

January 4, 2021

Hon. Howard Zucker, M.D.
Commissioner of Health
New York State Department of Health
Erastus Corning Tower
Nelson A. Rockefeller Empire State Plaza
Albany NY 12207

Dear Commissioner Zucker:

On behalf of the New York State Health Facilities Association (“NYSHFA”), a statewide organization representing over 425 skilled nursing and assisted living providers, I wish to respectfully express in the strongest terms possible our members’ profound concern, alarm, frustration and disappointment with the recent draconian enforcement policy that the New York State Department of Health (“DOH”) has adopted with respect to demanding absolute compliance by providers with the myriad rules, regulations, guidance and executive orders emanating from your office during the COVID-19 pandemic. Quite simply, the Department’s “zero tolerance” policy is ill-conceived, misguided, punitive, and most importantly, counterproductive. By prosecuting even the most trivial of violations, DOH has forced facilities to divert already precious, limited, and overextended resources away from dealing with the challenges confronting them in coping with the pandemic in order to deal with these enforcement initiatives.

More specifically, I have been made aware of and have personally reviewed the threatening letters DOH has recently sent to many facilities across the State advising them that they will be receiving Notices of Hearings and Statements of Charges requiring them to appear before an Administrative Law Judge to determine the amount of fines that should be imposed upon them unless they agree in advance to waive their right to a hearing and pay a fine to DOH in the amount of \$2000 for each alleged incident of noncompliance. In several cases, the fines amount to several thousands of dollars. These letters contain a stipulation of settlement which includes a term that would allow DOH to also take separate enforcement actions against the licensed administrators of these facilities. As you can surely understand, this has caused administrators considerable consternation about losing their licenses and livelihoods.

While our counsel has advised us that the procedure by which DOH has pursued enforcement in the past is no different from what it has done here, what is very different about the current enforcement initiative is the trivial, indeed picayune, nature of some of the alleged violations. Facilities have been cited for not having filed their HERDS reports, due daily by 1:00 PM, where those reports were, in fact, filed as little as one minute after 1:00 PM! When I first learned of this, I thought it was surely a mistake until I began receiving calls from other member facilities advising that they too had been cited for delinquent filings which were all filed shortly after the 1:00 PM deadline. I have copies of the electronic receipts from DOH acknowledging the exact time of the filings.

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In addition, many facilities are receiving citations for inadequate inventory of personal protective equipment (“PPE”) in violation of 10 NYCRR 419.18, as amended in July and October of 2020. This regulation requires a calculation based on average daily inventory reported by the facility during a 9-day “window” in April 2020. In many cases, however, DOH calculations used to determine whether enforcement was authorized were grossly inflated, resulting in unwarranted enforcement actions. While the regulation in question requires a calculation based upon a multiple of actual usage of PPE during the nine-day period, in April of this year facilities were not reporting “actual” usage to DOH, but were instead reporting ideal, hypothetical, “burn rates” based upon estimates of what a facility’s inventory should be during a pandemic. This was based on specific instructions from DOH to report in that fashion. I have copies of those instructions from DOH that were issued in April 2020.

When DOH embarked upon its recent zero tolerance enforcement campaign, it reviewed the data reported by the facilities in April and multiplied by the estimated “burn rates” rather than “actual usage” rates during the nine-day window as dictated by the applicable regulation. As a result, in many cases DOH’s calculations used to determine enforcement were grossly inflated, resulting in unwarranted enforcement initiatives. The calculations were based on data that DOH had mandated facilities to report at the time, but the amounts were not what the subsequently enacted regulations incorporated into the formula.

NYSHFA does not question the authority of DOH to undertake bona fide enforcement actions against facilities and/or administrators who deliberately ignore validly adopted rules and regulations issued by DOH, including those additional regulations necessary to deal with a pandemic. We must, however, strenuously protest enforcement that unnecessarily punishes the vast majority of facilities and administrators who are doing their very best to cope with an unprecedented crisis.

On several occasions DOH has referred to the “partnership” it has with providers in coping with this emergency, but I respectfully submit that the most recent overzealous enforcement policies adopted by the Department only serve to undermine that objective and destroy morale.

For all the foregoing reasons, I respectfully urge that your office reach out to NYSHFA to discuss how we may better work together to serve the people of the State during this crisis which should begin with the Department’s abandonment of the aforementioned unreasonable and ill- advised enforcement policy.

Thank you, and I look forward to hearing from you in the immediate future.

Sincerely,



Stephen B. Hanse
President & CEO
NYSHFA | NYSCAL

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