NORTH CAROLINA MEDICAL SOCIETY

Recommendations Regarding Healthcare Organizations and/or Healthcare Personnel Responsibilities to Provide Care During a Pandemic Influenza Outbreak (or Other State Declared Disaster)

I. Overview and Summary

An influenza pandemic in North Carolina would place unprecedented strains on the healthcare system. It would be a tremendous challenge to provide appropriate care for thousands of flu patients with acute, life-threatening infection while simultaneously treating normally occurring incidences of illness and injury. The combined service capacities of a wide variety of healthcare institutions (e.g. hospitals and nursing facilities), health-related businesses (e.g., physicians’ offices, drug stores, pharmaceutical manufacturers and other medical suppliers), licensed and unlicensed healthcare personnel, and government agencies will be essential to respond effectively to such a pandemic. Throughout this section, healthcare institutions, organizations and businesses are referred to as healthcare organizations; and licensed and unlicensed healthcare workers as healthcare personnel (unless specifically referring to licensed healthcare professionals).

North Carolina’s healthcare organizations and personnel have extensive experience in dealing with natural disasters, such as floods, hurricanes and ice storms. However, an influenza pandemic would differ from these natural disasters in facets such as, but not limited to the duration of the crisis, the amount of needed outside support, the potential lack of available healthcare workers, and the risk of secondary infection. Natural disasters tend to be of short-duration with the direct impact generally occurring in less than a week, although other effects or consequences may last much longer. In contrast, a virulent influenza pandemic would likely consist of multiple waves of six weeks duration or longer. Healthcare personnel and organizations from outside the directly affected area often volunteer to provide assistance in the aftermath of a natural disaster. In contrast, there would be few or no outside volunteers available during such a pandemic, as healthcare personnel would be needed to care for infected individuals within their own communities and fewer local personnel available due to illness within specific areas or regions. While healthcare organizations often have to operate with limited staff for short periods of time during a natural disaster, during a pandemic, the healthcare system may experience much higher absenteeism for longer periods.

Society has an expectation that healthcare organizations, especially hospitals, will provide care in the event of a public health emergency. Organizations can only operate if they have ample staffing; thus, healthcare personnel, healthcare organizations and government must work together in a concerted fashion to maximize the likelihood that the healthcare system can effectively respond to the crisis while at the same time provide necessary services to others with ongoing healthcare needs. Government should work with public and private healthcare organizations to adequately provide security, financial, medical, and administrative support vital to keeping healthcare personnel working and healthcare institutions functioning as optimally as possible during a pandemic or other disaster.
II. Ethical Issues

Duties of licensed healthcare professionals (doctors, nurses and other allied health occupations) are strictly limited to those included in their respective occupational licensing statutes in Chapter 90 of the North Carolina General Statutes and administrative rules adopted by their governing boards. As a member of the medical profession, a physician must recognize professional responsibility to patients, first, as well as to society, to other health care professionals, and to self and family. Ethical decision making is inherently a personal decision based on many factors. While physicians have a professional responsibility to respond to the needs of their patients, this obligation must be balanced with other competing and conflicting ethical obligations. These professional responsibilities should not be translated into statutory duties due to the complexity of circumstances surrounding individual ethical decisions.

The 2001 AMA Declaration of Professional Responsibility – Medicine’s Social Contract with Humanity states in pertinent part that as members of the world community of physicians, all physicians are committed to the principles of respecting human life and the dignity of every individual, and treating the sick and injured with competence and compassion and without prejudice. While the Social Contract also states that physicians will apply their knowledge and skills when needed even though doing so may put them at risk, in times of pandemic flu or disaster, physicians should not be expected to place themselves at greater risk than the benefit they can provide.

The 2001 AMA Principles of Medical Ethics includes the following statement: “A physician shall support access to medical care for all people.” When making decisions regarding whether or not to render medical care, physicians should balance the degree of need, proximity to need, their individual capability to assist, and other possible sources of aid with the amount of increased access to care the physician can individually provide.

III. Pandemic Influenza Planning

Recommendation: Healthcare organizations should develop highly detailed pandemic influenza/disaster continuity plans in compliance with OSHA/JCAHO standards that identify the healthcare personnel and/or positions that are critical to the ongoing operation of the organizations. These disaster plans should also cover employment status related issues including work expectations and duties of critical personnel. Support that will enable critical healthcare personnel to continue working while minimizing personal risk of harm must be considered.

Healthcare organizations should strive to ensure that all tasks assigned to healthcare personnel during a pandemic influenza/disaster are targeted to addressing the existing emergency. Healthcare organizations should design their plans to facilitate and to support health care workers and physicians to respond to this disaster. Upon hiring or upon adoption of the plan, critical healthcare personnel who would be required to work pursuant to this plan should be made aware of the expectation to work, agree with that expectation, and know that sanctions will arise from failure to do so. All healthcare personnel employment contracts and/or credentialing agreements should include provisions addressing work expectations during such events.
During a pandemic influenza outbreak, healthcare organizations should only require critical workers to work onsite if they cannot adequately perform their duties at home or off-site through social distancing methods. Healthcare organizations should use informed and trained volunteer personnel, where possible, to meet staffing needs during all disasters.

Healthcare organizations should ensure that the work asked of healthcare personnel does not exceed their professional capabilities. In the event of a disaster with excess demands and limited health care resources, individuals may volunteer or be asked to perform services that are not typical of their normal duties but are within their licensed scope of practice. Physicians must consider the risks and benefits to patients in making an ethical decision to practice beyond their typical level and area of experience or expertise. The principle of doing no harm must be balanced with potential benefits.

Healthcare personnel generally do accept some risks to their own health by the nature of their chosen profession. However, these risks may be increased during the time of a disaster or pandemic flu outbreak to the extent that some may re-evaluate their ethical and professional obligations to respond. Healthcare personnel should have decision-making flexibility on the extent and capacity to which they respond to any disaster. In the case of limited medical resources, healthcare personnel with an increased risk of infection (such as front-line healthcare workers with day-to-day contact with infected individuals) and their families should be on the healthcare organization’s priority list to receive personnel protective equipment, vaccinations, anti-viral drugs, and other non-medical control measures so as to protect themselves and limit the spread of the outbreak.

Healthcare personnel who become ill during the course of a pandemic influenza should be allowed to care for themselves so they can continue to provide care for the sick during and after the pandemic is over. In addition, all healthcare personnel should have access to behavioral health services in all disasters.

Healthcare personnel may also have family/dependent obligations that are not easily addressed during a pandemic. Healthcare organizations should consider providing critical healthcare personnel with such obligations with appropriate services to enable those individuals to come to work during a pandemic influenza or other disaster. These services include childcare, transportation, food, water, and other necessities, and medical care and treatment for family/dependents who are ill or become ill or injured. Healthcare organizations should consider contingency plans for those personnel who have family or dependent obligations that they consider of a higher priority than providing care or service to others in the event of a pandemic or other disaster.

IV. State Government’s Role in Assisting Healthcare Organizations and Personnel to Effectively Respond to Pandemic Influenza

Recommendation: State government should work with healthcare organizations to develop a highly detailed pandemic influenza response plan that includes the following elements:

1. Ensuring physical security of operating healthcare organizations
2. Providing necessary logistical support to maintain operation of the healthcare system including medicines and supplies for treatment, prevention, and care, and normal day to day functions of such a system

3. Communication of information and guidance for healthcare organizations and physicians to assist in making critical medical treatment decisions including decisions to limit, withdraw, and/or terminate care and the factors to consider in making such decisions.

4. Providing financial support for all healthcare personnel and organizations who respond to the disaster

State government should mobilize security forces including state and local government law enforcement employees, the North Carolina National Guard, etc. to provide ongoing physical security to all healthcare organizations and personnel providing medical treatment during a pandemic influenza or other disaster.

State government should provide all necessary logistical support including communications capabilities, personnel to ensure utilities services including electricity, water, and heating/cooling and ventilation systems remain operational, and ongoing procurement, and delivery of necessary food, water, and medical supplies from public and private sources to healthcare organizations during a disaster. State government planning for pandemic influenza should include measures to ensure patients may receive all needed treatment at the closest local responding healthcare organization to their home to promote containment of further spread of the outbreak.

State government should provide easily accessible information and updates as often as possible to all healthcare organizations and personnel regarding pandemic influenza/disaster status, available medical resources, and medical rationing/treatment instructions in accordance with local circumstances. This information is essential to healthcare organizations to ensure ongoing compliance with EMTALA and decrease the risk of avoidable adverse health outcomes.

The State of North Carolina should consider providing additional monetary compensation and disability and life insurance as incentives to attract more volunteer healthcare personnel and acknowledge their acceptance of increased risk of sickness or death associated with employment during a pandemic influenza.

**Recommendation:** State law should be amended to provide that critical healthcare personnel with direct patient contact or others at increased risk of infection due to their required work as part of a state or healthcare organization disaster plan and their families be given priority access to vaccinations and anti-viral medications.

**Recommendation:** State law should be amended to provide workers’ compensation benefits to individuals who are injured because they were required to obtain a vaccination or other prophylaxis as part of their job responsibilities.

Healthcare personnel required to receive an influenza vaccination pursuant to federal or state law or employer designation as a critical healthcare worker should be compensated if they are injured due to the vaccine. Workers’ compensation laws offer protection to people
who were injured because they were required to receive the smallpox vaccination, G.S. 97-53(29). Similar protections do not exist for workers who are required to receive an influenza vaccine as part of their job responsibilities.

Recommendation: State law should be amended to provide civil and/or medical malpractice liability protection to healthcare organizations and personnel including qualified immunity for all actions except in cases where there is clear and convincing evidence of willful misconduct, gross negligence, or bad faith, during a declared state of emergency pursuant to N.C.G.S. §166A such as pandemic influenza.

N.C.G.S. §166A-14 should be amended as follows:

(a1) In the event of an occurrence which the Governor of the State of North Carolina has declared a disaster or when the Governor has declared a state of emergency, or in the event of an occurrence for which a county or municipality has enacted an ordinance to deal with states of emergency under G.S. 14-288.12, 14-288.13, or 14-288.14, or to protect the public health, safety, or welfare of its citizens under Article 22 of Chapter 130A of the General Statutes, G.S. 160A-174(a) or G.S. 153A-121(a), as applicable, any healthcare provider who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with any of the following: medicine, surgery, dentistry, pharmacy, optometry, midwifery, osteopathy, podiatry, chiropractic, radiology, nursing, physical therapy, athletic trainers, pathology, respiratory therapy, anesthesiology, anesthesia, laboratory analysis, rendering assistance to a physician, dental hygiene, psychiatry, psychology; or a hospital or a nursing home; or any other person who is legally responsible for the negligence of such person, hospital or nursing home; or any other person acting at the direction or under the supervision of any of the foregoing persons, hospital, or nursing home providing medical services shall not be liable for the death of or injury to persons, or for damage to property as a result of any such activity except in cases with clear and convincing evidence of willful misconduct, gross negligence or bad faith.

Recommendation: State law should be amended to provide that good faith compliance with state directives regarding limitation, withdrawal, and/or termination of care and the factors to consider in making such decisions constitutes prima facie evidence sufficient for dismissal of any criminal charges or civil/medical malpractice lawsuit against healthcare organizations and/or personnel for actions during a declared disaster under N.C.G.S. §166A.

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\(^a\) Current law considers certain conditions to be occupational diseases, compensable under workers compensation laws. This includes “Infection with smallpox, infection with vaccinia, or any adverse medical reaction when the infection or adverse reaction is due to the employee receiving in employment vaccination against smallpox incident to the Administration of Smallpox Countermeasures by Health Professionals, section 304 of the Homeland Security Act, Pub. L. No. 107-296 (Nov. 25, 2002)(to be codified at 42 USC §233(p)), or when the infection or adverse medical reaction is due to the employee being exposed to another employee vaccinated as described in this subdivision.”
Recommendation: State law should be amended to provide immunity for healthcare organizations and personnel from criminal prosecution or civil/medical malpractice liability for actions in the course of providing healthcare services for which they have a good faith basis to believe that the benefit of performing the service outweighs the harm of not doing so during a declared state of emergency pursuant to N.C.G.S. §166A.

Recommendation: State law should be amended to provide that healthcare organizations and/or personnel should be indemnified by the State for all costs and attorneys’ fees of defending any civil/medical malpractice lawsuit for actions during a declared disaster under N.C.G.S. §166A unless the injury or death is shown by clear and convincing evidence to be a result of willful misconduct, gross negligence or bad faith.

Recommendation: Federal law should be amended to provide that healthcare organizations and/or personnel should be indemnified by the State for all costs and attorneys’ fees of defending any EMTALA related lawsuit for actions during a federal or state declared disaster under N.C.G.S. §166A unless any violation is shown by clear and convincing evidence to be a result of willful misconduct, gross negligence or bad faith.

Government may have to determine where medical equipment, supplies, and services are needed during a disaster. For example, in the event of a pandemic influenza outbreak, there may be insufficient ventilators to meet the respiratory needs of every infected individual in the state. Physicians and other healthcare personnel may be required by the state to triage who receives ventilator services. State directives providing medical treatment guidelines regarding limitation, withdrawal, and/or termination of care and the factors to consider in making such decisions and other related issues will assist physicians and other healthcare personnel to ensure that all available medical resources are fully utilized and reduce the probability of adverse health outcomes. If there is an adverse health outcome because of this forced need during a pandemic or other disaster to limit certain healthcare services, healthcare organizations and personnel acting in good faith should not be held liable. In responding to declared disasters, healthcare workers should not be held liable for any actions during a declared disaster unless their treatment decisions amount to willful misconduct, gross negligence, or bad faith.

Recommendation: State law should be amended to provide that healthcare organizations and/or personnel are immune from disciplinary action by any professional licensing or certification agency for actions taken in the course of providing healthcare services during a declared state of emergency pursuant to N.C.G.S. §166A that were: (1) in good faith and based on reasonable medical judgment under the circumstances and (2) were in the best interest of the patient.