



## **LEGAL PREPAREDNESS FOR A PUBLIC HEALTH EMERGENCY IN PENNSYLVANIA**

### **AN ANALYSIS OF CURRENT AUTHORITY THROUGH THE LENS OF THE MODEL STATE EMERGENCY HEALTH POWERS ACT**

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It is impossible to pick up a magazine or newspaper or listen to a TV new broadcast without learning of yet another act of terrorism or new threat to public health and safety. While terrorism around our globe is truly disturbing, suicide bombings and mortar shellings are somewhat remote threats in the minds of most Pennsylvania residents. The idea of preparing for such incidents while prudent to some, just in case an ounce of prevention is really worth a pound of cure, to others is a truly impractical way to protect the public. Many express the belief that in this era of expanding potential for development and dissemination of WMD there is no adequate way to prevent or prepare for bioterrorism. And, when discussing legal authority in such emergencies with preparedness groups, the following sentiment is invariably expressed: if it happens and any of us survive, we'll just do what we need to do and worry about liability later!"

In some situations that may be true, particularly if an incident occurs and the emergency is immediately apparent. In such circumstances, people will do what needs to be done to help those injured and to protect others from incurring harm and likely will not concern themselves with their legal authority to act until much later, long after the action was taken.

However, a slowly emerging situation which results in an unknown infectious illness that spreads among the population, over time, undetected until unusual patterns of illness are finally noticed or deaths begin to accumulate is a situation that concerns the residents of the Commonwealth.

Contemplating the outbreaks of SARS in Asia and Toronto last winter, the Hepatitis A outbreak in Beaver County this fall, and the initial fears this flu season of a nationwide spread of a particularly virulent virus begs the question -- Is Pennsylvania prepared to handle a large scale infectious outbreak or an act of bioterrorism? Does the legal infrastructure exist in Pennsylvania to enable the Commonwealth to appropriately identify, contain, and mitigate such an event?

## **Legal Preparedness Needs**

*The Model State Emergency Health Powers Act*, created by the Center for Law and the Public's Health at Johns Hopkins and Georgetown Universities, was drafted to serve as model legislation to help states assess the scope of public health legal authority afforded by their current legislation and to provide model language for drafting needed authority. The Model Act reportedly addresses the scope of legal authority vital for identifying, containing and mitigating a public health emergency.

To assess one area of Pennsylvania's readiness for a public health emergency, the University of Pittsburgh Center for Public Health Preparedness conducted a review of the current Pennsylvania statutes and administrative code seeking express legal authority to correlate with the authority created by key sections of the Model State Emergency Health Powers Act. This review identified significant areas where multiple layers of regulation could potentially undermine the Commonwealth's ability to address a Public Health Emergency. The following areas present specific concerns:

1. Current regulation and statutes make it difficult to ascertain the scope of authority in a situation that would be considered a public health emergency but not yet a declared disaster. While widely used throughout the Pa Code and Pennsylvania statutes, the term Public Health Emergency is not expressly defined by statute.

In a declared emergency, Pennsylvania's Governor has the responsibility to meet the danger to the commonwealth and the people presented with a disaster. The Governor declares a disaster upon the finding that a disaster has occurred or that such an occurrence or the threat of such a disaster is imminent. Once declared, the Commonwealth and local disaster emergency plans shall be deployed. During the declared emergency, the Governor has the power to suspend provisions of any regulatory statute prescribing Commonwealth business or agency functions which would prevent, hinder or delay actions required to cope with the emergency.

During a declared emergency, the Governor has the power to commandeer or utilize any private, public or quasi-public property if necessary to cope with a disaster emergency. He may order the evacuation of population from a stricken or threatened area within the Commonwealth if doing so preserves life or assists with disaster mitigation etc. He may refuse ingress to a disaster area and may control the movement of persons within the area and the occupancy of premises therein. See 35 P.S. § 7301.

However, when does a public health emergency fall under the classification of a declared emergency? Pennsylvania statutes discuss public health emergencies, and threats to public health, but do not define the phrase "public health emergency" and do not create any special authority in the event of a situation deemed to be such an emergency. The Model Act addresses the specific areas of authority needed to manage a public health emergency. Some states have adopted a statutory definition for public health emergency to provide their public health officials with needed authority in lieu of a declared emergency management type disaster.

2. Current Pennsylvania statutory language permits public health authorities to investigate

cases and outbreaks which pose a threat to public health. However, examination is limited to individuals suspected of being infected with a communicable disease or being a carrier. Public health officials may order that an individual infected with a communicable disease undergo treatment for the condition. If the PH authority has reasonable grounds to suspect a person of being infected with a communicable disease or of being a carrier, but lacks confirmatory evidence, the authority may require the person to undergo medical exam or other approved diagnostic procedure to determine infectious status. If the individual refuses, a court order may be procured, a hearing held and the individual quarantined until it is determined that he is not a threat to public health, or he may be isolated until appropriately treated.

Furthermore, underlying this specific and limiting statutory authority is very broad statutory language that permits the Department of Health and Boards of Health to promulgate rules and regulations necessary to protect the health of the people of the Commonwealth and to determine and employ the most efficient and practical means to prevent and suppress disease. The Disease Prevention and Control Act of 1955 authorizes the Department of Health or municipal or county departments of health with boards of health, to create rules and regulations regarding the immunization and vaccination of persons and animals and to create, implement and enforce a variety of other control measures as needed.

3. Several different sections of PA statutes and PA Code create authority for isolation and quarantine. In one section the PA code authorizes isolation of individuals with a communicable disease in a communicable stage, or when an individual is suspected of harboring an infectious agent. Another section provides authority to quarantine individuals suspected of being in contact with a person or animal with a communicable disease or infection. In addition, the Counterterrorism Planning, Preparedness and Response Act of 2002 provides isolation and quarantine authority without notice (due process) in the case of an actual or suspected outbreak of a contagious disease or epidemic due to an actual or suspected BT or Bio-hazardous event, if the authority is invoked by written order and necessary to protect public health. Multiple sources of isolation and quarantine authority and conflicting statutory direction as to conditions which permit isolation and quarantine create uncertainty in an area where authority must be unambiguous.

3. During a declared disaster, the Governor may suspend statutes if complying with them would hinder mitigation of the disaster. It is believed that in such circumstances, professional licensing and credentialing statutes could be waived to enable health care professionals from other facilities and jurisdictions to provide professional services to assist in a disaster recovery. However, doing so during a disaster emergency may be potentially chaotic and may create unnecessary liability. As a result, some state Departments of Health are instituting statewide credentialing programs to verify credentials and create a registry of available professionals prior to the need.

4. Due process procedures needed for isolation and quarantine should include provisions to ensure utilization of the least restrictive means possible to prevent spread of communicable disease or an infectious/toxic agent. Current Pennsylvania laws do not address this limitation. Lessons learned from Canada regarding public willingness to voluntarily adhere to quarantine orders inform that compliance with isolation and quarantine orders is improved when confined individuals are paid for missed work. Pennsylvania statutes do not include a mechanism to

compensate individuals for wages missed as a result of compliance with a quarantine order. In addition, compliance with quarantine orders is further enhanced when individuals do not fear loss of employment as a result of their absence from work. Consequently, legislation may be needed to protect workers from job termination as a result of adherence to the quarantine request/order.

5. In the event of a true public health emergency, timely, accurate, culturally appropriate, public health information is vital to engender trust in the public health system and thus enlist support for needed disease prevention strategies, particularly if the strategies involve risk or restriction of personal liberties. Current PA statutes addressing the dissemination of public information relate only to disaster situations. Prior to a public health emergency, risk communication strategies must be equally formalized.

6. Current PA statutes limit civil liability for medical and non-medical good samaritans that render voluntary emergency services in good faith, provided the acts or omissions were not intentionally designed to harm, were not grossly negligent and resulting in harm to the person receiving the emergency care. Also, the Counterterrorism Preparedness, Planning and Prevention Act of 2002 created civil immunity for those serving on the various counterterrorism teams created by the Act. However, civil immunity may be needed by additional professional disciplines who may be engaged in preventing or mitigating a public health emergency: dentists, pharmacists, psychologists, social workers and others working under an Emergency Operations plan, or public health emergency plan should also be afforded statutory protection from civil liability. In addition, PA statutes create civil immunity for volunteer physicians, nurses involved in mass immunization projects sanctioned by the government when persons are injured by such project, but do not create immunity from liability for vaccine manufacturers. Reportedly, this type of legislative exclusion dissuades manufacturers from engaging in vaccine development.

While civil immunity is intended to protect state actors engaged in emergency response, limitations to this immunity should be considered in cases of wrongful detention and injuries from mandatory treatment.

### **Opportunities to enhance legal preparedness**

Legal preparedness for a public health emergency requires attention to the areas of law that provide the authority needed to address emerging threats, ensuring that the legal infrastructure in place encompasses contemporary legal and scientific principles.

To be legally prepared for a public health emergency, practitioners must understand the legal issues raised here, and must plan ahead to ensure that all necessary authority is in place. Procedures for due process and documents for appropriate orders must be formulated and drafted before they are needed. Practitioners must forge relationships across vertical and horizontal jurisdictions and must anticipate the practical problems that will occur. And lastly, law enforcement and the judiciary must understand their role in ensuring the public's health through appropriate due process protections and regulation enforcement. They must have clear understanding of the legal authority available and the will to implement that authority when needed. This can only happen if all parties are engaged before an emergency occurs.

On Sept. 30, 2003 Deputy Assistant Secretary Dr. William Raub, of the Office of Public Health Preparedness in HHS presented a Bioterrorism Preparedness Lecture at the University of Pittsburgh GSPH. Dr Raub stated that “the timeliness and quality of initial engagement determines the course and duration of the crisis as well as the character and magnitude of the consequences.”

Ensuring that the Commonwealth has the necessary legal infrastructure will assure that in the face of a public health emergency Pennsylvania will mount a timely, quality initial engagement and thus mitigate the severity of the emergency and the magnitude of its consequences.

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