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February 11, 2020

The Honorable Lorig Charkoudian
226 House Office Building
Annapolis, Maryland 21401-1991

Dear Delegate Charkoudian:

You have asked for advice concerning Senate Bill 873, "Health Facilities - Hospitals - Medical Debt Protection." Specifically, you have asked whether the bill violates any federal or state laws or conflicts with the Total Cost of Care terms. It is my view that the information collection portion of the bill as now written would violate the Health Insurance Portability and Accountability Act ("HIPAA"). Otherwise, I have detected no problems.

MEDICAL RECORDS

The proposed bill would require each hospital to submit an annual report to the Health Service Cost Review Commission ("HSCRC") with the total number of patients by race or ethnicity, gender, and zip code of residence that the hospital, or an outside collection agency used by the hospital, filed an action against to collect a debt owed on a hospital bill, or has or has not reported or classified as a bad debt. Reporting this information at the zip code level is a violation of regulations adopted under HIPAA.

The HIPAA regulations permit a covered entity to use protected health information to create information that is not individually identifiable health information and to disclose that de-identified information. 45 CFR § 164.502(d). Generally, information does not meet the de-identification requirement if it reports the information by geographic subdivisions smaller than a state, though areas based on the first three numbers of a zip code may be used if it is established that each area has at least 20,000 people. 45 CFR § 164.514(b)(2)(i)(B).

FEDERAL LAW

Federal law undoubtedly has provisions that touch upon the collection of medical debt. As an example, Medicare regulations, at 42 CFR § 413.89(d) provides that bad debt resulting from the failure of beneficiaries to pay deductible and coinsurance amounts is an allowable cost, while 42 C.F.R. § 413.89(e) places certain requirements for the bad debt to be collectible from Medicare, including that the provider "must be able to establish that reasonable collection efforts were made." 42 C.F.R. § 413.89(e)(2). The regulation does not define "reasonable collection efforts," but I do

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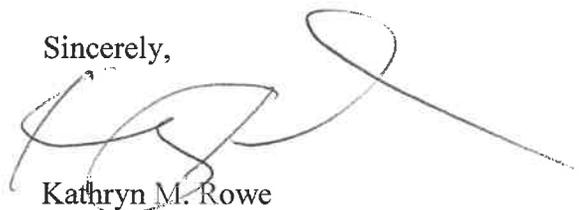
not think that it should be assumed that it would be read to require acts that would violate state law.

Federal law also prohibits “extraordinary collection actions” by hospitals with section 501(c)(3) status against a patient before the hospital has “made reasonable efforts to determine whether the individual is eligible for assistance” under the financial assistance policy required by the regulations. 26 U.S.C. § 501(r)(6). Extraordinary collection actions include selling the debt to another party; reporting adverse information to consumer credit reporting agencies or credit bureaus; deferring or denying, or requiring a payment before providing medically necessary care because of an individual's nonpayment of one or more bills for previously provided care covered under the hospital facility's financial assistance plan; and actions that require judicial or legal process including placing a lien on the individual's property, foreclosing on an individual's real property, attaching or seizing an individual's bank account or other personal property, commencing a civil suit against the individual, causing the individual's arrest, causing an individual to be subject to a writ of body attachment, or garnishing an individual's wages. 26 CFR § 1.501(r)-6(b)(1). These regulations do not apply to all hospitals, but only those who wish to obtain or keep their charitable tax status. Moreover, they do not require any hospital to engage in extraordinary collection actions at any time. Thus, while Senate Bill 873 would cover more patients and provide additional protections in some cases, it is not in conflict with, or preempted by this law.

TOTAL COST OF CARE CONTRACT

Counsel for the HSCRC reports that the HSCRC does not currently believe that the draft bill contradicts the Total Cost of Care Contract. My reading of the information about Total Cost of Care Contract on the HSCRC web site supports this conclusion.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. Rowe', with a long horizontal flourish extending to the right.

Kathryn M. Rowe
Assistant Attorney General

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