New York State Office of the State Comptroller
Thomas P. DiNapoli

Division of State Government Accountability

Nursing Home Surveillance

Department of Health

Report 2015-S-26 February 2016

Executive Summary

Purpose

To determine whether the Department of Health (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. This audit covers the period January 1, 2012 through September 17, 2015.

Background

The Department, through its Division of Nursing Homes and Intermediate Care Facilities for Individuals with Intellectual Disabilities Surveillance (Division), is responsible for ensuring nursing homes comply with federal and State regulations, which establish standards that govern their operations. 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. Division staff assess compliance through on-site facility inspections, referred to as surveys. Standard Health and Life Safety Code surveys are unannounced and must be conducted at least every 15.9 months pursuant to CMS guidance. Complaint surveys investigate issues, and nursing home-reported incidents, that may involve non-compliance with regulations. Follow-up surveys are used to monitor nursing homes' progress in correcting previously noted deficiencies.

CMS requires states to investigate complaints and incidents for severity and urgency to assess whether a nursing home has violated a federal or State regulation. If any survey reveals violations, surveyors issue citations. Depending on the severity classification, the Department can implement a range of enforcement actions, such as fines, directed plans of correction, and, if warranted, facility closure. Between January 1, 2007 and May 12, 2015, the Division conducted over 39,000 surveys and issued more than 50,000 citations.

Key Findings

- The Department is generally meeting its obligations to conduct Standard Health and Complaint surveys in accordance with federal and State requirements, including the timeliness of inspections and the accuracy of scope and severity ratings of citations. However, the Department's enforcement policies and procedures need to be strengthened to better protect the health and well-being of nursing home residents.
- Inefficiencies in the Department's processes have significantly impaired its ability to assess fines timely, in some cases resulting in delays of up to six years between when the violation is cited and the resulting fine is imposed. This trend has worsened significantly in recent years.
- As a matter of policy, the Department does not utilize the full array of enforcement actions available to it under both State law and CMS guidelines, choosing to not levy fines for well over 80 percent of the violations it cites.
- These weaknesses appear to undermine the incentive that fines can have as a deterrent to deficient practices, as well as the sense of urgency for correcting the deficiencies, particularly in addressing cases of repeated non-compliance.

Key Recommendations

- Eliminate the backlog in enforcement activity and maintain timely processing of future assessments of State fines.
- Consider assessing State fines for additional citations allowable by the Public Health Law and CMS guidelines, especially for facilities that demonstrate a pattern of repetitive citations.

Other Related Audit\Report of Interest

Department of Health: Facility Structure, Safety, and Health Code Waivers (2014-S-27)

State of New York
Office of the State Comptroller

Division of State Government Accountability

February 19, 2016

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

Dear Dr. Zucker:

The Office of the State Comptroller is committed to helping State agencies, public authorities, and local government agencies manage government resources efficiently and effectively and, by so doing, providing accountability for tax dollars spent to support government operations. The Comptroller oversees the fiscal affairs of State agencies, public authorities, and local government agencies, as well as their compliance with relevant statutes and their observance of good business practices. This fiscal oversight is accomplished, in part, through our audits, which identify opportunities for improving operations. Audits can also identify strategies for reducing costs and strengthening controls that are intended to safeguard assets.

Following is a report of our audit entitled *Nursing Home Surveillance*. This audit was performed according to the State Comptroller's authority under Article V, Section 1 of the State Constitution and Article II, Section 8 of the State Finance Law.

This audit's results and recommendations are resources for you to use in effectively managing your operations and in meeting the expectations of taxpayers. If you have any questions about this report, please feel free to contact us.

Respectfully submitted,

Office of the State Comptroller
Division of State Government Accountability

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Background

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 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. In order to receive payment under Medicare and Medicaid programs, nursing homes must comply with these standards and be certified as compliant by the Department.

Division staff assess compliance through the following types of on-site facility inspections, commonly referred to as surveys:

- Standard Health and Life Safety Code surveys (usually conducted together and hereafter referred to as Standard Health surveys), which are unannounced and must be conducted at least every 15.9 months.
- Complaint surveys, which investigate complaints and incidents reported by the nursing homes or third parties that may involve non-compliance with federal or State regulations.
- Follow-up surveys to monitor nursing homes' progress in correcting previously noted deficiencies.

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 (see Exhibit A). 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.

The Division has seven regional offices throughout the State that carry out survey functions, including three in the New York City area, known as Metropolitan Area Region Offices (MARO). Of the 631 nursing home facilities currently active in New York State, over half are located in the MARO area. Between January 1, 2007 and May 12, 2015, the Division completed 39,373 surveys, including Standard Health and Complaint surveys, and issued over 50,000 citations (see Table 1). Additionally, the Division received over 79,000 complaints and incident reports, of which more than 37,000 were investigated.

Table 1 – Survey, Citation, and Complaint/Incident Data, 2007–May 12, 2015

	2007	2008	2009	2010	2011	2012	2013	2014	2015	Totals
Surveys	5,884	4,391	4,508	4,144	4,733	4,533	4,759	4,809	1,612	**39,373[1]**
Citations	7,343	5,713	5,918	5,351	6,040	5,985	5,832	6,135	2,114	**50,431[2]**
Complaints /Incidents:										
Intake	8,594	9,581	9,244	9,158	8,573	8,907	10,695	11,098	3,954	**79,804**
Investigated	5,077	5,304	4,765	4,471	3,726	4,276	4,104	4,400	1,180	**37,303**

[1] Includes 478 Federal Monitoring surveys conducted directly by CMS.

[2] Includes 968 citations from surveys before January 1, 2007 that had revisits after January 1, 2007 as well as 804 citations resulting from Federal Monitoring surveys.

Audit Findings and Recommendations

We found that the Department is generally meeting its obligations to conduct periodic Standard Health and Complaint surveys in accordance with State and federal requirements, including the timeliness of those inspections, and the accuracy of the scope and severity of cited deficiencies. However, the Department's enforcement policies and procedures still need to be strengthened to better protect the health and well-being of nursing home residents. For instance, as a matter of policy, the Department does not utilize the full array of enforcement actions available to it under both State law and CMS guidelines, choosing to not levy fines for certain categories of violations that comprise almost 85 percent of the problems identified during its surveys. In fact, the Department only imposes fines if it finds that a problem has already resulted in actual harm to an individual or is currently placing people in immediate jeopardy, a condition that has historically comprised less than 4 percent of violations.

Even when fines are imposed, inefficiencies in the Department's processes for issuing and tracking these assessments have significantly impaired its timeliness, in some cases resulting in delays of up to six years between when a violation is cited and a resulting fine is imposed. This trend has worsened significantly in recent years. These weaknesses undermine the incentive that fines can have as a deterrent to deficient practices, as well as the sense of urgency for correcting the deficiencies, particularly in addressing cases of repeated non-compliance.

Annual Certification and Complaint Survey Requirements

The Department is required to comply with certain CMS performance standards when conducting Standard Health and Complaint surveys. As part of its Performance Standards System, CMS reviews the Department's surveys to ensure they are conducted in accordance with federal regulations. This includes examining the accuracy of the ratings assigned to the scope and severity of citations and the timeliness of the inspections themselves. We found the Department met CMS's quality measures for conducting surveys in accordance with federal regulations, including accurate assessment of the scope and severity of citations.

For each facility, the Department is required to conduct its Standard Health surveys within 15.9 months of the last day of the previous survey, and to maintain an overall statewide average of 12.9 months or less between consecutive Standard Health surveys. This schedule allows the Department flexibility in the frequency with which it conducts individual surveys based on nursing homes' performance. For example, better performing nursing homes can be surveyed only once every 12 to 15 months, while poorer performing nursing homes can be surveyed every 9 months. We found that between calendar years 2007 and 2014 the Department generally inspected all nursing homes within the 15.9-month cycle and had a statewide average of 11.8 months between surveys.

We also found the Department effectively utilized its discretion to conduct more frequent surveys of riskier nursing homes that had historically received more citations. Those facilities that were inspected more frequently – at or less than 9.9 months between Standard Health surveys – had

83 percent more citations than those inspected less frequently. Additionally, the Department met another CMS requirement that increases the element of surprise associated with the Standard Health survey. CMS requires that at least 10 percent of these surveys begin either on the weekend, before 8:00 a.m., after 6:00 p.m., or on a holiday. Between January 1, 2007 and May 2015 the Department conducted 847 (20 percent) of 4,163 Standard Health surveys during these off hours.

As with Standard Health surveys, CMS imposes performance standards when conducting Complaint surveys. Depending on the seriousness of the allegation, the Department is required to prioritize and conduct Complaint surveys within established time frames, as follows:

- Immediate Jeopardy complaints (which involve serious injury, harm, impairment, or death of a patient or resident, or the risk of such occurring) must be investigated within two business days 95 percent of the time.
- Non-Immediate Jeopardy High Priority complaints (where alleged non-compliance may have caused harm to an individual's mental, physical, and/or psychosocial status) must be investigated within 10 business days 95 percent of the time.

We found the Department investigated Immediate Jeopardy complaints timely, within two days 98 percent of the time. The Department fell short of the 95 percent requirement for Non-Immediate Jeopardy High Priority complaints, investigating them on time only 73 percent of the time. However, we determined this was largely due to the sheer volume of complaints received in this category, especially in the MARO area. MARO accounted for 13,206 (53 percent) of the 24,938 complaints prioritized as Non-Immediate Jeopardy High Priority between January 2007 and April 2015 and for over 90 percent of the High Priority complaints that weren't investigated on time. Department officials stated that, based on the volume of complaints received and other priorities, such as investigating Immediate Jeopardy complaints, it has difficulty meeting CMS's requirement to investigate Non-Immediate Jeopardy High Priority complaints within 10 business days.

Enforcement Practices

Untimely Assessment and Inefficient Tracking of State Fines

The Department levies fines as an enforcement tool for compliance; however, we found the Department does not process and issue fines timely or efficiently. Our analysis shows that, for at least the past seven years, the time lag between when deficiencies are uncovered and related fines are assessed has been steadily rising at a significant rate. At the same time, the number and total amount of monetary penalties imposed peaked several years ago and have steadily declined thereafter. These trends undermine the credibility and effectiveness of the threat of monetary sanction as a meaningful deterrent to deficient practices.

The process for assessing and issuing fines is complex and involves multiple branches within the Department. Once identified through survey, deficiencies are assessed to determine whether and what type of enforcement should be applied. Surveyors rate the seriousness of each deficiency

based on the following CMS lettered rating system (which is further described in Exhibit A), where "A" represents the least severe, most isolated deficiencies and "L" the most severe, widespread problems:

- 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

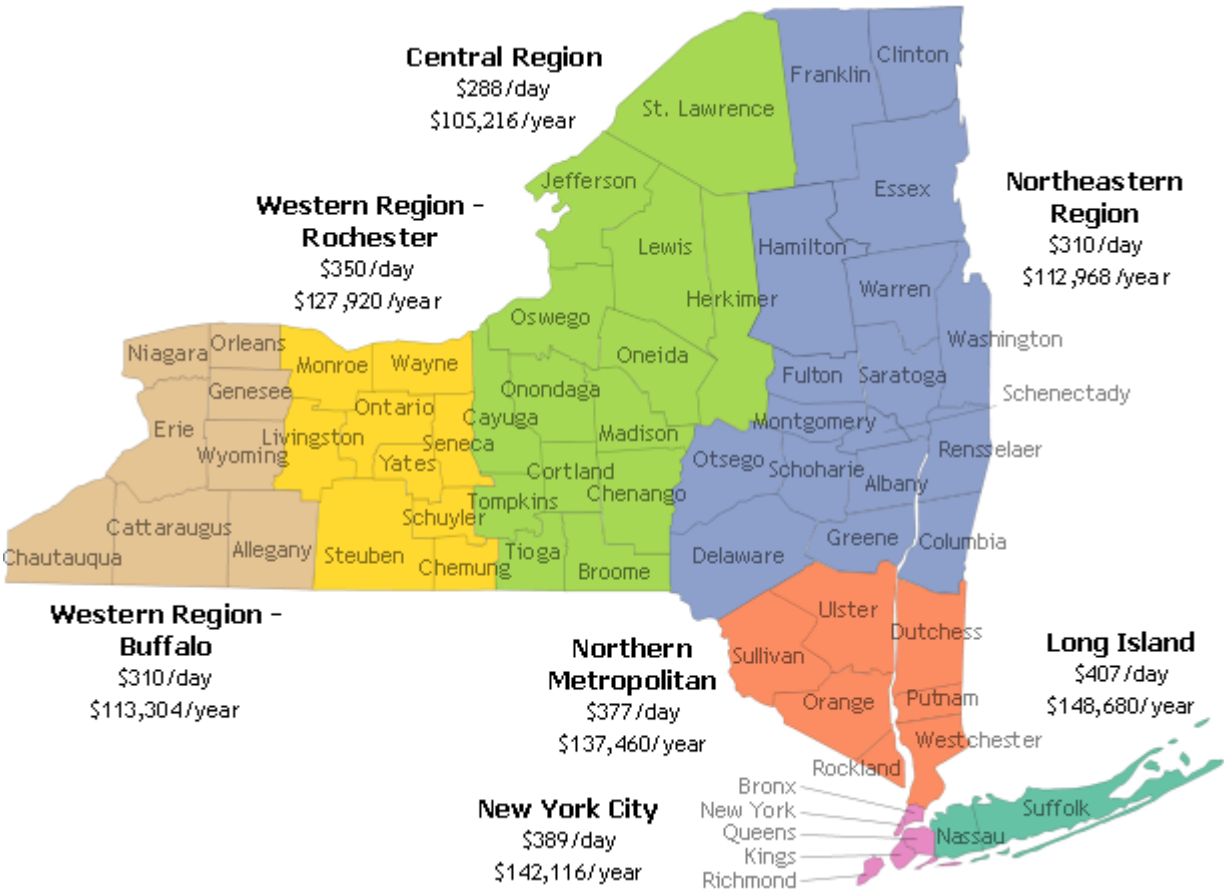
Nursing homes are required to correct all deficiencies with a rating greater than A. Furthermore, Division policy recommends that deficiencies that meet the following criteria be identified for fine assessment:

- All Immediate Jeopardy and Substandard Quality of Care (SQC) events - deficiencies rated as F, H, I, or J–L in one of the following regulatory groups: Resident Behavior and Facility Practices, Quality of Life, or Quality of Care;
- Two or more G deficiencies in the same survey ("Double G"); and
- Any G deficiencies where a G or greater deficiency was cited within the prior two survey cycles and continues to exist.

The Division's Bureau of Quality & Surveillance (Bureau) refers citations to the Division of Legal Affairs (Legal) to assess State fines pursuant to the Public Health Law. As part of this process, the Bureau creates enforcement packets, which include recommended State fine amounts, and submits them to Legal. In turn, Legal reaches settlements with the nursing homes and issues Stipulation & Orders (Orders) that include the agreed-upon fines.

Prior to 2008, Section 12 of the Public Health Law (Law) allowed for a maximum fine of just $2,000 per incident even for the most egregious violations, including those that result in serious physical harm or death to a patient. In 2008, the Law was amended to include additional fine amounts for certain types of violations. The amendment authorized the Department to assess a $5,000 fine for repeat violations fined in consecutive years and a $10,000 fine if a violation results in serious physical harm to a resident.

However, the amendment is currently scheduled to expire in April 2017, after which the maximum fine for any violation, no matter how severe, will once again be $2,000 – or less than the equivalent of one week's revenue derived from one bed. The Department estimates the average daily rate for nursing home care ranges from $288 to $407 (or $2,016 to $2,849 per week) across the various regions of the State, as shown in the following map chart.



Source: https://www.health.ny.gov/facilities/nursing/estimated_average_rates.htm

We analyzed data on the Orders issued during calendar year 2014, and found the average time between the survey end date when deficiencies are first identified and reported and the issuance of Orders was 3.89 years. This compares to just 6 months for Orders issued in 2007. Further, between January 2014 and July 2015, the Department assessed only 12 State fines totaling $152,000. Table 2 shows a breakdown of fine processing data from January 2007 to July 3, 2015.

Table 2

Year	Fine Orders Issued	Total Fine Amounts	Average Time Between Survey and Fine Order (in years)	Average Fine per Order
2007	28	$82,500	0.50	$2,946
2008	57	197,000	0.74	3,456
2009	51	247,000	1.09	4,843
2010	66	511,000	1.39	7,742
2011	62	628,000	1.43	10,129
2012	47	482,000	1.48	10,255
2013	20	238,000	2.12	11,900
2014	10	148,000	3.89	14,800
2015[1]	2	4,000	2.97	2,000
Totals	**343**	**$2,537,500**	**1.36[2]**	**$7,398[1]**

Note. Adapted from DOH Bureau of Complaints & Analysis (BCA).

[1] Excludes seven orders processed on June 24, 2015, totaling $46,000 in fines that were not included in BCA's database.

[2] The average of 1.36 years was calculated on the entire population of data and is different than calculating the average of the averages (1.73 years). Calculating the average of the averages puts more emphasis on the years with minimal Orders processed and higher processing times.

As of July 2015, the most recent facility survey that had progressed to the point of an Order and fine assessment was completed on March 25, 2012. In the intervening three years from that point through May 2015, completed surveys have noted a total of 433 citations that meet the Division's criteria for assessing State fines, but are yet to progress to the point of an Order, including:

- 343 Immediate Jeopardy citations;
- 80 "Double G" citations; and
- 10 "F" citations with SQC.

The standard fines for these citations amount to $820,000, all of which have yet to be assessed and collected.

While we recognize the Department's successful effort to meet CMS's performance standards and to implement the specific practices that CMS mandates and reviews, it does so at the expense of timely conduct of other enforcement activities, such as imposing fines, which is an equally important but non-regulated outcome. In particular, we identified three aspects of the Department's process that contribute to inefficient and ineffective fine assessment:

- **Insufficient Enforcement Resources**: The Department has focused its resources on

those areas mandated by CMS (e.g., conducting mandated inspections, follow-up on complaints), but has not assigned appropriate resources to enforcements. The Bureau has only one part-time employee assigned to process enforcement referrals and prepare enforcement packets. This employee also assists in conducting surveys when needed, having participated in 66 surveys since 2007, reducing the time allocated to processing fines.

- **Six-Month Waiting Period**: The Division prefers to wait six months before processing enforcements in the event fine assessments are amended or withdrawn as a result of appeals. However, it does so at the expense of timely management of other enforcement activities. This wait period is neither required by CMS nor established by Department policy. We note that between August 2012 and May 21, 2015 there were only 29 appeals, accounting for 42 citations that would be fined. Of these citations, 36 were fully upheld (86 percent), five were reduced (12 percent), and only one was expunged (2 percent). Given the low volume of disputes, the waiting period appears unwarranted and contributes to an unnecessary delay in processing State fines.
- **Inadequate System for Tracking Assessed Fines**: The Bureau uses a database that, by its staff's own admission, is fragmented and incomplete. In March 2015, the Bureau started using a spreadsheet to track each enforcement's status and ultimate submission to Legal. However, the spreadsheet did not replace the original database for enforcement tracking and does not contain information on enforcements prior to March 2015, nor does it contain all information for each enforcement, such as fine amounts. Therefore, the Bureau uses both systems to track assessed fines. According to Division officials, technical improvements for an enhanced database were being developed as of September 2015. Division officials stated the use of both data sources has improved the tracking and monitoring of assessed fines in the interim.

As part of its 2014 internal control certification process, the Division identified the backlog in assessing State fines as a risk that needed to be addressed. In response, the Division reassigned two full-time staff to assist in the processing of enforcement referrals. In addition, in April 2015, the Division implemented a revised enforcement process based on policy established by the Center for Health Care Provider Services and Oversight, which oversees the Division. Since implementing these improvements, the Department states that the backlog has been significantly reduced.

Stronger Remedies Needed for Repeated Non-Compliance

CMS's State Operations Manual allows states to impose civil monetary penalties for each instance a nursing home is found to be in non-compliance at or above the Minimal Harm level (D–F rating). In addition, CMS considers a facility's history of non-compliance, both in general and specifically with reference to cited deficiencies, as a factor that states should consider when determining which remedies to impose. However, the Department's routine policy is to not assess any fines for Minimal Harm citations, regardless of past performance. Instead, the Department opts to implement what it refers to as "alternative remedies," such as directed plans of correction and/or in-service training, to resolve these lower-level issues.

We found that some nursing homes are repeatedly cited for continued deficiencies within the

same categories and that, when problems are not corrected timely, Minimal Harm citations can escalate in severity over time. As a result, although the Department's alternate remedies are intended to correct the deficiencies and achieve maintained compliance, in many cases there is little assurance that these outcomes are ultimately being realized.

Between January 2007 and May 2015, the Department issued 42,585 citations rated with a Potential for More Than Minimal Harm (D–F rating). The Department has the ability to impose fines in these instances, but chooses not to. These accounted for 84 percent of all the citations issued during this 100-month period (see Table 3). Comparatively, only 4 percent (1,981) of the violations noted were cited at the Actual Harm (G–I) or Immediate Jeopardy (J–L) levels – the level at which the Department assesses State fines.

Table 3 – Citations by Scope and Severity, January 1, 2007 to May 12, 2015

Harm Level	Scope/Severity Rating	Citations Issued	Percent of Total
No More Than Minimal Harm	A	257	0.51
	B	3,974	7.88
	C	1,634	3.24
Subtotal		**5,865**	**11.63**
Potential for More Than Minimal Harm	D	25,738	51.04
	E	15,229	30.20
	F	1,597	3.17
	F(w/SQC)	21	0.04
Subtotal		**42,585**	**84.45**
Actual Harm	G	985	1.95
	H	36	0.07
	I	5	0.01
Subtotal		**1,026**	**2.03**
Immediate Jeopardy	J	74	0.15
	K	566	1.12
	L	315	0.62
Subtotal		**955**	**1.89**
Total		**50,431**	**100.00**

Note. For more information about where citations rated at or above the Actual Harm level occur across New York State, see Exhibits C through F.

When identified problems are not corrected timely, and enforcement actions cease to be an effective deterrent to continued non-compliance, the risk increases that issues will escalate in both scope and severity. Our analysis of deficiency citations issued between January 2007 and May 2015 identified a facility, the Westgate Nursing Home in Rochester, which received more citations than any other active facility. We reviewed the citation history for Westgate and found that, over time, citations once cited at the Minimal Harm level eventually rose to Actual Harm or Immediate Jeopardy levels of severity, as follows:

- Between January 2007 and October 2011, the Department issued Westgate a total of 156 citations for violations, all of which were rated below the Minimal Harm level and therefore not subject to fines under the Department's policy. Between November 2011 and May 2015, the Department conducted four Standard Health surveys and 10 Complaint surveys at this facility, resulting in 115 additional citations. Included therein was the Department's June 2013 survey, which resulted in 18 citations, one of which was cited for SQC, another at the Actual Harm level, and three at the Immediate Jeopardy level. These were the first and only citations that the Department issued to Westgate that were cited at or above the Minimal Harm level.
- Of the five deficiency categories cited, four had been cited a total of eight times in previous surveys, and three were cited a total of six more times on subsequent surveys. One deficient category that focused on keeping facilities free from accidents and hazards was cited at the highest level of severity (Immediate Jeopardy-Widespread). This same deficiency category had been cited on two previous surveys: at the Minimal Harm-Pattern level in April 2012 and at the Minimal Harm-Isolated level in April 2013. No fine was previously issued because these levels fell below the Department's criteria for assessing State fines. In April 2014, the facility was again cited for violating the same category of deficiency, with the levels again falling to just below the threshold for fine assessment (Minimal Harm-Isolated; Minimal Harm-Pattern).
- Despite having the highest number of citations issued during this 100-month period, Westgate hasn't been assessed a single monetary fine since January 2005, which resulted from a March 2004 survey. Because of the inefficiencies in the fine process, even the problems cited in June 2013 (for SQC, Actual Harm, and Immediate Jeopardy) have yet to result in an Order to impose a fine.

In addition to Westgate, there were other facilities in which citations once cited at the Minimal Harm level eventually rose to Actual Harm or Immediate Jeopardy levels of severity.

The Department expressed confidence that the other remedies it relies upon, such as directed plans of correction, can be an effective means of ensuring quality of care and service delivery. However, for nursing homes that show a pattern of non-compliance, stronger consequences, such as fines coupled with these alternate remedies, may be more effective in deterring poor behavior and, in turn, ensuring higher-quality care for patients.

Recommendations

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

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

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

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.

Audit Scope and Methodology

The objectives of our audit were to determine whether the Department of Health (Department) consistently follows federal and State regulations and procedures for conducting nursing home surveys, including the identification of violations and the scope and severity of citations issued, and to assess whether the Department's inspection process is effective in improving the quality of care and safety in nursing homes. The audit covered the period January 1, 2012 through September 17, 2015.

To accomplish our audit objectives, we interviewed Department officials responsible for nursing home oversight. We reviewed relevant State and federal laws and regulations, including pertinent sections of the Centers for Medicare and Medicaid Services' State Operations Manual. We examined the Department's internal controls and assessed their adequacy as they related to our objectives. In addition, we obtained and reviewed survey-related data and complaint/incident data for the period January 1, 2007 through May 12, 2015. We did not obtain or review any personal and/or confidential information during the course of the audit. Although the start of our audit scope was January 1, 2012, we reviewed data going back to 2007 for trending purposes. We reviewed a stratified random sample of 25 surveys representing each of the seven regional offices, plus an additional 25 complaint/incident intakes, to conduct data reliability testing, and found the data to be reliable for purposes of our audit objectives.

To identify the number of surveys completed, we counted Standard Health surveys and Life Safety Code surveys as single events, even though both are required for certification. The Department most often combines these surveys as one when presenting these statistics.

We obtained fine assessment data for the period January 1, 2007 through July 3, 2015 from the Department's Bureau of Complaints & Analysis. This data was based on Orders issued to nursing homes by the Division of Legal Affairs. We used this data to identify Division processing times between the survey end dates and the dates fines were assessed. Also, we used the Department's Nursing Home Profile webpage to obtain additional information on particular nursing homes, such as deficiency and penalty information.

We conducted our performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

In addition to being the State Auditor, the Comptroller performs certain other constitutionally and statutorily mandated duties as the chief fiscal officer of New York State. These include operating

the State's accounting system; preparing the State's financial statements; and approving State contracts, refunds, and other payments. In addition, the Comptroller appoints members to certain boards, commissions, and public authorities, some of whom have minority voting rights. These duties may be considered management functions for purposes of evaluating organizational independence under generally accepted government auditing standards. In our opinion, these functions do not affect our ability to conduct independent audits of program performance.

Authority

This audit was performed according to the State Comptroller's authority under Article V, Section 1 of the State Constitution and Article II, Section 8 of the State Finance Law.

Reporting Requirements

A draft of this report was provided to Department officials for their review and comment. We considered their comments in preparing this report. Their comments are attached to this report in their entirety. While Department officials generally agree with our findings and respond they have taken steps to implement our recommendations, certain of their explanations, which we have highlighted in the agency's response, warrant further comment. Our rejoinders in these areas are attached at the end of the report as State Comptroller's Comments.

Within 90 days after final release of this report, as required by Section 170 of the Executive Law, the Commissioner of Health shall report to the Governor, the State Comptroller, and the leaders of the Legislature and fiscal committees, advising what steps were taken to implement the recommendations contained herein, and if the recommendations were not implemented, the reasons why.

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Vision

A team of accountability experts respected for providing information that decision makers value.

Mission

To improve government operations by conducting independent audits, reviews and evaluations of New York State and New York City taxpayer financed programs.

Exhibit A

Centers for Medicare & Medicaid Services' Scope and Severity Grid

	Scope & Severity Grid	SCOPE		
		Level 1 **Isolated**	*Level 2* **Pattern**	*Level 3* **Widespread**
SEVERITY	*Level 4* **Immediate Jeopardy**	J*	K*	L*
	Level 3 **Actual Harm**	G	H*	I*
	Level 2 **Potential for Greater Than Minimal Harm**	D	E	F*
	Level 1 **Potential for No More Than Minimal Harm**	A	B	C
	**Substandard Quality of Care – Refers to Scope/Severity Levels F, H, I, J-L in one of the following Regulatory Groups: Resident Behavior & Facility Practices (42 CFR 488.13); Quality of Life (42 CFR 483.15); or Quality of Care (42 CFR 488.25).*			

Severity Levels (1 through 4)

- **Level 1** – Deficiency with potential for no more than minor negative impact on resident(s).
- **Level 2** – Non-compliance with no more than minimal physical, mental and/or psychosocial discomfort to the resident and/or has potential (not yet realized) to compromise the resident's ability to maintain and/or reach his/her highest practicable physical, mental and/or psychosocial well-being as defined by resident assessment, plan of care and provision of services.
- **Level 3** – Non-compliance resulting in negative outcome that compromised resident's ability to maintain and/or reach his/her highest practicable physical, mental, psychosocial well-being defined by resident assessment, plan of care, and provision of services. Does not include a deficient practice that only could or has caused limited consequences to resident.
- **Level 4** – Immediate Jeopardy where immediate corrective action is necessary because facility's non-compliance with one or more requirements has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident receiving care in the facility.

Scope Levels (1 through 3)

- **Level 1** – One or a very limited number of residents affected, staff involved and/or situation only occasionally or in very limited number of locations.
- **Level 2** – More than very limited number of residents affected, staff involved and/or situation occurred in several locations, and/or repeated deficient occurrences to same resident(s) but not pervasive throughout facility.
- **Level 3** – Problems causing deficiencies are pervasive in facility and/or represent systemic failure that affected or has potential to affect a large portion or all facility residents.

Exhibit B

Breakdown of New York State Citations by Scope and Severity for the Period January 1, 2007 to May 12, 2015

	Breakdown of NYS Citations by Scope & Severity (N = 50,431)	SCOPE		
		Level 1 **Isolated**	*Level 2* **Pattern**	*Level 3* **Widespread**
SEVERITY	*Level 4* **Immediate Jeopardy**	J 74 *(0.15%)*	K 566 *(1.12%)*	L 315 *(0.62%)*
	Level 3 **Actual Harm**	G 985 *(1.95%)*	H 36 *(0.09%)*	I 5 *(0.01%)*
	Level 2 **Potential for Greater Than Minimal Harm**	D 25,738 *(51.04%)*	E 15,229 *(30.20%)*	F* 1,618 *(3.21%)*
	Level 1 **Potential for No More Than Minimal Harm**	A 257 *(0.51%)*	B 3,974 *(7.88%)*	C 1,634 *(3.24%)*

*Includes 21 citations (0.04%) with Substandard Quality of Care tags, which are automatically enforced by the Division's Bureau of Quality & Surveillance.

Exhibit C

Major Deficiencies (Actual Harm/Immediate Jeopardy) Cited by County
January 1, 2007 – May 12, 2015

County	Number of Nursing Homes	Portion of Statewide Total	Total Violations Identified	Major Deficiences		Scope of Major Deficiencies			County
				Number	Percent of Violations	Isolated (Level 1)	Pattern (Level 2)	Widespread (Level 3)	
Albany	14	2.1%	955	72	7.5%	38	25	9	Albany
Allegany	4	0.6%	312	14	4.5%	6	2	6	Allegany
Bronx	46	6.8%	2,963	114	3.8%	54	36	24	Bronx
Broome	11	1.6%	861	31	3.6%	11	18	2	Broome
Cattaraugus	5	0.7%	430	7	1.6%	4	0	3	Cattaraugus
Cayuga	4	0.6%	498	14	2.8%	12	2	0	Cayuga
Chautauqua	9	1.3%	682	26	3.8%	16	9	1	Chautauqua
Chemung	6	0.9%	429	5	1.2%	5	0	0	Chemung
Chenango	5	0.7%	319	7	2.2%	5	2	0	Chenango
Clinton	5	0.7%	271	20	7.4%	15	5	0	Clinton
Columbia	3	0.4%	443	61	13.8%	28	16	17	Columbia
Cortland	3	0.4%	381	28	7.3%	19	6	3	Cortland
Delaware	4	0.6%	234	40	17.1%	16	6	18	Delaware
Dutchess	13	1.9%	1,072	39	3.6%	18	21	0	Dutchess
Erie	43	6.4%	3,800	87	2.3%	50	37	0	Erie
Essex	3	0.4%	294	33	11.2%	15	7	11	Essex
Franklin	3	0.4%	224	32	14.3%	12	16	4	Franklin
Fulton	3	0.4%	254	30	11.8%	22	0	8	Fulton
Genesee	4	0.6%	268	6	2.2%	6	0	0	Genesee
Greene	2	0.3%	144	17	11.8%	11	2	4	Greene
Hamilton	None	N/A	N/A	N/A	N/A	N/A	N/A	N/A	Hamiltion
Herkimer	5	0.7%	353	16	4.5%	5	5	6	Herkimer
Jefferson	6	0.9%	433	34	7.9%	24	10	0	Jefferson
Kings	43	6.4%	2,804	104	3.7%	65	26	13	Kings
Lewis	1	0.1%	64	5	7.8%	2	3	0	Lewis
Livingston	3	0.4%	180	5	2.8%	3	2	0	Livingston
Madison	4	0.6%	294	12	4.1%	6	4	2	Madison
Monroe	35	5.2%	3,621	61	1.7%	40	16	5	Monroe
Montgomery	7	1.0%	355	24	6.8%	12	6	6	Montgomery
Nassau	37	5.5%	3,390	91	2.7%	52	30	9	Nassau
New York	22	3.3%	1,205	46	3.8%	27	13	6	New York
Niagara	12	1.8%	871	12	1.4%	12	0	0	Niagara
Oneida	18	2.7%	1,666	108	6.5%	47	48	13	Oneida
Onondaga	15	2.2%	1,402	102	7.3%	41	41	20	Onondaga
Ontario	5	0.7%	401	8	2.0%	5	3	0	Ontario
Orange	10	1.5%	776	18	2.3%	10	3	5	Orange
Orleans	3	0.4%	351	10	2.8%	1	6	3	Orleans
Oswego	6	0.9%	591	16	2.7%	4	12	0	Oswego
Otsego	3	0.4%	188	12	6.4%	7	0	5	Otsego
Putnam	2	0.3%	163	6	3.7%	3	3	0	Putnam
Queens	60	8.9%	3,773	123	3.3%	83	30	10	Queens
Rensselaer	9	1.3%	682	61	8.9%	21	9	31	Rensselaer
Richmond	11	1.6%	481	26	5.4%	12	12	2	Richmond
Rockland	10	1.5%	916	16	1.7%	7	9	0	Rockland
Saratoga	4	0.6%	189	6	3.2%	3	0	3	Saratoga
Schenectady	7	1.0%	558	50	9.0%	30	15	5	Schenectady
Schoharie	1	0.1%	0	0	N/A	0	0	0	Schoharie
Schuyler	1	0.1%	70	1	1.4%	1	0	0	Schuyler
Seneca	1	0.1%	56	0	0.0%	0	0	0	Seneca
St Lawrence	9	1.3%	395	10	2.5%	10	0	0	St Lawrence
Steuben	6	0.9%	519	10	1.9%	6	0	4	Steuben
Suffolk	45	6.7%	3,644	119	3.3%	61	36	22	Suffolk
Sullivan	2	0.3%	184	5	2.7%	2	3	0	Sullivan
Tioga	2	0.3%	164	5	3.0%	4	1	0	Tioga
Tompkins	5	0.7%	506	20	4.0%	5	10	5	Tompkins
Ulster	7	1.0%	358	6	1.7%	6	0	0	Ulster
Warren	4	0.6%	243	21	8.6%	13	7	1	Warren
Washington	4	0.6%	364	58	15.9%	19	14	25	Washington
Wayne	4	0.6%	326	7	2.1%	4	3	0	Wayne
Westchester	48	7.1%	2,819	59	2.1%	38	12	9	Westchester
Wyoming	2	0.3%	143	4	2.8%	4	0	0	Wyoming
Yates	2	0.3%	99	1	1.0%	1	0	0	Yates
Grand Total	672	100%	50,431	1,981	3.9%	1,059	602	320	Grand Total

Exhibit D

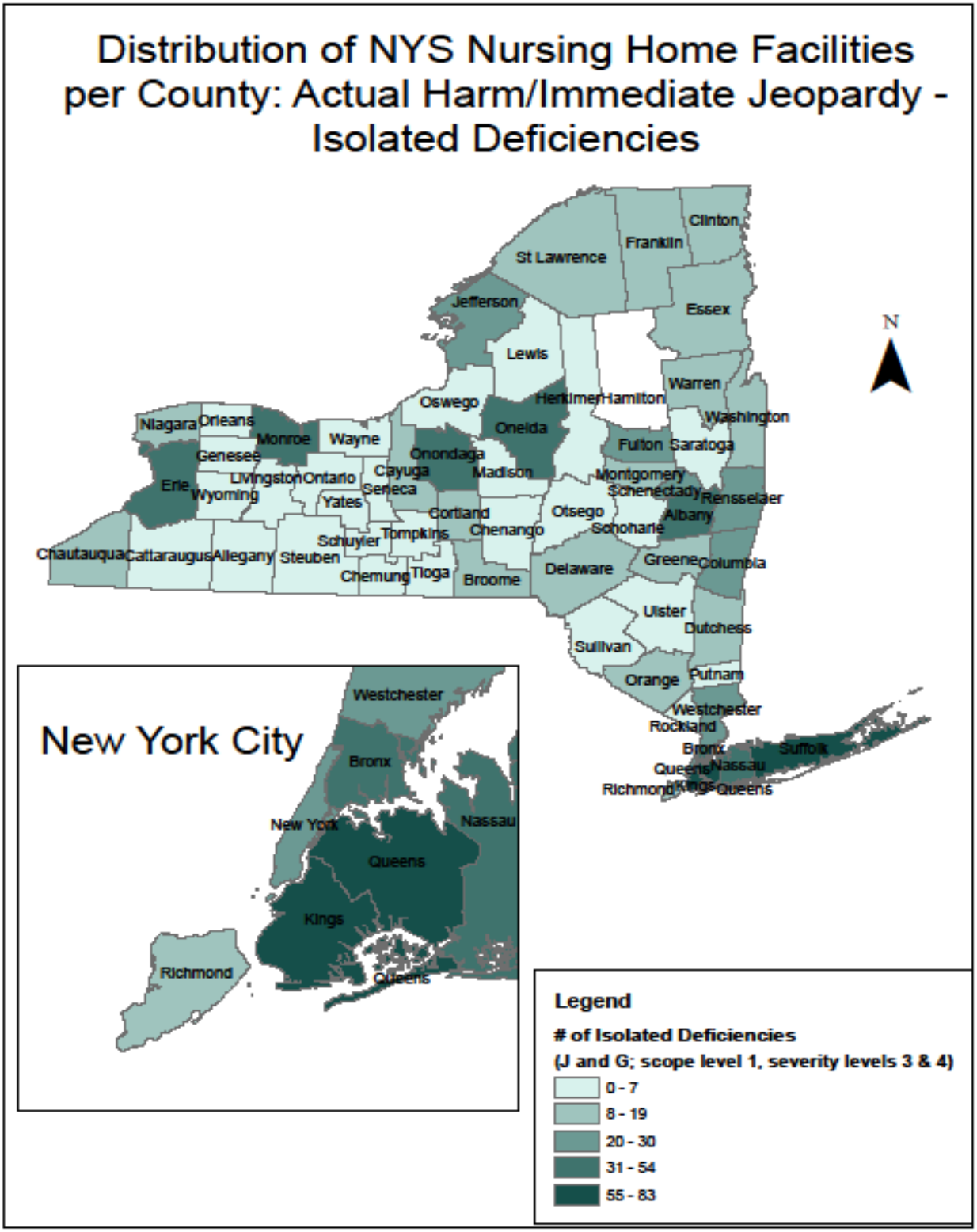

Distribution of NYS Nursing Home Facilities per County: Actual Harm/Immediate Jeopardy - Isolated Deficiencies
Clinton
Franklin
St Lawrence
Jefferson
Essex
Lewis
Warren
Oswego
Herkimer
Hamilton
Washington
Niagara
Orleans
Monroe
Wayne
Oneida
Fulton
Saratoga
Genesee
Onondaga
Cayuga
Madison
Montgomery
Erie
Livingston
Ontario
Seneca
Schenectady
Rensselaer
Wyoming
Yates
Albany
Cortland
Otsego
Tompkins
Chenango
Schoharie
Schuyler
Chautauqua
Cattaraugus
Allegany
Steuben
Chemung
Tioga
Broome
Delaware
Greene
Columbia
Ulster
Dutchess
Sullivan
Orange
Putnam
Westchester
Rockland
Bronx
Suffolk
Queens
Nassau
Richmond
Kings
Queens
N
New York City
Westchester
Bronx
New York
Nassau
Queens
Kings
Richmond
Queens
Legend
# of Isolated Deficiencies
(J and G; scope level 1, severity levels 3 & 4)
0 - 7
8 - 19
20 - 30
31 - 54
55 - 83

Exhibit E

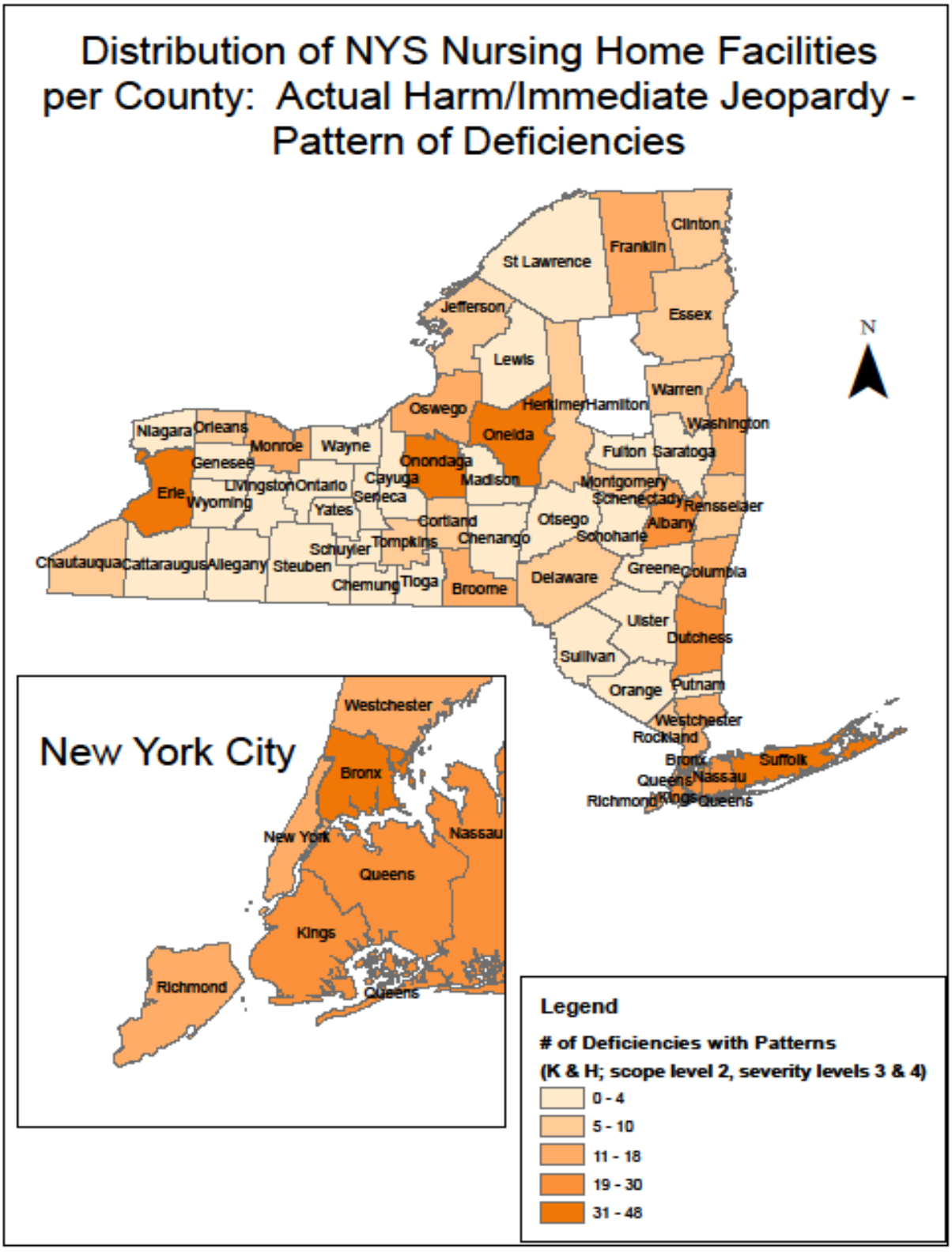
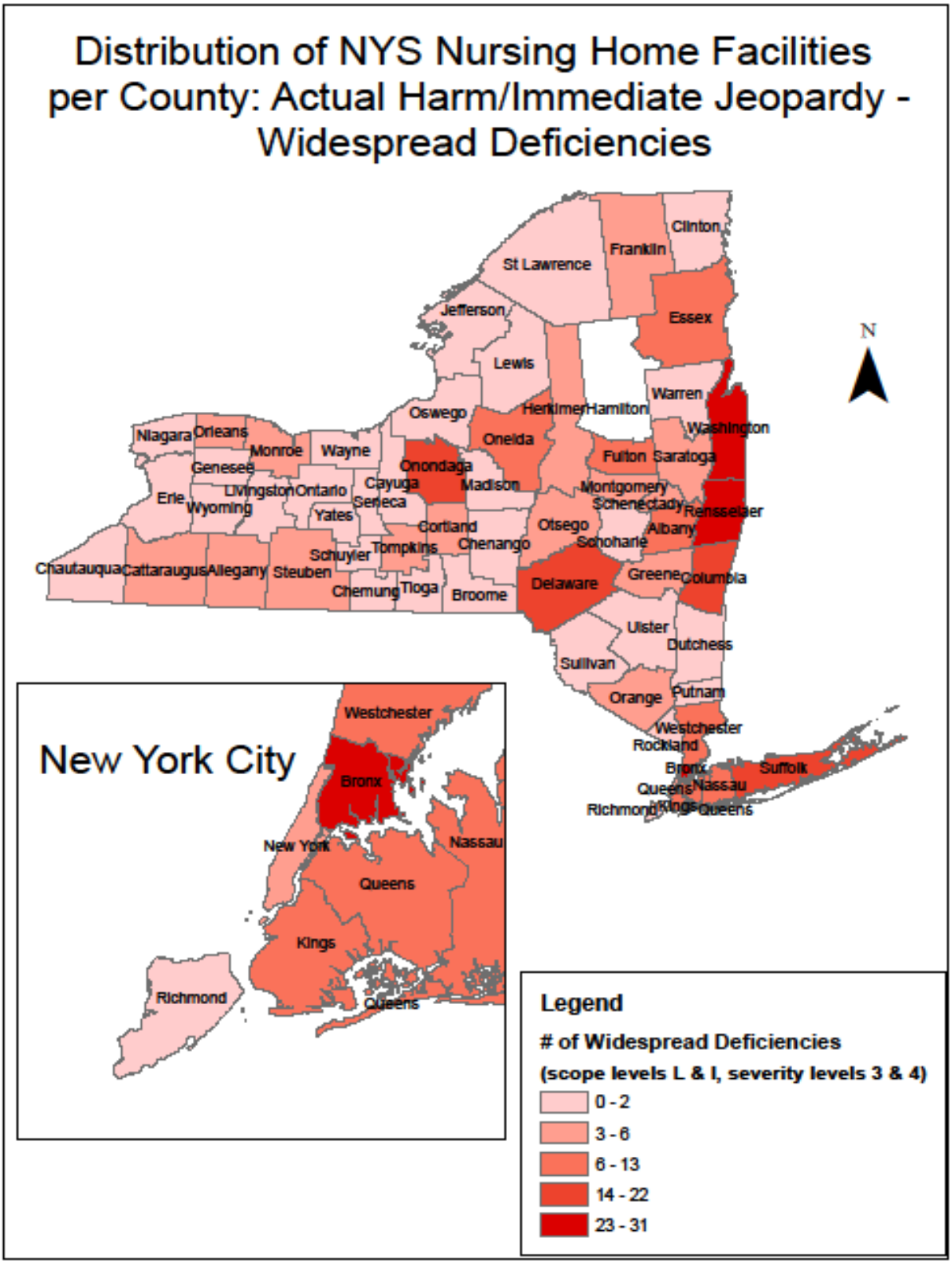

Distribution of NYS Nursing Home Facilities per County: Actual Harm/Immediate Jeopardy - Pattern of Deficiencies
N
Clinton
Franklin
St Lawrence
Jefferson
Essex
Lewis
Warren
Oswego
Herkimer
Hamilton
Washington
Niagara
Orleans
Onelda
Monroe
Wayne
Fulton
Saratoga
Genesee
Onondaga
Livingston
Ontario
Cayuga
Madison
Montgomery
Erie
Wyoming
Seneca
Schenectady
Rensselaer
Yates
Otsego
Albany
Cortland
Schoharie
Tompkins
Chenango
Schuyler
Chautauqua
Cattaraugus
Allegany
Steuben
Greene
Columbia
Chemung
Tioga
Broome
Delaware
Ulster
Dutchess
Sullivan
Orange
Putnam
Westchester
Rockland
Bronx
Suffolk
Queens
Nassau
Richmond
Kings
Queens
New York City
Westchester
Bronx
New York
Nassau
Queens
Kings
Richmond
Queens
Legend
# of Deficiencies with Patterns
(K & H; scope level 2, severity levels 3 & 4)
0 - 4
5 - 10
11 - 18
19 - 30
31 - 48

Exhibit F


Distribution of NYS Nursing Home Facilities per County: Actual Harm/Immediate Jeopardy - Widespread Deficiencies
N
Clinton
Franklin
St Lawrence
Essex
Jefferson
Lewis
Warren
Oswego
Herkimer
Hamilton
Washington
Niagara
Orleans
Onondaga
Oneida
Fulton
Saratoga
Monroe
Wayne
Genesee
Cayuga
Madison
Montgomery
Erie
Livingston
Ontario
Seneca
Schenectady
Rensselaer
Wyoming
Yates
Albany
Otsego
Cortland
Schoharie
Tompkins
Chenango
Schuyler
Chautauqua
Cattaraugus
Allegany
Steuben
Greene
Columbia
Chemung
Tioga
Broome
Delaware
Ulster
Dutchess
Sullivan
Orange
Putnam
Westchester
Rockland
Bronx
Suffolk
Queens
Nassau
Richmond
Kings
Queens
New York City
Westchester
Bronx
New York
Nassau
Queens
Kings
Richmond
Queens
Legend
# of Widespread Deficiencies
(scope levels L & I, severity levels 3 & 4)
0 - 2
3 - 6
6 - 13
14 - 22
23 - 31

Agency Comments

NEW YORK STATE OF OPPORTUNITY. Department of Health

ANDREW M. CUOMO
Governor

HOWARD A. ZUCKER, M.D., J.D.
Commissioner

SALLY DRESLIN, M.S., R.N.
Executive Deputy Commissioner

December 3, 2015

Mr. John Buyce, Audit Director
Office of the State Comptroller
Division of State Government Accountability
110 State Street – 11th Floor
Albany, NY 12236-0001

Dear Mr. Buyce:

Enclosed are the Department of Health's comments on the Office of the State Comptroller's Draft Audit Report 2015-S-26 entitled, "Nursing Home Surveillance."

Thank you for the opportunity to comment.

Sincerely,

Sally Dreslin, M.S., R.N.
Executive Deputy Commissioner

Enclosure

cc: Dan Sheppard
Keith Servis
Jennifer Treacy
Shelly Glock
Paula Grogin
Marybeth Hefner
Chris Fay
Michael J. Nazarko
Marci Natale
Diane Christensen
Lori Conway

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

The following are the Department of Health's (Department) comments in response to the Office of the State Comptroller's (OSC) Draft 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 the 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 draft 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 draft 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 the 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 draft 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.

* Comment 1

Recommendation #1

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

Response #1

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. These efforts are ongoing and being adjusted, as necessary, to ensure that State fines are assessed in a timely manner. 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 draft report, the Division has trained additional staff to eliminate the backlog and ensure timely processing of future enforcements.

* Comment 1

Recommendation #2

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

Response #2

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, consideration is being given to identifying enforceable events on a monthly basis (after a period of 90 days to allow the survey process to proceed to conclusion) to expedite the assessment of penalties.

Recommendation #3

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

*See State Comptroller's Comments on page 28.

Response #3

The Department is making improvements to its enforcement tracking system. The Department has improved tracking and monitoring on an interim basis with existing tools. The draft report supported the Department's findings from its 2014 internal control review -- that an improved tracking process is needed. The Division's plan includes the development of an automated report to track and monitor the status of enforcement processing to identify any issues that may impede processing, with a goal of ensuring that fines are assessed in a timely manner.

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

The Department follows CMS' civil money penalty protocol in assessing State civil penalties (fines). The Federal protocol states 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 draft report accurately notes that the CMS State Operations Manual provides states discretion to assess fines at the Greater than Minimal Harm level.

However, the Department maintains that other remedies (such as Directed Plans of Correction) may be more effective means of ensuring quality care and service delivery. The Department will continue to review the effectiveness of imposing fines.

* Comment 2

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. The Department is committed to protecting the health and safety of New York State's nursing home residents and, accordingly, will consider the multiple complexities of the recommendation related to the assessment of fines for citations issued at the Greater Than Minimal Harm level, especially for those facilities that demonstrate a pattern of repetitive citations.

State Comptroller's Comments

1. 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 our 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. By the time our fieldwork was complete in September 2015, officials reported substantial reduction to the accumulated backlog, primarily by temporarily diverting staff from other tasks. However, the core problems that led to the backlog have not been addressed. For example, although two staff were assigned to assist in completing enforcement, they only summarized information for the one part-time staff member who is assigned to create enforcement packets. Therefore, there remains only one part-time person responsible for processing ongoing enforcement actions, and then only when that person is not completing inspections. Additionally, the Department has not addressed the six-month delay that it has built in for the appeals process. As a result, there is significant risk that a material backlog could recur.
2. While other remedies such as Directed Plans of Corrections may be effective in some instances, our analysis of specific facilities shows a pattern of repeated violations despite the Department's use of these other remedies. Therefore, the Department should consider broader use of its authority to fine as an additional deterrent to persistent non-compliance.