

Date: March 15, 2021
To: The Majority and Minority Chairs and Members of the Government Oversight Committee
From: Kerry Benninghoff, Majority Leader
Re: Committee Referral for Investigation

Under the provisions of House of Representatives Rule 45A, I hereby refer the following to the House Government Oversight Committee for their consideration and investigation.

Background

A novel coronavirus, known as COVID-19, emerged in Wuhan, China, and began infecting humans in December of 2019.¹ As of March 6, 2020, there were 233 confirmed and/or presumed positive cases of COVID-19 in the United States, including 2 presumed positive cases in the Commonwealth.²

On March 6, 2020, Governor Wolf proclaimed a disaster emergency throughout the Commonwealth, citing a threat of imminent disaster and emergency that had:

- (1) the potential to cause significant adverse impacts on the Commonwealth's population;
- (2) already caused schools to close and would likely prompt additional local measures;
- and
- (3) was of such magnitude and severity that it required the activation of emergency response plans.

The original Proclamation of Disaster Emergency has been renewed four times (June 3, 2020; August 31, 2020; November 24, 2020; and February 19, 2021).

Throughout the Disaster Emergency, the Governor has issued various orders pursuant to his authority and the Secretary of Health has issued orders under, at a minimum, her authority pursuant to the Disease Prevention and Control Law and the Administrative Code of 1929.³

¹ "Proclamation of Disaster Emergency," March 6, 2020, Governor Tom Wolf, available at <https://www.governor.pa.gov/wp-content/uploads/2020/03/20200306-COVID19-Digital-Proclamation.pdf>.

² Id.

³ For example, see <https://www.health.pa.gov/topics/Documents/Diseases%20and%20Conditions/Updated%20Order%20of%20the%20Secretary%20Requiring%20Universal%20Face%20Coverings.pdf>, p.1. See also Cty. of Butler v. Wolf, No. 2:20-CV-677, 2020 WL 5510690, at *3 (W.D. Pa. Sept. 14, 2020).

Older Adult Care Decisionmakers During the Pandemic

The Pennsylvania Departments of Aging, Health, and Human Services all regulate various aspects of older adult care. In particular, the Department of Health regulates skilled nursing facilities and the Department of Human Services regulates personal care homes and assisted living residences.

Further, the various orders issued by both the Governor and the Secretary of Health during the pendency of the disaster emergency received input from government employees and officials beyond the reach of the three executive agencies mentioned above. As explained in County of Butler v. Wolf:

The Governor's proclamation of a disaster emergency vested him with extraordinary authority to take expansive action by executive order. Within the Governor's office, a "group" "was formed to work on issues related to the pandemic" both on the "economic development side and pertaining to the business closures" and "**on the health side, teams were formed to work to understand the progress of the pandemic.**" (ECF No. 75, p. 17).³ **It was an "interdisciplinary team" with "individuals from the [G]overnor's office and agencies being pulled together for specific tasks," including Secretary Levine.** (ECF No. 75, pp. 17-18). The "group" never reduced its purpose to writing, although "its stated purpose was to develop mechanisms to respond to that emerging threat [i.e. a pandemic] in a very quick period of time." (ECF No. 75, p. 26). The names of its members remain unknown.

Cty. of Butler v. Wolf, No. 2:20-CV-677, 2020 WL 5510690, at *2 (W.D. Pa. Sept. 14, 2020) (*emphasis in bold added*).⁴

Return of Stable COVID-19 Patients

On March 13, 2020, the Centers for Medicare and Medicaid Services (CMS) issued a revised Guidance for Infection Control and Prevention of Coronavirus Disease 2019 (COVID-19) in Nursing Homes which stated that a "nursing home **can** accept a resident diagnosed with COVID-19 ... **as long as the facility can follow CDC guidance for Transmission-Based Precautions.**"⁵

⁴ See also Cty. of Butler v. Wolf, No. 2:20-CV-677, 2020 WL 5510690, at *3 (W.D. Pa. Sept. 14, 2020) (discussing various orders of the Governor and the Secretary).

⁵ Available at <https://www.cms.gov/files/document/3-13-2020-nursing-home-guidance-covid-19.pdf>.

On March 18, 2020, the Pennsylvania Department of Health (DOH) issued interim guidance⁶ which stated:

Nursing care facilities must continue to accept new admissions and receive admissions for current residents who have been discharged from the hospital who are stable to alleviate the increasing burden in the acute care settings. **This may include stable patients who have had the COVID-19 virus.**

(emphasis in bold added).

Governor Wolf was questioned on the distinction between the federal guidance and state guidance, to which the Governor replied **“I’m not sure. I just don’t know.”**⁷

In contrast, it appears the Pennsylvania Department of Human Services (DHS) did not issue a corresponding guidance to personal care homes and assisted living residences to receive admissions of patients who had suffered from COVID-19.

On May 12, 2020, the DOH updated their earlier guidance to include a chart which provided direction as to the return of stable patients who have had the COVID-19 virus to nursing care facilities.⁸

Reporting of COVID-19 Deaths and other Data

As of March 11, 2021, the Department of Health’s Long-Term Care Facilities data webpage reported more than 12,700 COVID-19 deaths associated with nursing homes and personal care homes in Pennsylvania.

In the early months of the disaster emergency, reporting requirements concerning COVID-19 deaths and other data in skilled nursing facilities, personal care homes and assisted living residences were inconsistent.

⁶ Available at <https://pahomecare.memberclicks.net/assets/docs/FINAL%20FOR%20DISTRO%20Interim%20Nursing%20Facility%20Guidance%2003192020%20at%201500.pdf>.

⁷ Available at <https://www.abc27.com/news/this-week-in-pennsylvania/gov-wolf-questioned-about-march-2020-memo-on-pa-covid-nursing-home-deaths/> (“I think the Department of Health was just following what the federal government was telling us to do,” Gov. Wolf said. But that’s not exactly correct. While Pa. said nursing homes ‘must’ accept COVID-positive seniors with proper precautions, the CDC guidance said a nursing home ‘can’ accept a resident diagnosed with COVID-19. It also says, ‘nursing homes should admit any individuals that they would normally admit.’ But not must.”).

⁸ Available at <https://sais.health.pa.gov/commonpoc/content/FacilityWeb/attachment.asp?messageid=3872&filename=Interim+NC+F+Guidance%5F20200512%2Epdf&attachmentnumber=3>.

On May 16, 2020, the Secretary of Health issued an order requiring all skilled nursing facilities to begin reporting all data required by the CMS, which was reported to the Centers for Disease Control and Prevention (CDC), in a system designed by the DOH.⁹

On May 28, 2020, the Secretary of Health issued an order which required personal care homes and assisted living facilities to report “data elements established by the Department of Human Services in consultation with the Department of Health.”¹⁰ These reports were made to the Department of Human Services (DHS) and the DHS, in turn, would report information to the DOH.

Under the County Code, Coroners have an obligation to investigate “the facts and circumstances concerning a death ... known or suspected to be due to a contagious disease.” 1218-B(a)(7) of the act of August 9, 1955 (P.L. 323, No. 130), known as the County Code.¹¹

On several occasions, there were reported discrepancies between Coroners and the Department of Health concerning the reporting of COVID-19 deaths.¹²

⁹ Available at <https://www.dhs.pa.gov/providers/Clearances-and-Licensing/Documents/Assisted%20Living%20Licensing/Secretary%20Order%20DHS%20Facility%20Reporting%20dml.pdf>.

¹⁰ Available at <https://www.dhs.pa.gov/providers/Clearances-and-Licensing/Documents/Assisted%20Living%20Licensing/Secretary%20Order%20DHS%20Facility%20Reporting%20dml.pdf>.

¹¹ Section 1218-B. Coroner's investigation.

(a) Duty.--The coroner having a view of the body shall investigate the facts and circumstances concerning a death that appears to have happened within the county, notwithstanding where the cause of the death may have occurred, for the purpose of determining whether or not an autopsy or inquest should be conducted in the following cases:

....

(7) A death known or suspected to be due to contagious disease and constituting a public hazard.

¹² <https://www.spotlightpa.org/news/2020/04/pennsylvania-coronavirus-coroners-testing-communication-health-department/>, (April 10, 2020) (“Providing answers to a community about its deaths is precisely what Pennsylvania’s coroners are elected to do, Kiessling said. But because of a dispute with the state Health Department, he said, coroners are hindered in that obligation.”); See also <https://www.spotlightpa.org/news/2020/09/pa-coronavirus-deaths-reporting-edrs/>, (September 24, 2020) (“As a result, the state’s official death count unexpectedly fluctuated during the pandemic’s deadliest months, fueling conspiracy theories and undermining public trust in the numbers. Even now, six months into the crisis, the state is continuing to add months-old deaths to its official tally, skewing a real-time view of the virus.... The Pennsylvania Department of Health blamed the prolonged rollout on a small number of coroners who refused to be trained on the electronic system, and on others who did not voluntarily use the technology, like funeral directors and hospital personnel. Unlike in other states, coroners do not report directly to the health department, said Nate Wardle, a spokesperson for the agency.”); <https://www.spotlightpa.org/news/2020/04/pennsylvania-coronavirus-death-count-changes/>, (April 23, 2020) (“Pa. removes more than 200 deaths from official coronavirus count as questions mount about reporting process, data accuracy”).

Independent reviews have found other reporting discrepancies and inexplicable omissions.¹³ Similar concerns have arisen in other states.¹⁴ At a Pennsylvania House of Representatives Appropriations Committee budget hearing on February 25, 2021, a Deputy Secretary of the DOH admitted only 80% to 85% compliance with some reporting requirements.

Members of Congress Ask for an Investigation

Citing a report released by the Attorney General of New York which noted an undercounting of COVID-19 nursing fatalities in that state, eight members of Congress from Pennsylvania asked the Attorney General of Pennsylvania if he plans to “offer a similar report as the New York State Attorney General’s office” and inquired about his plans to “ensure that all publicly available information on this important topic is reliable and accurate.”¹⁵

The Attorney General replied that he was not in a position to conduct an independent investigation.¹⁶

Reason for and Scope of the Referral

One of the most important roles of government is to protect our vulnerable populations. As a component part of the General Assembly, the Pennsylvania House of Representatives has an obligation to inquire whether such protection has been effectuated pursuant to the Commonwealth’s laws in order to determine the necessity of changing and updating those laws. The unique circumstances of the COVID-19 pandemic, and the Commonwealth’s response, present such an opportunity for investigation and the development of future legislation.

As noted above, there have been more than 12,700 COVID-19 deaths associated with nursing homes and personal care homes in Pennsylvania. It is imperative to know whether those deaths, or a percentage of those deaths, are attributable to decisions about the movement of COVID-19 patients between hospitals and nursing care or other older adult care facilities. It is also important know which agencies or government entities contributed to those decisions. The answers to those questions may either bolster the need for legislative change or support the current statutory framework.

¹³ “Levine questioned on missing Pa. nursing home data in federal confirmation hearing,” available at <https://www.spotlightpa.org/news/2021/02/rachel-levine-pennsylvania-nursing-homes-data-joe-biden-senate-confirmation/>.

¹⁴ “Democratic lawmakers have begun to challenge Gov. Andrew Cuomo’s handling of virus-related nursing home deaths...,” available at <https://www.nytimes.com/2021/02/17/nyregion/cuomo-nursing-homes-deaths.html>.

¹⁵ Available at <https://meuser.house.gov/media/press-releases/meuser-members-pa-gop-delegation-ask-shapiro-covid-19-nursing-home-report>.

¹⁶ <https://www.attorneygeneral.gov/wp-content/uploads/2021/02/2.19.21-Rep-Response-Letter-1.pdf>.

Similarly, the investigation of potential discrepancies in COVID-19 death reporting related to older adult care facilities may bolster the need for a comprehensive statutory framework regarding death reports or demonstrate that such change is unnecessary.

In short, we must know what worked, and what did not, in order to make changes for the future.

As a result, I am requesting that the House Government Oversight committee conduct an investigation into decisions made, guidance issued, and public information provided, concerning the movement of COVID-19 patients from nursing care or other older adult care facilities to hospitals or similar healthcare settings by:

- (1) the Pennsylvania Department of Aging,
- (2) the Pennsylvania Department of Health,
- (3) the Pennsylvania Department of Human Services,
- (4) persons in the Governor's Office or other agencies who provided input into those decisions through formal or informal arrangements; or
- (5) any combination of the above.

I am further requesting that the House Government Oversight committee conduct an investigation into decisions made, guidance issued, and public information provided, concerning the movement of COVID-19 patients from hospital or similar healthcare settings to nursing care or other older adult care facilities by:

- (1) the Pennsylvania Department of Aging,
- (2) the Pennsylvania Department of Health,
- (3) the Pennsylvania Department of Human Services,
- (4) persons in the Governor's Office or other agencies who provided input into those decisions through formal or informal arrangements; or
- (5) any combination of the above.

When investigating decisions about the movement of COVID-19 patients between hospitals and nursing care or other older adult care facilities as described above, the House Government Oversight Committee should also investigate relevant guidance provided by the CMS and the CDC.

Finally, I am requesting that the House Government Oversight Committee investigate any standards for, and discrepancies in, reporting of COVID-19 deaths, with a particular focus on COVID-19 deaths related to nursing care or other older adult care facilities.