NEW YORK STATE OF OPPORTUNITY. Department of Health

KATHY HOCHUL
Governor

MARY T. BASSETT, M.D., M.P.H.
Commissioner

KRISTIN M. PROUD
Acting Executive Deputy Commissioner

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DHDTC DAL#: 21-14
General Hospital Patient Transfers for
Load Balancing During State Disaster Emergency

Dear Chief Executive Officer:

The purpose of this guidance is to explain how the Department expects general hospitals in New York State to work together to implement load balancing (shifting patients among hospitals to alleviate overcrowding when possible) during the State disaster emergency declared under Executive Order No. 4 and the State disaster emergency declared under Executive Order No. 11. As general hospitals in some regions of the State reach capacity, it may be necessary to transfer patients to general hospitals that have available beds either in that region or in other regions of the State dependent upon when and where there is bed availability.

Under Executive Order No. 4, as continued, the following may be waived or suspended:

> "Section 400.9 and paragraph 7 of subdivision h of section 405.9 of Title 10 of the NYCRR, to the extent necessary to permit general hospitals and nursing homes licensed pursuant to Article 28 of the Public Health Law that are treating patients during the disaster emergency to discharge, transfer, or receive such patients, as authorized by the Commissioner of Health if necessary due to staffing shortages, provided such facilities take all reasonable measures to protect the health and safety of such patients and residents, including safe transfer and discharge practices, and to comply with the Emergency Medical Treatment and Active Labor Act (42 U.S.C. section 1395dd) and any associated regulations."

In addition, Executive Order No. 11 satisfies the requirement that there be a declared State disaster emergency in order to give the Department authority under 10 NYCRR Part 360 for the Commissioner of Health to activate the Surge and Flex Health Care Coordination System. Under 10 NYCRR §360.2(a)(4)(i):

> "Health care facilities regulated by the Department shall, if directed to do so by the Commissioner, rapidly discharge, transfer, or receive patients, while protecting the health and safety of such patients and residents, and consistent with the Emergency Medical Treatment and Active Labor Act (EMTALA). The Department shall coordinate with health care facilities to balance individual facility patient load, and may promulgate further directives to specify the method and manner of transfer or discharge."

This DAL does not alter established federal EMTALA law, regulations, and guidance. The federal State Operations Manual for Medicare provides guidance regarding the federal regulations, including 42 CFR §489.24(f), under which patients who present at a hospital but have not been admitted may be transferred to another hospital, which would be required to accept the patient transfer.

Consistent with the Commissioner's authority under the Surge and Flex regulations, in the case of a patient who is admitted at a general hospital (sending hospital) but must be transferred to another general hospital (receiving hospital), because the sending hospital is at or

near capacity and must therefore triage which patients it can care for, 10 NYCRR §400.9 and §405.9(h)(7) are SUSPENDED to the extent necessary to permit general hospitals to transfer such patients to a receiving hospital, if necessary because the sending hospital has reached capacity. Both the sending hospital and the receiving hospital must continue to at all times take all reasonable measures to protect the health and safety of such patients, including safe transfer and discharge practices, and they must comply with EMTALA and associated federal regulations and guidance.

Regarding consent by the patient or other authorized health care decision-maker, federal rules under Conditions of Participation (COPs) for Medicare and Medicaid are comparable to the provisions of 10 NYCRR §405.9(h)(7). Each removal, transfer or discharge shall be carried out after a written order made by a physician that, in the physician's judgment, such removal, transfer or discharge will not create a medical hazard to the person or that such removal, transfer or discharge is considered to be in the patient's best interest despite the potential hazard of movement. Such a removal, transfer or discharge shall be made only after explaining the need for removal, transfer or discharge to the patient or other authorized health care decision-maker and prior notification to the medical facility expected to receive the patient. The patient or other authorized health care decision-maker must be consulted prior to a transfer to another facility. If the health care decision-maker does not consent to the transfer, the patient may nevertheless be transferred so long as the health care-decision maker is advised of the benefits of the transfer and the risks of remaining at the facility. The health care decision-maker may sign the patient out against medical advice if there is no consent to the transfer.

Any objections regarding transfer must be documented in the patient's chart and include a description of who spoke with the patient and/or legal representative, and what was discussed with the patient and/or their legal representative. The record should also reflect which physician made the determination to transfer the patient and why. The hospital must maintain a record of transfers from the hospital, including the date and time of the hospital reception or admission, name, sex, age, address, presumptive diagnosis, treatment provided, clinical condition, reason for transfer and destination (i.e., receiving hospital). A copy of this information must accompany the patient and become part of the patient's medical record.

General hospitals should do everything they can to work with patients and their legal representatives prior to a transfer using this suspension. General hospitals should also be aware of any logistical issues that arise when a patient is transferred.

General hospitals should continue to work with the Department's Surge Operations Center (SOC). The Department will make every effort to assist with transportation using the FEMA National Ambulance Contract (NAC). New York's hospitals have done an incredible job working together to continue to provide care to all New Yorkers during the COVID-19 State of Emergency, and the Department expects that they will continue to do so. However, in the event that a sending hospital is unable to obtain the consent of the receiving hospital to accept a patient transfer, *the Department will use the SOC to direct the receiving hospital to accept the patient transfer where medically appropriate*.

Sincerely,

Dorothy M. Persico
Deputy Director, Division of Hospitals and
Diagnostic & Treatment Centers