

**Joint Oversight Hearing**  
**Assembly Committee on Aging & Long-Term Care**  
**and**  
**Assembly Committee on Health**  
  
**Department of Public Health**  
**Licensing and Certification Division**

Assemblymember Mariko Yamada, Co-Chairperson  
Assemblymember Richard Pan, MD, Co-Chairperson

Tuesday, January 21, 2014  
State Capitol, Room 4202  
2:00 p.m. – 4:00 p.m.

**Hearing Overview**

The Department of Public Health's (DPH) Licensing and Certification Division (L&C), the state regulatory apparatus overseeing facilities that care for the state's most vulnerable adults, has recently been the focus of scrutiny in the press and the subject of sanctions by the federal Centers for Medicare and Medicaid Services (CMS). These reports suggest that significant gaps exist in state oversight of these facilities and certain professionals that work in them. In light of these issues, the Assembly Committee on Aging and Long-Term Care and the Assembly Committee on Health have sought information from DPH related to federal sanctions, internal processes, current and past investigation backlogs, and other data and statistics related to complaint investigations.

The purpose of this joint hearing of the Assembly Aging and Long-Term Care and Health Committees is: 1) to examine the consumer complaint process, including procedures for timely and effective investigation of complaints and the management of DPH's network of district offices; 2) to provide an opportunity for DPH to explain how it ensures it has sufficient capacity to perform effective oversight; and 3) identify reforms that are needed to improve the effectiveness of DPH's complaint investigation functions. Testimony from DPH will include the

strategies it continues to deploy, and DPH will be offered the opportunity to explain its enforcement, management, and leadership techniques intended to ensure safe and healthy environments in health facilities.

## **Background**

According to the California Department of Finance, the number of people over age 65 in California will reach 5 million this year. The number of people 85 years of age and older (those most likely to require medical long-term care) is expected to grow by nearly 300% over the next three decades (from about 1.25 million today to about 3.7 million in 2035). According to the American Community Survey, the level of disability grows with age, nearly doubling between the ages of 65 and 75, with over 52% of the California population 75 and older reporting disability compared to 24% of those ages 65 to 74. With the Baby Boomers entering their so-called “golden” years in droves and a rapidly changing health care and social services system, the regulatory challenges for the state are anticipated to grow in complexity.

A skilled nursing facility (SNF), or nursing home, is a place of residence for people who require continual nursing care and have significant difficulty coping with activities of daily living. Also known as “nursing homes,” rehabilitation centers,” or “convalescent hospitals,” these facilities provide nursing care for individuals with long-term chronic illness, or short-term residents for rehabilitation and recovery, of all ages.

The typical stay in a nursing home is less than three months for over three-quarters of the resident population. Just over 7% of all residents remain in the facility for one year or more. Most facilities are run as for-profit enterprises; though about 13% are not-for-profit according to the Office of Statewide Health Planning and Development. Two out of three nursing facility residents are women.

Nursing homes receive revenue from three primary sources. Medi-Cal, the state’s Medicaid program, pays for the majority of nursing home days in California. These residents must meet Medi-Cal eligibility requirements. Medicare is a federal health insurance program that provides coverage to eligible beneficiaries at federal expense. However, Medicare provides only a limited nursing home benefit for beneficiaries recovering from a hospital stay. In addition, Medicare generally only pays for 100 days of nursing home care per beneficiary per year. Some private-pay nursing home residents pay for care out of their own pocket. Other private-pay residents have their care paid for through long-term care insurance or their existing health care insurance policies. In 2012, the reported average cost per patient day for a skilled nursing facility was approximately \$226 (\$82,500 annually).

## **DPH L&C**

The programmatic responsibilities of DPH are grouped within five clusters: the Center for Chronic Disease Prevention and Health Promotion, the Center for Infectious Diseases, the Center for Family Health, the Center for Environmental Health, and the Center for Health Care Quality.

Since the 2007-08 fiscal year, the DPH budget has grown by 9.8%: from \$3.091 billion to \$3.396 billion in fiscal year 2013-14. Personnel allocated to the department have increased from 3,228 to 3,805, or about 17.9% during that period. Resources are a mixture of special funds, General Funds, and licensing fees.

L&C, within the Center for Health Care Quality, is the largest program within DPH, with about 1,200 management and staff. L&C is responsible for ensuring and promoting a high standard of medical care in approximately 8,000 health care facilities and agencies in California, including about 1,286 SNFs. L&C also oversees the certification of nurse assistants (a key classification of nursing home employees), home health aides, and hemodialysis technicians and the licensing of nursing home administrators.

California's nursing facilities are subject to comprehensive state and federal mandates governing all aspects of resident care and facility operations. L&C performs annual inspections of all state licensed long-term care facilities. The typical inspection lasts about three days and involves three or more state employees, known as surveyors.

L&C employs over 600 surveyors and uses teams to inspect nursing homes. Teams consist primarily of registered nurses classified as Health Facility Evaluator Nurses. On some inspections, the team is joined by other professionals, like pharmacists, nutritionists, physical and occupational therapists, infection control experts, and physician consultants.

In addition to inspecting nursing homes for compliance with state law, L&C is also the state survey agency for CMS—it is responsible for certifying to the federal government that health care facilities are eligible for payments under CMS programs. According to CMS, state survey agencies perform initial surveys (inspections) and periodic resurveys (including complaint surveys) of health facilities that receive Medicare or Medicaid financial reimbursement. CMS requires L&C to promptly review complaints/incidents, conduct unannounced onsite investigations of reports alleging noncompliance, and inform CMS of any certification requirements that are found to be out of compliance.

Federal certification inspections are generally conducted on-site over a four to five day period, during which the inspection team evaluates all aspects of resident care and nursing home procedures and practices, and assesses facility compliance with state and federal standards. Surveyors review compliance with state licensing requirements during the federal certification inspection or during a separate licensing inspection and during on-site complaint investigations.

Inspections include observations of resident care; inspection of all areas of the nursing home; interviews of residents, family members, staff or other individuals; and inspection of medical records and other documents. The inspection team also evaluates the quality of resident care through an analysis of statistical data reported by nursing homes.

Inspections in response to complaints are generally shorter than certification inspections. If during the course of a complaint investigation DPH uncovers additional problems, a full on-site inspection may be initiated.

According to data provided to the Committees, over 62% of the L&C personnel workload is dedicated to SNF and intermediate care facility surveys, recertification, field surveys, and complaint responses. L&C may issue state citations, impose sanctions, and assess monetary penalties on those facilities that fail to meet requirements.

L&C carries out the state's health facility licensing and certification activities through a network of 14 district offices and a contractual role with the County of Los Angeles. District offices exist in Bakersfield, Chico, Oakland, Fresno, Orange County, Santa Rosa, Riverside, Sacramento, San Bernardino, San Diego (2), San Francisco, San Jose, and Ventura. Each district office is led by a Supervising Health Facility Evaluator and support staff and performs the regulatory duties of licensure and certification.

The majority of L&C's licensing, certification, and enforcement activities are performed by health facility evaluator nurses (HFENs). An HFEN must meet the legal requirements to practice as a professional registered nurse in California and have one year of professional nursing experience, including at least six months of administrative responsibility, such as a charge nurse, shift supervisor, head nurse, director of staff development, or teaching experience in nursing education.

L&C oversees an extensive system of training for newly recruited HFENs. All HFEN recruits receive training through the state survey academy and receive CMS long-term care training within one year of hire. In addition, new supervisors attend appropriate training as soon as possible, but in no case no later than six months after hire. Additional training includes state mandated training on the new surveyor tool related to evaluating antipsychotic medication use and conducting complaint investigations, including assessing scope and severity to ensure consistent application of federal regulations throughout the district offices.

DPH indicates that HFEN personnel have historically been difficult to recruit and hire due to the state's inability to compete with private sector pay and due to delays in the hiring process. DPH indicates that, as a result of an advertising campaign, retention and recruitment bonuses, and a reduction in personnel processing time, the L&C surveyor vacancy rate has declined from 11% to 4% since January 2012.

## **Investigation of health facility complaints by L&C**

Investigations of complaints and facility-reported incidents (reports facilities make when an unusual event, like outbreaks, fires, disruption of services, major accidents, or other unusual occurrences that threaten the health and safety of patients, residents, clients, staff, or visitors) are carried out pursuant to dual mandates from both federal and state protocols. Under California and federal law, DPH must begin an onsite investigation of a complaint within 10 working days of receipt. If the complaint involves a threat of imminent danger of death or serious bodily harm, state law requires DPH to investigate onsite within 24 hours of receipt of the complaint. Federal rules allow for a two day period prior to the initiation of an investigation.

The long-term care facility complaint investigation process described by DPH is complex. DPH reports that L&C is in the process of revising its complaint process to incorporate federal requirements. In the interim, DPH is using standard complaint procedures provided by CMS. According to CMS, the goal of federal requirements for the complaint/incident process is to establish a system that will assist in promoting and protecting the health, safety, and welfare of residents, patients, and clients receiving services.

State law sets out specific requirements for investigation of complaints in long-term care facilities. According to materials provided by DPH, the key steps in the complaint process include the following:

- A complaint is submitted by telephone, writing (including fax and e-mail), or in-person (all district office staff are trained to be prepared take a complaint).
- The district office formalizes the complaint by populating an incident intake form with data necessary to initiate tracking in the DPH's "ACTS" (Aspen Complaint Tracking System).
- The completed complaint intake document is then given to a supervisor for review, tracking and evaluator assignment.
- Within two working days of receipt of the complaint, the complainant is notified of the name of the assigned evaluator by the district office.
- The complainant is informed of the DPH's proposed course of action and given the opportunity to accompany the inspector on the inspection or investigation of the facility.
- DPH performs an onsite inspection or investigation within timeframes required by state and federal law.
- DPH may issue a citation based upon observations, statements, or records.
- Within 10 days of completion of the investigation, DPH is required to inform the complainant and licensee of DPH's determination as a result of the investigation.

## **Investigation of complaints against nurse assistants**

The principle employee classification deployed in nursing homes is certified nurse assistant (CNA). CNAs receive 60 hours of classroom training and 100 hours of precertification supervision. State and federal law require a 16-hour orientation program to be given to newly employed CNAs prior to providing direct patient care. CNAs must also pass a criminal background clearance.

The Professional Certification Branch (PCB) within L&C is responsible for the certification of over 160,000 CNAs, home health aides, hemodialysis technicians and the licensure of over 3,000 nursing home administrators. PCB's Investigation Section is responsible for investigation of all complaint allegations received of unprofessional conduct including abuse, neglect and misappropriation involving professionals certified by PCB.

State law requires DPH to investigate complaints concerning misconduct by CNAs. Based on the results of an investigation, DPH may deny an application for, initiate an action to suspend or revoke a certificate for, or deny a training and examination application for unprofessional conduct, such as incompetence, gross negligence, physical, mental, or verbal abuse of patients, or misappropriation of property of patients, conviction of a crime substantially related to the qualifications, functions, and duties of a CNA, conviction for misuse of controlled substances, or fraud. DPH maintains a registry that includes the certification status of all CNAs, including the status of any proposed or completed disciplinary actions.

Investigators work primarily in the field, interviewing complainants, victims and witnesses; reviewing medical, financial, and criminal records; developing investigative leads; and collecting, securing and interpreting evidence. In the office, the investigators document case findings and recommend disciplinary actions.

When a complaint is of a criminal nature, investigators work with local law enforcement, the Department of Justice (DOJ) and other agencies. Investigators also testify as expert witnesses in criminal cases filed by local prosecutors and DOJ.

## **Criticism of L&C complaint investigations**

The L&C complaint investigation process has been a subject of criticism for several years. In 2006, the California Advocates for Nursing Home Reform (CANHR) and two consumers sued the Department of Health Services (or DHS, which then housed L&C) to force DHS to comply with state law requiring initial onsite investigation within 10 days of receipt of a complaint. DHS informed the court that 9,463 of 17,210 complaints were initiated within 10 working days, with a backlog of 1,071 complaints still to be initiated. The court issued the order requested by CANHR, which established several performance benchmarks, including: 1) conduct initial on-site investigations within 10 working days for 80% of new complaints received through April of 2007; 2) conduct initial investigations within 10 days for 100% of new complaints received

beginning in May of 2007; 3) conduct initial on-site investigations for 40% of all complaints received through September 2006 to address the backlog; and 4) clear the entire backlog of complaints by September 27, 2006.

In its February 23, 2006 analysis of the 2006-07 Budget, the Legislative Analyst's Office (LAO) reported that California's nursing home oversight system suffered from serious weaknesses. In fiscal year 2004-05, DHS reported that only one-half of all complaints alleging harm, but not immediate and serious, were investigated within the 10-day timeframe required under federal rules. In fiscal year 2001-02, nearly 72% of these complaints had been investigated within 10 days. The LAO also reported a similar reduction in the timeliness of investigations of self-reported incidents.

In 2007, the Bureau of State Audits published a report entitled, "Department of Health Services: Its Licensing and Certification Division Is Struggling to Meet State and Federal Oversight Requirements for Skilled Nursing Facilities." The report found that DHS had struggled to initiate and close complaint investigations and communicate with complainants in a timely manner. In addition to timeliness issues, the report found that L&C did not correctly prioritize complaints and understated the severity of certain deficient practices at SNFs. The report found that, over a two year period, investigations of 9% of highest priority complaints and over half of all other complaints were not initiated within statutory time frames. For non-highest priority complaints, which L&C is required to investigate within 10 days of receipt, 17% of investigations were initiated more than 90 days after receipt of the complaint.

On June 20, 2012, CMS sent a letter to DPH expressing concern with the ability of DPH to meet many of its responsibilities as state survey agency. In this letter, CMS stated that L&C was not adequately meeting federal survey and certification workload requirements. As a result of these concerns, CMS set benchmarks for DPH to attain and is requiring quarterly updates from DPH on its work plans and progress on meeting these benchmarks. CMS withheld over \$1.5 million from the state grant from DPH until L&C was able to demonstrate compliance with the benchmarks. Ultimately, 38 of 41 benchmarks were met and CMS withheld less than \$200,000.

As one of the benchmarks, CMS required DPH to conduct a comprehensive assessment of its survey and certification operations. DPH elected to hire an outside consultant, Hubbert Systems, Inc., to analyze internal systems in order to optimize practices, assess programmatic activities, perform a gap analysis, and provide a remediation plan for the timely fulfillment of L&C's state licensing and federal certification workload. The contractor has been tasked with providing weekly telephonic updates, monthly written reports, and additional incremental reports on progress.

In September 2013, the Center for Investigative Reporting published an article entitled, "Quick dismissal of caregiver abuse cases puts Calif. patients at risk," which focused on the investigation of complaints against nursing home employees by L&C's PCB. The article

asserted in 2009, due to a large backlog of complaints against CNAs and home health aides (HHAs), L&C ordered its investigators to dismiss nearly 1,000 pending cases, often with a single phone call from Sacramento headquarters. The article suggests this rapid reduction in the CNA/HHA complaint backlog was a result of less rigorous investigations: in 2006, L&C revoked or denied a caregiver’s certification in 27% of complaints it investigated, whereas in 2009, only 7% of complaints resulted in revocation or denial of certification.

**L&C funding and resources**

The Budget Act of 2006 altered altered the way L&C acquires resources to perform oversight duties. It established a new fee structure for health facilities that are licensed and/or certified by L&C: fees must be calculated based on (1) specified workload data provided by DPH to the Legislature and made available to the public on their website, (2) any General Fund support appropriated by the Legislature, (3) any federal grant funds received for this purpose, and (4) any policy adjustments as proposed by the Administration and as adopted by the Legislature. The Budget Act required L&C to become entirely supported by special funds and federal funds by the beginning of the 2009-10 fiscal year unless otherwise specified in statute, or unless funds are specifically appropriated from the General Fund by the Legislature. The fees are updated annually and published no later than 14 days after the chaptering of the annual Budget Act. For 2013, L&C was allocated \$56.8 million for the performance of L&C’s responsibility as the state survey agency from a combination of state licensing fees and federal funds provided to the state to perform various certification activities on behalf of CMS.

In order to manage data related to enforcement a related timekeeping system was initiated in fiscal year 2006-07. This Time Entry and Activity Management (TEAM) System captures data on the number of surveys with exit dates and the total hours spent for each survey activity to determine the average hours it takes to accomplish specific workload. The L&C program uses such data to estimate state licensing workload and subsequently set the licensing fee for each facility type. Per bed fees for SNFs since fiscal year 2006-07 are as listed in the table below:

| <b>2006-07</b> | <b>2007-08</b> | <b>2008-09</b> | <b>2009-10</b> | <b>2010-11</b> | <b>2011-12</b> | <b>2012-13</b> | <b>2013-14</b> |
|----------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|
| \$202.96       | \$250.77       | \$287.00       | \$287.00       | \$228.57       | \$297.14       | \$312.00       | \$312.00       |

State law requires DPH to prepare an analysis along with the annual fee report that includes, among other data, information on the number and timeliness of complaint investigations. The law does not specify how DPH should measure the timeliness of complaint investigation. From 2007-08 to 2009-10, DPH reported the percentage of investigations completed within specified time frames. The reported time frames vary from year to year. Beginning with the 2012-13 report’s information on 2010-11 complaints, DPH has not included any information on timeliness of complaint investigations. The information from the annual fee reports on complaint investigations for long-term care facilities is summarized in the table below:



| <b>Fiscal Year</b> | <b>Total complaints received</b> | <b>Complaints requiring investigation</b> | <b>Immediate and serious (IS) complaint investigation completion rate</b> | <b>Non-IS complaint investigation completion rate</b> |
|--------------------|----------------------------------|---|---|---|
| <b>2007-08</b>     | 6,754                            | 6,356                                     | 69% within 10 days  | 79% within 40 days                                    |
| <b>2008-09</b>     | 6,275                            | 5,961                                     | 61% within 40 days  | 21% within 40 days                                    |
| <b>2009-10</b>     | 6,027                            | 5,692                                     | 47% within 40 days  | 54% within 60 days                                    |
| <b>2010-11</b>     | 5,838                            | 5,523                                     | Not reported  | Not reported  |
| <b>2011-12</b>     | 6,109                            | 5,701                                     | Not reported  | Not reported  |

In DPH’s May Revise Estimate for the 2013-14 State Budget, the Department estimated that 133 additional positions, including 97 HFENs, would be required to complete 100% of L&C’s state and federal mandated workload. However, the Estimate notes that the federal government does not provide funding for the full mandated workload and states, “Due to the current fiscal climate, adjustments are made to not request additional positions.” Instead, DPH requested 21 positions, including 15 HFENs, supported with existing resources within the current L&C special fund appropriation.

However, in DPH’s November Estimate for the 2014-15 State Budget, DPH states that the calculations for the 2013-14 Budget overestimated L&C’s staffing needs, partially due to an error in calculation. DPH states that there is now a decrease of overall surveyor workload hours and staffing needs. To address the fluctuations in estimated workload, DPH has proposed to expand the work being done by the outside contractor to conduct high-level workload assessments and the development of improvements in six areas, including workload management and the TEAM System. In light of this ongoing and expanded evaluation, DPH proposes to keep staffing levels constant until the contractor’s evaluation is complete.

**Conclusion**

Through its recent actions in response to federal sanctions, DPH has taken steps to improve the timeliness of the initiation and completion of complaint investigations by L&C. But these federal sanctions, combined with a history of reports of inadequacies in DPH’s complaint investigations, suggest a persistent pattern of problems in DPH’s investigations of complaints against the facilities and personnel it licenses and/or certifies. Through this hearing, the Committees hope to learn what actions DPH is taking and what policy changes are necessary to help ensure that DPH has the resources and ability to meet its statutory obligations to protect Californians in nursing homes.

## **Previous Legislation**

AB1710 (Yamada), Chapter 672, Statutes of 2012, revises how nursing home administrator licensing fees are to be adjusted so that fee revenue is sufficient to cover the regulatory costs to DPH, and revises and increases DPH reporting requirements regarding the Nursing Home Administrator Program (NHAP).

SB 799 (Negrete-McLeod) of 2011 would have required DPH to complete long-term care facility complaint investigations within a 90-working day period. SB 799 was held on the suspense file in Senate Appropriations.

AB 399 (Feuer) of 2007 would have established a 40 day timeframe for DPH to complete a long-term care facility complaint investigation. AB 399 was vetoed by Governor Schwarzenegger with the following message: “While I believe this bill is well-intended, it is premature to place additional investigation requirements on this program as it continues to demonstrate progress in meeting its mandated state and federal workload.”

AB 1807 (Committee on Budget), Chapter 74, Statutes of 2006, was the health trailer bill for the Budget Act of 2006. Among other changes, AB 1807 establishes a new fee structure for health facilities that licensed and/or certified by L&C: fees must be calculated based on (1) specified workload data provided by DPH to the Legislature and made available to the public on their website, (2) any General Fund support appropriated by the Legislature, (3) any federal grant funds received for this purpose, and (4) any policy adjustments as proposed by the Administration and as adopted by the Legislature. States intent that L&C become entirely supported by fees and federal funds by no later than July 1, 2009.

SB 1312 (Alquist) Chapter 895, Statutes of 2006, requires inspections and investigations of long-term care facilities certified by the Medicare or Medicaid program to determine compliance with federal standards and California statutes and regulations.

AB 1731 (Shelley), Chapter 451, Statutes of 2000, enacts major reforms for SNFs and intermediate care facilities, including the expansion of citations and penalties, an increase in disclosure requirements and inspections, requires DPH to provide specified notice to complainants within specified timeframes, and requires initial onsite investigations within 24 hours in response to complaints where there is a serious threat of imminent danger of death or serious bodily harm.