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UPDATED: Key Considerations for COVID-19 Emergency Triage Policies in Pennsylvania

Ropes & Gray offers immediate practical guidance on how to navigate the legal and ethical issues raised by the need to have a clear plan for allocating scarce resources as COVID-19 strains Pennsylvania hospitals in unprecedented ways. Below are key considerations as hospitals and academic medical centers evaluate policies and procedures to guide these challenging decisions.

1. **Review your written disaster plan to ensure it addresses the anticipated shortages.** Pennsylvania law requires hospitals to have written disaster plans. In preparation for a health care "surge," this includes a plan for allocating scarce resources in cases of extreme shortages. A triage plan should include a clear statement of goals, be developed in an open and transparent manner, provide appropriate accountability for all decisions made, and clearly indicate the parties responsible for developing and updating the plan. At a minimum it should address:

    - What triggers the plan,
    - How treatment and supplies are allocated,
    - Conversion of all usable space into clearly defined areas for efficient triage and for patient observation and for immediate care,
    - The prompt and orderly discharge or transfer of patients already in the hospital who can be safely moved without jeopardy,
    - Whether the plan may result in withdrawing or withholding care, or in any combination of the two, and
    - Who will make allocation decisions for and among specific patients,
    - Assignment of public relations liaison duties to a qualified individual, and
    - How and when the policies will be communicated to patients and their families.

2. **Your plan should comply with non-discrimination laws.** The federal Office for Civil Rights (OCR) has recently issued guidance warning that supply shortages do not suspend anti-discrimination laws. Your triage plan should account for the following:

    - The triage plan should be facially neutral, meaning it does not discriminate against any protected class as written, and that its various measures and procedures are justified by necessity. Any plan should include a statement explaining why that specific plan is necessary to provide the applicable standard of care and the rationale behind it.

- The greatest discrimination risk in triage plans is that they unfairly – and perhaps illegally – distinguish among patients based on underlying disabilities. In some cases, disabling conditions are co-morbidities that are appropriately considered in allocation of scarce medical resources, but those priorities should be established by clinical experience and ratified by senior medical staff, preferably by reference to professional or government guidelines.

3. **Confirmation of the need to transition to alternate or crisis standards of care.** Transition to an alternate or crisis standard should not occur until allocation or rationing becomes necessary. A triage plan should be followed only as long as the circumstances require. Before implementing your plan, the hospital should confirm and document:

   - Which resources and infrastructure are critically limited;
   - The hospital has maximized its efforts to conserve, reuse, adapt, and substitute conventional therapies;
   - Available supply is insufficient to meet demand for conventional standard of care therapy;
   - Patient transfer is not feasible or creates undue strain, with provisions made for discussing individual cases with, and gaining consent from, patients and/or legally authorized representatives; and
   - The hospital has requested necessary resources from appropriate government health officials.

   Governmental recognition of the need to transition. On March 22, 2020, the Pennsylvania Department of Health issued guidance on the use of crisis standards of care during the pandemic ("CSC guidelines"). The CSC guidelines are activated in the event of a disaster declaration by the governor, and allow individual institutions to transition to CSC when all efforts to extend resources have been utilized and the institution is still unable to meet demand. Under the guidelines, hospitals should communicate with state and local health departments when they anticipate making this transition to provide situational awareness and coordination of response efforts.

   On March 6, 2020, Governor Wolf issued an emergency disaster declaration.

4. **Liability protection under state or federal emergency declarations.** In developing triage policies and procedures, it could be important to understand the contours of potential legal liability for certain decisions. In Pennsylvania, providers are not generally civilly liable provided they act in accordance with generally accepted medical standards of care under the circumstances, and use such care, skill, and treatment recognized as acceptable and appropriate by other members of the profession. In addition, current emergency declarations and Pennsylvania law offer the following limited protections:[1]

   - The Pennsylvania Good Samaritan law grants immunity from civil liability to any person, including physicians and registered nurses, who in good faith renders emergency care or treatment at the scene of an emergency outside of the hospital setting.

[1] These are the March 16, 2020, Executive Order by Governor Wolf declaring a State of Emergency; and the March 13, 2020, National Emergency Determination by President Trump.

- Protection from tort claims may be available under the federal Public Readiness and Emergency Preparedness Act (PREP Act), 42 U.S.C. § 247d-6d. PREP protects the manufacture, distribution, administration, or use of medical countermeasures. Key questions are whether the hospital and its agents are "covered persons" and whether the specific care being providing is a "covered countermeasure." Any protection that is available under the PREP Act is expected to extend until 2024.