

Public Health Emergency Powers in the Aftermath of Hurricane Katrina

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In the wake of hurricane Katrina, and pursuant to Section 319 of the Public Health Service Act,¹ U.S. Secretary of Health and Human Services (“HHS”) Michael O. Leavitt on August 31, 2005, declared that a public health emergency “exists and has existed since August 24, 2005 in the State of Florida and since August 29, 2005 in the States of Alabama, Louisiana, and Mississippi.”² On September 4, 2005, Secretary Leavitt made the same determination with respect to the State of Texas.³ Under the Public Health Service Act, a “public health emergency” exists when “(1) a disease or disorder presents a public health emergency; or (2) a public health emergency, including significant outbreaks of infectious diseases or bioterrorist attacks, otherwise exists.”⁴ The Secretary of HHS makes a determination that a public health emergency exists after consultation with appropriate public health officials and may take such actions as “making grants, providing awards for expenses, and entering into contracts....”⁵

Following the public health emergency declaration, Secretary Leavitt on September 1, 2005, waived specific requirements of Medicare, Medicaid and the State Children’s Health Insurance Program (“CHIP”) program as provided in Section 1135 of the Social Security Act.⁶ The waiver makes it possible for physicians and other health care workers to provide eligible evacuees with services and items and be assured that these expenses will be reimbursed even if the provider was not able to comply with appropriate laws and regulations, as long as the care was given in good faith. While the waiver initially applied only to the States of Louisiana, Mississippi, Alabama and Florida, Secretary Leavitt later amended the waiver to include providers in Texas, where the bulk of Louisiana evacuees are being housed and treated. The waiver is retroactive to August 24, 2005, for Florida, August 29, 2005, for Alabama, Louisiana and Mississippi, and September 2, 2005, for Texas. Among other HHS agency actions, the Centers for Medicare & Medicaid Services (“CMS”) has issued a fact sheet that answers frequently asked questions and reassures health care providers and patients that flexibility will be allowed in order to accommodate the extraordinary exigencies that have resulted from Katrina.⁷ Information on HHS actions in general is available at a HHS web page dedicated to the Katrina relief effort: <http://www.os.dhhs.gov/katrina/index.html>.

¹ 42 U.S.C. § 247d.

² U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES [hereinafter HHS], *HHS Declares Public Health Emergency for Hurricane Katrina* (Aug. 31, 2005), available at <http://www.hhs.gov/emergency/determination.html>.

³ HHS, *HHS Declares Public Health Emergency for Hurricane Katrina* (Sept. 4, 2005), available at <http://www.hhs.gov/emergency/determination.html>.

⁴ 42 U.S.C. § 247d.

⁵ *Id.*

⁶ 42 U.S.C. § 1320b-5. A copy of the waiver is available at <http://www.cms.hhs.gov/katrina/1135ssa.pdf>.

⁷ CENTERS FOR MEDICARE & MEDICAID SERVICES [hereinafter CMS], *Hurricane Katrina Information*, available at <http://www.cms.hhs.gov/katrina/>. CMS also has provided a digital audio recording of its Open

On a State level, the Texas Disaster Act of 1975 gives the governor the power to declare a “state of disaster if the governor finds a disaster has occurred or that the occurrence or threat of disaster is imminent.”⁸ A “disaster” for purposes of the Texas Act means:

... the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause, including fire, flood, earthquake, wind, storm, wave action, oil spill or other water contamination, volcanic activity, epidemic, air contamination, blight, drought, infestation, explosion, riot, hostile military or paramilitary action, other public calamity requiring emergency action, or energy emergency.⁹

If the governor declares a state of disaster under the Act, the proclamation not only activates applicable parts of the State’s emergency recovery plan, but also grants the governor widespread power to marshal state resources, including state agencies, to manage the crisis. In the wake of Katrina, Texas Governor Rick Perry on September 1, 2005, officially proclaimed that an emergency disaster had occurred and had created “emergency conditions for the people in the State of Texas...”¹⁰

In addition to the powers granted by the Texas Disaster Act, certain Texas statutes contain separate emergency provisions that have become relevant following Katrina, and in some cases local health authorities also have emergency powers that may now be triggered. For example, the Texas Pharmacy Act grants pharmacists authority to refill a prescription¹¹ in an emergency when the prescriber cannot be reached or when a disaster has occurred.¹² The Pharmacy Act’s emergency refill provision includes a 72-hour supply limit, but Governor Perry’s emergency declaration allows pharmacists to prescribe medications for up to 30 days for those displaced by hurricane Katrina.¹³

For physicians from Texas who want to help in the rescue and recovery operations in Louisiana and Mississippi and physicians displaced to Texas from States affected by Katrina, the federal Emergency Management Assistance Compact (“EMAC”) – a congressionally ratified organization intended to facilitate interstate emergency aid¹⁴ – makes it possible to practice medicine in another state for short periods of time in emergency situations. Chapter 778 of the Texas Health and Safety Code and EMAC require Texas to provide a temporary suspension of licensure laws for physicians from other signatory States so that they can render aid in emergencies. Also, the Texas

Door Forum held on September 1, 2005, available toll-free at (800) 642-1687 (enter 2865492# at the prompt).

⁸ TEX. GOV’T CODE § 418.014.

⁹ TEX. GOV’T CODE § 418.004.

¹⁰ *Proclamation by the Governor of the State of Texas* (Sept. 1, 2005), available at <http://www.governor.state.tx.us/divisions/press/proclamations/proclamation.2005-09-01>.

¹¹ Other than a Schedule II controlled substance.

¹² TEX. OCC. CODE § 562.053.

¹³ <http://www.tsbp.state.tx.us/hurricanemain.htm>.

¹⁴ See Emergency Management Assistance Compact at <http://www.emacweb.org/>.

Medical Practice Act gives the Texas Medical Board the power to grant temporary physician licenses, with specific expiration dates.¹⁵ The Board has already announced that it will expedite applications for 45-day temporary licenses for Louisiana physicians displaced by Katrina. The application must be accompanied by a letter containing personal information as well as the personal information of a “sponsoring physician” already licensed to practice in Texas.¹⁶

Local health authorities have the power under the Texas Health and Safety Code to impose quarantines to control outbreaks of communicable disease.¹⁷ Such quarantines may be imposed only after a local health authority “consults” with the Texas Department of State Health Services. Local health authorities also may take other disease control measures that they deem “necessary and most appropriate to arrest, control, and eradicate the threat to the public health.”¹⁸ For purposes of quarantine powers, the Texas Health and Safety Code defines a “communicable disease” as an “illness that occurs through the transmission of an infectious agent or its toxic products from a reservoir to a susceptible host, either directly, as from an infected person or animal, or indirectly through an intermediate plant or animal host, a vector, or the inanimate environment.”¹⁹

Other federal, state and local statutes authorize government officials and agencies to take a variety of additional steps to respond to an emergency, but in the aftermath of Katrina – widely considered the worst natural disaster in the United States in decades – even these broad powers may be found inadequate. Only time will tell how government can adapt to a crisis on this scale.

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¹⁵ TEX. OCC. CODE § 155.104.

¹⁶ TEXAS MEDICAL BOARD, *Katrina Emergency Request*, at http://www.tsbme.state.tx.us/katrina_emergency.htm.

¹⁷ TEX. HEALTH & SAFETY CODE § 81.085(a).

¹⁸ TEX. HEALTH & SAFETY CODE § 81.085(c).

¹⁹ TEX. HEALTH & SAFETY CODE § 81.003(1).