

October 21, 2024

VIA EMAIL

The Honorable Brad Wenstrup, D.P.M.
Chairman
Select Subcommittee on the Coronavirus Pandemic
U.S. House of Representatives
Washington, DC 205-6143

Re: Former Governor Andrew M. Cuomo’s Objections and Responses to Post Hearing Questions Related to his September 10, 2024, Testimony Before the Select Subcommittee on the Coronavirus Pandemic

Dear Chairman Wenstrup,

I represent former New York Governor Andrew M. Cuomo (“Governor Cuomo”) and am writing to provide the Select Subcommittee on the Coronavirus Pandemic (the “Select Subcommittee”) with Governor Cuomo’s objections and responses to the questions attached to your September 19, 2024 letter. Subject to the Preliminary Comments, and to the objections set forth in the responses to the individual questions issued by Rep. Nicole Malliotakis and Rep. Mariannette Miller-Meeks, Governor Cuomo responds as follows:

Preliminary Comments

The Select Subcommittee represented to Governor Cuomo that the purpose of the September 10, 2024 public hearing (the “Hearing”) would be in service of the Select Subcommittee’s purported nonpartisan goal of assessing the response to the COVID-19 Pandemic and identifying “lessons learned” so that the country could prepare for, and possibly avoid, a similar Pandemic.¹ Governor Cuomo concurs with that objective, and agreed to voluntarily appear

¹ See Cuomo Transcribed Interview 120:7-16 (Chairman Wenstrup: “The Select Subcommittee was formed in an effort to perform an after-action review and have lessons learned, what worked, what didn’t work, so that we can in the future be able to possibly predict and prepare ourselves for and protect ourself from and maybe prevent a Pandemic. That’s the goal.”); *Cuomo Testifies On Handling of COVID-19 Pandemic*, REV, 31:58:00-32:56:00 (Sep. 11, 2024), <https://www.rev.com/blog/transcripts/cuomo-testifies-on-handling-of-covid-19-pandemic> (statement of Chairman Wenstrup)[hereinafter *Cuomo COVID Hearing*](“We’re examining actions taken by Congress, including

before the Select Subcommittee for the purpose of engaging in a serious discussion of these critically important issues. However, the public statements by you and other majority members concerning the purpose of the Select Subcommittee are inconsistent with the conduct of certain majority members at the Hearing. Numerous majority members opted to forego any legitimate and nonpartisan fact-finding process designed to obtain information and lessons learned from the response to the Pandemic, and instead used their time to engage in a partisan attack on Governor Cuomo and, in many cases, did not afford him any meaningful opportunity to answer questions and provide testimony before the public on the important issues the Select Subcommittee purportedly was formed to address.

Governor Cuomo believes that the post-Hearing questions issued by two majority members of the Select Subcommittee would have been unnecessary if the Select Subcommittee had conducted the Hearing fairly and in accordance with normal rules of procedure. Instead, after initially providing Governor Cuomo with limited time to respond to questions, certain members of the majority, apparently disappointed that Governor Cuomo had cogent and persuasive fact-based responses to accusations made against him by the Select Subcommittee, decided to deprive Governor Cuomo any meaningful opportunity to answer questions and provide testimony to the Select Subcommittee. Indeed, a review of the publicly available video of the Hearing reflects that the majority used a total of approximately 44 minutes to ask “questions” or, more accurately, make statements attacking Governor Cuomo, while Governor Cuomo was provided approximately 14

measures I voted for, but might want to do differently or better the next time, so that when the next shocking Pandemic occurs, we have looked back, found what worked and what didn't, and established a workable system so that we may endure. This is an after-action review in hopes of being able to predict, prepare, protect, and perhaps even prevent the next Pandemic.”).

minutes to respond to questions of the majority members.² In this regard, the conduct of the two majority members now issuing questions was particularly egregious. Rep. Malliotakis used 5 minutes and 10 seconds (slightly over her allotted 5 minutes) to engage in an attack on Governor Cuomo. Governor Cuomo managed to break in for a mere 30 seconds in an effort to respond. Rep. Miller-Meeks similarly used nearly 5 minutes and 8 seconds (slightly over her allotted 5 minutes) to ask her “question” while only providing Governor Cuomo with approximately 24 seconds to respond and provide testimony. *Id.*

We also note that Chairman Wenstrup rejected Governor Cuomo’s request at the Hearing for additional time to respond to these “questions,” which were partisan attacks on him. Again, had the Select Subcommittee provided Governor Cuomo with an opportunity to respond to questions publicly at the Hearing, the supplemental question process would not have been necessary.

Objections and Responses to Questions from Rep. Nicole Malliotakis

QUESTION NO. 1

During the COVID-19 Pandemic, when you were granted special emergency powers as Governor, did the directives you issued under those powers supersede existing state law?

RESPONSE TO QUESTION NO. 1

Governor Cuomo objects to this question on the grounds that it calls for him to provide a legal analysis of New York State law. Governor Cuomo further objects to this question on the grounds that it is based on a series of unsupported contentions, such as its assertion that Governor Cuomo was “granted special emergency powers” without identifying any particular source of such “emergency power,”; its incorrect assertion/underlying assumption that such power included

² CBS, *Andrew Cuomo Testifies Before Congress About COVID Response in New York Nursing Homes*, YouTube (Sep. 10, 2024), https://www.youtube.com/watch?v=S_avLNdXHKo&t=5408s

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issuing “directives” that “supersede existing New York law”; and its incorrect assertion/underlying assumption that Governor Cuomo personally “issued” certain unspecified “directives.” Governor Cuomo reserves the right, through counsel, to submit a legal analysis of the relevant legal issues in the future as may be appropriate, and as may be agreed to with the Select Subcommittee.

Subject to and without waiving the forgoing objections, Governor Cuomo states that New York law provides the Governor with authority to issue executive orders which, under certain defined circumstances can temporarily suspend (not supersede) specifically identified provisions of existing statutes, ordinances and regulations. Governor Cuomo did issue such formal executive orders during the Covid-19 Pandemic pursuant to that statutory authority.

With respect to the March 25, 2020 Advisory drafted and issued by the New York Department of Health, such advisories and guidance do not “supersede” provisions of New York law. *Cuomo COVID Hearing* at 2:10:13-2:10:52 (“This was an advisory. The Department of Health did 10, 12, 15 advisories a day, 400 in a couple of weeks. They did not substitute for the existing state law. And the law remains in place. And the state law says on our nursing home, 415.26, you cannot accept the person who you can’t care for.”).

New York’s Attorney General has made clear that: “While some commentators have suggested DOH’s March 25 guidance was a directive that nursing homes accept COVID-19 patients even if they could not care appropriately for them, such an interpretation would violate statutes and regulations that place obligations on nursing homes to care for residents.” *See* Attorney General’s January 30, 2021, report on the Nursing Home Response to the COVID-19 Pandemic (the “OAG Report”) at n.45.

Thus, to the extent Rep. Malliotakis’ question is asking whether the March 25 Advisory “superseded” existing New York law, Governor Cuomo states that it did not, and that the relevant

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laws relating to nursing home infection control requirements, and requirements that nursing homes decline admission of patients for whom they do not believe they can provide adequate care, remained in full force and effect throughout the Pandemic.

Not only did the March 25 Advisory not “supersede” existing New York law, but it and other advisories actually reinforced the obligation of nursing homes to ensure that they applied appropriate infection control procedures. The March 25 Advisory itself includes a requirement that “standard precautions must be maintained, and environmental cleaning made a priority.” Moreover, prior to the issuance of the March 25 Advisory the New York State DOH issued a series of advisories requiring nursing homes to reinforce their infection control policies and specifically referred them to CDC/CMS guidance regarding the appropriate infection control precautions to utilize.

QUESTION NO. 2

Do you agree with every report issued by the Attorney General’s office, and are those reports always based solely on the laws and facts?

RESPONSE TO QUESTION NO. 2

Governor Cuomo objects to this question on the grounds that it is vague and overly broad in its reference to “every report issued by the Attorney General’s office” and its request for Governor Cuomo to opine on whether some undefined and unlimited group of reports are “always based solely of the facts and the law.” Governor Cuomo cannot reasonably be expected to provide a response to a question that utilizes such open-ended and undefined terms. Moreover, Governor Cuomo objects to the overly broad and undefined scope of this question, as it fails to identify any particular subject matter or issue upon which information is requested, and therefore seems to seek information wholly unrelated to the issues before the Select Subcommittee.

Subject to and without waiving the forgoing objections, Governor Cuomo states that to the extent the question is simply asking whether he agrees with every report the OAG publishes, including every single finding or conclusion in such report, the answer is no. As a general matter, his assessment as to the findings or conclusions of a report issued by the OAG depends, in part, on the extent to which the underlying facts, witnesses, evidence, information, data, investigative procedures, and legal analyses, are made available for review either to the public in general or to Governor Cuomo for the purpose of his review. Only with such underlying data could Governor Cuomo assess the findings and conclusions of a particular report. Sometimes Governor Cuomo agrees with certain findings in a particular report and sometimes he does not, and sometimes he does not have enough information to make such a determination.

To the extent this question asks for Governor Cuomo's position with respect to certain findings contained in the OAG Report, Governor Cuomo states that certain findings are consistent with his understanding of the relevant facts and the law, including the following:

- (i) "DOH noted that it was 'essential' that all nursing homes 'maintain situational awareness about the disease, its signs and symptoms, where cases and outbreaks are occurring, and necessary infection prevention and control procedures by regularly visiting' CDC and DOH websites to review the most up-to-date information. DOH advised nursing homes that they 'must review and reinforce their policies and procedures with all staff and visitors regarding infection prevention and control.'" OAG Report at 18.
- (ii) "At the same time, the March 25 guidance was consistent with the CMS guidance on March 4 that said nursing homes should accept residents they would have normally

admitted, even if from a hospital with COVID-19, and that patients from hospitals can be transferred to nursing homes if the nursing homes have the ability to adhere to infection prevention and control recommendations. It was also consistent with CDC Published Transmission-Based Precaution (T-BP) guidance, which was referred to in CMS's March 4 guidance, and which stated that if T-BP were still required for a patient being discharged to a nursing home, the patient should go to a facility with an ability to adhere to infection prevention and control recommendations for the care of residents with COVID-19." *Id.* at 36.

- (iii) "It is worth noting that to the extent New York hospitals had capacity concerns due to the Pandemic, the March 25 guidance would have been helpful to communities where those facilities were experiencing longer COVID-19 patient stays due to delays in receiving testing results, and were at or exceeding acute care capacity while simultaneously were anticipating more new patients in need of acute care." The OAG Report at 37. "This practice meant that some patients who no longer required acute care were occupying valuable hospital beds while waiting to be discharged." *Id.* at 37.
- (iv) "OAG's investigation to date has not revealed an admission for any nursing home operator that could not care for referred residents." *Id.*
- (v) "While some commentators have suggested DOH's March 25 guidance was a directive that nursing homes accept COVID-19 patients even if they could not care appropriately for them, such an interpretation would violate statutes and regulations that place obligations on nursing homes to care for residents. For example, New York law requires a nursing home to 'accept and retain only those residents for whom it can provide adequate care.' See 10 NYCRR § 415.26(i)(1)(ii). Preliminary findings show a number

of nursing homes implemented the March 25 guidance with understanding of this fundamental assessment.” The OAG Report at n.45.

Objections and Responses to Questions from Rep. Mariannette Miller-Meeks

QUESTION NO. 1

Governor Cuomo, despite you clearly understanding the likelihood of Covid running through nursing homes like fire through dry grass, why did your Administration require facilities to accept elderly residents who still had active Covid-19 infections?

RESPONSE TO QUESTION NO. 1

Governor Cuomo objects to this question on the ground that it is based upon a number of improper and incorrect factual assumptions, including its contention that Governor Cuomo’s Administration “required” nursing homes to admit certain patients, and its contention that such patients had “active Covid-19 infections.” These assertions/underlying assumptions are incorrect and Governor Cuomo therefore rejects the fundamental assumptions upon which this question is based.

Subject to and without waiving the forgoing objections, Governor Cuomo responds as follows:

First, as Governor Cuomo stated to the Select Subcommittee, the March 25 Advisory contains no such admission “requirement.” The Select Subcommittee—although repeatedly making this unsupported statement that the March 25 Advisory required nursing homes to accept infectious Covid-19 patients—does not quote or cite anything in the March 25 Advisory that sets forth this purported “requirement.” Instead, the March 25 Advisory merely states “[n]o resident shall be denied re-admission or admission to the NH solely based on a confirmed or suspected

diagnosis of COVID-19.” This is consistent with federal CDC and CMS guidance which repeatedly recommended that nursing homes should accept covid-positive patients.

Second, as Governor Cuomo pointed out numerous times in both his June 11, 2024 transcribed interview and at the September 10 Hearing, under New York law nursing homes are required to maintain appropriate infection control procedures, and are prohibited from admitting patients they are unable to care for. Accordingly, there was no “requirement” that nursing homes accept patients for whom they were unable to provide an appropriate level of care. *See* Cuomo Transcribed Interview at 149:3-15 (“You cannot object to the state directive, but you have a legal right just to say I can’t accept the person, period, for any reason. I literally said if they can’t provide adequate care, they tell us we’ll find a different facility. I said—now you can say well, look, I can’t provide care because of the Pandemic, because my staff is out, because I can’t get supplies, because I don’t have masks. Because I can’t quarantine. Whatever reason. You have to readmit COVID-positive residents but only if they have the ability to provide the adequate level of care under the Department of Health and CDC guidance.”); *Id.* at 151:9-15 (“Solely, solely based on the [test]. Solely. You can’t say I’m not taking them back because she has COVID. You say I’m not taking her back because I don’t have a ventilator. I don’t have quarantine. I don’t have PPE. I don’t have the time of day, but you can’t say solely because she has a test.”); *Id.* at 153:12-17 (“On the state side, they should take them back, if they can, under an NYCRR, which is just a carte blanche, carte blanche. I can’t care for the person under any reason I pick. That’s the two total outs. If you did not want the patient, you didn’t take the patient.”); *Id.* at 159:20-21 (“But the nursing homes had the ability to say no. Period.”); *Id.* at 164:3-19 (“I would have explained the directive, you know. And which I did as soon as it became public. And I said multiple times, you only take a person

who you are prepared to take. Period. That I said for literally a week, Congresswoman. If they can't care for a person in the facility, they have to transfer the person to another facility. The nursing home is responsible for appropriate care. If they can't provide it, they have to transfer the person to another facility. They can take a person but only if they have the ability to provide. You can say I can't do this, I can't do this, you can decline for any reason, but it starts with the nursing home, that's the primary care provider saying I can't provide for the person."); *Cuomo COVID Hearing* at 1:04:39-1:05:29("Depends on the context. In this context, the nursing homes were not directed to accept anyone. It was up to the discretion of the nursing home. That was made abundantly clear. All the laws of the state of New York remained in effect.") If a nursing home could not care for the patient and did not have adequate infection control policies, the nursing home was required under New York law to refuse the patient.

Third, the question's vague use of the term "active Covid-19 infections" appears to assume that patients admitted to nursing homes from hospitals while the March 25 Advisory was in effect were contagious. Again the Select Subcommittee has not provided any verifiable data supporting that contention. Moreover, the March 25 Advisory contains no such requirement. Instead, the March 25 Advisory required a clinical assessment by a physician that the patient was stable before being transferred to a nursing home, and further required that the physician and nursing home implement a detailed plan of care for the particular patient. Given the average length of hospital stays prior to discharge, it was highly unlikely that any patient(s) transferred to nursing homes from hospitals were actually contagious and in all events nursing homes were required, in direct communication with the discharge physician, to ensure an adequate level of patient care.

QUESTION NO. 1(a)

Was the New York Hospital Association involved in your decision-making process?

RESPONSE TO QUESTION NO. 1(a)

By not identifying what, if any, particular “decision-making process” this question refers to, Governor Cuomo is unable to answer this question. Moreover, although Governor Cuomo is familiar with the “Greater New York Hospital Association,” Governor Cuomo is unfamiliar with the “New York Hospital Association.”

QUESTION NO. 2

Do you acknowledge that your Administration purposely tried to deceive the public about infections and deaths that may have been impacted by your policies?

RESPONSE TO QUESTION NO. 2

No. The premise of this question is simply false. Governor Cuomo’s Administration was transparent in disclosing accurate information relating to COVID-19 deaths in New York State and worked tirelessly to communicate accurate and verifiable data to the public.

QUESTION NO. 3

Knowing what you know now, would you propose and enforce different nursing home readmission policies if the Covid Pandemic were to happen again?

RESPONSE TO QUESTION NO. 3.

Governor Cuomo states that any response to a future Pandemic would depend on the particular facts and circumstances and the level of scientific knowledge at the time, and it is impossible to respond accurately without the necessary factual predicate. However, as a general matter Governor Cuomo states that the one thing that his Administration would do, is rely on the medical and public health experts concerning the appropriate response with respect to issues affecting public health and safety, including readmission policies concerning nursing home patients. This was the approach the Administration took during the last Pandemic. Governor

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Cuomo did not substitute his judgment for those of the medical and public health experts during the last Pandemic and would not do so in any future Pandemic.

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Please do not hesitate to contact me if you seek further clarification from Governor Cuomo.

Sincerely,



Rita M. Glavin