Executive Order 2020-138: Encouraging the use of telehealth services during the COVID-19 emergency

EXECUTIVE ORDER

No. 2020-138

Encouraging the use of telehealth services during the COVID-19 emergency

Rescission of Executive Order 2020-86

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended (EMA), MCL 30.401 et seq., and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended (EPGA), MCL 10.31 et seq.

Since then, the virus spread across Michigan, bringing deaths in the thousands, confirmed cases in the tens of thousands, and deep disruption to this state's economy, homes, and educational, civic, social, and religious institutions. On April 1, 2020, in response to the widespread and severe health, economic, and social harms posed by the COVID-19 pandemic, I issued Executive Order 2020-33. This order expanded on Executive Order 2020-4 and declared both a state of emergency and a state of disaster across the State of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, and the Emergency Powers of the Governor Act of 1945. And on April 30, 2020, finding that COVID-19 had created emergency and disaster conditions across the State of Michigan, I issued Executive Order 2020-67 to continue the emergency declaration under the EPGA, as well as Executive Order 2020-68 to issue new emergency and disaster declarations under the EMA.

Those executive orders have been challenged in *Michigan House of Representatives and Michigan Senate v Whitmer*. On May 21, 2020, the Court of Claims ruled that Executive Order 2020-67 is a valid exercise of authority under the Emergency Powers of the Governor Act but

that Executive Order 2020-68 is not a valid exercise of authority under the Emergency Management Act. Both of those rulings are being challenged on appeal.

On June 18, 2020, I issued Executive Order 2020-127, again finding that the COVID-19 pandemic constitutes a disaster and emergency throughout the State of Michigan. That order constituted a state of emergency declaration under the Emergency Powers of the Governor Act of 1945. And, to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act when emergency and disaster conditions exist yet the legislature has declined to grant an extension request, that order also constituted a state of emergency and state of disaster declaration under that act.

The Emergency Powers of the Governor Act provides a sufficient legal basis for issuing this executive order. In relevant part, it provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

Nevertheless, subject to the ongoing litigation and the possibility that current rulings may be overturned or otherwise altered on appeal, I also invoke the Emergency Management Act as a basis for executive action to combat the spread of COVID-19 and mitigate the effects of this emergency on the people of Michigan, with the intent to preserve the rights and protections provided by the EMA. The EMA vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)–(2). This executive order falls within the scope of those powers and duties, and to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act when emergency and disaster conditions exist yet the legislature has not granted an extension request, they too provide a sufficient legal basis for this order.

To promote use of telehealth, the U.S. Department of Health and Human Services Office for Civil Rights is exercising its enforcement discretion and will not impose penalties for noncompliance with HIPAA Rules against covered health providers in connection with the good-faith provision of telehealth services using non-public facing audio or video communication products during the COVID-19 national public health emergency. Moreover, the Centers for Disease Control and Prevention have issued guidance encouraging healthcare systems to use telehealth services when feasible to reduce the risk of transmission of COVID-19.

Telehealth provides a way for patients to obtain needed health services while observing social distancing. It is a means to limit potential exposure to COVID-19 and is currently permitted under Michigan law. In order to suppress the spread of COVID-19 and protect the public health and safety of this state and its residents, it is therefore reasonable and necessary to enable the use of telehealth services in new contexts and encourage expansion of telehealth services through other means. Executive Order 2020-86 took these needed measures. On June 24, 2020, I signed into law House Bills 5412, 5413, 5414, 5415, and 5416, which codified significant pieces

of Executive Order 2020-86. In light of that legislation, those parts of Executive Order 2020-86 are no longer needed. This order trims Executive Order 2020-86 to only those provisions that remain necessary. I am prepared to continue to work with the Legislature on appropriate legislation to suppress the spread of COVID-19 and mitigate the effects of this global pandemic on the people of Michigan. With this order, Executive Order 2020-86 is rescinded.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. All health care providers are authorized and encouraged to use telehealth services when medically appropriate and upon obtaining patient consent. To facilitate the provision of telehealth services:
    a. Written consent for treatment is not required. A health care provider may obtain verbal consent for telehealth services and must document such consent in the patient's file before providing telehealth services.
    b. A physician is not required to conduct an in-person examination before prescribing medication or ordering the administration of medication, including controlled substances except for methadone.
    c. Strict compliance with MCL 500.3476 is suspended only to the extent necessary to effectuate this section.
2. **Health care providers must abide by applicable guidance issued by the Substance Abuse and Mental Health Services Administration ("SAMHSA"), the Centers for Medicare and Medicaid Services ("CMS"), Centers for Disease Control and Prevention ("CDC"), and the Drug Enforcement Agency ("DEA") when providing telehealth services.** Strict compliance with Rules of the Michigan Administrative Code that apply to substance use disorder services programs licensed under part 62 of the Public Health Code, 1978 PA 368, as amended, MCL 333.6230 et seq., is temporarily suspended only to the extent necessary to effectuate this section.
3. A controlled substance license issued under part 73 of the Public Health Code, MCL 333.7301 et seq., is sufficient to authorize a licensee to prescribe, administer, or dispense a controlled substance to treat a drug-dependent person enrolled in a drug treatment and rehabilitation program, regardless of whether the program is in-patient, out-patient, office-based, or another format. Strict compliance with article 7 of the Public Health Code, 1978 PA 368, as amended, MCL 333.7101 et seq., and Rules 338.3132(1)(f), 338.3163(1)(a), and 338.3170(2) of the Michigan Administrative Code is suspended only to the extent necessary to effectuate this section.
4. **Upon a determination by a health care provider that an in-person evaluation, examination, or visitation is not feasible due to the COVID-19 pandemic, the use of** two-way interactive video technology satisfies the requirement of an in-person evaluation, examination, or visitation under article 5, part 3 of the Estates and Protected Individuals Code, MCL 700.5301 et seq., and chapters 4, 4A, 5, and 10 of the Mental Health Code, 1974 PA 258, MCL 330.1400 et seq., MCL 330.1498a et seq., MCL 330.1500 et seq., and MCL 330.2000 et seq. If no two-way interactive video technology is available, and a health car

provider determines that another remote participation tool is clinically appropriate, the use of that remote participation tool satisfies this requirement.

5. The restrictions of MCL 500.3476 requiring telehealth services to be provided by a health care professional who is licensed, registered, or otherwise authorized to engage in his or her health care profession in the state where the patient is located is hereby suspended to the extent necessary to allow a medical professional licensed and in good standing to practice in a state other than Michigan to use telehealth when treating patients in Michigan without a license to practice medicine in Michigan. A license that has been suspended or revoked is not considered a license in good standing, and a licensee with pending disciplinary action is not considered to have a license in good standing. A license that is subject to a limitation or restriction in another state is subject to the same limitation or restriction in this state.
6. Strict compliance with sections 3(a)(1) and 3(q)(2) of the Michigan Medical Marihuana Act, Initiated Law 1 of 2008, MCL 26423(a)(1) and (q)(2), is suspended only to the extent necessary to allow relevant medical evaluations to be conducted via telemedicine.
7. Definitions.
    a. As used in this order, "telehealth" has the meaning provided in section 16283(c) of the public health code, MCL 333.16283(c).
    b. **As used in this order, "health care providers" includes health professionals licensed under articles 7 and 15 of the Public Health Code, 1978 PA 368, as amended, MCL 333.7101 et seq. and 333.16101 et seq.; "health facilities or agencies," as that term is defined in section 20106(1) of the Public Health Code, MCL 333.20106(1); psychiatric hospitals and units licensed under section 134 of the Mental Health Code, MCL 330.1134; health care employers, state-owned surgical centers, state-operated psychiatric hospitals, state-owned facilities, state-owned veterans facilities; and substance use disorder services licensed under part 62 of the Public Health Code, MCL 333.6201 et seq.**
    c. As used in this order, "medical professional" means a person licensed in a state other than Michigan who holds a license in that state for a profession that is licensed in article 7 or 15 of the Public Health Code, MCL 333.7101 et seq. or 333.16101 et seq.
    d. As used in this order, "state" means any of the fifty sovereign American states or the District of Columbia.
8. This order supersedes any order issued by a local health department to the extent that it conflicts with this order.
9. Executive Order 2020-86 is rescinded.
10. This order is effective immediately and remains in effect during any state of emergency or state of disaster arising out of the COVID-19 pandemic.

Given under my hand and the Great Seal of the State of Michigan.

GRETCHEN WHITMER
GOVERNOR

Date: June 29, 2020

Time: 8:17 pm

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