Navigating Legalities in Crisis Standards of Care

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Introductions

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• CSC On Trial: COVID-19
• Major Legal Challenges & Solutions
  • Legal Triggers
  • Regional Coordination
  • Discriminatory Impacts
  • Tiebreaking Decisions
  • Post COVID CSC?
• Questions/comments
Crisis Standards of Care

Guidance for Establishing Crisis Standards of Care for Use in Disaster Situations

A Letter Report

2009

INSTITUTE OF MEDICINE
OF THE NATIONAL ACADEMIES

Crisis Standards of Care

A Toolkit for Indicators and Triggers

2012

INSTITUTE OF MEDICINE
OF THE NATIONAL ACADEMIES
CSC’s Balance

CSC = substantial change in usual healthcare operations & level of care due to a pervasive/catastrophic disaster.

Available ICU beds, PPE, HCWs, meds & capacities

CSC = when sustained scarcities warrant real-time resource allocations to protect the public’s health.
Shortages Implicating CSC

Space
(Available hospital beds, ICU beds, etc.)

Staff
(Doctors, nurses, respiratory therapists, etc.)

Stuff
(PPE, treatments, ventilators, etc.)

CSC at its Core
CSC’s Legal Foundations
CSC’s Legal Tools and Issues

- Executive Orders
- Reimbursements
- Authorized Takings
- Expedited Procurements
- Statutory Waivers
- Regulatory Waivers
- Liability Protections
- Scope of Practice Expansion
- Licensure Reciprocity
Risks of Liability

- Abandonment
- Due Process
- Equal Protection
- Negligence
- Constitutional
- Search/Seizure
- False Imprisonment
- Battery
- Assault
- Vehicle Liability
- Privacy
- Unprofessional Conduct
- Invasion of Privacy
- HIPAA
- State Privacy Law
- Defamation
Paths Re: CSC Liability Claims

Increasing:
- Patient #s
- Patient needs
- Risks

Path 1 - Follow the Evolving Standard of Care

Lessening:
- HCWs
- Volunteers
- ICU beds
- PPE

Path 2 - Provide Enhanced Liability Protections for HCWs & Entities

Conventional Care  ▶  Contingency Care  ▶  Crisis Standards of Care
Multiple liability protections may apply to HCWs, volunteers & entities for acts of negligence – but not intentional misconduct.
Federal Emergencies/Invocations

HHS Public Health Emergency
- Jan. 31

HHS PREP Act Declaration
- Feb. 4

Stafford Act Emergency
- Mar. 13

National Emergencies Act
- Mar. 13

Defense Production Act
- Mar. 20
COVID-19 State Emergency Declarations in 2020 + Rescissions
(as of January 6, 2022)

Re-declared emergency – 2 states

Emergency + Pub. Health Emergency Declarations

Rescinded Declarations + Date[s] - 27 states

Emergency Declaration
Disaster Declaration
Pub. Health Emergency Declaration

AK – Alaska 4/30/21
HI – Hawaii
PR - Puerto Rico
VI - Virgin Islands

CA
OR
WA
ID
MT
6/30/21
TX
SD
6/30/21
WY
NV
OK
5/3/21
KS
6/15/21
NE
6/30/21
CO
NM
AZ
UT
4/30/21
ND
4/30/21
MN
7/1/21
SD
6/30/21
MI
10/20/20
WI
3/31/20
IL
IA
IN
6/18/21
KC
OH
6/10/20
MI
10/20/20
MI
10/20/20
PA
6/12/21
PA
6/12/21
NY
6/25/21
VT
6/15/21
NH
6/11/21
ME
6/30/21
MA
6/15/21
NJ
6/4/21
MD
8/15/21
PR - Puerto Rico
VI - Virgin Islands

AK – Alaska 4/30/21
HI – Hawaii

COVID-19 State Emergency Declarations in 2020 + Rescissions
(as of January 6, 2022)
COVID-19 Vaccination Uptake

% of Population Fully Vaccinated (as of 1/17/22)
COVID-19 Denialism Playbook

- Rescind Emergency Declarations
- Re-open Recklessly
- Ban Mask Mandates
- Disavow Social Distancing
- Forbid School & Business Closures
- Prohibit Vaccine Mandates & Passports
ICU Bed Utilization

- 81.78% of ICU Beds in Use
  - 5,558 Hospitals Reporting

- 34.32% of ICU Beds in Use for COVID-19
  - 5,438 Hospitals Reporting

Source: https://protect-public.hhs.gov/pages/hospital-utilization
Omicron?
Emerging Impacts on Hospitals

Fox Valley hospitals reaching 'breaking point' as COVID-19 omicron variant spreads, beg community to get vaccinated, boosted

"From the beginning of the omicron surge, hospitals have faced a two-pronged assault of more COVID-19 patients, with fewer health care workers to treat them."

Source: Post Crescent

Source: NBC Miami

More Than 4,000 Children Hospitalized for COVID Nationwide as Omicron Variant Rapidly Spreads

"People Aren’t Going To Realize It Until They Call 911 And No One Comes": How Omicron Could Push Hospitals Over The Edge

Source: People

Source: Buzzfeed News
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Resolving CSC Legal Challenges

1. Legal Triggers

2. Regional Coordination

3. Discrimination

CSC Invocations

April 2020

December 2020; October 2021

September 2021

January 2022

June 2020

September 2021

November 2021; January 2022
Sustained scarcity of resources

Patient surges in emergencies

CSC’s Definitive “Trigger”
<table>
<thead>
<tr>
<th>Type of Trigger</th>
<th>Source of Trigger</th>
<th>Examples</th>
</tr>
</thead>
</table>
| Federal Guidance                | • National Academies  
• HHS, ASPR, CDC, etc.                                | Dec. 18, 2020 – NAM & others expressly call for CSC invocation          |
| Emergency Declarations          | • Federal/state emergency declarations  
• Local PHEs                                              | July 29, 2021 – Arkansas Gov. Hutchinson declares PHE in response to Delta |
| Executive Orders                 | • Gubernatorial EO  
• State/local health commissioner                         | Sept. 21, 2021 – AK DHSS Commissioner issues order to implement CSC in response to COVID-19 |
| Existing CSC Plans              | • Express language of plans  
• Specific addenda/clarifications                          | April 10, 2021 – Pennsylvania releases interim CSC guidelines re: COVID-19 |
| Regional Agreements             | • EMAC  
• Hospital resource sharing contracts                    | June 6, 2013 – D.C. Emergency Healthcare Coalition issues MoU re: CSC allocations for members |
| Health Care Entity Experiences  | • Express allowance via state plans  
• Assessed field experiences                              | Nov. 3, 2021 – San Juan Regional Medical Center (NM) activates CSC in response to COVID-19 |
Menus re: Legal Triggers & Powers

**State Emergency Declarations Menu**
- Licensure Reciprocity
- Statutory/Regulatory Waivers
- Liability Protections for HCWs
- Scope of Practice Expansions
- Telehealth expansions
- Expedited Procurement or Allocation Powers

**Regional Agreements (EMAC) Menu**
- Licensure Reciprocity
- Statutory/Regulatory Waivers
- Liability Protections for HCWs
- Expedited Procurement or Allocation Powers
- Additional Powers Outlined in Supplementary Agreements

**PREP Act Menu**
- Licensure Reciprocity
- Statutory/Regulatory Waivers
- Liability Protections for HCWs
- Scope of Practice Expansions
- Telehealth expansions
- Federal Supremacy to Control Uses of MCMs
- Preemption of Conflicting State Laws
Regional Coordination

*Emergency declarations/CSC plans differ across jurisdictions, complicating coordination efforts.*
Potential Solutions: AZ Surge Line

Potential Solutions: Federal Action

Federal powers offer various pathways to increase regional coordination:

- CMS
- FEMA
- MOCCs
- EMTALA
- New Legislation

Federal Actions
Disparate Impacts in Implementation

Perspective
Inequity in Crisis Standards of Care
Emily Cleveland Manchanda, M.D., M.P.H., Cheri Couillard, M.A., and Karthik Sivashanker, M.D., M.P.H.

NON-DISCRIMINATION IN CRISIS STANDARDS OF CARE

Monica E. Peek MD, MPH, MS, Russell A. Simons BS, William F. Parker MD, MS, David A. Ansell MD, MPH, Selwyn O. Rogers MD, MPH, and Brownsyne Tucker Edmonds MD, MPH, MS

Hospitals Serving The Poor Struggled During COVID. Wealthy Hospitals Made Millions
May 18, 2021 - 4:00 PM ET
Heard on All Things Considered

Perspective
Respecting Disability Rights — Toward Improved Crisis Standards of Care
Michelle M. Mello, J.D., Ph.D., Govind Persad, J.D., Ph.D., and Douglas B. White, M.D.

Health providers’ scramble for staff and supplies reveals sharp disparities
A POLITICO survey of health care workers elicited dozens of stories from the front lines across the country.

Source: NPR
Source: AJPH
Source: Emory L.J.
Source: NEJM
Source: NEJM
Source: POLITICO
Non-Discrimination in CSC

- Categorical exclusions of specific populations
- Exclusions based on discriminatory impact of “color-blind” policies

- Diagnostic tools which are facially valid but can be applied in a discriminatory manner in specific circumstances

- Tools which anticipate discriminatory outcomes and adjust to avoid them (ADI/SVI/equity indices)
convene multi-disciplinary panel to update NASEM’s CSC guidance “for equity”

“widely disseminate these standards . . . and incentivize adherence through accreditation and reimbursement requirements.”

“support research to better understand [how] states’ [CSC] intersect with ableism and ageism [and how] disproportionately impacted communities of color and other underserved populations should be supported.”
CSC Tiebreaking Decisions
Potential Legal Concerns

- Disability
- Age
- Race
- Sex
## Tiebreaking Factors

### Legally-prohibited Allocation Bases

<table>
<thead>
<tr>
<th>Race/color</th>
<th>Long-term Mortality or Life Expectancy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ethnicity</td>
<td>Assumptions of Perceived Health Status</td>
</tr>
<tr>
<td>Sex</td>
<td>Disability – Physical or Mental</td>
</tr>
<tr>
<td>Gender</td>
<td>Quality of Life</td>
</tr>
<tr>
<td>Age</td>
<td>Individual’s Relative Worth</td>
</tr>
<tr>
<td>Veteran Status</td>
<td>Resource Intensity Due to Disability/Age</td>
</tr>
<tr>
<td>Marital Status</td>
<td>Duration of Need Due to Disability/Age</td>
</tr>
<tr>
<td>Religion/Exercise of Conscience</td>
<td>Advanced Planning/Steering Decisions</td>
</tr>
<tr>
<td>Limited English Proficiency</td>
<td>Categorical Exclusions</td>
</tr>
<tr>
<td></td>
<td>Blanket Applications</td>
</tr>
<tr>
<td></td>
<td>Stereotypes</td>
</tr>
</tbody>
</table>
### Legally-Possible Allocation Bases

<table>
<thead>
<tr>
<th>Specific Resource Limitations or Suitability</th>
<th>Age (as a limited prognostic factor)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Current Medical/Public Health Information</td>
<td>Patient/Surrogate Consent and Choices</td>
</tr>
<tr>
<td>Individualized Patient Assessments</td>
<td>Health Care Worker Status</td>
</tr>
<tr>
<td>Objective Medical Evidence</td>
<td>Reasonable Modifications to Assure Equal Access for Disabled or Aged Patients</td>
</tr>
<tr>
<td>Equitable Clinical Assessment Scores</td>
<td>Appeals</td>
</tr>
<tr>
<td>Short-term Survival</td>
<td></td>
</tr>
</tbody>
</table>
CSC = substantial change in usual healthcare operations & level of care due to a pervasive/catastrophic disaster.

CSC = when sustained scarcities warrant real-time resource allocations to protect the public’s health.
Emerging Version of CSC

Provision

Omission
Ask the Network re: additional questions/comments

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Thank you for attending

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