



MEMORANDUM

May 18, 2020

To: Governors' Offices
From: Bill McBride, Executive Director
RE: Governor Considerations Regarding Crisis Standards of Care

As part of state public health emergency preparedness initiatives, many states have developed guidelines or frameworks to address crisis standards of care (CSC). CSC are intended to help health systems and providers implement standardized and consistent approaches to allocate scarce resources throughout a region or state for triaging and treating patients impacted by a given emergency. Standardization is critical to ensure fairness in access to care throughout the affected area and to help limit the extent to which patients “hospital shop” if there is perceived or actual differentiation in protocols for prioritizing care. Absent state guidance, hospitals will develop and follow their own policies. However, hospitals can incorporate guidance into their own operating procedures, decide when to activate, and decide when to deactivate.

The rapid spread of COVID-19 has led several states to update their CSC frameworks to address issues unique to the pandemic (e.g., allocation of ventilators, use of intensive care unit beds, reduced use or dosage of certain drugs or use of alternative therapies due to inadequate drug supply, and insufficient personal protective equipment limiting the number of treating providers). Governors are well-positioned to facilitate coordination of framework development, solicit stakeholder input to achieve buy-in, ensure the appropriate legal protections for health care professionals, and communicate with the public about the plan.

Governors may consider the following actions regarding CSC.

Solicit public stakeholder and thought leaders’ input to ensure all perspectives are reflected in the guidelines and achieve public buy-in. CSC guidelines involve difficult decisions about how life saving or health protecting resources should be allocated. Engaging different groups will help state leaders to gain a more comprehensive understanding of the various considerations.

States may consider:

- Engaging in a public stakeholder convening. Because the guidelines will address difficult decisions that affect people’s lives in critical ways, it is important they are in accord with the values of the public and relevant stakeholders. Input can be solicited directly or through advisory group convenings and consultations. Input should be sought in particular from those positioned to best guard against discrimination, stereotyping, or other unfair or disadvantaging effects.
- Engaging hospitals and health care systems to understand their level of need and capacity as well as to foster collaboration on the development and adoption of concrete guidelines.
 - Allowing flexibility for different facilities based on capacity and resources. For example, some hospitals in a state may face shortages of ventilators or medication while others do not, while some hospitals may have the staff resources to establish

triage committees or other additional layers of oversight and process, while others may not.

- Including state officials, hospital/health system representatives, medical experts, bioethicists, legal experts and groups representing different populations (older adults, individuals with disabilities, disproportionately impacted racial or ethnic minority groups, and others) to develop or update an existing CSC framework or guidelines for consistent implementation across the state taking into account broader stakeholder input.
- Tasking the group developing or revising the framework to give concrete guidance about both the substantive principles and the fair processes for making these decisions, guidance that is specific enough to relieve providers of the need to rely on hunches and minimize inconsistent treatment approaches. This process can include providing clear reasons for each recommendation that can be relied on to defend the approach after the fact. Some states have triage protocols that consider individuals' improvement in survival from the treatment, which may favor neither the sickest nor healthiest. According to legal experts, such protocols are on stronger legal footing than those using subjective quality of life measures.
- Explicitly prohibiting consideration of intellectual or physical disabilities except where relevant to prospect of benefit, and avoiding language (such as references to "life-limiting conditions" or inability to perform "activities of daily living") that could connote quality-of-life judgments. To ensure adherence to provisions of the Americans with Disabilities Act, guidelines could require assessment, where possible, of how individual patients will respond rather than using blanket exclusions.
- Reaffirming that race, nationality, religion, and similar factors will not be considered.
- Consider intermediate steps that can be taken before more drastic measures ("crisis plans") are required. One example is Minnesota's [Crisis Standards of Care Framework](#), which addresses seeking ventilators from other sources, using non-invasive ventilation, transferring patients, etc.

Ensure health care workers are appropriately protected from liability while adhering to CSC. Fear of liability can deter practitioners from rendering care when it is needed the most. By ensuring certain liability safeguards for health care workers adhering to CSC, states can help providers effectively conduct critical life-saving activities that require difficult decision-making.

- Every state has declared an emergency in response to COVID-19, which may help trigger the shift to CSC or alternative standards for negligence. Activating a CSC framework may prompt additional protections for health care workers and entities. States may consider how to best ensure that health care workers are protected from liability when operating under and adhering to CSC guidelines.
- While federal and state laws offer a wide range of liability protections and immunities for health care workers during a public health emergency, states can tailor protections to specific professions and different types of shortages. For example, Maryland has an existing [statute](#) which specifically provides protections for medical providers acting during an emergency. A 2015 [Attorney General Opinion](#) from the Maryland Attorney General interprets the law to include immunity to providers "acting in accordance with mandatory ventilator allocation protocols established by the state."

Demonstrate accountability and transparency in communications with the public about CSC guidelines.

- Although the necessity for CSC will inevitably increase some level of fear and concern among state residents, proactively communicating guidelines can help increase understanding and trust if crisis standards must be implemented.
- There are benefits to clearly articulating the standards and framework before a crisis. Being able to reference pre-established plans may benefit states trying to maintain trust while these difficult decisions must be made.

Below are select examples of state CSC guidelines released or updated in 2020:

- In April, the Colorado Department of Public Health and Environment released updated CSC [guidelines](#). Following the release of these guidelines, CSC standards were activated in Colorado for personal protective equipment (PPE) and emergency medical services (EMS)
 - On April 7, Colorado [activated](#) CSC guidelines for PPE, which includes strategies to optimize the use of PPE during a shortage.
 - On April 8, Colorado [activated](#) CSC guidelines for EMS workers, which includes contingency measures and triage strategies to help first responders manage the medical surge.
- Governor Charlie Baker of Massachusetts released CSC [guidelines](#) in April.
- The Minnesota Department of Health Standards of Care [framework](#) was updated in February. In addition to their framework, the Minnesota Department of Health also developed [scarce resource cards](#) for providers.
- In April, Governor Chris Sununu of New Hampshire issued an [executive order](#) which activated the state's CSC plan. The New Hampshire Department of Health and Human Services released the CSC [guidelines](#) in a separate announcement.
- The Pennsylvania Department of Health and the Hospital Health System Association of Pennsylvania collaborated to release CSC [guidance](#) in April.

Other Resources

- The federal Health and Human Services Office for Civil Rights released [guidance](#) on civil rights laws, specifically pertaining to persons with disabilities and access and functional needs, as they relate to COVID-19 and CSC “to ensure that entities covered by civil rights authorities keep in mind their obligations under laws and regulations that prohibit discrimination.”
- The National Academy of Medicine released a [rapid expert consultation](#) which includes expert feedback on the guiding principles and key elements of CSC planning. They published a [discussion paper](#) in March 2020 updating CSC guidelines from 2009 and giving COVID-19 specific considerations..

- The New England Journal of Medicine recently published an [article](#) regarding ethical values for rationing health resources in a pandemic including six specific recommendations.
- The Annals of Internal Medicine released a [review](#) of more than 20 CSC plans and identified the most common themes and policy content, triage criteria, and triage committee membership.
- The Chest Journal published an article with a [framework](#) to guide statewide allocation of scarce mechanical ventilation during disasters.
- The Network for Public Health Law has multiple resources available on CSC considerations, including an [overview](#) of legal and regulatory challenges with implementing CSC, as well as a [Frequently Asked Questions](#). They also conducted a [webinar](#) in late March that provides background and considerations for developing legal and ethical frameworks for crisis care.
- HHS' Technical Resources, Assistance Center, and Information Exchange prepared a [memo](#) addressing CSC, including relevant background, indicators and triggers, coalition activities, planning questions, and other resources.
- The American Medical Association provided an [overview](#) of liability protections at the federal and state level for doctors during a public health emergency.
- The Center for Practical Bioethics has a [resource page](#) dedicated to COVID-19 and resource allocation considerations for emergencies.

For questions or concerns related to the contents of this memo, please contact NGA staff:

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