

MEMORANDUM

A.4616 (Gunther)

AN ACT to amend the public health law, in relation to authorizing a nursing home patient to install, operate and maintain an electronic monitoring device in his or her room

LeadingAge New York has concerns with this legislation, which would allow a nursing home patient or their representative to install, operate and maintain, at their own expense, an electronic monitoring device in their room. While this may seem like a harmless allowance for nursing home residents and families, it does not properly take into account the privacy rights and personal desires of resident roommates or other residents that live in the nursing home.

Federal and state regulations and accompanying interpretive guidance place a high priority on ensuring each resident has a right to privacy and to be treated with dignity. Federal regulations at 42 CFR § 483.10(h) [see also state regulations at 10 NYCRR § 415.3(e)] provide that the resident has a right to personal privacy, which includes accommodations, medical treatment, communications, personal care and visits. 42 CFR § 483.15(a) [see also 10 NYCRR § 415.5(a)] also requires the facility to promote care for residents in a manner and in an environment that maintains or enhances each resident's dignity and respect in full recognition of his or her individuality. These important rights are conferred not only on a resident that may choose to have electronic monitoring, but also on their roommates and individuals interacting with the roommate.

LeadingAge New York's more specific concerns about the legislation and potential resolutions follow:

1. A camera must not be placed in a location to capture the provision of medical procedures and personal care services to the resident unless resident privacy and dignity issues are addressed. Consent to the authorization for installation and use of a monitoring device should include a release of liability to the nursing home for a violation of the resident's right to privacy and dignity insofar as the use of the monitoring device is concerned.
2. If any images and audio are transmitted from the camera and saved to the cloud, rebroadcast to a third party and/or viewed by unauthorized parties, this would create additional HIPAA security and privacy liability for the facility. This could be addressed by requiring any recordings to be made to a local memory card (which would be accessed only by the resident or representative) instead of live streaming or otherwise transmitting the content.
3. With residents, caregivers and other individuals moving about the room, the potential for inadvertently recording audio or video of a roommate is great. Other states' laws require any roommate to consent to installation of a camera or audio recorder. Comparatively, this bill would allow a video-only camera to be installed even if the roommate doesn't consent.
4. If the resident leaves the room, there is the potential for the camera to record two people (e.g., staff) who enter the room without their awareness. Video-only devices could address this, as well as signage or other notification to staff that a device is installed. It is reasonable to notify a caregiver that he/she may be recorded, with an explanation that the device will not only identify abusers but can also exonerate caregivers who might be wrongly accused of abuse.

5. While the legislation would require the administrator to include a report on the installation of a monitoring device and required consents in the resident's record, it does not address installation of a device without the facility's knowledge and all needed consents/requirements being in place. In any such cases, the legislation should specify that in any civil action against a nursing home, material obtained through the use of a monitoring device should not be used if the device was installed or used without the knowledge of the nursing home, or installed or used without all required consents.

For these reasons, we urge the Legislature to oppose A.4616 (Gunther) as it is currently written, and to instead make appropriate amendments to address each of these concerns.

LeadingAge New York represents over 400 not-for-profit and public long term care providers, including nursing homes, home care agencies, senior housing, retirement communities, assisted living, adult care facilities, adult day health care and managed long term care.

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