STATE OF NEW YORK
DEPARTMENT OF HEALTH
Corning Tower The Governor Nelson A. Rockefeller Empire State Plaza Albany, New York 12237

Richard F. Daines, M.D.
Commissioner

April 16, 2007

Robert D. Belfort
Manatt, Phelps & Phillips, LLP
7 Times Square
New York, New York 10036

Dear Mr. Belfort:

This is in response to your February 14, 2007 letter in which you requested a Department of Health ("DOH") opinion regarding disclosure of specially protected HIV related information in a "peer-to-peer" electronic data exchange/health information exchange ("HIE"). You asked whether an on-line certification by a health care provider, which indicates that HIV related information is necessary for the provider to deliver appropriate treatment to a patient, is sufficient to permit the disclosure to the certifying provider of such information by another provider under Public Health Law ("PHL") § 2782(1)(d). PHL § 2782(1)(d) permits disclosure of HIV related information, without a special HIV release to:

> a health care provider or health facility when knowledge of the HIV related information is necessary to provide appropriate care or treatment to the protected individual, a child of the individual, a contact of the protected individual or a person authorized to consent to health care for such a contact.

The facts you present indicate that the information would be loaded into/made accessible to the exchange within each institution pursuant to a general release (not HIV specific) authorizing disclosure of information to outside entities for treatment purposes.

The language in PHL § 2782(1)(d) was enacted in 1986 and has governed the disclosure of information since without a requirement of a certification of any type by the accessing or disclosing provider. Consequently, utilizing a certification, at first, appears to add protection to the information by enhancing or documenting the condition under which such information is disclosed.

However, the fact that the provider is presented with only two choices when attempting to access the HIE is problematic. He/she must either decline to use the HIE totally or must certify that HIV related information is necessary for whatever treatment is to be rendered. Certification is made only when the provider utilizes the information found in the HIE for patient care. Although this "all or nothing" approach arguably conforms to the letter of the law, it does

not appear to address the intent of the law, namely, to afford an extra level of protection to HIV related information which is not afforded to general medical information.

Rather, at a minimum, a third option recognizing that the protected individual may consent to disclosure of the information should be presented on the screen at the time when the provider requests access to the HIE with HIV related information. The options on screen would be: "(1) I certify that HIV related information may be necessary to provide appropriate care or treatment to the protected individual...; (2) I decline to certify...; (3) The HIV related information is not/may not be needed to provide appropriate care or treatment to the protected individual, but the individual has specifically consented to disclosure of HIV related information to me." If this third option is made available by the HIE to the provider requesting access, then PHL Article 27-F appears to be satisfied. Otherwise, a provider who does not certify that it may be necessary cannot gain access to the exchange for any of the other information.

Also we noted that although PHL § 2782 (1)(d) states that an exception applies when the HIV related information "is" necessary for appropriate care and treatment, a requesting provider who is unaware of what information is present in the HIE cannot certify that such information "is" necessary. They must speculate as to its clinical value. Therefore, we believe "may be necessary" is the appropriate standard in this context.

At this time, the DOH cannot accept that obtaining the consent of the patient is overly burdensome or unnecessary. In fact, a soon to be initiated Medicaid pilot in NYC will allow clinical providers to access HIV related pharmacy claims based on an executed consent where the appropriate consent form is downloaded and then bar-coded back into the patient's medical record, enabling follow-up audit. Evaluation of these pilot procedures will be informative.

While the Department of Health fully appreciates the operational complexity of this approach, we currently believe it can be implemented to satisfy both the letter and intent of the law. Of course, new legislation which might permit the disclosure of specially protected information via a health information exchange for all direct patient care and treatment would clarify this matter and avoid the risk of private litigation for potential violations of PHL Article 27-F. Also, medical consensus about the need for HIV related information for comprehensive primary care would also affect this response.

Very truly yours,

Thomas Conway
General Counsel

cc: Guthrie S. Birkhead, M.D., M.P.H.
J. Figge, M.D.

[redacted]

TC/JOQ/kc