

7/13/09

To: Greg Pleasants, Supervising Attorney
From: Pooja Nair, MHAS Summer Clerk

**Re: EMTALA Obligations Imposed on Hospitals Handling Psychiatric
Emergencies of ICE Detainees**

**I. EMTALA requires only California hospitals that 1) participate in Medicare
and 2) have an emergency department to treat ICE detainees who are
experiencing medical or mental health emergencies.**

*A) EMTALA applies only to “Medicare hospitals” that accept Medicare and
Medicaid patients.*

EMTALA imposes obligations specific to “Medicare hospitals” with “emergency departments.” EMTALA defines a "participating hospital" as a "hospital that has entered into a provider agreement under section 1395cc of this title." 42 USC 1395dd(e)(2).

EMTALA is part of the Social Security Act and only applies to the hospitals that accept patients through government benefits programs. Federal agency materials confirm that a hospital is only responsible for admitting patients under EMTALA if it is a “Medicare-participating hospital[] that offer[s] emergency services.” Centers for Medicare & Medicaid Services, *EMTALA Overview*, April 2009, available at <http://www.cms.hhs.gov/emtala/>.

Court decisions also acknowledge that the legal obligation created by EMTALA is limited to Medicare hospitals. *See, e.g., Cleland v. Bronson Health Care Group*, 917 F.2d 266, 268 (6th Cir. Mich. 1990) (“the Act imposes on hospitals such as this one the following duties”); *Thomas v. Christ Hosp. & Med. Ctr.*, 328 F.3d 890, 893 (7th Cir. Ill.

2003) (“EMTALA imposes two primary obligations on certain federally funded hospitals”); *Gardner v. Elmore Community Hosp.*, 64 F.Supp.2d 1195 (M.D.Ala., 1999) (EMTALA imposes “two duties on hospitals that have entered into Medicare provider agreements”).

B) *EMTALA applies only to hospitals with a “dedicated emergency department.”*

The Department of Health and Human Services has stated that EMTALA “obligations concern individuals who come to a hospital emergency department and request examination or treatment for medical conditions.” DHHS compliance regulations for EMTALA define “dedicated emergency department” as:

- any department or facility of the hospital that either –
 - (1) is licensed by the state as an emergency department;
 - (2) held out to the public as providing treatment for emergency medical conditions; or
 - (3) on one-third of the visits to the department in the preceding calendar year actually provided treatment for emergency medical conditions on an urgent basis.

An agency rule from the Centers for Medicare & Medicaid Services emphasizes that the “dedicated emergency department” is broadly defined.

We note that the proposed definition would encompass not only what is generally thought of as a hospital’s “emergency room” but would also include other departments of hospitals, such as labor and delivery departments and psychiatric units of hospitals, if these departments provide emergency psychiatric or labor and delivery services, or both, or other departments that are held out to the public as an appropriate place to come for medical services on an urgent, nonappointment basis.

Department of Health and Human Services- Centers for Medicare & Medicaid Services (CMS), *Medicare Program; Clarifying Policies Related to the Responsibilities of Medicare-Participating Hospitals in Treating Individuals with Emergency Medical Conditions. Final Rule*, 68 FED. REGIST. (2003) 53222-64.

II. EMTALA defines ‘emergency condition’ strictly and the determination that such condition exists must be made by hospital professionals using standard medical screening procedures.

- A) *EMTALA lays out a specific definition for an “emergency condition” which requires that the admitting condition could reasonably be expected to result in imminent danger of death or serious injury.*

The EMALTA statute defines an “emergency medical condition” as follows:

- (1) A medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain, psychiatric disturbances and/or symptoms of substance abuse) such that the absence of immediate medical attention could reasonably be expected to result in--
 - (i) Placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy;
 - (ii) Serious impairment to bodily functions; or
 - (iii) Serious dysfunction of any bodily organ or part;
- (2) With respect to a pregnant woman who is having contractions--
 - (i) That there is inadequate time to effect a safe transfer to another hospital before delivery; or
 - (ii) That transfer may pose a threat to the health or safety of the woman or the unborn child.

The Federal Regulations promulgated by the Health Care Financing Administration, Department of Health and Human Services ("HCFA") further define an "emergency medical condition" as a medical condition of sufficient severity as to include not only severe pain, but also a psychiatric disturbance and/or symptoms of substance abuse. 42 C.F.R. § 489.24(b)(i).

Courts have adhered to a strict standard to determine whether an emergency medical condition exists under EMTALA. A patient is only entitled to admission if she is in imminent danger of death or serious injury. *Doe v Montgomery Hosp.*, 7 AD Cases

121 (E.D. Pa 1996); *Watts v. Hermann Hosp.*, 962 S.W.2d 102 (Tex. App. Houston 1st Dist. 1997) (Emergency medical condition exists under EMTALA “only if patient is in ‘imminent’ danger of death or worsening condition which could be life-threatening”); *Pagan-Pagan v. Hospital San Pablo, Inc.*, 97 F. Supp. 2d 199, 203 (D. P.R. 2000) (“a patient will suffer from an emergency medical condition if he is in imminent danger of death or serious disability.”).

B) EMTALA requires that the screening examination be conducted by a qualified medical professional.

EMTALA states that the screening examination “must be conducted by an individual(s) who is determined qualified by hospital bylaws or rules and regulations and who meets the requirements of §482.55 of this chapter concerning emergency services personnel and direction.” 42 C.F.R. § 489.24(a). 42 C.F.R. § 482.55 states that services must be organized “under the direction of a qualified member of the medical staff.” Courts have affirmed that the screening duty belongs to qualified hospital staff. *See, e.g., Baber v. Hospital Corp. of America*, 977 F.2d 872, 879 (4th Cir. W. Va. 1992) (“We recognize that application of the procedure necessarily requires the exercise of medical training and judgment. Hospital personnel must assess a patient's signs and symptoms and use their informed judgment to determine whether a critical condition exists.”).

C) *EMTALA imposes the duty for medical screening to determine whether an emergency condition exists on the hospital alone. Thus, in order to comply with EMTALA, statutorily qualified hospital professionals, not ICE officers, must make the determination of whether there is a qualifying emergency condition.*

Courts have found that EMALTA imposes two duties on hospitals that have entered into Medicare provider agreements. First, those hospitals with an emergency medical department must provide an appropriate medical screening to determine whether an emergency medical condition exists for any individual who comes to the emergency medical department requesting treatment. Second, an additional duty arises to stabilize any emergency medical condition that is discovered during the screening process. Robert Michael Ey, *Cause of Action against Hospital under Emergency Medical Treatment and Active Labor Act (42 USC § 1395dd) for Failure to Appropriately Screen, Failure to Stabilize, or Improper Transfer of Patient*, 8 Causes of Action 2d 629 (2008). Cases interpreting EMTALA refer to the hospital as the only entity with this duty. The Supreme Court held that EMTALA “places obligations of screening and stabilization upon hospitals and emergency rooms that receive patients suffering from an “emergency medical condition.” *Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249 (1999). Other courts agree. *See, e.g., Gardner v. Elmore Community Hosp.*, 64 F.Supp.2d 1195 (M.D.Ala., 1999) (EMTALA imposes “two duties on hospitals that have entered into Medicare provider agreements”); *Matter of Baby K*, 16 F.3d 590 (C.A.4 Va.,1994) (“those hospitals with an emergency medical department must provide an appropriate medical screening”).

D) *EMTALA requires that the medical screening provided to patients admitted under EMTALA be the same screening that the hospital would have provided for any other patient with similar symptoms. Therefore, if ICE attempted to force the hospital to deviate from its standard screening procedure, it would be a violation of EMTALA.*

In order for hospitals to comply with EMTALA, they must treat EMTALA admittees using their standard screening practices. *See, Correa v. Hosp. San Francisco*, 69 F.3d 1184, 1192 (1st Cir. 1995) (“The essence of [EMTALA's] screening requirement is that there be some screening procedure, and that it be administered even-handedly”); *Baber v Hospital Corporation of America*, 977 F2d 872 (4th Cir W Va 1992) “a hospital satisfies the requirements of § 1395dd(a) if its standard screening procedure is applied uniformly to all patients in similar medical circumstances.”); *Magruder v. Jasper County Hosp.*, 243 F. Supp. 2d 886 (N.D. Ind. 2003) (“A hospital fulfills its statutory duty to screen patients in its emergency room if it provides for a screening examination reasonably calculated to identify critical medical conditions that may be afflicting symptomatic patients and provides that level of screening uniformly to all those who present substantially similar complaints.”).

If a hospital deviates from screening procedure it would have provided for any paying patient demonstrating the same symptoms, a patient may bring a claim of failure to provide appropriate medical screening. In order for a patient to bring such a claim, he must prove that the hospital failed to follow the screening policy which it regularly follows for other patients presenting substantially similar conditions. *See, Sanchez-*

Rivera v. Doctors' Center Hosp., Inc., 247 F. Supp. 2d 90, 98 (D.P.R. 2003) ("an EMTALA claim may only ensue for failure to screen in a manner comparable to others brought into the emergency room with the same conditions"); *Feighery v. York Hosp.*, 59 F. Supp. 2d 96, 102-103 (D. Me. 1999)("to state a claim under the EMTALA, the plaintiff must show that he or she was given a screening that was different from that afforded as a matter of course to patients presenting the same symptoms").

Hospitals can deviate from the screening procedure and thus violate EMTALA by conducting cursory screenings. *Eberhardt v. City of Los Angeles*, 62 F.3d 1253, 1257 (9th Cir. 1995) (finding that an examination so cursory that it is not "designed to identify acute and severe symptoms that alert the physician to the need for immediate medical attention to prevent serious bodily injury" violates EMTALA); *Lewellen v. Schneck Med. Ctr.*, 2007 U.S. Dist. LEXIS 60358 (S.D. Ind. Aug. 16, 2007) (case involving pre-conviction state detainee who was brought to the hospital but dismissed before the doctor printed x-ray results and x-ray results showed patient had a burst fracture in his spine). Patients can also allege that proper tests were not conducted given the emergency condition. *See, Carodenuto v. New York City Health & Hosp. Corp.*, 156 Misc. 2d 361 (N.Y. Sup. Ct. 1992) (finding that plaintiff alleging that defendant municipal hospital discharged her without proper evaluation or X-rays after she suffered a concussion, could maintain an action under EMTALA"). If ICE regulations required hospitals to substantially deviate from standard emergency medical screening procedures, the hospital would violate EMTALA by complying with these regulations.

III. EMTALA is explicitly limited with regard to psychiatric treatment and does not provide ICE with any authority to require hospitals to provide long-term care.

A) *EMTALA does cover psychiatric emergencies, but it only requires basic screening and stabilization, not in-depth care.*

The definition of emergency condition makes it clear that psychiatric emergencies fall within the ambit of EMTALA. A medical publications states that “all of the EMTALA rules apply to mental health patients, including financial screening, MSE, stabilization, transfer procedures, and transport by appropriate medical vehicle with qualified medical personnel and life support equipment.” Stephen A. Frew, *Mental Health Patients Pose Major EMTALA Risk*, 2 TRANSFER NEWS (2003), available at <http://www.valleyemergency.com/cme/TransferNewsSpring2003.pdf>.

B) *The obligations of hospitals to provide psychiatric care are limited and EMTALA does not apply to long-term psychiatric care.*

Case law on EMTALA and mental health care is somewhat limited, but existing cases clearly define some limits of EMTALA authority with regard to psychiatric care. A district court decision stated in dicta that EMTALA “has no application in the event of long-term, nonemergency treatment of the patients of mental institutions.” *Teufel v. United States*, 1992 U.S. Dist. LEXIS 9361 (D. Kan. June 15, 1992). The hospital has no legal obligation to provide in-depth psychiatric assessment even if a patient comes in

with a psychiatric emergency and urgently needs psychiatric care. *Baker v. Adventist Health, Inc.*, 260 F. 3d 987 (9th Cir., 2001).

C) *EMTALA has been found inapplicable to community mental health treatment facilities*

Community mental health treatment facilities that are not Medicare hospitals are not required to admit patients under EMTALA, even if they contract some services to hospitals with dedicated emergency departments. There is limited case law on the subject, but the cases that do address the issue are clear. For example, in *Gossling v. Hays Medical Ctr.*, 1995 U.S. Dist. LEXIS 5765 (D. Kan. Apr. 21, 1995), the court found that a mental health center was not a participating hospital under EMTALA. This facility, High Plains Mental Health Services was licensed to provide emergency services and to accept involuntary committed patients. *See*, High Plains Mental Health Services for Northwest Kansas, available at <http://www.highplainsmentalhealth.com/index2.asp?main=archives>; Fort Hays State University, *Crisis Management Plan- Crisis Response Protocols*, available at <http://www.fhsu.edu/crisis/protocol.php> (stating that High Plains Mental Center was an available facility to place students who were being involuntary committed for short-term psychiatric emergencies). The court found that High Plains was “a community mental health center created pursuant to K.S.A. § 19-4001 et seq” (Kansas statute establishing “community mental health centers and community facilities for the mentally retarded”). *Gossling* at 21. Thus, the court found that “High Plains is not a participating hospital as defined by the Act, and therefore plaintiffs cannot state EMTALA claims against it.”

Gossling at 22. Using the logic of the court in *Gossling*, a California psychiatric facility providing exclusively psychiatric services could be considered a community mental health center rather than a Medicare hospital with a dedicated emergency department. Under this construction, ICE would not be able to force such facilities to accept ICE detainees as EMTALA admittees.

IV. EMTALA does not give ICE any power to dictate under what conditions emergency treatment will be provided beyond any existing custodial authority. Care must be provided in accordance with existing federal regulations and hospital professionals and the patient must make all medical treatment decisions.

A) EMTALA admissions are governed by federal standards for emergency services, as provided in 42 C.F.R. § 482.55.

Hospitals admitting patients under EMTALA must meet the emergency needs of patients while acting in accordance with mandated standards of practice. 42 C.F.R.

§489.24 states that “a hospital is required by the conditions of participation for hospitals under Part 482 of this chapter to provide care to its inpatients in accordance with those conditions of participation.” The conditions of participation for hospitals receiving Medicare and providing emergency services are laid out in 42 C.F.R §482.55.

42 C.F.R §482.55 mandates that “the policies and procedure governing medical care...are established by and are a continuing responsibility of the medical staff.”

§ 482.55 Condition of participation: Emergency services.

(a) Standard: Organization and direction. If emergency services are provided at the hospital--

- (1) The services must be organized under the direction of a qualified member of the medical staff;
- (2) The services must be integrated with other departments of the hospital;
- (3) The policies and procedures governing medical care provided in the emergency service or department are established by and are a continuing responsibility of the medical staff.

(b) Standard: Personnel.

- (1) The emergency services must be supervised by a qualified member of the medical staff.
- (2) There must be adequate medical and nursing personnel qualified in emergency care to meet the written emergency procedures and needs anticipated by the facility.

B) EMTALA explicitly recognizes the patient's right to refuse treatment.

Section 2(a) of the EMTALA statute terminates the hospital's obligation to provide emergency treatment if the individual refuses treatment. Although the statute is framed in terms of the hospital's obligation, it implicitly recognizes a patient's right to refuse treatment under the principle of informed consent. The statute states:

A hospital is deemed to meet the requirement of paragraph (1)(A) with respect to an individual if the hospital offers the individual the further medical examination and treatment described in that paragraph and informs the individual (or a person acting on the individual's behalf) of the risks and benefits to the individual of such examination and treatment, but the individual (or a person acting on the individual's behalf) refuses to consent to the examination and treatment. The hospital shall take all reasonable steps to secure the individual's (or person's) written informed consent to refuse such examination and treatment.

Although the statute provides that a person may act on the behalf of the EMTALA patient, the intent of the statute and the circumstances under which it was envisioned to be administered strongly suggest that it was not meant to increase the authority of custodial institutions over detainees. The statute was designed to protect individuals experiencing emergency conditions, who could likely be incoherent or unconscious, by

allowing family members to make decisions on their behalf. Identical language is present in other federal statutes and regulations. For example, the Social Security Act section governing agreements with providers of services and the hospital enrollment processes states that hospitals must give certain health information to the individual patient or “to a person acting on the individual's behalf”. 42 USCS § 1395cc. Similarly, the section of the SSA governing peer review organizations states that peer review organizations must respond to complaints about hospitals made by patients or by a “person acting on the individual's behalf.” 42 USCS § 1320c-3. The language of EMTALA, like the language of other medical provisions within the Social Security Act, was designed to ensure the best interests of patients by setting up a system in which decisions about patient health would be made by a family member or other person acting in furtherance of the patient’s desires and best interests. Since ICE is a custodial institution engaged in adversarial proceedings against the patient, allowing ICE to make decisions on behalf of the patient would create a clear conflict of interest and violate fundamental principles of medical ethics. Such a construction of the statutory language would violate the basic principles of EMTALA to protect patient’s rights by ensuring emergency care for all people, regardless of insurance status.

C) While EMTALA does not discuss specific rights that could apply to detainee- patients, nothing in the statute eliminates existing rights.

Because EMTALA was meant to govern a limited range of situations involving short-term, emergency treatment, it does not explicitly provide any due process protections for patients. However, hospitals are only mandated to accept patients under

EMTALA until the patient can be stabilized. Stabilization occurs when a medical professional determines, “within reasonable medical probability that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility.” 42 C.F.R. §489.24(d). A hospital's duty ends when the patient's medical condition is stabilized. *Green v. Touro Infirmary*, 992 F.2d 537, 539 (5th Cir. 1993). EMTALA does not require a hospital to completely alleviate an emergency medical condition, but only to stabilize it. *Brooker v. Desert Hosp. Corp.*, 947 F.2d 412, 415 (9th Cir. 1991). Once the patient is stabilized and transferred to another facility or to a non-emergency department of the hospital, the patient’s due process rights would be governed by the standards of that facility. Given the expectation of a short duration for EMTALA admission and the limited duty that EMTALA creates, Congress’s failure to specify due process protections should not be construed as reducing existing protections. Due process protections already existing for hospital patients apply in the emergency setting as well. A hospital publication for medical professional states that “all restrictions on restraint and seclusion that apply to admitted patients apply in the emergency department. Special policies and procedures must be in place to allow temporary measures to control a dangerous situation.” Stephen A. Frew, *Mental Health Patients Pose Major EMTALA Risk*, 2 TRANSFER NEWS (2003), available at <http://www.valleyemergency.com/cme/TransferNewsSpring2003.pdf>. Thus, any attempts by ICE to limit the freedoms of detainees through EMTALA do not have a legal basis. All protections for hospital patients apply in the emergency setting to EMTALA admitees.

V. Conclusion

EMTALA's application is limited to Medicare hospitals that have a dedicated emergency department. Under EMTALA, such hospitals are obligated to admit ICE detainees who are experiencing medical or mental health emergencies. EMTALA defines 'emergency condition' to mean that the admitting condition could reasonably be expected to result in imminent danger of death or serious injury. The determination that an emergency condition exists must be made by hospital professionals using standard medical screening procedures, not by ICE officers. With regard to psychiatric treatment, EMTALA is highly limited and does not provide ICE with any authority to require hospitals to provide long-term care for detainees. Emergency care provided to ICE detainees under EMTALA must comply with existing emergency care treatment guidelines, as provided in 42 C.F.R. § 482.55. EMTALA recognizes the patient's right to refuse treatment, but does not specify any additional due process rights. However, given the purpose of the statute to ensure patients' rights to emergency treatment, EMTALA should not be construed as limiting existing due process rights for patients.