



**CALIFORNIA DEPARTMENT OF PUBLIC HEALTH
CENTER FOR HEALTH CARE QUALITY
LICENSING AND CERTIFICATION**

**RECOMMENDATIONS TO THE CALIFORNIA STATE AUDITOR
BUREAU OF STATE AUDIT REPORT 2010-108
STATE FACILITIES CITATION PENALTIES ACCOUNT**



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MISSION

The Licensing and Certification Program's (L&C) mission is to promote the highest quality of medical care in community settings and facilities. L&C is responsible for ensuring health care facilities comply with state laws and regulations. In addition, L&C cooperates with CMS to ensure that facilities accepting Medicare and Medi-Cal (in California, Medicaid is referred to as Medi-Cal) payments meet federal requirements. L&C also oversees the certification of nurse assistants, home health aides, hemodialysis technicians, and the licensing of nursing home administrators. L&C's six branches and executive office (with nearly 1,200 budgeted positions) work to improve access to care and assure quality of care through four programmatic goals:

1. Public Service -- Responding in timely and effective ways to the public's questions, complaints, and other concerns about the standards of care in health facilities and about the health care workers that L&C monitors
2. Effective Enforcement -- Operating a uniform and effective enforcement program in accordance with state licensing and certification requirements
3. Quality Improvement -- Encouraging provider-initiated compliance, quality of care and access improvement activities; and, promoting research regarding the quality and effectiveness of health care services
4. Meaningful Standards -- Providing leadership in initiating and implementing changes to licensing and certification requirements that: improve quality of care; remove barriers to access; recognize new technologies and changes in scopes of practice; respond to California's changing health care delivery system; and, reflect the diversity of California's demographics

LEGISLATIVE REQUIREMENTS

Senate Bill 853 (Chapter 717, Statutes of 2010), passed by the Legislature and signed by the Governor on October 19, 2010, added Section 1417.5 to the Health and Safety Code. Health and Safety Code Section 1417.5(b) requires the California Department of Public Health to provide to the fiscal and policy committees of the Legislature, no later than March 1, 2011, recommendations addressing the findings in the California Bureau of State Audits report 2010-108.

OVERVIEW

The California State Auditor, Bureau of State Audits (BSA) presented report 2010-108 to the Joint Legislative Audit Committee concerning the Department of Public Health's (Department) management of the State and Federal Health Facilities Citation Penalties Accounts. The report contained 21 recommendations which included steps designed to ensure the governor's budget not overstate funds available for appropriation for the federal account, steps to increase revenue for the state account, recommendations for: changes to state law, the frequency of state surveys, streamline the citation process, coordination with the Centers for Medicare and Medicaid Services (CMS), temporary management companies, and penalties and late penalties.

The Department was able to implement many of the recommendations. Others require legislative changes to statute.

In response to the BSA report, the legislature passed, and the governor signed, Senate Bill 853 (Chapter 717, Statutes of 2010) which added Section 1417.5 to the Health and Safety Code (HSC). HSC Section 1417.5 states:

(a) The department, in consultation with stakeholders, shall develop recommendations to address the findings published in the June 2010 report entitled, "Department of Public Health: It Reported Inaccurate Financial Information and Can Likely Increase Revenues for the State and Federal Health Facilities Citation Penalties Accounts" (Report 2010-108). The recommendations shall address, but not be limited to, all of the following:

(1) Streamlining the citation appeal process, including the citation review conference process.

(2) Increasing citation penalty amounts, including late penalty fees, and annually adjusting penalty amounts to reflect an inflation indicator, such as the California Consumer Price Index.

(3) Revising state law to enable the department to recommend that the federal Centers for Medicare and Medicaid Services impose a federal civil money penalty when the department's Licensing and Certification Division determines that a facility is out of compliance with both state and federal requirements.

(4) Authorizing the department to collect citation penalty amounts upon appeal of the citation and allowing the department to place those funds into a special interest bearing account.

(b) The department shall provide the recommendations to the fiscal and policy committees of the Legislature no later than March 1, 2011.

This report to the legislature addresses the findings published in the BSA June 2010 report and enumerates the recommendations of the CDPH.

BACKGROUND

The Department's role is to protect the health and safety of the public by ensuring long term care facilities are in compliance with state and federal laws and regulations.

Health and Safety Code Section 1417 established "The Long-Term Care, Health, Safety, and Security Act" which identified the authority by which the Department carries out its mission.

Health and Safety Code Section 1417.1 establishes a method by which the Department shall develop a citation system for imposing civil sanctions against LTC facilities in violation of the laws and regulations of this state, and the federal laws and regulations as applicable to nursing facilities.

Additionally, HSC Section 1417.2(a) establishes the State Health Facilities Citation Penalties Account in which state civil penalty moneys collected by the department are deposited. Monies from the account are to be used upon appropriation by the Legislature for the protection of health or property of residents of long-term care facilities.

SUMMARY OF THE PROCESS TO DEVELOP RECOMMENDATIONS

In January, 2011 the Department solicited input from Stakeholders, seeking their recommendations regarding each of the four issues identified in HSC Section 1417.5(a).

Stakeholders provided a variety of comments, such as the following:

- a) The California Association for Health Facilities (CAHF) supported:
- Streamlining of the citation appeal process and suggested that the Department complete complaint investigations within 90 working days of receipt
 - Moving the appeals to the Quality Improvement Organization or requiring the Department to contract with another qualified state agency to conduct Citation Review Conferences (CRC) within 60 days
 - Adopting the federal model for Class AA and A citations, placing those moneys into an escrow account and allow reduction of penalties by up to 50 percent

CAHF opposed:

- Increasing penalty amounts, including late penalty fees
- Annually adjusting penalty amounts to reflect and inflation indicator
- Discouraging settlement of appealed monetary penalties.
- Imposing both state and federal monetary penalties for a single incident

- Paying penalties upon being issued and placing amounts tied to citations being appealed into an interest bearing account until the appeal process is completed
- b) The Office of the State Long-Term Care Ombudsman supported:
- Using the actual issuance date for penalties rather than the date the citation was received by the facility
 - Improving the processing of appeals for all classes
 - Periodically adjusting penalty amounts
 - Seeking both State and Federal penalties
 - Funding the Long Term Care Ombudsman program
 - Collecting penalties up front from facilities who want to appeal

The Office of State LTC Ombudsman opposed:

- Reducing penalties for early payment or through negotiation
- The settling of penalties for a reduced amount

- c) The California Advocates for Nursing Home Reform (CAHNR) provided the following comments:
- Authorize the Department to periodically revise penalty amounts to reflect an inflation indicator
 - Require facilities who want to appeal the penalty to pay the penalty upon appeal.
 - Allow the Department to impose a state monetary penalty and to recommend to CMS the imposition of a federal penalty
 - Ensure the Department conducts all state surveys at least every two years.
 - Eliminate the backlog of appeals but do not discount or dismiss citations
 - Require the Department to complete investigations of abuse and neglect in a timely manner
 - Treat acts of abuse as an “A” level citation
 - Terminate Medi-cal payment of nursing home legal fees incurred when challenging citations
 - Use citation penalty account to fund the Long Term Care Ombudsman program
 - Post full copies of citations on the Consumer Information System website
 - Conduct oversight hearings regarding the management of the citation system to include failure of District Office to enforce the citation law, misuse of small fines and disappearing federal fines.

d) Bet Tzedek (a public interest law firm with a Nursing Home Advocacy Project) provided comment that they concur with the recommendations made by the California Advocates for Nursing Home Reform and also the recommendations listed in the BSA report.

e) Disability Rights California (an advocacy group for Californians with disabilities) commented that they support the BSA audit recommendations including timely completion of investigations, increasing penalty amounts, issuing citations according to the level of harm, and publishing citations on the Department's website.

After receipt of the above recommendations from interested stakeholders, the Department reviewed the BSA recommendations and Departmental historical information such as:

- The Department licenses 2,556 long term care (LTC) facilities in the State of California;
- In calendar year 2009, 15.92% of all the LTC facilities were involved in citation actions in 2009 and 12.8% of all the LTC facilities were involved in citation actions in 2010. [Electronic Licensing Management System (ELMS) January 12, 2011],
- In 2009 & 2010 of the 1302 Citations issued, 358 CRC (approximately 28%) were requested. Of these, 96 have been completed and 260 remain to be performed.
- Since 2004, there have been 15 dismissals (11 citations stemmed from 1 case which was dismissed) out of 955 citation actions for a rate of 1.6% dismissals, or taking into account that 11 were related to 1 case, the rate would be 0.52 %.
- In 2009 only 7.8% of all the LTC facilities requested a CRC and in 2010, 6.22% of all the LTC facilities requested a CRC, leaving over 90% of facilities not being involved in a CRC in any given year.
- The breakdown of the requested CRCs for 2009 and 2010 is: AA-30; A-124; B-202.
- The results of the completed CRCs and how many remain to be completed from 2009 and 2010 are:
 - AA: 25 upheld, 2 withdrawn, 1 modified, 2 with decisions pending (total of 30 completed)
 - A: 8 upheld, 4 withdrawn, 11 dismissed (all related to 1 instance), 2 paid, 1 write-off, (total of 26 completed) - 98 remain to be done
 - B: 29 paid, 1 uncollectable, 12 withdrawn, (total of 42 completed) - 160 remain to be done*
- As of January 31, 2011, the total number of CRCs waiting to be completed by the Department are shown in the following table:

Citation Level	CY 2004	CY 2005	CY 2006	CY 2007	CY 2008	CY 2009	CY 2010	Total
B	13	18	27	6	43	80	79	266
A	2*		16**	13	30	51	47	159
AA								
WMF							2	2
Total	15	18	43	19	73	131	128	427

* = 1 has been heard by OAH and another is scheduled to be heard but we have not received information so all are counted here.

** = 9 are on OAH calendar and have either completed or have been continued, we don't know which yet so the 9 are counted in the 16.

- Costs to the Department to conduct CRCs include overhead expenses, supplies/postage etc. as well as staff time for the following classifications:
 - Health Facility Evaluator Nurse
 - Health Facility Evaluator Supervisor
 - District Manager
 - Program Support Technicians
 - Branch Chief
 - Office of Legal Services Support Staff
 - Department Counsel
 - Hearing Officer

After reviewing all of the above comments, recommendations, and data the Department developed and finalized a proposed course of action for each of the areas identified in HSC 1417.5 (a). On January 31, 2011, the Department released a draft of its recommendations (listed below) to the interested stakeholders and received via e-mail the following comments regarding the recommendations:

The California Advocates for Nursing Home Reform expressed their support for the recommendation to delete the CRC process and also strongly supported the other three recommendations to reform the citation system. They did wish to see any information or data on the outcome of having appeals go directly to an Administrative law Judge or Superior Court. The Department does not have information or data regarding this.

Bet Tzedek strongly supported the Department's recommendations to reform and improve the citation system.

DEPARTMENT RECOMMENDATIONS

The Department makes the following recommendations

:

1. Streamlining the citation appeal process, including the citation review conference process.

The Department supports this BSA audit recommendation and recommends deleting the CRC process and subsequent arbitration for all levels of Citations. All appeals for all levels of Citations would go directly to an Administrative Law Judge or Superior Court.

Discussion/ Pro-Con Arguments: Eliminating the voluntary CRC process would result in all levels of citations going directly to an Administrative Law Judge or Superior Court. This would save time in the overall citation appeal process by removing a review conference process that rarely results in a citation being dismissed. The purpose of the citation review conference is to review the processes and procedures the Department followed in citing and issuing a citation. The CRC is not intended to deal with any alleged legal issues. Since 2004, 15 cases have been dismissed (11 citations stemmed from 1 case which was dismissed) out of 955 citation actions for a rate of 1.6% dismissals, or taking into account that 11 were related to 1 case, the rate would be 0.52%. The Department's costs to conduct CRCs are large and the CRCs rarely result in overturning the citation. Eliminating the CRC process would result in a savings to both the Department and to the facilities who choose to appeal and go straight to an Administrative Law Judge or Superior Court.

In 2009 and 2010, only 7.8% and 6.22% respectively of all LTC facilities requested a CRC. This means that over 92% of LTC facilities help bear the cost for a service used by few facilities and that rarely changes the outcome of a citation action at this administrative level. The costs of appealing citations would be borne by only those facilities who did not elect to settle the citation at the reduced rate provided in statute. Since all appeals would go to the Administrative Law Judge or Superior Court, the arbitration mentioned in Section 1428 (c) & (d) would also be eliminated.

2. Increasing citation penalty amounts, including late penalty fees, and annually adjusting penalty amounts to reflect an inflation indicator, such as the California Consumer Price Index

CDPH agrees with the recommendation that the Department should seek legislation authorizing it to periodically revise the current penalty amounts to reflect an inflation indicator, such as the Consumer Price Index.

Discussion/ Pro-con Arguments: The citation penalty amount has not been adjusted since the statutes were first written 1973 [§1425] and in 2000 [§1424.5]. Increasing the maximum penalty for a "B" citation would emphasize to facilities the seriousness of Patient's rights and other events that are required by statute to be issued at a "B" level, but does not require the Department to issue every "B" citation at the maximum level.

Instead, this option allows the Department to determine the level of the penalty based on the circumstances of each incident. The increased amount would be the dividing line between the maximum penalty for a “B” citation and the minimum penalty for an “A” citation and would be an appropriate maximum penalty for a “B” level. Increasing the minimum and maximum amount of an “A” citation would keep the penalty amount above that of a “B” citation and provide emphasis to the facilities of the seriousness of citations issued at an “A” level. The Department would not be required to issue every penalty at the maximum level but would be able to determine the penalty level based on the circumstances of the incident. Increasing the minimum amount of the “AA” citations would keep it above the level of the “A” citations. Increasing the penalty for failure to correct a violation within the time frame specified would encourage facilities to correct violations on time rather than pay a minimal fine while continuing to be in violation of the regulation or statute. Assessing late penalties encourages providers to pay penalties on time. Tying the maximum fine to the CCPI would allow the fine levels to adjust up or down, depending on what the CCPI was for each year and would keep penalties more in line with current cost and inflation factors.

The provider community opposed an increase in penalties or in automatic adjustments of penalties tied to an inflation factor stating increased penalties would be a punitive approach to quality. Further, they stated that tying increases in penalty amounts to an inflation factor would serve no purpose other than to raise additional state revenue.

3. Revising state law to enable the department to recommend that the federal Centers for Medicare and Medicaid Services impose a federal civil money penalty when the department's Licensing and Certification Division determines that a facility is out of compliance with both state and federal requirements.

The Department supports the BSA Audit recommendation and recommends that state law be amended to enable the Department to recommend that the federal CMS impose a federal civil money penalty (CMP), in addition to the penalty imposed by the state, when the Department determines that a facility is out of compliance with both the state and federal requirements.

Discussion/ Pro-Con Arguments: Currently state law does not allow the Department to make a recommendation to CMS to impose a CMP. Allowing the Department this option does not mean that CMS is required to impose a CMP. Also, there is no prohibition for CMS imposing a federal CMP when it determines that a facility is out of compliance with a federal requirement as a result of a state investigation resulting in a state citation. Allowing the State to make a recommendation to CMS does not in any way change CMS's enforcement power or actions. It provides the State with an additional line of communication to CMS regarding issues and problems that have been identified at a particular facility.

The provider community was opposed to allowing the State to recommend a CMP to CMS indicating it was a form of dual enforcement.

4. Authorizing the department to collect citation penalty amounts upon appeal of the citation and allowing the department to place those funds into a special interest bearing account.

The Department does not support the BSA Audit recommendation and instead recommends that the penalty collection process remain unchanged and also recommends increasing the time for transmittal of penalties to the Department from 15 days to 30 days after issuance of the citation.

Discussion/Pro-Co Arguments: Originally the Department supported the recommendation of the BSA Audit. Upon meeting with the stakeholders and taking into consideration their comments the Department determined that the BSA Audit recommendation was not one it could support. The Department's recommendation noted above allows facilities up to 30 days to transmit their penalties to the Department. This offers facilities more flexibility in ensuring they have monies to meet their obligations.

Changing the collection process and requiring facilities to pre-pay penalties and placing the penalties in an interest bearing account would result in a cost to the Department of approximately 65,000 a year. The penalty amount would not be available for use until the appeals were exhausted therefore the Department would need to ensure the proper accounting of funds received, disbursed, and tracked. This would need to be paid either by the imposition of a non-refundable administrative fee upon filing of an appeal or by an increase in bed fees.

The provider community was in support of this recommendation but the advocate community was supportive of the recommendations in the BSA audit.

Another alternative the provider community suggested was adoption of the federal CMP model. This model collects penalties upfront only for those deficiencies where there was immediate jeopardy or actual harm and allows for a reduction in penalties of up to 50% if paid within a specified timeframe. This alternative suggested by the provider groups would still require a CRC.

The BSA Audit also discussed the possibility of the Department more closely aligning the citation process with the CMS citation process, and focused its discussion on the collection of moneys with no delay in payment and timely collection of monetary penalties. The BSA Audit further indicated this process could cause potentially fewer facilities to request CRCs since doing so would not delay the payment of monetary penalties. The BSA Audit recommendations regarding this were to seek legislation to have the CRC process more closely reflect the federal process by prohibiting facilities from seeking a delay of the imposition of monetary penalties. The BSA Audit did not make recommendations to apply this model to only certain citation levels and it also did not recommend a reduction in penalties of up to 50%.