Washington and Lee Law Review

Volume 36 | Issue 4 Article 6

Fall 9-1-1979

Hill-Burton Notice Provisions: Informing The Indigent

NOTES & COMMENTS

Hill-Burton Notice Provisions: Informing the Indigent

In 1946, Congress enacted the Hospital Survey and Construction Act,[1] better known as the Hill-Burton Act.[2] The primary purpose behind the legislation was to fund the construction of nonprofit health facilities.[3] The legislation required that Hill-Burton grantees[4] be open to all people in the area in which the facility is located.[5] The requirement that Hill-Burton facilities provide a reasonable amount of services to people unable to pay,[6] the "free services" assurance, was added to the original 1945 bill as a concession to liberal senators who had failed in their attempt to include national health insurance as part of the program.[7]

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[1] Hospital Survey and Construction Act, Pub. L. No. 79-725, § 2, 60 Stat. 1041 (1946) (*as amended* 42 U.S.C. §§ 291-291o (1976)) [hereinafter cited as Hospital Survey and Construction Act].

[2] For discussions of the legislative history of the Hospital Survey and Construction Act, see S. REP. No. 1285, 93rd Cong., 2d Sess. ——, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7842, 7859-60 [hereinafter cited as Senate Report]; Rose, *The Duty of Publicly-Funded Hospitals to Provide Services to the Medically Indigent*, 3 CLEARINGHOUSE REV. 254, 261-62 (1970).

[3] Section 601 of the original Act states in relevant part: "[t]he purpose of this title is to assist the several States - . . . (b) to construct public and other nonprofit hospitals in accordance with such [state survey and construction] programs." Hospital Survey and Construction Act, *supra* note 1, § 601. *See also Hearings on § 191 Before the Senate Comm. on Education and Labor*, 79th Cong., 1st Sess. 30, 190-91 (1945). Initially, state agencies were authorized to spend $75 million per year for five years to survey hospital needs and carry out construction programs based on those surveys. Hospital Survey and Construction Act, *supra* note 1, § 621.

[4] Hill-Burton grantees or recipients are health facilities that have received funds from the program. Hill-Burton applicants are health facilities that are seeking funds under the program.

[5] *See* Hospital Survey and Construction Act, *supra* note 1, § 622(f)(1). The original requirement, known as the "community services assurance," that the facility be open to all persons in the community, allowed discrimination "where separate hospital facilities are provided for separate population groups, if the plan makes equitable provision on the basis of need for facilities and services of like quality for each such group . . . ." *Id.* In 1963, the "separate but equal" clause was held unconstitutional by the Fourth Circuit in Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959, 969-70 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964). In response to *Simkins*, Congress deleted the "separate but equal" provision in 1964. 43 Fed. Reg. 49,954, 49,955 (1978)). In 1974, HEW issued detailed compliance requirements to insure that Hill-Burton facilities meet their "community services" obligation. 39 Fed. Reg. 31,766 (1974) (codified at 42 C.F.R. § 53.113 (1978)). The 1974 regulations were prompted by Cook v. Ochsner Foundation Hosp., 61 F.R.D. 354, 360-61 (E.D. La. 1972). *Cook* required that Hill-Burton facilities must participate in the Medicaid program and cannot exclude persons because they are Medicaid recipients. *Id.*

[6] *See* Hospital Survey and Construction Act, *supra* note 1, § 622(f)(2). Section 622(f)(2) is commonly referred to as the "free services assurance."

[7] Rose, *Federal Regulation of Services to the Poor Under the Hill-Burton Act: Realities and Pitfalls*, 70 NW. L. REV. 168, 170 (1975) [hereinafter cited as Rose]. Senator Robert Taft

By 1974, Hill-Burton grants had helped finance a substantial proportion of the health care facilities in the United States.[8] Unfortunately, virtually no change was made from 1946 to 1972 in the vague free service compliance standard for grantees.[9] Prompted by litigation,[10] the Department of Health, Education and Welfare (HEW) finally issued regulations in 1972 which were designed to govern the free service obligation of the Hill-Burton recipients.[11] The 1972 regulations were amended in 1975 to include a posted notice provision to help inform those people unable to afford the full cost of medical treatment of a Hill-Burton hospital's free service obligation.[12] The adequacy and form of the notice provision has

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casually suggested during the hearings that facilities receiving Hill-Burton funds should be required to provide a certain level of free services to those unable to pay. *Id.* Taft's suggestion later emerged as § 622(f) (2) of the 1946 Act which states: "there will be made available in each such hospital or addition to a hospital a reasonable volume of hospital services to persons unable to pay therefor, but an exception shall be made if such a requirement is not feasible from a financial standpoint." Hospital Survey and Construction Act, *supra* note 1, § 622(f) (2).

[8] By 1974, congressional appropriations under the program had totaled over $4.4 billion with $2.0 billion of loans authorized. Senate Report, *supra* note 2, at 7860. Appropriations for the Hill-Burton program reached a peak of $270 million in 1967. *Id.* at 7861. In years 1972 through 1974, Congress appropriated $197.2 million annually. *Id.* A 1972 study indicated that Hill-Burton funds had financed approximately 35 percent of the general hospital beds in the United States. Comment, *Provision of Free Medical Services by Hill-Burton Hospitals*, 8 HARV. C.F.C.L. L. REV. 351, 352 n.9 (1973) [hereinafter cited as *Provision of Free Medical Services*] (citing Public Health Service, U.S. Dep't of Health, Education and Welfare, FACTS ABOUT THE HILL-BURTON PROGRAM, JULY 1, 1947 - JUNE 30, 1971, at 4 (HEW Pub. No. 72-4006, 1972)). The need for more hospital beds has virtually disappeared, but the funding program remans essential since roughly one-third of the country's general hospitals and long-term care facilities require remodeling or replacement. Senate Report, *supra* note 2, at 7864.

[9] Before 1972, the standard for compliance with the free services assurance aspect of the Hill-Burton program was extremely general. 43 Fed. Reg. 49,954, 49,954 (1978). *See* 42 C.F.R. §§ 53.1-.79 (Supp. 1947). In 1970, HEW admitted that the department had never enforced the free services assurance obligation despite 42 U.S.C. § 291g (1976), which authorized the Surgeon General to withhold funds from facilities which did not carry through with the free services assurance. *Provision of Free Medical Services, supra* note 8, at 356 n.36. The lack of enforcement by HEW was not a result of Hill-Burton facilities complying with the free services provision. A 1972 survey of approximately 187 nonprofit Hill-Burton hospitals found that roughly 70% had not met the compliance guidelines at that time. Cypen, *Access to Health Care Services for the Poor: Existing Programs and Limitations*, 31 U. MIAMI L. REV. 127, 136 (1976).

[10] *See* text accompanying note 21 *infra.*

[11] *See* 37 Fed. Reg. 182, 182-93 (1972). The initial proposals were issued April 18, 1972. 37 Fed. Reg. 7,632 (1972). The regulations were issued in interim form on July 22, 1972 and in final form with some technical changes on June 22, 1973. 37 Fed. Reg. 14,719 (1972); 38 Fed. Reg. 16,353 (1973). *See also* text accompanying notes 22-29 *infra.*

[12] 42 C.F.R. § 53.111(i) (1978). The suggested language of the posted notice requirement is set forth below:

> Notice of Hill-Burton Obligation
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> This hospital (or other facility) is required by law to give a reasonable amount of service at no cost or less than full cost to people who cannot pay. If you think that you are eligible for these services, please contact our business office (give office location) and ask for assistance. If you are not satisfied with the results, you may

been a continual source of controversy since the 1975 regulations.[13] HEW recently has suggested an alternative individual written notice provision[14] that the Department believes will provide meaningful notice to indigents of the possibility of below cost health care at Hill-Burton hospitals.

The Hill-Burton Act was enacted primarily to meet growing deficiencies in the supply and distribution of health facilities in the United States.[15] Very few hospitals were built during the Depression or World War II and existing facilities were becoming obsolete.[16] To meet the growing need for new medical facilities, the Hill-Burton program allocated federal funds to the states, which planned the final distribution to Hill-Burton applicant facilities.[17] The Surgeon General maintained oversight of the program by virtue of his authority to reject individual state plans.[18] The Surgeon General also was empowered by the 1946 Act to prescribe regulations which would require that an applicant give assurance to the state agency administering the program that a reasonable volume of free services would be provided to persons unable to pay.[19] The initial regulations restated the free service obligation as expressed in the 1946 Act, but failed to establish any compliance levels of free services for Hill-Burton recipients.[20]

As a result of lawsuits brought by indigents to enforce Hill-Burton hospitals' free service obligation,[21] HEW proposed the first detailed free

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contact (the state Hill-Burton agency with address).

Id. Section 53.111(i) also provides:

> [t]hat an applicant which has selected a presumptive compliance guideline under paragraph (d)(1) of this section *may, at its option,* either (1) add to such notice language stating that the facility's obligation is limited to a specified dollar volume of uncompensated services and that if the facility has, during a specified period (e.g., year, quarter, month), already provided a volume of uncompensated services sufficient to satisfy such obligation, any person inquiring about such services will be given a written statement to that effect which shall also state when additional uncompensated services will be available; or (2) post an additional notice stating that the facility's obligation has been satisfied for the current period and stating when additional uncompensated services will be available.

Id. (emphasis added). For an explanation of the presumptive guidelines, see note 25 *infra.*

[13] *See* text accompanying notes 37-61 *infra.*

[14] 43 Fed. Reg. 49,954, 49,965-66 (1978) (to be codified in 42 C.F.R. § 124.505).

[15] Senate Report, *supra* note 2, at 7859; *see* note 3 *supra.*

[16] Senate Report, *supra* note 2, at 7859.

[17] Hospital Survey and Construction Act, *supra* note 1, §§ 611, 621.

[18] *Id.* § 632 (Withholding of Certification).

[19] *Id.* § 622(f)(2).

[20] 42 C.F.R. § 53.63 (Supp. 1947). *See generally* 42 C.F.R. §§ 53.1-.79 (Supp. 1947). The requirement to provide free services would be waived if the facility demonstrated that providing such services was not financially feasible. *Id.* § 53.63.

[21] *See, e.g.,* Euresti v. Stenner, 458 F.2d 1115 (10th Cir. 1972); Organized Migrants in Community Action, Inc. v. James Archer Smith Hosp., 325 F. Supp. 268 (S.D. Fla. 1971); Cook v. Ochsner Foundation Hosp., 319 F. Supp. 603 (E.D. La. 1970). *But see* Stanturf v. Sipes, 224 F. Supp. 883 (W.D. Mo. 1963). Since neither the Hill-Burton Act nor the initial regulations authorized private civil actions, these early cases were important in that *Euresti, OMICA,* and *Cook* established the right of a person who was denied services to bring suit

service regulations in 1972.[22] The 1972 regulations were designed to establish more specific guidelines for compliance and enforcement of the free services aspect of the Hill-Burton program.[23] Principally, the 1972 regulations were aimed at three different areas. First, the state agency was responsible for setting eligibility criteria for persons unable to pay.[24]

Second, the regulations defined free service compliance levels for Hill-Burton recipients.[25] Third, the 1972 regulations provided guidelines for

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against a Hill-Burton facility for such a denial.

The unsuccessful plaintiff in *Stanturf* instituted his suit against Wright Memorial Hospital, a Hill-Burton facility, after the hospital refused him admission. 224 F. Supp. at 884. The plaintiff asserted that he was a third-party beneficiary of a contract between the hospital and the federal government and thus had standing to bring the action. *Id.* at 890. The contractual relationship was allegedly created by virtue of the federal government giving funds to the hospital under the Hill-Burton program. *Id.* The court, unable to find any authority for the plaintiff's novel argument, dismissed the suit. *Id.*

In *Cook*, the plaintiffs sought to compel defendant hospitals to provide a reasonable volume of free services to those persons unable to pay. 319 F. Supp. at 606. The district court allowed the suit, accepting what had been called a "unique" argument by the *Stanturf* court seven years earlier. *Id.* at 605.06. The *Cook* court reasoned that since the Hill-Burton Act did not authorize private civil actions, the plaintiffs would have to be regarded as "somewhat analogous to third-party beneficiaries of a contract and a civil action would have to be implied under the act" before the suit could be entertained. *Id.* at 605. Crucial to the court's analysis was the Fifth Circuit's rationale in Gomez v. Florida State Employment Serv., 417 F.2d 569 (5th Cir. 1969). In *Gomez*, migratory farm workers sought relief from injuries suffered as a result of alleged violations of federal regulations concerning wage and housing standards for migrant farm workers promulgated under the authority of the Wagner-Peyser Act. *Id.* at 570. *See also* 29 U.S.C. §§ 49-49k. (1976). Similar to the Hill-Burton Act, the Wagner-Peyser Act had no provision which allowed a private civil action to be brought. *Id.* The Fifth Ciicuit, however, held that such an action could be maintained because the migratory workers were the real beneficiaries of the Act. 417 F.2d at 577. In order to protect the interests of the beneficiaries, the *Gomez* court reasoned that the Wagner-Peyser Act called for implied remedies. *Id.* at 576. The *Cook* court accepted the Fifth Circuit's reasoning and applied the analysis to the Hill-Burton Act Act because the mechanics of the two acts were so similar. 319 F. Supp. at 605-06. Both Wagner-Peyser and Hill-Burton were governed by federal regulations and promulgated for the benefit of a special class of persons, migratory farm workers and persons unable to pay the full cost of medical treatment, respectively. The *Gomez* reasoning, adopted by *Cook*, was followed in both *Euresti* and *OMICA*. *See* 458 F.2d at 1117-18; 325 F. Supp. at 271.

[22] 37 Fed. Reg. 7,632, 7,632-34 (1972); *see* note 11 *supra.*

[23] 37 Fed. Reg. 7,632, 7,632 (1972).

[24] 42 C.F.R. § 53.111(g) (1978). Persons who are unable to pay must first qualify for free services. Eligibility criteria are determined by the state agency administering the program in accordance with generally recognized standards of need, such as the current Social Security Administration poverty income level, or the Current Office of Economic Opportunity Income Poverty Guidelines applicable for the area, or any other equivalent measures which the Secretary finds provide a reasonable basis for determining an individual's ability to pay. *Id.* Additional factors to be considered in reaching the eligibility determination include the medical insurance coverage of the patient, the size of the patient's family, and other financial liabilities and assets of the patient and his or her family. *Id.* Section 53.111(g)(2) provides that a copy of the criteria be given upon request, to any person seeking services from a Hill-Burton facility.

[25] 42 C.F.R. § 53.111(d), (h) (as amended). Section 53.111(d) established a presumptive

enforcing the free service obligation and possible sanctions which could be imposed by the state agency for failure to comply.[26] The 1972 regulations, however, lacked any individual or posted notice provisions which could benefit those patients who were unable to pay fully for medical services. The initial regulations did include two sections which could, under certain circumstances, help notify indigents of the availability of less than full cost medical care. Section 53.111(g)(2) provided that a copy of the eligibility criteria should be given to any individual seeking services at a Hill-Burton facility, but only upon request.[27] Section 53.111(h)(4) required the state agency administering the program to publish the rate of uncompensated services established for the applicant hospital in a newspaper of general circulation within the community served by the applicant.[28] Although the 1972 regulations did not provide any on-site notice to persons seeking services from a Hill-Burton facility, they helped to define the free services obligation of Hill-Burton recipients and demonstrated that compliance with the obligation was an important aspect of the Hill-Burton program.

The 1972 regulations remained substantially unchanged[29] until 1975

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compliance guideline for Hill-Burton facilities. A hospital is in presumptive compliance with the free services provision of the Act if the facility makes uncompensated services available at a level not less than the lesser of three percent of operating costs or 10 percent of all federal assistance provided under the program; or if the facility certifies that persons unable to pay for services will not be denied admission. A Hill-Burton facility which chooses never to deny persons admission because of financial reasons is said to operate under an "open door" policy. A 1974 report indicated that 2,019 out of 3,125 Hill-Burton facilities chose the open door policy to meet their free services obligation. Rose, *supra* note 7, at 190 n.131.

Section 53.111(h) applies to facilities which do not choose the presumptive compliance guidelines as the standard for their free services obligation. The state agency is responsible for setting the compliance level at such facilities based on the financial status of the facility, the nature and quantity of service provided by the applicant, the need for free services within the area, and the extent and nature of any joint or cooperative programs the facility may take part in with other facilities for the distribution of free services. In no event is the level for uncompensated services set by the state agency to exceed the presumptive compliance guideline. 42 C.F.R. § 53.111(h) (1978).

[26] 42 C.F.R. § 53.111(e), (j). Section 53.111(e) requires that each facility submit a copy of its annual statement to the state agency. *Id.* § 53.111(e). Such statement must include the facility's operating costs and the amount of uncompensated services provided in that year. Section 53.111(j) requires the state agency to determine annually whether each facility is meeting its quota of free services. *Id.* § 53.111(j). Section 53.111(j) also suggests that if a facility does not comply with the free services provision, the state agency may impose sanctions including, but not limited to, license revocation, termination of state assistance, and court action. *Id.*

[27] 42 C.F.R. § 53.111(g)(2) (1978). For an explanation of the eligibility criteria see note 24 *supra.*

[28] 42 C.F.R. § 53.111(h)(4) (1978). The published notice should contain a statement "that the documents upon which the agency based its determination are available for public inspection at a location and time prescribed," and if the rate established by the state agency is less than the presumptive compliance guideline, anyone wishing to object "may do so by writing to the State agency within 20 days after publication of the notice." *Id.*

[29] Amendments effective on June 22, 1973 made minor changes in § 53.111(e)(3) and § 53.111(h)(4) and (5). Section 53.111(e)(3) was changed to eliminate unnecessary reporting

when litigation once again prompted changes by HEW. In *Corum v. Beth Israel Medical Center*,[30] the New York district court held section 53.111(f)(1) of the 1972 regulations invalid.[31] Section 53.111(f)(1) allowed a Hill-Burton recipient to suspend determination of a patient's eligibility for free services until after the patient received his bill.[32] The court accepted the plaintiffs' argument that many truly eligible persons would be discouraged from seeking any medical care because of the uncertainty of their status if a determination of their eligibility could be delayed until after billing.[33] The uncertainity arises in the case of a truly eligible person because, by deferring the eligibility determination, the hospital's free services obligation may have been met for the current period.[34] The *Corum* court concluded that section 53.111(f)(1) would act to bar even eligible persons from seeking the benefits of the free services provision.[35] The district court consequently held that the eligibility determination must be made before rendition of services, and declared section 53.111(f)(1) invalid.[36]

The 1975 amended regulations reflected the district court's holding by requiring the eligibility determination to by made prior to the rendition of services.[37] HEW also added a provision to the 1975 regulations requiring

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requirements for facilities that operated under an open door policy. 38 Fed. Reg. 16,353, 16,354 (1973). *See also* note 25 *supra*. Section 53.111(h)(4), which originally allowed objections regardless of the rate set by the state agency, was amended only to require published notice to include a statement that persons wishing to object to the rate may do so by writing the state agency within 20 days only if the rate established by the state agency is less than the presumptive compliance guideline. *Id.*

[30] 373 F. Supp. 550 (S.D.N.Y. 1974).

[31] *Id.* at 557-58.

[32] 42 C.F.R. § 53.111(f)(1) (1974). Subsection (f)(1) stated in relevant part:

> In determining the amount of uncompensated services provided by an applicant, there shall be included only those services provided to an individual with respect to whom the applicant has made a written determination prior to any collection effort *other than the rendition of bills* that such individual is unable to pay therefor. . . .

Id. (emphasis added).

[33] 373 F. Supp. at 557.

[34] *Id.* A person truly unable to pay might hesitate to obtain medical services because the hospital could meet its current free services obligation sometime between treatment and billing.

[35] *Id.*

[36] *Id.* at 557-58.

[37] 42 C.F.R. § 53.111(f) (1978). HEW agreed with the *Corum* court that there was no apparent justification for delay in making determinations with respect to patients who are clearly unable to pay. 40 Fed. Reg. 46,202, 46,202 (1975). Consequently, the language of the billing provision, subsection (f), was changed to require that the determination of eligibility be made prior to the rendition of services except in emergency cases or when a change in circumstances occurred. 42 C.F.R. § 53.111(f) (1978). An eligibility determination may be made after treatment if, for example, the patient's financial condition has changed due to a loss of wages resulting from the illness or if insurance coverage or income from other sources is less than anticipated or if the costs of the medical treatment are greater than anticipated. *Id.* Revised § 53.111(f)(1)(i) also provides that in an emergency case when the eligibility

Hill-Burton facilities to post notice of their free services obligation in order to inform "patients or potential patients that criteria for eligibility and applications are available upon request . . . ."[38] The posted notice provision, section 53.111(i), essentially requires a statement indicating the

determination must be delayed, any billing must also include notice of the availability of free services similar to the posted notice provision of § 53.111(i). *Id.*

[38] 42 C.F.R. § 53.111(i) (1978). The 1975 changes were first published in March 1975 as proposals with comments invited. 40 Fed. Reg. 10,686, 10,686-87 (1975). A number of the approximately 250 comments received complained that there was no necessity to advise indigent patients of the availability of uncompensated services prior to the rendition of services. 40 Fed. Reg. 46,202, 46,202 (1975). HEW reacted to the criticism by noting that the objections were inconsistent with the *Corum* holding as well as the fundamental policy underlying § 53.111 and the statute on which it is based. *Id.* The proposed regulations went into effect in October 1975. *Id.* at 46,203; 42 C.F.R. § 53.111(i) (1978); *see* note 12 *supra*. The North Carolina district court's position regarding notice in Gordon v. Forsyth Hosp. Auth., Inc., 409 F. Supp. 708 (M.D.N.C. 1976), was consistent with the 1975 regulation. Plaintiffs brought a class action suit prior to the 1975 regulations asking for declaratory and injunctive relief against the county hospital authority which would require that the plaintiffs receive free medical services at two hospitals in accordance with the Hill-Burton Act. *Id.* at 711. Standing was not an issue in *Forsyth* because Congress provided a statutory means for private litigants to institute civil actions for compliance with the free services provision when it implemented title XVI of the Public Health Service Act. *See* 42 U.S.C. § 300p-2(c) (1976). *See also* note 21 *supra* (standing before title XVI). The Hill-Burton Act was adopted in 1946 as Title VI of the Public Health Service Act of 1944. Hospital Survey and Construction Act, *supra* note 1, at § 2. In 1975, Congress enacted title XVI to replace the title VI assistance program. 43 Fed. Reg. 49,954, 49,954 (1978). The free services assurance requirement of title XVI is substantially the same as the title VI provision. *Id.* at 49,955. Section 300p-2(c), the exclusive remedy for private individuals, requires that before a lawsuit may be filed by a private individual, he first must exhaust administrative remedies by filing a complaint with the Secretary of HEW. If the Secretary dismisses the complaint or the Attorney General does not bring a civil action for compliance within six months of filing, the individual may seek legal relief. *Id.*

The *Forsyth* plaintiffs sought compliance with the free services obligation with respect to two hospitals in the area, only one of which was a Hill-Burton recipient (Forsyth). 409 F. Supp. at 711. The court dismissed the claim against the non-Hill-Burton facility for want of jurisdiction because the facility was not charged with any Hill-Burton responsibilities. *Id.* at 725. Among other contentions, the plaintiffs asserted that the court should issue an injunction requiring Forsyth to give notice to patients at the time of their admission of Forsyth's uncompensated services obligation. *Id.* at 711. The court recognized that notice was necessary to satisfy the free services obligation and observed that the current free services regulations simply provided for yearly published notice in a newspaper of general circulation within the community indicating the level of uncompensated services to be provided by the Hill-Burton facility. *See* text accompanying note 28 *supra*. The *Forsyth* court had access to the proposed posted notice provision and reasoned that posted notice would be far more effective in communicating information to eligible persons than an annual newspaper publication. 409 F. Supp. at 725. Furthermore, the court believed that such notice was necessary as a practical matter to give effect to the free services provision of the Hill-Burton Act. *Id.* Appropriately placed posted notices, according to the court's analysis, would be an effective and satisfactory means of informing the public of the availability of free services. *Id.* The *Forsyth* court, however, did not determine whether posted notice was constitutionally required to meet procedural due process. The court held that the Hill-Burton facility should adopt the proposed notice provision until it became codified in 42 C.F.R. § 53.111, at which time the hospital should change the notice, if necessary, to comply with the federal regulations. 409 F. Supp. at 725.

availability of free services.[39] The notice shall be multilingual if the applicant serves a multilingual community, and posted in appropriate areas within the facility (admissions office, emergency department and business office).[40] Any applicant which selected a presumptive compliance guideline[41] *may* add to the posted notice language which explains that the facility already may have met its obligation for the current period.[42] Hill-Burton hospitals which have met their free services obligation for the current period may add a statement to the posted notice indicating when uncompensated services will be available again.[43]

Although the 1975 regulations are still in effect, the recent Tennessee district court decision in *Newsom v. Vanderbilt University*[44] prompted HEW to issue proposed regulations[45] which would require individual written notice to anyone seeking services from a Hill-Burton facility.[46] In *Newsom,* the plaintiff argued that Vanderbilt University Hospital failed to provide a reasonable volume of free services to those persons unable to pay, and alternatively that if the hospital did meet its obligation, the procedures for distribution of free services violated procedural due process under the fifth and fourteenth amendments.[47] The court noted that unless the Hill-Burton facility's allocation of free services amounted to state action, the fifth and fourteenth amendments would be inapplicable.[48] The

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[39] 42 C.F.R. § 53.111(i) (1978).

[40] 42 C.F.R. § 53.111(i) (1978); *see* note 12 *supra.*

[41] *See* 42 C.F.R. § 53.111(d) (1978). *See also* note 25 *supra.*

[42] 42 C.F.R. § 53.111(i) (1978).

[43] *Id.*

[44] 453 F. Supp. 401 (M.D. Tenn. 1978).

[45] *See* 43 Fed. Reg. 49,954, 49,954 (1978); text accompanying notes 62-68 *infra.* The 1978 proposed regulations were also an indirect response to a large number of administrative complaints that had been received by HEW after Congress enacted title XVI in 1975. *Id.* at 49,955. Section 1612(c) of title XVI authorized private individuals to file complaints with the Secretary of HEW charging noncompliance with the free services provision. 42 U.S.C. § 300p-2(c) (1976). Section 1612(c) additionally requires the Secretary to make periodic investigations of Hill-Burton facilities to determine whether such facilities are in compliance with the free services obligation. *Id.* The proposed regulations reflect, in part, findings acquired through investigations of Hill-Burton grantees. 43 Fed. Reg. 49,954, 49,955 (1978).

[46] 43 Fed. Reg. 49,954, 49,965-66 (1978) (to be codified as 42 C.F.R. § 124.505).

[47] 453 F. Supp. at 405. The plaintiff in *Newsom* achieved standing by first exhausting her administrative remedies in accordance with § 300p-2(c) of title 42. *Id. See* note 39 *supra. See also* U.S. CONST. amends. V, XIV.

[48] 453 F. Supp. at 419. Federal district and circuit courts which had examined the question of whether the receipt of Hill-Burton funds constituted state action reached inconsistent results. *Compare* Jackson v. Norton-Children's Hosp., Inc., 487 F.2d 502, 503 (6th Cir. 1973) (something more than partial federal funding necessary to create state action in activities of ostensibly private hospital); *and* O'Neill v. Grayson County War Memorial Hosp., 472 F.2d 1140, 1143 (6th Cir. 1973) (provisions in lease of hospital premises indicated that hospital was not purely private and therefore was not immune from fourteenth amendment); *and* Chiaffitelli v. Dettmer Hosp., Inc., 437 F.2d 429, 430 (6th Cir. 1971) (five of nine members of hospital board responsible to public gave hospital the character of public agency subject to § 1983); *with* Holton v. Crozer-Chester Medical Center, 419 F. Supp. 334, 341 (E.D. Pa. 1976),

Newsom court concluded, however, that the nexus between the government and the distribution of Hill-Burton free services was sufficiently close so that the action of the hospital could be treated as the state action.[49]

The hospital maintained that indigents were not entitled to procedural due process because the Vanderbilt University Hospital's free service obligation was insufficient to meet the need for below cost medical treatment. Thus, not all eligible patients had the right to receive free services from the Hill-Burton facility.[50] The court rejected the hospital's argument and held that the denial of free services could be accomplished only if the procedures satisfied due process requirements.[51] The *Newsom* court reasoned that distribution of free services in a manner which complies with due process would insure that the resources are not allocated arbitrarily.[52] To meet due process standards, the court held that indigents could be denied treatment under the Hill-Burton program only if they are first given meaningful notice of the possibility of obtaining free care and of the written eligibility criteria.[53]

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vacated and remanded, 460 F.2d 575 (3rd Cir. 1977) (private non-profit hospital not subject to § 1983 unless participation with government direct and intimate).

[49] 453 F. Supp. at 420. The *Newsom* court adopted the "something more" test from the *Norton-Children's* case, *see* note 48 *supra*, but reasoned that regulation alone would not be the "something more" which was necessary to create state action. 453 F. Supp. at 420. The *Newsom* court also cited Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), for the proposition that the crucial question to be answered is whether a sufficiently close nexus exists between the state and the challenged action of the regulated entity so that the action of the latter may be treated as that of the state. 453 F. Supp. at 420. The plaintiff in *Norton-Children's* was a physician who tried to assert state action by claiming that he had been wrongly dismissed from the staff of a Hill-Burton hospital. The *Newsom* court concluded that the nexus between the doctor's dismissal and the government was tenuous at best compared to the relationship between the government and the allocation of free services pursuant to the Hill-Burton Act. *Id.* The court therefore held that state action existed since the "something more" test was satisfied in *Newsom*. *Id.*

[50] 453 F. Supp. at 422. The defendants argued that not everyone in need of free services, even if eligible, would receive them, because the hospital was only required to provide a reasonable volume of free services. *Id.* A qualified indigent always faces the risk that the hospital has met its free services obligation for the current period. The defendants reasoned that because individual indigents did not have a right to free care, they were not entitled to due process under the fifth and fourteenth amendments. *Id.*

[51] *Id.* at 423 (citing Goldberg v. Kelly, 397 U.S. 254 (1970)). The *Newsom* court, relying on Board of Regents v. Roth, 408 U.S. 564 (1972), concluded that the plaintiff and the class of indigents she represented had a constitutionally protected property interest in free services under the Hill-Burton program. 453 F. Supp. at 422-23. In *Roth*, the court stated that property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." 408 U.S. at 577. "Rules and understandings" which led the *Newsom* court to conclude that the plintiff was entitled to procedural due process included the plaintiff's claim for free services, which derived both from statute and regulation, as well as the plaintiff's ability to enforce the free services provision. 453 F. Supp. at 423.

[52] 453 F. Supp. at 423.

[53] *Id.* at 424; *see* note 24 *supra*.

The focus of the *Newsom* analysis then shifted to the posted notice provision of the 1975 regulations to determine whether the provision provided the "meaningful" notice required by due process standards.[54] The court determined that while posted notice was more effective than an annual publication in an area newspaper,[55] the posted provision still fell far short of constitutional requirements.[56] The court based its finding largely on the testimony of hospital personnel which indicated that only a few persons inquired about Hill-Burton care.[57] The testimony, viewed in light of the fact that approximately 105 persons were denied care for financial reasons over roughly the same period of time that the hospital personnel were deposed,[58] led the *Newsom* court to conclude that posted notice was ineffective.[59] The court reasoned that if posted notice had been effective, more persons would have inquired about the Hill-Burton program. To be effective, the court held that actual notice of the facility's Hill-Burton obligation must be given to persons who otherwise would be denied admission for financial reasons and who are ineligible to receive less than cost care at another facility in the area.[60] The court suggested, for simplicity, that the free services notice be attached to the admission application.[61]

In accordance with the *Newsom* opinion, HEW believes the 1978 regulations[62] will assure that Hill-Burton grantees distribute free services fairly,

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[54] *Id.* at 424-29; *see* note 12 *supra.*

[55] 453 F. Supp. at 425.

[56] *Id.* at 428.

[57] *Id.* at 426-28. The *Newsom* deposees included the hospital's service representative, a financial counselor, and the hospital's director of admissions. Each of these individuals was engaged in the admission of patients, and each had personal contact with individuals who were seeking hospital treatment. *Id.* Despite the close contact with incoming patients, the service representative could not recall any patient telling her that he or she read the posted notice and desired to apply for Hill-Burton free services. *Id.* at 426. Nor could the financial counselor remember a patient ever mention that he or she saw the posted notice. *Id.* at 427. The hospital's director of admissions was the only deposee that recalled inquiries concerning free services that resulted from patients reading the posted notice. To his own knowledge, approximately six to eight patients made requests for uncompensated care based on the posted notice. *Id.* at 428.

[58] Vanderbilt Hospital's service representative, financial counselor, and director of admissions were deposed on various dates over a five and one-half month period before trial. During this time, approximately 105 persons were denied admission for financial reasons. *Id.* at 428.

[59] *Id.* The *Newsom* court noted that for posted notice to be effective, a patient must perform four steps. First, the patient must see the notice. Second, he must read the notice. Third, he must understand the notice. Finally, he must act by inquiring at the proper location about the availability of free services. *Id.*

[60] *Id.*

[61] *Id.* The *Newsom* court suggested that a regulation be promulgated requiring that notice *actually* be read by (or to) any patient who was unable to obtain or continue needed care for financial reasons. *Id.* The court specifically directed this suggestion to patients who became eligible under the "changed circumstances" provision. *Id. See generally* 42 C.F.R. § 53.111(f)(1)(ii) (1978); note 37 *supra.*

[62] 43 Fed. Reg. 49,954 (1978) (to be codified in 42 C.F.R. § 124). The proposed regulations were made to promote "proper administration of the statute." *Id.* at 49,959.

that the required amount of free services are delivered, and that the services are administered to those who should receive them.[63] Proposed subsections 124.505(b) and (c) require that a Hill-Burton facility provide both posted and individual written notice.[64] Subsections (b) and (c) propose four basic changes from the existing posted notice provision. Subsection (b) requires that the heading of the posted notice be legible at a distance of fifteen feet.[65] Second, "multilingual" has been defined.[66] Third, subsection (b)(2) requires a facility which has met its free services obligation for the current period to post notice to that effect.[67] Finally, section 124.505(c) requires individual written notice of the availability of free services to be given to anyone who seeks services.[68]

In its explanation of the proposed regulations, HEW acknowledged the ineffectiveness of posted notice as the sole means of informing persons of the availability of uncompensated services.[69] By requiring individual written notice, HEW effectively adopted the suggestion in *Newsom* that notice appear on the signature page of a Hill-Burton facility's admission form.[70] The individual written notice regulation, proposed section 124.505(c), requires that the written notice contain the same information as the posted notice, be given prior to any treatment,[71] and set forth the applicable eligibility criteria.[72] The individual notice also must state that the facility will make a written determination, upon request, of whether the person

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[63] *Id.* at 49,955.

[64] *Id.* at 49,965-66 (to be codified in 42 C.F.R. § 124.505 (b), (c)).

[65] *Id.* at 49,965 (to be codified in 42 C.F.R. § 124.505(b) (1) (iii)). The requirement that the posted notice heading be legible at a distance of 15 feet was made necessary after site investigations had discovered that 3 by 5 inch cards were utilized in some facilities with the required notice printed in small type. *Id.* at 49,959.

[66] *Id.* at 49,965 (to be codified in 42 C.F.R. § 124.505(b)(1)(ii)). HEW has defined a community to be multilingual "if the 'usual language of households' of five percent or more of its population, according to the most recent figures published by the Bureau of the Census, is other than English." *Id.* The existing posted notice provision calls for multilingual notice where the applicant serves such a community, but the regulation does not establish a minimum percentage of non-English speaking residents which would deem the community "multilingual." *See* 42 C.F.R. § 53.111(i) (1978).

[67] 43 Fed. Reg. 49,954, 49,965-66 (1978) (to be codified in 42 C.F.R. § 124.505(b)(2)). Section 124.505(b)(2) gives applicants the option of either posting notice that the facility has met its obligation for the current period or adding language to the required posted notice to the effect that if the facility satisfies its obligation for the period, anyone inquiring about free service will be given a written statement to that effect. *Id.* In both instances, the notice will state when uncompensated services will again be available. *Id.* The existing regulations give Hill-Burton facilities the option of posting notice in the event the facility meets its free services obligation before the termination of the period. *See* 42 C.F.R. § 53.111(i) (1978).

[68] 43 Fed. Reg. 49,954, 49,966 (1978) (to be codified as 42 C.F.R. § 124.505(c)).

[69] *Id.* at 49,959.

[70] *See* text accompanying note 61 *supra.*

[71] 43 Fed. Reg. 49,954, 49,966 (1978) (to be codified in 42 C.F.R. § 124.505(c)). Individual written notice does not have to be given prior to the rendition of services if the emergency nature of the services makes prior notice impractical. *Id.; see* text accompanying notes 89-93 *infra.*

[72] 43 Fed. Reg. 49,954, 49,966 (1978) (to be codified as 42 C.F.R. § 124.505(c)).

will receive free services.[73] The proposed regulation for individual notice is designed to function in connection with the new provision for eligibility determination.[74] Hill-Burton facilities are required under the proposed eligibility determination provision to make a prompt determination, upon request, of a person's eligibility for free services.[75] By requiring the facility to provide individual notice before rendering services as well as requiring a prompt eligibility determination, HEW reasons that anyone seeking an eligibility determination will receive it before incurring any medical expenses.[76]

The written notice requirement set forth in the proposed regulations of October 1978 should be an improvement over mere posted notice. The issue remains, however, whether the 1978 provision will provide the "meaningful" notice that *Newsom* held necessary to satisfy due process.[77] Some of the criticisms directed towards the existing regulations[78] are also applicable to the proposed provision. The person who is seeking services must still read the notice. He or she must also be able to understand the notice and then inquire about free services at the appropriate location. The only substantial difference in the proposed regulations is that the patient or person seeking services should not have any difficulty seeing the notice statement.[79] Arguably, this difference may be great enough to make the notice effective and meaningful. If all people seeking services are given notice of the availability of free services, many might inquire about the Hill-Burton program. Consequently, the individual written notice surely would be deemed meaningful and thereby satisfy the due process standards of the fifth and fourteenth amendments. On the other hand, the person to whom the notice is given may glance over the print and "see" it

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[73] *Id.* The notice shall state "that the applicant will make on request a written determination of whether the person will receive uncompensated services and will *promptly* inform the person of the determination made." *Id.* (emphasis added).

[74] *Id.* at 49,959.

[75] *Id.* at 49,967 (to be codified in 42 C.F.R. § 124.508(a) (2)). The existing regulations require eligibility determinations to be made prior to the rendition of services. 42 C.F.R. § 53.111(f)(1) (1978). The change was prompted by site investigations by HEW which found that the existing provision is misunderstood by the facilities and difficult to monitor. Additionally, HEW discovered that documentation of the determination is often incomplete. 43 Fed. Reg. 49,954, 49,959 (1978). *See also* 42 C.F.R. 53.111(g) (1978). The proposed regulations also call for federal criteria to replace the state guidelines, *see* note 24 *supra*, which vary widely from state to state. 43 Fed. Reg. 49,954, 49,956 (1978).

[76] 43 Fed. Reg. 49,954, 49,959 (1978). Although the proposed regulations have eliminated the requirement that the eligibility determination be made prior to treatment, HEW believes that § 124.508, in conjunction with § 124.505(c) (prompt determination of eligibility), will still be consistent with the *Corum* decision, since subsection (c) requires individual written notice to be given before the rendition of services. *Id.* at 49,966 (to be codified in 42 C.F.R. § 124.505(c)).

[77] *See* 453 F. Supp. at 424.

[78] *See* note 59 *supra*.

[79] Because written notice will be furnished to persons prior to the rendition of services, they should have no difficulty in at least seeing the provision.

only to the limited extent that persons now "see" the posted notices as words printed on a sheet of paper. Of course, much of this problem depends upon how the individual written notice is presented to the person seeking services. If the notice is on a separate and distinct form with the heading "ATTENTION—YOU MAY BE ABLE TO RECEIVE FREE MEDICAL TREATMENT," the notice should be meaningful.[80] Notice which is designed to catch the reader's attention would undoubtedly be meaningful.[81] However, notice in small print and hidden among numerous forms may be only slightly better than the existing posted notice provision.[82] Another difficulty with individual written notice is that persons who read or glance over the statements may be under great stress at the time. The anxiety of the situation may prevent many persons from a thorough reading of the notice of the availability of free services.[83]

Additional problems could arise if a patient arrives for admission with another person who fills in the application for admission. Under the pro-

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[80] The proposed regulations alter the heading for both the posted and the individual written notice. The existing regulations for posted notice provide for the words "Notice of Hill-Burton Obligation" at the top of the notice. 42 C.F.R. 53.111(i) (1978). The proposed heading reads "Free or Below Charge Care Available." 43 Fed. Reg. 49,954, 49,965 (1978) (to be codified in 42 C.F.R. § 124.505(b)(iv)).

[81] Hospitals may not wish to broadcast the possibility of free services. According to the *Newsom* court, Vanderbilt's policy was to say as little as possible about potential free treatment. 453 F. Supp. at 416. The hospital was concerned that if all patients were aware of the facility's free services obligation, many patients who could pay would try to defraud the hospital to avoid paying for their hospital care. *Id.* at 417.

[82] Legislatures and governmental agencies other than HEW have recognized the importance of the type size used in printed notices. The general disclosure regulation accompanying the Truth in Lending Act, 12 C.F.R. § 226.6 (1978), provides that

> [e]xcept with respect to the requirements of § 226.10, where the terms "finance charge" and "annual percentage rate" are required to be used, they shall be printed more conspicuously than other terminology required by this part and all numerical amounts and percentages shall be stated in figures and shall be printed in not less than the equivalent of 10 point type, .075 inch computer type, or elite size typewritten numerals, or shall be legibly handwritten.

Id.

The Civil Aeronautics Board (CAB) issued regulations concerning the airlines' liability limitation for lost, delayed, or damaged baggage. 14 C.F.R. § 221.176 (1979). Notice of an airline's baggage liability limitations must appear on each ticket "in at least 10-point type . . . ." *Id.* The Food and Drug Administration (FDA) has issued regulations governing the size of print on food packaging. Section 102.41 of 21 C.F.R. requires that the words "made from dried potatoes" appear on packaging of potato chips composed of dehydrated potatoes. 21 C.F.R. § 102.41 (1978). The words "made from dried potatoes" shall appear immediately following or below the words "potato chips" in easily legible boldface type. *Id.* The words must be printed either

> [n]ot less than one-sixteenth inch in height on packages having a principal display panel with an area of 5 square inches or less and not less than one-eighth inch in height if the area of the principal display panel is greater than 5 square inches; or (2) [n]ot less than one-half the height of the largest type used in the words 'potato chips.'

Id.

[83] *See* 453 F. Supp. at 428.

posed regulation, the individual written notice must be given to "each person who seeks services in the facility on behalf of himself or another."[84] The ambiguity of this subsection may be better explained with an example. If a worker were injured on the job and his foreman transported him to the hospital and sought services for the worker, the foreman might properly be the recipient of the notice of the availability of free services.[85] Unfamiliar with the patient's financial position, the foreman could easily disregard such notice, effectively preventing the worker from applying for free care unless the worker sees, reads, understands, and acts upon posted notice.[86] Although the hospital complied with the individual notice requirement, it is doubtful whether such notice is meaningful to the patient under these circumstances.[87] If, however, a relative is seeking services on behalf of the person who can not pay, individual notice to the relative would appear to be almost as meaningful as notice to the patient. The relative is probably familiar with the patient's financial status and interested in helping the patient find some means of paying for the hospital care should the patient be unable to afford treatment. The above problem results from the ambiguity in the phrase "seeks services on behalf of himself or another." The issue is whether "seeking" is equivalent to "trying to pay for," or means "trying to find," without incurring any liability. Perhaps the best means of assuring that potential recipients of Hill-Burton services receive meaningful notice and eliminating the ambiguity in the phrase "seeks services" is to require that the notice be given either to the patient or to the person who will be responsible for payment. Requiring that notice be given to persons responsible for payment would alter the proposed regulation which requires that individual notice be given to each person who seeks services in the facility on behalf of himself or another.[88]

Section 124.505(c)(2) of the proposed regulations requires that individual notice be given before rendition of services except where such notice is impracticable due to emergency services.[89] In an emergency situation, however, when the patient is unaccompanied, the patient or his next of kin must be given notice as soon as practicable, "and in no event later than the first rendition of a bill for the services."[90] Thus, there exists a slight distinction in the proposed regulations regarding who must receive individual notice in an emergency situation when the patient has no one accompa-

[84] 43 Fed. Reg. 49,954, 49,966 (1978) (to be codified in 42 C.F.R. § 124.505(c)).

[85] Because the foreman sought services on behalf of the injured worker, the foreman could be the appropriate person to be notified of the availability of free services according to § 124.505(c). *See* 43 Fed. Reg. 49,954, 49,966 (to be codified in 42 C.F.R. § 124.505(c)).

[86] *See* note 59 *supra.*

[87] Assuming that the foreman does not act upon the individual written notice, the patient will be left to rely solely on the posted notice provision which already had been held inadequate in *Newsom. See* text accompanying notes 54-61 *supra.*

[88] 43 Fed. Reg. 49,954, 49,966 (1978) (to be codified in 42 C.F.R. § 124.505(c)).

[89] *Id.*

[90] *Id.*

nying him to the facility as opposed to the situation where another person seeks services for the patient. When a patient is accompanied upon admittance to the hospital, the hospital may meet its requirement by furnishing notice to the patient, or the person seeking services for the patient.[91] The person seeking services need not be the patient's next of kin.[92] This distinction may lead to less effective notice when notice is given to an unrelated individual than when notice before care is impracticable and must be made to either the patient or his next of kin as soon as possible. Such a result follows from the assumption that the patient and his next of kin will be more likely to know the patient's financial status and be more interested in helping the patient procure free services than an unrelated individual.[93]

Although individual written notice, if presented properly,[94] could be an effective means of notifying indigents of the availability of free services, courts might find that only oral notice provides meaningful notice as required by due process standards. Hospitals might respond that oral notice is logistically impossible and also would create a deluge of applicants for free services.[95] Whether the proposed notice regulation will satisfy due process standards cannot be answered until after the regulations are adopted and their effect is measured. Individual written notice is an improvement over the existing posted notice provision. Patients will, according to the proposed regulations, be exposed to notice of the availability of free services in a way that is more likely to encourage indigents to apply for free services than the posted notice provision.[96] Furthermore, indigents who apply for admission at a facility which has already met its free services obligation for the current period will be notified of such fact before they incur any liability.[97] Thus, if the proposed notice regulation is adopted in its current form, free services should be distributed to the poor more fairly.

MALCOLM S. DORRIS

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[91] *Id.*

[92] Section 124.505(c)(1) states that "individual written notice of the availability of uncompensated services to *each person* who seeks services in the facility on behalf of himself or another." *Id.* (to be codified in 42 C.F.R. § 124.505(c)(1)) (emphasis added).

[93] *See* text accompanying notes 84-88 *supra.*

[94] Clear and conspicuous notice to each individual seeking services would be in accordance with *Newsom. See* text accompanying notes 54-61 *supra.*

[95] *See* 453 F. Supp. at 416-17.

[96] *See* text accompanying notes 80-82 *supra.*

[97] *See* 43 Fed. Reg. 49,954, 49,965-66 (to be codified in 42 C.F.R. § 124.505(b)(2)).