

Peter Arbeeny
128 Amity St. Brooklyn, NY 11201
wecarewall@gmail.com

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The Honorable Pamela Bondi
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington DC 20530

Reference: New York State March 25, 2020 Nursing Homes directive versus the 2024 DOJ IG report.

Dear Attorney General Bondi,

We are advocates whose loved ones were among the thousands of New Yorkers who tragically lost their lives in nursing homes during the COVID-19 pandemic. As you are no doubt aware, more than 15,000 New York nursing home residents died of COVID-19 during the early part of the pandemic. We are approaching the five-year anniversary of New York State's infamous [March 25, 2020 directive](#), which forced ill-prepared nursing homes to accept 9,056 COVID-patients over a six-week period. Thousands of families have endured indescribable pain and sorrow, and we continue to seek answers, justice, and accountability for the New York State Department of Health policies that contributed to these unnecessary deaths.

With the December 2024 release of the Biden Administration's [Department of Justice Inspector General report](#) titled "An Investigation of Alleged Misconduct by Senior DOJ Officials for Leaking Department Investigative Activities Concerning COVID-19 in Nursing Homes to Members of the News Media in October 2020," we are compelled to write to you.

In reviewing your report, we discovered multiple errors and misleading statements that must be corrected because they are being [used as a weapon](#) to further hurt victims' families and erode the trust we have in our political system. The DOJ IG report's summary conclusion, that the New York State March 25th directive was "largely consistent" with federal guidelines, is wrong, and not supported by the facts.

Trump Admin Federal Guidelines vs Cuomo Admin March 25th Directive

One of the major findings in the House Select Subcommittee's [report](#) on the Coronavirus Pandemic, released on September 9, 2024, was:

“The March 25 Directive Was **Inconsistent with Applicable Federal Guidance** Regarding Hospital to Nursing Home Transfers and COVID-19 Related Infection Control”

A [separate report](#) from the Subcommittee's minority Democrats came to a similar conclusion, saying: “Governor Cuomo was immediately criticized for the [March 25] Advisory, which also **arguably contradicted federal CMS guidance** by *requiring* nursing homes to accept patients with a COVID-19 diagnosis.”

In addition, CMS Administrator Seema Verma in an [interview](#), and White House Coronavirus Response Coordinator Dr. Birx in [congressional testimony](#), both stated that the March 25th directive was **not following CMS and CDC guidelines**.

We have created the [attached document](#) to visually show in **yellow** the differences between the DOH March 25th directive, and CDC/CMS guidelines. As you can see, this document is almost entirely in yellow, because we highlighted any words that are **not found** in the federal CDC or CMS guidelines.

A June 2021 [report](#) from the New York State Bar Association's Task Force on Nursing Homes summarized a key distinction between the Cuomo administration's March 25 order and federal guidance from the CDC and CMS:

“Although the Governor would later describe the March 25th directive as in accordance with CDC guidance, **there appears to be a significant difference between then-current CDC guidance and the March 25th directive**. The CDC guidance emphasized that a nursing home should admit residents with COVID-19 only if able to follow CDC guidance for transmission-based precautions. If the nursing home could not do so, “it must wait until these precautions are discontinued before admitting residents with COVID-19. The Centers for Medicare and Medicaid Services (“CMS”) had also issued infection control guidance, including a self-assessment checklist that long-term care facilities could use to determine their compliance with these crucial infection control actions.”

While the words used in the federal guidelines were permissive, the March 25 directive was prescriptive and indeed, blunt, using words and phrases such as “must comply,” “urgent need,” “prohibited from requiring,” and “directive.”

In contrast to federal guidelines, the March 25th directive:

- Failed to instruct nursing homes to follow COVID-specific “Transmission-Based Precautions” but instead directed them to use “standard precautions.”
- Omitted instructing nursing homes to follow the CDC and CMS guidelines.
- Omitted CDC guidelines recommending that nursing homes take precautions such as designated separate COVID units and cohorting staff.
- Omitted CDC guidelines stating that nursing homes “must wait until these precautions are discontinued before admitting residents with COVID-19”. *Details below*
- Prohibited nursing homes from requiring a COVID test prior to admission, a provision not included in the federal guidelines. *Details below*
- The sole criteria for admittance to a nursing home was a hospital’s determination that a patient is “medically stable” before transfer to a nursing home, but that phrase is not found in any of the CDC and CMS guidelines. *Details below*

Section IV.B.2: On May 10, 2020 the Governor of New York issued a new order

In a footnote on p. 30, the IG report describes the governor issuing a new [Executive Order 202.30](#) requiring a nursing home to accept only patients that received a negative COVID test. This raises a question: If the Cuomo administration’s March 25th directive was always consistent with federal guidance, why was it [rescinded](#) on May 10, 2020? Was May 10th the day the Cuomo administration stopped following federal guidelines, or the day it started following them?

It is worth noting that at Governor Cuomo’s [May 10, 2020](#) press conference there was no mention that nursing homes should follow CDC and CMS infection prevention and control recommendations.

The DOJ IG report, when describing the NYS March 25th directive as following federal guidelines, quotes the NYS March 25th directive which is logically wrong. The proper approach would be to use the CDC & CMS guidelines as the source material and do a proper comparison and analysis.

Confusion and mistakes on which federal guidelines used

The DOJ IG report is mistaken about which federal guidelines it uses. In [Section IV, B, 1](#), it wrongly states a date for both the CDC and CMS that does not exist for the CDC. Additionally, footnote 60 wrongly uses March 13th for both CDC and CMS guidelines when only one exists. This is wrong and should be corrected.

The DOJ IG report leaves out key details on the federal guidelines so the reader cannot decide on the veracity of many of the claims. Section IV, B, 1 distills nursing home admission criteria to “certain practices” and then references, in footnote 61, the CMS March 13th guidance. The CMS guidance states:

“If a nursing home cannot” follow CDC guidance then “it must wait” until CDC “precautions are discontinued.”

This means a nursing home can accept a patient if they can follow CDC guidance on COVID positive patients, and only if they can do it in a manner that is safe for the other residents. Hence if they can’t follow the CDC guidelines they cannot accept a patient.

The word “wait” is significant given the date here: March 2020 was the beginning of the pandemic. Anyone reading these federal guidelines would know that they are not being forced into admitting a COVID positive patient. This is contrary to the Cuomo Administration March 25th directive.

The CMS March 13th guidance further states:

“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 a long-stay original room).”

This is focused on a COVID-negative patient which the CMS recommends be isolated in a special unit for 14 days before being moved to a normal floor. That is a significant requirement very few, if any, nursing homes were able to do in March, April and May 2020. Further, the March 25th Directive omits this guidance, and states that so-called “standard precautions must be maintained,” rather than the COVID specific federal “transmission-based precautions” (TBP). It is important to note that TBP was the best available science for COVID at the time and not “standard precautions” as the March 25th directive used.

The facts and details around what the IG report calls “certain practices” listed above paint a proper and full picture meaning the report is misleading which must be corrected.

In Section IV, B, 1 the report states:

“The CMS guidance provided that nursing homes could accept residents diagnosed with COVID-19 so long as the facility could implement certain practices. 61 The guidance also noted that “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 present” and, “if possible, dedicate a unit/wing exclusively for any residents coming or returning from the hospital.”62”

These two sentences lead the reader to assume they are both about **COVID positive** patients which is wrong. The second sentence is from the section in the CMS guidance on **COVID negative** patients. Any reader without an intimate understanding of the CMS guidance would mistakenly think these sentences are about COVID positive patients. In short, a reader will think

the CMS guidance states a nursing home should admit a COVID positive patient rather than a nursing home should admit a COVID negative patient (with a dedicated wing). This must be corrected.

Worse, these sentences seem to be taken from the [NYS DOH July 6th report](#) (on page 16). That report “**was not in fact a scientific or medical report**” and that it was **written and edited by Cuomo and his Executive chamber rather than the DOH** which comes from the [NYS Comptroller’s report](#) (p18) and [Congressional Select Subcommittee’s report](#) (p238 & 243). Finally the [NYS AG report](#) (p12) revealed that the nursing home death toll was at least 50% higher than the July 6th report claims.

Based on the evidence that the Cuomo administration falsified and manipulated data in the NYS July 6th report, why would the IG report rely on a report that was not based on facts or science leaving a reader to think these dubious statements are undisputed.

COVID Testing

The DOJ IG report frequently brings up COVID testing as in [Section IV, B, 1](#) and footnote 96.

The federal guidance contemplated test scarcity so it had a “non-test-based strategy” that was purposefully meant to be rare rather than the rule. The DOJ IG report lacks key information and context in the federal guidance for “not testing” including:

- A patient should spend 14 days in a dedicated unit (sometimes called stepdown unit)
- Key checks & balances should be instituted for “not testing” like state health officials’ approval on a case-by-case basis

In the CDC March 23, 2020 guidelines, in section “When a Testing-Based Strategy is Preferred” reads:

“If testing is not readily available facilities may choose to use the non-test-based strategy for discontinuation of transmission-based precautions or extend the period of isolation beyond the non-test-based- strategy duration, on a **case by case basis in consultation with local and state public health authorities.**”

As stated above, “not testing” was meant to be the exception, not the rule plus controlled thereby protecting current nursing home residents.

The March 25th directive made “not testing” the one and only option.

Additionally the DOJ IG report uses the term “if available” (footnote 96) but that term **does not exist** in the federal guidelines. This should be clarified and corrected.

In footnote 87 the IG report states:

“87 none of the previously rescinded or revised orders that CRT leadership was focused on (Michigan, New Jersey, New York, and Pennsylvania) required nursing homes to accept COVID-19 positive patients without testing them”

This is completely false since the March 25th directive clearly prohibited testing: “NHs are **prohibited from requiring a hospitalized resident** who is determined medically stable **to be tested for COVID-19** prior to admission or readmission.”

The rest of the footnote is misleading since nursing homes felt because of the prescriptive nature of the directive plus the suspension of New York laws (NYRCC 415.26, etc.) dealing with nursing home admittance requirements they had no choice but to admit all patients.

Use of the term medically stable/medical stability

The DOJ IG report used the term “medically stable” and “medical stability” 6 (six) times, as seen in sections Section IV, B, 1 in the second paragraph & Section IV, B, 2 in the first paragraph & footnote 96 and appendix A.

It is wrong to use the term “medically stable” or “medical stability” because it is *not* found in any of the federal guidelines. In fact, it is only found in two places, both New York State-based sources:

1. The NYS DOH March 25th directive
2. The [Cuomo letter to the DOJ](#) dated July 29, 2021 titled “MEMORANDUM OF LAW TO DISSUADE FURTHER INVESTIGATION AND PROSECUTION”

The IG report relies on a key term that is exclusively found in documents authored by former governor Cuomo or his administration instead of the federal guidelines is clearly incorrect. The federal guidance never mentioned the word “deny,” nor the words “medically stable”. These sentences clearly change the focus from the actual federal guidance to something else.

Additionally, the use of “medically stable” in the March 25th directive is in the context of admittance. The phrase is not well defined and does not appear in any of the federal guidelines. The federal guidelines did not rely upon a subjective interpretation of an ambiguous term for something as critical as for admittance criteria.

Omission of the true death toll/Odd defense of the March 25th directive

The DOJ IG report dedicates a paragraph, Section V, A, 3, e paragraph 4, on the Cuomo administration’s complaint about having to report the death toll to the DOJ. Yet it does not, in this section, mention that the state was falsifying the data, or that the New York attorney general found that the true death toll was at least 50 percent higher.

Switching of Source material and secondary material

The DOJ IG report uses quotes and content from Cuomo administration documents like footnote 96 quotes Cuomo's official response to the DOJ inquiry (In re Grand Jury Investigation, F. #2021R00167). Then again in Section V, A, 3, e paragraph 4, detailing that the Cuomo administration complained about having to report deaths to the DOJ. The [NYS AG](#), [NYS Comptroller](#) and [Congressional Select Subcommittee](#) (as well as the [NYSBA](#)) reports all call into question the veracity of Cuomo's claims.

Given Cuomo's reported deception on material facts, the IG authors should have been very skeptical of anything the Cuomo administration produced. At a bare minimum, unproven or disputed statements by former Governor Cuomo and his administration should not have been uncritically accepted as true. The IG report remains nearly silent (only footnote 14 & 89 makes mention of death data manipulation but does not seem to use it in context of the paragraph's point) on the evidence that the Cuomo administration's falsification and manipulation of death data, leaving a reader to think these dubious statements are undisputed.

Lastly, Governor Cuomo's July 2021 letter to the DOJ (as well as his [written statement to Congress](#) on Sept 10, 2024), stated: "DOJ should send a letter to CMS and CDC since the states' advisories were modeled after their guidance." Did the IG contact and communicate with the CDC and CMS specific to this issue before they came up with their conclusion?

We hope you see, from the fact-based evidence presented herein, the DOJ IG report of 2024 is deeply flawed when it comes to the question of whether the Cuomo administration's March 25th directive was consistent with federal guidelines.

We ask you to revise the DOJ IG report in light of the facts presented.

Thank you for your attention to this critical matter. We look forward to your response and stand ready to provide additional information or assistance required to support this effort.

Sincerely,



Peter Arbeeny



Janice Dean



Vivian Zayas/Alexa Rivera
Voices for Seniors

Cc:

Inspector General Michael E. Horowitz

Chairman James Comer

Office of the Inspector General
Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530-0001

House Oversight Committee
2410 Rayburn HOB
Washington, DC 20515