

JAMES E. CLYBURN
CHAIRMAN
MAXINE WATERS
CAROLYN B. MALONEY
NYDIA M. VELÁZQUEZ
BILL FOSTER
JAMIE RASKIN
ANDY KIM

ONE HUNDRED SIXTEENTH CONGRESS
Congress of the United States
House of Representatives

STEVE SCALISE
RANKING MEMBER
JIM JORDAN
BLAINE LUETKEMEYER
JACKIE WALORSKI
MARK E. GREEN, M.D.

SELECT SUBCOMMITTEE ON THE CORONAVIRUS CRISIS

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

PHONE (202) 225-4400

<https://coronavirus.house.gov>

July 9, 2020

The Honorable Andrew M. Cuomo
Governor of New York
NYS State Capitol Building
Albany, NY 12224

Dear Governor Cuomo:

On June 15, 2020, more than forty percent of the members of the House Select Subcommittee on the Coronavirus Crisis sent a letter to you requesting information on your nursing home order. To date, we have not received a direct response from you or your administration, though you are clearly aware of our investigation, as evidenced your decision to hurl political slurs at us rather than simply answer our questions.¹

On June 25, 2020, after receiving no response from your administration, we — along with members of the New York Congressional Delegation — called on New York Attorney General Letitia James to look into your administration’s nursing home orders and provide us with information.² Likewise, we have received no direct response from her office.

Instead, the closest thing that members of this committee and your state’s congressional delegation have received is the publicly available report that the New York State Department of Health (NYSDOH) released Monday.³ This report – issued by your own administration and thus hardly independent – claimed that nursing home admission policies “were not a significant factor in nursing home fatalities.”⁴ In addition to being dubious on its face, this conclusion was reached through a flawed methodology. Disappointingly, it also casts aspersion on heroic frontline nursing home workers in the process.

¹ Bernadette Hogan & Bruce Golding. *Congress demands documents, briefing on Cuomo’s deadly nursing-home order*, N.Y. POST. (June 16, 2020), <https://nypost.com/2020/06/16/congress-demands-documents-briefing-on-cuomos-nursing-home-order/>.

² Letter from Steve J. Scalise, Ranking Member, Select Subcomm. on the Coronavirus Crisis, H. Comm. on Oversight & Reform, to Letitia James, Attorney General, State of N.Y. (June 25, 2020), <https://republicans-oversight.house.gov/wp-content/uploads/2020/06/FINAL-Letter-to-NY-Attorney-General-6.25.20.pdf>.

³ See generally NEW YORK STATE DEPARTMENT OF HEALTH, FACTORS ASSOCIATED WITH NURSING HOME INFECTIONS AND FATALITIES IN NEW YORK STATE DURING THE COVID-19 GLOBAL HEALTH CRISIS (July 6, 2020) available at https://www.health.ny.gov/press/releases/2020/docs/nh_factors_report.pdf.

⁴ *Id* at 25.

Some of the numerous flaws that raise serious questions about the NYSDOH report's conclusion include:

- 1. NYSDOH's report claims, without sufficient proof, that the staff, rather than your March 25th order, are to blame for your state's high nursing home mortality rate.** The report claims the "peak number of nursing home staff reported COVID-19 symptoms on March 16, 2020—23 days prior to the date of the peak nursing home fatalities, which occurred on April 8, 2020," and concludes that the staff, rather than your admission order, are to blame for your state's high nursing home mortality rate.⁵ To back up this questionable assertion, the NYSDOH report's Figure 4 purports to show this 23-day gap. But the most recent data tell a far different story. What Figure 4 actually indicates is March 16 was the day when the highest number of nursing homes (49) reported one or more health care workers with virus symptoms.⁶ This statistic tells us nothing about the actual number of symptomatic staff on that day or even when the actual number of confirmed cases among nursing home staff peaked. In fact, Figure 6 of the NYSDOH report appears to contradict the previous assertion by showing far more infected nursing home workers in April than March.⁷ This would appear to place the peak of infected nursing home staff chronologically *after* you issued the March 25 order and much closer to the peak date of patient deaths.⁸
- 2. NYSDOH's report claims, without sufficient proof, your March 25 order was not a key catalyst of nursing home deaths after mortality peaked in April.** The report claims that your readmission order did not increase nursing home deaths because a large number of infected patients were sent back to affected facilities after the mortality at those facilities peaked in April.⁹ But this claim ignores the simple reality that just a single coronavirus infected patient can infect several others when placed in close quarters among a high-risk population or, as you famously put it, like "fire through dry grass."¹⁰
- 3. NYSDOH's report claims, without sufficient proof, your March 25 order did not drive nursing home deaths, since those deaths did not align with hospital admissions.** NYSDOH dismisses the nursing home order as a driving factor in patient deaths because the peak in nursing deaths did not align with peak hospital readmissions. This analysis, however, ignores the role that readmissions played in the rate of deaths, even if they were declining. Whether or not nursing home deaths would be less numerous and would decline far faster without your order is an important question this report fails to even address.

⁵ *Id* at 4.

⁶ *Id* at 15.

⁷ *Id* at 19

⁸ *Id*.

⁹ *Id* at 5.

¹⁰ Joaquin Sapien & Joe Sexton, "Fire Through Dry Grass": Andrew Cuomo Saw COVID-19's Threat to Nursing Homes. Then He Risked Adding to It, PROPUBLICA, (June 16, 2020), <https://www.propublica.org/article/fire-through-dry-grass-andrew-cuomo-saw-covid-19-threat-to-nursing-homes-then-he-risked-adding-to-it>

4. **NYSDOH’s report claims, without sufficient proof, patients readmitted to nursing homes were “likely not contagious.”** The NYSDOH claims the patients readmitted under your order were no longer contagious. The report states, “most patients readmitted to nursing homes were likely not infectious” but does not make it clear what evidence — if any — exists to back up that claim, and your order prohibited nursing homes from even testing readmitted patients. The report then goes on to add that the length of hospital stays was a median of nine days and that the Centers for Disease Control and Prevention (CDC) believes patients are unlikely to be infectious nine days after showing symptoms. But if this is the basis for the previous claim about “most patients,” then that presents two more problems. First, a median length of stay does not necessarily mean a majority of readmitted patients were hospitalized longer than nine days. Second, the report says that pre-symptomatic people also went to the hospital, which would mean that a nine-day hospital stay would not have placed those patients past the nine-day-from-first-symptom timeline when forcibly readmitted under your order.

5. **NYSDOH’s report claims, without sufficient proof, the time between the peak of nursing home staff deaths and resident deaths is consistent with the average.** NYSDOH says the 23-day lag between the March 16 peak of staff deaths and the April 8 peak of resident deaths is consistent with the average time of infection – between 18 and 25 days.¹¹ This claim does not appear to account for the relative age of nursing home patients. According to the CDC, older patients tend to succumb to COVID-19 at the early end of the above range or before.¹² The peak nursing home resident deaths occurred on April 8, or 14 days after your March 25 order. Any suggestion 14 days is insufficient time for a vulnerable resident to contract and succumb to COVID-19 is divorced from science.

6. **NYSDOH’s report uses faulty data to support all the above claims.** This assessment is fundamentally flawed from the outset because it only accounts for patient deaths in nursing homes facilities and does not include potentially readmission-related deaths that occurred after nursing home patients were transported to hospitals. This flawed use of data incorrectly colors every assertion made in the report. If New York counted deaths of nursing home residents in hospitals, the peak relied upon to defend the March 25 order could be later than April 8. If true, this would undermine NYSDOH’s entire report and render its conclusion meaningless. It is unclear why the State decided to count fatalities in such a flawed manner, but it is safe to assume that the numbers would be significantly larger if New York were fully transparent.

The facts about what happened have not changed. On March 13, 2020, the Center for Medicare & Medicaid Services (CMS) issued guidance “For Infection Control and Prevention of Coronavirus Disease 2019 (COVID-19) in Nursing Homes.”¹³ This guidance provided a

¹¹ New York State Department of Health *supra* note 3 at 14.

¹² Pandemic Planning Scenarios, U.S. Centers for Disease Control & Prevention (last updated May 20, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html#table-2>.

¹³ Memorandum from David R. Wright, Director, Quality, Safety & Oversight Group, U.S. Centers for Medicare & Medicaid Services, to State Survey Agency Directors (Mar. 13, 2020) (on file with Comm. Staff).

blueprint for individual states to follow when determining how to best control outbreaks of COVID-19 in nursing homes and long term care facilities. This guidance does not direct any nursing home to accept a COVID-19 positive patient, if they are unable to do so safely. In fact, it says “nursing homes should admit any individual *that they would normally admit to their facility*, including individuals from hospitals where a case of COVID-19 was/is present” *only if* the nursing home can follow CDC quarantining guidance.¹⁴

CMS Administrator Seema Verma said, “[u]nder no circumstances should a hospital discharge a patient to a nursing home that is not prepared to take care of those patient’s needs.”¹⁵ CMS did not mandate COVID-19 positive patients back to nursing homes but, instead, stated that a COVID-19 case at a hospital does not preclude the nursing home from accepting a COVID-19 negative patient. This CMS guidance was so clear that 45 out of 50 governors followed it and saw much lower nursing home fatalities per capita in their states. You, along with four other governors, chose to ignore this common sense infectious disease guidance.

On March 25, 2020, the NYSDOH issued, on their website, a now-deleted directive on “Hospital Discharges and Admissions to Nursing Homes.”¹⁶ This directive said “[n]o resident *shall be denied* re-admission or admission to the [nursing home] solely based on a confirmed or suspected diagnosis of COVID-19” and “[nursing homes] are *prohibited* from requiring a hospitalized resident who is determined medically stable to be tested from COVID-19 prior to admission or re-admission.”¹⁷

For clarity, your advisory mandated nursing homes accept known COVID-19 positive patients and, further, mandated that nursing homes were prohibited from testing patients for COVID-19 prior to admission. A day later, the Society for Post-Acute and Long-Term Care Medicine issued a statement calling the order “unsafe” and warning that “[u]nsafe transfers will increase the risk of transmission in post-acute and long-term care facilities which will ultimately only serve to increase the return flow back to hospitals, overwhelming capacity, endangering more healthcare personnel, and escalating the death rate.”¹⁸ But despite these warnings, you ignored the scientific guidance, forcing nursing homes to comply and, as one recent congressional witness explained, nursing home administrators complied out of fear of losing their livelihoods.¹⁹

¹⁴ *Id.*; (emphasis added).

¹⁵ Charles Creitz, *Medicare chief Verma blasts Cuomo for trying to deflect blame onto White House for NY nursing home deaths*, FOX NEWS (May 28, 2020), <https://www.foxnews.com/media/seema-verma-andrew-cuomo-nursinghome-deaths>.

¹⁶ Memorandum from the New York State Department of Health to Nursing Home Administrators, et. al. (Mar. 25, 2020) (on file with Comm. Staff).

¹⁷ *Id.*; (emphasis added).

¹⁸ Press Release, Society for Post-Acute and Long-Term Care Medicine, Statement on the March 25, 2020 New York State Department of Health Advisory: Hospital Discharges and Admissions to Nursing Homes (March 26, 2020),

<https://paltc.org/sites/default/files/Statement%20on%20the%20March%2025%20NYSDOH%20Advisory.pdf>.

¹⁹ *Examining the COVID-19 Nursing Home Crisis: Hearing Before H. Ways & Means Comm.* 116th Cong. (statement of Rebecca Gould, President, Schuyler Hospital).

According to the most recent available data, New York has suffered 6,462 nursing home deaths related to COVID-19. That is already more than 25% of the State's total COVID-19 deaths.²⁰ However, given your decision to withhold the information about patients who died after being transferred from nursing homes to hospitals, many are suggesting that those numbers are much higher.

NYSDOH's report appears to be little more than your administration's latest attempt to deflect criticism and shift blame for the consequences of your deadly nursing home order. But blame-shifting, name-calling and half-baked data manipulations will not make the facts or the questions they raise go away. The families of those affected by your March 25 order deserve answers about why it was put in place and, rest assured, we will not give up until we get those answers.

Therefore, to help us better understand what science or guidance you used to make this lethal decision, we reiterate our previous request and also request the following documents and information:

1. All State issued guidance, directives, advisories, or executive orders regarding hospital discharges to nursing homes or any and all other types of assisted living facilities, including those previously superseded, in chronological order.
2. The total number of COVID-19 related nursing home deaths, including deaths that occurred at the nursing home and deaths of a registered nursing home patient at a hospital, by day between January 1, 2020 and present.
3. The total number of COVID-19 related nursing home positive cases, including individuals who tested positive at a nursing home and individuals who tested positive at a hospital, by day between January 1, 2020 and present.
4. The total number of confirmed or suspected COVID-19 positive patients returned to a nursing home or other long-term care facility between March 25, 2020 and present.
5. All information, documents, and communications between the Office of the Governor and the New York State Department of Health regarding COVID-19 mitigation in nursing homes and other long-term care facilities.
6. All information, documents, and communications between the New York State Department of Health and any and all of the State's Nursing Home Administrators.
7. All information, documents, and communications between the New York State Department of Health and your office regarding the report issued on July 6, 2020.

²⁰ State by state nursing home data collected via open source research by the Committee to Unleash Prosperity available at https://docs.google.com/spreadsheets/d/e/2PACX-1vRQztYJ5rdGLdKqNi7_7SGGciugkgwscN3judtUw2hoimsfH-t_NYXKMPONJkrA4jtJNMsuR7jkQite/pubhtml#.

The Honorable Andrew M. Cuomo

July 9, 2020

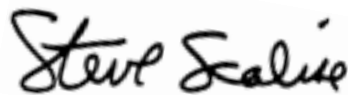
Page 6

8. All underlying information, documents, and research used by the New York State Department of Health to draft the July 6, 2020, report entitled “Factors Associated with Nursing Home Infections and Fatalities in New York State During the COVID-19 Global Health Crisis.”

In addition to these documents, please provide a staff-level briefing no later than July 16, 2020. This briefing may be conducted remotely for convenience, if requested. To schedule the briefing or ask any follow-up or related questions, please contact Committee on Oversight and Reform staff at (202) 225-5074.

The Committee on Oversight and Reform is the principal oversight committee of the U.S. House of Representatives and has broad authority to investigate “any matter” at “any time” under House Rule X. Further, the Select Subcommittee on the Coronavirus Crisis is empowered to investigate “preparedness for and response to the coronavirus crisis, including the planning for and implementation of testing, containment, mitigation, and surveillance activities.”²¹ Thank you in advance for your cooperation with this inquiry.

Sincerely,



Steve Scalise
Ranking Member

cc: The Honorable James E. Clyburn, Chairman
Select Subcommittee on the Coronavirus Crisis

²¹ H. Res. 935 § 3(a)(4) (2020).