

Legal Issues in Public Health Emergencies

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Agenda

- Introductions
- Crisis Standards of Care
- Isolation and Quarantine
- Vaccines
- BREAK!
- Volunteers and Liability
- Vulnerable Populations
- HIPAA



Crisis Standards of Care

Crisis Standards of Care

- Crisis standards of care (CSC) provide guidance on how hospitals and other healthcare facilities can fairly allocate resources in the event of an overwhelming medical surge
- Currently ~38 states have official CSC plans

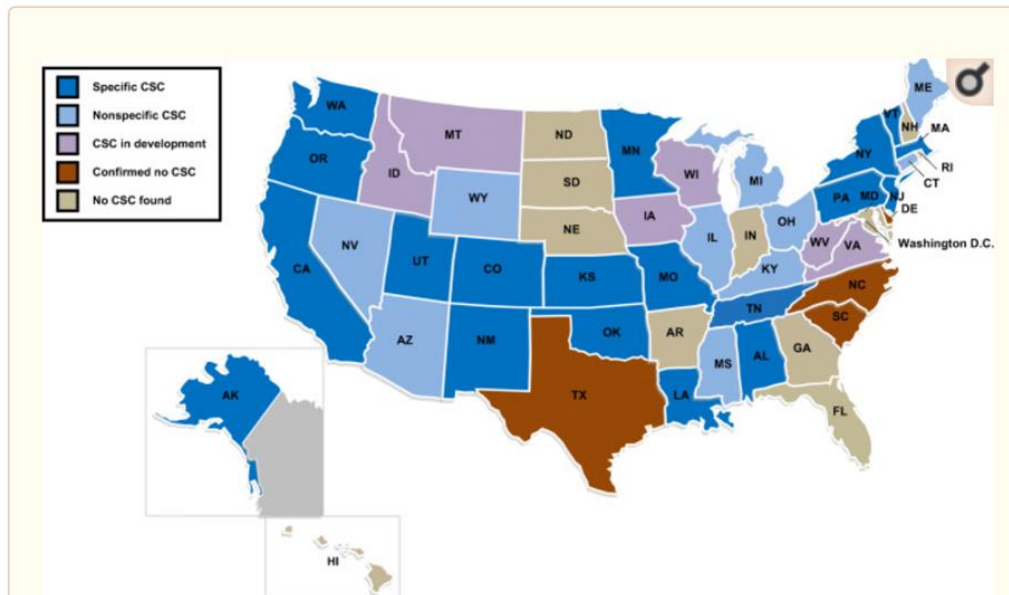


Fig. 2

Crisis Standards of Care across the USA, by status of development as of May 3, 2020



What are the guiding principles underlying Crisis Standards of Care?

- The medical community aims to provide the best care for the most patients possible in Nebraska.
- Healthcare planning must do everything possible never to need CSC.
- The goal is to provide equitable and consistent treatment throughout the state, no matter where patients live or what health care facility they visit.
- CSC have the joint goals of extending the availability of key resources and minimizing the impact of shortages on clinical care.
- CSC strive to save the most lives possible
- Implementation of CSC will require facility-specific decisions regarding the allocation of limited resources, including how patients will be triaged to receive life-saving care.



What decisions are involved in Crisis Standards of Care?

- Decisions on how to allocate scarce resources
 - Staff
 - Space
 - Supplies
- These decisions need to be supported in order to alleviate stress on healthcare providers and to remove bias



Triage Teams

- Each facility should have access to a crisis triage team that will be activated in a crisis if that facility approaches its minimal operating capacity for resources like ventilators. A triage team will make decisions based on medical condition. A triage team should consist of:
 - An expert on ethics or palliative care
 - An attending physician or provider familiar with critical care
 - A representative of nursing staff
 - A representative of the facility's leadership
- The primary medical team caring for a patient **SHOULD NOT** be involved in crisis triage decision-making for their own patient. Each institution should create a crisis triage team that is objective and removed from the patient.



CSC Planning in Nebraska

- CSC Plan drafted and reviewed by numerous clinicians and stakeholders across the state
- CSC plan is based on the Massachusetts CSC plan
- 11/24/2020 – Nebraska Hospital Association and Nebraska Medical Association both endorsed the final plan
- Launched education on CSC across the state
- Coalition planning initiated on CSC triage and how to operationalize the plan regionally across the state



LB 53

- Introduced by Senator Steve Lathrop on January 7, 2021, hearing held in the Judiciary Committee on February 8, 2021
- Bill was written to provide immunity for healthcare providers acting under Crisis Standards of Care (CSC), and related strictly to the declared COVID-19 emergency
- Used the MEOC CSC planning guidance to define the state crisis standards



LB 139

- Introduced by Senator Briese on January 8, 2021
- Created as a general COVID-19 Liability act, providing liability protection to businesses and individuals from claims relating to COVID-19 exposure
- Merged with LB 53, but language changed to Health Care Crisis Protocol Act
- Passed legislature on May 20, and signed by the Governor on May 26



LB 139 Continued

- Health Care Crisis Protocol Act
 - Uses the MEOC Planning document as the state health care crisis protocol
 - Requires hospitals to have a copy of the health care crisis protocol and to make that copy available to the public
 - No other type of health care facility is included in this requirement
 - DHHS will also maintain a copy of the health care crisis protocol on their website



Isolation and Quarantine

Isolation vs. Quarantine

- **Isolation** –

- Reasonable belief of ***infection*** with a quarantinable, communicable disease

- **Quarantine** –

- Reasonable belief of ***exposure*** to a quarantinable, communicable disease



Federal Quarantine Authority

- Authority to “prevent the transmission, introduction, or spread of communicable diseases”
- Statutory authority for Health and Human Services to govern questions of isolation and quarantine
 - HHS created regulations which give operational oversight to CDC
- Covers interstate and foreign quarantine rules
- Federal quarantine last invoked in 1963



Quarantinable Diseases

- Determined by Executive Order
- List of diseases:
 - Cholera
 - Diphtheria
 - Infectious Tuberculosis
 - Plague
 - Smallpox
 - Yellow Fever
 - Viral Hemorrhagic Fevers
 - **Severe acute respiratory syndromes**
 - Influenza caused by novel or reemergent influenza viruses that are causing, or have the potential to cause, a pandemic



CDC Regulatory Governance

- Most recently modified in 2017
- Regulations split between interstate and foreign quarantine
- Allow for protective measures such as limiting travel and conducting screenings at ports of entry

42 CFR Part 70 - INTERSTATE QUARANTINE

CFR

[prev](#) | [next](#)

[§ 70.1 General definitions.](#)

[§ 70.2 Measures in the event of inadequate local control.](#)

[§ 70.3 All communicable diseases.](#)

[§ 70.4 Report of disease.](#)

[§ 70.5 Requirements relating to travelers under a Federal order of isolation, quarantine, or conditional release.](#)



State Quarantine Authority

- Most frequently utilized
- Can be voluntary or involuntary
- Laws and processes differ across states
 - Nebraska uses Directed Health Measures, ordered by local health departments
- Diseases that may qualify for quarantine/isolation differ across states



Legal Rights under Quarantine

- Right of Habeas
 - Determines whether there is sufficient cause to justify detention
 - Constitutional right, cannot be infringed by federal or state entities
- Right to Counsel
 - Federal – right to counsel at medical review
 - State – varies, only 23 states explicitly allow for the right to counsel in the state regulations
 - Nebraska – No explicit right to counsel



Legal Rights under Quarantine

- Right to Food, Medicine, and Other Necessities
 - Federal – Provides adequate food and water, appropriate accommodation, appropriate medical treatment, and means of necessary communication
 - State – Varies, some states require individuals to pay for their own needs
 - Nebraska – no explicit right
- Right to Lost Compensation
 - Federal – no provision
 - State – Varies, 20% of states provide employment protection for quarantined individuals
 - Nebraska – no explicit right



Vaccines

Jacobson v. Massachusetts (1905)

- Cornerstone Public Health Law case
- Jacobson refused mandatory smallpox vaccination and said it was an invasion of his liberty, was fined \$5, and appealed his case to the Supreme Court
- Holding: “The state may be justified in restricting individual liberty... under the pressure of great dangers to the safety of the general public.”



Rapid-fire vaccine questions

- Can private businesses require proof of vaccination for individuals entering business?
 - Yes, with exemptions for disability and religion
- Is this an invasion of 4th amendment rights to not be subject to unlawful search or seizure?
 - No, 4th Amendment only applies to government action, not private business
- Can employers legally require the COVID-19 vaccine for their employees under the EUA?
 - Unclear.



Volunteers and Liability

Volunteer Protection Act of 1997

- The VPA is a federal law, protecting volunteers from the risk of liability, when acting on behalf of a non-profit or governmental organization
 - Unless their actions are willfully negligent or in bad faith
- Sets a baseline threshold protection for volunteers, which states may then add on to



Nebraska Guidance - Liability

- Nebraska Emergency Management Act
 - “For purposes of the Emergency Management Act, unless the context otherwise requires: ...
 - Emergency management worker includes any full-time or part-time paid, *volunteer*, or auxiliary employee of this state...”
 - (Neb. Rev. Stat. 81-829.39)
 - Includes volunteers in the definition of emergency management worker
 - Only if formally organized and their efforts are coordinated with local or state emergency operations plan (i.e. ESAR-VHP)



Nebraska Guidance - Liability

- Nebraska Emergency Management Act
 - Includes emergency management workers in liability shield language
 - Waives licensure requirement for *authorized* emergency management workers
 - Allows emergency management workers to practice across state borders where mutual aid agreements/compacts are in place



Nebraska Guidance – Liability

- 2009 Attorney General Guidance
 - Interprets Emergency Management Act to provide liability shield during training and exercising for volunteers
- Emergency Management Assistance Compact (EMAC)
 - Allows individuals to practice across state lines in an emergency and provides protection from liability and workers compensation coverage



Vulnerable/At-Risk Populations

What's the correct term to use?



How has the government addressed At-Risk Populations?

2006 – Pandemic and All-Hazards Preparedness Act (PAHPA)

One Hundred Ninth Congress
of the
United States of America

AT THE SECOND SESSION

*Begun and held at the City of Washington on Tuesday,
the third day of January, two thousand and six*

An Act

To amend the Public Health Service Act with respect to public health security and all-hazards preparedness and response, and for other purposes.

*Be it enacted by the Senate and House of Representatives of
the United States of America in Congress assembled,*

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the “Pandemic and All-Hazards Preparedness Act”.



At-Risk Definitions



PAHPA



At-Risk Definitions



PAHPA



HHS



At-Risk Definitions



PAHPA



HHS



FEMA

FEMA



Needs of At-Risk Individuals



HHS - CMIST

Communication

Maintaining Health

Independence

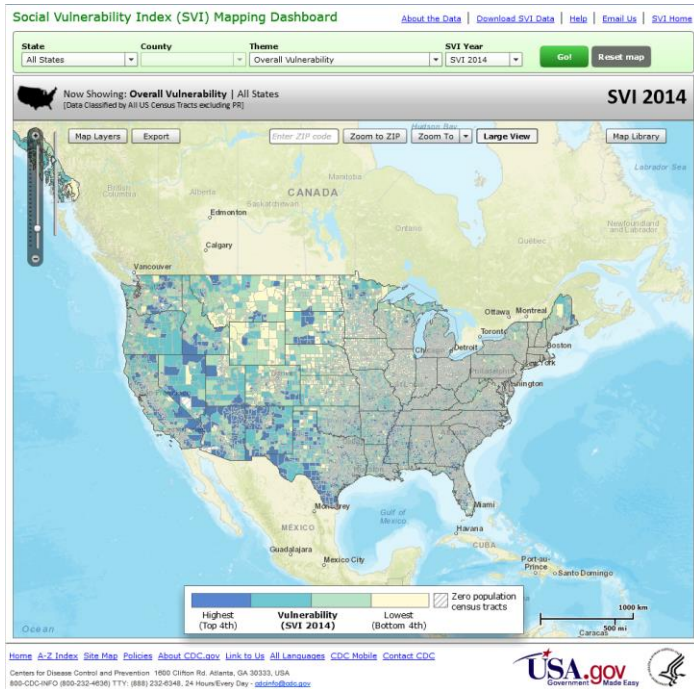
Services and Support

Transportation



CDC Social Vulnerability Index

www.svi.cdc.gov



Social Vulnerability



Socioeconomic Status



Age



Gender



Race and Ethnicity



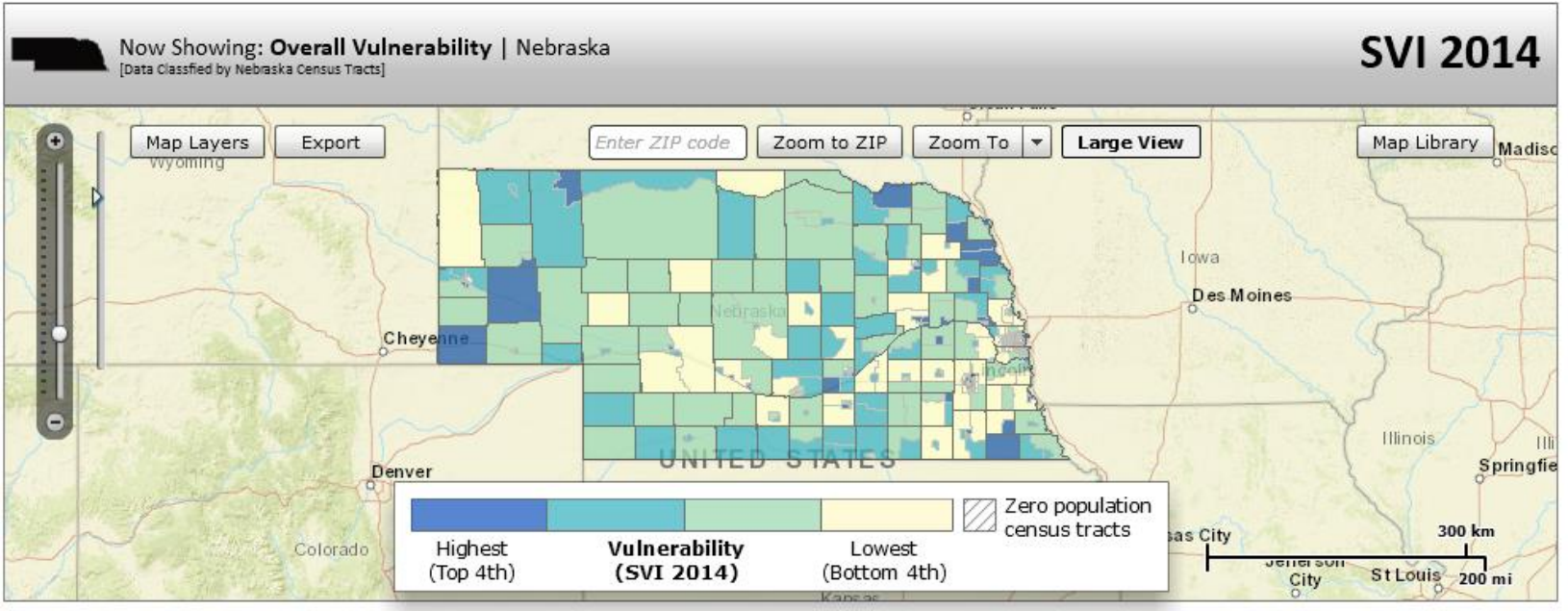
English Language Proficiency



Medical Issues and Disability



Social Vulnerability Index Map (Nebraska)



HIPAA for Emergencies

What is HIPAA?

- The Health Insurance Portability and Accountability Act (HIPAA) governs the use of patients' protected health information (PHI) in a *healthcare* setting
- Broken into two sections - Privacy and Security Rules
- Ensures that patients' PHI is safely and privately maintained, and that unauthorized disclosures do not occur
- In an emergency, healthcare facilities must ensure that all HIPAA requirements are still followed
 - Unless there is a specific 1135 waiver



Who is a Covered Entity?

- Healthcare providers
- Health plans
- Healthcare clearinghouses



What is PHI?

- Protected health information, or PHI, includes any individually identifiable health information that relates to:
 - A person's past, present, or future physical or mental health or condition,
 - The provision of health care to the person, or
 - The past, present, or future payment for the provision of health care to the person
- This includes demographic data such as name, address, and date of birth



When can PHI be released without an individual's consent, and to whom?

- Under the HIPAA privacy rule, healthcare facilities may disclose an individual's PHI without their prior authorization only in specific circumstances. Those circumstances include:
 - If disclosure is necessary to treat the patient,
 - To a legally authorized public health authority, who requires the information for public health purposes,
 - To individuals at risk of contracting or spreading a disease or condition (if authorized by other law),
 - To family, friends, or other individuals who may be involved in or responsible for a patient's care,
 - To legally authorized disaster relief organizations in the event that they are coordinating family notification efforts, or
 - If there is an imminent threat to public health or safety.



Other HIPAA Info

- Anytime a disclosure is made under HIPAA, the covered entity should ensure that only the minimum necessary information is disclosed, unless the disclosure is to a fellow healthcare provider for treatment purposes.
- Covered entities should also document all disclosures of PHI. HIPAA requires covered entities to keep records of disclosure of patient PHI, and additionally to provide a log of PHI disclosure or use to patients upon request so that they may see how their information has been disclosed.



Questions?





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