

Background

Governor Cooper is requesting your concurrence on an Executive Order intended to prepare for and address a forecasted surge of COVID-19 cases requiring inpatient hospitalization in facilities across North Carolina in the coming days. A recent composite modeling forecast, constructed by experts from North Carolina universities and research organizations, estimates that by the end of May 2020, approximately 250,000 North Carolinians will be infected with the novel coronavirus, even if social distancing measures continue through that date. Other statistical modeling by experts within and outside North Carolina predict a significant risk that North Carolina will not have a sufficient number of hospital beds and medical equipment to meet the crisis.

With the Council of State's concurrence, and pursuant to the Emergency Management Act, including without limitation N.C. Gen. Stat. § 166A-19.30(b)(4), which allows the Governor to waive a provision of any regulation or ordinance of a state agency which restricts the immediate relief of human suffering; N.C. Gen. Stat. § 166A-19.30(b)(5), which allows the Governor to perform and exercise other such functions, powers and duties as are necessary to promote and secure the safety and protection of the civilian population; and N.C. Gen. Stat. § 166A-19.10(b)(3), which allows for the delegation or sub-delegation of any authority vested in the Governor under the North Carolina Emergency Management Act, the following actions will be directed in a forthcoming Executive Order (the "Order").

The actions to be set forth in the Executive Order, and described in this Executive Order Summary, include delegating to the Secretary of Health & Human Services authority to waive or modify the enforcement of laws or regulations in order to allow increases in licensed health care facilities' bed capacity, allow increases in available medical professionals, allow acquisition of critical medical equipment, and allow transfer of medical resources where they can be most effective and save the most lives.

The actions contemplated in the Order are temporary and shall remain in effect for 60 days unless rescinded or replaced with a superseding Executive Order.

Section 1. Allowing Increases in Health Care Resources

Section 1 delegates to the Secretary of Health & Human Services authority to waive or modify the enforcement of any legal or regulatory constraints that would prevent or impair:

- (a) Temporarily increasing licensed health care facilities' bed capacity,
- (b) Temporarily relocating beds to other facilities,
- (c) Temporarily adding dialysis stations,
- (d) Temporarily relocating dialysis stations,
- (e) Temporarily acquiring CT or MRI scanners, or
- (f) Allowing an ambulatory surgical facility to operate as a temporary hospital.

These temporary actions may be made only with the approval of the NCDHHS Division of Health Service Regulation following a written request and certification. The request must explain how the increase in capacity, relocation or addition of resources, equipment acquisition, or change in facility operation is necessary for the public health and safety in the geographic area served. The request must also certify that the physical facilities to be used are adequate to safeguard the health and safety of patients and that patients' health and safety will be safeguarded.

If the request is accepted by DHSR, the Secretary may authorize the increase in capacity, relocation or addition of resources, equipment acquisition, or change in facility operation notwithstanding the following rules:

- Any regulations on licensed bed capacity of nursing home facilities, including but not limited to 10A N.C. Admin. Code 13D .2105.
- Any regulations on licensed bed capacity of adult care homes, including but not limited to 10A N.C. Admin. Code 13F .0206 and 13G .0206.
- Any regulations on licensed bed capacity of mental health, developmental disabilities and substance abuse facilities, including but not limited to 10A N.C. Admin. Code 27G .0404(e).
- Any regulations that are related to the provisions listed above.

The Secretary's action would temporarily waive or modify the enforcement of N.C. Gen. Stat. § 131E-178 and 190; the authorized action would not require any immediate Certificate of Need.

Section 2. Child Care Facilities for Covered Children

Section 2 authorizes child care facilities to remain open or reopen under new guidelines that adapt regulatory requirements to the circumstances of the COVID-19 pandemic. The Order delegates to the Secretary of Health and Human Services authority to waive or modify enforcement of certain regulations, including:

- Regulations on child care facility requirements, activities, records, orientation, continuing education, food, and attendance, including without limitation 10A N.C. Admin. Code 09 .0201, .0508, .0510, .0703(c) and (d), .0901, .1101(a), .1401(a) and (f), .1402(b), .1709, .1718, .1721(a)(1) and (a)(2), .2318(6), .2504, .2508, .2830, .3003, and .3005.

In addition, the Secretary may waive or modify, by adding additional required health or emergency elements, enforcement of any regulations on child care facility staff qualifications, health and safety training, and sanitation requirements, including without limitation 10A N.C. Admin. Code 09 .0701(a), .0703(c) and (d), .1102, .1720, .1725, and .2401 to .2411, and 15A N.C. Admin. Code 18A .2803, .2827, and .2836. Finally, the Secretary may waive or modify enforcement of any regulations that are related to the provisions listed above.

Child care facilities may remain open or may reopen if they follow the NCDHHS Emergency Facility Guidelines and submit an application. Child care facilities may provide care only to children of employees of COVID-19 Essential Businesses and Operations (as defined in Executive Order No. 121), children who are receiving child welfare services, or children who are homeless or living in unstable or unsafe living arrangements.

Section 3. Increasing the Pool of Professional Health Care Workers

A. Allowing work in North Carolina by certain out-of-state health care professionals.

Section 3 takes several actions meant to add additional health care workers to the North Carolina system. First, in Section 3(A), the Governor delegates to each professional health care licensure board the authority to waive or modify enforcement of any legal or regulatory constraints that would prevent:

- (i) Allowing practice in North Carolina by health care professionals that are licensed in other states, but not in North Carolina;
- (ii) Allowing retired or inactive health care professionals to provide care;
- (iii) Allowing skilled, but unlicensed volunteers to provide care; and/or
- (iv) Allowing students to provide care if they are at an appropriately advanced stage of professional study.

The professional licensing boards will have the authority to allow or not allow, in their discretion, any of these four types of waivers or modifications.

To allow expansion of the supply of health care providers, the relevant professional health care license board would have the authority to waive or modify the following rules:

- The regulations on admission and licensure for the practice of medicine, at 21 N.C. Admin. Code Chapter 32.
- The regulations on admission and licensure for the practice of nursing, at 21 N.C. Admin. Code Chapter 36.
- The regulations on admission and licensure for the practice of midwifery, at 21 N.C. Admin. Code Chapter 33.
- The admission and licensure regulations for the social worker profession, at 21 N.C. Admin. Code Chapter 63.
- The regulations on admission and licensure for the practice of respiratory care, at 21 N.C. Admin. Code Chapter 61.
- The admission and licensure regulations for the pharmacy profession, at 21 N.C. Admin. Code Chapter 46.
- The regulations on admission and licensure for the practice of speech language pathology/therapy, at 21 N.C. Admin. Code Chapter 64.
- The regulations on admission and licensure for the practice of psychology, at 21 N.C. Admin. Code Chapter 54.
- The regulations on admission and licensure for the practice of clinical mental health counseling, at 21 N.C. Admin. Code Chapter 53.
- The admission and licensure regulations for substance use disorder professionals, at 21 N.C. Admin. Code Chapter 68.
- The regulations on admission and licensure for the practice of occupational therapy, at 21 N.C. Admin. Code Chapter 38.
- The regulations on admission and licensure for the practice of physical therapy, at 21 N.C. Admin. Code Chapter 48.
- The regulations on admission and licensure for the practice of recreational therapy, at 21 N.C. Admin. Code Chapter 65.
- The admission and licensure regulations for the profession of interpreters and transliterators, at 21 N.C. Admin. Code Chapter 25.
- The admission and licensure regulations for the profession of nursing home administrators, at 21 N.C. Admin. Code Chapter 37.
- The admission and licensure regulations for the profession of assisted living administrators, at 10A N.C. Admin Code 13F. 1701.
- The admission and licensure regulations for the perfusionist profession, at 21 N.C. Admin. Code Subchapter 32V.
- Any regulations that are related to the provisions listed above.

The emergency action to add health care providers to the system would affect operation of statutes on the following topics:

- Medicine — Chapter 90 Article 1
- Nursing — Chapter 90 Articles 9A, 9C, 9G
- Midwifery — Chapter 90 Article 10A
- Social Worker — Chapter 90B
- Respiratory Care — Chapter 90 Article 38

- Pharmacy — Chapter 90 Article 4
- Speech language pathology/therapy — Chapter 90 Article 22
- Psychology — Chapter 90 Article 18A
- Clinical Mental Health Counseling — Chapter 90 Article 24
- Substance use disorder professionals — Chapter 90 Article 5C
- Occupational Therapy — Chapter 90 Article 18D
- Physical Therapy — Chapter 90 Article 18E and 18F (Compact)
- Recreational Therapy — Chapter 90C
- Interpreters and transliterators — Chapter 90D
- Nursing Home Administrator — Chapter 90 Article 20
- Assisted Living Administrator — Chapter 90 Article 20A
- Perfusionist — Chapter 90 Article 40

B. Utilizing the Emergency Management Assistance Compact (EMAC).

Section 3(B) authorizes North Carolina to seek medical assistance from health care providers in other states. This section utilizes the Emergency Management Assistance Compact (EMAC), a 50-state compact authorized by N.C. Gen. Stat. §§ 166A-40 to -53.

Under EMAC, health care providers may deliver services in North Carolina through remote telecommunications technologies, or “telehealth.” The EMAC statute also includes automatic cross-licensing provisions and a limitation on liability for EMAC emergency assistance providers. N.C. Gen. Stat. § 166A-45 to -46.

C. Limitation of liability under N.C. Gen. Stat. § 166A-19.60.

Potential emergency health care workers have raised concerns about whether they would be subject to unwarranted liability for malpractice if they serve North Carolinians during this pandemic. Section 3(C) of the Executive Order provides a series of orders and statements that, taken together, show that the Governor intends to authorize insulation from liability to the maximum extent authorized by existing law, N.C. Gen. Stat. § 166A-19.60. Specifically, the Governor requests that all persons who are licensed to perform professional skills in the field of health care provide any health care services to respond to the COVID-19 pandemic. The Governor also makes clear that persons providing these health care services are complying with the Executive Order.

Section 4. Public Health

Section 4(A) delegates to the Secretary of Health and Human Services the authority to extend expiration dates for two permits in areas overseen by NCDHHS.

When a restaurant is sold, the restaurant sanitation permit does not transfer to a new owner and a new restaurant permit must be obtained from the local health department. The new permit must meet all current rules. A transitional permit may be issued for restaurants that do not meet all of the rules but the items in violation do not pose a hazard to public health. These permits expire in 180 days from the date issued. Many current transitional permits could expire before restaurants are able to fully re-open for business and have sufficient funds to obtain new equipment or make repairs. Section 4(A)(1) of the Order extends the expiration date for current transitional permits for an additional 180 days.

- The rule that may be waived or modified is 15A NCAC 18A .2659(b).

Chemical analysts that do testing in DWI cases are required by NCDHHS to take proficiency training within 24 months of issuance of their permits, or their permits will expire. The courses are taught by the State and must be attended in person to do hands-on work on the testing devices. In-person training is not being offered at this time to comply with social distancing requirements and limitations on travel by state employees. Many analysts have permits nearing expiration that could expire unless the deadline for expiration is extended, impacting prosecutions for DWIs.

- The rule that may be waived or modified is 10A NCAC 41B .0302(a).

Section 5. Mental Health, Developmental Disabilities and Substance Abuse Services

Section 5 suspends certain regulations that could prevent or impair providing mental health and substance use disorder treatment services and support services for individuals with intellectual and/or developmental disabilities (“MH/DD/SAS” services).

To allow MH/DD/SAS services to continue to be provided—and to authorize these services to be provided by telehealth—the Secretary of Health and Human Services is delegated the authority to waive or modify enforcement of the following rules:

- Regulations on minimum periodic retraining and demonstration of competence requirements for non-restrictive and restrictive interventions, including without limitation 10A N.C. Admin. Code 27E .0107, 27E .0108, 28D .0209, and 28D .0210.
- Regulations on minimum program teaching requirements for non-restrictive and restrictive interventions trainers, including but not limited to 10A N.C. Admin. Code 27E. 0107(i)(7) and .0108(i)(10).
- Regulations on requiring that Associate Professionals must have individualized supervision plans upon hiring, including but not limited to 10A NCAC 27G.0203(f) and 10A NCAC 27G.0204(f).
- Regulations setting minimum hours per week for licensed professionals at Residential Treatment Staff Secure Facilities, including but not limited to 10A N.C. Admin. Code 27G. 1705(a).
- Regulations setting requirements for the direct service ratio at Adult Developmental and Vocational Programs (ADVP) for Individuals with Developmental Disabilities, including but not limited to 10A N.C. Admin. Code 27G .2303(d).
- Regulations, including but not limited to N.C. Admin. Code 10A NCAC 28D .0102(c), setting requirements for annual exams to the extent that they require delivery of non-essential medical services.
- Regulations setting requirements for multiple staff members to be in the presence of the client at all times, including but not limited to 10A N.C. Admin. Code 27G .1402(b).
- Regulations setting a maximum date after which an adolescent may not remain in a day treatment facility for children and adolescents with behavioral or emotional disturbances, including but not limited to 10A N.C. Admin. Code 27G .1403.
- Regulations regarding factors for determining program compliance for purposes of take-home eligibility, including but not limited to 10A N.C. Admin. Code 27G .3602(6).
- Regulations setting the ratio of certified drug abuse or substance abuse counselors to clients, including but not limited to 10A N.C. Admin. Code 27G. 3603(a).
- Regulations regarding conditions for determining levels of take-home eligibility, including but not limited to 10A N.C. Admin. Code 27G .3604(f)(1).
- Regulations regarding the minimum frequency for the conduct, and program staff observation of, random testing for alcohol and other drugs on each active opioid treatment client, including but not limited to Requirements set forth in 10A N.C. Admin. Code 27G .3604(h).

- Regulations setting limitations on the class session schedule at drug education schools, including but not limited to 10A N.C. Admin. Code 27G.3903(e)(5).
- Regulations on routine drug screens, staffing, minimum operational hours and days per week, and minimum service hours per week at Substance Abuse Intensive Outpatient Programs, including but not limited to 10A N.C. Admin. Code Subchapter 27G, Section 4400.
- Regulations on routine drug screens, staffing, minimum operational hours and days per week, and minimum service hours per week at Substance Abuse Comprehensive Outpatient Programs, including but not limited to 10A N.C. Admin. Code Subchapter 27G, Section 4500.
- Regulations limiting cumulative provision of private home respite services, including but not limited to 10A N.C. Admin. Code 27G .5101(b).
- The requirement set forth in 10A N.C. Admin. Code 27G .5601(g) defining “F” designation facility as a facility in a private residence which serves no more than three adult clients whose primary diagnosis is mental illness, to the limited extent necessary to also allow for service of minor clients whose primary diagnosis is mental illness in this setting.
- Regulations establishing specific timeframe requirements for the steps of the non-Medicaid appeals process, including but not limited to 10A N.C. Admin. Code Subchapter 27I.
- State MH/DD/SAS administrative rule provisions requiring that services, assessments, interviews, consultations, counseling, crisis or emergency responses, or other client contacts be provided in-person or face-to-face in connection with delivery of MH/DD/SAS Services, including but not limited to 10A N.C. Admin. Code 27G. 1705(a), .3602(8), .3805(3), .3807(b), .4003(c)(2), .4403(a), .4503(f), .5703(c), and .6102(b).
- State MH/DD/SAS administrative rule provisions requiring MH/DD/SAS Services to be furnished in a group setting, including but not limited to 10A N.C. Admin. Code 27B .0401(a), .3401, .3602(8), .3603, .3701(a), .4101, .4501, and .5401(a).
- State MH/DD/SAS administrative rule provisions requiring day/night treatment facilities for substance use disorders to provide services at the facility or program site setting, including but not limited to 10A N.C. Admin. Code 27G .2301(d).
- State MH/DD/SAS administrative rule provisions requiring substance abuse treatment programs to operate in a setting separate from the client’s residence, including but not limited to 10A N.C. Admin. Code .4403(a) and .4503(a).
- State MH/DD/SAS administrative rule provisions that require adult developmental and vocational programs for individuals with developmental disabilities to provide a majority of services and activities on the program site premises, including but not limited to 10A N.C. Admin. Code 27G. 2301(d).
- Any regulations that are related to the provisions listed above.

Section 6. Health Services Licensure

A. Program of All-Inclusive Care for the Elderly (“PACE”) entities to provide in-home care.

The Programs of All-Inclusive Care for the Elderly (“PACE”), under Medicaid, provide essential care, but traditionally, PACE care has been provided in centralized PACE centers. Because having elderly PACE participants congregate at centers would place them at severe risk of illness or death from COVID-19, Section 6(A) authorizes PACE care to be provided at home.

The Secretary of Health and Human Services is delegated authority to waive or modify enforcement of any legal or regulatory constraints that would prevent or impair providing PACE services in an in-home setting. This includes the authority to waive or modify the following regulations:

- Any regulations on licensure of home care agencies, including but not limited to 10A N.C. Admin. Code Subchapter 13J.
- Any regulations that are related to the provisions listed above.

Ordinarily, providing PACE care through an in-home setting would require a license under N.C. Gen. Stat. § 131E-138 for the provider to operate a home care agency. Section 6(A) authorizes the Secretary of Health and Human Services to temporarily waive enforcement of section 131E-138.

B. Waivers of enforcement of in-home aides rules.

Section 6(B) allows the Secretary of Health and Human Services to waive or modify the enforcement of regulations on initial assessments or supervisory visits, adapting those provisions for social distancing during the COVID-19 pandemic.

The Secretary of Health and Human Services is delegated authority to waive or modify enforcement of the following regulations:

- Regulations on initial assessment for agencies providing in-home aide services, including but not limited to 10A N.C. Admin. Code 13J .1107.
- Regulations on supervisory visits for in-home caregivers, including but not limited to 10A N.C. Admin. Code 13J .1110.
- Any regulations that are related to the provisions listed above.

C. Additional time to screen new hires because of disruptions to fingerprinting.

Because of the COVID-19 crisis, private health care providers are facing extreme difficulty in maintaining their workforce. Section 6(C) allows private health care providers, other than child care providers, to avoid a problem indirectly caused by certain counties failing to offer fingerprinting during the COVID-19 pandemic.

Some counties currently fail to offer fingerprinting. Without fingerprinting, national background checks cannot be performed, although state background checks can still be performed. National background checks are required for certain new hires.

Therefore, under Section 6(C), the Secretary of Health and Human Services is delegated the authority to give health care providers (other than child care providers) additional time to complete the national background check part of a new hire's application. Under this procedure, the health care provider may temporarily accept a written verification from a potential new hire's current employer (or most recent employer within 30 days) in lieu of the portions of the national background check that would require fingerprinting. This authority applies only in areas of North Carolina where fingerprinting is not available. The national background check would need to be completed as soon as possible once fingerprinting is once again provided in the new hire's area.

To this end, the Secretary of Health and Human Services is delegated authority to modify enforcement of the following regulations:

- 10A N.C. Admin. Code 13F .0407(a)(7), on background checks for staff of an adult care home.
- 10A N.C. Admin. Code 13G .0406(a)(7), on background checks for staff of a family care home.
- Any regulations that are related to the provisions listed above.

The process set out in this Subsection would affect the operation of statutes including N.C. Gen. Stat. §§ 122C-80, 131D-40, 131D-45, and 131E-265.

Section 7. Social Services Programs and Licensure

Section 7 allows the Secretary of Health and Human Services to waive or modify the enforcement of several human services regulations involving in-person visits or physical presence. Under this authority, the Secretary may adapt those provisions for social distancing during the COVID-19 pandemic.

The Secretary of Health and Human Services is delegated authority to waive or modify enforcement of the following regulations:

- 10A N.C. Admin. Code 71P .0601(6), requiring that an applicant or his designated representative apply in person for the State/County Special Assistance Program at a county department of social services.
- 10A N.C. Admin. Code 71P .0701, requiring that certain State/County Special Assistance Program eligibility factors be reviewed at least once every 12 months.
- 10A N.C. Admin. Code 71P .0903(c)(1), causing a loss of benefits upon leaving a Special Assistance-Adult Care Home facility for greater than 30 calendar days.
- Subchapters 06A and 06X of Title 10A of the North Carolina Administrative Code, involving in-person requirements for any visit or supervisory visit.
- Subchapter 06D of Title 10A of the North Carolina Administrative Code, involving in-person requirements for any assessment, reassessment, or quarterly visits.
- Subchapters 70I and 70K of Title 10A of the North Carolina Administrative Code, involving in-person requirement for any visit or interview.
- 10A N.C. Admin. Code 70I .0405(f)(2)(B) and (C), involving direct care service personnel standards for licensure of residential child-care facilities.
- 10A N.C. Admin. Code 70E .0704 and 10A N.C. Admin. Code 70E .1108, involving deadlines for safety inspections.
- Any regulations that are related to the provisions listed above.