

Congress of the United States
Washington, DC 20510

June 29, 2020

VIA ELECTRONIC TRANSMISSION

Christi A. Grimm
Principal Deputy Inspector General
Office of Inspector General
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Ms. Grimm:

We are writing to express our concern that a number of states are pressuring nursing facilities to admit residents who may be infected with the COVID-19 virus.

With over 50,000 deaths in nursing homes now linked to COVID-19, such facilities remain hotspots for the coronavirus.¹ One in five nursing homes have reported COVID-19 cases and at least a third of all deaths attributable to the coronavirus have occurred in long-term care facilities.² Similar data suggests that deaths in nursing homes may account for more than half of all COVID-19 fatalities in 14 states.³

This dire situation is due, in part, to the vulnerabilities of nursing home residents, who typically are elderly, frail, and more susceptible than younger individuals, on average, to adverse effects of the coronavirus.⁴ It also is due in part to staffing shortfalls at many nursing facilities,⁵ coupled with the close quarters in which most residents live. And, it is partly due to infection

¹ Jon Kamp and Anna Wilde Mathews, “As U.S. Nursing-Home Deaths Reach 50,000, States Ease Lockdowns,” *Wall St. J.* (June 24, 2020), available at <https://www.wsj.com/articles/coronavirus-deaths-in-u-s-nursing-long-term-care-facilities-top-50-000-11592306919>; see also Scott McClallen, “Analysis: Minnesota has highest percentage of COVID-19 deaths in long-term care facilities in the nation,” *The Center Square* (May 14, 2020).

² Vanessa Romo, “For Most States, At Least A Third of COVID-19 Deaths Are in Long-Term Care Facilities,” *NPR* (May 9, 2020); see also Kaiser Family Foundation, “State Reports of Long-Term Care Facility Cases and Deaths Related to COVID-19,” (Apr. 23, 2020); Avik Roy, “The Most Important Coronavirus Statistic: 42% of U.S. Deaths Are From 0.6% of The Population,” *FORBES* (May 26, 2020) (noting that “an astounding 42% of all COVID-19 deaths have taken place in nursing homes and assisted living facilities,” which house 0.62% of the U.S. population).

³ Kaiser Family Foundation, “State Reports of Long-Term Care Facility Cases and Deaths Related to COVID-19,” (Apr. 23, 2020), available at <https://www.kff.org/coronavirus-covid-19/issue-brief/state-reporting-of-cases-and-deaths-due-to-covid-19-in-long-term-care-facilities/>.

⁴ “COVID-19 Poses Particular Challenges for Nursing Homes” HUB (Apr. 1, 2020), available at <https://hub.jhu.edu/2020/04/01/alice-bonner-coronavirus-nursing-homes/>.

⁵ See, e.g., Rebecca Moss, “Coronavirus exploited failure of Pa. health officials to improve long-standing problems with nursing home oversight,” *PITTSBURGH POST-GAZETTE* (June 15, 2020) (noting that “Pennsylvania’s already low minimum staffing requirements, long criticized as “totally unsafe,” were exacerbated by the pandemic”), available at <https://www.post-gazette.com/news/health/2020/06/15/The-coronavirus-exploited-failure-of-Pa-health-officials-to-improve-long-standing-problems-with-nursing-home-oversight/stories/202006150025>.

control and prevention deficiencies that posed persistent challenges for years at many nursing homes across the nation.⁶

As noted last month by the U.S. Government Accountability Office (GAO), 82 percent of nursing homes surveyed had been cited at least once for infection prevention and control shortfalls in a recent four-year period,⁷ making it the most common deficiency cited. (Examples include: not properly isolating sick residents, using improper handwashing techniques, not wearing masks or using other personal protective equipment.) GAO underscored that infection control and prevention practices “can be critical to preventing the spread of infectious diseases, including COVID-19” in nursing homes.⁸ More concerning, about half of the nursing facilities with such deficiencies were cited multiple times over the course of several years, “an indicator of persistent problems,”⁹ according to GAO.

As reported by the media, the governors of a handful of states in which some nursing homes struggled to provide safe and adequate care “actually ordered nursing homes to accept patients with active COVID-19 infections who were being discharged from hospitals.”¹⁰ Governors issuing such directives include those in New York, New Jersey, California, Pennsylvania, and Michigan.¹¹

These state directives were issued as the COVID-19 fatality rate in nursing homes soared. In Pennsylvania, which reportedly has the seventh highest death rate for residents of these facilities,¹² 69 percent of the state’s COVID-19 fatalities are now attributable to nursing and

⁶ GOV’T ACCOUNTABILITY OFFICE (GAO), “Infection Control Deficiencies Were Widespread and Persistent in Nursing Homes Prior to COVID-19 Pandemic,” GAO-20-576R (May 20, 2020), *available at* <https://www.gao.gov/assets/710/707069.pdf>.

⁷ *Id.* at 4.

⁸ *Id.*

⁹ *Id.* (“In each individual year from 2013 through 2017, the percent of surveyed nursing homes with an infection prevention and control deficiency ranged from 39 percent to 41 percent. In 2018 and 2019, we found that this continued with about 40 percent of surveyed nursing homes having an infection prevention and control deficiency cited each year. About half—6,427 of 13,299 (48 percent)—of the nursing homes with an infection prevention and control deficiency cited in one or more years of the period we reviewed had this type of deficiency cited in multiple consecutive years from 2013 through 2017. This is an indicator of persistent problems.”).

¹⁰ Avik Roy, “The Most Important Coronavirus Statistic: 42% of U.S. Deaths Are From 0.6% of The Population,” FORBES (May 26, 2020) (“an astounding 42% of all COVID-19 deaths have taken place in nursing homes and assisted living facilities,” which house 0.62% of the U.S. population), *available at* <https://www.forbes.com/sites/theapothecary/2020/05/26/nursing-homes-assisted-living-facilities-0-6-of-the-u-s-population-43-of-u-s-covid-19-deaths/#7c36cba274cd>.

¹¹ Kim Barker and Amy Julia Harris, “‘Playing Russian Roulette’: Nursing Homes Told to Take the Infected,” N.Y. TIMES (Apr. 24, 2020) (citing “state guideline [that] says [nursing homes](#) cannot refuse to take patients from hospitals solely because they have the [coronavirus](#)”), *available at* <https://www.nytimes.com/2020/04/24/us/nursing-homes-coronavirus.html>.

¹² Kaiser Family Foundation, *supra* note 3.

personal care homes.¹³ Similarly, in New Jersey, the rate was roughly 52 percent as of last month;¹⁴ in New York, at least 6,000 deaths are attributable to nursing homes; and in Michigan, where the governor's directive has yet to be rescinded, 34 percent of COVID-19 deaths reportedly are linked to nursing homes.¹⁵

It appears that at least one governor reportedly reinforced this requirement well after the period in which COVID-19 cases at hospitals peaked—suggesting that its imposition on nursing homes was not entirely due to hospital overcrowding.¹⁶ To illustrate: on April 23, according to *Forbes*, after hospitalization rates already had peaked in New York, Governor Cuomo “declared that nursing homes ‘don’t have a right to object’ to accepting elderly patients with active COVID-19 infections.”¹⁷

More puzzling, although the Federal government set up temporary hospitals in New York, state officials seemingly did not rely on such resources, in any truly meaningful way, as an alternative to nursing homes. For example, although the U.S. Navy sent an entire hospital ship staffed with a crew of 1,200 to treat COVID-19 patients, the 1,000 bed hospital ship departed New York on April 30th, reportedly having treated fewer than 200 during its month-long stay.¹⁸ In addition, the U.S. Army Corps of Engineers set up a temporary hospital inside the nation's biggest convention center, the Jacob K. Javits Center, at the end of March, which by early April had the capacity to treat up to 2,500 patients.¹⁹

Some skilled nursing facilities already may have an incentive, in the form of payments under State or Federal programs, for accepting patients discharged from hospitals with a

¹³ Don Shaw, “69% of COVID-19 Deaths in PA are Nursing or Personal Care Homes, House Speaker Unveils Bill to Protect Residents Living in Care,” PENNSYLVANIA CHRONICLE (June 19, 2020), *available at* <https://www.pennsylvaniachronicle.com/news-pennsylvania/pennsylvania/69-of-covid-19-deaths-in-pa-are-in-nursing-or-personal-care-homes-house-speaker-unveils-bill-to-protect-residents-living-in-care/>.

¹⁴ Karen Yourish, K.K. Rebecca. Lai, et al., “One-Third of All U.S. Coronavirus Deaths are Nursing Home Residents or Workers,” N.Y TIMES (May 11, 2020), *available at* <https://www.nytimes.com/interactive/2020/05/09/us/coronavirus-cases-nursing-homes-us.html>.

¹⁵ Craig Mauger, “New Michigan numbers: 34% of COVID-19 deaths linked to nursing homes,” THE DETROIT NEWS (June 15, 2020), *available at* <https://www.detroitnews.com/story/news/local/michigan/2020/06/15/new-michigan-numbers-34-covid-19-deaths-linked-nursing-homes/3193407001/>.

¹⁶ Avik Roy, “The Most Important Coronavirus Statistic: 42% of U.S. Deaths Are From 0.6% of the Population,” FORBES (May 26, 2020), *available at* <https://www.forbes.com/sites/theapothecary/2020/05/26/nursing-homes-assisted-living-facilities-0-6-of-the-u-s-population-43-of-u-s-covid-19-deaths/#5692005e74cd>.

¹⁷ *Id.*

¹⁸ J.D. Simkins, “Hospital ship Comfort departs NYC, having treated fewer than 200 patients, U.S. NAVY TIMES (Apr. 30, 2020) (“By the time of Comfort’s departure, the approximately 1,200-person crew and 1,000-bed hospital had treated just 182 patients, of which approximately 70 percent had COVID-19”), *available at* <https://www.navytimes.com/news/your-navy/2020/04/30/hospital-ship-comfort-departs-nyc-having-treated-fewer-than-200-patients/>.

¹⁹ *Id.* (noting that “[u]nderutilization of added medical resources in New York City is not unique to the Comfort. Thousands of hospital beds made available in a converted convention center have gone largely unused after quick assembly by the U.S Army Corps of Engineers.”)

COVID-19 diagnosis.²⁰ As noted by *Politico*, “the ones most desperate for the money are often among those with low ratings and a history of citations for poor cleanliness or neglecting patients.”²¹ In light of this incentive, public officials should have expressly, and consistently, encouraged nursing home facilities uncomfortable with their directive to make alternative arrangements for those infected with the virus.

At the Federal level, the head of the Centers for Medicare and Medicaid Services (CMS) certainly did so, warning on May 27th that “[u]nder no circumstances should a hospital discharge a patient to a nursing home that is not prepared to take care of those patients’ needs.”²² As reported by *Politifact*, the policy of the Centers for Disease Control and Prevention (CDC) is that hospitals should discharge patients with a COVID-19 diagnosis only to nursing homes and other long-term care facilities that are capable of implementing all recommended infection control procedures:

CDC “cited two ‘key factors’ to consider when deciding whether to discharge a patient with COVID-19 to a long-term care facility....First, is the patient medically ready for discharge to a long-term care facility? And second, *is the selected long-term care facility able to safely care for a patient recovering from the virus by implementing all*

²⁰ “Coronavirus-positive patients can bring in double or more the funding of other residents. States including California, Massachusetts, Michigan and New Mexico, wanting to relieve pressure on crowded hospitals, are providing extra incentives for nursing homes to accept such patients....But the ones most desperate for the money are often among those with low ratings and a history of citations for poor cleanliness or neglecting patients. In Michigan, for example, eight of 20 nursing homes selected by the state government to build wings for coronavirus-positive patients are currently rated as “below average” or “much below average,” the two lowest designations, on the Health and Human Services department’s five-star nursing home rating scale.” Maggie Severns and Rachel Roubein, “States Prod Nursing Homes to Take More COVID-19 Patients,” *Politico*, available at <https://www.politico.com/news/2020/06/04/states-nursing-homes-coronavirus-302134>.

²¹ *Id.* See also Jack Dolan and Brittany Mejia, “Coronavirus Patients Could Be Cash Cows For Nursing Homes,” *Los Angeles Times* (May 3, 2020) (“A new Medicare reimbursement system that went into effect last fall pays nursing homes substantially more for new patients — including those released from a hospital — particularly for the first few weeks. Under those guidelines, COVID-19 patients can bring in upward of \$800 per day, according to nursing home administrators and medical directors interviewed by The Times. By contrast, facilities collect as little as \$200 per day for long-term patients with dementia, the industry experts said.”), available at <https://www.latimes.com/california/story/2020-05-03/coronavirus-nursing-homes-financial-profits>.

²¹ *Id.*

²² Danielle Brown, “Verma Calls out Cuomo for forcing NY nursing homes to take COVID-19 patients,” MCKNIGHTS LONG TERM CARE NEWS (May 29, 2020) (citing Fox News interview with CMS Administrator Seema Verma), available at <https://www.mcknights.com/news/verma-calls-out-cuomo-for-forcing-ny-nursing-homes-to-take-covid-19-patients/>. A March 13th CMS document “says that nursing homes should only accept those patients for which they can care. The CMS memo also states: ‘Per CDC, prompt detection, triage and isolation of potentially infectious residents are essential to prevent unnecessary exposures among residents, healthcare personnel, and visitors at the facility. Therefore, facilities should continue to be vigilant in identifying any possible infected individuals.’” Jill Terreri Ramos, “New York’s nursing home policy was not fully in line with CDC,” *Politifact* (Jun. 13, 2020), available at <https://www.politifact.com/factchecks/2020/jun/13/andrew-cuomo/new-yorks-nursing-home-policy-was-not-line-cdc/>

recommended infection control procedures? These [CDC] directives were in place on or before March 23, two days before the state [of New York] issued its advisory.”²³

State officials in other parts of the country followed this CDC guidance, often with better results. In Florida, for example, the governor signed an order banning hospitals from discharging infected patients into long-term care facilities.²⁴ Other states, instead of barring the state’s nursing facilities from denying admission (or readmission) to a patient solely based on a confirmed or suspected coronavirus diagnosis, designated some facilities for COVID-19 treatment only—an approach that some have characterized as a safer way to free up hospital beds for the most severely ill.²⁵

Those state officials that pressured nursing home administrators to admit untested and contagious COVID-19 patients from hospitals may have fueled the spread of the coronavirus in nursing facilities throughout these jurisdictions.²⁶ The risks of this practice certainly were evident at the outset of the pandemic, when the coronavirus spread rapidly in a Washington long-term care facility in March.²⁷ As reported by *Forbes*, on March 17, as the pandemic was just beginning to accelerate, at least one epidemiologist warned “that ‘even some so-called mild or common-cold-type coronaviruses have been known for decades [to] have case fatality rates as high as 8% when they infect people in nursing homes.’”²⁸ Deaths among residents of nursing homes and assisted-living facilities continue to increase.

With this in mind, we request that the Office of Inspector General initiate an investigation into whether the decision by these states to pressure nursing homes to admit COVID-19 patients from hospitals violated, or was in any way inconsistent with, guidelines or requirements for participation in Federal health care programs. As we do not know yet whether a second wave of the COVID-19 will occur later this year, we ask that you present your initial findings by September 30, 2020.

²³ Jill Terreri Ramos, *supra* note 22 (characterizing as “mostly false” a statement by New York Gov. Cuomo regarding CDC’s policy) [Emphasis added].

²⁴ Don Shaw, *supra* note 13.

²⁵ Danielle Brown, *supra* note 18.

²⁶ As noted by *Politifact*, “the AMDA Society for Post-Acute and Long-Term Care Medicine issued a statement on March 26 opposing the New York Governor’s] order: “We find the New York State Advisory to be over-reaching, not consistent with science, unenforceable, and beyond all, not in the least consistent with patient safety principles.” A joint statement by that organization and others in long-term care three days later reinforced their objections: ‘a blanket order for every nursing home in the state to accept all admissions from hospitals is not sound policy.’” Jill Terreri Ramos, *supra* note 22.

²⁷ Asia Fields and Paige Cornwell, “Coronavirus killed hundreds at Washington state’s long-term care facilities,” *THE SEATTLE TIMES* (Apr. 18, 2020), available at <https://www.seattletimes.com/seattle-news/coronavirus-killed-hundreds-at-washington-states-long-term-care-facilities-six-weeks-later-widespread-testing-may-finally-near/>.

²⁸ Avrik Roy, *supra* note 2.

Principal Deputy Inspector General Grimm

Page 6

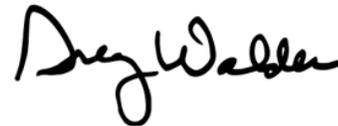
June 29, 2020

Thank you for your consideration, and if you have any questions, please contact Evelyn Fortier of Chairman Grassley's staff at 202-224-4515 and Caleb Graff with Republican Leader Walden's staff at 202-225-3641.

Sincerely,



Charles E. Grassley
Chairman
Committee on Finance
U.S. Senate



Greg Walden
Ranking Member
Energy and Commerce Committee
U.S. House of Representatives

cc: The Honorable Robert Redfield, Director, Centers for Disease Control and Prevention