CCSI
COORDINATED CARE SERVICES, INC.

TO: Monroe County Service Providers

FROM: Don Kamin, Ph.D.
Chair, Emergency Services Committee

RE: Clarification regarding HIPAA and implications for sharing information among providers in an emergency

DATE: May 7, 2003

This is the first in what CCSI anticipates to be a series of clarifying memos regarding HIPAA and its implications for our local service delivery system. This and all future memoranda will be posted on the CCSI website (http://www.ccsi.org/HIPAA.asp).

The Emergency Services Committee is composed of representatives from the hospitals providing psychiatric emergency services, emergency medical services, law enforcement representatives, and personnel from Coordinated Care Services (CCSI) and the Monroe County Office of Mental Health. The Committee meets monthly to address various system issues.

The issue of HIPAA has been raised within this committee with particular concern about the impact of HIPAA privacy regulations on information sharing among local providers. Because of myriad concerns, we agreed to follow-up with Paul Litwak (the attorney who is providing CCSI with guidance on issues related to HIPAA) regarding the impact, if any, these regulations have on the ability of local providers to share information in emergency situations. His response was as follows:

It is important to remember that HIPAA establishes minimum national standards for protection of the privacy of health information. The standards and implementation specifications of the HIPAA Privacy Rule must be considered in conjunction with applicable requirements of state law or other applicable federal law. The legal requirement that is most favorable to individuals in limiting disclosure of information without their permission, or granting rights to individuals should be applied. Where State law is silent, the HIPAA rule should be followed.

Sharing of information among providers in emergency situations.

HIPAA permits health care providers that are "covered entities" to disclose information to other health care providers in an emergency without the permission of the individual who is the subject of the record or his or her personal representative 45 CFR 164.506). 42 CFR Part 2 governs disclosure of information by alcohol and drug abuse programs. 42 CFR 2.1(b)(2)(A) specifically permits disclosure of a patient record whether or not the patient gives his written consent "to medical personnel to the extent necessary to meet a bona fide medical emergency."

New York law requires clinical professionals to maintain the confidentiality of information revealed in the course of a clinical relationship. This applies to physicians, psychologists and social workers. (See CPLR 4504 et. seq.) Section 33.13 of the Mental Hygiene Law of New York establishes confidentiality requirements for state operated and licensed mental health programs. Oddly, none of the New York

1099 Jay Street Bldg J Rochester, NY 146111-1153 PH: 716.328.5190 FAX: 716.328.5211
www.ccsi.org

statutes directly address the issue of disclosure of clinical records for the purpose of enabling medical personnel to respond to an emergency. Mental Hygiene Law §33.13(c)(6) permits disclosure "to an endangered individual and a law enforcement agency when a treating psychiatrist or psychologist has determined that a patient or client presents a serious and imminent danger to that individual". This provision does not address clinical emergencies directly, but it clearly indicates the policy of the State that an individual's interest in privacy must be balanced against public safety considerations.

There are many cases decided by New York courts that support the idea that clinical organizations and professionals have a duty to maintain the confidentiality of information about patients and clients. Again, there is no case that specifically addresses the question of disclosure for purposes of responding to a medical emergency. But the case law is close enough to make it clear that such a disclosure is permitted.

The leading case with regard to mental health records is MacDonald v Clinger, 84 A.D.2d 482; 446 N.Y.S.2d 801 (4th Dept., 1982). This decision, by the Appellate Division court in Rochester establishes that the duty of confidentiality exists, but is not absolute.

> "The relationship of the parties here was one of trust and confidence out of which sprang a duty not to disclose. Defendant's breach was not merely a broken contractual promise but a violation of a fiduciary responsibility to plaintiff implicit in and essential to the doctor-patient relation.
>
> Such duty, however, is not absolute, and its breach is actionable only if it is wrongful, that is to say, without justification or excuse. Although public policy favors the confidentiality described herein, there is a countervailing public interest to which it must yield in appropriate circumstances. Thus where a patient may be a danger to himself or others (see, e.g., *Tarasoff v Regents of Univ. of Cal.*, 17 Cal 3d 425; *Berry v Moench*, 8 Utah 2d 191; *Simonsen v Swenson*, 104 Neb 224), a physician is required to disclose to the extent necessary to protect a threatened interest. "The protective privilege ends where the public peril begins."

In a medical emergency, the interest in providing immediate care to an endangered person outweighs the fiduciary obligation to maintain confidences. I am confident that health care providers may disclose protected health information in an emergency without fear of liability. For risk management purposes, the reason for the emergency disclosure should be documented in the record.

The same logic applies to sharing information between a mental health and chemical dependency provider.

We believe that the regulations referenced above, together with the associated case law, should make providers feel comfortable in sharing information with one another in order to provide care in an emergency.

If you have any questions or concerns about this, please contact Elizabeth Meeker, Psy.D. at 613-7632 or via e-mail at emeeker@ccsi.org. Dr. Meeker is CCSI's Privacy Officer and will be working with clinical providers to help clarify HIPAA-related issues.

c: Neilia Kelly, Acting Director
Monroe County Office of Mental Health

Anne Wilder, CCSI

Elizabeth Meeker, Psy.D.
CCSI Privacy Officer