STATE OF MICHIGAN

GRETCHEN WHITMER
GOVERNOR

DEPARTMENT OF HEALTH AND HUMAN SERVICES
LANSING

ELIZABETH HERTEL
DIRECTOR

May 21, 2021

Order under MCL 333.2253 – Requirements for Residential Care Facilities
Rescission of March 17, 2021

Michigan law imposes on the Michigan Department of Health and Human Services (MDHHS) a duty to continually and diligently endeavor to "prevent disease, prolong life, and promote the public health," and gives the Department "general supervision of the interests of the health and life of the 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).

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. COVID-19 spreads through close human contact, even from individuals who may be asymptomatic.

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 those posed by COVID-19. MCL 333.2253(1) provides that:

If 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 from the United States District Court, 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."); *id*. (McCormack, C.J., concurring in part and dissenting in part, 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 limiting the number, location, size, and type of gatherings, and requiring the use of mitigation measures at gatherings as a condition of hosting such gatherings.

On March 10, 2020, MDHHS identified the first two presumptive-positive cases of COVID-19 in Michigan. As of May 13, 2021, Michigan had seen 871,569 confirmed cases and 18,467 confirmed deaths attributable to COVID-19. 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 2020. Strict preventative measures and the cooperation of Michiganders drove daily case numbers dramatically down to fewer than 200 confirmed cases per day in mid-June, greatly reducing the loss of life. Beginning in October, Michigan again experienced an exponential growth in cases. New cases peaked at nearly 10,000 cases per day in mid-November, followed by increases in COVID-19 hospitalizations and deaths.

In November 2020 MDHHS issued an order enacting protections to slow the high and rapidly increasing rate of spread of COVID-19. Cases, hospitalizations, and deaths remained high through early December, threatening hospital and public health capacity. These protections were sustained by subsequent orders

through mid-January. These orders played a crucial role in slowing the spread in Michigan and had brought new cases down to about 1,500 per day. The decrease in cases helped prevent Michigan's healthcare system from being overwhelmed with a holiday surge. Beginning in late January 2021, in light of the reduction in cases, MDHHS issued orders permitting indoor dining and contact sports. On March 19, 2021, MDHHS issued an order requiring testing for youth sports.

Cases dropped to under 1,000 per day in mid-February. However, trends shifted, and cases increased to a seven-day daily average of 6,555 on April 11. The statewide positivity peaked at 18.5% on April 8. Metrics approached all-time highs, and in some cases surpassed the peaks from the fall/winter surge. While the Spring 2021 surge saw more cases in persons who were under the age of 60, there remained a high number of cases seeking emergency care and hospitalizations. Healthcare capacity peaked in mid-April with 601 daily hospital admissions seen in Michigan. Individuals under the age of 60 accounted for nearly 50% of all new admissions.

Positivity, case rates, hospitalizations and deaths are improving since the April peak. Positivity has decreased to 9.3% and the case rate for Michigan is 230 cases per million. As of May 13, there are 2,200 Michiganders hospitalized with COVID-19, and 11.0% of all available inpatient beds were occupied by patients who had COVID-19. During this time, Michigan had the second highest number of cases and the highest case rate in the nation, as well as the highest COVID-19 hospital utilization, and COVID-19 ICU utilization according to data from the CDC and U.S. Health and Human Services. The state death rate was 5.4 deaths per million people on May 6, and there are approximately 375 weekly deaths in Michigan attributable to COVID-19. This is a decrease of 26% from the peak of 7.3 deaths per million on April 23, 2020.

Even where COVID-19 does not result in death, and where Michigan's emergency and hospital systems are not heavily burdened, the disease can cause great harm. Recent estimates suggest that one in ten persons who suffer from COVID-19 will experience long-term symptoms, referred to as "long COVID." These symptoms, including fatigue, shortness of breath, joint pain, depression, and headache, can be disabling. They can last for months, and in some cases, arise unexpectedly in patients with few or no symptoms of COVID-19 at the time of diagnosis. A study published on April 6 in the medical journal *The Lancet* indicates that COVID-19 has been associated with a significantly increased risk of neurological and psychiatric disorders in the 6 months after a diagnosis. COVID-19 has also been shown to damage the heart and kidneys. Furthermore, racial and ethnic minority groups in Michigan have experienced a higher proportion of "long COVID." The best way to prevent these complications is to prevent transmission of COVID-19.

Since December 11, 2020, the Food and Drug Administration has granted emergency use authorization to three vaccines to prevent COVID-19, providing a path to end the pandemic. Michigan is now participating in the largest mass vaccination effort in modern history and is presently working toward vaccinating at least 70% of Michigan residents 16 years of age and older as quickly as possible. On May 12, 2021, the Advisory Committee on Immunization Practices (ACIP) approved for use the Pfizer-BioNTech COVID-19 Vaccine for adolescents age 12-16. As of May 13, 50% of Michigan residents 12 and older have received at least one dose of COVID-19 vaccine, and 53% of Michigan residents 16 and older have received at least one dose. And an increasing number and volume of therapeutics are available, such as monoclonal antibodies, which can help to reduce the severity of COVID-19 cases.

New and unexpected challenges continue to arise: in early December 2020, a variant of COVID-19 known as B.1.1.7 was detected in the United Kingdom. According to the CDC, this variant is roughly 50% more infectious than the original strain. On January 16, 2021, this variant was detected in Michigan. B.1.1.7 is currently the dominant strain of COVID-19 in Michigan and the United States. Michigan is second in the nation with respect to the number of B.1.1.7 variant cases detected. Michigan has also detected cases of variants B.1.351, P.1, and B.1.427/B.1.429, which experts continue to study and monitor closely. This further complicates the battle against COVID-19.

Considering the above, and upon the advice of scientific and medical experts, I have concluded pursuant to MCL 333.2253 that the COVID-19 pandemic continues to constitute an epidemic in Michigan. I have also,

subject to the grant of authority in 2020 PA 238 (signed into law on October 22, 2020), herein defined the symptoms of COVID-19 based on the latest epidemiological evidence. I further conclude that control of the epidemic is necessary to protect the public health and that it is necessary to restrict gatherings and 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 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) "Assisted living facility" means an unlicensed establishment that offers community-based residential care for at least three unrelated adults who are either over the age of 65 or need assistance with activities of daily living (ADLs), including personal, supportive, and intermittent health-related services available 24-hours a day.

   (c) "Communal dining and group activities" means dining areas and group activities involving residents in facilities that house more than six individuals.

   (d) "Confirmed COVID-19 positive employee or resident" means a case of COVID-19 originating in the facility, including those involving staff or residents ("facility-onset cases").

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

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

   (g) "Residential care facilities" means a nursing home, home for the aged, adult foster care facility, hospice facility, substance use disorder residential facility, or assisted living facility. It does not include independent living facilities.

   (h) "Serious or critical condition or in hospice care" includes residents enrolled in hospice services regardless of whether the resident appears to be in serious or critical condition or at the End of Life; residents receiving End of Life care who are not enrolled in hospice; residents whose wellbeing is at significant risk, based on the clinical judgment of a treating medical professional, where family visits are a potentially effective intervention; and residents who experience a significant adverse change of condition. These visits are also known and commonly referred to as "compassionate care" visits.

   (i) "End of Life" is as determined and documented by a qualified medical professional.

   (j) "Fully vaccinated" means a person who has received their second dose in a 2-dose series (Pfizer-BioNTech or Moderna) plus at least two weeks or a person who has received a single-dose vaccine (Johnson and Johnson (J&J)/Janssen) plus at least two weeks.

2. Resident and Employee Protections.

(a) Residential care facilities (hereafter referred to as "facilities" in this order) shall comply with the Center for Medicare and Medicaid Services guidance included in QSO-20-39-NH. Consistent with that guidance, facilities shall:

(1) Make efforts to allow communal dining and group activities to occur for those residents who are not in isolation or are otherwise not under observation for symptoms of COVID-19.

(2) Ensure that dining and group activities:

(A) Have adequate physical distancing, at least six feet between participants, any time a resident who is not fully vaccinated is present.

(B) Require participating residents to wear masks, if able, when not eating or drinking, any time a resident who is not fully vaccinated is present.

(C) Provide access to hand hygiene.

(3) Inform employees and residents of the presence of a confirmed COVID-19 positive employee or resident as soon as reasonably possible, but no later than 12 hours after identification.

(4) As soon as reasonably possible, but no later than 24 hours after identification of a confirmed COVID-19 positive employee or resident:

(A) Inform legal guardians or healthcare proxies for all residents within the facility of the presence of a confirmed COVID-19 positive employee or resident.

(B) Post a notice in a visible and obvious place near the main entrance of the facility indicating the presence of a confirmed COVID-19 positive employee or resident. The notice must continue to be displayed until 14 days after the last positive COVID-19 test result for an employee or resident in the facility.

(C) Adopt a protocol to inform prospective residents and staff of the presence of a confirmed COVID-19 positive employee or resident. Such notification must continue until 14 days after the last positive COVID-19 test result for an employee or resident in the facility. The protocol must specify how guardians and health care proxies will be informed of the positive COVID-19 test result.

(D) Contact the local health department in the facility's jurisdiction to report the presence of a confirmed COVID-19 positive employee or resident; and

(E) Support and comply with contact tracing efforts as requested.

(5) Maintain accurate and current COVID-19 records in a manner consistent with MDHHS surveillance reporting guidance.

(6) Report to MDHHS and the applicable Local Health Department(s) all presumed positive COVID-19 cases in the facility together with any additional data when required under MDHHS guidance.

(b) Independent Living Facilities shall:

(1) Contact the local health department in the facility's jurisdiction to report the presence of a confirmed COVID-19 positive employee or resident; and

(2) Support and comply with contact tracing efforts as requested.

3. Implementation.

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

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

(c) 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.

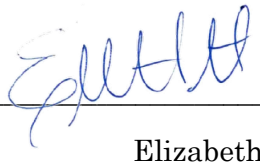
(d) Consistent with MCL 333.2261, violation of this order is a misdemeanor punishable by imprisonment for not more than 6 months, or a fine of not more than $200.00, or both.

(e) The March 17, 2021 order entitled "Requirements for residential care facilities" is rescinded as of the effective date of this order. Nothing in this order shall be construed to affect any prosecution or enforcement based on conduct that occurred before the effective date of this order.

(f) 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.

Date: May 21, 2021



Elizabeth Hertel, Director

Michigan Department of Health and Human Services