Upholding Tribal Sovereignty in Federal, State, and Local Emergency Vaccine Distribution Plans

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Abstract: Cross jurisdictional collaboration efforts and emergency vaccine plans that are consistent with Tribal sovereignty are essential to public health emergency preparedness. The widespread adoption of clearly written federal, state, and local vaccine plans that address fundamental assumptions in vaccine distribution to Tribal nations is imperative for future pandemic response.

Tribal nations have historically been excluded from cross jurisdictional vaccine planning and collaboration critical to the effective distribution of vaccines in emergencies. This exclusion led to severe consequences during the 2009 H1N1 pandemic when a number of Washington Tribes prioritized the vaccination of Tribal elders, departing from Centers for Disease Control and Prevention (CDC) guidance for state and local health departments which, at the time, prioritized children.[1] These Tribes based their decision on various factors including cultural considerations and morbidity and mortality rates within their communities.[2] At that time, many Tribes in Washington State received delivery of their vaccines from local health jurisdictions (LHJs). In response, some LHJs did not distribute vaccines to these Tribes on the basis that the Tribes' priority groups for vaccines conflicted with CDC recommendations.[3] Several months later, CDC Director Thomas Frieden informed state health officers that all American Indian and Alaska Native people, regardless of age, "should also receive the vaccine on a priority basis."[5] Unfortunately, many Tribes never benefitted from the retroactive guidance, leaving those Tribes without the vaccines needed to protect their citizens.[6]

H1N1 demonstrated the pressing need to clarify the roles and responsibilities of federal, state, and local governments in emergency vaccine distribution to Tribal nations and the opportunity for each jurisdiction to foster partnerships in disaster response efforts that honor Tribal sovereignty. This article reviews the process for Tribal inclusion in emergency vaccine distribution by (1) providing an overview of Tribal governments' public health powers; (2) analyzing cross jurisdictional planning efforts in Washington State and the development of the federal COVID-19 Vac-

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cination Program for Tribal nations; and (3) recommending four key components that federal, state, and local officials should incorporate in future emergency vaccine distribution planning to ensure inclusion of Tribal nations.

Tribal Governments' Public Health Power and Authority

Federal, Tribal, and state governments are the three types of sovereigns in the United States.[7] As one of the three sovereigns, federally recognized Tribal governments possess the legal authority to protect the health and welfare of their citizens.[8] In contrast to a local government that derives certain powers to enact ordinances from a state constitution or statute, a Tribe's power is inherent, and the Tribe does not need delegated authority from any source to exercise their public health powers.[9] Tribal sovereignty may only be divested or diminished by Congress — not a state or local government or any other party — and no federal law has divested Tribes of their public health powers.[10] All Tribal governments possess a wide range of public health powers including, but not limited to: (1) declaring public health emergencies;[11] (2) ordering mandatory isolation and quarantine;[12] (3) closing businesses and reservation borders to protect Tribal citizens;[13] (4) performing case and contact investigations;[14] and (5) conducting surveillance activities.[15]

Understanding a Tribe's public health powers in relation to other governments can encourage productive cross jurisdictional efforts. As Professor James Hodge astutely asserts, "Federal, tribal, state and local governments often work together to address public health issues. Yet, sometimes they clash over who is in charge though they clearly have the power to act."[16] A Tribal government's "power to act" in the realm of public health is often misunderstood or disregarded despite the fact that a Tribe's power to govern their people is recognized and protected under federal law.[17] H1N1 was a strong reminder that a lack of understanding of Tribal jurisdictional authorities and respect for Tribal sovereignty can have detrimental impacts on Tribal governments and American Indian and Alaska Native people by creating a barrier to critical resources. To effectuate laws and policies that do not further harm Tribal nations, federal, state, and local jurisdictions must support and uphold the sovereign authority of Tribal governments to exercise their public health powers.

Cross Jurisdictional Planning Efforts in Washington State and the Federal COVID-19 Vaccination Program for Tribes

Shortly after the events of H1N1, Tribes and LHJs identified the need for federal and state agencies to provide clear and sufficient guidance regarding the distribution of medical countermeasures (MCM).[18] The American Indian Health Commission (AIHC), an organization that works in support of member Tribes and urban Indian health programs in the State of Washington, in partnership with the Washington State Department of Health (WA DOH), engaged Tribes and LHJs to identify and address gaps in the MCM distribution system in Washington State. AIHC facilitated cross jurisdictional collaboration meetings with participants from the twenty-nine federally recognized Tribes in Washington, two urban Indian health programs, the WA DOH, and thirty-five LHJs over a period of several years. Participants engaged in MCM tabletop exercises and developed extensive policy recommendations to WA DOH in 2018.[19] Based on these recommendations, AIHC proposed language addressing the distribution of MCM to Tribes to be added to the WA DOH MCM plan. Within months of the impending arrival of the COVID-19 vaccines, WA DOH Secretary John Wiesman, following formal consultation with Washington Tribes, approved the state's MCM plan which fully adopted AIHC's proposed cross jurisdictional policy.[20]

Subsequently, the AIHC reached out to the CDC's Public Health Law Program (PHLP) to inquire how CDC could adopt MCM distribution policies similarly deferential to Tribal sovereignty. As the COVID-19 vaccine distribution plans began to form, PHLP connected AIHC with the newly formed Federal Entities Team on CDC's COVID-19 Vaccine Task Force. The guidance provided by AIHC to the Federal Entities Team helped CDC develop a proposed vaccine distribution program for Tribal nations that became the

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basis for emergency consultation with Tribes.[21] These efforts ultimately resulted in the Tribal COVID-19 vaccine program, the development of the Tribal section of CDC's *COVID-19 Vaccination Program Interim Playbook for Jurisdiction Operations*,[22] and led to vaccine distribution to Tribes through states and the federal Indian Health Service.

With these policies in place prior to the COVID-19 vaccine rollout, federal, state, Tribal, and local jurisdictions had access to improved guidance on the jurisdictional roles and responsibilities for vaccine distribution to Tribes. As reported by Tribes in Washington State in the *Tribal Covid-19 Pandemic After Action Report*, the "new policy of recognizing the sovereign right of Tribes to receive vaccine and determine their own service and priority populations was the strongest factor for Tribes' success in conducting widespread vaccination efforts."[23] This policy benefited not only Tribal nations but their surrounding communities, many of whom were able to receive their vaccines from neighboring Tribes.[24] In Washington State, Tribes and urban Indian health programs vaccinated over 250,000 individuals.[25]

Four Key Components for Including Tribes in Federal, State, and Local Emergency Vaccine Distribution Plans

Tribal nations benefit from effective coordination and communication with federal, state, and local governments to review and update vaccine plans. These plans should clearly outline the roles and responsibilities of state and local jurisdictions in distributing and dispensing vaccines to Tribes in accordance with existing federal and state policy. The CDC and Washington State COVID-19 vaccine plans serve as good models by including the following four key components:

1. *Tribal Nations' Right to Choose Which Jurisdiction to Receive Vaccines From.* Each Tribal nation has the sole and sovereign authority to choose among the jurisdiction (e.g., the state where the Tribe is located) or federal agency options for accessing vaccines. State and LHJs do not possess legal authority over how a Tribe receives vaccines.[26]

2. *Tribal Nations' Right to Determine Who They Serve.* Each Tribal nation has the sole and sovereign authority to determine the populations it chooses to serve in an emergency. For example, Tribes may choose to dispense MCMs they receive to both Tribal members and non-Tribal members living, working, or interacting with the Tribe. State and local jurisdictions do not possess the legal authority to prevent Tribal nations from directly providing vaccines to Tribal and non-Tribal members.[27]

3. *Tribal Nations' Right to Establish Vaccine Priority Groups.* Each Tribal nation has the sole and sovereign authority to establish their priority groups when there is an FDA approved/authorized vaccine or other accompanying resources for those groups, even if the Tribe's priority groups differ from what is recommended by federal or state advisory groups such as the Advisory Committee on Immunization Practices (ACIP).[28]

4. *Coordinating with Tribal Nations.* Jurisdictions should regularly engage with Tribal nations within their respective areas for involvement in planning efforts and include Tribal engagement procedures in their vaccination plans.[29] CDC's COVID-19 vaccine playbook underscores the importance of this coordination, stating "[i]t is imperative that state and local jurisdictions, [T]ribal nations, and their planning partners clearly understand each other's roles and responsibilities in the COVID-19 Vaccination Program."[30] This approach requires communication, flexibility, and trust. Mechanisms to incorporate lessons learned at every level is critical to ensure improvements from H1N1 to COVID-19 vaccine implementation are not lost. Additionally, such mechanisms could be used to find solutions to still existing challenges. Formal documentation of the process; establishing regular meetings between Tribes, state, and LHJs that include reviewing each other's vaccine plans, capabilities, and resources; creating other forums for developing collaborative relationships; and ensuring Tribal representation when federal agencies develop guidance are some suggested mechanisms that can help save lives and streamline future pandemic response.

Next Steps

In Washington State, the successful distribution of the COVID-19 vaccine to Tribes happened because Tribal Sovereignty and Tribes' expertise and understanding of the needs of their own population was honored for the first time during an outbreak. Nationally, single dose COVID-19 vaccination coverage is the highest among American Indian and Alaska Native populations.[31] Early increases in vaccination coverage demonstrate the success of (1) Tribal nations exercising their public health powers in responding to the COVID-19 pandemic; (2) the adoption of vaccine distribution policies that address the sovereign rights of Tribes; and (3) intensive, collaborative planning between Tribes

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and local, state, and federal agencies. Moving forward, upholding the legal foundations of Tribal sovereignty requires all jurisdictions to consult and coordinate with Tribes in the development and implementation of future vaccine distribution plans and policies. For states and LHJs with neighboring Tribes, incorporating CDC and WA DOH's existing policy on emergency vaccine distribution to Tribal nations into their own vaccine plans can serve as a critical component of emergency preparedness and help inform non-emergency events involving the distribution of vaccines and other MCM. The inclusion of Tribal nations in a manner that recognizes and respects Tribal sovereignty is vital for future pandemic response, the health of Tribal communities, and the equitable distribution of critical resources across all federal, Tribal, state, and local jurisdictions.

Acknowledgments

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