

10 Rules for Responding to Pandemics

Learning from Michigan's COVID-19 Experience

BY MICHAEL VAN BEEK

Introduction

The COVID-19 pandemic is one of the most significant policy concerns Michigan has faced. It will likely be a foremost issue for the foreseeable future too. While there is still much we do not know about this coronavirus and the impact of the state's response, there are still important lessons from our pandemic experience in 2020 and beyond.

One thing we learned is that politicians apparently feel no obligation to follow pandemic plans already developed by health care experts and state officials. These plans were prepared for exactly the type of threat COVID-19 posed, yet public officials threw them out the window and relied on new, ad hoc approaches.

Enacting novel policies on the fly that are effective is difficult, and it showed. Many of the dictates handed down from Lansing were legally questionable, confusing and even contradictory. This led to numerous policy reversals, legal challenges and even open defiance from within government itself, with local public officials announcing their unwillingness or inability to enforce some of the state's orders.

Another lesson is that government officials tend to assume their policies are effective, no matter what the available evidence suggest. For instance, if a policy was aimed at reducing positive case counts but the numbers continued to rise, government officials would explain that this must mean the public was

not complying with the rules. Little evidence, if any, suggested compliance levels were low. Nevertheless, politicians and bureaucrats tended to assume virtually every action they took, no matter the result, was proper and effective.

COVID-19 policies intervened in Michiganders' private lives in unprecedented ways. They went so far as to define the "essential" needs of 10 million people and what activities and goods could be prohibited because they were not important enough. No sphere of life was spared — state officials intervened in economic, social, recreational, family and religious matters.

Establishing policy affecting broad swaths of the population through ad hoc, administrative rules is not ideal. It effectively enables state

officials, some of whom are not accountable to voters, to unilaterally dictate policy indefinitely. A prepared and thought-out, collaborative and transparent, comprehensive and consistent approach should be the goal. Standards of good governance require it, and it should be more effective for minimizing the public health threats posed by pandemics.

Following the 10 rules described below should help policymakers balance two vital interests: meeting the demands of mitigating a pandemic and protecting Michiganders' constitutional rights. Some of the rules are rooted in long-established ideas that are fundamental to our democratic system of governance. Others are based on lessons learned from the state's initial response to COVID-19.

10 Rules for Pandemic Policies

Rule #1

The normal lawmaking process should determine pandemic policies

The state's response to pandemics must be defined by the normal lawmaking process, where elected representatives propose bills and deliberately debate and vote on them. This means the governor works together with the Legislature to craft policies. This is what the Michigan Constitution requires and what the state Supreme Court affirmed when it ruled

Gov. Gretchen Whitmer's use of indefinite emergency powers was unconstitutional.

The basic principles of a representative democracy bound by a constitution demand this. Temporary, emergency executive orders have their place, but the government must practice extreme judiciousness when using them, and they may be used only for a defined and limited period. While overly broad language in the century-old public health code seems to authorize policymaking by unilateral, administrative orders, allowing unelected bureaucrats to define, indefinitely, what

constitutes legal behavior is an affront to the concept of representative democracy. It robs Michigan voters of their political power, as they cannot hold these officials accountable at the ballot box.

Rule #2

The state should not favor one public health concern at the expense of others

There is no question that COVID-19 is one of the most challenging public health crises this state has faced. But it is not the only public health concern, and policymakers must consider all aspects of the public's general welfare, even as they attempt to mitigate the harms of a pandemic. Dire, emergency conditions in a time of extreme uncertainty may temporarily require such a narrowly focused approach, but once those conditions pass, the goal should be to protect and improve all facets of public health, not just one element of it.

All policy decisions, including those involving public health, must confront tradeoffs. Shutting down schools may decrease the risk that school employees will contract COVID-19, but it also harms children who need the educational and support services that only in-person schooling provides. Limiting the scope of procedures that medical professionals may perform can free up space for treating people afflicted by a rapidly spreading virus, but it harms patients who need treatment for other conditions. While closing school buildings and suspending so-

called nonessential medical treatments may have helped to contain COVID-19, there are additional consequences that are known to cause harm. These should be considered when crafting policies to slow the spread of a virus.

Rule #3

State government should not be the arbiter of what is essential

The state should not be in the business of determining which private goods and activities are most important. Like beauty, what is essential to life is in the eye of the beholder: One person's nonessential activity is another person's lifelong, identity-defining passion.

In restricting residents' movement in the spring of 2020, Gov. Whitmer categorized all activities into just two categories: essential and nonessential. "Essential" activities included things like buying food and medicine, caring for a pet, servicing automobiles and exercising outdoors. The "nonessential" category included buying paint, servicing bicycles, motorboating and traveling to a second residence, among other activities. Attempting to fit every action into just two categories generated much confusion and pushback.

If the public welfare requires government to restrict people's freedom to associate and suspends other civil rights, the primary factor determining which activities are permitted should be the risk these activities pose to maintaining health care services and capacity. Using such risk-based assessments provides more fairness and consistency.

Judgment calls will still need to be made, but this approach will help policymakers avoid appearing to subjectively pick winners and losers, as the essential-nonessential dichotomy requires.

Rule #4

Restricting individual rights should always be explicitly temporary

When their civil rights are restricted by mandates, people should be ensured that they are temporary. Each policy must include an expiration date, which requires public officials to regularly review the need for extraordinary measures. People may be more likely to comply with the orders when they know they are temporary and will end at a predetermined time.

Most of the mandates Gov. Whitmer issued through executive orders had no defined expiration. The same was true for some orders issued by Robert Gordon, former director of the state health department. Michiganders' civil rights were suspended indefinitely, and we could do nothing else but wonder how long until these policies might be repealed and our rights restored.

Rule #5

The process of restricting constitutional rights must be transparent

Only with great caution and care should the government make it a crime to leave your home, limit where and with whom you associate and prevent you from practicing your religion — all prohibitions that violate widely embraced civil rights. Public officials who curtail our rights must provide a coherent rationale to the people about why their drastic measures are necessary.

During the COVID-19 crisis, Gov. Whitmer and the state's health directors have not done this. Though they have made vague references to "science and data," they have not specified what metrics drive their decisions to restrict Michiganders' fundamental freedoms. Nor did they specify what information they will use to determine when individuals' rights will be restored.

For example, the governor provided no valid justification in determining that casinos could reopen in the summer of 2020 but not bowling alleys and movie theaters. That's a problem. Any government policy that discriminates in such a way should pass a tall hurdle of justification and provide a coherent and fact-based rationale. Yet, many orders, especially those the governor issued early in the pandemic, prohibited certain activities without any rationale. No evidence was provided for why boating with a motor, golfing with a golf cart or purchasing plants at a nursery must be prohibited, while boating without a motor,

golfing without a cart or purchasing plants elsewhere were acceptable risks.

Rule #6

The state should provide notice when it plans to restrict civil rights

If lawmakers decide to temporarily suspend civil rights or subject individuals to criminal penalties for what would otherwise be ordinary behavior, Michiganders should be given a notice of when these extraordinary policies will go into effect. Except in rare, emergency situations requiring an immediate response, no policies should be made effective without providing an opportunity for the public to learn about them first. An advanced notice will give individuals time to adjust their behavior and policymakers time to process public feedback.

The executive orders Gov. Whitmer used to commandeer the state's response to COVID-19 did not consistently provide forewarnings. For example, when she required law enforcement to begin penalizing individuals for not wearing a mask in public, she did so with an order that was given immediate effect at 9:43 a.m. on a Friday morning. Perhaps millions of Michiganders were suddenly and unknowingly committing a criminal offense as a result of that order.

Similarly, the governor's mandate to close indoor service at bars, which required restaurants to consult their financial records to determine if the rule applied to them, took effect less than eight hours after it was announced. Epidemic orders issued by the

Department of Health and Human Services that limited gatherings and required face coverings in nearly all public settings also went into effect immediately, without any notice provided to the public.

Rule #7

Pandemic policies should be easy to understand and follow a consistent logic

Policies attempting to mitigate the spread of a communicable disease that is present throughout the state must be applied broadly. Easy-to-understand and logically consistent orders will increase compliance levels. Complicated and inconsistent rules, by contrast, may undermine compliance. This fact needs to be considered when crafting pandemic policies.

The state's response to COVID-19 under Gov. Whitmer has been anything but consistent and easy to understand. The governor's initial rules were so complicated and confusing that her administration wrote more than a thousand responses to frequently asked questions about them. On multiple occasions, the governor issued an executive order but then rescinded or amended it a few days later. Orders from the state health department were no different. The director issued an order on Oct. 5 and then replaced it entirely four days later. Some occasions require rapid response and shifting policies, but a more methodical and steady approach is possible and preferred.

Gov. Whitmer created unnecessary confusion by mandated certain behaviors but then refusing to enforce them, putting in place a pseudo-mandate. For example, one section of an April 24 order required people to wear a mask in some public settings, but then a later section of the same order declared that this mandate would not be enforced. Similarly, gatherings at churches were prohibited and later limited, but individuals could not be penalized for gathering at churches. The state should only mandate under penalty of law what it is willing to enforce.

Additional confusion is created when government agencies provide conflicting recommendations and mandates. In late August, for example, the governor reversed course and modified an executive order to allow high school football and other contact sports. The order told sports organizers to follow guidance from the state health department on what sports are safe to play. But in its guidance, the department said that playing contact sports such a football was not safe and should be avoided.

Rule #8

Voluntary compliance should be the default approach, and buy-in from law enforcement is necessary

The state should rely on voluntary compliance with orders that suspend civil rights as much as possible. To the extent that enforcement measures are needed, civil fines should be used first, and then, only if necessary, criminal sanctions. But if policymakers choose to use

these sanctions, the state must ensure buy-in from law enforcement agencies at all levels, so that the law is enforced equally across the state's population.

This did not occur when Gov. Whitmer was issuing emergency orders that carried criminal penalties. Several local law enforcement agencies publicly pledged not to enforce her orders, leading to even more confusion among the public. Many enforcement agencies complained that they were not made aware of the orders until they were publicly announced. Before the state issues criminally enforceable orders, law enforcement officials should be offered an opportunity to provide feedback, or at a minimum, be given notice that they are going to be responsible for their enforcement.

Rule #9

Statewide rules should come from a consistent source

State law gives policymakers several methods for dealing with pandemics. Emergency executive orders, the public health code, administrative rules, and most importantly, the normal lawmaking process all can play a role. But to provide orders that are easy to understand and boost compliance, policymakers should use a consistent method for issuing broadly applicable rules as much as possible.

This was not the case in the first several months of the pandemic containment effort led by Gov. Whitmer. The bulk of the governor's rules came through her emergency

executive orders, but additional details and orders were issued from a variety of sources. For instance, the administration used FAQs, which were simply posted and updated on a state website, to iron out the details of her executive orders. Similarly, the governor's MI Safe Start Plan, which, like the FAQs, was not developed through a formal process, was a source and reference for some subsequent mandates. The Department of Health and Human Services also issued its own orders that "reinforced" the governor's and even required compliance with the FAQs. The result was that Michiganders needed to keep track of multiple and overlapping state requirements. This led to more confusion than comprehension.

Rule #10

Laws that hinder pandemic responses should be considered for permanent repeal

Michigan is regulated by countless statutes and administrative rules aimed at protecting public health. There may have been an initial rationale for each, but not all of them are helpful. In fact, many laws and regulations that apply to Michigan's health care sector make the act of expanding medical services more expensive and time-consuming — the opposite of what seems helpful for a pandemic. Rules that limit the supply of services and create needless barriers for jobseekers should be reconsidered entirely.

Among the first things Gov. Whitmer did when COVID-19 hit in the spring was to suspend certain licensing requirements for medical

providers and professionals. These included Certificate of Need laws and restrictions on telemedicine and scope-of-practice policies. It was clear these would get in the way of dealing with the pandemic, and the governor was wise to take the action she did.

State regulations suspended during a pandemic should be considered for permanent repeal. Short of that, such rules could be automatically suspended during declarations of a public health emergency. If it is useful to suspend a law during a pandemic emergency, there are likely benefits of repealing it altogether. In addition, policymakers should reexamine public health regulations to identify opportunities for more substantive reforms that would improve the state's ability to respond to pandemics.

Conclusion

An underlying theme in these 10 rules is the importance of individuals' rights and responsibilities in mitigating the dangers of a pandemic. Even during times of crisis, protecting civil rights should be paramount, and the people remain the source of the government's power. The long-established method of adhering to these axioms is to govern through the constitutionally required lawmaking process, and policymakers should limit their action to this method as much as possible.

There is another important reason to consider these 10 rules: They will help produce more effective government action. Under current

law, public officials have broad statutory powers to issue rules and orders in response to pandemics. Those rules and orders, however, are effective only if the public is willing to comply with them. These 10 rules will help create policies that are consistent, fair, temporary, transparent, easy to comprehend, and created through a deliberate process. Policies issued in this manner will lead to better compliance and be more effective in limiting the harms from a pandemic — the goal that all Michiganders share.

Read this pdf online at:

www.mackinac.org/rules-for-pandemics



140 West Main Street | P.O. Box 568 | Midland, Michigan 48640

(989) 631-0900 *phone* | (989) 631-0964 *fax*

mackinac.org | mcpp@mackinac.org