STATE OF MICHIGAN
GRETCHEN WHITMER
GOVERNOR
DEPARTMENT OF HEALTH AND HUMAN SERVICES
LANSING
ROBERT GORDON
DIRECTOR

October 28, 2020

Emergency Order Under MCL 333.2253 – Testing in Skilled Nursing Facilities, Homes for the Aged, and Adult Foster Care Facilities

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 for this disease. COVID-19 spreads through close human contact, even from individuals who may be asymptomatic. On March 10, 2020, the Michigan Department of Health and Human Services ("MDHHS") identified the first two presumptive-positive cases of COVID-19 in Michigan. Throughout the pandemic, Michigan has used a range of public health tools and guidance to contain the spread of COVID-19 and protect the public health, including via the Governor's authority under the Emergency Management Act and the Emergency Powers of Governor Act. On Friday, October 2, 2020, the Michigan Supreme Court concluded that the Governor was not authorized to issue executive orders addressing COVID-19 after April 30, 2020.

Michigan was one of the states most heavily impacted by COVID-19 early in the pandemic, with new cases peaking at nearly 2,000 per day in late March. Strict preventative measures and the cooperation of Michiganders drove those numbers down dramatically, greatly reducing the loss of life. Although fewer than 100 new cases per day were reported in mid-June, cases have increased since that time, and recently as many as over 3,000 new cases have been reported per day. To ensure continuation of essential public health services, we must not permit the spread of COVID-19 to increase. This necessitates continued measures to condition the gathering of individuals upon certain precautions being put in effect, including the ability to identify and isolate cases in order to reduce the spread of the virus. Based on the authority of MDHHS, it is necessary to issue orders under the Public Health Code to control the COVID-19 epidemic.

Michigan law imposes on MDHHS a duty to continually and diligently endeavor to "prevent disease, prolong life, and promote public health," and gives the Department "general supervision of the interests of health and life of people of this state." MCL 333.2221. MDHHS may "[e]xercise authority and promulgate rules to safeguard properly the public health; to prevent the spread of diseases and the existence of sources of contamination; and to implement and carry out the powers and duties vested by law in the department." MCL 333.2226(d). Furthermore, where imminent danger to the health or lives of individuals exists in the state, MDHHS has an interest in regulation to rectify conditions that constitute a menace to the public health. MCL 333.2251(1) and (3).

In recognition of the severe, widespread harm caused by epidemics, the Legislature has granted MDHHS specific authority, dating back a century, to address threats to the public health like that posed by COVID-19. MCL 333.2253(1) provides that "[i]f the director determines that control of an epidemic is necessary to protect the public health, the director by emergency order may prohibit the gathering of people for any purpose and may establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws. Emergency procedures shall not be limited to this code." See also *In re Certified Questions,* Docket No. 161492 (Viviano, J., concurring in part and dissenting in part, at 20) ("[T]he 1919 law passed in the wake of the influenza epidemic and Governor Sleeper's actions is still the law, albeit in slightly modified form."); see also *id.* (McCormack, C.J., dissenting, at 12). Enforcing Michigan's health laws, including preventing disease,

prolonging life, and promoting public health, requires limitations on gatherings and the establishment of procedures to control the spread of COVID-19. This includes testing protocols to identify COVID-19 cases and isolate them to prevent spread to additional individuals.

Considering the above, and upon the advice of scientific and medical experts employed by MDHHS, I have concluded pursuant to MCL 333.2253 that the COVID-19 pandemic continues to constitute an epidemic in Michigan. I further conclude that control of the epidemic is necessary to protect the public health and that it is necessary to establish procedures to be followed during the epidemic to ensure the continuation of essential public health services and enforcement of health laws. As provided in MCL 333.2253, these emergency procedures are not limited to the Public Health Code.

I therefore order that:

1. **Definitions.** For purposes of this Order, terms are defined as follows:

    (a) "Adult foster care facility" has the same meaning as provided by section 3(4) of the Adult Foster Care Facility Licensing Act, 1979 PA 218, as amended, MCL 400.703(4).

    (b) "Home for the aged" has the same meaning as provided by section 20106(3) of the Public Health Code, MCL 333.20106(3).

    (c) "Nursing home" has the same meaning as provided by section 20109(1) of the Public Health Code, MCL 333.20109(1).

    (d) "Staff" includes employees, consultants, contractors, volunteers, and caregivers who provide care and services to residents on behalf of the facilities listed above, as well as students in the facility's training programs or from affiliated academic institutions.

    (e) "Testing" means one of the following:

        (1) Diagnostic tests that seek to identify viral RNA, have received Emergency Use Authorization from the Food and Drug Administration, and are completed by a laboratory of moderate or high complexity under the Clinical Laboratory Improvement Amendments ("CLIA").

        (2) Antigen diagnostic tests that have received Emergency Use Authorization from the Food and Drug Administration and are used consistently with CDC guidance.

2. **Testing Protocols.**

    (a) The State of Michigan will provide testing support for nursing homes, homes for the aged, and adult foster care facilities licensed to care for 13 individuals or more (collectively "facilities") as capacity allows, and assist facilities in identifying other sources of testing capacity as needed.

    (b) Adult foster care facilities licensed to care for 13 individuals or more, homes for the aged, and nursing homes must conduct COVID-19 diagnostic testing as follows:

        (1) Initial testing of all residents and staff, unless initial testing of all residents and staff has already been conducted previously since March 10, 2020;

        (2) Testing any resident or staff member with symptoms of COVID-19 or suspected exposure;

(3) Weekly testing of all residents and staff in facilities with any positive cases among residents or staff, until 14 days after the last new positive;

(4) Weekly testing of all staff in counties of risk levels A through E on the MI Safe Start Map;

(5) Testing of all new or returning residents during intake unless tested in the 72 hours prior to intake;

(6) Testing of all newly hired staff on their start date or in the 72 hours prior to start date.

(c) Asymptomatic individuals who have recovered from COVID-19 in the past 3 months are exempted from testing under section 2(b).

(d) The federal Centers for Medicare and Medicaid Services (CMS) has also issued testing requirements for nursing homes. Nursing homes must comply with both state and federal requirements. Specifically:

(1) All nursing homes in counties of risk levels A through E on the MI Safe Start Map must test all staff weekly, even if federal requirements provide testing shall take place less frequently in the county where the facility is located.

(2) Nursing homes in counties with percent positivity over 10 percent, as indicated in CMS data, must test staff twice per week in order to meet federal requirements. These nursing homes will be deemed compliant with the testing required by this order.

(3) Nursing homes in counties with the risk level of low on the MI Safe Start Map do not need to conduct weekly staff testing under this order. Nursing homes in these counties should conduct staff testing in accordance with federal requirements only.

(e) Hospice facilities licensed by the state as a nursing home must test all staff at the same intervals as nursing home staff. Testing of a hospice patient may take place with consent of the individual or other person legally authorized to make medical care decisions for the individual.

(f) Adult foster care facilities licensed to care for 13 individuals or more, homes for the aged, and nursing homes must also take the following actions:

(1) Facilities must obtain consent or assent to conduct testing from each resident or another person legally authorized to make medical care decisions for the resident. Facilities must develop a protocol for residents who decline or are unable to be tested.

(2) Facilities must establish a protocol for staff who decline or are unable to be tested. Staff who decline testing without medical justification and documentation are prohibited from direct contact with residents.

(3) Following a positive test of a staff member or resident, facilities must take all necessary precautions in accordance with relevant guidance from the CDC to prevent transmission of the COVID-19 virus, including, but not limited to, excluding employees with COVID-19 from work until they have met all return to work criteria established by the CDC.

(g) Adult foster care facilities licensed to care for 13 individuals or more, homes for the aged, and nursing homes may request state assistance to complete testing. The State of Michigan will provide testing support for each facility as its capacity allows and/or assist facilities in identifying other sources of testing capacity as needed. Requests for state assistance must be submitted in accordance with MDHHS guidance.

(h) Adult foster care facilities licensed to care for 13 individuals or more, homes for the aged, and nursing homes that request MDHHS assistance to comply with this order by November 4, 2020, as described in section 3(g) of this order, do not violate this order if they do not receive such assistance and cannot comply for reasons beyond their control (e.g. inadequate testing supplies). Facilities must report to MDHHS within 24 hours of their known inability to comply. MDHHS may determine that a facility cannot comply with this order for a reason beyond its control. A facility that receives such a determination from MDHHS will not be in violation of this order.

(i) Nursing homes must begin testing in compliance with this order, and the October 21 epidemic order "Requirements for residential care facilities," immediately.

(j) Homes for the aged must begin testing in compliance with this order, and the October 21 epidemic order "Requirements for residential care facilities," as soon as practicable and no later than November 18, 2020.

(k) Adult foster care facilities licensed to care for 13 individuals or more must begin testing in compliance with this order, and the October 21 epidemic order "Requirements for residential care facilities," as soon as practicable and no later than:

(1) November 24, 2020 for testing requirements in section 2(b)(2), 2(b)(3), 2(b)(5), and 2(b)(6);

(2) December 2, 2020 for testing requirements in section 2(b)(1) and 2(b)(4).

(3) Further, by November 24, 2020, adult foster care facilities licensed to care for 13 individuals or more must test any resident leaving the facility to spend the Thanksgiving holiday at a residential home, or an overnight stay at a community location, prior to that resident's departure from the adult foster care facility and upon return to the facility.

3. **Implementation.**

(a) The June 15, 2020 "Emergency Order Under MCL 333.2253 Regarding Executive Orders 2020-123 and 2020-108" from Director Robert Gordon is rescinded, except that nothing in this order shall be construed to affect any legal proceeding based on conduct that occurred before the effective date of this order. Except as otherwise specified, nothing in this order supersedes any other order.

(b) Nothing in this order modifies, limits, or abridges protections provided by state or federal law for a person with a disability.

(c) Under MCL 333.2235(1), local health departments are authorized to carry out and enforce the terms of this order.

(d) Law enforcement officers, as defined in the Michigan Commission on Law Enforcement Standards Act, 1965 Public Act 203, MCL 28.602(f), are deemed to be "department representatives" for purposes of enforcing this order, and are specifically authorized to

investigate potential violations of this order. They may coordinate as necessary with the appropriate regulatory entity and enforce this order within their jurisdiction.

(e) Consistent with MCL 333.2261, violation of this order is a misdemeanor punishable by imprisonment for not more than 6 months, or a fine of not more than $200.00, or both.

(f) Consistent with any rule or emergency rule promulgated and adopted in a schedule of monetary civil penalties under MCL 333.2262(1) and applicable to this order, violations of this order are punishable by a *civil* fine of up to $1,000 for each violation or day that a violation continues. A civil monetary penalty issued under this section does not limit the Medicaid Services Administration's authority or responsibilities pursuant 42 CFR 488.426 nor its authority under MCL 400.111 et seq. related to its authority to stop or hold Medicaid payments, or to summarily suspend or terminate a Medicaid provider's enrollment for the same or similar infractions.

(g) MDHHS will refer any known violation of this order by a nursing home, home for the aged, or adult foster care to the Michigan Department of Licensing and Regulatory Affairs ("LARA"). MDHHS will also report to LARA whether a penalty pursuant to paragraph 3(f) was or will be assessed to the facility for noncompliance with this order. This order does not limit or hinder LARA's authority and discretion related to its own authority to pursue additional enforcement actions as it determines appropriate.

(h) Consistent with MCL 333.2263, any appeals of civil monetary citations issued under this order in accordance with the schedule of fines set forth in related emergency rules may be heard by the Michigan Office of Administrative Hearings and Rules.

(i) If any provision of this order is found invalid by a court of competent jurisdiction, whether in whole or in part, such decision will not affect the validity of the remaining part of this order.

This order is effective immediately and remains in effect until rescinded. Persons with suggestions and concerns are invited to submit their comments via email to COVID19@michigan.gov.

Date: October 28, 2020

Robert Gordon

Robert Gordon, Director

Michigan Department of Health and Human Services