

MRSA resists expulsion as well as antibiotics

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By the New York State Association of School Attorneys

There's a new bully in school. Methicillin-resistant Staphylococcus Aureus, commonly known as MRSA, is usually contracted when one comes into physical contact with an infected surface. Accordingly, students engaged in school athletics such as wrestling, football, and other contact sports are susceptible to the harmful bacteria. Recent outbreaks in schools across the country have led school districts to question their obligations in preventing the spread of MRSA and other bacterial skin infections, as well as how to protect themselves from potential legal liability.

MRSA typically infects one's nostrils then moves quickly throughout the body, causing pimple-like blemishes that can become larger and open up, appearing as skin lesions. If not treated properly, MRSA can be fatal.

Schools lack authority to seek to prevent the spread of MRSA by suspending infected students. Commissioner's regulations [8 NYCRR §136.3 (h)] state that schools may only exclude students with communicable diseases that are reportable under the state Public Health Law. While that law requires medical providers to report positive test results for diseases such as salmonella, HIV and even streptococcus pyogenes (strep throat), there is no such requirement for MRSA.

Consistent with that, a 2008 advisory issued jointly by the state Departments of Health and Education stated that "[u]nless directed by a physician, students with MRSA infections should not be excluded from attending school."

Nevertheless, the New York State Public School High School Athletic Association (NYSPHSAA) has taken a strong stance on this bacterial disease. Its rules require any athlete known to be infected with MRSA to take oral antibiotics for 10 days before competing again. (While resistant to commonly prescribed antibiotics such as amoxicillin, MRSA may respond to other forms of antibiotics.) Athletes cannot return to practice or games until a 10-day regimen is complete or all lesions are scabbed over, whichever occurs last.

While there is not a great deal of case law on the subject, New York State courts have considered instances in which students have contracted an infection in school. In a case involving a wrestler who contracted herpes simplex from an opponent, the Supreme Court of Nassau County held that while transmitting a communicable disease through "casual contact" does not carry a cause of action for the tort of negligence, wrestling is considered "very close, intimate contact," which poses a duty on a carrier of the disease to inform his opponent of his condition [*Silver v. Levittown Union Free School District*, 180 Misc. 2d 1015 (N.Y. Sup. Ct. Nassau County 1999)].

That interpretation of the law cannot be viewed as unequivocal, however, as the Appellate Division of State Supreme Court, Second Department, held in a different case involving transmission of herpes simplex that the transmittal of diseases is an inherent danger of the sport of wrestling. In *Farrell v. Hochhauser*, 884 N.Y.S.2d 261, the Appellate Division ruled in 2009 that "[b]y engaging in a sport or recreational activity, a participant consents to those commonly-appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation."

The *Farrell* case did not address whether the other student was aware that he was infected with herpes simplex as the decision dealt only with a cause of action against a school district. The Second Department found that the school district in question was not liable for the plaintiff's contraction of the disease because it had informed the plaintiff of the specific risk of contracting herpes. It had distributed a packet of information regarding skin diseases, and the coach had a discussion with wrestlers and their parents regarding the possibility of contracting a skin disease. In this case, both the student who initially had the disease and the student who contracted the disease attended the same school district, and the court primarily discussed the dissemination of information to the plaintiff student. Accordingly, it is difficult to ascertain how the principles set forth by the court would be applied to a case of infection involving students who attend different school districts.

The cases cited above regarding herpes simplex centered on the degree to which districts had provided notice and information. This suggests that a participant in a sport may be found to assume the inherent risks of the activity only to the degree that he or she has been made aware of those risks.

It is the school's responsibility to inform students of the risks of skin diseases. As the Second Department held in *Farrell*, providing this information to students can serve to protect the district from liability. It is also important for school districts to take proper precautions in cleaning mats, locker rooms, etc., to minimize the chances of transmission.

While schools may not exclude students with MRSA, school districts should seek to employ procedures and protocols to insulate themselves from liability. School policy should strongly encourage student athletes to report any cases of MRSA to district administration. In addition, because case law is not unequivocal, the individual should be removed from all competition during the period of infection. If the infected student is allowed to compete, the district may choose to notify future opponents of the infection in order to avoid potential liability.

The next developments in MRSA law may come from state legislatures rather than the courts. Legislators in Pennsylvania prefer a regulatory approach. On May 2, 2011, the General Assembly of Pennsylvania passed a bill to urge the Pennsylvania Department of Health to monitor MRSA more closely. In New York, state Senator Lee Zeldin (R-Haup-pauge) recently conducted two meetings with coaches from

Long Island schools to discuss his draft bill which would require wrestling mats to be disinfected before and after a practice or match. Zeldin's bill would include a demand for efficient showers where the practice or match is held.

School boards should consult with their school attorneys regarding whether their policies and practices need to be updated in light of MRSA.

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