Testimony of Bill Hammond
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On March 25, 2020, three days into New York's pandemic lockdown, the state Health Department issued a directive compelling nursing homes to accept COVID-infected patients being discharged from hospitals.

It was an act of desperation – an attempt to avert a crisis in hospitals at the risk of worsening a crisis in nursing homes, whose frail and elderly residents were known to be acutely vulnerable.

It was also a warning about how dangerous pandemics can be, and how quickly they can undermine social norms.

This episode and others like it should be closely investigated – not to shame past officials for misjudgments in the heat of a crisis, but to make sure that future officials will have better options.

The March 25 policy was in effect for 46 days, through the harrowing peak of New York's first wave. During that period, hundreds of people were dying each day – and a third or more of those victims were nursing home residents.

While the policy was in force, more than 9,000 COVID patients – who had recovered from acute symptoms but were known or assumed to still be carrying the virus – were moved into nursing homes, most of them as new arrivals.

These transfers were not the only source of COVID in nursing homes, but they likely made a bad situation worse.

A later analysis by Empire Center found a statistically significant correlation between the number of patients transferred and higher mortality rates in the nursing homes that accepted them. The analysis indicated the policy was associated with several hundred and possibly more than 1,000 additional resident deaths.[1]

In retrospect, the directive also appears to have been unnecessary. Although some facilities became overcrowded, the hospital system as a whole never ran out of capacity – and emergency facilities such as the Javits Center and a Navy hospital ship went mostly unused.

[1] Bill Hammond and Ian Kingsbury, "Covid-positive Admissions Were Correlated with Higher Death Rates in New York Nursing Homes," Empire Center, Feb. 18, 2021. https://www.empirecenter.org/publications/covid-positive-admissions-higher-death-rates/

To avoid such a directive from being issued again, it's important to consider the larger context. The March 25 policy was one link in a chain of public health policy failures that stretched back well before the novel coronavirus emerged in China.

It turned out that New York – like other states and the federal government – had not adequately prepared for a pandemic they knew would be coming eventually.

New York, for example, did not have clear and usable action plans for predictable contingencies, such as the need for more hospital capacity during a major outbreak. It had not adequately stockpiled safety equipment such as masks, gloves, gowns and ventilators, which were liable to become scarce in a large-scale emergency.

The Health Department lacked surveillance tools – such as weekly statistics on emergency room visits or routine sewage testing – that could have detected the first signs of the state's outbreak, which probably began in early February. When the CDC's test kits proved faulty, New York like other states had no immediate access to a backup.

By the time the state's first infections were confirmed in early March, the virus had already proved itself to be fast-spreading and deadly in Europe. Yet New York officials, blinded by the lack of testing, initially downplayed the danger and delayed ordering population-wide precautions for critical weeks.

So it was that by late March, the state's hospitals were filling rapidly – and projections indicating they might soon be utterly overwhelmed had to be taken seriously.

Having allowed the crisis to fester – and lacking ready-made plans – officials pressed hospitals to expand their capacity as quickly as possible. It was at that point that the state Health Department issued its directive discharging frail but stable COVID patients into nursing homes as a way of freeing up beds.

Officials of the Greater New York Hospital Association later said that they had proposed the idea to the governor's office. Nursing home groups, by contrast, said they had not been consulted or given advance notice.

Had the industry been asked, it likely would have pushed back hard against issuing such a rule. A week earlier, the Society for Post-Acute and Long-Term Care (known as AMDA) had warned against policies like this one in stark terms, calling them "a clear and present danger to all of the residents of a nursing home."

Federal officials at the CDC and the Centers for Medicare and Medicaid Services were also urging caution in nursing homes. Their guidelines said that homes should accept COVID-positive patients only if they were prepared to practice good infection control. The guidelines recommended that homes "cohort" their staff – so that employees who dealt with infected patients would have no contact with uninfected patients, and vice-versa. They urged homes to consider isolating residents with COVID in separate wings, floors or buildings.

Cuomo and members of his administration insisted that the March 25 directive was consistent with CDC and CMS guidelines. In fact, the state policy differed in key respects.

First, New York's directive used prescriptive language such as "must" and "shall" instead of "can" and "should":

> During this global health emergency, all NHs [nursing homes] must comply with the expedited receipt of residents returning from hospitals to NHs. Residents are deemed appropriate for return to a NH upon a determination by the hospital physician or designee that the resident is medically stable for return. … No resident shall be denied re-admission or admission to the NH solely based on a confirmed or suspected diagnosis of COVID-19. NHs are prohibited from requiring a hospitalized resident who is determined medically stable to be tested for COVID-19 prior to admission or readmission. [Emphasis in original]

Second, it did not emphasize the need for infection control or refer to the federal recommendations on cohorting and isolation. It said only that "standard precautions must be maintained and environmental cleaning made a priority during this public health emergency."

Citing a long-standing state regulation, Cuomo and his aides further contended that nursing homes always had the option – and indeed the obligation – to turn away patients they could not safely handle. However, that regulation was not actually in effect on March 25, because Cuomo had suspended it by emergency order on March 18.

Under the circumstances, nursing home officials would have assumed that the directive had the force of law, and that they had little choice but to comply.

The policy was flawed in other ways: Although the first wave was overwhelmingly concentrated in New York City and its suburbs, the directive was enforced statewide. Upstate hospitals that were unusually empty due to the lockdown still transferred hundreds of their COVID-infected patients into upstate nursing homes. The policy also remained in place until May 10, even though the state's first wave had peaked in mid-April.

In the aftermath of a disaster response, it's important for the officials involved to identify mistakes, analyze how they happened and build systems that can prevent them from occurring again.

In this case, among other steps, the state should be writing contingency plans – for creating hospital surge capacity and for housing infected nursing home residents. It should be building a robust emergency stockpile. It should be developing systems to routinely monitor for disease outbreaks and to rapidly deploy its own testing kits when the CDC's efforts falter.

Instead of engaging in this necessary process, Cuomo and other state officials clouded the truth. They misstated how the policy had worked, downplayed its impact and stripped relevant information from a Health Department study. Worst of all, they withheld a full accounting of how many residents had died, understating the toll by thousands. They only released the full data after the Empire Center obtained a court order in February 2021.

Critics of the policy have sometimes distorted things, too – by suggesting that it was responsible for all or most of the deaths in New York nursing homes, which is not consistent with the available evidence.

Setting the record straight on New York's March 25 directive is an important first step – but it's one of many.

Hundreds if not thousands of other mistakes were made during the pandemic response, by public health officials in all 50 states and at the federal level. Many of them likely caused as much suffering if not more than must-admit orders for nursing homes.

These hard experiences must not go to waste. The coronavirus pandemic has cost the world millions of lives and trillions of dollars. The federal and state governments should be closely investigating every aspect of this massive disaster and using the lessons gleaned to build stronger public health defenses for the future.

The time to do it is now, before memories fade and before the next deadly virus arrives.

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COVID-positive Admissions Were Correlated with Higher Death Rates in New York Nursing Homes

by Bill Hammond and Ian Kingsbury

February 18, 2021

The following analysis uses information related to coronavirus deaths in long-term care facilities that was recently released by the New York State Department of Health.[i]

Findings

The admission of coronavirus-positive patients into New York nursing homes under March 25 guidance from the New York State Department of Health was associated with a statistically significant increase in resident deaths.

The data show that each new admission of a COVID-positive patient correlated with .09 additional deaths, with a margin of error (MOE) of plus or minus 0.05.

Further, admitting any number of new COVID-positive patients was associated with an average of 4.2 additional deaths per facility (MOE plus or minus 1.9).

The effect was more pronounced upstate—possibly because the pandemic was less severe in that region at the time, so that even a single exposure would have had a larger impact on the level of risk.

Among nursing homes outside of New York City and its suburbs, each positive admission was associated with 0.62 additional deaths (MOE plus or minus 0.17), and any number of positive admissions was associated with 9.33 additional deaths per facility (MOE plus or minus 2.6).

Also in the upstate region, facilities that admitted at least one positive patient during this period accounted for 82 percent of coronavirus deaths among nursing home residents, even though they had only 32 percent of the residents.

Statewide, the findings imply that COVID-positive new admissions between late March and early May, which numbered 6,327, were associated with several hundred and possibly more than 1,000 additional resident deaths.

This analysis—based on the limited data available—sheds new light on the Cuomo administration's much-debated March 25 guidance memo, which instructed nursing homes not to refuse the admission of coronavirus-positive patients being discharged from hospitals.[ii] The policy—inspired by concern about overcrowding of hospitals at the height of New York's spring wave—was effectively rescinded on May 10.[iii]

The data indicate that the March 25 memo was not the sole or primary cause of the heavy death toll in nursing homes, which stood at approximately 13,200 as of early this month.[iv] At the same time, the findings contradict a central conclusion of the Health Department's July 6 report on coronavirus in nursing homes, which said, among other things: "Admission policies were not a significant factor in nursing home fatalities" and "The data do not show a consistent relationship between admissions and increased mortality."[v]

Data & Methodology

This analysis was based on three sources of information:

- A newly released and more complete database of coronavirus deaths in New York's long-term care facilities by date and location, released by the Health Department under a Feb. 3 court order, which enforced compliance with a Freedom of Information request filed by the Empire Center in August.[vi]

- A newly released and more complete database of coronavirus-positive admissions to nursing homes between March 25 and May 8, recently released by the Health Department under a Freedom of Information request by the Associated Press.[vii] (A copy of this data set was obtained by the New York Post, which shared it with the Empire Center.)

- Nursing home census figures routinely posted by the Health Department on a weekly basis.[viii]

This analysis focused on two key variables: the number of newly admitted COVID-positive patients to each nursing home between March 25 and May 8, which totaled 6,327; and the number of residents in each facility who died between April 12 and June 4, which totaled 5,780.[ix]

The shift in dates reflects the typical delay between exposure to the virus and death, which the Health Department has said ranges from 18 to 25 days.[x] The assumption was that deaths occurring before April 12 or after June 4 were less likely to be related to the admission of positive patients under the March 25 policy.

The admissions figures exclude 2,279 patients who were *readmitted* to nursing homes where they were already residents. Because such patients were not new to those facilities, they were seen as less likely to be the original cause of an outbreak.

The analysis controlled for the varying size of nursing homes by including each facility's average resident census during the 12 months before the pandemic. To control for the varying intensity of outbreaks in different parts of the state, the analysis also factored in each facility's home county.

These variables were then subjected to multiple regression analysis to identify statistical correlations.

As with any such analysis, the results should be viewed with caution. Even a statistically significant correlation between two factors does not necessarily mean that one caused the other. The available data were also limited in potentially important ways—such as the lack of dates for the COVID-positive admissions.

Other possibly relevant factors, such as the relative quality of care provided in the nursing homes and the average acuity of their patients' condition, were beyond the scope of this review. Moreover, the data do not clarify how many of the patients admitted to a nursing home from a hospital later died in the nursing home, which would add to the home's death count even if the patient in question did not spread the virus there.

Conclusion

Within the limitations of the available data, the results were robust. The findings were calculated with statistical significance at the 99 percent confidence level. Similar correlations were found across varying approaches, including expanding the pool of admissions data to include readmissions and treating the transfer of hospital patients to nursing homes as a binary outcome (i.e. whether a nursing home received such transfers) or a continuous variable that considers the impact of each additional transfer. When analysis is disaggregated by region (i.e. upstate or downstate), the models indicate that transfers from hospitals to nursing homes were significantly associated with nursing home deaths upstate but not downstate, where the population-wide infection rate was exceptionally high during the period in question.

The coronavirus pandemic wreaked havoc in nursing homes across the country and around the world, including in jurisdictions that did not adopt policies similar to those in the Cuomo administration's March 25 guidance memo. However, this analysis indicates that the guidance may have made a bad situation worse—and points to the need for further research to determine the best policy before the state faces another pandemic.

Endnotes

[i] The full data set of coronavirus deaths in nursing homes and other long-term care facilities is available at https://www.empirecenter.org/publications/covid-nursing-home-data/

[ii] New York State Department of Health Advisory dated March 25, 2020.

[iii] Executive Order No. 202.3.

[iv] Bill Hammond, "New York Reveals Another 1,516 COVID-19 Deaths in Long-Term Care Facilities," empirecenter.org, Feb. 7, 2021.

[v] 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 (revised July 17, 2020, and February 11, 2021).

[vi] Available at https://www.empirecenter.org/publications/covid-nursing-home-data/.

[vii] Bernard Condon and Jennifer Peltz, "AP: Over 9,000 virus patients sent into NY nursing homes," February 11, 2021.

[viii] Available at https://health.data.ny.gov/Health/Nursing-Home-Weekly-Bed-Census-Beginning-2009/uhyy-xp9s.

[ix] This nursing home death toll of 5,780 includes residents who died after being transferred to hospitals, a group that was previously omitted from the state's public reporting and from the Health Department's July 6 report.

[x] New York State Department of Health's July 6 report.

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‘Like fire through dry grass’
Documenting the Cuomo administration's cover-up of a nursing home nightmare

by Bill Hammond
August 17, 2021

Introduction

Governor Cuomo’s resignation over sexual harassment charges – and the subsequent suspension of Assembly impeachment proceedings – have left other serious allegations of wrongdoing by the governor unresolved.

Of particular concern are questions surrounding the Cuomo administration’s handling of the coronavirus pandemic in nursing homes – including a March 25, 2020, directive that compelled homes to admit COVID-positive patients and a months-long effort to conceal the fallout of that policy.

The exact impact of the original policy on nursing home residents remains uncertain, in large part because the Cuomo administration succeeded in clouding the picture.

The ensuing cover-up, however, is clearly documented by a close review of the public record – in the form of briefing transcripts, official documents, hearing testimony, media reports and belatedly released government data.

More details about these actions may yet come to light – from a pending report by the Assembly Judiciary Committee or from an investigation by federal prosecutors in Brooklyn. Still, enough is known already to tell a disturbing story.

It began with a fateful decision in late spring of last year, when the pandemic’s first wave was sweeping into New York.

Desperate to clear space in rapidly filling hospitals, the Health Department issued a memo directing nursing homes to promptly accept discharged patients who were known or suspected to be infected with the virus.

“No resident shall be denied re-admission or admission to the [nursing home] solely based on a confirmed or suspected diagnosis of COVID-19,” the department’s directive said in underlined type. It also barred homes from waiting on results of tests before letting patients move in.

Even in those early days, the risk being taken was clear. A nursing home near Seattle had been the epicenter of the nation’s first major outbreak a month before. As Governor

'Like fire through dry grass': Documenting the Cuomo administration's cover-up of a nursing home nightmare

Cuomo memorably said in late March, "Coronavirus in a nursing home can be like a fire through dry grass."

Soon, nursing home residents were dying by the thousands, and Governor Cuomo found himself answering for a policy that had effectively shipped the virus into facilities full of the state's most vulnerable citizens. The hospital transfers were not the only source of infections in nursing homes, but they most likely contributed to what became a horrific situation.

As public concern about that decision mounted, the governor and his aides made another fateful choice – to hide the truth about what was happening in nursing homes.

The result was months of turmoil: protests by family members of residents who died, tussles with legislators and the press, a legal battle over public records, a whistle-blowing report from the attorney general, a federal investigation, an impeachment inquiry and bipartisan calls for the governor's resignation.

The record shows that the governor and his aides:

- misstated how the March 25 directive worked and where it came from;
- omitted thousands of victims from official death counts;
- rewrote and falsified a Health Department report;
- knowingly disseminated skewed and misleading statistics;
- stonewalled legislative inquiries; and
- withheld public records in defiance of the Freedom of Information Law.

An array of high-ranking state officials participated in the cover-up, including several of the governor's closest advisers, the health commissioner, the superintendent of financial services and a longtime aide later elevated to be SUNY chancellor.

As a result of their combined efforts, the true scale of the pandemic in New York's nursing homes remained secret for months – until the attorney general's office faulted the Cuomo administration for under-reporting and the Empire Center won a court order compelling release of complete data. The death toll in long-term care facilities turned out to be more than 6,000 higher than the state had acknowledged – a disparity shocking enough to make national headlines.

The original directive grew out of a moment of genuine crisis, when a deadly but poorly understood virus was spreading with fearsome speed.

Once the worst had passed, however, the governor and his aides had an opportunity to reassess their decision-making without the pressure of an emergency. They could have led an

honest discussion of the decision they made – by describing the policy accurately, proactively sharing relevant data and engaging in good-faith debate to draw lessons for the future.

Instead, they led what amounted to a disinformation campaign – one that continues to cloud understanding of a major public health disaster.

Background

New York confirmed its first known case of COVID-19 on March 1, 2020, but it's clear in retrospect the novel coronavirus had already been spreading for weeks.[i]

After initially downplaying the threat, Governor Cuomo – exercising his newly enhanced emergency powers – responded with increasingly dramatic measures as the days went by and case counts mushroomed.

At his briefing on March 17, the governor cited projections indicating that as many as 110,000 New Yorkers would soon be sick enough to require hospitalization – in a state that has a total of 55,000 beds.[ii] Lending credibility to that dire forecast, the real-time number of COVID-19 inpatients leapt from 326 on March 16 to 3,343 on March 23, a 10-fold increase in one week.[iii]

Anticipating a flood of critically ill patients, the governor took increasingly urgent steps to prepare. On March 21, he announced plans to set up temporary hospitals at New York's Javits Convention Center and other sites.[iv] On March 22, he ordered the cancellation of elective procedures and directed hospitals to expand their bed capacity on an emergency basis by 50 to 100 percent.[v]

In response to the latter, officials of the Greater New York Hospital Association approached the governor's office with a request of their own: They sought the state's help to discharge recovered COVID patients into nursing homes.

On March 25, the Health Department issued a strongly worded one-page directive, which said in part:

> During this global health emergency, all NHs [nursing homes] must comply with the expedited receipt of residents returning from hospitals to NHs. Residents are deemed appropriate for return to a NH upon a determination by the hospital physician or designee that the resident is medically stable for return. … No resident shall be denied re-admission or admission to the NH solely based on a confirmed or suspected diagnosis of COVID-19. NHs are prohibited from requiring a hospitalized resident who is determined medically stable to be tested for COVID-19 prior to admission or readmission.[vi]

Nursing home officials later testified that they received no advance notice of this directive. Had the department or the governor's office consulted the industry, they likely would have received pushback. A week earlier, the Society for Post-Acute and Long-Term Care (known as AMDA) had

warned against policies like this one in stark terms: "Admitting patients with suspected or documented COVID-19 infection represents a clear and present danger to all of the residents of a nursing home," the society's executive committee said in a March 19 resolution.[vii]

That resolution was cited in the first news story about the March 25 directive, which appeared in the Wall Street Journal on March 26.[viii]

State officials have not directly addressed how they weighed this risk at the time. After seeing hospitals become overwhelmed in China and Italy, it seems likely they considered that scenario to be the greater danger.

At a briefing on May 20, 2020, the governor gave this explanation:

> We were dramatically increasing hospital capacity. If a person doesn't need an urgent care bed in a hospital because they're not urgently ill … it can take two weeks to test negative. When you're no longer urgently ill, is the best use of a hospital bed to have somebody sit there for two weeks in a hospital bed? When they don't need the hospital bed because they're not urgently ill? They're just waiting to test negative on the antibody test, which can take two weeks. And you need that hospital bed for somebody who may die without it.[ix]

More than 9,000 patients would be transferred under the policy, including 2,700 readmissions of existing residents and 6,300 new admissions.[x]

By the time the directive was issued, the coronavirus was already spreading rapidly in nursing homes, and more than 200 residents had died.[xi] It's not clear whether state officials knew that at the time. The Health Department did not require daily COVID reporting by nursing homes until mid-April.

The daily death rate in nursing homes statewide would escalate to a high of 340 on April 7 and then begin declining, closely matching the pandemic trend for the state as a whole.[xii] Ultimately, nursing home residents, who represent approximately one-half of 1 percent of the state's population, would account for almost a third of COVID deaths.

The number of patients hospitalized for COVID during the first wave peaked on April 13 at just under 19,000, well below the projections that had originally inspired the March 25 directive.[xiii] Hospitals in some parts of New York City did become overcrowded for a period – and there were critical shortages of intensive-care capacity and ventilators – but facilities in other parts of the city and state had available beds at the time.

Although the March 25 directive was issued in the name of preventing hospital crowding, it was implemented throughout the state. More than 500 transfers of COVID-positive patients occurred in upstate areas where hospital crowding was less severe or nonexistent.[xiv]

The policy also continued until May 10, when the governor issued a superseding order barring hospitals from discharging positive patients to nursing homes. That was almost a month after hospitalizations peaked on April 13. According to available records, about two-thirds of the transfers happened between April 13 and May 10.[xv]

Other key developments related to the March 25 directive include:

April 13: The state started posting separate reports on the death toll among nursing home residents – and the March 25 policy soon became a frequent topic at the governor's daily briefings.

May 3: The state changed how it reported pandemic data from nursing homes – adding "presumed" COVID deaths but for the first time excluding nursing home residents who had been transferred to hospitals before dying. Regarding the latter group, officials said they were worried about "double counting" and resisted requests from the media and others to release the missing numbers.

July 6: Responding to increasing protests, the Health Department published a 34-page report on the pandemic in nursing homes.[xvi] It contended that COVID-positive admissions under the March 25 directive "were not a significant factor in nursing home fatalities," and identified the primary cause as infected staff members who spread the disease unwittingly. The report – which was later revealed to have been rewritten by the governor's aides – was replete with omissions and inaccuracies, and its conclusions were widely questioned by independent experts.

Aug. 3: In testimony at a legislative hearing, Health Commissioner Howard Zucker defended the administration's nursing home policies but refused to say how much higher the death toll would have been if residents who died in hospitals were included.

Aug. 26: The U.S. Justice Department announced that it was opening a preliminary inquiry into the nursing home policies of New York, New Jersey, Pennsylvania and Michigan, but requested data only from the relatively few facilities owned by state and local governments.

Sept 18: The Empire Center sued the Health Department under the Freedom of Information Law, seeking prompt release of the full count of deaths among nursing home residents, both in the facilities and in hospitals, including the dates and locations of each.[xvii]

Oct. 27: The Justice Department broadened its inquiry in New York, asking the state to turn over data on private nursing homes as well as public.

Jan. 28: Attorney General Letitia James issued a report on the pandemic in nursing homes that, among other points, estimated that the true death toll was 50 percent

higher than the state had acknowledged.[xviii] That prompted Zucker to confirm a total of 13,000 resident deaths, about 4,000 more than previously reported.[xix]

Feb. 3: A state Supreme Court judge ruled in favor of the Empire Center's FOIL suit and ordered the Health Department to release the requested data by Feb. 10. That data – which also included assisted living and adult-care facilities – showed a total of more than 15,000 resident deaths, or 6,000 more than previously reported.

Feb. 17: A federal investigation of the Cuomo administration's handling of nursing homes and other matters was first reported in the media.[xx]

March 11: Assembly Speaker Carl Heastie announced an impeachment inquiry focused on the governor's handling of nursing homes, sexual harassment allegations and other matters.

Aug. 10: Cuomo announces his intention to resign effective in 14 days.

Aug. 13: Heastie announced that the impeachment inquiry would end with the governor's pending resignation.

Correcting the record

The Cuomo administration's deceptions and obfuscations about the March 25 directive began when reporters first asked about the issue in mid-April 2020 and continue to the present day.

The effort has unfolded in four overlapping phases:

- Mischaracterizing the policy
- Withholding data and skewing statistics
- Falsifying a Health Department report
- Rewriting the history of their own actions

Their alternative narrative was often self-contradictory and unconvincing. Their statements were regularly challenged by fact-checkers. Yet they kept up the misinformation for months.

What follows is a partial summary of false and misleading statements and omissions of fact. (Unless otherwise noted, emphasis in quoted material was added by the author.)

Mischaracterizing the policy

Conflating admissions and readmissions

The March 25 directive specified that it applied both to the admission of new residents and the readmission of existing residents. New admissions under the policy outnumbered readmissions by more than two to one, according to data ultimately released by the Health Department.

Yet officials repeatedly implied that the policy applied exclusively or primarily to the existing nursing home residents who were returning to a facility where they had already lived.

Zucker, April 17 briefing: "I would start by first mentioning, many of those individuals who have gone to the hospital because they were ill and then they left to *go back to their nursing home*, which is, as we've said before, *which is their home*, so that's the first thing. You want to bring them back to that area."[xxi]

Zucker, April 20 briefing: "The policy is that if you are positive, you should be *admitted back to a nursing home*. … We're working closely with the nursing homes … to protect those individuals who are *coming back* who had COVID-19 and were *brought back to the nursing home from where they came*."[xxii]

Health Department report, July 6: "Admissions into nursing homes are patients *who went to the hospital from a nursing home*, were treated and *returned back to their nursing home*. By definition these patients could not have been responsible for introducing COVID into their nursing home, as they had COVID prior to going to the hospital for treatment and before being readmitted."[xxiii]

Insisting the policy was taken from federal guidelines

On March 13, the federal Center for Medicare and Medicaid Services (CMS) issued a six-page coronavirus guidance memo for nursing homes, which drew upon earlier guidance from the Centers for Disease Control and Prevention (CDC).[xxiv] The memo included a section about when to admit patients diagnosed with COVID from hospitals. The section built upon previous guidelines for managing infectious patients, known as "transmission-based" protocols or precautions.

"A nursing home can accept a resident diagnosed with COVID-19 and still under Transmission-Based Protocols for COVID-19 *as long as* the facility can follow CDC guidance for Transmission-Based Precautions," the memo said. "*If a nursing home cannot, it must wait until these precautions are discontinued*" (i.e., the patient is no longer infectious).

Later, the same memo added: "Nursing homes should admit any individuals that they would normally admit to their facility, including individuals from hospitals where a case of COVID-19 was/is present. *Also, if possible, dedicate a unit/wing exclusively for any residents coming or returning from the hospital*. This can serve as a step-down unit where they remain for 14 days with no symptoms (instead of integrating as usual on short-term rehab floor, or returning to long-stay original room)."

In general, CMS has no direct authority to dictate public health policy, so these guidelines did not carry the force of law or regulation. Indeed, some states later issued rules that restricted or forbade the admission of COVID-positive patients to nursing homes.

Confirming the non-mandatory nature of the guidance, CMS used permissive rather than prescriptive language, such as "can accept" and "should admit." They included the caveat about taking special precautions with all patients returning from hospitals – whether diagnosed with COVID or not – and recommended that homes establish a separate unit or wing where such patients should stay for 14 days.

The Health Department's March 25 policy differed from the CDC guidelines in several critical ways.

First, it came from state government, which has direct legal authority over nursing homes and other health-care providers within New York's borders. Second, it was labeled as a "directive" rather than "guidance."

Third, it used clearly prescriptive language, saying that homes "must comply with expedited receipt of residents returning from hospitals," that "no resident shall be denied re-admission or admission to the [nursing home] based solely on a confirmed or suspected diagnosis of COVID-19," and that homes "are prohibited from requiring" tests before admission.

Fourth, the memo included only a non-specific caveat: "As always, standard precautions must be maintained, and environmental cleaning made a priority, during this public health emergency." It did not mention the CDC guidance, the need for special precautions for newly admitted COVID-positive hospital patients or the idea of keeping them in a separate unit for 14 days.

A June 2021 report by the New York State Bar Association's Task Force on Nursing Homes and Long-Term Care concluded: "Although the Governor would later describe the March 25th directive as in accordance with CDC guidance, there appears to be significant difference between then-current CDC guidance and the March 25th directive."[xxv]

Despite these distinctions, the governor and other officials declared the March 25 policy was entirely consistent with – and driven by – the federal guidance.

Secretary to the Governor Melissa DeRosa, May 23 briefing: "The policy that the Department of Health put out was *in line directly with the March 13 directive put out by CDC and CMS* that read, and I quote, 'Nursing homes should admit any individuals from hospitals where COVID is present.' Not could, should. That is President Trump's CMS and CDC."[xxvi]

Cuomo, May 23 briefing: "New York *followed the president's agencies' guidance*. So that depoliticizes it. What New York did was follow what the Republican administration said to do. That's not my attempt to politicize it. That's my attempt to depoliticize it. So don't criticize the state for following the president's policy."[xxvii]

DeRosa, May 27 briefing: "The CDC and CMS put out guidelines on March 13th that DOH drew directly from the March 25th directive. So it's directly in line with the Centers for Disease Control. And we believe that in the middle of a pandemic, you should be looking to the national experts for advice."[xxviii]

Zucker, July 6 press conference: "The document *following the March 13th CMS guidance* simply said that no resident shall be denied admission solely because of COVID-positive status."[xxix]

Denying that the policy was mandatory

Despite the strong wording of the March 25 directive, the governor and other officials said nursing homes always had the option of turning away patients under pre-existing state laws and regulations. Those regulations include a provision mandating that a facility "shall … accept and retain only those nursing home residents for whom it can provide adequate care."[xxx]

During public health emergencies, however, the governor and commissioner are empowered to suspend laws and regulations as necessary to protect the public. The directive itself did not mention an obligation for homes to turn away patients under any circumstances – nor did the department update the policy to clarify its expectations. Since the March 25 directive invoked the emergency and used prescriptive language, nursing home officials might reasonably have assumed that it was meant to supersede normal regulations.

Nursing homes are also heavily dependent on the good will of the Health Department, which oversees both their regulation and licensing and the bulk of their revenue through the Medicaid program. Whether the directive was technically mandatory or not, administrators would have felt pressure to comply.

Legal ambiguities and practical realities notwithstanding, the governor and other officials contended that the homes themselves bore all responsibility for accepting COVID-positive patients.

Cuomo, April 22 briefing: "The state regulates the nursing home, but it's a private corporation … They take care of senior people, people with illnesses, etc. That's what they get paid to do. We set a regulatory framework for them to do it. If they can't do it, they should say, 'I can't do it.' "[xxxi]

Cuomo, May 4 briefing: "Remember the basic premise of the nursing home: The nursing home can only accept or keep a patient if they can provide adequate care for that patient. If they have a COVID patient or non-COVID patient but they can't provide adequate care for that person, it is their obligation to transfer the person. If they can't find the place to transfer the person, it's their obligation to call the state Department of Health, and the state Department of Health will transfer the person."[xxxii]

From Cuomo's book, "American Crisis": "No law or policy would have ever required a nursing home to take any COVID-positive person. The policy was that nursing homes couldn't

discriminate, not that they had to accept. That makes all the difference in the world. In fact, in New York law, it is clear that a nursing home can 'only accept' a patient that it is prepared and equipped to treat given the needs of the other patients in its facility. … They had an obligation to keep the other residents safe from the virus. If they couldn't do that, then they could not accept a COVID-positive person and they were legally obligated to decline that person's admission."[xxxiii]

Withholding information and skewing statistics

Throughout the pandemic, the state Health Department has used its Health Emergency Response Data System, or HERDS, to track the progress of the pandemic in hospitals and nursing homes.

Starting in mid-April, nursing homes were required to file daily updates of how many residents and employees were sick with COVID-19 and how many had died. For residents, homes were obliged to specify the numbers of residents who died within the facility, and the number who died in hospitals or other out-of-facility locations.

The HERDS system was the basis for many of the statistics that Cuomo and his aides shared during their daily briefings, but some of the data gathered through HERDS were reported selectively and other data were withheld completely.

Failing to post nursing home infection counts

Infection rates are a crucial leading indicator in any pandemic. When they start to increase, it provides an early warning about new outbreaks – and the likelihood that deaths will soon rise as well.

HERDS reports from nursing homes included a detailed daily update on the number of residents and employees in each facility who were sick – including both laboratory-confirmed cases and "presumed" or "suspected" cases who had shown symptoms but had not been tested.

Although most other states have provided statistics on nursing home infections as well as deaths, New York never did – denying both the facilities and the public an early warning of worsening conditions.

Posting death tolls in a hard-to-use format

The Cuomo administration has posted most of the data on its COVID tracker website in formats that did not provide for easy downloading or conversion to spreadsheets. For many metrics, the site provided the latest totals but omitted the "historic" data for previous dates that would show the trends over time.

For nursing home deaths, the state posted semi-regular reports as PDF documents. These text files gave cumulative totals for each facility and each county, but no statewide total and no

dates for when deaths occurred – details that are crucial for tracking trends and analyzing policy.

Even after the court ordered the state to release complete day-by-day data in early February (which are available at the Empire Center's website[xxxiv]), the Health Department has continued posting PDFs that inhibit analysis.

Under an executive order by Cuomo from 2013, the state established an "open data website" where agencies were encouraged to proactively post records in a database format that was easy to download and analyze.[xxxv] The state shared little of its pandemic data through this portal until the spring of 2021, and nursing home fatality data were still not available there as of the publication of this report.

Omitting certain residents from nursing home fatality reports

Starting in mid-April 2020, the Health Department posted semi-regular reports on confirmed COVID deaths in nursing homes – reports that initially included residents who had been transported to hospitals before dying.

On May 3, however, the department changed those reports in two ways: First, it stopped including the deaths of residents that occurred in hospitals or otherwise outside the facilities. Second, it added a column for "presumed" COVID deaths, referring to cases in which the diagnosis had not been confirmed by laboratory testing.[xxxvi]

With the combined effect of those two changes, the total death toll increased from 3,087 on May 1 to 4,968 on May 3 – reflecting the addition of more than 2,500 presumed deaths. However, the number of *confirmed* deaths declined, from 3,087 to 2,274, reflecting the omission of more than 800 resident deaths in hospitals.[xxxvii]

In adult-care facilities, the effect was more dramatic: Their total COVID toll dropped from 646 to 155, suggesting that most of the deaths among their residents were occurring in hospitals.[xxxviii]

The omission of out-of-facility deaths from the state's reports was not a secret – it was disclosed in a footnote – but the number of those deaths remained hidden for the next nine months.

The Cuomo administration had effectively divided nursing home victims into two categories – those who died physically within the facilities, and those who died somewhere else – and counted only the first group. The result was to make New York's nursing home death toll look roughly one-third lower than it actually was.

Removing the directive from the Health Department's website

In an unusual maneuver, the department removed the March 25 directive from its website while it was still in effect.

Its disappearance went largely unnoticed until late May. Based on an independent internet archive, however, the change appears to have occurred between May 5 and May 8.[xxxix]

That would have been prior to May 10, when the state issued a superseding order that barred hospitals from sending COVID-positive patients to nursing homes.

Despite the May 10 order, Zucker has said the original March 25 directive technically is still in effect. The rationale for removing an existing policy from public view is unclear.

Rebuffing inquiries from the media and the Legislature

In addition to omitting thousands of out-of-facility deaths from its official reports, the Cuomo administration also declined to provide information about those deaths when asked.

Officials clearly had the data available to them. Beginning in mid-April, they were requiring nursing homes to report both in-facility and out-of-facility COVID-19 fatalities on a daily basis through HERDS. Yet the governor and other officials consistently deflected requests for that data from reporters, watchdog groups, industry associations and even members of the Legislature.

Initially, the governor promised transparency. "We give you everything I have that doesn't invade someone's personal privacy," Cuomo said at his briefing on April 13, 2020. "Otherwise, there's no secret to [the] number of deaths in nursing homes. To the extent you can release it without invading people's privacy, release it."[xl]

At a legislative hearing on Aug. 3, however, Commissioner Zucker repeatedly declined to provide the number of nursing home residents who had died in hospitals.

"I know that you want that number, and I wish I could give you the number today," Zucker said in response to a question from Senate Investigations Chairman James Skoufis. "I need to be sure it's absolutely accurate."[xli]

Pressed by Skoufis for a "ballpark" figure, he added: "I'm not prepared to give you a specific number."

In a subsequent hearing on Aug. 10, an official of the nursing home association Leading Age New York, James Clyne, said the department had not shared full data with his group, either: "I don't have access to that HERDS data on my own."[xlii]

The department also rebuffed requests for the data under the state's Freedom of Information Law, including one filed by the Empire Center on Aug. 3. "Please be advised this office is unable

to respond to your request … because a diligent search for responsive documents is still being conducted," the Health Department said in a Aug. 31 letter.[xliii]

The department deferred responding to the center's request three times before the center won a court order forcing release of the data in February 2021.

Citing invalid reasons for withholding data

In declining to provide a complete count of nursing homes deaths, officials cited concerns about accuracy.

At the Aug. 3 hearing, Zucker noted that the department was collecting data from two different sources – hospitals and nursing homes. "We don't want to double-count and say this person died here and also there. … You know me. I will not provide information unless I'm sure it's absolutely accurate and out there."[xliv]

An aide to Cuomo who also testified on Aug. 3, Gareth Rhodes, also resisted sharing numbers: "We will not give ballparks. We will not give ranges. We're not going to give estimates. We're going to give the actual data. We need to collect it. We need to go back to the nursing homes, poll them and validate this data and release it on a rolling basis."[xlv]

It was later reported that Rhodes completed an audit of nursing home deaths in late August, but the administration would continue withholding the data for six more months.[xlvi]

Bona fide or not, concerns about accuracy would not have been valid grounds for withholding data under the Freedom of Information Law – and for good reason. No large-scale data-gathering system is error-free. An accuracy-based exception to FOIL would be license to block virtually any request for records.

As for the specific concern about double-counting, this should have been easy to address. Through HERDS, nursing homes were directly reporting how many of their residents had died, regardless of location. The department could have shared those numbers with minimal risk of redundancy.

Flouting the Freedom of Information Law

The state's Freedom of Information Law requires agencies to produce records within a reasonable amount of time given the circumstances of a particular request. If the response is going to take an extended period, the agency must provide the reason for the delay and a "date certain," or hard deadline, for when it will comply.[xlvii]

In response to the Empire Center's Aug. 3 request for data on nursing home deaths, the Health Department flouted both requirements. The reason it gave for the delay – that it was conducting a "diligent search" for the records – was obviously false, since the requested numbers were readily available in the department's HERDS database.[xlviii]

The department also failed to specify a date certain for completion, instead merely estimating when it would provide an update on its progress. It repeated that tactic three times – delaying first to Nov. 5, 2020, then to Jan. 13, 2021, and then to March 22, 2021.

In response to an appeal by the Empire Center, the Health Department contended it was acting within the law: "There is no provision of FOIL that prohibits extensions, even repeated extensions, which are particularly reasonable under the circumstances at hand," attorney David Spellman wrote on Sept. 16. "Specifically, documents need to be located and then reviewed for responsiveness, accuracy, legal privileges, and applicable FOIL exemptions under [the Public Officers Law]."[xlix]

Delaying tactics like these have been common practice for the Health Department and other agencies. The public's only recourse is to file suit – as the Empire Center successfully did, with legal representation from the Government Justice Center.

Ruling in the center's favor on Feb. 3, state Supreme Court Justice Kimberly O'Connor confirmed that the department's actions were illegal under FOIL:

> Notwithstanding any assertions to the contrary, DOH had had ample time to respond to Empire Center's FOIL request. Its continued failure to provide petitioner a response, given the straightforward nature of the request, how the data is collected and maintained, and the fact that some of the requested data has already been made publicly available without personally identifiable information, goes against FOIL's broad standard of open and transparent government and is a violation of the statute.[l]

O'Connor ordered the department to produce the records within five business days and, in light of the violation, to reimburse the Empire Center's court costs and legal fees.

Promulgating distorted statistics

If the governor and other officials were genuinely concerned about reporting nursing home deaths accurately, they would have emphasized that their official counts were incomplete and avoided using them for comparisons to other states.

As it happened, they did just the opposite – repeatedly using a statistic based on their incomplete death toll to assert that New York's nursing homes were among the best-protected in the nation.

The statistic drew on a table created by the New York Times titled "Cases and deaths in long-term care facilities, by state."[li] When the table was first published in May 2020, the pandemic's first wave was far more severe in some parts of the country than others. To roughly adjust for that difference, the table included the "share of COVID-19 deaths" – a percentage that showed nursing homes deaths as a share of the total pandemic death toll for each state. A lower number would indicate that nursing homes were relatively well protected given the level of virus in the community.

For New York, the table initially showed that nursing homes accounted for 12 percent of the state's total COVID-19 deaths. That was 34th lowest among the states then reporting the relevant data. Over time, as the pandemic spread into other states, New York's percentage on this metric dropped as low as 48th.

However, the comparison was misleading in New York's case – because the Cuomo administration was omitting thousands of out-of-facility deaths from its nursing home toll, a methodology used by few if any other states. That artificially lowered New York's toll and, therefore, the percentage being measured.

Also helping reduce New York's percentage was its extraordinarily high fatality rate outside of nursing homes, which remains among the worst in the U.S.

When the state's full nursing home death toll first became available in late January 2021, New York's standing in terms of the *Times'* metric deteriorated from 48th to 33rd lowest among the states.[lii]

In terms of a more straightforward metric – the percentage of the nursing home population who succumbed to COVID-19 – the new data pushed New York to 13th highest, up from 33rd based on the incomplete count.[liii]

Given these issues, state officials should have cautioned that the *Times'* comparison was misleading – or avoided using it at all.

Instead, Cuomo and other officials seized on the number as supposed evidence that critics of the March 25 directive were wrong and that New York's nursing homes were unusually safe. Officials cited it repeatedly and forcefully, never mentioning why New York's rate was artificially low. They also described the statistic in vague or misleading ways, sometimes wrongly referring to it as a "per capita" rate.

Cuomo at briefing on May 20, 2020: "You take 50 states … where is New York? No. 34. Even though we had the highest number of cases per capita, we're No. 34. You could say, 'Wow, how come you're only No. 34?' "[liv]

Cuomo on "Meet the Press," June 28, 2020: "In New York, we're No. 46 in the nation in terms of percentage of deaths at nursing homes, compared to the total percentage. … If they want to point fingers, not at New York. … We're number 46, you have 45 other states to point fingers at first."[lv]

Slide from Zucker webinar, July 6, 2020: "A New York Times analysis found that in terms of the percentage of total deaths in nursing homes, New York State ranked 46th in the nation, meaning 45 states had a greater percentage of fatalities."[lvi]

Cuomo in "American Crisis," published October 2020: "New York was number forty-six out of fifty in the nation when it came to percentage of deaths in nursing homes. There were only four

states with a lower percentage of nursing home deaths, and New York had a much worse situation to manage."[lvii]

Falsifying a Health Department report

In early July 2020, as the governor sought to quell criticism of his nursing home policies, the Health Department issued a 34-page technical report titled "Factors Associated with Nursing Home Infections and Fatalities in New York State During the COVID-19 Global Health Crisis."[lviii]

Drawing on previously undisclosed data, the report argued the March 25 directive was "not a factor in nursing home fatalities," pointing instead to the role of staff members who had unwittingly carried the virus into their workplaces in the pandemic's early weeks.

Although presented in the form of a scientific analysis, the report was replete with falsehoods, omissions, errors and questionable analyses that discredited its central findings. Some of its flaws were evident right away; others came to light later.

Relying on an incomplete death toll

As later revealed by *The New York Times*, several people outside the Health Department had played a role in rewriting and editing the report at the governor's behest – a process that included lowering its tally of nursing home deaths.[lix]

The original draft had put the total at more than 9,000, a number that included out-of-facility deaths. The version published on July 6 reduced the stated toll to 6,432, consistent with the incomplete count being disseminated by the governor's office at the time.[lx]

In response to the Times' reporting, the governor's counsel, Beth Garvey, issued a statement that said, in part:

> COVID Taskforce members, including Melissa DeRosa, Linda Lacewell[lxi], and Jim Malatras[lxii], were involved in reviewing the draft report – none of them changed any of the fatality numbers or 'altered' the fatality data. After asking DOH questions as to the source of the previously unpublished data – to which there were not clear or complete answers – and probing to determine whether it was relevant to the outcome of the report, *a decision was made* to use the data set that was reported by the place of death with firsthand knowledge of the circumstances, which gave a higher degree of comfort in its accuracy. *The [Executive] Chamber* concluded that given the uncertainty of one data set that had not been verified, it did not need to be included, because it did not change the ultimate conclusions, as shown in the revised report which did include that additional data. DOH has repeatedly said they support both the original and revised reports as issued. *(Emphasis added.)*[lxiii]

The passive-voice phrase "a decision was made" and the reference to the Executive Chamber seem to imply that the decision to use the lower death total came from Cuomo himself.

Although Garvey's statement cites a concern about accuracy, the choice to remove an entire category of deaths – without disclosing that fact – makes the report less accurate, not more so.

Mischaracterizing the data about employee infections

An even more serious flaw in the report – which has received little attention to date – lies in one of its core arguments, which attributed the bulk of the nursing home outbreak to nursing home staff.

The report compared the timing of three metrics: deaths among nursing home residents, transfers from hospitals under the March 25 directive, and infections among nursing home staff.

As part of that analysis, the report's text asserted that "the peak number of nursing home staff reported COVID-19 symptoms on March 16, 2020." It noted that this date was 23 days prior to the peak of resident deaths, which it said was consistent with the average delay between infection and death of 18 to 25 days.

"It is likely that thousands of employees who were infected in mid-March transmitted the virus unknowingly – through no fault of their own – while working, which then led to resident infection," the report said.

A chart included later in the report, however, makes clear that what peaked on March 16 was not the number of *staff* with symptoms, but the number of *homes* reporting an initial sick employee. According to the chart, the "number of nursing homes reporting first symptomatic staff" peaked at 49 on March 16.

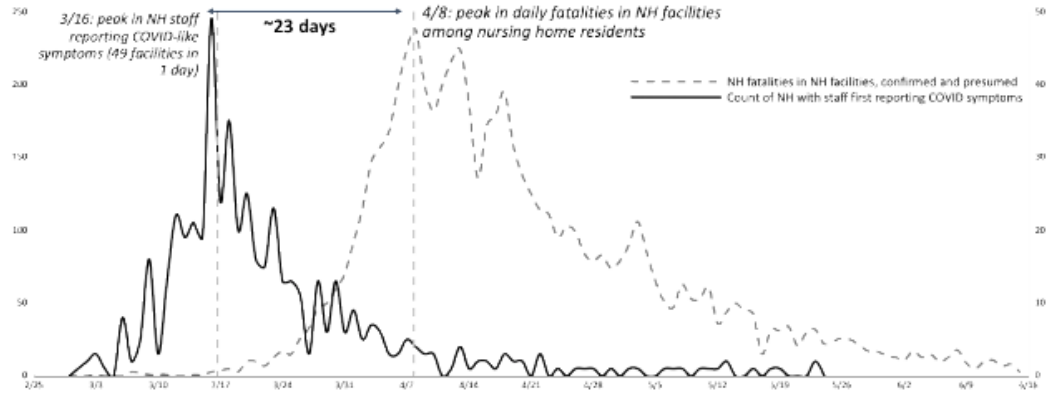
The number of sick *employees* apparently peaked much later. A second chart in the report shows that 6,853 employee infections were reported in March 2020, rising to 13,900 in April.

These two charts appear to contradict the text of the report, yet the discrepancy went unexplained. The department has updated the report two times, in late July 2020 and in February 2021, without addressing this seemingly major error.

To date, the state has not released enough detail on infections among nursing homes to determine the precise date when they peaked. If, as seems likely, they peaked in April rather than March – and possibly after the high point of resident deaths – that would undermine if not contradict the report's central argument.

average length of time between infections to death is between 18-25 days. Therefore, an analysis of the timing between known nursing home staff infections and nursing home fatalities indicates that they are correlated due to the fact that the peak number of nursing home staff reporting COVID-19 symptoms occurred 23 days prior to the date of the peak nursing home fatalities.

Figure 4. Number of Nursing Homes Reporting First Symptomatic Staff and Nursing Home Resident Fatalities Timeline



SOURCES: NYSDOH Nursing Home Staff Testing Survey, June 8, 2020, data reported by NYS nursing homes to NYSDOH and NYSDOH Daily Health Emergency Response Data System (HERDS) survey.

The text of the a Health Department report on COVID in nursing homes (top) misstated the nature of key data on employee infections, as shown in an accompanying chart (bottom).

Misstating the number of COVID-positive transfers from hospitals

Health Department data released to the Associated Press in February 2021 showed that the number of COVID-positive patients transferred from hospitals to nursing homes under the March 25 directive was 9,056. That included 6,327 new admissions of patients who were not previously residents of nursing homes, and 2,729 readmissions of existing residents.

In the July 2020 report, however, the department identified and analyzed only the new admissions. It did not mention that it was omitting the readmitted residents or explain that choice. To the contrary, as mentioned above, the report as originally published implied that it had focused *only* on readmissions. It defined "COVID admission" as patients "who went to the hospital *from* a nursing home, were treated and returned back to their nursing home" (emphasis in original).[lxiv]

That wording was corrected in February 2021, at around the same time the department disclosed the full count of transfers to the Associated Press.[lxv]

The department's analysis found that the daily number of admissions under the March 25 directive peaked on April 14, almost a week after the peak in resident deaths, which it presented as evidence that the transfers were not a significant factor in causing the deaths.

"If admissions were driving fatalities, the order of the peak fatalities and peak admissions would have been reversed," it said.

That pattern would not have significantly changed if readmissions were included, making it unclear why the department had left them out of the report without explanation.

Relying on dubious analysis and drawing exaggerated conclusions

Even if the report had used complete and accurate data, its analysis would not have been as definitive as the report's language suggested.

The relative timing of the peaks in staff illness, resident deaths and hospital transfers (if accurately portrayed) makes clear that the March 25 directive was not the sole source of COVID in nursing homes – refuting an extreme version of the criticism leveled at Cuomo.

However, that evidence is also consistent with the idea that nursing home outbreaks had multiple causes, and that the COVID-positive transfers under the directive played at least some role.

By the report's own calculations, the directive took effect 14 days before the high point of deaths. That's outside the 18- to 25-day span given for the typical time between infection and death – but only by four days. Also, residents kept dying by the hundreds per day for weeks after the peak, and certainly some of those victims could have caught the virus from an infected patient arriving from a hospital.

Yet the text of the report, as rewritten and edited by the governor's aides, tried to downplay or rule out any possibility that the March 25 directive had an effect.

"Peak nursing home admissions occurred a week after peak nursing home mortality, therefore illustrating that nursing home admissions from hospitals were not a driver of nursing home infections or fatalities," it said in its executive summary.

"Admission policies were not a significant factor in nursing home fatalities," it declared as one of its conclusions.

In another dubious claim, the report contended that hospital transfers would no longer have been infectious when they arrived in nursing homes:

> Preliminary data show that residents were admitted to nursing homes a median of 9 days after hospital admission. Health experts believe that individuals infected with the virus are most infectious 2 days before symptoms appear and are likely no longer

> infectious 9 days after symptom onset – thus, by the time these patients were admitted to a nursing home after their hospital stay, they were no longer contagious.

By the definition of "median" however, half of the transfers would have occurred in fewer than nine days and half would have occurred in more than nine days. This implies that some 4,500 patients might still have been infectious on arrival in the homes.

Calling the report "peer reviewed"

"Peer review" is a vetting process used in academic publishing. After a manuscript is submitted to a journal, the editor will distribute it to independent experts in the same field for in-depth critiques. The reviewers – who usually remain anonymous to the authors — are asked to comment on the merits of the work, identify any flaws in the methodology or reasoning and recommend revisions to be made before publication.

There is no evidence that the Health Department's report underwent this process. If it had, the flaws mentioned above could have been identified and fixed.

Instead, a pair of hospital officials – Dr. David Reich, the chief operating officer of Mount Sinai, and Michael Dowling, the chief executive of Northwell Health – endorsed the report's basic findings in a press release and during a joint news conference with Commissioner Zucker.[lxvi]

They were not chosen by a journal editor. They were not experts in epidemiology or nursing home medicine. (Reich is an anesthesiologist by training, and Dowling's primary background is in health-care management.) They were commenting on a report after publication, not before. And they were anything but independent, in that they run hospitals that are regulated by the Health Department and draw much of their revenue from the state's Medicaid program. Dowling has also been a long-time adviser to both Governor Cuomo and his father.

Yet based on Reich's and Dowling's comments, administration officials described the report as "peer reviewed."

Senior advisor Rich Azzopardi in the New York Post, July 7: "The DOH report was peer reviewed by experts at Mount Sinai and Northwell Health and it's disturbing that this politician is refusing to believe facts, science and dates on a calendar."[lxvii]

Azzopardi on Twitter, July 7: "The report was peer reviewed by experts at Mount Sinai and Northwell Health, but speaking of jokes did you hear the one about the Congress member who threw away all her credibility to hitch her wagon to the Trump train & then the president couldn't even remember her name?"[lxviii]

Testimony of Commissioner Zucker, Aug. 3: "On the report, just so you know, it has been reviewed by outside experts as well. So it's sort of peer-reviewed as well."[lxix]

Rewriting history

'Like fire through dry grass': Documenting the Cuomo administration's cover-up of a nursing home nightmare

As controversy mounted over the March 25 directive, the governor and his aides distorted the history of the policy and the ensuing debate.

Attributing the controversy to President Trump and his allies

The governor and his aides have charged that the controversy over New York nursing homes originated with the Trump administration and its allies, which exploited a tragic situation to deflect criticism of the president's pandemic performance.

As Cuomo wrote in his book:

> By early spring, Republicans needed an offense to distract from the narrative of their botched federal response—and they needed it badly. So they decided to attack Democratic governors and blame them for nursing home deaths. … The Trump forces had a simple line: "Thousands died in nursing homes." It was true. But they needed to add a conspiracy, which was that they died because of a bad state policy that "mandated and directed" that the nursing homes accept COVID-positive people, and these COVID-positive people were the cause of the spread of the disease in the nursing homes. It was a lie.[lxx]

In fact, the earliest criticism of the March 25 directive came not from a partisan political voice, but from the Society for Post-Acute and Long-Term Care Medicine, representing medical professionals who work in nursing homes – which on March 26 called the policy "over-reaching, not consistent with science, unenforceable, and beyond all, not in the least consistent with patient safety principles."[lxxi]

Similar concerns were echoed by figures across the political spectrum, including both Republican and Democratic elected officials. One of the governor's most outspoken critics has been Assemblyman Ron Kim of Queens, a Democrat whose uncle died of COVID-19 in a Queens nursing home in April 2020.

In June 2020, the issue received attention in Washington when Rep. Steve Scalise of New Orleans and fellow Republicans on the House Oversight Committee challenged the March 25 directive and similar policies in other states in letters to Cuomo and three other Democratic governors.[lxxii]

Although Trump and Cuomo sparred repeatedly in the spring, their fights at that time largely focused on other issues, such as Cuomo's demands for federal aid in obtaining ventilators and building emergency hospitals.

Trump's Twitter account attacked Cuomo about nursing homes for the first time on Aug. 17 – two weeks after a hearing in the state Legislature at which members of both parties sharply criticized the governor's nursing home policies.[lxxiii]

Saying the hospital transfers "never happened"

'Like fire through dry grass': Documenting the Cuomo administration's cover-up of a nursing home nightmare

In an extended answer to a reporter's question on Sept. 30, 2020, Cuomo made a striking claim: that the state-mandated transfer of COVID-positive patients from hospitals to nursing homes "never happened."[lxxiv]

He called the March 25 directive an "anticipatory rule" that was put in place out of concern that the hospital system would become overwhelmed with critically ill patients:

> That situation never came to be in New York State – because we flattened the curve so effectively. We always had available hospital beds, so we never scrambled for beds. … So, it just never happened in New York where we needed to say to a nursing home, "We need you to take this person even though they're COVID-positive." It never happened. We had extra beds. We had extra beds at [the Javits Convention Center]. We had extra beds at emergency hospitals that we put up all across the state. So, it just never happened that we needed a nursing home to take a COVID-positive person. It never happened.[lxxv]

It was true that the state did not completely run out of hospitals beds, but of course the transfers of COVID-positive patients to nursing homes did happen. According to the Health Department's report – which Cuomo had referenced earlier in his answer – transfers under the March 25 directive happened more than 6,000 times. According to more complete data released later, the transfers happened more than 9,000 times.

Linking the failure to release data to pressure from Washington

The court-imposed deadline for the Health Department to release nursing home data to the Empire Center was Feb. 10, 2021. On that same evening, representatives of the Cuomo administration held a private virtual meeting with Democratic legislators who had also requested information about nursing homes in a letter the previous August 20.

During the meeting, the governor's top adviser, Melissa DeRosa, effectively blamed the Trump administration for the state's failure to share data:

> The [legislators'] letter comes in at the end of August and right around the same time, President Trump turns this into a giant political football. He starts tweeting that we killed everyone in nursing homes, he starts going after [New Jersey Governor Phil] Murphy, starts going after [California Governor Gavin] Newsom, starts going after [Michigan Governor] Gretchen Whitmer.
>
> He directs the Department of Justice to do an investigation into us. … And basically, we froze, because then we were in a position where we weren't sure if what we were going to give to the Department of Justice or what we give to you guys – what we start saying – was going to be used against us while we weren't sure if there was going to be an investigation.

> That played a very large role into this. We went to the [Assembly and Senate] leaders and we said to the leaders, can we please pause on getting back to everybody until we get through this period, and we know what's what with the DOJ? We since have come through that period. All signs point to they are not looking at this. They dropped it. They never formally opened an investigation. They sent a letter asking a number of questions and then we satisfied those questions, and it appears that they're gone. But that was how it was happening back in August.
>
> In the intervening period, the second wave happened. The vaccine rollout started, and all of our attention shifted elsewhere.[lxxvi]

In effect, DeRosa was acknowledging that the administration's actions were motivated by politics – the fear that the information they released would be "used against us" by Trump and his administration.

Self-incriminating as it was, that rationale did not adequately explain what happened.

First, the president's attacks began in mid-August, and the Justice Department's initial inquiry opened on Aug. 26. By that time, state officials had already been holding back data on nursing homes – and rebuffing questions from the Legislature and others – for more than three months.

Second, seven weeks elapsed between the state's response to the first Justice Department inquiry in Sept. 9 and the arrival of the second one on Oct. 28.[lxxvii] During that period, the governor celebrated a low ebb in the pandemic's numbers and promoted his book, which was published on Oct. 13.

Third, the failure to release nursing home records had persisted past the November election and the inauguration of President Biden on Jan. 20, 2021 – which ended any threat of a politically motivated prosecution by the Trump administration.

Even after the attorney general released her Jan. 28 report, and Zucker confirmed a higher overall death toll, the Health Department continued holding back complete data.

In the end, the Cuomo administration shared information with the Legislature (and the public) only when it was legally compelled to, in the final hours before a court-imposed deadline. Fear of attacks by Trump appear not to have been the decisive factor.

Insisting death counts were always complete and accurate

In the months after the full nursing home death toll was exposed, the governor and his administration repeated many of their earlier misleading claims while adding new ones.

'Like fire through dry grass': Documenting the Cuomo administration's cover-up of a nursing home nightmare

At his briefing on Feb. 15, 2021, the governor acknowledged creating a "void of information" about nursing homes that allowed the spread of "misinformation, disinformation [and] conspiracy theories."[lxxviii]

However, he also declared: "The New York State DOH has always fully and publicly reported all COVID deaths in nursing homes and hospitals. They have always been fully reported."[lxxix]

This statement could be seen as correct only in a narrow sense: The thousands of out-of-facility deaths omitted from the Health Department's nursing home toll had not happened "in" the nursing homes. His carefully chosen wording – which also appeared on a slide accompanying his briefing – was likely to confuse a casual observer.

What The Full Data Revealed

The data set released by the Health Department under court order on Feb. 10 revealed much more than just a higher death toll. It also provided the dates and locations of each fatality – information that was critical to analyzing the March 25 directive.

For the first time, it was possible to quantify deaths on a facility-by-facility basis during the specific period when the directive would have been having its maximum impact. Those figures could then be cross-matched with how many COVID-positive patients were transferred to each home, information the department had belatedly released to the Associated Press.

Using this newly released data, the Empire Center found a statistically significant correlation between the admission of new residents who were COVID-positive and higher death rates in the nursing homes that received them. Statewide, the analysis found, the transfers were associated with "several hundred and possibly more than 1,000 additional resident deaths."[lxxx]

The findings suggested that the March 25 directive had indeed been a factor contributing to infections and deaths in nursing homes – directly contradicting a central conclusion of the Health Department's July 2020 report.

The Empire Center's methodology, known as multiple regression analysis, is commonly used to tease out the relative effects of competing factors in complex situations such as a pandemic in nursing homes. The authors of the Health Department report – who would have had access to the same data – did not mention whether they considered using this approach.

Conclusion

Spin and deception are nothing new in Albany, nor in politics generally.

In this episode, however, the stakes were especially high – involving the deaths of thousands of vulnerable New Yorkers, and an ongoing threat to tens of thousands more living in state-regulated and state-funded facilities.

In addition to spreading misinformation, officials concealed the readily available data that would have corrected the record.

The effort went on for months. It made broad use of state resources in the governor's office, the Health Department and elsewhere. It enlisted a raft of high-ranking personnel, including the health commissioner, the head the Department of Financial Services and the now-chancellor of the State University of New York.

It denied members of the Legislature the facts they needed to properly fulfill their constitutional role.

It violated the law, as confirmed by a court ruling in the Empire Center's FOIL suit.

Worst of all, the cover-up itself may have cost lives. The governor and his administration withheld facts that could have pointed toward more effective protection of nursing home residents during the second wave that struck in the fall and winter, when thousands more of them died.

At a minimum, they ran the risk of endangering those residents – and corroded the public trust that will be crucial in the face of future pandemics.

Although the Assembly has chosen not to pursue impeachment, this long list of offenses demands thorough investigation – to fully understand what the governor and his team did and why, hold them accountable if possible, and make sure nothing like it can happen again.

Recommendations

The task of addressing what happened with nursing homes under Governor Cuomo's leadership now falls to his successor, Kathy Hochul. As governor, Hochul should:

- order the prompt release of all available public data related to the pandemic, including still-missing details of what happened in nursing homes;
- commission an independent review of the state's pandemic response, including the development, implementation and impact of the March 25 directive;
- develop contingency plans and protocols to better protect nursing home residents from future outbreaks;
- demand the resignations of all officials involved in withholding records and spreading misinformation during the pandemic, including Commissioner Zucker;
- order the Health Department and other agencies to improve compliance with the Freedom of Information Law and end routine delaying tactics; and

- work with the Legislature to strengthen FOIL so that it lives up to it promise of keeping the public informed and holding officials accountable.

Endnotes

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