

hospital-owned ambulances are subject to EMTALA and must be transported to the hospital that owns the ambulance, unless the hospital EMS personnel on board the ambulance determine that doing so would put the patient's life or safety at risk. The commenter further recommended that if the on-board hospital EMS personnel believe that transporting the individual to the owner hospital would risk the life or health of the individual, the personnel should be authorized to redirect the ambulance to the closest appropriate hospital without violating EMTALA.

*Response:* We appreciate the support of those commenters who expressed approval of the proposal and have kept their views in mind in responding to other comments on this issue. In regard to the comment about an individual who refuses transport from a planned pickup site, we believe such cases should be treated as refusals to consent to treatment and should be handled in accordance with the requirements for documenting such refusals in existing § 489.24(c)(2) (redesignated in this final rule as § 489.24(d)(3)).

We understand that the term "hospital-owned ambulances operating under medical command" describes a situation in which the destination of an ambulance is not determined by the ambulance personnel but by a physician in radio contact with ambulances in the community. We believe individuals on board such ambulances would not be considered to have "come to the hospital" for EMTALA purposes if the physician providing the medical command is not employed or otherwise affiliated with the hospital that owns the ambulance. If the physician's direction of the ambulance (medical command) is provided subject to communitywide protocols that require the individual to be transported to a hospital other than the hospital that owns the ambulance, such as the closest appropriate hospital, the hospital would be considered to be operating under communitywide protocols. With respect to situations in which hospital EMS personnel on board the ambulance determine that transporting the individual to the owner hospital would put the patient's life or safety at risk, we recognize that there may be some situations in which redirection of the ambulance is necessary to protect the life or safety of the individual and that under these circumstances it would not be an EMTALA violation to transport the individual to the closest hospital capable of treating his or her condition. However, we believe such cases can best be identified and resolved on a case-by-case basis and, therefore, are not

revising the final regulations based on this comment.

*Comment:* One commenter recommended that the proposed clarification of the nonapplicability of EMTALA to hospital-owned ambulances when the ambulance is operating under communitywide protocols be extended to air ambulances as well as ground ambulances.

*Response:* We agree and in this final rule are revising § 489.24(b), the definition of "come to the emergency department," accordingly.

*Comment:* One commenter recommended that guidance provided in the State Operations Manual, to the effect that hospitals have no EMTALA obligation with respect to individuals who are in ambulances that are neither hospital-owned and operated nor on hospital property, be incorporated into the regulatory language.

*Response:* We agree that this statement of policy is accurate, but believe the proposed regulatory language makes this clear. Therefore, we are not making revision in the final rule based on this comment.

*Comment:* One commenter referenced the recently issued CMS guidance, in the form of letters to Regional Administrators and State Survey Agencies, regarding EMTALA responsibilities in the event of a bioterrorist attack. The commenter believed this guidance might be viewed as being inconsistent with a hospital's statutory responsibility to provide screening services under EMTALA, and suggested that the regulatory language be revised to reflect the guidance, so that hospitals that follow it are not at risk for a citation of noncompliance with EMTALA.

*Response:* We agree that hospitals should be informed of their EMTALA responsibilities in the event of a bioterrorist attack or other national emergency. We also believe the commenter's suggestion is consistent with the intent of section 143 of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (Pub. L. 107-188, enacted June 12, 2002). That legislation amended section 1135 of the Act to authorize the Secretary to temporarily waive or modify the application of certain Medicare, Medicaid, and State Children's Health Insurance Program (SCHIP) requirements, including requirements for the imposition of sanctions for the otherwise inappropriate transfer of an unstabilized individual, if the transfer arises out of the circumstances of the emergency.

To help inform hospitals of their responsibilities in such situations, we

have added a new paragraph (a)(2) to § 489.24(a). The new paragraph specifies that sanctions under EMTALA for an inappropriate transfer during a national emergency do not apply to a hospital with a dedicated emergency department located in an emergency area, as specified in section 1135(g)(1) of the Act. In the event of such a national emergency, CMS would issue appropriate guidance to hospitals.

*Comment:* One commenter stated that, in some areas of the country, ambulance protocols requiring emergency patients to be taken to the closest appropriate hospital are not determined on a community-by-community basis. Instead, the protocols apparently are established by individual ambulance service medical directors in conformity with State law and are filed with the State EMS board. The commenter expressed concern that the proposed regulatory language on communitywide EMS protocols would not protect hospitals in such States from inappropriate EMTALA liability, and cited several examples of situations in which a hospital-owned and operated ambulance might be required to bypass appropriate hospitals to reach the owner hospital. To avoid this result, the commenter recommended that the regulations be revised either to state that hospital-owned and operated ambulances are not included in the definition of "hospital property" or to provide an exemption for hospital-owned ambulances operated in accordance with protocols on file with and approved by the State ambulance licensing authority.

*Response:* We agree that protocols mandated by State law should be given the same deference as those established on a communitywide basis. However, we believe the reference in § 489.24(b)(3)(i) to communitywide EMS protocols which direct that the individual be transported to a hospital other than the hospital that owns the ambulance is broad enough to encompass those communitywide protocols that have been adopted in conformity with State law. Therefore, we are not revising the provision in the final rule based on this comment.

*Comment:* One commenter stated that most ambulance protocols direct that individuals be taken to the "closest appropriate facility" rather than the "nearest hospital" and suggested that this change in wording of the regulation text would be appropriate because, in some cases, individuals may need to be taken to a freestanding emergency facility or some other location that is not a hospital. The commenter also recommended that hospital-owned and