

EXECUTIVE ORDER 2020-083

On March 11, 2020, I issued Executive Order 2020-004, which declared a state of public health emergency under the Public Health Emergency Response Act and invoked powers provided by the All Hazards Emergency Management Act ("AHEMA ") and the Emergency Licensing Act ("ELA"). That public health emergency was declared for a period of 30 days. The President of the United States approved a Major Disaster Declaration for the State of New Mexico on April 5, 2020. I have renewed and extended the public health emergency in Executive Orders 2020-022, 2020-026, 2020-030, 2020- 036, 2020-053, 2020-55, 2020-059, 2020-064, 2020-073, and 2020-80. That declaration is likely to be extended and renewed on an ongoing basis for the foreseeable future.

The facts precipitating my invocation of emergency powers under the AHEMA and ELA are well documented. On December 31, 2019, several cases of pneumonia with an unknown cause were detected in Wuhan City, Hubei Province, China, and reported to the World Health Organization ("WHO"). The underlying virus giving rise to those reported instances of respiratory illness was later identified as a novel coronavirus disease which has been referred to "COVID-19." By the time the first COVID-19 cases had been confirmed in New Mexico, on March 11, 2020, COVID-19 had already spread globally and throughout the United States. Cases of COVID-19 and deaths related to COVID- 19 continue to proliferate at an alarming pace. As of December 4, 2020 the WHO reported nearly 64 million worldwide infections and more than 1,490,000 related deaths. According to the United States Centers for Disease Control and Prevention, more than 13.8 million people have been infected in the United States, including confirmed cases in every state, with more than 272,000 related deaths. The numbers of reported cases and deaths are continuing to increase exponentially throughout many parts of the world and in many parts of the United States. It is also highly likely that there are many unreported cases and deaths.

The numbers have also risen dramatically in our State since I declared a public health emergency. As of December 1, 2020, the New Mexico Department of Health reported more than 99,000 confirmed cases of COVID-19 in New Mexico and over 1,589 related deaths.

Since March 11, 2020, New Mexico has seen multiple surges of COVID-19 cases in different areas of the state. In October and November, 2020, the state has seen an unprecedented spike in COVID-19 cases, deaths and hospitalizations in every region of the state. Moreover, high test positivity rates in every region of the state suggest that the actual number of cases is significantly greater than test results indicate. Modelling performed by Los Alamos National Laboratory indicates that hospitalizations will continue to increase significantly throughout the month of December even if case counts begin to drop in December.

New Mexico is in the midst of an urgent medical crisis caused by the COVID-19 pandemic which has strained the ability of both institutional and individual providers to deliver the quality of care New Mexicans generally, and reasonably, expect. Particularly for our hospitals, this crisis - and the most recent surge of COVID-19 cases -has created extraordinary medical circumstances that will severely handicap health care workers in almost every kind of care they provide, and it will require providers to change their normal perspective to a crisis perspective. Normally, providers have an ethical and legal obligation to do whatever is in the best interest of each of their patients; under crisis standards of care, providers instead have an ethical and legal obligation to do what is best for everyone in the state, not just what is best for their individual patients.

While healthcare providers are always held to a legal standard that requires them to do what reasonable providers would do under the circumstances, it is vital to realize that those circumstances are now determined by factors which are unique in the public health history of the State of New Mexico. While providers' adherence to their professional and ethical obligations has precluded them from threatening not to work without additional protection, they are deserving of our admiration and support. They cannot be expected to do what no human being reasonably can do.

Any standard of care applied to assess the liability of providers offering healthcare during the period of the declaration of this crisis must consider the fact that during this period there will be an inadequate numbers of physicians, nurses and other healthcare workers available given the number of cases; many providers work substantially more hours than good practice would suggest under normal circumstances; some providers must continue to work even when sick - and even when sick with COVID-19 if treating COVID-19 patients; many essential clinical services have been limited, postponed or discontinued because of the urgent requirements of patients with COVID-19; much treatment has been delayed because of strains on the systems in place for transferring patients from one facility to another; many supplies are unavailable, or unavailable in amounts

necessary to provide adequate treatment under normal circumstances; many patients must be treated without access to adequate medical records (or any medical records at all), and without access to close family members who can provide information and make decisions; many providers must provide care within the scope of practice of their license but beyond their normal scope or practice; many hospital facilities are in short supply and some are unavailable at some time; medications are not fully available and some are not available at all; earlier than recommended discharge of patients is common because of the desperate need for inpatient facilities; care is limited by lack of adequate medical supplies or PPE; procedures normally provided only to inpatients must be provided to patients who have been discharged; and there will be a host of other modifications of normal practice necessitated by the pandemic.

Further, the special circumstances that must be considered when determining whether a provider met the standard of care expected of that provider during a pandemic crisis are not all-or- nothing circumstances which turn liability on and off. Rather, they are a continuum of circumstances that begin to be significant factors when providers enter levels of care for which they have done contingent planning and continue to the point at which crisis standards are in place, when the ordinary negligence standard is virtually indistinguishable from a standard that would allow for liability only upon a finding of gross negligence or reckless or willful conduct.

Due to the nature of the public health emergency and the impact on medical resources, the State has convened a group of experts in health, ethics, and law (referred to hereafter as "the Medical Advisory Team") to, inter alia, address best practices in the treatment and care of New Mexicans suffering from COVID-19. To that end, the Medical Advisory Team has developed the "New Mexico Statewide Acute Care Medical Surge Plan for COVID-19 Pandemic Response" (hereafter referred to as the "COVID-19 Medical Surge Plan". The COVID-19 Medical Surge Plan supplements New Mexico's 2018 Crisis Standards of Care, which address the allocation of health resources during this public health emergency. Among other things, the COVID-19 Medical Surge Plan identifies numerous markers that show when hospitals move from normal (conventional) standards of care to lower and higher levels of contingency care and eventually to the most acute of these standards, identified as "Crisis Care" and occurs only "where the demand for care surpasses resource supply despite contingency care strategies. The normal standard of care cannot be maintained and allocation and triage strategies must be implemented." Current projections indicate that "Crisis Care" standards may need to be implemented over the next several weeks and our State should prepare for that possibility.

Contingency care has already been implemented in hospitals throughout New Mexico, requiring some healthcare professionals to work outside their usual scope of practice. In addition, hospitals throughout the State are coordinating care of patients and transferring patients to facilities with available beds, staff and resources to provide care. If "Crisis Care" standards are implemented, healthcare professionals will be asked to assist in additional areas outside their scope of practice and to provide support, in any way possible, with the treatment and care of those infected with the COVID- 19 virus and to stretch limited resources beyond usual and customary practice. Providers have raised concerns about their legal protections when asked to address the extraordinary demands of treating New Mexicans with and without COVID-19 during this heightened medical surge.

For these reasons, I find that it is in the public interest to invoke certain provisions of AHEMA and ELA to ensure that physicians will not hesitate to respond and provide necessary assistance as "Contingency Care" standards have been implemented in many hospitals and in the potential event that "Crisis Care" standards are brought into effect.

Therefore, for the reasons above, I, Michelle Lujan Grisham, Governor of the State of New Mexico, by virtue of the authority vested in me by the Constitution and the laws of the State of New Mexico, hereby ORDER and DIRECT:

1. Pursuant to the authority vested in me by NMSA 1978, Section 12-10-4, and in accordance with NMSA 1978, Sections 12-10-4, 12-10-11, and 12-10-13, the New Mexico Department of Health is hereby directed to undertake all steps necessary to credential physicians and other licensed healthcare providers with authority under New Mexico law to provide medical care independently and not under the supervision of a physician ("advanced practice clinicians") who are providing care to a person infected with the COVID-19 virus or providing care to a person that a physician or advanced practice clinician reasonably believes may be infected with COVID-19 virus. Such physicians shall be identified as "COVID-19 Credentialed Physicians". Such advanced practice clinicians shall be identified as "COVID-19 Credentialed Advanced Practice Clinicians". For purposes of this Order, "physicians" include medical doctors and doctors of osteopathic medicine. For purposes of this Order, "advanced practice clinicians" include certified nurse practitioners (licensed by the New Mexico Board of Nursing in accordance with NMSA 1978 § 61-3-23.2), certified registered nurse anesthetists (licensed by the New Mexico Board of Nursing in accordance with NMSA 1978 § 61-3-23.3), clinical nurse specialists (licensed by the Board of Nursing in accordance with NMSA 1978 § 61-3-23.4), and certified nurse-midwives (licensed by the Board of

Nursing pursuant to the Nursing Practice Act and licensed by the Department of Health as a certified nurse-midwife pursuant to NMSA 1978 § 24-1- 3(R) and NMAC 16.11.2).

2. The Secretary of Health (the "Secretary") shall designate physicians as "COVID-19 Credentialed Physicians" and advanced practice clinicians as "COVID-19 Advanced Practice Clinicians" based upon findings that: (1) the physician/advanced practice clinician services will materially further the State interest in public health and welfare and (2) the physician/advanced practice clinician possesses the requisite skills and background necessary to provide care during the pendency of the existing health emergency. The Secretary may weigh and consider any additional factors the Secretary deems appropriate given the operative facts and circumstances.

3. "COVID-19 Credentialed Physicians" and "COVID-19 Credentialed Advanced Practice Clinicians" shall be considered public employees for purposes of the Tort Claims Act when performing the COVID-19-related duties for which they received that credential. NMSA 1978, §§ 41- 4-1 et seq. See NMSA 1978, § 12-10-4; NMSA 1978, § 12-10-11, and § 12-10-13.

4. I further order the Secretary to request the New Mexico Medical Advisory Team to consult with hospitals throughout the State and make a recommendation to the Secretary, based on criteria developed by the Medical Advisory Team, if and when the New Mexico Medical Advisory Team determines that it is appropriate for the Secretary to declare that the State should apply Crisis Care standards.

5. The directives contained in paragraphs 1-3 within this Order become effective and may be invoked only after "Crisis Care" standards have been activated by the New Mexico Medical Advisory Team and upon the Secretary's determination that such measures are necessary.

6. I further order the Superintendent of Insurance to take action to ensure that healthcare providers continue to receive professional liability coverage while providing health care services to patients under standards for Contingency and Crisis Standards of Care as reflected in the COVID-19 Medical Surge Plan and that patients are covered for treatment even if it is received in a hospital outside the patient's health plan's usual provider network.

7. This Order supersedes any previous orders, proclamations, or directives in conflict. This Executive Order shall take effect immediately, and shall remain in effect for thirty (30) days.

ATTEST:

/ S /
MAGGIE TOULOUSE OLIVER
SECRETARY OF STATE

DONE AT THE EXECUTIVE OFFICE
THIS 4TH DAY OF DECEMBER 2020

/ S /
WITNESS MY HAND AND THE GREAT
SEAL OF THE STATE OF NEW MEXICO
MICHELLE LUJAN GRISHAM GOVERNOR