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OFFICE OF THE STATE COMPTROLLER

March 8, 2018

Howard A. Zucker, M.D., J.D.
Commissioner
Department of Health
Corning Tower
Empire State Plaza
Albany, NY 12237

Re: Nursing Home Surveillance
Report 2017-F-12

Dear Dr. Zucker:

Pursuant to the State Comptroller's authority as set forth in Article V, Section 1 of the State Constitution and Article II, Section 8 of the State Finance Law, we have followed up on the actions taken by officials of the Department of Health to implement the recommendations contained in our audit report, *Nursing Home Surveillance* (2015-S-26).

Background, Scope, and Objective

The Department of Health (Department) oversees nursing home facilities in New York State through its Division of Nursing Homes and Intermediate Care Facilities for Individuals with Intellectual Disabilities Surveillance (Division). The Division also acts as an agent for the federal government's Centers for Medicare and Medicaid Services (CMS) in monitoring quality of care in nursing homes. The Division is responsible for ensuring that nursing homes comply with federal and State regulations, which establish standards that govern their operations. These standards cover a range of requirements, such as residents' rights, clinical services, and administrative practices, and are intended to ensure the highest possible quality of care for all residents.

Division staff assess compliance through three types of on-site facility inspections: Standard Health, Complaint, and Follow-Up surveys. If a survey reveals violations of federal or State regulations, surveyors issue a Statement of Deficiencies detailing all deficiencies identified. For each deficiency, surveyors use record reviews, interviews, and observations to determine both the scope and the severity of the issue based on CMS's rating system, as follows:

- A–C: No Actual Harm With Potential for No More Than Minimal Harm
- D–F: No Actual Harm With Potential for More Than Minimal Harm
- G–I: Actual Harm But Not Immediate Jeopardy
- J–L: Immediate Jeopardy

Depending on the severity classification, the Department can implement a range of enforcement actions, such as directed plans of correction, State fines, and, if warranted, facility closure.

Our initial audit report, which was issued on February 19, 2016, examined whether the Department consistently followed federal and State regulations and procedures for conducting nursing home surveys and whether survey processes, including the issuance of fines and other enforcement actions, were effective in improving the quality of care and safety in nursing homes. We found the Department generally met its obligations to conduct Standard Health and Complaint surveys in accordance with federal and State requirements, but its enforcement policies and procedures needed to be strengthened to better protect the health and well-being of nursing home residents. Inefficiencies in the Department's processes significantly impaired its ability to assess fines timely, in some cases resulting in delays of up to 6 years between when the violation was cited and the resulting fine was imposed. Further, the Department did not utilize the full array of enforcement actions available to it, choosing to not levy fines for well over 80 percent of the violations it cited.

The objective of our follow-up was to assess the extent of implementation, as of December 14, 2017, of the four recommendations included in our initial audit report.

Summary Conclusions and Status of Audit Recommendations

We found Department officials addressed the problems we identified in the initial audit, having implemented all four of the prior audit's recommendations.

Follow-Up Observations

Recommendation 1

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

Status – Implemented

Agency Action – In the prior audit, we identified 433 citations as backlogged citations. According to Division officials, all of these citations have been cleared – either through enforcement activity or a decision not to pursue. We reviewed the backlog, and found Division officials either pursued enforcement activity or had legitimate reasons for not pursuing enforcement activity (e.g., facilities had already closed down, events preceded the established “look-back” period of January 2015 onward, facilities filed an Informal Dispute Resolution [IDR] to dispute the citation identified in the survey, and/or citations resulted from a federal survey and CMS would therefore be responsible for enforcement).

In an effort to maintain the timely processing of future assessments, the Division revised its enforcement policy in March 2016 to ensure enforceable events are sent to the Division

of Legal Affairs (DLA) within 60 days of the date the Division decides to take enforcement action, and nursing home facilities are notified that enforcement actions will be pursued within 90 days of the decision date. The Department also appointed a new Director for the Bureau of Quality and Surveillance and re-assigned a full-time staff member – both of whom are assigned responsibility for the ongoing processing of enforcement actions and for ensuring that backlogs do not recur. The full-time staff member is tasked with processing select monthly citation reports, identifying enforceable events, creating enforcement packets, obtaining appropriate approvals from Division officials, and sending the enforcement packet to DLA for further review and assessment of fines. Enforcement packets are sent to DLA within 60 days unless a facility decides to file an IDR. As an added control, the Bureau Director generates a report of enforcements sent to DLA to track the timeliness of enforcement actions.

Based on our review of a sample of 19 of 139 enforcement actions identified in citation reports for the period June 1, 2016 to September 20, 2017, we determined the Division’s timeliness of enforcement actions has improved substantially. Of the 19 enforcements, 13 (68 percent) were sent timely. The remaining 6 were late for legitimate reasons: 3 facilities filed an IDR, thereby extending the time frame of further enforcement; and the 3 others were delayed (for relatively short periods ranging from 21–55 days) due to either an administrative issue or a clerical error.

Recommendation 2

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

Status – Implemented

Agency Action – We found that the Division no longer delays enforcement decisions for the six-month waiting period it previously used. Instead, Division officials instituted a process where the Bureau Enforcement Coordinator reviews internal resources generally within two months of the citation. For example, November citation reports are reviewed January 1 to determine which deficiencies are eligible for enforcement. Once eligible enforcements are identified, Division officials send enforcement packets to DLA within 60 days for processing. We reviewed 26 cases from the Division’s report of Enforcements Sent to DLA Within 60 Days of Decision to Enforce for the period April 1, 2017 to November 10, 2017. We found that, in all cases, enforcement decisions were much more timely compared with the prior six-month standard: for 23 cases, decisions were made within 60 days of citation and for three cases, between 62 and 143 days of citation. Once the Division made the decision to enforce, the enforceable events were sent to DLA well within 60 days.

Recommendation 3

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

Status – Implemented

Agency Action – The Division 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 (i.e., Actual Harm and Immediate Jeopardy [IJ] ratings) to ensure fines are assessed in a timely manner, and include: IJ Substandard Quality of Care (SQC) Findings Grouped by Survey Date, G Level and Higher Citations (Actual Harm), and Enforcements Sent to DLA Within 60 Days of Decision to Enforce. Staff can identify surveys that are eligible for enforcement in the federal ASPEN database and automatically populate them into the Department enforcement database to ensure accuracy. These reports are reviewed on a monthly basis by Division staff to ensure that enforcement determinations are made within the required time frames. Additionally, Division officials found that SQC at F Level citations were not being captured in the original reports used to identify citations eligible for enforcement. As a result, Division officials updated their enforcement procedures in September 2016 to include the SQC at F Level report in the review resources. We verified the existence of these reports, and utilized several of them as part of our sample selection process during our testing.

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.

Status – Implemented

Agency Action – Division officials met in April 2016 to discuss assessing State fines for citations issued at the Greater Than Minimal Harm level. During this meeting, Division officials decided against issuing fines for these citations and instead implemented the Performance Monitoring Program (PMP). The PMP is utilized to conduct greater oversight of nursing homes where conditions affect the rights, quality of life, or health and safety of residents. According to Division officials, the PMP reflects a progressive form of monitoring of nursing homes with repeat deficiencies. The goal of the program is to:

- Increase program oversight over nursing homes with performance concerns throughout the State and across the Division.
- Improve the likelihood of successful and sustained nursing home corrective action implementation, thereby reducing the volume and frequency of repeat deficiencies.
- Identify and share regional office best practice models across the regions.

According to Division officials, 16 nursing home facilities have been placed in the PMP since its inception. Of these, 10 implemented corrective actions and were removed from the program. Examples of corrective actions taken include implementation of a quality assurance and performance improvement plan to address recruitment and retention of

nursing staff, using root cause analysis to identify and correct quality of care and quality of life deficiencies, and responding timely to family and resident concerns. Additionally, the Division initially referred another 11 enforcements through the PMP for repeat citations at the Greater Than Minimal Harm level; however, the Division ultimately decided to impose a civil penalty. Our review of the 11 enforcements showed that nine resulted in the Department and the facility reaching an agreement on the civil penalty.

In September 2016, the Division sent letters to facility administrators notifying them that it would recommend State-level enforcement actions against nursing homes found to be non-compliant with State regulations, pursuant to Section 12 of the Public Health Law. Among other enforcement actions considered were pursuit of enforcements for repeat deficiencies at levels D to F identified on the current survey and any survey within the last two calendar years. The Department also extended the penalty amounts – a \$5,000 fine for repeat violations fined in consecutive years and a \$10,000 fine for violations that resulted in serious physical harm to a resident – as listed in Section 12 of the Public Health Law – until April 1, 2020. The penalty amounts will no longer be reverted to \$2,000.

Major contributors to this report were Walter J. Irving, Todd Seeberger, Danielle Rancy, and Nancy Hobbs.

We thank the management and staff of the Department for the courtesies and cooperation extended to our auditors during this review.

Sincerely,

Stephen J. Goss, CIA, CGFM
Audit Director

cc: Paula Grogin