



## Department of Health

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May 17, 2016

Mr. John Buyce  
Audit Director  
New York State Office of the State Comptroller  
110 State Street, 11<sup>th</sup> Floor  
Albany, New York 12236

Dear Mr. Buyce:

Pursuant to the provisions of Section 170 of New York State Executive Law, I hereby transmit to you a copy of the New York State Department of Health's comments related to the Office of the State Comptroller's final audit report 2015-S-26 entitled, "Nursing Home Surveillance."

Please feel free to contact Amy Nickson, Assistant Commissioner, Office of Governmental and External Affairs at (518) 473-1124 with any questions.

Sincerely,

Howard A. Zucker, M.D., J.D.  
Commissioner of Health

Enclosure

cc: Ms. Nickson

**Department of Health  
Comments on the  
Office of the State Comptroller's  
Final Audit Report 2015-S-26 Entitled,  
Nursing Home Surveillance**

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The following are the Department of Health's (Department) comments in response to the Office of the State Comptroller's (OSC) Final Audit Report 2015-S-26 entitled, "Nursing Home Surveillance."

**Comments**

The Department is committed to protecting the health and safety of New York State's nursing home residents. The Centers for Medicare and Medicaid Services (CMS) has developed a national process for nursing home inspections to ensure quality care and service delivery. The Department, as the Single State Survey Agency, carries out the federally mandated inspection program to ensure that nursing home operators are in compliance with all State and/or Federal regulatory requirements, and investigates occurrences of abuse, neglect or mistreatment. Nursing home oversight is carried out by the Division of Nursing Homes and ICF/IID (Intermediate Care Facilities for Individuals with Intellectual Disabilities) Surveillance (Division) within the Department's Office of Primary Care and Health Systems Management (OPCHSM), Center for Health Care Provider Services and Oversight (Center).

The purpose of the OSC audit was to determine whether the Department consistently follows Federal and State regulations and procedures for conducting nursing home surveys and whether survey processes, including the issuance of fines and other enforcement actions, are effective in improving the quality of care and safety in nursing homes. The Department is pleased to note that OSC found the Department's performance in conducting Standard Health and Complaint surveys in accordance with Federal and State requirements to be satisfactory, including the timeliness of inspections and the accuracy of scope and severity ratings of citations. This finding demonstrates that the Department effectively carries out the Federal inspection process in monitoring and evaluating nursing home regulatory compliance.

However, the OSC's findings conclude that the Department's enforcement policies and procedures still need to be strengthened to better protect the health and well-being of nursing home residents. The final audit report notes that weaknesses in these policies and procedures appear to undermine the incentive that fines can have as a deterrent to deficient practices in nursing homes, as well as the sense of urgency for correcting the deficiencies, particularly in addressing cases of repeated non-compliance.

As noted in the final report, there are a number of available remedies to influence regulatory compliance and quality of care. While State fines may play a role in this regard, they should not be viewed independent of the overall regulatory structure, which ensures quality care and service delivery.

The Department is authorized to impose fines of up to \$2,000 per violation to health care providers licensed under Article 28 of the Public Health Law that are found to be out of compliance with regulatory requirements. These fines can be increased to \$5,000 and \$10,000 under certain

conditions (currently effective until April 1, 2017, with a plan to extend). The Department agrees with OSC's finding that there were delays in issuing State fines to nursing homes that were determined to have failed to comply with regulatory requirements. However, as noted in the final report, and as acknowledged by the OSC during an August 25, 2015 meeting with Department officials to discuss the Preliminary Findings, the Department identified this process as an area for improvement, and began to address it well before the start of the audit.

The Division targeted its focus in this area following a 2013 Department internal audit of fee and fine revenue, which included the effective use of nursing home fines. As a result of this internal audit, the Division's policies and procedures guiding the State fine enforcement process were updated and implemented in February 2014. This was linked to a larger initiative to implement a Center-wide policy governing State enforcement for noncompliance by hospitals, nursing homes and adult care facilities. The Division's 2014 Internal Control Certification identified a backlog in the assessment of State fines, and included a plan for improvement in this area.

### **Recommendation #1**

Eliminate the backlog in enforcement activity and maintain timely processing of future assessments of State fines.

### **Response #1**

The Department has already implemented a process that aligns with this recommendation. The Division fully implemented a revised enforcement process in April 2015, utilizing the Center-wide policy as a guide. Since implementing these improvements, the Division's backlog in enforcements (through June 30, 2015) was fully addressed by the end of October 2015 and has been kept current. The Center Director and Division Director are responsible for monitoring and ensuring compliance with the policies and procedures and the timely processing of State enforcements. As noted in the final report, the Division trained additional full-time staff to process enforcements to eliminate the backlog and ensure timely processing of future enforcements. OSC's Comment #1 states that the accumulated backlog has been reduced (primarily) by the Department temporarily diverting staff from other tasks, and that the core problem has not been addressed as there remains only one part-time person responsible for processing ongoing enforcement actions and then only when that person is not completing inspections. A full-time staff member has been assigned responsibility for the ongoing processing of enforcement actions to ensure that backlogs do not recur.

### **Recommendation #2**

Take steps to initiate the assessment of State fines earlier to better align survey results with the assessed penalty.

### **Response #2**

The Department has already implemented a process that aligns with this recommendation. By Division policy, enforcement reviews are ongoing, but completed no less than quarterly. This timeframe allows for the survey process to proceed to conclusion, including the provider's right to appeal or dispute survey findings. As part of the Division's process refinements, the enforcement policy was revised in March 2016 to identify enforceable events on a monthly basis after a maximum period of 60 days following a facility survey. This revised timeframe will result in nursing homes being notified within 90 days of a survey exit date of the enforcement action.

### **Recommendation #3**

Develop and implement a single, more comprehensive system to track and monitor all enforcement actions.

### **Response #3**

The Department has already implemented a process that aligns with this recommendation. The final report supported the Department's own findings review -- that an improved tracking process is needed. The Division has developed an automated suite of reports to track and monitor the status of enforcement processing. These reports allow managers to identify deficiencies that are eligible for enforcement, and any issues that may impede processing, to ensure that fines are assessed in a timely manner. The Division, working with OPCHSM's Data Management, Analysis and Research Group, has refined existing reports and developed new reports to track the status and outcome of enforcement processing. A new functionality has been added that allows staff to identify surveys that are eligible for enforcement in the Federal ASPEN database and automatically populate them into the Department enforcement database to ensure accuracy. New reports have been developed which identify the status of enforcements completed and outstanding for any identified time period. These reports are reviewed on a monthly basis by the Division Director and responsible Division staff, as well as the Division of Legal Affairs' Bureau of Administrative Hearings, to ensure that enforcement determinations are made within the timeframes discussed in Response #2, and all fines are processed timely.

### **Recommendation #4**

Consider assessing State fines for citations issued at the Greater Than Minimal Harm level (D-F rating, as allowable by the Public Health Law and CMS), especially for those facilities that demonstrate a pattern of repetitive citations.

### **Response #4**

As part of its ongoing improvement efforts, the Department is carefully considering the assessment of fines as recommended by the OSC. The Department follows CMS' civil money penalty protocol in assessing State civil penalties (fines). The Federal protocol directs that the imposition of a civil money penalty may be most appropriate when a facility is not given an opportunity to correct; when immediate jeopardy exists; when there is noncompliance that results in a negative outcome that has compromised the resident's ability to maintain and/or reach his/her highest practicable physical, mental and psychosocial well-being as defined by an accurate and comprehensive resident assessment, plan of care and provision of services (i.e., actual harm that is not immediate); or when there is a finding of substandard quality of care.

The final report accurately notes that the CMS State Operations Manual provides states discretion to assess fines at the Greater Than Minimal Harm level. CMS provides this discretion because it recognizes that other remedies (such as Directed Plans of Correction) may be more effective in ensuring regulatory compliance and quality care and service delivery. Strategies for improved enforcement effectiveness and efficiency, including the imposition of fines, are currently being evaluated to promote sustained compliance for nursing homes with poor compliance histories.

A meeting with surveillance program leaders and managers was held on April 18 and 19, 2016 to explore the complex and varied implications of the OSC's recommendation and appropriate remedies based on different situations. DOH will finalize a framework for imposing remedies for citations issued at the Greater Than Minimal Harm level (D-F rating) by July 1, 2016.

OSC's Comment #1, in response to the Department's comments on the draft audit report, inaccurately represents the timeframes associated with the Department's identification of this backlog and associated plan for improvement. Comment #1 states that although the Department had identified the risks associated with its extensive backlog in enforcement as part of the agency's annual Internal Control Certification in April 2014, at the time the audit began (a year later, in April 2015), it had just begun training additional staff on the enforcement process and a significant backlog still existed. State agencies are required to certify compliance with the State's Internal Control Act and each year report on the internal control activities undertaken by the agency during the preceding fiscal year. Budget Bulletin B-1214 (dated April 2, 2015) established April 30, 2015 as the due date for the 2014-15 certification. In April 2014, the Department's Risk Management Reporting transitioned to an online electronic reporting system. The new reporting system requires individual Department offices to conduct annual self-assessments (including internal control testing) on a staggered, monthly schedule. In this regard, it should be noted that the internal control testing, which identified the weaknesses in the enforcement process, was conducted in December 2014. The actions taken by the Department to address the identified weaknesses were fully implemented in April 2015, only four months after identifying the weaknesses.

## **Summary**

In summary, the Department had recognized issues raised in the enforcement process findings before the start of the audit, took steps to address them, and continues to review and refine those actions to improve its processing of enforcements. These actions reflect the Department's commitment to protecting the health and safety of New York State's nursing home residents.