

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

THE ROMAN CATHOLIC DIOCESE OF BROOKLYN,
NEW YORK,

Plaintiff,

vs.

GOVERNOR ANDREW M. CUOMO, in his official
capacity,

Defendant.

DECLARATION

Civil No. 20-cv-4844

Howard A. Zucker, M.D., J.D., on the date noted below and pursuant to § 1746 of title 28 of the United States Code, declares the following to be true and correct under penalty of perjury under the laws of the United States of America:

Background and Qualifications

1) I am the Commissioner of the New York State Department of Health (“Department”). I make this declaration in my capacity as the Commissioner after consultation with Department program staff directing the initiatives detailed below. I respectfully submit this declaration in order to place before the Court certain testimony and documents relevant to the relief requested. I am familiar with the matters set forth herein, either from professional knowledge, conversations with Department staff, or on the basis of documents that have been provided to and reviewed by me. I have been asked to assist New York State in its response to the COVID-19 public health emergency. I am a member of the Governor’s COVID-19 Response and Recovery Task Force (the “COVID-19 Task Force”).

2) I have extensive knowledge of pediatric medicine and care and am aware of many family health issues. I am board-certified in six specialties/subspecialties and trained in pediatrics at Johns Hopkins Hospital, anesthesiology at the Hospital of the University of Pennsylvania, pediatric critical care medicine/pediatric anesthesiology at The Children's Hospital of Philadelphia, and pediatric cardiology at Children's Hospital Boston/Harvard Medical School. I was a professor of clinical anesthesiology at Albert Einstein College of Medicine of Yeshiva University and pediatric cardiac anesthesiologist at Montefiore Medical Center in the Bronx. I also served as associate professor of clinical pediatrics and anesthesiology at Columbia University College of Physicians & Surgeons and pediatric director of the ICU at New York Presbyterian Hospital. I am a former Columbia University Pediatrics Teacher of the Year.

3) As Commissioner of the Department, I must "take cognizance of the interests of health and life of the people of the state, and of all matters pertaining thereto and exercise the functions, powers and duties of the department prescribed by law." Public Health Law ("PHL") §206(1)(a).

4) I preside over the State's Office of Public Health, which includes epidemiology, the Medicaid program, the New York State Public Health and Health Planning Council, and the Wadsworth Center, New York's premier public health lab, as well as the entire health care workforce, and health care facilities.

5) In the last nine months, I have been personally involved in the development and implementation of what is known as the "New York State on PAUSE" initiative—restrictions implemented through a series of executive orders and associated guidance designed to stop the transmission of the novel coronavirus (COVID-19)—and I am also familiar with the detailed plan

that the State adopted to allow the safe reopening of each New York industry, including all gatherings. I am familiar with the facts set forth herein based upon personal knowledge, discussions with Department staff, and Department records.

6) I make this declaration – based upon, among other things, my personal knowledge; my studies and research on matters related to infectious diseases; and my work and discussions with other infectious disease experts and public health officials – to, among other things, further clarify the process and the creation, designation, and monitoring of the zones through the Governor’s Cluster Action Initiative (“Initiative”); the tracking of the disease; and the State’s response generally to this global pandemic.

7) The data throughout New York shows the State has maintained an average transmission rate around 1% or below since March 22, 2020, when the New York State on PAUSE plan was initiated, but there have been outbreaks and spikes in areas necessitating immediate attention to contain the virus and mitigate spread throughout the community.

8) The intention is to create an aggressive and targeted approach to contain and control the spread of the virus from the immediate area where the cluster is located and to a larger region.

COVID-19 Mapping

9) The Initiative was created to divide clusters and the areas around them into three categories with successively higher restrictions within each one: Red Zone - cluster itself; Orange Zone - warning zone; and Yellow Zone - precautionary zone.

10) The creation of the Zones is intended to be a short-term, but aggressive, approach to contain the threat of the virus spreading throughout a community and creating a larger potential super-spreader event.

11) Members of my team in the Department closely track the metrics related to COVID-19 on a daily basis to determine areas of particular concern that may need additional resources such as increased testing access, compliance enforcement, or targeted pause on economic and/or social activities. My staff and I work with members of the Governor's COVID-19 Response and Recovery Task Force ("COVID-19 Task Force"), by, among other things, providing case data and rates to help inform decisions on what steps the State needs to take to address areas of concern with higher positivity rates.

12) An area may be placed in a "Red Zone" if the following factors are met:

- The area is a defined geographic area (which may or may not align to geopolitical or other common geographic subdivisions, such as county, zip codes, or contiguous neighborhoods) has a 7-day rolling average positivity rate of 3% or higher for a sustained period of time (metrics adjusted for population size and population density);
- Positive cases reflect community spread and cannot be solely explained by a contained cluster in a single institution (e.g., nursing home, factory, college, etc.); and
- The Department, in consultation with the local departments of health, finds that it is in the best interest of public health for the area to be placed in Red Zone status.

13) Once an area has been designated as a "Red Closure Zone," the following steps are taken:

- The Department, in coordination with local health authorities, uses case incidence and mapping data to refine boundaries that balance epidemiological priorities with geographic realities;
- The Department, in coordination with local health authorities, uses case incidence and mapping data to refine and establish boundaries for "buffer zones" around the Red Closure Zone to ensure spread

from the closure zone does not broaden into the wider community. In densely populated urban areas, two buffer zones – an Orange Warning Zone and a Yellow Precautionary Zone -- may be required; and

- The Department issues guidance specific to each warning zone and the status of activities within the zone (i.e., mass gatherings, businesses, schools, etc.).

14) After 14 days, the Department, in coordination with local health authorities and in consultation with global health experts, determines whether data sufficiently demonstrate that the area has successfully reduced viral spread to a level able to be contained given testing, contact tracing, and other health system metrics. Based on this data and expert advisement, the Department decides whether the Red Closure Zone will be extended, modified, or ended.

Mapping Data

15) The creation of the cluster zones is map-based and formulated from data submitted to the Department and analyzed by Department staff.

16) We rely upon data submitted to the State's Electronic Clinical Laboratory Reporting System ("ECLRS") to map the zones. Laboratories in New York State use this system for secure and rapid transmission of reportable disease information to the Department, county health departments, and the New York City Department of Health and Mental Hygiene ("NYCDOHMH").

17) A laboratory is required to report all COVID-19 tests results to the State and will upload data files related to these tests. It is this data analyzed and used to generate a map indicating the location of these cases (COVID-19 positive test results). The cases are represented as dots on a map and indicate areas with high positivity percentages. My team

works with members of the Task Force to look first at the zip codes with the highest positivity rates and then break that down further based on individual addresses using the data pulled from ECLRS.

18) The Red Zone contains the highest level and concentration of positive cases, which is the cluster itself and is created by analyzing the mapping of the positivity rates and using streets as a boundary.

19) The Red Zone is created by pulling data form ECLRS and analyzing it to map out cases as dots. It is the concentration of dots that indicate a high level of virus in an area which in turn delineates the boundaries of the red zone. When we are mapping the positive cases and creating the zones, we are not looking at the businesses or entities located within those zones, only the number and grouping of positive cases. We look solely at the data and do not take into account who or what are located in that zone – whether it is a non-essential business, school, yeshiva, church, synagogue, or a car dealership – as they all face restrictions, if justified by the scientific data, whether or not that particular school, car dealership, or religious group has positive cases within it. The data drives the zone.

20) There is no specific percentage or threshold to determine when an area should be designated as an Orange or Yellow Zone, as it is a nuanced process that takes multiple factors into account and not solely the positivity percentage. It is important, for instance, to consider the population density of the area. The Department analyzes the number of cases within the Orange and Yellow Zones to determine the rates positive cases. The positivity percentages within those zones indicate the level of spread beyond the cluster and require some level of mitigation to prevent any further spread of the virus.

21) The Orange Zone serves as a buffer to the Red Zone and is generally a five block or quarter mile boundary around the Red Zone tracked by streets. The goal of having such an area, which is given more scrutiny, is to prevent the cluster zone from expanding further and keep it contained.

22) The Yellow Zone serves as a buffer to the Orange Zone with the same goal of containing the virus and not allowing the cluster to expand.

Positivity Rates

23) The positivity rates are pulled daily from ECLRS, are mapped out, and are analyzed to determine if a particular cluster is improving or getting worse. The positivity rates in all red zones as of October 15, 2020 is 4.8% a reduction of the 7.9% positivity rate the week of September 20 through September 26 and reducing each subsequent week. While this indicates that the targeted restrictions are having the desired effect to mitigate and control the spread of the virus, this is still approximately 4 times the overall state positivity rate, which is still highly concerning since it is over 1%.

24) Any re-evaluation for a reduction in restrictions would not occur before 14 days since that is the incubation period for the virus. This data and analysis are provided to the Governor and his team on a daily basis, including the COVID-19 Task Force.

25) Any reduction or increase in restrictions will occur based on the analysis of all of the available data. While we do not speculate on what future actions will be taken since this is an ever-evolving process, driven by the positivity rates and trends over time, the goal is clearly to mitigate community spread and continue the phased reopening throughout the state.

26) Many different actions can be taken based on an analysis of the data and due to its

evolving nature. This is a highly calibrated process to ensure that the most precise restrictions are in place. The Department receives new data throughout the day creating fluctuations in numbers and rates. The data is continually reassessing to fine tune the statistics to ensure that we, the Task Force, and the Governor have the most current data available to indicate progress, or lack thereof, in the zones.


Modification of the Zones

27) The Department and the Task Force are continually monitoring and testing the data related to transmission, including the positivity rates and population density, to inform decisions on zone designation and possible modification.

28) Where the data shows sustained decrease in community transmission in the cluster, the Department, the Task Force, and the Governor assess the change in transmission rates and all available relevant information related thereto to determine whether zone modification is warranted and would protect the public health of New Yorkers.

29) With respect to any easing of restrictions in the Red Zone, the Department, the Governor's team, and the Task Force will continue to monitor and assess the current decreasing trend in that zone to ensure that it a sustained downward trend. Upon this review, if the operation has been successful, the designation of a Red Zone may be modified or lifted altogether.

Dated: October 16, 2020
Albany, New York


Howard A. Zucker, M.D., J.D.