

ARE WE READY TO SAVE PEOPLE?:

ATLANTIC CITY'S 2004 MUNICIPAL NEEDLE EXCHANGE ORDINANCE

Prepared by Cara Wilking, J.D.

I. INTRODUCTION

In 2004, the City of Atlantic City, NJ passed an ordinance establishing a municipal needle exchange program. Atlantic City faced an HIV/AIDS public health crisis with one in forty residents infected and sixty percent of infections related to injection drug use. The Atlantic City Department of Health and Human Services (“DHHS”), working in conjunction with Drug Policy Alliance of New Jersey (“DPA-NJ”), proposed a municipal needle exchange ordinance after the state legislature repeatedly failed to enact needle exchange legislation. The DHHS informed the Atlantic County Prosecutor and law enforcement of the proposed ordinance. The County Prosecutor told DHHS and the press that he believed the ordinance violated New Jersey’s criminal drug paraphernalia laws. After consulting DPA-NJ, and with full support of the Mayor of Atlantic City and the head of the City Council, the ordinance was formally proposed and passed into law. The Atlantic County Prosecutor immediately filed suit to enjoin implementation of the ordinance, and the law was overturned

ABOUT THE DEFENSIVE LITIGATION PROJECT

Funded by the Robert Wood Johnson Foundation’s Public Health Practice & Policy Solutions, the Project uses case study research methodology to investigate threats of litigation made during the proposal and passage of public health laws. The case studies examine this experience across a range of public health issues. Public health officials, attorneys and advocates provide insight into their decision-making and planning process in anticipation of and in response to legal challenges.

in court. Despite the invalidation of the ordinance, Atlantic City’s bold action to address its public health crisis focused media attention on the HIV/AIDS issue and generated the political will necessary to successfully enact state-level needle exchange legislation in 2006.

II. NEW JERSEY’S HIV/AIDS CRISIS

A. Statewide HIV/AIDS Infection Rates

In 2006, New Jersey became one of the last states in the nation to implement some form of legal sterile syringe access. The controversy in New Jersey over sterile syringe access to reduce the transmission of HIV/AIDS came to a head in 2004. That year, “[n]ationally, New Jersey rank[ed] fifth in cumulative AIDS cases, third in cumulative pediatric AIDS cases, and ha[d] the highest proportion of women among those living with AIDS.”¹ African Americans and Hispanics have been disproportionately affected by HIV/AIDS in New Jersey. As of December 31, 2004:

- One in every 65 Black non- Hispanics was living with HIV/AIDS;
- One in every 185 Hispanics was living with HIV/AIDS, and
- One in every 783 White non-Hispanics was living with HIV/AIDS.²

“[A]pproximately 51 percent of . . . [New Jersey’s cumulative HIV/AIDS cases as of June 30, 2004] can be attributed to injecting drug user, their partner or their children.”³ And while annual rates of infection from injection drug use (“IDU”) have decreased over time, “IDU associated exposures are still a major risk (43% which includes 31% IDU plus 12% heterosexual sex with an IDU), particularly among White

non-Hispanic women. The majority of White non-Hispanic women (53%) were exposed through IDU” or sexual contact with an injection drug user.⁴

B. The Atlantic City HIV/AIDS Crisis

“Atlantic City is such a small little place with big time problems.” –Director Ron Cash

In 2004, the rates of HIV/AIDS infection in Atlantic City had reached epidemic proportions, with one in forty Atlantic City residents infected with HIV/AIDS and one in thirty-two black males infected with HIV/AIDS.⁵ Sixty percent of HIV/AIDS infections in Atlantic City were related to injection drug use.⁶

C. Sterile Syringe Access to Protect the Public Health

As early as 1997, the Centers for Disease Control (“CDC”) concluded that needle exchange programs are an effective way to prevent HIV/AIDS infection.⁷ The CDC recommends syringe access programs as part of a comprehensive approach to preventing blood-borne diseases like HIV/AIDS amongst injection drug users.⁸ Numerous domestic and international studies have documented the efficacy of sterile syringe access in combating the transmission of blood borne disease.⁹

III. PROCESS OF ACHIEVING SYRINGE ACCESS IN NEW JERSEY

New Jersey needle exchange advocates tried unsuccessfully for over a decade to enact legislation at the state-level to legalize some form of sterile syringe access for injection drug users: “In every legislative session here but one since 1992, at least one bill has been introduced to allow drug users to exchange used syringes for new ones . . .

.”¹⁰

A. The Campaign for a Healthier New Jersey

In 2002, Drug Policy Alliance opened an office in New Jersey. Headed by Ms. Scotti, an attorney and drug policy reform advocate, DPA-NJ committed itself to syringe access.¹¹ The decision to open the office was motivated in part by the election of Governor James E. McGreevey, who was thought to be more amenable to the idea of syringe access.¹² Shortly after opening the office, DPA-NJ began organizing the Campaign for a Healthier New Jersey. The campaign was a broad-based coalition effort and garnered support from organizations such as the New Jersey State Nurses Association, the New Jersey Medical Society and the Black Ministers Council.¹³ The Campaign “worked on legislation . . . for about 18 months very much under the radar.”¹⁴ Another important aim of the Campaign for a Healthier New Jersey was to educate the media about the public health benefits and scientific basis for syringe access.¹⁵

B. Senate Bills No. 631 and 494 and Assembly Bills No. 1852 and 2839

In 2003, DPA-NJ supported “New Jersey Senate Bills No. 631 and 494 and Assembly Bills No. 1852 and 2839, which allow[ed] for the establishment of municipal syringe access programs and the non-prescription sale of syringes in pharmacies”¹⁶ According to Ms. Scotti, the decision to advocate for complete deregulation of syringes was strategic: “[We] knew it was probably a long shot, but we knew that strategically, and for public health reasons, it was the best way to go.”¹⁷ As part of the legislative effort to authorize municipalities to engage in needle exchange, DPA-NJ worked with five cities around the state to pass resolutions in support of syringe access.¹⁸ According to Ms. Scotti, “Camden and Atlantic City were the cities with the most support.”¹⁹

In December of 2003, the legislation was scheduled for a hearing in front of the Health Committee.²⁰ According to Ms. Scotti, “. . . the day before the hearing, the bill was pulled by the sponsor who just realized there simply weren’t enough votes and to have a hearing on the bill and to have it voted down would be worse than no hearing at all.”²¹ The inability to even move the bills to a hearing in front of the Health Committee was very disappointing.²² Ms. Scotti recalled that “[t]here was an attitude [in the legislature] that it just was never going to happen and a lot of people I would talk to would use those exact words, ‘it’s never going to happen.’”²³

C. A Light Bulb Goes On: The Municipal Ordinance Route

In December of 2003, after the bills died in committee, Ms. Scotti attended an AIDS Forum in Atlantic City. According to Ms. Scotti, people at the meeting were disappointed. It was at that meeting that Ms. Scotti had the idea to implement needle exchange at the municipal level:

I literally had one of those moments where a light bulb goes on over your head and I thought, I spent years in law school if I can’t make a colorable legal argument that these cities can do [syringe exchange] on their own then that would be pretty sad. Especially knowing that there had been cities around the country like Philadelphia and Pittsburgh who had said they had the authority to do this and it had stood. No one had challenged them.²⁴

Director Ron Cash of the Atlantic City Health Department recalled that “[w]e were down,” but the setback in the State Senate “gave us resolve to go at [syringe access] in another way.”²⁵

Ms. Scotti then researched New Jersey law to see if municipalities had legal authority to implement local needle exchange programs.²⁶ She conferred with Professor

Scott Burris, an expert on the legalities of needle exchange and a professor of law at Temple University’s Beasley School of Law. Ms. Scotti came to the conclusion that municipalities could legally operate syringe exchange programs.²⁷ She wrote a legal memorandum, drafted an ordinance and acquired additional input from Professor Burris.²⁸

Ms. Scotti then brought her proposed ordinance to Director Cash and Mr. Brunner. According to Mr. Brunner, HIV Coordinator for the City of Atlantic City:

When Roseanne Scotti came in the door here . . . we were under the assumption that if anybody operated a syringe exchange in the state it would be illegal because of the drug laws. She put forth an argument and she had outside counsel . . . from Temple University who’s an expert on needle exchange . . . and she said she believed that the NJ statutes the way they read you could do needle exchange. So that was a big part of her selling everybody on it.²⁹

IV. LEVEL OF LEGAL PREPAREDNESS BY PROPONENT

The Atlantic City Health Department does not have its own assigned legal counsel and relies upon the Atlantic City City Solicitor’s office for legal assistance.³⁰ While Ms. Scotti recalled that the City was concerned about the potential costs of litigation,³¹ Director Cash stated that he “wasn’t really concerned about legal costs.”³² He had the support of both the City Council President and the Mayor of Atlantic City.³³

Early on, Ms. Scotti assured the City that she would arrange for pro bono representation. Local attorney Robert S. Sandman of Hankin, Sandman, Bradley and Palladino volunteered to represent the City of Atlantic City on a pro bono basis in the event of a legal challenge. Ms. Scotti and Professor Burris offered their legal assistance in the event of a legal challenge as well.

The Atlantic City Health Department consulted with the Atlantic City's City Solicitor who wrote a memo stating that she did not believe the City could legally operate a syringe exchange program under New Jersey's drug paraphernalia laws:

Our local solicitor, at the time, agreed with the county prosecutor and the then state attorney's position. She thought it would be illegal for us. So in effect we had an outside attorney, Sandman, who put himself in place to do pro bono work for us because he felt that strongly about it.³⁴

With the full support of the President of the City Council and the Mayor of Atlantic City, the Health Department decided to go forward with the proposed ordinance, contrary to the City Solicitor's advice.

With respect to the actual risk of a lawsuit, New Jersey has a legacy of legal action against needle exchange workers. As Ms. Scotti noted, "The State had gone out of its way to arrest lay needle exchange workers. We were the only state other than California to prosecute syringe exchange workers."³⁵ As Mr. Brunner recalled, given how conservative the prosecutor was, they expected a challenge and discussed the threat of litigation with Ms. Scotti and Professor Burris. Although the City was not naïve about the fact that the ordinance would be challenged, Director Cash acknowledged that "[w]e were a little naïve about the legal side of it and what was going to come after that."³⁶

Director Cash and Mr. Brunner convened a meeting with the Chief of Police, County Prosecutor and local attorneys so that Ms. Scotti and Professor Burris could explain the legal rationale behind the ordinance and generally share the City's plans with law enforcement and the prosecutor's office.³⁷ According to Director Cash, "[t]here was some push back at that point . . . It was going to be a fight between public health and the legal people."³⁸

V. MUNICIPALITIES ENACT LOCAL NEEDLE-EXCHANGE PROGRAMS

A. Atlantic City Ordinance No. 55: “Ordinance Establishing a Sterile Syringe Access Program in the City of Atlantic City”

Ordinance No. 55, titled “Ordinance Establishing a Sterile Syringe Access Program in the City of Atlantic City,” authorized the following:

. . . the Director of the Department of Health and Human Services is hereby authorized to establish a Harm Reduction Program with Sterile Syringe Access as part of the Department’s HIV prevention program, and create guidelines and procedures for such a program.

. . . . the Director is further authorized to approve such public health agencies or organizations, as the Director deems appropriate and qualified, to establish sterile syringe access programs to be operated under the authority of the City of Atlantic City³⁹

Ordinance No. 55 had its first reading by the City of Atlantic City Council on June 2, 2004 and passed by a vote of six-to-one. There was a second reading on June 16, 2004, and the measure passed again by a vote of seven-to-one. Mayor Lorenzo Langford signed the ordinance on June 21, 2004.

Two days later on June 23, 2004, the Atlantic County Prosecutor’s Office, with the public support of the State Attorney General’s Office, filed a complaint that sought to invalidate the ordinance and a preliminary injunction to stop implementation of the ordinance. Ordinance No. 55 would have gone into effect on July 8, 2004.⁴⁰

B. The City of Camden Passes Its Own Ordinance

The City Council of Camden, New Jersey passed its own needle exchange ordinance days after the passage of the Atlantic City ordinance.⁴¹ While no litigation was filed against the City of Camden’s ordinance, the City agreed to stay implementation of its ordinance pending the outcome of the Atlantic City litigation.⁴²

C. Governor McGreevey Wades In: Executive Order No. 139

Governor McGreevey had pledged support for a pilot needle exchange program while running for office, but once elected, would only support “hospital-based” programs administered by the State Department of Health.⁴³

On August 12, 2004, amidst a sex scandal with a male co-worker and the federal indictment of two of his top fundraisers, Governor McGreevey announced his resignation, effective November 15, 2004.⁴⁴ One reporter noted, “[a]s it turns out, Mr. McGreevey’s political demise could be the best thing that has happened to . . . [needle exchange advocates].”⁴⁵ Freed from the fear of controversy, Governor McGreevey showed renewed public support for community-based needle exchange:

“I think there’s a recognition now, because of the limited time left and because of political considerations not being important, that there’s an ability to overcome obstacles and look for common ground,” said Micah Rasmussen, a spokesman for the governor. “All of the sudden there is a clarity that the issue of protection people’s health and protecting people’s lives is bigger than any one of us.”⁴⁶

On October 26, 2004, while the Atlantic County Prosecutor Office’s case against the City of Atlantic City was pending, Governor McGreevey issued Executive Order No. 139, declaring a “State of Emergency” “. . . with regard to the transmission of HIV/AIDS through intravenous drug use” and authorizing the State Commissioner of Health and Senior Services to adopt guidelines for a sterile syringe exchange program.⁴⁷

State Senators Ronald Rice (D-Essex), Tom Kean (R-Union) and Assemblymen Joe Pennacchio (R-Morris) and Eric Munoz (R-Union) immediately filed suit to have Executive Order No. 139 invalidated. The legal challenge against the Executive Order placed the Attorney General’s Office in the awkward position of having to defend the

Order authorizing municipal syringe exchange after publicly supporting the Atlantic County Prosecutor’s lawsuit to stop implementation of the City’s municipal needle exchange ordinance. From the perspective of Director Cash, Governor McGreevey’s order was the first sign of support he had seen from anyone in state government and it put pressure on the legislature and the Attorney General’s Office.⁴⁸ The case against the Executive Order was rendered moot once the order expired.⁴⁹

As discussed in more detail below, the City of Atlantic City’s needle exchange ordinance was invalidated by the courts and never implemented. However, Governor McGreevey’s successor Jon S. Corzine signed the Blood-borne Pathogen Harm Reduction Act into law on December 18, 2006.⁵⁰ This state-level legislation authorizes six cities to establish syringe access programs.⁵¹

VI. LEGAL AND POLICY CHALLENGES AGAINST MUNICIPAL NEEDLE EXCHANGE

A. Types of Opposition

Opposition to sterile syringe access has been widely studied, and it is helpful to view the New Jersey case through the lens of some existing scholarship on the issue.

Tempalski, et al. describe three general forms of opposition to needle exchange:

- (1) “institutional opposition . . . from district attorneys, police officials and beat officers, and legal opposition through the enactment of state and local legislation such as drug paraphernalia laws and laws banning over-the-counter sale of syringes”;
- (2) “community opposition” from clergy, neighborhood and business associations, and “particular sectors of minority communities (African American clergy and politicians) . . .”; and
- (3) “negative media portrayals of injection drug users and services designed to help them.”⁵²

In the case of Atlantic City’s needle exchange ordinance, opposition was primarily institutional, with some community opposition and little to no media opposition.

Institutional opposition to Atlantic City’s needle exchange ordinance came in the form of the state legislature’s repeated failure to reform the drug paraphernalia laws to allow sterile syringe access. Director Cash and Mr. Brunner also noted that state health officials and local health department staff from parts of the state less affected by HIV/AIDS expressed a form of opposition through inaction. As Mr. Brunner noted, “The State Health Department was pretty much silent on the issue.”⁵³ And according to Director Cash, “Many of my colleagues throughout the state were mum and quiet . . . many of them don’t have to deal with the disease the way we have to deal with it.”⁵⁴ For example, when Atlantic City’s ordinance was overturned by the District Court, one local newspaper reported that “State health officials would not comment . . . on the ruling.”⁵⁵

In addition, Governor McGreevey’s executive order declaring a health emergency did little to change the State Health Department’s lukewarm position on needle exchange:

Transmission of HIV, hepatitis and other blood-borne pathogens, by the sharing of contaminated needles, has given rise to syringe exchange programs in other states. Although some epidemiologic studies have shown that these programs decrease the transmission of HIV disease without increasing the rates of addiction, they remain controversial. Some people think it is inconsistent with public health policy to provide drug paraphernalia to addicts. A gubernatorial Executive Order has called for the establishment of up to three syringe exchange (SEP) programs in New Jersey. Guidelines have been developed and promulgated to eligible municipalities with a request for proposals to determine when an SEP may be implemented. Potential barriers to successful implementation are local law enforcement concerns, political will and a possible court challenge. The DHAS will continue to monitor and respond to the political challenges regarding this important issue.⁵⁶

The statement evinced a desire to carry out the Health Department's mandate but contained no advocacy for needle exchange.

Similarly, the direct legal challenge from the Atlantic County Prosecutor's Office, then headed by County Prosecutor Blitz, was a form of institutional opposition. The Office of the New Jersey Attorney General publicly supported the Atlantic County Prosecutor's challenge.⁵⁷

The only real community opposition city officials encountered came from State Senator Rice, who invoked racially charged rhetoric when opposing needle exchange. Director Cash and Ms. Scotti both felt that the general community response to the proposed ordinance was overwhelmingly positive. Likewise, the majority of the media coverage was supportive of needle exchange and critical of the devastating toll taken on the public health due the use and sharing of non-sterile syringes by injection drug users.

B. The Atlantic County Prosecutor's Legal Challenge

Shortly after they decided to pursue a municipal ordinance establishing a needle exchange program, Director Cash and Mr. Brunner convened a meeting with law enforcement, DPA-NJ and the Atlantic County Prosecutor's Office. At that meeting, the Atlantic County Prosecutor made it known that his office opposed the ordinance. After the proposed ordinance was made public, the Atlantic County Prosecutor's Office and the State Attorney General publicly opposed the ordinance via media reports. On June 23, 2004, just two days after the ordinance was enacted, the Atlantic County Prosecutor's Office filed a complaint seeking to have the ordinance invalidated and a preliminary injunction to stop implementation of the ordinance.

The original complaint filed by the Atlantic County Prosecutor’s Office stated that “When the Atlantic County Prosecutor learned of the plans to institute such a program, he communicated with officials of the City of Atlantic City, including solicitor of said city, verbally and in writing, to advise that such a program would be in conflict with the criminal law of the State of New Jersey”⁵⁸ Director Cash and Mr. Brunner were not aware of any written warning about the legality of the proposed ordinance.⁵⁹

Prior to the passage of the ordinance, the Atlantic County Prosecutor told the press:

“It [the ordinance] would be a violation of the drug act,” said Jeffrey Blitz, the Atlantic County prosecutor, who has warned city officials that the law prohibits the distribution of needles to anyone without a doctor’s prescription. “We haven’t taken any personal position, we’ve just told them what the law is, and I fully expect that Atlantic City and its employees will comply with the law.”⁶⁰

The Attorney General’s office echoed this sentiment: “Paul Loriquet, a spokesman for Attorney General Peter C. Harvey, said, ‘Our office has serious concerns about any policy or practice which facilitates or encourages drug use, particularly heroin or cocaine.’”⁶¹

In its complaint seeking to enjoin implementation of the ordinance, the Atlantic County Prosecutor argued that the ordinance was preempted by the New Jersey Criminal Code:

The implementation of a needle exchange program by the City of Atlantic City will violate and frustrate the purposes of the criminal laws and operate in an area preempted by State law. If the activity is allowed to commence, there will be irreparable harm in that the Prosecutor will be forced to arrest persons for unlawfully receiving that which another component of government has given to them. There is also the need to

enjoin the activity inasmuch as public funds would be expended as a result of an illegal action by a local public body.⁶²

State Senator Rice⁶³ advocated strongly against any form of syringe access by invoking racially charged rhetoric and questioning the public health benefits of sterile syringe access:

“Needle exchange is a form of keeping people junkies for the rest of their lives,” said Mr. Rice, a former Newark police officer.

“You don’t wipe out a whole lot of people by gassing them,” he said. “And you don’t wipe people out like the Tuskegee Institute, where we had a bad experience.”

“That’s what you’re doing with this needle exchange,” Mr. Rice said. “Those aren’t offensive statements; those are examples of what people have been doing to people, and it shouldn’t be.”⁶⁴

The City of Atlantic City Health Department was particularly concerned with the high rates of HIV/AIDS infection amongst people of color. State Senator Rice’s invocation of experimentation on African Americans as well as his indictment of sterile syringe access as an attempt to curb the epidemic was particularly upsetting to Director Cash:

[W]hen he talked about the fact that we were trying to perpetrate genocide in the black community and we didn’t care about their health . . . he offended me and many of my colleagues . . . with this race baiting . . . and it really showed how ignorant he was on the issue. I was offended as one of the people in Atlantic City who knew the most about how this disease was hurting African Americans and Latinos in this town.⁶⁵

Whereas State Senator Rice strongly opposed to syringe exchange, he lobbied hard for state funding of HIV/AIDS treatment programs, which has resulted in allocations of state funding for HIV/AIDS treatment. To date, no state funding has been designated for needle exchange programs.⁶⁶

VII. NEEDLE EXCHANGE SUPPORTERS RESPOND

Proponents of municipal syringe exchange programs were undeterred by the Atlantic County Prosecutor’s lawsuit. According to Ms. Scotti, “[o]nce the suit was filed there was no backing down.”⁶⁷ Amending the ordinance in response to the legal challenge was not an option, given the nature of the service they wanted to provide.

From a public relations and policy perspective, needle exchange proponents kept the focus on what they saw as the moral imperative to implement the program and the public health threat of HIV/AIDS. As Camden City Councilman Ali Sloan El told the press, “This isn’t a political issue. . . . The issue is: Are we ready to save people?”⁶⁸ Ms. Scotti echoed this sentiment: “[a] lot of what was driving . . . [the needle exchange movement] was just the moral and public health imperative that this is worth taking a chance.”⁶⁹ Ms. Scotti felt “[i]t was literally a life and death situation”⁷⁰

Longtime proponents of needle exchange in the State Legislature seized the media attention garnered by the Atlantic City lawsuit to voice their support for needle exchange. “When the prosecutor took their action, Senator [Nia] Gill was the first one to speak out and say that these people ought to be praised for what they are doing. Not taken to court.”⁷¹ Atlantic County’s local Republican State Senator also came out in support of the ordinance.⁷²

VIII. LITIGATION

As noted above, the City Solicitor for the City of Atlantic City was of the opinion that the ordinance impermissibly conflicted with state law. According to Ms. Scotti, City officials were also concerned about legal costs regarding defense of the lawsuit. Ms. Scotti arranged for Attorney Sandman of the Atlantic City firm Hankin, Sandman & Paladino to represent the City on a pro bono basis for the duration of the litigation. Ms. Scotti and Professor Burris collaborated with Attorney Sandman throughout the litigation.

On June 23, 2004, the Atlantic County Prosecutor's Office, represented by First Assistant Prosecutor Talasnik, filed a Verified Complaint against the "City of Atlantic City and various John Doe individuals" in the New Jersey Superior Court. The complaint alleged that Atlantic City's needle exchange ordinance would "violate and frustrate the purposes of the criminal laws and operate in an area preempted by State law."⁷³ This assertion was based upon the New Jersey criminal code, which makes it unlawful to possess and distribute drug paraphernalia including syringes without a valid prescription.

Secondly, the complaint alleged that "[i]f the activity [needle exchange] is allowed to commence, there will be irreparable harm, in that the Prosecutor will be forced to arrest persons for unlawfully receiving that which another component of government has given to them."⁷⁴ The County Attorney sought relief in the form of a preliminary injunction to prevent implementation of the program, and a finding that the "City ordinance purporting to authorize it to be null, void and illegal, in conflict with the law

of [the] State of New Jersey, and outside the authority of the Atlantic City Municipal Government.”⁷⁵

On June 23, 2004, the same day the complaint was filed, the Superior Court of New Jersey Law Division for Atlantic County issued an Order to Show Cause, granted the prosecutor’s request for a preliminary injunction enjoining enactment of the needle exchange ordinance and set a hearing date for July 7, 2004.⁷⁶

State drug paraphernalia law contains an exemption for “duly licensed physician[s], dentist[s] . . . nurse[s] . . . medical institution[s], or a state or a governmental agency . . .” from criminal liability for possession of hypodermic syringes.⁷⁷ Atlantic City’s primary legal argument was that as a municipality, the City fit squarely within the definition of a “governmental agency” and therefore, should have been exempt from criminal prosecution under the drug laws.

The Superior Court ruled in favor of the County Prosecutor, holding that “it is not debatable that implementation of a needle exchange program by the City is preempted by state law, absent specific state legislative action permitting the development and implementation of such programs.”⁷⁸ The entire ordinance was invalidated and implementation of a city needle exchange program was permanently enjoined. The City appealed the decision.

On appeal, the City argued that “any municipal official who distributes hypodermic needles or syringes under its needle exchange program would be exempt from prosecution under NJSA 2C:36-6(a) [the section containing exemptions to the drug paraphernalia law] and would not be subject to prosecution under any other

provision of the Code.”⁷⁹ The Superior Court Appellate Division upheld the lower court decision on the grounds that the City could be held criminally liable under a theory of accomplice liability:

We conclude that . . . any person who distributes hypodermic syringes to drug addicts for their use in injecting controlled dangerous substances, including a municipal official, would be subject to prosecution as an accomplice to the addict’s illegal use of drugs. Therefore, the Atlantic City ordinance purporting to authorize this conduct conflicts with and is thus preempted by the Code of Criminal Justice.⁸⁰

Following the ruling, the City appealed the decision to the Supreme Court of New Jersey. On January 24, 2006, the Supreme Court of New Jersey declined to accept the case for review offering no explanation for the denial.⁸¹

In December of 2006, New Jersey Governor Jon Corzine signed into law the Blood-borne Pathogen Harm Reduction Act, authorizing up to six cities to establish syringe exchange programs throughout the State of New Jersey.⁸²

IX. IMPACT OF THE LITIGATION ON NEEDLE EXCHANGE

“This issue crystallized people’s view of what was going on.” –Director Ron Cash

While the City of Atlantic City lost in court, the litigation brought a new level of attention to the tragic toll of HIV/AIDS in the absence of needle exchange and pressured the state legislature to act after years of inaction on the issue. As Mr. Brunner noted:

I think it was embarrassing that we had to take the lead and it went in front of the court and the legislature and Governor in Trenton couldn’t get it done. I think this certainly was a motivator for them because the court said . . . if they changed the statute in the legislature then [needle exchange] would be legal.⁸³

Essentially, the lawsuit changed the dynamic—it seemed absurd that a criminal prosecutor was trying to stop local health officials from taking an evidence-based public health strategy to address the HIV/AIDS epidemic.

For example, in response to the Superior Court ruling against Atlantic City’s ordinance, State Assembly Majority Leader Joe Roberts (D-Camden) stated in a news release, “Although I have believed for some time that this public health crisis must be addressed, today’s decision increases my resolve to have this matter considered by the legislature as soon as possible.”⁸⁴

Majority Leader Roberts also told the media: “[Atlantic City officials] are trying to take matters into their own hands because they believe the state has not taken on a leadership role. . . . Our current policy has resulted in people losing their lives. It’s intolerable.”⁸⁵ And “State Sen. Joseph Vitale, D-Woodbridge, said the court’s decision was yet another reason that the Legislature should pass a bill that would establish municipal programs under which sterile syringes could be distributed.”⁸⁶ The Star-Ledger of Newark, N.J. summarized the change as follows: “The local skirmishes have lit a fire under legislators who promise to deliver a bill [Governor] McGreevey will support.”⁸⁷

The confluence of legal challenges to Atlantic City’s municipal needle exchange ordinance and Governor McGreevey’s Executive Order led to a very public contradiction in the Attorney General’s stance on needle exchange. The Attorney General’s Office had publicly come out in support of the Atlantic County Prosecutor’s legal action against Atlantic City, while at the same time having to defend a legal challenge to Governor

McGreevey's executive order declaring a health emergency and sanctioning needle exchange. The Attorney General's precarious position accentuated the need for legislative action to address needle exchange.

X. LESSONS LEARNED

Public health threats linked to drug use can lead to direct conflict between law enforcement and public health officials. The Atlantic County Prosecutor's legal challenge to Atlantic City's needle exchange ordinance reframed the state-level New Jersey debate from one about balancing law and order and public health to one about an unaddressed public health crisis. The collaboration between the DHHS and DPA-NJ played an important role in breaking the log jam around needle exchange in New Jersey. When asked what advice he has for other public health officials facing a protracted public health crisis, Director Cash said, "Sometimes you have to take a risk."⁸⁸ The paradigm shift that occurred in New Jersey around the public health need for needle exchange most likely would not have happened if Atlantic City abandoned its ordinance when threatened with litigation by the County Prosecutor.

RESEARCH METHODOLOGY

The Project utilized descriptive case study methodology to examine instances of state and local public health legislation that was opposed with legal rhetoric or faced a direct legal challenge. Descriptive case study methodology is designed to present a complete description of a case within its context. The descriptive case study technique was selected because of the lack of prior research on the issue of defensive public health litigation and the resulting lack of established theory in the area. The primary unit of analysis for each study was the proponent of the public health initiative. Background research for each case study included local and national media coverage, legislative and/or administrative documents, documents generated by the opposition, scholarly articles, legal filings and judicial opinions. A minimum of two in-depth telephone interviews were conducted for each case. Where possible, one interview was of a public health official, and one interview was with an attorney affiliated with the public health official. Given the resources available to conduct the studies interviews with opponents were not conducted.

¹ Division of HIV/AIDS Services, New Jersey Department of Health and Senior Services, *HIV/AIDS Epidemiologic Profile for the State of New Jersey 2004* at 15 (2004), <http://www.nj.gov/health/aids/documents/epi2004.pdf> (last visited Aug. 7, 2009) (hereinafter “NJ Epidemiological Profile”).

² *Id.*

³ State of New Jersey, Exec. Order No. 139 (Oct. 26, 2004).

⁴ NJ Epidemiological Profile, *supra* note 1.

⁵ MichaelAnn Knotts, *Needle-exchange Test*, 13 N.J. LAWYER 5 (June 21, 2004).

⁶ City of Atlantic City, N.J., Ordinance 55 (June 21, 2004).

⁷ National Center for HIV/AIDS, Viral Hepatitis, STD, and TB Prevention, Centers for Disease Control and Prevention, *Fact Sheet: Syringe Exchange Programs* (Dec. 2005), http://www.cdc.gov/IDU/facts/AED_IDU_SYR.pdf (last visited Aug. 7, 2009).

⁸ See Academy for Educational Development, *A Comprehensive Approach: Preventing Blood-Borne Infections Among Injection Drug Users* (Dec. 2000), <http://www.cdc.gov/IDU/pubs/ca/comprehensive-approach.pdf> (last visited Aug. 7, 2009).

⁹ *Deregulation of Hypodermic Needles and Syringes as a Public Health Measure: A Report on Emerging Policy and Law in the United States 7-9* (Scott Burris, Ed., American Bar Association AIDS Coordinating Committee 2001), <http://www.abanet.org/AIDS/publications/deregulation.pdf> (last visited Aug. 7, 2009).

¹⁰ David W. Chen, *No Compromise in Sight on Plan to Fight H.I.V.*, N.Y. TIMES, June 4, 2006.

¹¹ Telephone Interview with Roseanne Scotti, Director, Drug Policy Alliance New Jersey (July 31, 2008) (hereinafter “Scotti Interview”).

¹² *Id.*

¹³ Drugpolicy.org, *Campaign for a Healthier New Jersey Supporters*, <http://www.drugpolicy.org/about/stateoffices/newjersey/chnj/supporters/> (last visited Aug. 7, 2009).

¹⁴ Scotti Interview, *supra* note 11.

¹⁵ *Id.*

¹⁶ Drugpolicy.org, *Campaign for a Healthier New Jersey*, *supra* note 13.

¹⁷ Scotti Interview, *supra* note 11.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Drugpolicy.org, *Campaign for a Healthier New Jersey*, *supra* note 13.

²¹ Scotti Interview, *supra* note 11.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Telephone Interview with Ron Cash, Director, City of Atlantic City Health & Human Services and Gene Brunner, HIV Coordinator, City of Atlantic City Health & Human Services (Oct. 21, 2008) (hereinafter “Cash Interview”).

²⁶ Scotti Interview.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Cash Interview, *supra* note 25.

³⁰ *Id.*

³¹ Scotti Interview, *supra* note 11.

³² Cash Interview, *supra* note 25.

³³ *Id.*

³⁴ *Id.*

- ³⁵ Scotti Interview, *supra* note 11. In 1998 a lay needle exchange worker was criminally prosecuted and convicted under New Jersey’s drug paraphernalia laws for distributing syringes as part of a non-profit needle exchange program that had been in operation since 1994 and was affiliated with clinical programs at Rutgers University. *See State v. McCague*, 314 N.J. Super. 254, 257-259 (N.J. Super. Ct. App. Div. 1998) *cert. denied*, 157 N.J. 542 (N.J. 1998).
- ³⁶ Cash Interview, *supra* note 25.
- ³⁷ *Id.*
- ³⁸ *Id.*
- ³⁹ City of Atlantic City, N.J., Ordinance 55 (June 21, 2004).
- ⁴⁰ Verified Complaint in Lieu of Prerogative Writ And/Or For Declaratory Relief, *State of New Jersey v. City of Atlantic City and Various John Doe Individuals*, 379 N.J. Super. 515 (N.J. Super. App. Div. 2005) (No. ATL-L-1898-04) (hereinafter “Verified Complaint, *State v. City of Atlantic City*”).
- ⁴¹ Dwight Ott & Troy Graham, *City Council OKs Needle Exchange*, PHILADELPHIA INQUIRER, June 25, 2004, at B1.
- ⁴² Kera Ritter, *Syringe Programs Advance in Trenton*, PHILADELPHIA INQUIRER, Sept. 24, 2004, at A01.
- ⁴³ Jessica Bruder, *Needle Exchange Gains Old Friend*, N.Y. TIMES, Sept. 19, 2004, at Section 14NJ.
- ⁴⁴ Michael Powell & Michelle Garcia, *N.J. Governor Resigns Over Gay Affair: McGreevey Has Been Facing Other Political Problems*, WASHINGTON POST, Aug. 13, 2004, at A1.
- ⁴⁵ Jessica Bruder, *Needle Exchange Gains Old Friend*, *supra* note 43.
- ⁴⁶ *Id.*
- ⁴⁷ State of New Jersey, Exec. Order No. 139 (Oct. 26, 2004).
- ⁴⁸ Cash Interview, *supra* note 25.
- ⁴⁹ Drugpolicy.org, *Campaign for a Healthier New Jersey*, *supra* note 13.
- ⁵⁰ *Id.*
- ⁵¹ *Id.*
- ⁵² Barbara Tempalski, PhD, MPH, *Social and Political Factors Predicting the Presence of Syringe Exchange Programs in 96 US Metropolitan Areas*, 97 AM. JUR. PUB. HEALTH 437, 446-447 (March 2007) (citing five needle exchange case studies).
- ⁵³ Cash Interview, *supra* note 25.
- ⁵⁴ *Id.*
- ⁵⁵ Bob Groves & Laura Fasbach, *Needle Exchange Programs Overruled; Court Decision a Setback for HIV Prevention*, THE RECORD (Bergen County, NJ), August 17, 2005, at A1.
- ⁵⁶ NJ Epidemiological Profile, *supra* note 1.
- ⁵⁷ Jessica Bruder, *Atlantic City Challenging the State on Syringes*, *supra* note 43.
- ⁵⁸ Verified Complaint, *State v. City of Atlantic City*, *supra* note 40.
- ⁵⁹ Cash Interview, *supra* note 25.
- ⁶⁰ Jessica Bruder, *Atlantic City Challenging the State on Syringes*, *supra* note 43.
- ⁶¹ Knotts, *Needle-Exchange Test*, *supra* note 5.
- ⁶² Verified Complaint, *State v. City of Atlantic City*, *supra* note 40.
- ⁶³ Tragically, in 2004 while one in every 264 New Jersey residents was living with HIV/AIDS, in Essex County (State Senator Rice’s District) that number was one in every 86 persons. *See* NJ Epidemiological Profile, *supra* note 1.
- ⁶⁴ David W. Chen, *No Compromise in Sight on Plan to Fight H.I.V.* *supra* note 10.
- ⁶⁵ Cash Interview, *supra* note 25.
- ⁶⁶ *Id.*
- ⁶⁷ Scotti Interview, *supra* note 11.
- ⁶⁸ Kera Ritter, *Syringe Programs Advance in Trenton*, *supra* note 42.
- ⁶⁹ Scotti Interview, *supra* note 11.
- ⁷⁰ *Id.*
- ⁷¹ Cash Interview, *supra* note 25.
- ⁷² *Id.*
- ⁷³ Verified Complaint, *State v. City of Atlantic City*, *supra* note 40.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Order to Show Cause, *State of New Jersey v. City of Atlantic City and Various John Doe Individuals*, 379 N.J. Super. 515 (N.J. Super. App. Div. 2005) (No. ATL-L-1898-04).

⁷⁷ N.J.S.A. 2C:36-6 (2005).

⁷⁸ *State v. City of Atlantic City*, 369 N.J. Super. at 29 (N.J. Super. Ct. Law Div. 2002).

⁷⁹ *State of New Jersey v. City of Atlantic City and Various John Doe Individuals*, 379 N.J. Super. 515, 520 (N.J. Super. Ct. App Div. 2005)).

⁸⁰ *Id.* at 520-521.

⁸¹ *State of New Jersey v. City of Atlantic City and Various John Doe Individuals*, 186 N.J. 892 (N.J. 2006) (*cert. denied*).

⁸² N.J.S.A. 26:5C-27 – 29.

⁸³ Cash Interview, *supra* note 25.

⁸⁴ Luis Puga, *Groups Press for Needle Exchange*, COURIER-POST (Cherry Hill, NJ), Sept. 2, 2004, at 2G.

⁸⁵ Susan K. Livio, *Cities Stoke Debate by Bucking N.J. Law on Needle Exchange*, STAR-LEDGER (Newark, NJ), July 12, 2004, at 1.

⁸⁶ Bob Groves & Laura Fasback, *Needle Exchange Programs Overruled; Court Decision a Setback for HIV Prevention*, *supra* note 55.

⁸⁷ Susan K. Livio, *Cities Stoke Debate by Bucking N.J. Law on Needle Exchange*, *supra* note 85.

⁸⁸ Cash Interview, *supra* note 25.