Health Officials Change School Closure Guidance for the H1N1 Virus

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On May 6, 2009, thousands of students in the Houston, Texas, area returned to schools after state and federal officials announced that closing schools was not as effective in containing the spread of the influenza A (H1N1), or swine flu, as previously believed. Richard Besser, acting director of the Centers for Disease Control (CDC) said the agency changed its earlier recommendation to close schools because the H1N1 virus does not appear to be as severe as feared.

“So far, the severity of illnesses we’re seeing in this country is similar to what we’re seeing with seasonal flu,” said Dr. Besser.

Based upon prior recommendations from the Texas Department of State Health Services, the Texas Education Agency, and the CDC’s theory that dismissal of students from schools coupled with the theory of “social distancing,” could reduce the spread of a pandemic-like virus, nearly 500,000 Texas students missed classes because of the closure of 831 schools in the past two weeks related to the H1N1 virus.

Health officials’ change in school closure policy is based, in part, on the fact that the H1N1 virus has reached most areas of the country and resembles the seasonal flu

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2 Id.
4 News Release, Texas Dep’t of State Health Servs., School to Close, Other Flu Precautions Recommended, (Apr. 25, 2009), available at: http://www.dshs.state.tx.us/news/releases/20090425.shtm (last visited May 6, 2009) (the agency announced that Byron Steele High School in Cibolo will temporarily close effective immediately as public health and school officials work to keep swine influenza from spreading).
contracted during the fall and winter months; thus, closing schools may not have the desired effect of keeping the virus away from healthy students.\textsuperscript{8}

The CDC’s new advice for students with flu-like symptoms is to stay at home for at least seven days, even if they feel well sooner.\textsuperscript{9} This new guidance, combined with local and state recommendations, may prove to be more confusing to parents and local school districts. What should a local school district or school do if a student is now confirmed to have a case of H1N1 flu? Keep that student home to be certain. What about the other students in the school? The CDC states that school closure is now not advised for a single confirmed case of the H1N1 virus and is only warranted should the virus affect many students and/or faculty.\textsuperscript{10} This policy contradicts the Texas Education Agency’s advice that it “is important to close schools when there is a confirmed case of H1N1 or swine flu because children are more susceptible than adults to infection…”\textsuperscript{11} What should parents do if they fear their, otherwise healthy, child may contract the virus if the child goes to the school – even though the facility remains open?

For the most part, decisions whether to open or close school districts in Texas are made by the districts themselves.\textsuperscript{12} In some cases, districts rely on the discretion of principals or superintendents. However, more thorny legal issues arise where a school remains open but parents refuse to allow their children to attend out of fear that they may contract the H1N1 virus. In such a situation, parents should be aware of the consequences of keeping a child home.

Texas’ compulsory attendance law requires all students who are at least six years old and less than 18 years old to “attend school each school day for the entire period the program of instruction is provided.”\textsuperscript{13} The attendance requirement does not apply if the child is enrolled in a private or parochial school, home schooled, or if specific special needs are present.\textsuperscript{14} One such exception provides an exemption from compulsory attendance if the student has a temporary and remediable physical or mental condition and are able to provide a note from a physician specifying the condition, treatment provided, and anticipated period of time for recovery.\textsuperscript{15} Certainly, if a child has contracted the H1N1 virus or other strain of flu and has received medical treatment, such an exemption would apply. Further, a student may be excused for temporary absence resulting from “any cause acceptable to the teacher, principal, or superintendent of the school.”\textsuperscript{16} Again, a student who is sick with the flu would likely be granted an excused absence; however, it is unclear whether a teacher, principal, or superintendent would be open to excusing the absence of an asymptomatic child whose parent was concerned about the child possibly

\textsuperscript{8} See Harris and Malkin, supra note 3.
\textsuperscript{9} See Mellon, supra note 1; see also Update on School (K-12) and Childcare Facilities, supra note 1.
\textsuperscript{10} See Update on School (K-12) and Childcare Facilities: (Recommendations), supra note 1.
\textsuperscript{12} Id.
\textsuperscript{13} TEX. EDUC. CODE § 25.085 (Vernon 2009).
\textsuperscript{14} TEX. EDUC. CODE § 25.086 (Vernon 2009).
\textsuperscript{15} Id.
\textsuperscript{16} TEX. EDUC. CODE § 25.087(a) (Vernon 2009).
contracting the H1N1 virus if he or she went to school. Such a scenario has largely been untested during times of possible pandemic illness.

If a child incurs multiple unexcused absences from school during the instruction period, both the child and the parent may be criminally prosecuted. Students who fail to attend school on 10 or more days within a six-month period or on three or more days within a four-week period may be prosecuted as a Class C misdemeanor.\(^{17}\) Parents may also be prosecuted for the offense of contributing to nonattendance.\(^{18}\) It is an affirmative defense to prosecution that one or more of the absences were excused by a school official.\(^{19}\)

In addition to mandating attendance, Texas law provides that a student may not receive credit for class under the provisions of the “90 percent rule” which, subject to exceptions, conditions credit for a class on the student’s attendance for at least 90 percent of the days the class is offered.\(^{20}\) A student who attends at least 75 percent of classes but less than 90 percent may receive credit if the student completes an approved alternative plan to meet course requirements.\(^{21}\)

Texas law requires local school districts to establish attendance committees to hear petitions by students who do not meet either the 75 percent or 90 percent attendance requirements yet seek credit due to “extenuating circumstances.”\(^{22}\) Comprised of a majority of classroom teachers, a committee is to utilize guidelines established by the board of trustees to determine what may constitute an extenuating circumstance.\(^{23}\) Students have an administrative right of appeal for adverse decisions and ultimately may appeal an adverse decision to a district court.\(^{24}\)

Parents and students are not the only ones facing possible repercussions involving school absenteeism. School districts facing high rates of student absenteeism may incur a financial penalty unless a waiver is sought from the Texas Education Agency for both missed instructional days and low attendance.\(^{25}\) If approved, such a waiver would allow the districts to avoid financial penalties which would otherwise arise from reducing the number of instructional days or having lower than normal attendance.\(^{26}\)

Parents in Texas who keep a child home from school out of fear that the child may contract the H1N1 virus or other flu may face an uphill battle when confronted by school teachers, principals, or superintendents who do not excuse the absence. Too many unexcused absences could possibly even result in criminal prosecution. Local school

\(^{17}\) \textit{TEX. EDUC. CODE} § 25.094 (Vernon 2009).
\(^{18}\) \textit{TEX. EDUC. CODE} § 25.093 (Vernon 2009) (the offense is a Class C misdemeanor).
\(^{19}\) \textit{TEX. EDUC. CODE} §§ 25.093 and 25.094 (Vernon 2009).
\(^{20}\) \textit{TEX. EDUC. CODE} § 25.092 (Vernon 2009).
\(^{21}\) \textit{Id.}
\(^{22}\) \textit{Id.}
\(^{23}\) \textit{Id.}
\(^{24}\) \textit{Id.}
\(^{25}\) See \textit{H1N1 Flu (Swine Flu) Frequently Asked Questions, supra note 11.}
\(^{26}\) \textit{Id.}
officials have considerable discretion in determining whether an absence by a student is warranted or an overreaction by the parent.