

a participating hospital with specialized capabilities or facilities that has the capacity to treat an individual but refuses to accept an appropriate transfer would thereby violate the EMTALA requirement on nondiscrimination (section 1867(g) of the Act) and could be liable for termination of its provider agreement or civil money penalties, or both.)

We also agree that it would be appropriate for hospitals to limit individuals' waiting time in the emergency department, and to either admit the individual as an inpatient or move him or her to another appropriate outpatient area for treatment in cases where the arrival of a specialist is unavoidably delayed. However, given the heavy demand on emergency department resources and the variations in numbers of patients needing emergency care, we do not believe it is feasible to mandate uniform national limits on how long patients may be held in emergency departments.

3. Recommended Definition of "Best Meets the Needs of the Hospital's Patients"

Comment: Some commenters recommended that the requirement to maintain an on-call list that best meets the needs of the hospital's patients be revised to specifically recognize potential limits on on-call physician availability, by stating that the list must best meet the needs of patients in accordance with the resources available to the hospital, including the availability of on-call physicians. Another commenter recommended that the regulation be revised to mandate maintenance of an on-call list that meets patient needs to the extent permitted by the physician resources available to the hospital through its organized medical staff. Still another commenter recommended that the list be one that best meets the needs of the hospital's patients in accordance with the resources available to the hospital. Another commenter stated that the language as proposed does not clarify whether the on-call coverage must be determined by the needs of the hospital's inpatients or its outpatients, and suggested that the regulation be clarified to state that the on-call list be maintained in a manner that best meets the needs of the hospital's patients who are receiving services required under EMTALA.

Response: After consideration of these comments, we agree that the regulations should be further revised to explicitly acknowledge the limits on availability of on-call staff in many specialties and geographic areas. Therefore, we are

revising proposed § 489.24(j) in this final rule to state that the list must be maintained in a manner that best meets the needs of the hospital's patients who are receiving services required under EMTALA in accordance with the capability of the hospital, including the availability of on-call physicians.

Comment: One commenter recommended that the regulations be revised to state that hospitals are not required to provide on-call physician coverage in specialties not available to the hospital's inpatients. Some commenters also stated that, at a minimum, CMS should require that if a hospital offers a service to the public, the service must be available through on-call coverage at the emergency department. For example, one commenter stated that some hospitals have departments of neurology and may have as many as 10 to 20 board-certified neurologists on its medical staff, but do not offer on-call services of neurologists to emergency patients. This commenter believed further specificity as to on-call obligations would avoid this problem.

Response: We agree that a hospital would not be required to maintain on-call physician coverage for types of services it does not routinely offer, but there are many reasons why a hospital would not have physician specialty care available on an on-call basis, even if such specialty care is above the range of specialty care available to inpatients. Therefore, we are not adopting this comment in this final rule.

Regarding the recommendation that a hospital be required to provide on-call coverage in any specialty offered to the hospital's patients, we agree that this would be a reasonable expectation and note that interpretative guidelines for EMTALA in the Medicare State Operations Manual (CMS Publication No. 7), page V-15, state that if a hospital offers a service to the public, the service should be available through on-call coverage of the emergency department. However, we are concerned that if this expectation were adopted as a requirement for all hospitals with emergency departments as part of this final rule, it might establish an unrealistically high standard that not all hospitals could meet. Therefore, we are not adopting this comment in this final rule.

Comment: One commenter recommended that the regulations be revised to clarify how CMS will deal with situations in which two hospitals with similar numbers of physicians on staff provide widely varying levels of on-call coverage. For example, one hospital with 3 neurosurgeons on staff might be able to provide "24/7"

coverage, while another hospital with 3 neurosurgeons on staff might provide coverage only 10 days per month.

Response: We agree that a situation of the type described by the commenter could raise questions regarding the second hospital's commitment to obtaining on-call coverage, but note that many factors, including the overall supply of specialty physicians in an area, the extent to which hospitals offer specialty care through the use of "itinerant" physicians from other areas, and the availability of specialty care at other nearby hospitals, might all influence the hospital's decisions regarding the level of on-call coverage it can reasonably expect to provide. Because we are concerned that establishing overly prescriptive standards might impose an unrealistically high burden for some hospitals, we are not adopting any further regulatory requirements for handling situations in which hospitals' levels of on-call coverage vary significantly. We will continue to investigate such situations in response to complaints and will take appropriate action if the level of on-call coverage is unacceptably low.

4. Physicians' Responsibility for On-Call Coverage

Comment: Some commenters suggested that the proposal to allow hospitals greater flexibility to maintain on-call coverage that best meets the needs of their patients may be more restrictive than necessary to prevent discrimination or may have the unintended effect of reducing access to on-call services. These commenters argued for a more precise description of how patient needs can best be met, or for elimination of the "best meets the needs" clause. Some commenters stated that by allowing a hospital flexibility and declining to adopt any specific standards as to when a hospital may or may not be required to provide on-call coverage, CMS may be placing the EMTALA on-call burden on hospitals with no corresponding responsibility on the part of physicians, whose participation is necessary for the hospital to meet its obligation.

Some commenters recommended that the regulations be further revised to more specifically address the responsibilities of physicians to make themselves available when on call, the accountability of physicians for EMTALA compliance, and the acceptability of transferring patients when specialty physicians are not available. Other commenters recommended that more specific rules