State of New York
Andrew Cuomo
Governor

Office of Mental Health
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Dear Colleagues:

The purpose of this announcement is to provide you guidance relative to the Incident Review Committee (IRC) composition requirements under the Protection of Persons with Special Needs Act (PPSNA). As you probably recall, OMH's August 7, 2013 letter acknowledged that providers are struggling with the IRC composition requirements, particularly with respect to confidentiality and external members.

We would like to take this opportunity to finalize our guidance to assist in meeting these new requirements.

Composition

Per the PPSNA, IRC membership must exclude a provider's director, but must at least include:

- members of the governing body of the mental health provider; and
- persons identified by the director of such provider, including some members of direct support staff, licensed health care practitioners; service recipients; and *representatives of family, consumer, and other advocacy organizations*

With regards to the latter ("representatives of family, consumer, and other advocacy organizations"), the specific provision at 14 NYCRR Section 524.11(b)(1) reads:

> "(1) Incident Review Committees may be organized on a provider-wide, multi-program or program-specific basis, and may have responsibilities other than those related to incident management. The composition of an Incident Review Committee must be such that a free and open exchange of information is ensured, in order to facilitate full and complete investigations. Committee membership must at least include:
>
> (i) members of the governing body of the mental health provider;
> (ii) persons identified by the director of such provider, including some members of the following:
>
> (a) direct support staff;
> (b) licensed health care practitioners;
> (c) service recipients; and
> (d) representatives of family, consumer, and other advocacy organizations."

OMH is interpreting this provision to mean that a provider's IRC must be comprised of at least some members of the current governing board and "other" persons identified by the provider's

Executive Director. Of that group, the IRC would need at least one direct support staff person, one licensed health care practitioner, a service recipient, and a single family/consumer/advocacy organization representative - therefore, 4 persons in total for item (ii). However, not all for need to be from a formal "organization" - they may merely include individuals identified as "family" or "consumer" representatives, without necessarily being affiliated with a formal family or consumer "organization". The "direct support staff" person must be someone involved in the provision of direct care services, as opposed to an administrative staff person, and the "service recipient" may either be a present or past recipient of such services.

Confidentiality

Providers may wish to go outside of their own organization to identify appropriate representatives of family, consumer, and other advocacy organizations. This, necessarily, raises concerns about how to protect the confidentiality of the protected health information (PHI) discussed in the course of these meetings. Providers of mental health services that are operated or licensed by OMH must continue to comply with HIPAA and New York State Mental Hygiene Law with respect to disclosures of PHI to persons or entities that are not part of the workforce of the mental health provider.

It is important to note that nothing in the PPSNA *requires* that these recipients be external to the provider. Therefore, if a provider currently has employees that could serve as representatives of family, consumer, or other advocacy organizations (e.g., peer advocates), those persons could be used to meet the composition requirements.

However, if persons external to the provider are to participate on the IRC, the provisions of HIPAA can be satisfied in either of two ways.

- First, the provider could consider the person to be a member of the provider's workforce for purposes of HIPAA, provided: (1) that the person is under the supervision and control of the provider while the person is accessing PHI; and (2) the person receives the same HIPAA training other members of the provider's workforce receive; or
- The person could be considered a "business associate" of the provider for purposes of IRC participation. In this case, a HIPAA compliance Business Associate Agreement should be executed with the external member.

The analysis does not end there, however. It is also necessary to consider the NYS Mental Hygiene Law to identify an applicable exception that would permit disclosure of patient information to external members of the IRC with patient consent. For State Operated providers, disclosures are permitted if there is a confidentiality agreement between the external member and the State operated facility. OMH has developed a template agreement that will be made available to State-operated providers for that purpose.

Unfortunately, for OMH-licensed providers, a similar exception, or another applicable one, does not appear to exist. Therefore, if licensed providers wish to use external members on their IRC, they should either obtain patient consent before disclosing PHI **to external IRC members (such**

a consent could be obtained at the time of admission, in case it was ever needed) or only use de-identified information in meetings involving the external members. Licensed providers are strongly advised to consult their own legal advisors as they consider an appropriate solution to their own circumstance.

Definition of "Director"

In relation to the "director", as the PPSNA covers providers regulated by multiple State agencies and each defines its hierarchical directors differently, this has been a difficult issue on which to provide guidance. In particular, the PPSNA (Article 11 Section 490 Subsection f) states:

> **"Such committees shall be composed of members of the governing body of the facility or provider agency and other persons identified by the director of the facility or provider agency, including some members of the following: direct support staff, licensed health care practitioners, service recipients and representatives of family, consumer and other advocacy organizations, but not the director of the facility or provider agency."**

At the present time, OMH is interpreting the requirement in the Justice Center law that prevents the "director of the facility or provider agency" from serving on the IRC to mean **the "Chief Executive Officer" of the Agency**. That would be the individual (or his or her successor) who signed the Part A Acknowledgment of the PAR application (or its predecessor form).

OMH is not presently in the position to issue waivers of the IRC requirements within the PPSNA. Rather, we hope the above guidance will provide you with the tools to best meet those requirements.

We encourage you to **please review the composition of your** current IRC membership to see if all of the required members are present, identify gaps that have to be filled, and initiate steps to fill those gaps. Records should also be kept of efforts made with respect to this, so that good faith efforts may be demonstrated if OMH surveyors question this on compliance reviews. The key message here is that OMH licensed providers should not "hold up" on IRC meetings while they try to comply with the composition requirements.

As always, thank you for your patience in implementing this comprehensive new law. If you have any additional questions, please do not hesitate to ask call Keith McCarthy at 518-474-5570 or email Keith.mccarthy@omh.ny.gov.

Sincerely,

Marcia L. Fazio
Deputy Commissioner
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