GT GreenbergTraurig

The Measles Epidemic and the Law

In his Health Law column, Francis J. Serbaroli addresses the current measles outbreak, statutory vaccination and quarantining requirements, and recent court decisions in proceedings challenging actions taken by Rockland County and New York City to contain the outbreak. He advises that elected officials, public health authorities, and their lawyers, should follow established laws for dealing with infectious diseases, and that courts should exercise caution in deciding legal challenges to disease containment efforts.

By Francis J. Serbaroli | May 15, 2019 | New York Law Journal

One of the paramount responsibilities of any government is the protection of its citizens. The Preamble lists among the U.S. Constitution's purposes "… to promote the general welfare." Article XVII, Section 3 of the New York State Constitution reads:

> The protection and promotion of the health of the inhabitants of the state are a matter of public concern and provision therefor shall be made by the state and by such of its subdivisions and in such manner as the legislature shall from time to time determine.

Protecting citizens and promoting the general welfare includes not only public safety in general but also responding promptly and effectively to threats to public health.

According to the federal Centers for Disease Control & Prevention (CDC), for the period of January 1 to May 10, 2019, there have been 839 cases of measles diagnosed in 23 states, the largest number of cases reported since 1994. As of May 6, 2019, New York City's Department of Health and Mental Hygiene (DHMH) reported that there have been 466 confirmed cases of measles in Brooklyn and Queens since September 2018. The current measles outbreak has prompted questions about what is the appropriate role of government in requiring vaccinations against infectious diseases, and ordering the quarantining of individuals who refuse vaccination and/or who contract an infectious disease such as measles. It is thus timely to review current New York state and New York City laws and regulations covering what our state and local governments are empowered to do with respect to measles and other infectious diseases, and to analyze some recent court decisions arising from legal challenges to local government responses to the measles outbreak.

Immunizations

State laws mandating vaccination against contagious diseases were first upheld by the Supreme Court of the United States more than a century ago. In *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the court upheld a Massachusetts law requiring compulsory vaccination for smallpox. Many more state and federal court decisions have upheld mandatory vaccination laws since then.

New York Public Health Law (PHL) §2164 sets forth state-wide immunization requirements for children ages two months to 18 years. It requires each parent (by birth or adoption), legally appointed guardian or custodian (hereinafter cumulatively "parent") to have administered to the child an adequate dose or doses of an immunizing agent against measles and other specified infectious diseases. If unable to pay for receiving such immunization from a private health practitioner, the law states that the immunization will be available without charge from the health officer of the county where the child resides. The practitioner administering the immunization must provide the parent with a certificate of immunization which the parent can then submit to the school attended by the child. Children may not be admitted to or attend school for more than 14 days without the certificate or other documentation of immunization. This 14-day period may be extended to 30 days for a student transferring from out-of-state or out-of-country if there has been a good faith effort to obtain the certificate or other evidence of immunization.

The law sets forth only two exceptions to the immunization requirement. PHL §2164(8) allows a physician to certify that the immunization may be detrimental to a child's health, and in that case the law states that immunization is not required until such immunization is found not to be detrimental to the child's health. There is also a religious belief exception. PHL §2164(9) states that the immunization requirement:

> … shall not apply to children whose parent, parents, or guardian hold genuine and sincere religious beliefs which are contrary to the practices herein required, and no certificate shall be required as a prerequisite to such children being admitted or received into school or attending school.

PHL §2165 applies similar immunization requirements and exceptions to students enrolled full-time or part-time in post-secondary education. NY Education Law §914 spells out the responsibilities of schools and school districts for compliance with the PHL's immunization requirements. Detailed school immunization regulations are found in 10 NYCRR Part 66.

Controlling Outbreaks

State Law. PHL §2100 confers broad authority on local boards of health and health officers (commonly the local commissioner of health) to deal with outbreaks of infectious diseases:

1. Every local board of health and every health officer shall guard against the introduction of such communicable diseases as are designated in the sanitary code, by the exercise of proper and vigilant medical inspection and control of all persons and things infected with or exposed to such diseases.

2. Every local board of health and every health officer may:

    (a) provide for care and isolation of cases of communicable disease in a hospital or elsewhere when necessary for protection of the public health and,

    (b) subject to the provisions of the sanitary code, prohibit and prevent all intercourse and communication with or use of infected premises, places and things, and require, and if necessary, provide the means for the thorough purification and cleansing of the same before general intercourse with the same or use thereof shall be allowed.

PHL §§2101-2102 impose requirements on physicians, hospitals, laboratories, hotels, lodgings, and others to report diagnosed cases of infectious diseases to local health officers and/or the state Department of Health (DOH), and §2103 requires local health officers in turn to report such diseases to DOH.

PHL §2120 authorizes specific steps to control "dangerous and careless patients":

1. Whenever a complaint is made by a physician to a health officer that any person is afflicted with a communicable disease or is a carrier of typhoid fever, tuberculosis, diphtheria or other communicable disease and is unable or unwilling to conduct himself and to live in such a manner as not to expose members of his family or household or other persons with whom he may be associated to danger of infection, the health officer shall forthwith investigate the circumstances alleged.

2. If the health officer finds after investigation that a person so afflicted is a menace to others, he shall make and file a complaint against such person with a magistrate, and on such complaint the said person shall be brought before such magistrate.

3. The magistrate after due notice and a hearing, if satisfied that the complaint of the health officer is well founded and that the afflicted person is a source of danger to others, may commit the said person to any hospital or institution established for the care of persons suffering from any such communicable disease or maintaining a room, ward or wards for such persons.

4. In making such commitment the magistrate shall make such order for payment for the care and maintenance of the person committed as he may deem proper.

5. A person who is committed pursuant to the provisions of this section shall be deemed to be committed until discharged in the manner authorized by section two thousand one hundred twenty-three of this chapter.

Similarly, 10 NYCRR §2.28 authorizes a health officer, when a case of measles comes to his/her attention, to order the isolation of the infected individual until the individual has recovered. If isolation of the person at home is impractical, the health officer may order the removal of the infected individual to a suitable hospital.

More provisions regarding the investigation, determination and reporting of cases of contagious diseases, quarantining and isolating infected individuals, and other measures for public protection are found in the State Sanitary Code. 10 NYCRR Chapter 1, Part 2.

New York City Ordinances. PHL §§2110 and 2125 exempt the City of New York, which has its own health code, from the PHL's provisions regarding control of infectious diseases. New York City's Health Code (NYCHC) §3.01(c) confers the following broad authority:

> Subject to the provisions of the New York City Health Code or other applicable law, the New York City Department of Health and Mental Hygiene may take such action as may become necessary to assure the maintenance of public health, the prevention of disease, or the safety of the City and its residents.

The NYCHC details the steps that the DHMH's Commissioner can take to quarantine those having or even suspected of having an infectious disease. NYCHC §11.23(a) states:

> Upon determining by clear and convincing evidence that the health of others is or may be endangered by a case, contact or carrier, or suspect case, contact or carrier of a contagious disease that, in the opinion of the Commissioner, may pose an imminent and significant threat to the public health resulting in severe morbidity or high mortality, the Commissioner may order the removal and/or detention of such a person or of a group of such persons by issuing a single order, identifying such persons either by name or by a reasonably specific description of the individuals or group being detained. Such person or group of persons shall be detained in a medical facility or other appropriate facility or premises designated by the Commissioner … .

The NYCHC authorizes detention until the individual is no longer contagious, or is determined not to have been infected or exposed to the disease. Id. §11.23(c). Detained individuals must:

1) have his or her medical condition and needs assessed and addressed on a regular basis; and

2) be detained in a manner that is consistent with recognized isolation and infection control principles in order to minimize the likelihood of the transmission of infection to such person and to others.

Id. §11.23(d)

If detention is for up to three business days, the detainee may request an opportunity to be heard. Detention beyond three business days requires an additional order of the Commissioner. If detention is for more than three business days and the detainee requests release, the Commissioner is required to apply for a court order (and an expedited hearing) authorizing continued detention within three business days of the detainee's request. No individual can be detained for more than 60 days without a court order, and the

Commissioner is required to seek further court review of the detention within 90 days following the initial court order and every 90 days thereafter. In all such court hearings, the Commissioner is required to prove the necessity of the continuing detention by clear and convincing evidence. Id. §11.23(e)-(f). No medication may be forcibly administered to anyone without a prior court order. Id. §11.23(l)

The NYCHC also authorizes the Commissioner to issue and seek enforcement of any other orders deemed "… necessary or appropriate to prevent dissemination or transmission of contagious diseases or other illnesses that may pose a threat to the public health …" These include:

- orders to remain isolated or quarantined at home or in premises acceptable to the [DHMH] under such conditions and for such period as will prevent transmission of the contagious disease;
- orders requiring the testing or medical examination of persons who may have been exposed to or infected by a contagious disease;
- orders to require an individual who has been exposed to or infected by a contagious disease to complete an appropriate and prescribed course of treatment, preventive medication or vaccination.

Id. §11.23(k)

NYCHC §11.31 includes other steps that can be taken to quarantine infected persons:

> Police Power and Limitations.
>
> > (a) It shall be the duty of an attending physician, or a person in charge of a hospital, clinic, nursing home or other medical facility to isolate a case, carrier, suspect case or suspect carrier of diphtheria, rubella (German measles), influenza with pandemic potential, invasive meningococcal disease, measles, monkeypox, mumps, pertussis, poliomyelitis, pneumonic form of plague, severe or novel coronavirus, vancomycin intermediate or resistant Staphylococcus aureus (VISA/VRSA), smallpox, tuberculosis (active), vaccinia disease, viral hemorrhagic fever or any other contagious disease that in the opinion of the Commissioner may pose an imminent and significant threat to the public health, in a manner consistent with recognized infection control principles and isolation procedures in accordance with State Department of Health regulations or guidelines pending further action by the Commissioner or designee.
> >
> > (b) Whenever the person in charge of a shelter, group residence, correctional facility, or other place providing medical care on site is not capable of implementing appropriate isolation precautions for the specific disease, upon discovering a case, carrier, suspect case or suspect carrier of a contagious disease of the kind as set forth in subdivision (a), such person in charge shall mask such individual, if indicated, and shall isolate the individual by placing him or her in a single room as instructed by the Department until such time as the individual can be transported to an appropriate healthcare facility that is capable of implementing appropriate isolation precautions for the specific disease.
> >
> > (c) The person in charge of a school, day care facility, camp or other congregate care setting with children under the age of six, homeless shelter, correctional facility, group residence or other congregate residential setting providing care or shelter shall, upon discovering a case, carrier, suspect case or suspect carrier of a contagious disease set forth in subdivision (a) shall mask such person, if indicated, and isolate the individual by placing him or her in

> a single room as instructed by the Department until the person can be safely transferred to an appropriate medical facility for evaluation.
>
> (d) A case, contact, carrier or suspect case, contact or carrier of a contagious disease set forth in subdivision (a) who is not hospitalized may, in accordance with the provisions of subdivision (k) of §11.23 of this Article, be ordered by the Department to remain in isolation or quarantine at home or other residence of his or her choosing that is acceptable to the Department, under such conditions and for such duration as the Department may specify to prevent transmission of the disease to others.

Court Challenges

Despite the wealth of cases upholding state and local governments' power to take extraordinary steps to address a public health threat, a declaration of a public health emergency or invoking the statutory requirements of immunization and quarantine can still trigger court challenges. The current measles outbreak in parts of New York has done just that. One such case took place in Rockland County, which has experienced a significant measles outbreak. Instead of having his Health Commissioner invoke the PHL provisions regarding vaccination and quarantine, County Executive Edwin J. Day on March 26 and 28, 2019 issued a "Declaration of a Local State of Emergency" (Declaration) pursuant to New York Executive Law (Exec. Law) §24. His Declaration prohibited a parent or guardian of a minor child from entering any "place of public assembly" in Rockland County if the child was not vaccinated against measles:

> … for any reason other than being serologically immune to measles as documented by a physician, or prevented from receiving a measles vaccination for a medical reason documented by a physician, or because the infant is under the age of 6 months.

The Declaration defined "a place of public assembly" as:

> a place where more than 10 persons are intended to congregate for purposes such as civic, governmental, social, or religious functions, or for recreation or shopping, or for food or drink consumption, or awaiting transportation, or for daycare or educational purposes, or for medical treatment. A place of public assembly shall also include public transportation vehicles, including but not limited to, publicly or privately-owned buses or trains, but does not include taxi or livery vehicles.

A group of parents whose children were not vaccinated because of a claimed religious exemption filed an Article 78 proceeding seeking a temporary restraining order and an order declaring the Declaration null and void as arbitrary, capricious, and contrary to law. [W.D. et al. v. County of Rockland, Index No. 031783/2019, 2019 WL 1716724 (Supreme Court, Rockland County.)] The County's lawyers responded that the definition of "disaster" set forth in Exec. Law §20(2)(a) includes "epidemic" and that the County Executive was thus well within his authority to issue the Declaration in view of the measles outbreak.

Acting Supreme Court Justice Rolf M. Thorsen, finding no definition of "epidemic" in the Exec. Law, relied on Merriam-Webster dictionary definitions of the word including:

> … an outbreak of disease that spreads quickly and affects many individuals at the same time. … [and]
>
> affecting or tending to affect a disproportionately large number of individuals within a population, community, or region at the same time.

Justice Thorsen then took the highly unscientific step of dividing the population of Rockland County (approximately 330,000 people) by the number of measles cases reported in the County for the prior six months (166 cases), and calculated that the cases of measles equaled only .05% of the population. He concluded that this percentage did not rise to the level of an "epidemic" as included in the Exec. Law's definition of a "disaster". Had Justice Thorsen consulted with an epidemiologist or even the County's Health Commissioner, he likely would have been advised that it is inappropriate to use simple division of the population by the number of infected individuals as a way of determining whether an outbreak of a highly infectious disease like measles is serious enough to rise to the level of an epidemic or a disaster.

Justice Thorsen then pointed out that the Emergency Declaration's 30-day duration exceeded the five-day limit in Exec. Law §24(2) for such a declaration. He concluded that the petitioners had demonstrated that without an injunction, their children would continue to miss school; petitioners would continue to incur monetary expenses; and that the petitioners had indicated that their children posed no immediate threat to the other children at their school where there have been no reported cases of the measles. He then issued a preliminary injunction. The County appealed but the Appellate Division denied the appeal. *W.D. v. County of Rockland*, Nos. 2019-03666, 2019-03681 (N.Y. App. Div. April 19, 2019).

Subsequent to the Court's voiding of the initial Declaration, the County Executive withdrew the Declaration, and the Commissioner of the Rockland County Department of Health (RCDOH), Dr. Patricia Schnabel Ruppert, issued a "Communicable Disease & Exposure Exclusion Order" more in keeping with the PHL provisions. It mandates the following:

1. Any person diagnosed with the measles or exposed to a person diagnosed with the measles as evidenced by laboratory evidence or a measles tracing investigation conducted by the RCDOH must be excluded from indoor and outdoor places of public assembly located in Rockland County for a period of up to 21 days.

2. The individual is prohibited from going to or being present at any place of public assembly for any period of time with exceptions for medical care, emergency situations and court appointments.

3. Individuals are required to cooperate with the RCDOH public health authorities by providing information regarding details of one's illness, exposures and contacts.

The Order notes that failure to comply can result in a $2,000 fine per violation per day.

Dr. Ruppert issued a second order requiring 16 schools and daycare centers in Rockland County, identified in an audit, to exclude students who do not have:

- a valid immunization certificate on file; or

- a laboratory test result demonstrating immunity against measles, mumps and rubella; or

- a valid medical or religious exemption on file.

The second order also requires these schools/daycare centers to submit to the RCDOH a sworn affidavit/affirmation identifying students who have been excluded. Failure to comply with the second order also carries a fine of $2,000 per violation per day.

In another court case with better facts and a sounder legal analysis, the Kings County Supreme Court recently rejected a challenge to a declared public health emergency. In response to a measles outbreak in certain neighborhoods in Brooklyn and Queens, the Commissioner of the DHMH, Dr. Oxiris Barbot, issued

an order on April 9, 2019 declaring a public health emergency pursuant to NYCHC §3.01, and ordering the vaccination of any person who lives or works in four designated zip codes and who has not received a measles immunization. The order stated that failure to comply would violate NYCHC §3.05 and subject the violator to civil and/or criminal fines and penalties. (This order was later amended to subject a violator to fines authorized by applicable law, which the DHMH's website indicates is a civil fine of $1,000.)

A group of parents of unvaccinated children challenged the order. *C.F. et al. vs. The New York City Department of Health and Mental Hygiene et al.*, Index No. 508356/19, Kings County Supreme Court. They claimed the order was arbitrary, capricious and contrary to law; was disproportionate to the provable factual circumstances; and did not use the least restrictive means that would likely control measles yet balance the rights to individual autonomy, informed consent, and free exercise of religion. The petitioners were represented by lawyers associated with Children's Health Defense, an anti-vaccination advocacy group.

After a hearing, Justice Lawrence Knipel denied the challenge and the requested injunctive relief and dismissed the petition in a decision filed on April 18, 2019. In his decision, Justice Knipel first turned to whether the Commissioner had a rational non-pretextual basis for declaring a public health emergency and issuing the vaccination order. He found that the petitioners' own exhibits documented 285 diagnoses of measles in the affected areas through April 8, 2019 compared to 85 diagnoses *nationwide* during all of 2016. He found this to be "the most significant spike in incidences of measles in the United States and that the Williamsburg section of Brooklyn is at its epicenter." He also noted that the outbreak has begun to spread elsewhere, with 39 cases diagnosed in Michigan that were traced to an individual traveling from Williamsburg. He concluded that this was an emergent measles epidemic in the designated areas sufficient to warrant the declaration of a public health emergency.

Justice Knipel then examined whether directing vaccination and imposing penalties for non-compliance was justified. He noted that, when asked at oral argument what actions DHMH could have taken that were better or less restrictive, the petitioners' attorney "could not offer a demonstrably better, safer or more efficient alternative" and thus failed to show that the DHMH's order was arbitrary, capricious or otherwise unlawful.

Petitioners' medical experts opined variously that the measles vaccine is ineffective, presents a greater risk than non-vaccination, and that the vaccine itself propagates the measles rather than prevents it. Justice Knipel found these contentions completely unsupported by studies, medical literature, or any other acceptable evidence, and amounted to little more than speculation.

Petitioners also raised the religious objection exception of PHL §2164(a) but Justice Knipel pointed out that this exception only applies to an immunization required to admit a child to school, and not to a declaration of a public health emergency. He also found that affidavits of petitioners claiming that taking the vaccine was violative of their religion were entirely unsupported by affidavits of any clergy or other religious doctrinal documentation.

Lastly, Justice Knipel found that petitioners' claims that the immunization requirement violated informed consent, medical ethics, tort law and internationally accepted human rights principles such as the Nuremberg Code were issues inappropriately raised in the context of the challenged order. He concluded:

> A fireman need not obtain the informed consent of the owner before extinguishing a house fire. Vaccination is known to extinguish the fire of contagion.

In an interesting footnote, Justice Knipel took exception to Justice Thorsen's calculation, in the Rockland County case, of the percentage of overall population affected to determine whether there is an epidemic:

> The appropriate measure is rather the sudden percentage rise in infection experienced by the subject population. If one were to wait till a significant percentage of overall population were infected, disaster would inevitably ensue.

Bills

Because of perceived abuse of the religious objection exception in PHL §2164(9), a bill (Senate Bill S2994) has been introduced in the Legislature to repeal the exception. The bill has the support of the Medical Society of the State of New York, which wants only the medical exception in PHL §2164(8) retained. Other organizations supporting the elimination of the religious objection exception include the New York Chapter of the American College of Physicians, the New York State Academy of Family Physicians, the New York State Nurse Practitioner Association, and the New York State Association of County Health Officials. California repealed its religious objection exception to mandatory vaccination in 2015 in the midst of a measles outbreak there. The Connecticut Legislature is currently considering a repeal of its religious objection exception.

Should New York repeal its religious objection exception, the constitutionality of such a repeal stands a good chance of being upheld. A 2015 decision of the U.S. Court of Appeals for the Second Circuit that upheld the constitutionality of the PHL §2164 mandatory vaccination law also opined:

> New York could constitutionally require that all children be vaccinated in order to attend public school.

Phillips v. City of New York, et al., 775 F.3d 538, 543 (2d Cir. 2015).

Another bill (Senate Bill S4244A) has been introduced that would amend the PHL to permit any child who is at least 14 years of age to consent to immunization without the consent or knowledge of the child's parents or guardian.

Conclusion

The CDC reports that:

> In the decade before 1963 when a vaccine became available, nearly all children got measles by the time they were 15 years of age. It is estimated 3 to 4 million people in the United States were infected each year. Also each year, among reported cases, an estimated 400 to 500 people died, 48,000 were hospitalized, and 1,000 suffered encephalitis (swelling of the brain) from measles.

Measles History, Centers for Disease Control and Prevention.

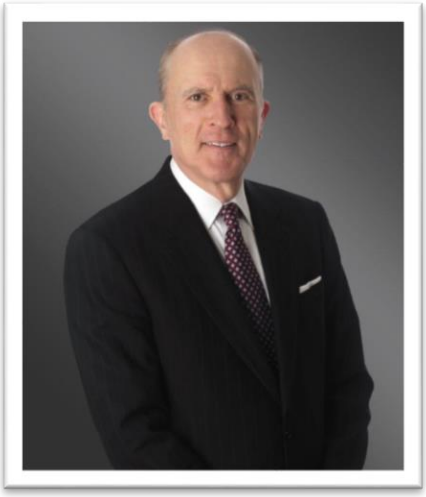
Because vaccination became so widespread, the CDC in 2000 declared measles "eliminated" (i.e. an absence of continuous disease transmission for greater than 12 months).

Unfortunately in recent years, a great deal of false and misleading information about vaccines in general, and the measles vaccine in particular, has gotten wide circulation particularly via the Internet and social media, with the result that rates of measles vaccination have decreased somewhat and outbreaks are occurring more frequently.

It is incumbent upon state and local public health authorities in every state not only to monitor outbreaks of all infectious diseases, but also to enforce statutory vaccination and quarantine requirements, and as necessary, strengthen the provisions of their health and sanitary codes dealing with infectious diseases. Elected officials should rely on the statutory provisions regarding vaccination and quarantine that have been upheld by the courts for generations, as opposed to issuing time-limited emergency declarations that may be vulnerable to court challenge. State attorneys general and municipal lawyers like corporation counsels and county attorneys must be knowledgeable about and prepared to defend their public health authorities' efforts to prevent and contain infectious diseases, and to effectively rebut the junk science that may be proffered in legal challenges to the efforts of state and local governments to protect public health. Lastly, courts should not venture into deciding what is or is not an outbreak or epidemic of infectious disease, or the validity of health or sanitary code procedures for dealing with such diseases, without seeking the assistance of qualified and objective epidemiologists and public health experts.

About the Author:

Francis J. Serbaroli is a shareholder at Greenberg Traurig and the former vice-chair of the New York State Public Health Council.



Francis J. Serbaroli
serbarolif@gtlaw.com