



1601 N. Tucson Blvd. Suite 9  
Tucson, AZ 85716-3450  
Phone: (800) 635-1196  
Hotline: (800) 419-4777

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## AAPS ANALYSIS

### REVISED DRAFT OF MODEL STATE EMERGENCY HEALTH POWERS ACT (DEC. 21) STILL A PRESCRIPTION FOR TYRANNY

The "new" Model State Emergency Health Powers Act (December 21 version) has apparently been modified to remove those provisions that attracted the most dissension. (This version can be downloaded from [www.publichealthlaw.net](http://www.publichealthlaw.net); the Oct 23 version from [www.aapsonline.org](http://www.aapsonline.org).) This appears to be a disingenuous effort to mute criticism while making little substantial change in the proposal.

For example, "firearms" have been deleted from the list of items explicitly named, but could still be included because the list is not restrictive. The intention to seize firearms has already been signaled.

The governor and other officials still have the power to practice medicine. The preamble states that "[d]uring a public health emergency, state and local officials are ... empowered to provide care, testing and treatment, and vaccination to persons who are ill or who have been exposed to a contagious disease...." (p. 9-all page references are to the Dec. 21 draft). These powers are not even restricted to the specific disease emergency but cover anyone who is ill from any cause.

A "public health emergency" does not have to constitute a clear and present danger. The harm could simply be exposure to an agent posing a "significant" risk of "substantial future harm" to a large number of people (p. 11). Do the PCBs covered with silt at the bottom of the Hudson River constitute such a hazard? They are being used as a rationale for dredging the river, over the protests of property owners on the shore. Could a risk of similar magnitude be used as a pretext to destroy the property without compensation under this proposal?

Although the proposal does give some access to courts, the Public Health Authority has the power to designate the "trial court" (p. 11).

Reporting requirements remain very broad and vague. Pharmacists would have to report "any prescription that treats a disease that is relatively uncommon or may be associated with terrorism." Is the pharmacist obligated to find out whether the tetracycline prescription is for acne, a sexually transmitted disease, or a possible bioterrorist agent such as brucellosis or plague?

The public health authority will be empowered to destroy-without compensation-any property that it

"reasonably suspects" may endanger the public health (pp. 16, 25).

The dictates of the public health authority may be enforced at gunpoint by military forces (the "organized militia") (p. 20).

One beneficial change in the proposal is that only a majority rather than a two-thirds majority is required to terminate the "emergency" - after 60 days.

Prudent preparations to cope with true emergencies, such as stockpiling supplies, are actually discouraged and stigmatized as "hoarding." In the event that more than one State was affected, the more provident State would be obligated to share with others in a "fair and equitable" manner (p. 24).

Infringements on liberty are less severe in this version, at least for ordinary citizens. Refusal of medical examination or vaccination is not a crime, but those who refuse may still be effectively imprisoned (quarantined or isolated) even in the absence of actual evidence of infection or exposure. Failure to adhere to the rules shall be a misdemeanor. At least the proposal acknowledges that confinement to a private home may be an option, and it does state that the least restrictive means necessary "must be used," and due process for relief of the quarantine or isolation is provided.

While "health care providers" (including physicians, nurses, pharmacists, and emergency responders) would not, as in the previous version, be guilty of a misdemeanor for failure to cooperate in examinations and treatments required by the State, the new penalty is possibly worse: delicensure and the inability to continue to practice in the State.

Some due process is provided for property owners to claim compensation for seized property-as long as it is not declared to be "contaminated"-but the rules for this may be made up by the courts during the emergency (p. 38).

Apparently, the author is aware of the unconstitutionality of many provisions and has inserted a "severability" provision to protect the rest of the Act should any portion be found invalid (p. 38).

All persons with medical skills, or who own facilities used in any way for a health-related purpose should be concerned about this Act. Their property can be commandeered, and their skills conscripted, to perform duties that might well violate their Oath to serve patients according to the best of their own judgment and ability. State authorities would be virtually immune from accountability for the death, economic destruction, and general havoc that they might cause.

It is prudent to remember that the Public Health Authority being entrusted with awesome power is the same one now that has for decades ignored the proliferation of chemical and biological weapons and thus bears a heavy responsibility for our lack of preparedness.

Jane M. Orient, M.D.  
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One drafting trick in response to complaints about bias is to make changes to mute the criticism but then re-insert the same bias elsewhere. For example, legislative drafters will change provisions x and y to quell criticism, but then sneak in a change to provision z to restore the same overall bias.

In the MSEHPA, the changes to mute criticism are offset by a weakening of the safeguard against State-ordered quarantines. The initial version allowed quarantining an individual only if he "poses a danger to the public health" (Section 504(b)). The revised version allows quarantining an individual "[t]o prevent the spread of contagious or possibly contagious disease" (Section 603)(b)(3)).

Parents who decline the Hepatitis B vaccine for their children now face the possibility, under MSEHPA, that the State will quarantine their children. This alarming revision is probably worse than all the positive changes combined.

Andy Schlafly, Esq. 908-719-8608  
AAPS General Counsel