

COVID-19: When Mandatory Isolation and Quarantine Become Necessary

The use of mandatory isolation and quarantine remedies has generated concerns and much debate regarding infringement of individual liberties. These challenges have met with limited success in New Jersey.

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On March 9, 2020, New Jersey Governor Phil Murphy issued Executive Order 103 which declared a Public Health Emergency and State of Emergency in the State of New Jersey, as a result of the coronavirus 2019 (COVID-19) outbreak. Included among the sources of legal authority for the governor's action is N.J.S.A. 26:13-1, et seq., which is known as the Emergency Health Powers Act (EHPA). Pursuant to N.J.S.A. 26:13-3(b), a public health emergency declared under the EHPA terminates automatically after 30 days unless renewed by the governor. From what we know at this time about COVID-19, we can anticipate renewals of the public health emergency declaration.

Modeled after the CDC's Model State Emergency Health Powers Act, the New Jersey Act became effective in September 2005 and was adopted because of potential bioterrorism concerns in the aftermath of the 9/11 attacks, and the potential for a widespread outbreak of Severe Acute Respiratory Syndrome (SARS). It was intended to "augment the emergency authority of the Commissioner of Health." See generally Jackson & Robertson, "Bioterrorism



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Preparedness: Isolation and Quarantine Issues," 179 N.J.L.J. 1143 (March 21, 2005).

The public-health steps taken to date because of COVID-19 in the absence of wide-scale testing initially included attention to personal hygiene and "self-distancing" as well as voluntary self-quarantine of persons suspected of or at risk for the COVID-19 disease. In the executive order, the governor for the present "reserved" additional authority and powers under the EHPA. On March 16, 2020, the governor issued Executive Order 104, which included the implementation of additional "social mitigation" protective steps in the form of limiting the number of persons at all gatherings, closing schools, and setting curfews.

On March 21, 2020, the governor issued Executive Order 107, which rescinded Executive Order 104 with more extensive restrictions that constitute essentially a statewide "stay at home" order, except for anyone involved with identified essential businesses, and the direction that whenever anyone ventures out of the home the social distancing guidance should be followed.

The "stay at home" order anticipates cooperation while being mandatory, but it is foreseeable that even more stringent and restrictive steps may be required to deal with the health crisis. These steps may also include mandatory isolation and quarantine orders. Such "lock-downs" have already been put in place in other countries affected

by COVID-19, such as China and Italy. It was also invoked as “an unprecedented action” by the CDC on Jan. 31, 2020, in ordering the 14-day quarantine of 195 Americans who had been evacuated by plane from the Wuhan, China, epicenter of the outbreak. <https://www.cdc.gov/media/releases/2020/t0131-2019-novel-coronavirus.html>.

Isolation is the physical separation and confinement of persons to prevent the spread of a contagious disease with which they are—or are believed to be—infected. Quarantine is the physical separation and confinement of persons who have been or are believed to have been exposed, but do not show symptoms of the disease. Access to and use of property can be restricted. The Supreme Court upheld the power of government to isolate and quarantine individuals, in the absence of effective vaccination or other treatment, in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). It permitted someone who had refused a smallpox vaccination to be quarantined as a form of self-defense for the protection of the public.

The commissioner of the Department of Health (DOH) has long had authority to identify communicable diseases and require reporting by physicians. This is now embodied in N.J.S.A. 26:4-1; 26:4-15, with regulations to be found at N.J.A.C. 8:57-1.3; 1.4; 1.5. The current list of reportable communicable diseases promulgated by DOH includes “Influenza, novel strains only.” N.J.A.C. 8:57-1.5.

Pre-EHPA, the legislature had empowered DOH and local health boards to maintain and enforce “proper and sufficient quarantine, wherever deemed necessary.” N.J.S.A. 26:4-2. Through broad implementing regulations upon receiving a report of a communicable disease, DOH can establish isolation or other restrictive

measures to prevent or control disease. N.J.A.C. 8:57-1.9.

Isolation and quarantine impact on personal liberty and safety as well as property rights. Drawing on *Jacobson*, long-standing common law principles provide tort immunity for Boards of Health establishing quarantines even where the disease did not actually exist provided the actions were “in good faith.” *Valentine v. Englewood*, 76 N.J.L. 509 (E & A 1908). The state Tort Claims Act incorporates these principles for public health decisions. N.J.S.A. 59:6-3.

The use of mandatory isolation and quarantine remedies has generated concerns and much debate regarding infringement of individual liberties. These challenges have met with limited success in New Jersey. The EHPA has not yet been tested.

In *Newark v. J.S.*, 279 N.J. Super. 178 (Law Div. 1993), the court dealt with the confinement of a homeless person who evidenced active tuberculosis. The court upheld the statute authorizing the confinement and analogized the proceeding ordering isolation or quarantine to a civil commitment. As such, it concluded that proof of danger must be established by “clear and convincing evidence,” with a right to counsel. Moreover, the government must use the least restrictive alternative available under the circumstances to effectuate confinement. Because J.S. had contagious active TB and was homeless, the court concluded that isolation in a hospital setting was the least restrictive alternative for him. J.S. still had “the right to refuse invasive medical treatment and medications, even if unwise,” but that would necessarily delay release from isolation.

Recognizing the imprimatur placed on the use of the police power in this setting by *Jacobson v. Massachusetts*, the judge insightfully commented:

The claim of “disease” in a domestic setting has the same kind of power as the claim of “national security” in matters relating to foreign policy. Both claims are very powerful arguments for executive action. Both claims are among those least likely to be questioned by any other branch of government and therefore subject to abuse. The potential abuse is of special concern when the other interest involved is the confinement of a human being who has committed no crime except to be sick.

Similarly, in *Hickox v. Christie*, 205 F. Supp.3d 579 (D.N.J. 2016), the court rebuffed an after-the-fact civil rights claim brought by a nurse who returned from Africa and was found to have a fever. She had been working near Ebola patients. The nurse was subjected to a period of quarantine at Newark Liberty Airport and then at her residence. The mandatory confinement was based on the Commissioner of Health’s general authority to quarantine and isolate for communicable diseases in N.J.S.A. 26:4-2(d) rather than the EHPA.

Relying on *Jacobson*, the federal court in *Hickox* found no violation of the nurse’s civil rights even though the confinement continued beyond the obtaining of blood tests that were negative for infection. Ebola is a disease for which there is no vaccine or cure along with a nearly three-week incubation period for symptomatic manifestations of the disease. The *Hickox* analysis is somewhat flawed, however, because the mechanism of transmission is direct contact with the blood or body fluids of a person who is sick or had died from Ebola. <https://www.cdc.gov/vhf/ebola/transmission/index.html> In contrast, as set out in Executive Order 103, the symptoms of COVID-19 include fever, cough and shortness of breath, which may appear in as few as two or

as long as 14 days after exposure, and can spread from person to person via respiratory droplets produced when an infected person coughs or sneezes. The risk of airborne transmission is a much greater danger.

The governor's declaration of the COVID-19 public health emergency triggers extensive powers on the part of the DOH commissioner, including control and use of property and requiring health-care facilities to provide services or the use of its facility to respond to the emergency. N.J.S.A. 26:13-9. Effective March 20, 2020, DOH, in conjunction with the Department of Human Services, required post-acute and long-term care facilities to report on the availability of beds and personal protective equipment so as to be aware of space for vulnerable populations if the need should arise.

Under the EHPA, to diagnose and treat contagious disease, DOH can order persons to submit to physical examination or testing, as well as vaccination or treatment. A person's refusal of examination, vaccination or treatment is "prima facie evidence that the person should be quarantined or isolated." N.J.S.A. 26:13-15(b)(1). The reasons for refusal still providing a basis for quarantine encompass "health, religion or conscience." N.J.S.A. 26:13-14(c)(2).

In ordering isolation or quarantine, DOH may designate suitable places, including a person's home. The Act incorporates a requirement that the isolation or quarantine be "by the least restrictive means necessary to protect the public health." N.J.S.A. 26:13-15(a)(3). Isolation or quarantine terminates when the person no longer poses a risk of transmitting infectious disease. Humanitarian considerations are to be observed,

including safe and hygienic premises designed to minimize the likelihood of further transmission.

Under the EHPA, DOH is to petition the Superior Court for an order authorizing isolation or quarantine. N.J.S.A. 26:13-15(e)(1). The application may be done ex parte. In an emergency the commissioner of DOH may issue a verbal order to be followed by a written order requested within 72 hours. Contrary to *Newark v. J.S.*, only a preponderance of the evidence is needed for an order. N.J.S.A. 26:13-15(e)(3). A person has a right to counsel and a hearing in the Superior Court within 72 hours. A further hearing must be held no less than 10 days later to contest continued isolation or quarantine. Immediate release is to be ordered if continued isolation or quarantine were not warranted. The court may order appropriate remedies if the humanitarian "safe and hygienic" requirements are not met.

Any person subject to isolation or quarantine "shall obey" the order and not leave or have contact with other persons not subject to isolation or quarantine other than a physician or person authorized to enter. N.J.S.A. 26:13-15(d). The original MSEHPA made violation of a quarantine or isolation order a misdemeanor. While that model provision was adopted in several states, New Jersey is not one of them. Violation may, however, be contempt of court. Any person entering an area of isolation or quarantine without authorization is subject to being isolated or quarantined.

Consistent with the long-standing principle found in *Valentine v. Englewood*, a public entity and its agency "shall not be liable" for any civil damages when injury results from acts or omissions within the scope of the Act

when done "in good faith." N.J.S.A. 26:13-19(b). Public entities, employees, volunteers as well as private persons or entities face "no liability" for activities in connection with a public health emergency unless the conduct constitutes a crime, actual fraud, actual malice, gross negligence or willful misconduct.

The EHPA provides that a person subject to isolation or quarantine is entitled to reinstatement to employment with concomitant seniority, status and pay. N.J.S.A. 26:13-16. The attorney general is to act as counsel for any person denied reinstatement.

The New Jersey statute embodies a balance of discretionary power to protect public health with respect for individual liberty and fundamental notions of due process. Its structure is such as to ensure that the power to quarantine and isolate is only used when it is necessary, and under conditions conducive to its success as a protective measure. Blanket deference to governmental or administrative authority in the name of "preventing disease" should not be the norm. But New Jersey's EHPA seems to recognize that respect for the public health requires that quarantine be placed within our constitutional system and be subject to judicial oversight with the expectation that it be used in clear circumstances demonstrating that it is the least-restrictive alternative and the impetus is grounded in science. This avoids the erosion of public trust as well as the abuse of public health powers for political objectives and to the detriment of public health.

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