



Schools and H1N1 Influenza: Legal Issues

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Outline

- CDC Guidance
- Who has legal authority over schools in Massachusetts?
- Exclusion of ill people
- School closures
- Vaccination issues
- Emergency authority in Massachusetts

CDC Guidance for Schools



- Decisions will **differ across communities** and should be based on local goals, epidemiology, health care system capacity, feasibility, and acceptability
- Interventions determined through **collaborative decision making** involving **education and public health agencies**, parents, and the community

Who has Legal Authority over Schools in Massachusetts?



- School authorities AND
 - Local boards of health and MDPH for health issues
- Persuasion before mandate – work together!***

Legal Authority over Schools in Massachusetts



- School authorities
 - School committee has general charge of schoolhouses (*M.G.L. c. 71, § 68*)
 - Superintendent must manage school system consistent with state law and school committee decisions (*M.G.L. c. 71, § 59*)
 - Principals supervise operation and management of their schools, subject to supervision and direction of the superintendent. (*M.G.L. c. 71, s. 59B*)

Legal Authority over Schools in Massachusetts



- Local boards of health
 - "Use all possible care to prevent the spread" of dangerous disease (*M.G.L. c. 111, § 104*)
 - Fine for obstruction of board in this duty
 - "Examine into all causes of sickness within the town," and "destroy, remove or prevent the same" (*M.G.L. c. 111, § 122*)
- MDPH
 - Has co-ordinate powers with boards of health in situations of infectious disease (*M.G.L. c. 111, § 7*)

Legal Authority over Schools in Massachusetts



- US Supreme Court upheld "police power" of state with respect to public health (*Jacobsen v. Massachusetts, 1905*)
- M.G.L. c. 76, s. 15: children shall not be admitted to school unless immunized **[Does NOT include H1N1 vaccination]**
- SJC case upheld power of school board, under its regulations, to exclude children from school who refused to be vaccinated during smallpox outbreak. (*Hammond v. Hyde Park, 1907*)

Legal Authority over Schools in Massachusetts



- **BOTTOM LINE:** If school officials refuse to follow health officials' directives, and failure to follow them presents a danger to public health, **health authority trumps school authority.**
Try not to let this happen!

Exclusion of Ill People from Schools



- M.G.L. c. 71, s. 55A: "A child showing signs of ill health or of being infected with a disease dangerous to the public health...shall be sent home immediately, or as soon as safe and proper conveyance can be found..."
- CDC Guidance
 - Individuals with ILI remain home for at least 24 hours after they are free of fever without use of fever-reducing medications
 - 3 to 5 day exclusion period in most cases

Exclusion of Ill People from Schools



- On August 27, Commissioner of Public Health issued generic order for **school and work exclusion** for sick people
 - Applies to students and staff in schools
 - Any suspect, probable or confirmed case of H1N1 shall be excluded for at least 24 hours after he or she is free of fever (100.4 F) without the use of fever-reducing medications, or for any other length of time deemed necessary pursuant to guidelines of DPH on the basis of medical information on transmission of the virus.

Exclusion of Ill People from Schools



- Authority for exclusion at school itself
 - School nurses can exclude students
 - **Medical decision** whether child is suspect, probable, or confirmed case of H1N1.
 - Most children will NOT have doctor's note
 - Superintendents/principals can exclude staff
 - If verified by school nurse or other medical provider that person meets exclusion criteria, we **strongly** recommend that superintendent and principal enforce exclusion requirements and treat as illness-related absence

School Closures



- Follow CDC/MDPH guidance
- Most schools will stay open
- If schools close, will usually be because can't fulfill educational mission; NOT to stop spread
 - However some schools with large # of medically vulnerable kids may close
- Legal authority to close: **school AND health authorities**
 - If failure to close endangers public health and school refuses, health authorities can close school

School Closures



- Filing MDPH closure notification form is NOT request for waiver of minimum school days requirement
- CDC recommends that staff remain in the building to provide instruction by other means
- When a school is closed due to H1N1, think about:
 - Union/non-union issues
 - Services to special ed students/those who receive PT, OT services
 - Itinerants (psychologists, custodians, etc.)

School Closures



- Can kids be prevented from congregating elsewhere (malls, playgrounds)?
 - Probably not necessary to prohibit; risk of spread lower
 - Legally, would be decision of local health or MDPH
 - Can't force sick/recovering kids to stay home UNLESS a mandatory home isolation order is issued
 - Such an order would come from LBoH or MDPH
 - Can't keep healthy kids apart (in absence of emergency declaration by Governor)
 - Use persuasion!

Vaccination Issues



- Vaccination clinics: several possible models. Decide at local level
 - During school day: students and staff
 - Community clinics after school hours
 - Similar to voting (dual use of space)
- Consent: CDC developing form
 - Likely parent will sign to **give or decline** consent

Vaccination Issues: Information Sharing



- MDPH will add provision to consent form for parent to sign, allowing school to share vaccination info with DPH, LBoH, and child's health care provider
- Sec. 23.07(4)(h) of Student Records regs: Local & state health personnel have access to vaccination records

Vaccination Issues: Information Sharing



- 105 CMR 300.191 allows DPH and LBoHs to **obtain** info from health care providers necessary to prevent & control diseases
- 105 CMR 300.120 allows DPH and LBoHs to **disclose** info for disease investigation, control, treatment and prevention purposes.
- Together, these regs allow health authorities to share vaccination info with school nurses.

Liability Protection for H1N1 Vaccinations



• Federal PREP Act

- Secretary of HHS issued **declaration** effective June 15, 2009 giving immunity from tort liability to anyone ("**covered persons**") involved in development, distribution, and **deployment** of H1N1 vaccine
- Declaration provides **immunity** from liability for negligence for any type of loss/harm suffered in connection with development, distribution, **administration**, or use of the vaccine

Immunity is Broad



- All tort claims (claims for civil wrong, e.g. malpractice) in state or federal court are precluded except for "willful misconduct."
 - Willful misconduct is action taken **intentionally** to achieve a wrongful purpose
- Immunity covers harms such as death, physical or emotional injury, disability, loss of or damage to property, etc. with **any causal relationship** to **any stage** of development, distribution, administration, or use of the vaccine.

"Covered Persons" under the PREP Act



- Manufacturers
- Distributors
- **Program planners** (state or local government or person employed by them, or other person who administers vaccination program)
- **Qualified Persons** who prescribe, administer, or dispense the countermeasure
- The United States
- Officials, agents, and employees of any of the above

“Qualified Persons” under the Declaration for H1N1 Vaccine



- “A licensed individual who is authorized to prescribe, administer, or dispense the [vaccine] under the law of the State in which such [vaccine] was prescribed, administered or dispensed.”

Therefore . . .



- Schools themselves, and school staff, are immune from liability as **program planners**
- Doctors who write prescriptions for H1N1 vaccine are immune as **qualified persons**
- People who administer the vaccinations (school nurses and others) are immune as **qualified persons**

Liability Protection: Seasonal Flu Vaccine



- M.G.L. c. 112, § 12C provides complete immunity from liability for **physicians and nurses** “administering immunization or other protective programs under public health programs.”
 - **Government-funded** public health programs
- If seasonal flu clinic is **not** publicly funded:
 - Staff employed by public schools are covered by Mass. Tort Claims Act
 - Staff in private schools should have own liability insurance

Emergency Authority in Massachusetts



- Public health emergency (*M.G.L. c. 17, § 2A*)
 - Declared by Governor
 - Gives Commissioner of Public Health power to take action as necessary to maintain public health
- State of emergency (*Chapter 639 of Acts of 1950*)
 - Declared by Governor
 - Gives Governor and MEMA broad authority
- NEITHER was declared for H1N1 in the spring
