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EXECUTIVE ORDER

Authorizing the Colorado Department of Public Health and Environment to Order Hospitals and Freestanding Emergency Departments to Transfer or Cease the Admission of Patients to Respond to the Current COVID-19 Disaster Emergency in Colorado

Pursuant to the authority vested in the Governor of the State of Colorado and, in particular, pursuant to Article IV, Section 2 of the Colorado Constitution and the relevant portions of the Colorado Disaster Emergency Act, C.R.S. § 24-33.5-701, *et seq.*, including C.R.S. § 24-33.5-704.5(1)(e)(II), I, Jared Polis, Governor of the State of Colorado, hereby issue this Executive Order authorizing the Colorado Department of Public Health and Environment (CDPHE) to order hospitals and freestanding emergency departments to transfer or cease the admission of patients to respond to the current disaster emergency due to coronavirus disease 2019 (COVID-19) in Colorado.

I. Background and Purpose

On March 5, 2020, CDPHE public health laboratory confirmed the first presumptive positive COVID-19 test result in Colorado. Since then, the number of confirmed cases has continued to climb, and we have evidence of widespread community spread throughout the State. I verbally declared a disaster emergency on March 10, 2020, and on March 11, 2020, I issued the corresponding Executive Order D 2020 003, as amended and extended by Executive Orders D 2020 018, D 2020 032, D 2020 058, D 2020 076, D 2020 109, D 2020 125, D 2020 152, D 2020 176, D 2020 205, D 2020 234, and D 2020 258. On March 25, 2020, I requested that the President of the United States declare a Major Disaster for the State of Colorado, pursuant to the Stafford Act. The President approved that request on March 28, 2020.

My administration, along with other State, local, and federal authorities, has taken a wide array of actions to mitigate the effects of the pandemic, prevent further spread, and protect against overwhelming our health care resources. While we have seen indications that our efforts to "flatten the curve" are working, transmission of the virus continues to threaten Coloradans' way of life and livelihoods and current data shows a recent increase in COVID-19 infections.

Unfortunately, given the increase in infections, the number of persons seeking medical treatment at hospitals may far exceed the capacity of any given hospital. Hospitals who have reached capacity may need to cease admitting patients and may also need to transfer such patients to a separate facility without first obtaining the individual's written or informed consent for such transfer. The transfer of patients from hospitals that have reached capacity to other

specified care facilities will combat the current public health emergency due to COVID-19 and promote public health.

C.R.S. § 24-33.5-704.5(1)(e)(II) specifically empowers the Governor, in the event of an emergency epidemic that has been declared a disaster emergency, to act by Executive Order to order hospitals "to transfer or cease admission of patients or perform medical examinations of persons."

The federal Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd, requires hospitals receiving Medicare funds to provide appropriate medical screening to determine whether a patient has an emergency medical condition. EMTALA prohibits a hospital from transferring a patient with an emergency medical condition unless and until that condition has been stabilized. One of the purposes of EMTALA is to prevent hospital emergency departments from "dumping" patients who are unable to pay. EMTALA also states: "The provisions of this section do not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section." 42 U.S.C. § 1395dd(f). The Secretary of Health and Human Services and the Centers for Medicare and Medicaid Services have waived 42 U.S.C. § 1395dd(a) so that hospitals can screen patients at a location offsite from the hospital's campus to prevent the spread of COVID-19. This Executive Order is not intended to conflict with EMTALA, and hospitals must still comply with all non-waived sections of EMTALA.

This Executive Order authorizes CDPHE to order hospitals and freestanding emergency departments to transfer or cease the admission of patients to respond to the current disaster emergency due to COVID-19 in Colorado within the requirements of federal law.

II. Directives

A. A hospital or freestanding emergency department that has reached capacity to examine and treat patients shall notify the State ESF 8 Lead, Office of Emergency Preparedness and Response, within CDPHE by contacting the 24/7 Emergency and Incident Reporting Line at 1-877-518-5608. The State ESF 8 Lead will then contact and inform the Health Facilities and Emergency Medical Services Division that the hospital or freestanding emergency department has reached capacity to examine and treat patients. Upon notification to CDPHE and after CDPHE has determined that a hospital or freestanding emergency department is at capacity, CDPHE:

1. May direct the hospital or freestanding emergency department to cease admitting patients and to direct any persons thereafter seeking treatment to another hospital or facility designated by CDPHE;

2. May direct the transfer of patients from the hospital or freestanding emergency department to another hospital, skilled nursing facility, dormitory, alternative care facility, or other facility designated by CDPHE.

A hospital or freestanding emergency department may transfer patients without first obtaining the patient's written or informed consent to such a transfer; and

3. May direct a hospital, skilled nursing facility, or other facility to accept patients transferred from a hospital or freestanding emergency department pursuant to this Executive Order.

B. A hospital must comply with the non-waived sections of EMTALA, including the requirements to provide stabilizing treatment within the hospital's capabilities and capacity prior to the initiation of a transfer to another hospital, and to provide a medical screening examination to any individual who comes to the emergency department and requests examination or treatment.

C. Hospitals and freestanding emergency departments shall not consider a patient's insurance status or ability to pay when making transfer decisions pursuant to this Executive Order.

D. Hospitals, physicians, health insurers or managed health care organizations, health care providers, public health workers, or emergency service providers that in good faith comply completely with this Executive Order shall be immune from civil or criminal liability for any action taken to comply with this Executive Order pursuant to C.R.S. § 24-33.5-711.5(2).

E. A person receiving care in a hospital or freestanding emergency department who is transferred to another hospital or facility pursuant to this Executive Order is deemed to have an emergency medical condition, and all services for the transfer and treatment at the receiving facility are considered to be emergency services for purposes of C.R.S. § 10-16-704(5.5), including the in network cost sharing benefits and consumer protections against balance billing

F. I direct CDPHE and the Division of Insurance to work with carriers, hospitals, freestanding emergency departments, other facilities, and any entity that has transferred or received patients pursuant to this Executive Order to develop methods of identifying patients transferred or received pursuant to this Executive Order in order to ensure that those patients are protected by the consumer protections set forth in Section II.E of this Executive Order. If necessary, CDPHE may direct carriers, hospitals, freestanding emergency departments, facilities, transporting entities, and any other entity that has transferred or received patients pursuant to this Executive Order to take certain actions to ensure that CDPHE is able to identify those patients.

G. Employers and third party administrators of self-funded health insurance programs that are governed under the federal Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq*., are strongly encouraged to take all

necessary steps to protect consumers enrolled in their plans from being balance billed by any hospital, facility, or transferring entity if those consumers are transferred pursuant to this Executive Order.

III. Duration

This Executive Order shall expire thirty (30) days from November 23, 2020, unless extended further by Executive Order.

GIVEN under my hand and the Executive Seal of the State of Colorado, this twenty-third day of November, 2020.

Jared Polis
Governor