

already committed to being on call at another hospital. One commenter stated that CMS should at least establish a grievance procedure that would allow physicians to challenge on-call requirements that the physicians believe are unreasonable.

Response: We appreciate the commenters' expression of support for the proposed clarification of our policy in this area, and agree with commenters that EMTALA does not require any physician to be on call at all times. However, we do not believe it would be appropriate for CMS to prescribe levels of on-call coverage; on the contrary, these matters should be worked out between individual hospitals and their medical staff. Therefore, we have not included any provision on the level of on-call coverage hospital may require. Also, we have no statutory authority to mandate the kind of appeals procedure for on-call requirements that was recommended. Therefore, we are not making any change in this final rule based on grievance procedures.

Comment: One commenter suggested that hospitals may be reducing physician staffing in some specialties (below the levels needed to treat all patients, including insured and uninsured patients) and relying on on-call coverage to meet the need to care for indigent patients. The commenter suggested that the regulations be revised to prohibit this practice.

Response: We understand the commenter's concern, but do not believe we can establish realistic objective standards for levels of physician staffing. However, we will keep the comment in mind as we prepare interpretive guidelines and conduct surveyor training, and will review any actual case situations involving understaffing of emergency departments carefully, to determine whether services mandated by EMTALA are, in fact, being provided within the capability of the hospital.

6. Simultaneous Call and Performance of Other Physician Services While on Call

Comment: A number of commenters stated that, because of shortages of physicians in certain specialties (for example, orthopedics or neurosurgery) in some areas, the proposed regulations regarding on-call coverage should be revised to state explicitly that it is not a violation of EMTALA for a physician to be on call simultaneously at two or more hospitals, as long as each hospital has a back-up plan for ensuring that needed care is received from another physician or through an appropriate transfer when the on-call physician is

not in fact available. The commenters also recommended that the regulations be revised to clarify that it is not a violation of EMTALA for a physician to schedule and perform elective surgery while he or she is on call, if such a back-up plan is in place at each hospital for which the physician is on call.

Some commenters suggested that the physician's performance of elective surgery that a physician has freely undertaken should be used as an example of a circumstance that is beyond the physician's control. One of these commenters recommended that physicians who have agreed to be on call, but subsequently engage in activities that make it impossible to fulfill their commitment, should be allowed to make alternative arrangements for responding to calls. Another commenter recommended that the regulations be revised to provide specific examples of situations beyond a physician's control.

Still another commenter recommended that proposed paragraph (j) be revised to state that physicians may provide simultaneous call at more than one hospital, provided the number and geographic proximity of the hospitals are such that a single physician can reasonably provide on-call services at each facility. The commenter recommended that further language be added to state that physicians who are on call may schedule office visits or elective surgery without incurring penalties under EMTALA. The commenter believed the policies and procedures of the hospital for responding to situations in which the particular specialty is not available or the on-call physician cannot respond because of circumstances beyond the physician's control should be developed in consultation with the hospital's medical staff and that the examples of situations beyond a physician's control should include situations when the physician is already treating another patient. Some commenters stated that a Program Memorandum issued by CMS on June 13, 2002, stated that when a physician is performing surgery while being on call, having another physician available to respond to calls is an acceptable way to fulfill the physician's on-call responsibility but that having the capability to arrange appropriate transfers is also an acceptable form of compliance. The commenters recommended that CMS revise proposed § 489.24(j) to reflect this policy.

Another commenter stated that the regulation should state more specifically what types of back-up plans would be acceptable when a physician has

scheduled elective surgery while on call.

Response: We agree that it is important that policy regarding simultaneous call and scheduling of elective surgery while on call be clearly communicated to, and understood by, affected hospitals and physicians. Therefore, on June 13, 2002, we issued Survey and Certification Letter No. S&C-02-35, to clarify that we believe hospitals should continue to have the flexibility to meet their EMTALA obligations by managing on-call physician coverage in a manner that maximizes patient stabilizing treatment as efficiently and effectively as possible. The letter further states that when the on-call physician is simultaneously on-call at more than one hospital in the geographic area, all hospitals involved must be aware of the on-call schedule, as each hospital independently has an EMTALA obligation.

In addition, the letter clarifies that hospitals must have policies and procedures to follow when an on-call physician is simultaneously on call at another hospital and is not available to respond. Hospital policies may include, but are not limited to, procedures for back-up on-call physicians, or the implementation of an appropriate EMTALA transfer according to § 489.24(d). The letter reaffirms CMS' view that hospitals have flexibility in adopting specific policies and procedures to meet their EMTALA obligations, so long as they meet the needs of the individuals who present for emergency care.

To avoid any misunderstanding of our policies in this area, we are revising proposed § 489.24(j) in this final rule to state the conditions under which simultaneous calls and elective surgery while on call are permitted.

7. Limiting On-Call Responsibility by Subspecialty

Comment: Some commenters stated that physicians' hospital privileges are typically more expansive than their actual scope of practice, in that a physician privileged in a broad specialty might in fact function only within a much narrower subspecialty. For example, a physician privileged by the hospital to treat all orthopedic cases might in fact limit his or her practice to pediatric cases. The commenters expressed concern that such a subspecialty physician might be disadvantaged by agreeing to be on call, since he or she could then be expected to treat types of patients that the physician would not normally see. To prevent this outcome, the commenters recommended that the EMTALA