P-20 Response to the Threat of a Pandemic: A Legal Analysis

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Abstract

Pandemics have occurred throughout history and continue to be a potential threat for humanity. P-20 leaders play an important role in the prevention and response to pandemics. P-20 leaders need to be aware of their legal authority and responsibilities concerning the prevention of pandemics and in the event of an actual pandemic. State and federal laws dictate authority and decision-making concerning public health. P-20 administrators should make informed decisions concerning potential pandemic threats in consultation and cooperation with state and federal actors and be prepared to cede authority concerning school closures, mandatory vaccinations, and other actions to other governmental actors in the event of an actual pandemic.
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U.S. popular culture has become obsessed with pandemics and the stories of the survivors, usually strong characters who must make difficult decisions with incomplete information. For example, in the popular television series *The Walking Dead*, a small town sheriff must decide where to lead a band of survivors following an outbreak of a meningitis-like disease that turns most humans into brain craving zombies. In *World War Z*, a narrator recounts first hand experiences with the failures of governments to deal with another zombie apocalypse and the importance of survivalism. These fictional stories unfold in ways that require readers to quietly wonder, “what would I do in similar circumstances and what responsibilities would I have for others?” The power of these narratives can be disconcerting when, after binge watching 3-4 episodes of *The Walking Dead*, the next morning’s headlines reference a new strain of influenza, the discovery of SARS, an outbreak of Ebola, or a strange illness that has many individuals not feeling well. Pandemics resulting from these diseases will not result in a zombie apocalypse, but events potentially resulting in a 25-50% mortality rate do challenge us to consider the implications on the roles and authority educational leaders may have at their institutions when making decisions that will effect students, employees, and the community.

While the chances of a pandemic are rare, the real possibility exists that a particular strain of an existing disease can mutate with devastating consequences. There have been numerous pandemics in the United States including smallpox, yellow fever, cholera, polio, influenza, whopping cough, and meningitis. The 1918 outbreak of the Spanish flu resulted in the deaths of 675,000 in the US and between 50-70 million people worldwide, mostly young healthy adults. The 1957 outbreak of the Asian flu killed...
70,000, and the 2009 outbreak of H1N1, or the Swine flu, resulted in 60.8 million cases in the US, 274,000 hospitalizations, and over 12,400 deaths according to the latest estimates by the Center for Disease Control (citation).

The advances in immunology and treatments may help stem the ravages of predictable or slow moving diseases, but health care experts caution that we must remain vigilant. For example, on April 29, 2009, just days after the public learned about a new swine flu virus, World Health Organization (WHO) Director-General Chan raised the pandemic level to Phase 5, suggesting a pandemic was almost certainly imminent. Dr. Chan acknowledged that it was impossible to determine the severity of the newly discovered flu strain but did use the following unfortunate phrase: *all of humanity is under threat.*

Although Dr. Chan actually stated, “it really is all of humanity that is under threat during a pandemic,” her unintentional truism created widespread panic that a large-scale crisis was already underway. President Obama proclaimed the “Declaration of a National Emergency” in October 2009 and by November 2009 the virus had infected nearly a half-million people in about 200 countries, and killed over 6,000 people. Similar fears resurfaced in 2014 when several individuals working closely with Ebola patients were themselves infected.

The world becomes increasingly interconnected and, as a result of this interconnectedness, an outbreak in one corner of the world can morph within weeks into a worldwide pandemic. This interconnectedness led then–TITLE Mike Leavett to

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4 Citation for the quote needed
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THREAT OF A PANDEMIC

declare, “We are overdue and underprepared for a pandemic.” The focus of this legal analysis is on the actions P-20 educational leaders can take to mitigate the spread of an infectious disease and the legal implications of these efforts. What actions should leaders take and what legal liability do they incur as a result their efforts to protect those within their charge?

I. Federal Statutes’ Role During a Time of Crisis

Unknown to many educators is the fact that a series of federal statutes serve to, collectively, provide the federal government the requisite authority to manage the nation during a unique crisis, such as a pandemic. This collection of federal statutes is a patchwork of laws aimed at helping contain or mitigated the effects of an infectious disease outbreak. These laws could also be considered a series of domino tiles lined up next to one another. As one falls a chain reaction is initiated that could, ultimately, provide the President of the United States, the Secretary of the Department of Health and Human Services, and the Director of the Center for Disease Control and Prevention (CDC) with the necessary authority to manage the nation during a pandemic. As a result, these federal statutes are reviewed below.

Public Health Service Act

The first domino that would need to fall in order to ensure that the federal government had sufficient authority to manage the nation during a pandemic is the Public Health Services (PHS) Act. The PHS Act allows the Secretary of the Department of

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Health and Human Services (HHS) to take specific steps to address a public health emergency. Specifically, PHS provides the Secretary of HHS to “take such action as may be appropriate to respond to the public health emergency, including making grants, providing awards for expenses, and entering into contracts and conducting and supporting investigations into the cause, treatment, or prevention of a disease.” In addition, the Secretary of HHS can order the Director of the CDC to provide technical and financial aid to states to investigate and control an outbreak of a disease.

National Emergencies Act Declaration

The National Emergencies Act (NEA) provides the President of the United States the authority to declare a national emergency. Once a national emergency is declared then the President of the United States and other executive branch leaders have the authority to activate different provisions incorporated in other statutes to utilize special power to better manage the emergency. Ironically, the NEA declaration of a national emergency does not, by itself, provide the President with additional authority, but such a declaration initiates emergency authority written into other federal statutes. The emergency authority vested in different federal statutes will remain dormant until the President declares a national emergency.

Stafford Act Declaration

Under the Stafford Act, the President of the United States may issue one of two types of declarations: emergency and major disaster. It is unclear if a pandemic would constitute an emergency or major disaster according to the Stafford Act, so many of the

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9 Id.
11 42 U.S.C. § 5193(b).
powers listed in this section may not apply to a pandemic crisis. However, it seems logical that if the nation were severely crippled by an infectious pandemic that an emergency declaration under the Stafford Act would be deemed constitutional. The President of the United States would issue the Stafford Act declaration and once such a declaration is issued federal agencies can be directed to support state and local emergency efforts. In addition, a Stafford Act declaration authorizes the President to coordinate disaster relief, provide emergency assistance, provide assistance to victims of the disaster, and aid in the distribution of survival supplies.

Social Security Act

On the surface, it seems odd that the Social Security Act\textsuperscript{12} would have anything to do with the federal government’s response to a pandemic. However, included in the Social Security Act is § 1135, which authorizes the Secretary of HHS to suspend regulatory requirements related to health care services. Specifically, the requirements that are suspended are designed to ensure health care services are extended to all in need, regardless of insurance coverage. The ultimate aim is to assist patients that require relocation and ensure benefits to those that may have lost their insurance paperwork due to the disaster.

Federal Food, Drug, and Cosmetic Act

The Federal Food, Drug, and Cosmetic Act\textsuperscript{13} includes Section 564 and this section provides the Commissioner of the Food and Drug Administration (FDA) with pivotal authority during a pandemic. Specially, Section 564 allows for the expedited distribution and use of medication that could stem the spread of the infectious disease.

\textsuperscript{12} 42 U.S.C. § 1320b-5(b).
\textsuperscript{13} 21 U.S.C. § 360bbb-3(a)(1).
Section 564 allows a medication that is not approved by the FDA to be used in an emergency situation.

II. The 2009 Influenza Pandemic: An Example of Governmental Response to Perceived Threat

In April 2009, severe cases of pneumonia related to a flu-like illness were reported in Mexico, and later scientists, who publically worried that the threat of a pandemic were high, soon identified the U.S. H1N1 as the responsible virus. On June 11, 2009 the WHO, concerned about the spread of the H1N1 virus, raised the influenza pandemic alert to phase 6, which is the WHO’s highest phase. This action resulted in a worldwide scare related to the 2009 influenza, despite the fact that this disease did not prove as lethal as originally thought. Nationally, specific steps were taken to prepare for a potential pandemic that involved the statutes reviewed in the previous section. These governmental actions are discussed to illustrate the fact that, despite the collective ignorance of most P-20 leaders, the nation came close to initiating significant mandates that could have impacted the daily governance of schools and university campuses in an effort to mitigate the spread of the H1N1 flu virus.

On April 26, 2009 the HHS Secretary issued a public health emergency declaration to the entire nation. This declaration was in response to the infectious nature of the H1N1 virus. The initial declaration by the HHS Secretary would have expired after 90 days. However, the declaration was renewed in July 24 and, again, on October 1. This declaration empowered the HHS Secretary to take specific steps to combat the spread of the H1N1 virus and initiated future governmental responses to the impending health

14 The declaration is available at [http://www.hhs.gov/secretary/phe_swh1n1.html](http://www.hhs.gov/secretary/phe_swh1n1.html)
crisis. First, the HHS Secretary gained access to special emergency funds that could be used to mitigate the spread of the virus. Second, this declaration had to be issued, along with two other events, in order for the Food, Drug, and Cosmetic Act to issue the Emergency Use Authorization related to the use of untested medication that could combat the virus.

On April 27, 2009, the Food and Drug Administration (FDA) issued a total of four Emergency Use Authorizations. Emergency Use Authorizations permit products not currently approved by the FDA to be used commercially as a result of the Food, Drug, and Cosmetic Act. The Director of the CDC requested the Emergency Use Authorizations in an effort to make specific drugs available to the public, to utilize diagnostic tests specific to the H1N1 virus, and to circulate respiratory devices. The FDA issued subsequent Emergency Use Authorizations over the summer of 2009 related to a second diagnostic tool and intravenous medication.

On June 11, 2009 the World Health Organization (WHO) elevated the alert level of the H1N1 virus to phase 6, which represented the highest level in the WHO’s warning system. The elevated alert issued by WHO was based on the spread of the virus and on the fact that H1N1 was a new strain of influenza. As a result, the WHO officials were not certain at the time the threat the virus posed to humanity. This action by the WHO only served to validate the steps taken by the US federal government up to this point and also put the rest of the world on notice of the potential pandemic danger.

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15 See [http://www.cdc.gov/h1n1flu/eua/](http://www.cdc.gov/h1n1flu/eua/)

16 See [http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm180153.htm](http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm180153.htm)

On October 23, 2009, President Obama, relying on authority vested in him by the National Emergencies Act, declared a state of national emergency due to the spread of the H1N1 virus. The national emergency declaration would serve to provide a temporary waiver from different federal rules and laws around health care and President Obama stated the declaration was necessary due to the spread of the virus across the nation. Specifically, the declaration waived or modified specific requirements related to Medicare and Medicaid.

Finally, on October 27, 2009, HHS Secretary, relying on Section 1135 of the Social Security Act, waived or modified requirements related to health care services. Specifically, these waivers and modifications centered on administrative requirements, mostly around reimbursement, in the Medicaid and Medicare programs.

The strain of H1N1 responsible for the 2009 pandemic largely resulted in less-severe symptoms then was originally feared, especially when coupled with basic treatment. However, findings from several studies suggest a more virulent strain could have resulted in profoundly different outcomes. For example, a large university in Delaware experienced a dramatic two-week surge in the number of undergraduate and graduate students experiencing respiratory illness that resulted in the university cancelling extracurricular, social, and athletic events for approximately five days. The institution partnered with the state’s Department of Health and Social Services to establish an emergency clinic to help evaluate students seeking care. Researchers at an Australian university found that many young students believed themselves to be not

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19 See [http://www.flu.gov/professional/federal/h1n1_1135Swaver_10272009.html](http://www.flu.gov/professional/federal/h1n1_1135Swaver_10272009.html)
susceptible to H1N1 despite being the most affected group. They also found that while most students were willing to be isolated if suffering from the flu, many were not willing to change their behavior in ways intended to reduce their chances of infection.

As stated at the beginning of this section, it is potentially alarming that the U.S. Federal government took so many specific steps that could have resulted in an authoritative handling of a pandemic situation and a vast majority of P-20 administrators were oblivious to the implications of these governmental actions. Clearly, P-20 administrators have sufficient demands for their time without having to pay attention to the WHO and the federal government when it comes to the potential spread of a pandemic. However, a take-away from the H1N1 scare in 2009 is that a majority of P-20 administrators were not directly included in the decision-making process and the federal and state governments wrestled with appropriate actions. As a result, P-20 administrators are left to act with the best interest of students in mind but with limited to no information. This combination can result in misguided actions by P-20 administrators and these misguided actions could result in litigation.

III. P-20 Leaders Responses to the 2009 Influenza and 2014 Ebola Scares

To better illustrate the need to keep P-20 administrators informed about a potential pandemic, an examination of how P-12 and higher education institutions responded to the H1N1 virus in 2009 and the Ebola scare in 2014 is presented. It should be noted that this analysis is replete with examples of administrators taking actions deemed appropriate during the threat of disease, but, in retrospect and due to an incomplete understanding of the severity of the situation, now viewed as inappropriate and reactionary.
H1N1 P-20 Reactions

In 2009 the threat of the H1N1 flu virus, also known as the Swine Flu, was significant in the United States and throughout the world. The H1N1 virus had a high infection rate and was considered to be a strain of the Spanish Flu, which in 1918 to 1920 killed millions of people. By the spring of 2009 the following factors were at play: uncertainty concerning the potential lethalness of the Swine Flu, media frenzy, limited information concerning the best course of action for schools and colleges/universities, and a virus that was infecting a significant number of people.

P-12 response to H1N1. Interestingly enough, out of the roughly 100,000 schools in the United States during the 2008-2009 school year, 726 decided to close for a period of time, based upon a recommendation from the CDC, in an effort to mitigate the spread of the H1N1 virus. In addition, the CDC quickly retracted its recommendation for schools to close based on the benign symptoms of the H1N1 flu. In addition to closures, P-12 school officials considered requiring all staff and students to receive an annual vaccine to ward off the H1N1 flu. Research indicates that even if 50% of a school’s population receive a vaccine that the likelihood of the flu spreading is significantly reduced. The final reaction, mostly retroactively, for school officials to the H1N1 virus was to engage in table top discussions about how a potential pandemic would be handled and the implications for each possible decision made by school officials.

Higher education response to H1N1. There is little evidence that higher education institutions reacted differently to the H1N1 virus as opposed to any seasonal flu.

Ebola P-20 Reactions

20 Frank Wolfe, *NASBE: Schools Should Consider Mandatory Flu Shots*, Education Daily 42(83), 1-4, 4.
Ebola is a type of hemorrhagic fever spread by virus that affects multiple organs and damages blood vessels resulting in internal and external bleeding. The average fatality rate among those infected is around 50%, although in some outbreaks it has spiked to 90%. Because the virus is spread primarily through direct contact with bodily fluids and treatments only in the experimental stages a natural step to addressing its spread is to isolate infected individuals from the larger community. In March 2014, initial cases of Ebola were reported in Guinea and later Sierra Leone and Liberia. In at least two instances, individuals exposed to Ebola in West Africa arrived in the U.S. apparently asymptomatic only to develop symptoms after having moved freely among the general population. In both cases the infected individual had flown on airplanes and in one instance an individual had taken a subway in New York City.

P-12 response to Ebola. P-12 administrators found themselves in a similar situation as they were in 2009 during the H1N1 scare. The media frenzy around the Ebola scare in the United States added to the scare around a potential Ebola outbreak. School officials in isolated pockets took actions during the height of the scare that, in retrospect, may have been reactionary and baseless.

In Connecticut, school officials encouraged a student, age 7, who had traveled to Nigeria, a country that was declared Ebola free by the WHO, to stay home for 21 days upon her return to her home. The girl had traveled to attend a family wedding and, despite not being exposed to anyone with Ebola and not demonstrating any of the Ebola symptoms, she was asked to stay home for the 21 days since that was the maximum incubation period. The girl’s family filed a lawsuit against the school district claiming the
decision was a violation of the Americans With Disabilities Act, which prohibits organizations from singling out individuals.

A school district in Ohio closed two schools for a thorough cleaning and disinfection because two employees, who worked at the two schools, had flown on the same plane, albeit at a different time, that had previously carried a person with the Ebola virus.

These examples serve to illustrate the P-12 educational leaders, operating with the best intentions, may make rash decisions during a threat of a pandemic that could hold legal implications for school districts.

Higher Education Response. In the majority of colleges and universities operated as usual, although many held meetings to discuss various scenarios and develop coordinated efforts to address student, parent, and employee concerns, and provide information to numerous stakeholders. A few exceptions, which appeared as news items, are worth noting because they provide examples for how institutional leaders start making decisions in the face of incomplete information. Kent State University asked three employees related to a Dallas-based nurse who was diagnosed with Ebola and had visited the family members, to remain off campus for 21–days and self-monitor their health. The University of Texas at Austin required a student who had shared a flight with the nurse in example 1, to stay home from class and away from campus activities. A Louisiana State University employee, who participated in police response training in Liberia, was asked not to return to campus for three weeks. Syracuse University’s School of Public Communications rescinded a speaking invitation to a photojournalist who recently traveled to Liberia even though he had been symptom-free and back in the U.S.
for more than 21 days. Navarro College, a Texas community college, made news for sending rejection letters to Nigerian applicants, stating it was not accepting international students from countries with confirmed cases of Ebola. College officials confirmed the institution was not sending similar letters to applicants from non-African countries with infected individuals, namely the U.S. and Spain (https://www.insidehighered.com/news/2014/10/20/us-campuses-are-edge-over-ebola).

In these cases, institutional leaders made decisions intended to protect campus communities but with seemingly limited guidance from federal authorities such as the CDC or Department of Education. Seemingly with limited Emory University Hospital and the Nebraska Medical Center, which is affiliated University of Nebraska, each accepted individuals infected with Ebola for treatment. While both received some criticism from a concerned public, each took steps to ensure community members and state officials that proper safety procure were in place to protect the public. The fact that several nurses were infected with Ebola while treating a patient at Texas Health Presbyterian Hospital suggests that accepting Ebola a patient does present an actual danger to the community unless the facility and all personal are properly equipped.

**IV. P-20 Leader’s Efforts to Prevent, Response, and Mitigation of Risk**

P-20 administrators have moral and legal responsibilities to prevent, prepare for, and mitigate the risk of a pandemic. However, the responsibilities are different for P-12 leaders who function *in loco parentis* for children under the age of 18 and college and university administrators who deal with adult students who may live on a residential campus. Regardless of the age of the students, administrators have moral and legal responsibilities to care for the students under their authority.
Vaccinations

P-20 administrators are often the first line of monitoring of adherence and enforcement of vaccination laws. Failure to monitor and enforce vaccination laws by admitting students who have not met the legal requirements for vaccination or provided the school with a legally acceptable exemption is a breakdown in the protection of the health of the individual student, the student body, and potential exposes all people in the school community and broader community to known public health threats.

Vaccinations are the primary prevention for known potential pandemic threats. According to the Center for Disease Control there are 14 diseases that can be prevented with routine childhood vaccination including diphtheria, hepatitis A, hepatitis B, Hib (bacteria meningitis), influenza, measles, mumps, pertussis, pneumococcal disease, polio, rotavirus, rubella, tetanus, and varicella (chicken pox) (citation). The mortality rates vary for these vaccine-preventable diseases. All pose a threat to the individual and a potential threat to public health.

State and local governments have the primary responsibility to enact laws for the protection of public health, and all 50 states have laws requiring children to be vaccinated for certain diseases before enrolling in public or private elementary and secondary schools (citation). States also have rules for exemptions based on medical, philosophical, or religious beliefs (citation). Certain states also have laws which require vaccination for certain diseases including hepatitis B and meningococcal disease for college and university students (citation). In addition, private colleges and universities may require evidence of vaccination even if the state law does not compel them to do so. Because diseases spread in different ways such as through the air, direct or indirect contact, body
fluids, soiled objects, or sexual contact, not all diseases possess the same level of public health threat and the recommended vaccination schedule varies for children and college/university students.

School districts and college and universities may also provide and encourage faculty and staff to participate in annual influenza (flu) vaccination programs. College and universities often provide these vaccines for little or no costs to students and employees. In addition, universities with hospitals or medical services may mandate annual influenza vaccinations as a precondition for employment or study for students unless the individual has a medical or religious exemption (citation).

V. P-20 Administrators’ Legal Responsibilities During a Pandemic

P-20 administrators are vested with the authority for the day-to-day operations of schools and colleges/universities. P-20 administrators make decisions concerning the safety of students and employees under normal operations. P-20 administrators are accustomed to making decisions concerning the closure of school due to severe weather and disruptions such as isolated rotavirus outbreaks or seasonal influenza in individual schools. However in the event of a pandemic school leaders cede much of the decision-making authority concerning the pandemic response to other governmental authorities. The layers of authority include state actors such as the state superintendent of schools, governor, and state health officers and federal actors such as the US Secretary of Education, Center for Disease Control, the Secretary of Health and Human Services, and the President of the United States.

In the event of a declared public health emergency such as a pandemic, state and federal laws give authority concerning school closure, vaccinations requirements, and
actions regarding public safety to state and federal officials. Local school and college/university officials are compelled to follow the directives of state and federal officials.

As witnessed in the 2014 Ebola scare, P-20 leaders took steps under the auspices of prevention such as refusing to allow students and employees who were feared to be sick or to have been exposed to a disease from attending school and even the closure of schools. These steps were often made in response to public anxiety and political pressures to perceived threats. While P-20 leaders may have had genuine desire to prevent disease and act in the best interests of their students, employees, and communities, the decisions were sometimes made without consultation or against the advice of state and federal authorities such as state departments of health or the Center for Disease Control. More concerning was the lack of confidence some politicians and P-20 leaders demonstrated towards the expertise of such authorities. (Insert story about Donald Trump and the Director of the CDC and which one was most quoted by news media?)

VI. Potential Liability Issues

The questions that will be answered in this section include the following:

Will government officials and, by extension P-20 administrators at public institutions, receive absolute immunity for actions taken during the threat of a pandemic? The answer seemingly depends upon the whether actors in the Federal have declared the disease a threat and ‘TURNS ON’ (what the is word) the powers derived from previously mentioned statutes. However, in general the assumption is that absent evidence that the P-20 administrator’s actions constituted willful misconduct that directly resulted in harm
to an individual, P-20 administrators’ efforts to mitigate the spread of a pandemic will be protected under absolute immunity.

What role will the Public Readiness and Emergency Readiness Act play in protecting P-20 administrators?

What protection will be granted to the actions of volunteers during a pandemic?

Would P-20 administrators be considered volunteers?

Finally, how does the Federal Tort Claims Act offer P-20 administrators an additional layer of protection?

How do civil rights factor into a situation where there is a threat of a pandemic or when the pandemic is real?

VII. Potential Employment Issues

Will P-20 organizations continue to pay employees? If not, what legal recourse do employees have during a time of crisis, such as a pandemic?

How does the FMLA apply to a pandemic situation?

What state and federal laws exist to protect the rights of employees during a time of isolation or quarantine?

VII. Conclusion