claim regarding a right to visitation, the court said that a hospital should be afforded broad discretion in whether to provide it. The court said:

\[\ldots[I] \text{ would predict that the Florida Supreme Court would hold that doctors at a trauma unit do not have a freestanding legal duty, untethered to informed consent by a patient or health care surrogate, to allow visitation with a patient who is in critical condition and undergoing treatment...or to allow visitation with a terminal patient...It may sometimes make sense for doctors to allow close relatives to visit a patient inside a hospital, even in a trauma unit or an intensive care unit, unless they have medical reasons for not allowing visitation...[but] decisions as to visitation should be left to the medical personnel in charge of the patient, without second-guessing by juries and courts...A decision to not allow visitation in a trauma unit setting, where emotions are already at their breaking point and where lives may literally hang in the balance,}\]

\(^9\) *Id.*
does not create ‘unreasonable risks’ of harm to the patient or to the putative visitors so as to establish a legal duty in tort.\textsuperscript{10}

The court dismissed all of Langbehn’s claims against the hospital though it admonished the healthcare facility for its “lack of compassion” during a time of anguish and vulnerability. Unfortunately, the court noted, no relief was available under Florida law.

\textbf{The Aftermath: Jackson Memorial’s Statement}

Following the media attention devoted to the case, Jackson Memorial Hospital attempted to salvage its image through a public relations piece entitled: \textit{A Message to the Community}, which stated, in part:

Jackson Memorial Hospital does not restrict visitation on account of a person’s sexual orientation. In fact, the hospital grants visitation to ALL individuals equally, no matter who they are and regardless of their relationship – as long as doing so does not interfere with the care being given to the patient or the other patients in the area. A friend or a colleague is viewed no differently than a partner, spouse, or parent for purposes of visitation.

It is important to point out, though, that the Trauma Resuscitation Unit at the Ryder Trauma Center is more like a large operating room with multiple beds separated by glass partitions than a traditional hospital floor. Ryder is the only level I trauma center for both children and adults in Miami-Dade County, meaning the most critically injured patients are brought here for life-saving care -- more than 4,000 patients annually. This includes those who have been stabbed, shot, or injured in serious automobile accidents. In fact, Ryder is so busy, and the medical teams are so experienced, that the United States Army trains its surgical teams at Ryder before they are deployed to war zones. Because of the nature of the work performed at Ryder, access for visitors, and even for hospital staff, is limited.\textsuperscript{11}

Just days prior to President Obama’s announcement that hospitals must include gay and lesbian couples in their visitation policies, Jackson Memorial changed its own policy to include same-sex partners as part of its “family member” definition and adopted a non-discrimination policy that encompasses sexual orientation, gender identity, and gender expression.\textsuperscript{12}

\textsuperscript{10} Id. at *7.

\textsuperscript{11} Jackson Health Sys., \textit{A Message to the Community}, http://www.jhsmiami.org/body.cfm?id=10287 (last accessed June 12, 2010).

President Obama’s Memorandum

In an e-mail to reporters sent on April 15, 2010, President Obama released a memorandum written to Kathleen Sebelius, Secretary of the U.S. Department of Health and Human Services (HHS) instructing her to undertake a rulemaking process that would ultimately require all hospitals accepting Medicare and Medicaid funds to adopt nondiscriminatory visitation policies to include same-sex partners. 13  Ironically, President Obama was attending a fund raiser in Miami, Florida when the memo was distributed. Specifically, the memo directs Sebelius to initiate appropriate rulemaking to “…ensure that hospitals…may not deny visitation privileges on the basis of race, color, national origin, religion, sex, sexual orientation, gender identity, or disability.” 14  Additionally, hospitals must respect “…all patients’ advance directives, such as durable powers of attorney and health care proxies…and that patients’ representatives otherwise have the right to make informed decisions regarding patients’ care.” 15

While on Air Force One, President Obama telephoned Janice Langbehn to inform her of the substance of the memorandum.  Langbehn later blogged that Obama’s actions provide hope for the next gay or lesbian couple in a similar situation. 16  However, a recent survey reveals that many hospitals in the U.S. still do not have a nondiscrimination policy for gay and lesbian couples.

The Survey

The Human Rights Campaign, the nation’s largest gay-rights advocacy group, recently released The Healthcare Equality Index, an annual survey of healthcare policies related to lesbian, gay, bisexual, and transgender (LGBT) patients and families. 17  It surveyed 178 healthcare facilities from 21 states and the District of Columbia; thirteen healthcare networks also submitted surveys covering a total of 141 network facilities. 18  Approximately 93 percent of the 178 facilities surveyed reported not having a nondiscrimination policy for LGBT patients and 42 percent did not include “sexual orientation” in their Patients’ Bill of Rights or other nondiscrimination policy documents. 19  Among those facilities given high marks for inclusiveness was not-for-profit giant Kaiser Permanente’s 36 hospitals, which earned a perfect score. 20  Even Miami’s Jackson Memorial Hospital scored well after changing its nondiscrimination

---

14 Id.
15 Id.
18 Id.
20 Id.
policy. Also among HRC’s high performers was Houston’s University of Texas MD Anderson Cancer Center.

Conclusion

The proposed nondiscrimination visitation rule will not only affect same-sex couples, but will extend to widows and widowers without children and members of religious orders who have, in the past, found it difficult to have the people they want at their side in hospitals that follow family-only visitation policies.

Health Law Perspectives (July 2010)
Health Law & Policy Institute
University of Houston Law Center
http://www.law.uh.edu/healthlaw/perspectives/homepage.asp

The opinions, beliefs and viewpoints expressed by the various Health Law Perspectives authors on this web site do not necessarily reflect the opinions, beliefs, viewpoints, or official policies of the Health Law & Policy Institute and do not constitute legal advice. The Health Law & Policy Institute is part of the University of Houston Law Center. It is guided by an advisory board consisting of leading academicians, health law practitioners, representatives of area institutions, and public officials. A primary mission of the Institute is to provide policy analysis for members of the Texas Legislature and health and human service agencies in state government.