



Will the Next Pandemic Lead to More Nursing Home Resident Death and Despair?

Nursing Homes and the Department of Health are Failing to Comply with New State Law on Pandemic Emergency Plans

Summer 2021

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Table of Contents

Acknowledgements	2
Table of Contents	3
Executive Summary	4
New York Nursing Home Residents Endured Misery and Death from COVID	6
The New York Legislature Passed a Law to Force Nursing Homes and the Department of Health to Prepare for Future Pandemics	8
Nursing Homes have Failed to Comply with the Law	11
Our review of the PEPs	11
The PEPs failed to cover required elements	13
PEPs Parrot Instructions	15
PEPs Fail to Specify Details Necessary to Ensure Accountability	19
Recommendations and Conclusion	21

Executive Summary

In late February 2020, an outbreak of COVID-19 (COVID) was reported at the Life Care Center, a nursing home in Kirkland, Washington.¹ Soon after, COVID cases were confirmed in New York, including its nursing homes. According to data released earlier this year by the New York State Department of Health (DOH), the first presumed COVID-related death of a New York nursing home resident was on March 2, 2020. Although facilities and state officials hid accurate death counts, it was clear throughout the spring that nursing homes were unprepared to control an outbreak of infection, with deadly consequences for residents and staff.²

In May 2020, the New York State Legislature passed a bill, signed by Governor Andrew M. Cuomo on June 17, 2020, requiring nursing homes to create pandemic emergency plans (PEP) and post their plans for the public on their websites. The law requires facilities to address a variety of topics that had proved inadequate since the pandemic began: ensuring timely communication with residents and families; facilitating video and other communications between residents and people outside their facilities; implementing infection control measures; and obtaining adequate personal protective equipment (PPE) and other supplies.³ The plans needed to be developed within ninety days and updated annually thereafter. The law also requires the DOH to review the PEPs. On August 20, 2020, the DOH issued a Dear Administrator Letter to nursing home administrators outlining the basic requirements of the PEP, as well as advice on how to fit the new PEP into existing comprehensive emergency management plans, a checklist for what specifics must be addressed in the PEP, and a template for facilities to use.

We have reviewed PEPs from forty New York nursing homes that had reported high numbers of in-facility COVID deaths, to examine, one year later, how well the law was implemented, and to recommend improvements to the plans that can be incorporated in facilities' annual plan updates, due in September 2021.

Of the forty facilities we identified, all but one complied with the statute's requirement to post a PEP on the facility's website. But nearly all of the PEPs that were posted lacked important information, casting serious doubt on the plans' usefulness and the facilities' actual preparedness to respond to future emergencies.

Despite the time the facilities have had to develop their policies and the guidance provided by the DOH, facilities still fell short:

¹ Hannah Everman, *4 residents at Life Care nursing home in Kirkland die of coronavirus*, KING 5, Mar. 2, 2020, available at: <https://www.king5.com/article/news/health/coronavirus/coronavirus-outbreak-kirkland-investigation/281-03e21bc4-9f68-4ad6-bc8c-a337b27de567>.

² See, e.g., Jesse McKinley & Luis Ferre-Sadurni, *New Allegations of Cover-Up by Cuomo Over Nursing Home Virus Toll*, N.Y. TIMES, Feb. 12, 2021, available at: <https://www.nytimes.com/2021/02/12/nyregion/new-york-nursing-homes-cuomo.html>; John Leland, Amy Julia Harris, & Tracey Tully, *29 Dead at One Nursing Home From the Virus. Or More. No One Will Say*, N.Y. TIMES, Apr. 16, 2020, available at: <https://www.nytimes.com/2020/04/16/nyregion/new-york-nj-nursing-homes-coronavirus-deaths.html>; Clodagh McGowan, *Queens Nursing Home Employees Say Some Coronavirus Deaths Are Going Unreported*, NY1, Apr. 29, 2020, available at: <https://www.ny1.com/nyc/all-boroughs/news/2020/04/27/queens-nursing-home-employees-say-deaths-are-going-unreported>; Courtney Gross, *State Attorney General to Investigate Complaints Into Manhattan Nursing Home*, NY1, May 2, 2020, available at: <https://www.ny1.com/nyc/all-boroughs/coronavirus/2020/04/30/nursing-home-coronavirus-nys-nursing-homes-with-covid-19-isabella-geriatric-center>.

³ Ch. 114 of the Laws of 2020, Pub. Health Law § 2803(12)(a).

- **Many PEPs fail to address all required topics**
The DOH's Dear Administrator Letter and its attachments identified five broad areas each plan should cover, with twenty-two required provisions and thirteen recommended areas of discussion. Few of the plans we reviewed touched on all required topics, even in the most general terms.
- **PEPs parrot instructions from the DOH without addressing the facility's or residents' specific needs**
The DOH's guidance provided facilities with a roadmap to complete their PEPs. But rather than use the DOH instructions as a starting point to develop specific practices and procedures, many of the PEPs we reviewed restated the DOH's requirements, sometimes verbatim, with little additional information added for many of the specific requirements.
- **PEPs fail to specify details necessary to ensure accountability**
Although the DOH directed facilities to develop specific plans that assign staff in certain roles to particular tasks, few plans consistently do so. Instead, the PEPs often employ platitudes and statements in the future tense about what their PEPs "will" include, but do not identify what staff or procedure will ensure that a required goal of the PEP would be achieved.

Facilities' plans are largely inconsistent. We cannot say that certain plans are thorough and others scant. They vary widely between plans and even within the same plan. Some lay out detailed procedures and contingency plans for some components of their PEP, but parrot DOH instructions for other components—indeed, almost all of the plans merely cut and paste at least some of the DOH guidance. Many PEPs name staff or departments to handle particular tasks but are quite vague when addressing how to substantively handle those tasks. None of the PEPs meaningfully respond to every statutory and DOH requirement.

Based on our review of these facilities' PEPs, we make several recommendations that would likely reduce the risk of a similarly disastrous outcome in a future pandemic. Facilities should revise their PEPs to clearly spell out policies and procedures for achieving the goals stated in the statute and DOH instructions and assign specific tasks to particular staff to ensure clarity and accountability. Revised PEPs should be posted on facilities' websites in accessible formats, and when additional facility policies are cited in PEPs, facilities should use hyperlinks so those policies can be reviewed in context. Finally, the DOH must carefully review the adequacy of PEPs to ensure that nursing home residents are protected during future pandemics.

New York Nursing Home Residents Endured Misery and Death from COVID

Since the outbreak at the Life Care Center in Kirkland, Washington, in February 2020, the risk COVID posed to nursing home residents and staff was clear. The consequences for residents, their families, and staff, were quickly felt. Visitation was banned. Residents, who relied on loved ones to provide care in short-staffed facilities before the pandemic, were left to endure uncomfortable and unsanitary conditions during the pandemic when family members were barred and staffing shortages were exacerbated. Residents whose visitors were their main or sole connection to their earlier lives felt abandoned without social interaction with loved ones. Activities and congregate meals were cancelled. In many situations, residents could not leave their rooms.⁴ Families complained that they could not contact their loved ones and were not being told reliable information by facilities.⁵ These changes added substantially to residents' loneliness, which itself has deleterious effects on physical health.⁶

After COVID entered facilities in New York, claiming its first life on March 2, 2020, the death toll quickly rose: By the end of March, 782 nursing home residents were presumed or confirmed to have died from COVID. By the end of May, that number exceeded 9,800.⁷ By early March 2021, over 13,000 nursing home residents in New York State had died from COVID.⁸

The below chart lists the ten nursing homes reporting the most deaths between March 1, 2020 and March 3, 2021. Some of these homes are relatively small. That means that an alarmingly high proportion of their residents died from COVID. For example, the home with the most deaths is Harris Hill Nursing Facility in Erie County. In that facility, which has 192 beds, 149 residents died.⁹ Father Baker Manor, which had 109 deaths, has 160 beds.¹⁰

⁴ Anne Montgomery, Sarah Slocum, & Christine Stanik, "Experiences of Nursing Home Residents During the Pandemic" (Oct. 2020), available at: https://altarum.org/sites/default/files/uploaded-publication-files/Nursing-Home-Resident-Survey_Altarum-Special-Report_FINAL.pdf.

⁵ See, e.g., John Pirsos, *Families complaint about lack of communication during COVID outbreak at Carthage Nursing Home*, WWNY-TV, Jan. 25, 2021, available at: <https://www.wwnytv.com/2021/01/25/families-complain-about-lack-communication-during-covid-outbreak-carthage-nursing-home/>; Lou Michel, *Cuomo administration won't say when nursing home visits will resume*, BUFFALO NEWS, June 7, 2020, available at: https://buffalonews.com/business/local/cuomo-administration-wont-say-when-nursing-home-visits-will-resume/article_9018d3f0-99fe-5f88-8fd1-6f0ed01b5f56.html; Jim Baumbach, Matt Clark, Paul LaRocco, Sandra Peddle, & David Schwartz, *Crisis, Care, and Tragedy on LI: Behind the Deaths at the island's second largest nursing home*, NEWSDAY, available at: <https://projects.newsday.com/long-island/coronavirus-cold-spring-hills-nursing-home/>.

⁶ Jennifer Abasi, *Social Isolation—the Other COVID-19 Threat in Nursing Homes*, 324 JOURNAL OF THE AM. MED. ASS'N 619, 620 (2020), available at: <https://jamanetwork.com/journals/jama/fullarticle/2768640>.

⁷ In February 2021, the DOH released data to the Empire Center, a public policy thinktank, pursuant to a court order. The data shows deaths by facility by date. Empire Center, COVID Nursing Home Data, available at: <http://www.empirecenter.org/publications/covid-nursing-home-data/>.

⁸ Long Term Care Community Coalition, New York COVID-19 Fatality Data: Nursing Homes & Adult Care Facilities, available at: <http://nursinghome411.org/ny-nursinghome-covid-data/>.

⁹ N.Y. State Dep't of Health, *Harris Hill Nursing Facility, LLC*, available at: https://profiles.health.ny.gov/nursing_home/view/150822.

¹⁰ N.Y. State Dep't of Health, *Father Baker Manor*, available at: https://profiles.health.ny.gov/nursing_home/view/150874.

The Ten Nursing Homes in New York State with the Most COVID Deaths After One Year¹¹

Nursing Home Name	County	COVID Confirmed Deaths at NH	*COVID Confirmed Deaths Out of Facility	COVID Presumed Deaths at NH	Total Deaths
Harris Hill Nursing Facility, LLC	Erie	128	19	2	149
Long Island State Veterans Home	Suffolk	77	36	8	121
Parker Jewish Institute for Health Care & Rehab	Queens	84	35	0	119
Father Baker Manor	Erie	81	28	0	109
Menorah Home & Hospital for Aged & Infirm	Kings	22	36	48	106
Isabella Geriatric Center Inc	NY	25	34	43	102
The Plaza Rehab and Nursing Center	Bronx	32	12	49	93
Hebrew Home for The Aged at Riverdale	Bronx	28	20	40	88
The Riverside	NY	51	16	18	85
Upper East Side Rehabilitation and Nursing Center	NY	19	55	11	85

Inadequate testing capability early in the pandemic makes it impossible to confirm just how many nursing home residents caught COVID or died from the virus, and it will likely make it difficult to determine the full impact of the March 25, 2020 order for nursing homes to accept hospital patients without a negative COVID test.¹² But what is known is that New York’s nursing homes have long failed to meet infection control standards,¹³ and they were not prepared to protect their residents or staff at the outset or for months after COVID was introduced to

¹¹ See LTCCC, New York COVID-19 Fatality Data, *supra* note 8.

¹² Two studies, one by the Empire Center, and one by the Department of Health, allegedly rewritten by Governor Cuomo’s political appointees, attempted to answer the question about the March 25, 2020, order. The Empire Center’s report, which is more damning of the March 25, 2020, order, found that the policy had more significant effects in upstate regions, where the virus spread later, but that the order “was not the sole or primary cause of the heavy death toll in nursing homes.” BILL HAMMOND & IAN KINGSBURY, COVID-POSITIVE ADMISSIONS WERE CORRELATED WITH HIGHER DEATH RATES IN NEW YORK NURSING HOMES (Feb. 18, 2021), available at: <https://www.empirecenter.org/publications/covid-positive-admissions-higher-death-rates/>. The DOH report blamed staff for bringing the virus into facilities. N.Y. State Dep’t of Health, “Factors Associated with Nursing Home Infections and Fatalities in New York State During the COVID-19 Global Health Crisis” (Feb. 11, 2021), available at: https://www.health.ny.gov/press/releases/2020/docs/nh_factors_report.pdf.

¹³ See e.g., Long Term Care Community Coalition, US Nursing Home Infection Control & Prevention Citations: March 2020 (Mar. 2020), available at: <https://nursinghome411.org/nursing-home-infection-control-citations-march2020/> (finding 543 citations for infection prevention and control at 373 nursing homes in New York State between 2017 and 2019).

facilities.¹⁴ More than fifty-five percent of New York nursing homes were cited for infection control and prevention problems between 2017 and 2019. Eighteen of the forty facilities whose plans we reviewed were cited during that period.¹⁵ To protect against a pandemic in the future, facilities will need to prepare.

The New York Legislature Passed a Law to Force Nursing Homes and the Department of Health to Prepare for Future Pandemics

In May 2020, Senator Julia Salazar and former Assembly Member Joseph Lentol introduced a bill that would require nursing homes to develop and publish PEPs (PEP Bill).¹⁶ Although nursing homes were already required to create Comprehensive Emergency Management Plans by the Centers for Medicare and Medicaid Services (CMS) regulations,¹⁷ the PEP Bill added more specific planning and implementation requirements for pandemics. The PEP Bill required facilities to address a variety of topics that had proved inadequate since the pandemic began: timely communication with residents and families; facilitating video and other communications between residents and people outside their facilities; implementing infection control measures; and obtaining adequate personal protective equipment (PPE) and other supplies.¹⁸ The plans needed to be developed within ninety days and updated annually thereafter.

The sponsors' memorandum in support of the legislation explains why the PEP Bill was necessary:

Given the congregate nature and resident population typically served in residential health care facilities, older adults often with underlying health conditions, it is crucial that such facilities have a comprehensive and actionable plan in place in advance of public health emergencies, such as the novel coronavirus COVID-19 pandemic, in order to protect high-risk residents, healthcare personnel and visitors from infection, hospitalization and death.

....

Given the rapid spread of the novel coronavirus COVID-19 in residential health care facilities across the country, immediate steps must be taken to ensure that these

¹⁴ Bridget Read, *New York's Nursing Homes Were on the Brink. Then COVID Hit*, N.Y. Mag.: The Cut, Apr. 6, 2021, available at: <https://www.thecut.com/2021/04/new-yorks-nursing-homes-covid-cuomo.html>.

¹⁵ See LTCCC, US Nursing Home Infection Control & Prevention Citations, *supra* note 13.

¹⁶ See Ch. 114 of the Laws of 2020, Pub. Health Law § 2803, available at: <https://www.nysenate.gov/legislation/bills/2019/s8289>.

¹⁷ 42 CFR § 483.73.

¹⁸ PEP Bill, *supra* note 16.

*facilities are fully prepared to immediately respond to public health emergencies in the future.*¹⁹

As the memorandum in support makes clear, the PEP Bill is forward-looking. It is focused on making sure that nursing homes are prepared for future pandemics. During the Assembly floor debate, Assembly Member Lentol explained:

*[T]his bill doesn't pretend to blame anybody, or want to blame anybody, it's a bill that would look to the future, future pandemics, future incidents of any type of an emergency infectious disease that comes our way to require residential health care facilities to prepare a pandemic emergency plan within 90 days, and annually thereafter, or more frequently if determined to be done by the Commissioner of Health. . . . And that's the purpose of the bill, to look to the future. We can't abandon our seniors again. We shouldn't allow it.*²⁰

Former Assembly Member Tremaine Wright also expressed hope for the future:

*[T]oday's bill is a step in the right direction. It's going to allow us to invest in preparedness. To invest in systems and to help build the supports necessary to make sure that our nursing homes are thriving institutions that really do benefit all of us and are part of -- an integral part and a supported part of our healthcare system.*²¹

The PEP Bill passed easily in both the Assembly and Senate on May 27, 2020. In the Assembly, the vote was 133 to 11; in the Senate, it was 61 to 1.²² Governor Cuomo signed the law on June 17, 2020.²³

On August 20, 2020, the DOH issued a Dear Administrator Letter (DAL) to help nursing homes comply with the new law.²⁴ The DAL “explains the requirements for the PEP outlined in the statute and provides additional direction and guidance on how to implement its requirements.”²⁵ In addition to outlining the basic requirements of the PEP, the DAL provided advice on how to fit the new PEP into facilities’ existing comprehensive emergency management plans, a checklist for what specifics must be addressed in the PEP, and a template for facilities to use for their PEPs.²⁶

¹⁹ *Id.*

²⁰ N.Y. Assembly Debate on Assembly Bill 10394-A (May 27, 2020) at 199-200, available at: <https://www2.assembly.state.ny.us/write/upload/transcripts/2019/5-27-20.pdf#search=%2210394%22>.

²¹ *Id.* at 219.

²² N.Y. Assembly Floor Vote on S.8289-B (May 27, 2020), available at: https://www.nyasembly.gov/leg/?default_fld=&leg_video=&bn=S08289&term=2019&Summary=Y&Floor%26nbspVotes=Y; PEP Bill, *supra* note 16.

²³ *Id.*

²⁴ N.Y. State Dep't of Health, DAL NH 20-09 Required Annual Pandemic Emergency Plan for All Nursing Homes (Aug. 20, 2020), available at: https://www.health.ny.gov/professionals/nursing_home_administrator/dal/docs/dal_nh_20-09.pdf (Hereinafter “DOH DAL”).

²⁵ *Id.* at 1.

²⁶ *See id.* at 44.

The DOH's checklist for what is required to be included in facilities' PEPs and what is recommended includes thirty-five elements in five broad areas:

- Preparedness tasks for all infectious disease events;
- Additional preparedness planning tasks for pandemic events;
- Response tasks for all infectious disease events;
- Additional response tasks for pandemic events; and
- Recovery for all infectious disease events.²⁷

Twenty-two of the elements are required.²⁸

The preparations and responses outlined in the DOH's checklist cover a communication plan to keep residents and families informed; infection protection plans for staff, residents, and families; a plan for ensuring a stockpile of PPE and other supplies; and plans on how to return to normal operations after a pandemic. At the time the legislation became law, each of these areas had been major problems, and the return to normal was an optimistic step in the early summer as restrictions began to ease. But it remains a question whether nursing homes have actually developed sufficient PEPs, as the law requires, to prevent the misery and death of nursing home residents during future pandemics. As our review shows, there are substantial reasons to believe they have not.

²⁷ *Id.* at 45-49.

²⁸ *See id.*

Nursing Homes have Failed to Comply with the Law

Our review of the PEPs

With the help of Fellows from the Solomon Center for Health Law and Policy at Yale Law School, we attempted to review the PEPs for the forty nursing homes with the most COVID-related deaths as of September 2020.

The Forty Nursing Homes in New York with the Most Covid Deaths as of September 2020²⁹

Nursing Home	County
Absolut Center for Nursing and Rehabilitation at Aurora Park	Erie
Amsterdam Nursing Home Corp (1992)	New York
Carillon Nursing and Rehabilitation Center	Suffolk
Carmel Richmond Healthcare and Rehabilitation Center	Richmond
Clove Lakes Health Care and Rehabilitation Center, Inc.	Richmond
Cobble Hill Health Center, Inc.	Kings
Father Baker Manor	Erie
Franklin Center for Rehabilitation and Nursing	Queens
Fulton Commons Care Center Inc.	Nassau
Gurwin Jewish Nursing and Rehabilitation Center	Suffolk
Harris Hill Nursing Facility, LLC	Erie
Haym Salomon Home for The Aged	Kings
Hebrew Home for The Aged at Riverdale	Bronx
Holliswood Center for Rehabilitation and Healthcare	Queens
Huntington Hills Center for Health and Rehabilitation	Suffolk
Isabella Geriatric Center Inc.	New York
Kings Harbor Multicare Center	Bronx
Long Island State Veterans Home	Suffolk
Mary Manning Walsh Nursing Home Co Inc.	New York

²⁹ See N.Y. State Dep't of Health, *Nursing Home and ACF COVID related Deaths Statewide: Data through September 19, 2020*, available at: https://web.archive.org/web/20200920155036/https://www.health.ny.gov/statistics/diseases/covid-19/fatalities_nursing_home_acf.pdf.

Nursing Home	County
Meadowbrook Care Center, Inc.	Nassau
Menorah Home & Hospital for Aged & Infirm	Kings
Our Lady of Consolation Nursing and Rehabilitative Care	Suffolk
Ozanam Hall of Queens Nursing Home Inc.	Queens
Parker Jewish Institute for Health Care & Rehab	Queens
Regency Extended Care Center	Westchester
Rutland Nursing Home, Inc.	Kings
Sapphire Center for Rehabilitation and Nursing of Central Queens	Queens
Schervier Nursing Care Center	Bronx
Schulman and Schachne Institute for Nursing and Rehabilitation	Kings
Silver Lake Specialized Rehabilitation and Care Center	Richmond
St. Johnland Nursing Center, Inc.	Suffolk
St. Patrick's Home	Bronx
The Citadel Rehab and Nursing Center at Kingsbridge	Bronx
The New Jewish Home, Manhattan	New York
The New Jewish Home, Sarah Neuman	Westchester
The Phoenix Rehabilitation and Nursing Center	Kings
The Plaza Rehab and Nursing Center	Bronx
The Riverside	New York
Throgs Neck Rehabilitation & Nursing Center	Bronx
Union Plaza Care Center	Queens

The Fellows included graduate students in public health, law, and medicine. We began our review by trying to locate the plan for each home. The plans were usually easy to find. On average, it took approximately thirty seconds to search for and locate each PEP. That being said, we were not able to locate a plan on the website for one of the homes—The Phoenix Rehabilitation and Nursing Center.³⁰ Also, almost twenty percent of the plans, including those for Clove Lake, Haym Salomon, Hebrew Home, Kings Harbor, Meadowbrook, Sapphire, and

³⁰ Although a button on The Phoenix's website does refer to "pandemic emergency plan updates," see The Phoenix Rehabilitation and Nursing Center, available at: <https://thephoenixrehab.com/>, when one clicks on the link, it leads to a page that says: "NOT FOUND. Apologies, but the page you requested could not be found." See *id.*, available at <https://thephoenixrehab.com/wp-content/uploads/2020/09/CRC-PEP-Doc-200814.pdf>.

Throgs Neck, were posted on the websites in inaccessible formats.³¹ As a result, these PEPs are very difficult, if not impossible, for people who are blind or have vision impairments to read.

We limited our review to the twenty-two elements that are listed as being required by the DOH DAL. Unfortunately, as explained in detail below, a careful review of the plans shows that they are seriously flawed and unlikely to prevent a repeat of the death and despair residents endured during the COVID pandemic. Many of the PEPs omit required elements entirely, and others merely contain vague language mimicking the DOH guidance and reflecting a future intention to develop plans to address the required elements. But the PEP is supposed to be the plan, not merely a plan to have a plan. Given the nature of infectious diseases, being able to respond rapidly and comprehensively may be critical to prevent needless injury and death, and it will be hard—if not impossible—for facilities to do so without detailed advanced planning tailored to their own staff, residents, and location. Simply stating that processes will be designed and implemented in the future is insufficient.

The PEPs failed to cover required elements

Almost all of the thirty-nine facilities that posted a PEP included staff education on infectious diseases in their PEPs. But the other twenty-one required provisions of PEPs were less consistently included.

Although some facilities' PEPs appear to be extensive on first glance, a more thorough review indicates that many elements required by the law remain unaddressed. For example, Harris Hill Nursing Facility has a 200-page comprehensive emergency management plan,³² but it still does not meet the requirements of the PEP. In numerous places, its responses to DOH prompts are “see Annex K,”³³ but Annex K is a twelve-page infectious disease appendix, a full page of which describes the protocol for handling soiled laundry, and much of Annex K merely copies the DOH's Dear Administrator Letter's description of what facilities' PEPs must cover.³⁴ For example, the DOH's PEP template requires facilities to describe their process to: “Review and assure that there is, adequate facility staff access to communicable disease reporting tools and other outbreak specific reporting requirements on the Health Commerce System (e.g., Nosocomial Outbreak Reporting Application (NORA), HERDS surveys. [describe facility's

³¹ See, e.g., CLOVE LAKES HEALTH CARE & REHABILITATION CENTER, PANDEMIC EMERGENCY PLAN (Sept. 11, 2020), available at: <https://www.clovelakes.com/pandemic-emergency-plan>; HAYM SALOMON HOME FOR NURSING & REHABILITATION, PANDEMIC EMERGENCY PLAN, available at: <https://www.haymsalomonhome.com/pandemic-emergency-plan/> (hereinafter “Haym Salomon PEP”); HEBREW HOME AT RIVERDALE, COMPREHENSIVE EMERGENCY MANAGEMENT PLAN (Sept. 11, 2020), available at: <https://www.riverspringliving.org/wp-content/uploads/2020/09/20200915164911688.pdf> (hereinafter “Hebrew Home PEP”); KINGS HARBOR MULTICARE CENTER, PANDEMIC EMERGENCY PLAN, available at: https://f281454b-05b3-420f-813d-cc54b2fe375e.filesusr.com/ugd/0211a1_45f72d121cb64a658262080f09cba1cd.pdf; MEADOWBROOK CARE CENTER, PANDEMIC EMERGENCY PLAN (Sept. 3, 2020), available at: <https://www.meadowbrooklongisland.com/wp-content/uploads/2020/09/20200914111239671.pdf> (hereinafter “Meadowbrook PEP”); SAPPHIRE CENTER FOR REHABILITATION & NURSING OF CENTRAL QUEENS, PANDEMIC EMERGENCY PLAN (Sept. 15, 2020), available at: <https://irp-cdn.multiscreensite.com/a995276c/files/uploaded/Pandemic%20Emergency%20Plan%20Part%201.pdf>; THROGS NECK REHABILITATION & NURSING CENTER, PANDEMIC EMERGENCY PLAN (Sept. 2020), available at: <https://throgsneckrehab.com/wp-content/uploads/2020/09/Throgs-Pandemic-Emergency-Plan.pdf> (hereinafter “Throgs Neck PEP”).

³² See HARRIS HILL HCF, COMPREHENSIVE EMERGENCY MANAGEMENT PLAN (Sept. 8, 2020), available at <https://www.mcquiregroup.com/wp-content/uploads/2020/09/CEMP-HH-final-9-8-2020.pdf> (hereinafter “Harris Hill PEP”).

³³ See *id.* at 30-34.

³⁴ Compare *id.* at 147-51, with DOH DAL, *supra* note 24, at 59-63

process].”³⁵ Harris Hill responds simply, “See Annex K.”³⁶ But Annex K does not describe a process for assuring adequate facility staff access to reporting tools. It merely restates about two pages of DOH directives about what must be reported.³⁷ The same is true for its response to the 60-day PPE mandate (referring to Annex K text saying PPE supplies should be addressed),³⁸ and isolating and cohorting residents (referring to Annex K text stating that “The facility establishes an infection prevention and control program (IPCP) that must follow accepted national standards and include, at a minimum, . . . when and how isolation should be used for a resident.”).³⁹

Reopening was one of the most common areas ignored in facilities’ PEPs. Some facilities⁴⁰ failed to cover two tasks in the DOH’s checklist related to recovery:

The facility will maintain review of, and implement procedures provided in NYSDOH and CDC recovery guidance that is issued at the time of each specific infectious disease or pandemic event, regarding how, when, which activities/procedures/restrictions may be eliminated, restored and the timing of when those changes may be executed.

...

*The facility will communicate any relevant activities regarding recovery/return to normal operations, with staff, families/guardians and other relevant stakeholders.*⁴¹

Others simply indicated they would follow government-issued guidance without elaboration.⁴² These omissions are particularly noteworthy at this stage in the pandemic, as CDC and DOH guidance related to permitting visitors, for example, was greatly relaxed in March 2021, but months later, some facilities had not “implement[ed] procedures provided in NYSDOH and CDC recovery guidance . . . regarding how, when, which activities/procedures restrictions may be eliminated, restored and the timing of when those changes may be executed.”⁴³ Months after legal restrictions were lifted, families have complained that they continue to be denied access or

³⁵ DOH DAL, *supra* note 24, at 50.

³⁶ Harris Hill PEP, *supra* note 32, at 31.

³⁷ *Id.* at 147-149.

³⁸ *Id.* at 150.

³⁹ *Id.* at 151.

⁴⁰ See, e.g., AMSTERDAM NURSING HOME, PANDEMIC EMERGENCY PLAN, available at <http://www.amsterdamcares.org/resources/ANH%20Pandemic%20Preparedness%20Plan.pdf> (hereinafter “Amsterdam PEP”); FATHER BAKER MANOR, PANDEMIC EMERGENCY PLAN (Sept. 1, 2020), available at: <https://www.chsbuffalo.org/sites/default/files/files/services/senior%20care/catholic-health-long-term-care-pandemic-emergency-plan-090320.pdf>, THE NEW JEWISH HOME, PANDEMIC EMERGENCY PLAN: MANHATTAN DIVISION, available at: <https://jewishhome.org/pandemic-emergency-plan-manhattan/>,

⁴¹ DOH DAL, *supra* note 24, at 49.

⁴² See, e.g., Haym Salomon PEP, *supra* note 31, at 4; ISABELLA CENTER FOR REHABILITATION AND NURSING CARE, PANDEMIC EMERGENCY PLAN (2020), available at: <https://www.mjhs.org/our-services/isabella-center/pandemic-response-plan-pep/>, MARY MANNING WALSH HOME, PANDEMIC EMERGENCY PLAN (2020) at 6, available at: <https://www.archcare.org/sites/default/files/images/PEP-%20Final%20-%2009%2014%202020.docx>.

⁴³ DOH DAL, *supra* note 24.

are subjected to requirements by facilities that are inconsistent with state and federal visitation rules.⁴⁴

PEPs Parrot Instructions

Although most of the PEPs we reviewed do in some way touch on most of the required items, many PEPs simply restate the words in the DOH’s guidance—or copy them outright without modification. Amsterdam Nursing Home’s PEP, which is merely three pages long (four pages including the title page), provides a good example of this problem.⁴⁵ Amsterdam’s response to a DOH prompt about infection control policies is one of dozens of examples of parroting in the PEPs we reviewed.

DOH Instruction	Amsterdam’s PEP
“Develop/Review/Revise and Enforce existing infection prevention, control, and reporting policies. [describe facility’s process].”	“Infection control policy and procedure will be developed, reviewed and/or updated as per guidelines from DOH, CMS, CDC and other related agencies.” ⁴⁶

Amsterdam responds to the prompt not by describing its process for developing, reviewing, and revising its policy but simply by restating the prompt in the passive voice and in the future tense.

In its PEP, Throgs Neck does even less editing of the prompt than Amsterdam in addressing its policies related to preserving residents’ rights to return after hospitalization.

⁴⁴ See, e.g., Marina Villeneuve, *Lawmakers urge NY to lift limits on nursing home visits*, ASSOCIATED PRESS NEWS, July 15, 2021, available at <https://apnews.com/article/business-health-coronavirus-pandemic-nursing-homes-3a2ff854b2880ff8992fa3e38dff898>; *Your Stories: Nursing home visitation limits causing pain for families*, WSYR-TV, June 18, 2021, available at: <https://www.localsyr.com/news/local-news/your-stories-nursing-home-visitation-limits-causing-pain-for-families/>; Kelly Dudzik, *Nursing home visits still limited by COVID-19*, WGRZ-TV, June 7, 2021, available at: [https://www.wgrz.com/article/news/health/coronavirus/nursing-home-visits-still-limited-by-covid-19-new-york-state-coronavirus/71-
ea7638b0-318b-42c3-8d2a-49a2456767ef](https://www.wgrz.com/article/news/health/coronavirus/nursing-home-visits-still-limited-by-covid-19-new-york-state-coronavirus/71-
ea7638b0-318b-42c3-8d2a-49a2456767ef); Fernando Alba, *This isn’t a prison’: Clinton County nursing home families push for expanded visits*, PRESS-REPUBLICAN, May 28, 2021, available at: https://www.pressrepublican.com/news/local_news/this-isnt-a-prison-clinton-county-nursing-home-families-push-for-expanded-visits/article_061e869a-1567-564b-a967-f93253def658.html;

⁴⁵ Amsterdam PEP, *supra* note 40.

⁴⁶ Compare *id.* at 2, with DOH DAL, *supra* note 24, at 45.

DOH Instruction

“In accordance with PEP requirements, the facility will implement the following process to preserve a resident's place in a residential health care facility if such resident is hospitalized, in accordance with all applicable laws and regulations including but not limited to 18 NYCRR 505.9(d)(6) and 42 CFR 483.15(e): [describe facility's planned process]”

Throgs Neck PEP

“The facility will implement processes to preserve a resident's place in a residential health care facility if such resident is hospitalized, in accordance with all applicable laws and regulations including but not limited to 18 NYCRR 505.9(d)(6) and 42 CFR 483.15(e).”⁴⁷

The facility's PEP ignores and removes the DOH's prompt to “describe facility's planned process” and, instead, merely states that it “will implement processes.”

Due to widespread complaints from families during the spring of 2020 about lack of communication from nursing homes—both about loved ones' condition and the spread of infection within the facility—a main component of the PEP Bill was the development of a communication plan to ensure residents and families are kept apprised both of the resident's status and the seriousness of the outbreak at the facility. Some facilities developed multi-tiered plans for when, how, and by whom contact information would be collected, when additional lines of communication would open, who would coordinate remote visits, and who is responsible for oversight of communications plan compliance. For example, Schulman & Schachne Institute makes it clear that it “provides all residents with daily access, at no cost, to remote videoconference or equivalent communication methods, with family members and guardians” and details how it will do so:

*Activities staff, nurses, and therapists assist the residents with logging onto social media; and providing phones or iPads. Due to the limited number of electronic devices, residents may need to be timed. Residents who are not technologically savvy are helped with technology issues on their own equipment, and those with disabilities (e.g., vision, hearing, sensory disabilities, altered mental state) or language barriers are assisted, as well. If needed, staff assist with communication boards, make all possible accommodations, provide access to the language lines for translation, including sign language.*⁴⁸

⁴⁷ Compare Throgs Neck PEP, *supra* note 31, at 10, with DOH DAL, *supra* note 24, at 48.

⁴⁸ See, e.g., SCHULMAN & SCHACHNE INSTITUTE FOR NURSING & REHABILITATION, COMPREHENSIVE PANDEMIC EMERGENCY MANAGEMENT PLAN (September 2020) at 8, available at: <http://www.schulmanandschachne.org/pdf/SSI-2020-Pandemic-Emergency-Plan.pdf>. Schulman & Schachne's PEP also provides quite detailed plans for providing family members with daily updates on infected residents and weekly updates on infections and deaths. See *id.* at 6-8.

But other PEPs merely state that the nursing home would do what the law requires, with little explanation of how. In its two-page-and-three-line-long PEP,⁴⁹ Fulton Commons Care Center provided even less specificity than the prompt to which it responded.

DOH Instruction	Fulton Commons PEP
<p>“In accordance with PEP requirements, the facility will implement the following mechanisms to provide all residents with no cost daily access to remote videoconference or equivalent communication methods with family members and guardians: Describe the communications plan/methods that will be used”</p>	<p>“All residents will be afforded the option of videoconferencing or phone calls with authorized family members/guardians.”⁵⁰</p>

Although Fulton Commons’ PEP language does not necessarily conflict with the law and DOH instructions—it does not say it will charge residents for phone or videoconference usage—it also does not acknowledge that free, daily communications are required when requested. It also does not “[d]escribe the communications plan/methods that will be used” to achieve the statutory mandate. It also does not explain what technology is available, what staff are assigned to coordinate and assist residents with the technology, or how such visits can be arranged.

The PEP Bill also requires nursing homes to have a plan “to maintain or contract to have at least a two-month supply of personal protective equipment.”⁵¹ Many of the thirty-nine plans simply restate the requirement from the DOH’s checklist, without elaboration. Compare, for example, the DOH instruction to the language from Meadowbrook Care Center’s PEP.

⁴⁹ FULTON COMMONS CARE CENTER, PANDEMIC EMERGENCY PLAN, available at <https://www.fultoncommons.com/documents/2020/09/pandemic-emergency-plan.pdf>.

⁵⁰ Compare *id.* at 1, with DOH DAL, *supra* note 24, at 48.

⁵¹ PEP Bill, *supra* note 16, at 12(a)(ii)(B).

DOH instruction

“In accordance with PEP requirements, the facility will implement the following planned procedures to maintain or contract to have at least a two-month (60-day) supply of personal protective equipment (including consideration of space for storage) or any superseding requirements under New York State Executive Orders and/or NYSDOH regulations governing PPE supply requirements executed during a specific disease outbreak or pandemic. As a minimum, all types of PPE found to be necessary in the COVID pandemic should be included in the 60-day stockpile.

This includes, but is not limited to:

- N95 respirators
- Face shield
- Eye protection
- Gowns/isolation gowns
- Gloves
- Masks
- Sanitizer and disinfectants (meeting EPA Guidance current at the time of the pandemic)

[describe facility’s planned procedures, contractors/contracts, storage locations]”

Meadowbrook Care Center’s PEP

“The facility has implemented procedures to maintain at least a two-month (60 day) supply of PPE (including consideration of space for storage) or any superseding requirements under New York State Executive Orders and/or NYSDOH regulations governing PPE supply requirements executed during a specific disease outbreak or pandemic.

This includes, but is not limited to:

- N95 respirators
- Face shield
- Eye protection
- Isolation gowns
- Gloves
- Masks
- Sanitizer and disinfectants (meeting EPA Guidance current at the time of the pandemic)
- Facility will calculate daily usage/burn rate to ensure adequate PPE”⁵²

⁵² Compare Meadowbrook PEP, *supra* note 31 at 8, with DOH DAL, *supra* note 24, at 48. Note that this is just one of several examples of the Meadowbrook Care Center’s PEP simply parroting the DOH’s guidance. Compare Meadowbrook PEP, *supra* note 31, at 8 with DOH DAL, *supra* note 24, at 53 (PEP parroting DOH guidance regarding procedures for preserving a resident’s place in the facility).

Regency Extended Care Center’s PEP also parrots the DOH guidance regarding a 60-day stockpile of PPE.⁵³ The language in Regency’s PEP is followed by a reference to its “Policy and Procedure on Securing PPE,” which might have more detail. But that policy is not publicly available on its website, and it seems not to have proved effective: While its PEP declared that it “implemented procedures to maintain at least a two-month (60 day) supply of PPE,” Regency told the federal government in mid-September 2020 (when PEPs were due) that it lacked a week’s supply of gloves.⁵⁴ More generally, the practice of citing policies that are not publicly available is a common and troubling practice in many of the PEPs we reviewed.⁵⁵ Even if a facility may have a basis to keep certain arrangements with suppliers confidential, a redacted version of the policy could be posted that would demonstrate the adequacy of its advance planning without disclosing any commercially-sensitive material. This type of practice further highlights the necessity of careful review and enforcement by the DOH.

PEPs Fail to Specify Details Necessary to Ensure Accountability

Some facilities’ PEPs are so vague that they fail to provide any direction to those charged with implementing them. Amsterdam’s PEP, for example, essentially says that the nursing home will have a plan.⁵⁶ Compare the statutory language about a communications plan with Amsterdam’s communications plan.

Statutory language	Amsterdam House PEP
<p>The PEP shall include “a communication plan:</p> <ol style="list-style-type: none"> 1. to update authorized family members and guardians of infected residents at least once per day and upon a change in a resident's condition and at least once a week to update all residents and authorized families and guardians on the number of infections and deaths at the facility, by electronic or such other means 	<ul style="list-style-type: none"> • Social Services will request up-to-date contact information of designated notification parties for all residents, including preferences for communication method. • Authorized family members/guardians of infected resident will be updated by assigned clinical team member at least on a daily basis and upon changes in condition. Information on the number of infections and deaths will be made

⁵³ REGENCY EXTENDED CARE CENTER, PANDEMIC EMERGENCY PLAN, available at: <https://www.regencycarecenter.org/pandemic-emergency-plan>.

⁵⁴ CENTERS FOR MEDICARE & MEDICAID SERVICES, COVID-19 NURSING HOME DATASET, available at: <https://data.cms.gov/Special-Programs-Initiatives-COVID-19-Nursing-Home/COVID-19-Nursing-Home-Dataset/s2uc-8wxp/data>.

⁵⁵ See, e.g., THE CITADEL REHABILITATION & NURSING CENTER AT KINGSBRIDGE, PANDEMIC EMERGENCY PLAN 2020 (2020), available at https://citadelcarecenters.com/wp-content/themes/fws-citadel-web/src/assets/images/CovidPolicies_CitadelKingsbridge.pdf; NEW FRANKLIN CENTER FOR REHABILITATION AND NURSING, PANDEMIC EMERGENCY PLAN, available at <http://www.franklinnh.net/covid-19-status-briefing/new-franklin-center-rehabilitation-nursing-pandemic-emergency-plan/>; THE PLAZA REHABILITATION & NURSING CENTER, PANDEMIC EMERGENCY PLAN 2020 (2020), available at https://citadelcarecenters.com/wp-content/themes/fws-citadel-web/src/assets/images/CovidPolicies_CitadelPlaza.pdf.

⁵⁶ Amsterdam PEP, *supra* note 40.

- as may be selected by each authorized family member or guardian; and
2. that includes a method to provide all residents with daily access, at no cost, to remote videoconference or equivalent communication methods with family members and guardians....”

available to all other residents at least once a week or more frequently as required by law. Facility’s website will also serve as additional source of information.

- Video conferencing using Face Time on iPads and mobile phones or other electronic means will be facilitated, based upon preferences by resident, family/guardian, on a daily basis.
- Policy and procedure on family notification, visitation, and communication will be re-enforced with residents, family and staff.”⁵⁷

Amsterdam’s first bullet is fairly strong, assigning a specific task to a specific team of employees. But then it reverts to using the passive voice to restate the statutory goals of a communication plan without laying out a plan for how the goals will be achieved and does not identify with specificity who will be in charge of what tasks to ensure accountability. Its last bullet point describes “procedure” being reinforced, but it never outlines a procedure for notifying families and residents of information required to be shared or for scheduling and carrying out remote visits.

Hebrew Home for the Aged added short—often one-sentence—responses to the DOH instructions.⁵⁸ For example, after the DOH’s direction for facilities to describe how they will implement planned procedures for having or contracting for a 60-day supply of PPE, Hebrew Home inserts a sentence into the template document: “A 60-90 day stockpile of Covid 19 related PPE is stored in it’s [sic] own area.”⁵⁹ Perhaps if Hebrew Home had fleshed out its process for ensuring compliance instead of merely stating its compliance, it would have been better prepared, but, the same week it published its PEP claiming to have a 60-90 day supply, Hebrew Home reported to the federal government that it did not have “any current supply of N95 masks.”⁶⁰

The 60-day supply of PPE is also the weakest part of Holliswood Center’s PEP, which is otherwise better than most of the PEPs we reviewed.⁶¹ This portion of the Holliswood plan

⁵⁷ Compare *id.* at 4, with PEP Bill *supra* note 16, at 12(a)(i)(A)-(B).

⁵⁸ Hebrew Home PEP, *supra* note 31.

⁵⁹ *Id.* at 54.

⁶⁰ CMS, COVID-19 NURSING HOME DATASET, *supra* note 54 (indicating that Hebrew Home reported no N95 masks until the week ending November 22, 2020).

⁶¹ HOLLISWOOD CENTER, PANDEMIC EMERGENCY PLAN (2020), available at: <https://facilities.centershealthcare.org/covid-stats/pep.php?target=18>. For example, regarding communications, the Holliswood PEP provides a level of detail and awareness of the needs of residents and their family members that is not common in these plans, noting that “[t]he facility will work to accommodate specific family communication requests, including alternative communication methods.”

essentially just states that the home will "[a]rrange for a minimum of 60-day stockpile of PPE,"⁶² However, it fails to do what the DOH guidance requires: "describe facility's planned procedures, contractors/contracts, storage locations."⁶³

Menorah Home parrots some of its responses regarding infection preparedness, but adds additional language.⁶⁴ That language, however, did not add to the specificity or actionability of the plan. For example, the DOH template required facilities to describe their process to "develop, review, revise, and enforce existing infection control, and reporting policies." Menorah's plan states that the facility "reviews, and revises, if necessary, existing Infection Prevention and Control policies, including mandatory reporting. Policy updates are reviewed by the Department Heads as appropriate and disseminated to all employees based on their role/department. Inservice training and competencies are conducted to enforce compliance with procedures."⁶⁵ This answer indicates that department heads will review policies if needed and there will be training about the policies, but it does not articulate when or why department heads would review the plans or identify a method for enforcement (beyond in-service trainings).

Recommendations and Conclusion

Our review of these PEPs led us to several recommendations to make the plans more useful for when facilities must implement them, make plans more accessible to residents and families with concerns about preparedness, and make nursing homes more accountable for the quality of services they provide at difficult times.

- **DOH must review the adequacy of PEPs to ensure that nursing home residents are protected during future pandemics**
The PEP Bill requires the DOH to review nursing homes' PEPs and impose civil penalties for facilities' non-compliance. Despite the myriad inadequacies described in this report, none of these plans were changed since being posted last fall, either of a facility's own accord or to resolve a citation for noncompliance by the DOH. Instead of rubber-stamping inadequate PEPs, the DOH must take the necessary steps to ensure that nursing home residents do not suffer and die on the same scale during the next pandemic.
- **Facilities should identify specific methods for achieving goals articulated in PEPs**
Plans, after all, are how something will be achieved, not just statements of what will be achieved. Most of the required prompts ask facilities to describe procedures or policies

⁶² *Id.*

⁶³ DOH DAL, *supra* note 24, at 49.

⁶⁴ MENORAH CENTER FOR REHABILITATION AND NURSING CARE, PANDEMIC EMERGENCY PLAN (2020), available at: <https://www.mjhs.org/covid-19/menorah-center-pandemic-response-plan-pep/>.

⁶⁵ *Id.*

that will lead to a particular goal. Merely restating the goal, as many plans we reviewed do, does not prepare a facility to achieve the goal in the next pandemic.

- **Facilities should identify clear roles for particular staff to execute plans**
Many of the required prompts direct facilities to identify the staff responsible for particular tasks in a procedure. Some facilities did so. But all PEPs should identify the people in particular roles who are responsible for completing tasks, not just assign everything to high-level employees “or their designee,” or worse, not identify anyone. Plans are more effective when everyone’s role is clear. Even if exigencies require reassigning roles, having clear responsibilities already established is a better place to start.
- **Facilities should link to other policies if they refer to them in their PEPs**
Many plans responded to the required prompts in their PEPs with brief, vague answers that referred to a policy that is apparently specific to the issue. While the PEPs are intended to be short, useful documents, it would be helpful for all users to be able to quickly access the more specific policies through hyperlinks when they are referenced in PEPs.
- **Facilities should post their plans in an accessible format that can be easily read by screen-reading software used by blind people and others with visual impairments**
Given that many nursing home residents and their loved ones are older, they are more likely to have difficulty seeing. It is easy and free to create a document or website in an accessible format. Putting inaccessible PEPs on a website is contrary to the goals of the PEP Bill.

It should be the goal of the DOH and the nursing home industry to avoid a future emergency with disastrous outcomes like COVID has had in nursing homes. That was clearly the goal of the PEP Bill. But how the law is implemented—by facilities and by the DOH—will determine the likelihood of better outcomes during future emergencies. The plans we reviewed were long on parroting statutory goals and short on specifics to achieve them. Plans are not adequate (or even truly plans) when they lack details that can be operationalized. PEPs must assign specific tasks to particular staff who are trained and ready to perform those tasks. PEPs must describe specific policies and procedures for achieving stated goals. The DOH must ensure that PEPs are serious documents, not merely thrown together to check a box that requires facilities to have a document titled “Pandemic Emergency Plan.” If these improvements are made to PEPs and the DOH’s oversight, New York’s nursing homes will be in a better position to avoid residents’ future pandemic-related misery and death.