

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 NUMBER 2010-108, ISSUED JUNE 2010

The report concludes that the Department of Public Health (Public Health) and the former California Department of Health Services have overstated the fund balances for the State and Federal Health Facilities Citation Penalties Accounts (state and federal accounts) on the fund condition statements since at least fiscal year 2004–05. Of particular note is that Public Health's budget section overstated the federal account's ending fund balance by \$9.9 million for fiscal year 2008–09. Errors made in the fund condition statements have masked the fact that the federal fund is now nearly insolvent and this condition may adversely affect services provided by the Department of Aging's (Aging) Long-Term Care Ombudsman Program designed to help protect residents of long-term health care facilities (facilities) from abuse and neglect.

Revenue for the state and federal accounts is derived from citations imposing Civil Money Penalties (monetary penalties) that Public Health's Licensing and Certification Division (division) or the Centers for Medicare and Medicaid Services (CMS) issue depending on whether the violation cited is with state or federal requirements. Although the division generally collects payments for all of the citations it issues for which the facilities choose not to appeal that are collectable, the amounts it ultimately collects are less than those originally imposed mainly because state law permits a 35 percent reduction to the monetary penalty if it is paid within a specified time frame. Specifically, during the nearly seven-year period we reviewed, the division imposed \$8.4 million in monetary penalties but collected only \$5.6 million. Furthermore, a significant amount of monetary penalties imposed by the division are stalled in the appeals process. From fiscal year 2003–04 through March 15, 2010, facilities appealed citations totaling \$15.7 million in monetary penalties. Of this amount, citations comprising nearly \$9 million were still under appeal and some of these citations were contested roughly eight years ago. The large number of citations stalled in the appeals process is likely due to incentives the appeals process offers facilities, including the delay of payment until the appeal is resolved and the potential that the monetary penalty will be significantly reduced. In fact, 71 percent of the citations issued, appealed, and resolved in the time period we reviewed received reductions to the original amount imposed. In particular, of the \$5.3 million imposed by citations that were appealed and ultimately reduced, facilities were required to pay only \$2.1 million.

Finally, we identified several opportunities for Public Health to increase revenue for both the state and federal accounts by seeking changes to state law and by ensuring the division adheres to current law. For instance, Public Health should seek the authority to revise the monetary penalties specified in state law—some were last revised in 2001 and others in 1985. We estimate that had the monetary penalties for citations been revised at the rate of inflation, Public Health could have collected nearly \$3.3 million more in revenue for the state account.

In the report, the California State Auditor (state auditor) made the following recommendations to Public Health. The state auditor's determination regarding the current status of recommendations is based on Public Health's response to the state auditor as of June 2011.

Recommendation 1.1.a—See pages 20—21 of the audit report for information on the related finding.

To ensure that the governor's budget does not overstate funds available for appropriation for the federal account, Public Health should include text in its budget section procedure manual requiring staff to reconcile the revenues, expenditures, and fund balance as supported by Aging's and Public Health's accounting records to the fund condition statement prepared for inclusion in the governor's budget.

Public Health's Action: Fully implemented.

Public Health has updated its budget section procedure manual with the revised fund condition statement procedures. Included in the manual are requirements for budget section staff to reconcile the revenues, expenditures, and fund balance prior to inclusion of the fund condition statement in the governor's budget. Additionally, Public Health stated that its budget section has implemented the procedures manual and held training for staff in March 2011 related to the revised procedures.

Recommendation 1.1.b—See page 21 of the audit report for information on the related finding.

To ensure that the governor's budget does not overstate funds available for appropriation for the federal account, Public Health should ensure that supervisory review is performed of the reconciliation of the fund condition as supported by Aging's and Public Health's accounting records to the fund condition statement prepared for inclusion in the governor's budget.

Public Health's Action: Fully implemented.

The fund condition statement procedures, included in Public Health's budget section procedures manual, require that a supervisor review the fund condition and indicate approval with a signature and date.

Recommendation 1.2.a—See pages 23—24 of the audit report for information on the related finding.

To increase revenue for the state account, Public Health should update its Electronic Licensing and Management System (ELMS) to use the issuance date of the citation as specified in state law when calculating whether a facility's payment was received in time to warrant a 35 percent reduction. Further, the division should update its monetary penalty assessment form to ensure it contains language that is consistent with state law. To the extent Public Health believes state law should be revised to reflect the date on which the facility received the citation, rather than the date the citation was issued, it should seek legislation to make such a change.

Public Health's Action: Fully implemented.

In December 2010 Public Health enhanced ELMS to use the citation issuance date when calculating whether a facility's payment was received in time to warrant a 35 percent reduction. Further, in September 2010, Public Health updated its monetary penalty assessment form with language that is consistent with state law. Finally, Public Health stated that it does not believe that it needs to revise state law to reflect the date on which the facility received the citation, rather than the date the citation was issued. Thus, our related recommendation is not applicable.

Recommendation 1.2.b—See pages 25—30 of the audit report for information on the related finding.

To increase revenue for the state account, Public Health should seek legislation authorizing it to require facilities that want to contest the monetary penalty to pay the penalty upon its appeal, which could then be deposited into an account within the special deposit fund. The original monetary penalty deposited, plus interest accrued in the account, should then be liquidated in accordance with the terms of the decision.

Public Health's Action: No action taken.

- Although Public Health originally agreed in its 60-day and six-month response with our recommendation, in its one-year response it stated that it is changing its position after meeting with stakeholders in January 2011. Public Health indicated that changing the collection process to require facilities to prepay penalties, and placing the penalties in an interest bearing account, would

result in a cost to the department of approximately \$65,000 a year. Public Health explained that the administrative cost of maintaining such an account would need to be paid either by the imposition of a nonrefundable administrative fee upon filing of an appeal or by an increase in licensing fees.

However, as we explain in our report, Public Health could probably generate more than enough interest revenue to outweigh the costs to administer the account. Further, establishing an account within the special deposit fund could help increase revenue for the state account and deter some facilities from appealing citations solely to defer or reduce payments of their monetary penalties.

Legislative Action: Unknown.

The state auditor is not aware of any action taken by the Legislature as of January 5, 2012.

Recommendation 1.3—See pages 29—30 of the audit report for information on the related finding.

To ensure consistency with federal guidance related to federal requirements, and that it is not creating incentives for facilities to appeal citations issued for noncompliance with state requirements, Public Health should provide guidance to its staff that discourages settling appealed monetary penalties for a better term than had the facility not contested the citation and paid the penalty within the time frame specified in law to receive a 35 percent reduction. If Public Health believes instances occur when it is appropriate to reduce a monetary penalty by more than 35 percent, it should document which statutory or regulatory factors that formed the basis for concluding that the original class of citation and corresponding monetary penalty amount were no longer considered valid or relevant.

Public Health's Action: No action taken.

Public Health stated that it disagrees with our recommendation related to establishing a policy that discourages settling appealed monetary penalties for a better term than had the facility not contested the citation, and will therefore not implement our recommendation. Additionally, Public Health stated that it will not implement our recommendation related to documenting the factors that formed the basis for reducing a monetary penalty by more than 35 percent. While Public Health agreed there should not be incentives for facilities to appeal citations, it asserted that it must maintain maximum discretion to weigh all factors in a final settlement. However, as we describe in our report, using its discretion in reducing monetary penalties has resulted in Public Health granting an average reduction to monetary penalties of 59 percent of the amount originally imposed over the past six years. Therefore, it appears that the manner in which Public Health is currently exercising its discretion to reduce monetary penalties could be an incentive for facilities to appeal citations.

Recommendation 1.4.a—See pages 31—33 of the audit report for information on the related finding.

To ensure that citation review conferences are completed expeditiously, Public Health should continue to take steps to eliminate its backlog of appeals awaiting a citation review conference.

Public Health's Action: Partially implemented.

To address the backlog of appeals awaiting a citation review conference, Public Health stated that it conducted citation review conferences for all Class A violations that were pending when we issued our report. In July 2010 Public Health entered into a contract with the Office of Administrative Hearings (OAH) to address the backlog of appeals for Class AA violations. However, Public Health stated that it terminated this contract in April 2011 due to escalating costs and because OAH was unable to conduct the citation review conferences consistent with Public Health's protocols. As a result, Public Health stated there is still a backlog of one Class AA, 162 Class A, and 337 Class B violations awaiting citation review conferences. Public Health recently hired three retired annuitants to conduct citation review conferences.

Recommendation 1.4.b—See pages 25—30 of the audit report for information on the related finding.

To ensure that citation review conferences are completed expeditiously, Public Health should seek legislation amending its citation review conference process to more closely reflect the federal process by prohibiting facilities from seeking a delay of the payment of monetary penalties on the grounds that the citation review conference has not been completed before the effective date of the monetary penalty.

Public Health's Action: Fully implemented.

See the legislative action below.

Legislative Action: Legislation enacted.

Chapter 729, Statutes of 2011 (Assembly Bill 641), eliminates the citation review conference from the citation appeals process for long-term care facilities and allows fines to be levied from both state and federal agencies when an incident violates both state and federal laws.

Recommendation 1.4.c—See pages 32—33 of the audit report for information on the related finding.

To ensure that citation review conferences are completed expeditiously, Public Health should monitor its progress in processing appealed citations for Class AA and Class B violations as well as OAH's progress in processing appealed citations for Class A violations.

Public Health's Action: Fully implemented.

Public Health stated that it now has a project manager responsible for tracking and coordinating citation review conferences and noted that it decreased the backlog for Class AA and Class B violations. Public Health stated that the backlog of Class A violations has risen after terminating the OAH contract, but anticipates this number will decrease because three retired annuitants are dedicated to conducting citation review conferences.

Recommendation 1.5.a—See pages 34—36 of the audit report for information on the related finding.

To increase revenue for the penalty accounts, Public Health should seek legislation authorizing it to revise periodically the penalty amounts to reflect an inflation indicator, such as the Consumer Price Index.

Public Health's Action: Partially implemented.

Public Health recognizes that this recommendation requires a statutory change. Public Health stated that, as a first step, the legislation referenced below increased the fine for Class B violations to \$2,000. It asserted that, going forward, it will continue to evaluate increases to the monetary penalty amounts for the other classes of violations.

Legislative Action: Legislation enacted to partially implement.

Chapter 4, Statutes of 2011 (Assembly Bill 19), authorizes Public Health to increase the fine for Class B violations to \$2,000.

Recommendation 1.5.b—See pages 34—36 of the audit report for information on the related finding.

To increase revenue for the penalty accounts, Public Health should encourage the CMS to seek changes to federal regulations authorizing CMS to revise periodically the monetary penalty amounts imposed on facilities to reflect the rate of inflation.

Public Health's Action: Fully implemented.

In December 2010 Public Health issued a letter to CMS encouraging it to periodically revise the monetary penalties imposed on facilities that are not compliant with federal requirements to reflect the rate of inflation.

Recommendation 1.5.c—See page 36 of the audit report for information on the related finding.

To increase revenue for the penalty accounts, Public Health should ensure that it conducts all state surveys of facilities every two years, as required by state law.

Public Health's Action: Pending.

Public Health concurs that it should conduct all state surveys of facilities every two years as required by state law and is making a concerted effort to do so. However, Public Health stated that it is unable to meet this standard at this time due to insufficient staffing resources.

Recommendation 1.5.d—See pages 36—37 of the audit report for information on the related finding.

To increase revenue for the penalty accounts, Public Health should submit to the Pooled Money Investment Board a request that the board approve including both the state and federal accounts in the Surplus Monetary Investment Fund (SMIF) in order to increase revenue for both accounts.

Public Health's Action: Fully implemented.

Public Health stated that it submitted a request to the Pooled Money Investment Board to include the penalty accounts in the SMIF in June 2010. The request was approved and the penalty accounts began to accrue interest for the fourth quarter of fiscal year 2009–10.

Recommendation 1.5.e —See pages 36—37 of the audit report for information on the related finding.

To increase revenue for the penalty accounts, Public Health should seek authorization from the Legislature both to impose a monetary penalty and to recommend that CMS impose a monetary penalty when the division determines that a facility is not complying with both state and federal requirements.

Public Health's Action: Fully implemented.

See the legislative action below.

Legislative Action: Legislation enacted.

Chapter 729, Statutes of 2011 (Assembly Bill 641), removes the prohibition of the issuance of both a state citation and the recommendation to impose a federal monetary penalty when Public Health determines that a facility is in violation of any state or federal law, regulation, or statutory provision.

Recommendation 1.5.f —See pages 37—38 of the audit report for information on the related finding.

To increase revenue for the penalty accounts, Public Health should seek legislation specifying a time frame within which facilities with nonappealed citations that do not qualify for a 35 percent reduction must pay their monetary penalties and allowing Public Health to collect interest on late payments of monetary penalties.

Public Health's Action: Pending.

Public Health did not entirely agree with our recommendation. However, Public Health indicates that it will explore proposing legislation for the 2012 legislative session that specifies a time frame within which nonappealed citations that do not qualify for a 35 percent reduction must be paid.

Legislative Action: Unknown.

The state auditor is not aware of any action taken by the Legislature as of January 5, 2012.

Recommendation 1.5.g—See pages 37—38 of the audit report for information on the related finding.

To increase revenue for the penalty accounts, Public Health should increase its coordination with CMS to ensure that it can track CMS's implementation of the recommendations that the division makes to CMS for the period before receiving training from CMS, and that it effectively use the Automated Survey Processing Environment (ASPEN) to track recommendations after the training.

Public Health's Action: Fully implemented.

Public Health stated that it worked with CMS to increase coordination. Public Health now generates a quarterly report from ASPEN that tracks the recommendations made by the State and related enforcement actions.

Recommendation 1.6—See pages 38—40 of the audit report for information on the related finding.

To make certain that it fully implements the recommendations made in our April 2007 audit report, Public Health should create written procedures specifying that expenditure reports should be reviewed monthly by an accounting analyst within the division to determine whether all charges apply to temporary manager payments. Further, Public Health should include in its written policies and procedures that general support items should not be charged to the penalty accounts.

Public Health's Action: Fully implemented.

Public Health stated that it finalized and implemented the procedures specifying that expenditure reports should be reviewed by an accounting analyst within Public Health on a monthly basis. Additionally, in June 2010, Public Health circulated written policies and procedures to staff which noted that general support items should not be charged to the penalty accounts.

Recommendation 1.7—See pages 39—40 of the audit report for information on the related finding.

To ensure that it complies with current state law and increases transparency, Public Health should adopt regulations for the administration of temporary management companies.

Public Health's Action: Pending.

Public Health stated that it will complete the regulations for the administration of temporary management companies by 2016.