FORMAL OPINION
2001-F-06

DATE ISSUED: June 29, 2001

REQUESTED BY: Representative Todd Porter

QUESTION PRESENTED

Whether the previsions in 2001 House Bill No. 1282 (H.B. 1282) permitting a licensed ambulance under direct medical control to refuse transport of an individual to a hospital when transport is not medically necessary conflict with the federal Emergency Medical Treatment and Labor Act.

ATTORNEY GENERAL'S OPINION

It is my opinion that H.B. 1282 does not conflict with the federal Emergency Medical Treatment and Labor Act by permitting a licensed medical ambulance under direct medical control to refuse transport of an individual to a hospital when transport is not medically necessary.

ANALYSIS

House Bill 1282 created two provisions concerning the operation of licensed ambulances that are pertinent to this question. The first provision added a new subsection to N.D.C.C. § 23-27-04, which reads:

> An officer, employee, or agent of any prehospital emergency medical service may refuse to transport an individual for which transport is not medically necessary and may recommend an alternative course of action to that individual if the prehospital emergency medical service has developed protocols that include direct medical control to refuse transport of an individual.

2001 House Bill No. 1282, § 1 (creating N.D.C.C. § 23-27-04(2)).

The other pertinent provision states:

> An officer, employee, or agent of any prehospital emergency medical service and a physician licensed in this state who provides medical direction to any prehospital emergency medical service who in good faith does not render emergency care, service, or medical direction to an individual based on a determination that transport of that individual to a hospital is not medically necessary is not liable to that individual for damages unless the damages resulted from intoxication, willful misconduct, or gross negligence.

2001 House Bill No. 1282, § 2 (creating N.D.C.C. § 23-27-04.1(4)).

House Bill 1282 therefore permits an ambulance service to refuse to transport an individual to a hospital only after it has been determined by a physician who is providing direct medical control that the transportation of the individual to a hospital is not medically necessary. This implies that the individual desiring transport must be examined by the ambulance crew and a physician must be consulted before the individual is refused transport.

The 1986 federal Emergency Medical Treatment and Labor Act (EMTALA) is a patient anti-dumping law covering all Medicare participating hospitals with emergency rooms. Eberhardt v. City of Los Angeles, 62 F.3d 1253, 1255 (9th Cir. 1995). The EMTALA is codified at 42 U.S.C. § 1395dd and includes regulations found at 42 C.F.R. § 489.24. EMTALA's general requirement concerning hospital emergency departments is "if any individual . . . comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department . . . to determine whether or not an emergency medical condition . . . exists." 42 U.S.C. § 1395dd(a). If it is determined that the individual has an emergency medical condition, the hospital must then provide for further medical examination and treatment as required to stabilize the medical condition or transfer the individual to another medical facility in accordance with other parts of the Act, unless the individual refuses to consent to treatment. 42 U.S.C. § 1395dd(b). The EMTALA also indicates that it does not preempt any state or local law requirement, except to the extent that the requirement directly conflicts with a requirement of EMTALA. 42 U.S.C. § 1395dd(f).

In order to determine whether there is a conflict between the EMTALA and H.B. 1282, it will be necessary to examine whether the EMTALA applies to an ambulance, whether an

appropriate medical screening examination may be made by the ambulance crew, and whether the medical standards established by these two laws conflict.

Federal regulations include provisions extending the EMTALA to ambulances, including ambulances owned and operated by the hospital or owned and operated by a separate entity. 42 C.F.R. § 489.24(b). EMTALA applies to an ambulance owned and operated by the hospital "even if the ambulance is not on hospital grounds." There is a limited safe haven for ambulances that are not owned by the hospital. The safe haven, however, is limited to situations where the hospital does not have the staff or facilities to accept any additional emergency patients and is diverting all emergency patients. Id. Otherwise, EMTALA will apply to the ambulance. Therefore, it is reasonable to interpret the provisions of EMTALA as applying to all ambulance services when transporting a patient to a hospital, even where the ambulance is not owned by the hospital.[1]

The appropriate medical screening examination required by 42 U.S.C. § 1395dd is neither defined in statute nor by federal regulation. Courts examining this issue have explained that the appropriate medical screening examination does not refer to malpractice or other standards of care, but instead "must more correctly be interpreted to refer to the motives with which the hospital acts. If it acts in the same manner as it would have for the usual paying patient, then the screening provided is 'appropriate' within the meaning of the statute." Cleland v. Bronson Health Care Group, Inc., 917 F.2d 266, 272 (6th Cir. 1990). See also Roberts v. Galen of Virginia, Inc., 111 F.3d 405, 409 (6th Cir. 1997).[2] Another court noted that the purpose of the appropriate medical screening examination is to identify an emergency medical condition, as is defined in statute. Eberhardt, 62 F.3d at 1257.

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[1] A contrary case is Arrington v. Wong, 19 F.Supp.2d 1151 (D. Hawaii 1998). Arrington involved a patient in an ambulance which was directed by a physician away from the nearest hospital and to patient's regular hospital some distance further away. The court held that EMTALA only applied once the patient was physically at the hospital. Id. at 1155 –1156. There was no discussion of 42 C.F.R. § 489.24(b), although that rule had been promulgated almost two years before the incident occurred.

[2] The Sixth Circuit requires that a plaintiff must show the hospital did not provide for an appropriate medical screening examination because of an improper motivation involving indigency or lack or insurance, or some other improper reason including race, sex, politics, occupation, education, personal prejustice, drunkenness, or spite; "that is, anything except medical negligence." Roberts, 111 F.3d at 409. At least two federal appelate circuits disagree with the Sixth Circuit's determination that EMTALA requires proof of some wrongful motive, noting that the Act's plain language extends protection to "any" individual seeking emergency room assistance. Gatewood v. Washington Health Care Corp., 933 F.2d 1037, 1040 (D.C. Cir. 1991), Correa v. Hospital San Francisco, 69 F.3d 1184, 1194 (1st Cir. 1995).

That court stated "the plain language of the EMTALA informs us that a medical screening examination is 'appropriate' if it is designed to identify acute and severe symptoms that alert the physician of the need for immediate medical attention to prevent serious bodily injury." Id. (Emphasis in original). Further, "the courts have achieved a consensus on a method of assessing the appropriateness of a medical examination in the EMTALA context. 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. The essence of this requirement is that there be some screening procedure, and that it be administered even-handedly." Correa, 69 F.3d at 1192 (citations omitted).

Therefore, the duty to provide an appropriate medical screening examination is met by an examination reasonably calculated to identify critical medical conditions and that is provided in a uniform manner. It may be reasonably concluded that state law granting permission to conduct such an examination when an ambulance encounters an individual seeking transport to the hospital does not directly conflict with the EMTALA if the examination meets the requirements found in the EMTALA. 42 U.S.C. § 1395dd(f). It may further be concluded that language in the EMTALA and its regulations discussing an examination in the emergency room would permit an examination in an ambulance because the ambulance is interpreted by the regulations as being a part of the emergency room. 42 C.F.R. § 489.24(b).

The question remains whether ambulance attendants, under physician supervision, may conduct the appropriate medical screening examination. The "examination must be conducted by individuals determined qualified by hospital bylaws or rules and regulations and who meet the requirements of Section 482.55 concerning emergency services personnel and direction." 42 C.F.R. § 489.24(a). Section 482.55 requires emergency services provided by a hospital to be under the direction of a qualified member of the medical staff, that the emergency services must be supervised by a qualified member of the medical staff, and there must be adequate medical and nursing personnel qualified in emergency care to meet written emergency procedures and needs anticipated by the facility. House Bill 1282 accommodates 42 C.F.R. § 482.55 by requiring direct medical control over the evaluation of the medical necessity to transport an individual. If we read the EMTALA requirements together with the requirements of H.B. 1282, it is apparent an ambulance crew may refuse to transport an individual only if they are under the direct medical control of a physician who is staffing or in charge of the emergency room of the hospital. This control by a physician satisfies the EMTALA requirement if the hospital bylaws or rules and regulations also permit ambulance crews to perform the examination and make appropriate conclusions in consultation with a physician.

A final issue concerns how the definition of an emergency medical condition under the EMTALA relates to the standard of medical necessity under H.B. 1282. The EMTALA provides two substantially similar, but slightly different, definitions of an emergency medical condition at 42 U.S.C. §1395dd(e)(1) and 42 C.F.R. § 489.24(b). The definition with greater inclusiveness is found in the federal regulations, and states that an emergency medical condition means:

> (i) 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 –
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> (A) 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;
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> (B) Serious impairment to bodily functions; or
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> (C) Serious disfunction of any bodily organ or part; or
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> (ii) With respect to a pregnant woman who is having contractions –
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> (A) That there is inadequate time to effect a safe transfer to another hospital before delivery; or
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> (B) That transfer may pose a threat to the health or safety of the woman or the unborn child.

42 C.F.R. § 489.24(b). An individual with an emergency medical condition as defined above would require medical attention and transportation to a hospital. Consequently, there is no need to specifically define what symptoms must exist to make it medically necessary to transport an individual to a hospital under H.B. 1282.

Therefore, it is my opinion that H.B. 1282 does not conflict with the federal Emergency Medical Treatment and Labor Act or federal regulations by permitting a licensed medical ambulance under direct medical control to refuse transport of an individual to a hospital when transport is not medically necessary.

EFFECT

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question is presented decided by the courts.

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