STATE OF NEW YORK
DEPARTMENT OF HEALTH

161 Delaware Avenue Delmar, NY 12054-1393

Antonia C. Novello, M.D., M.P.H., Dr. P.H.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

October 20, 2005

DAL/DQS: 05-10
Subject: Nursing Home Requirements
to Report to Department of Health

Dear Administrator:

In March 2000, the Department of Health issued a Dear Administrator Letter (DAL 00-04) describing the responsibilities of nursing homes in reporting abuse, mistreatment and neglect. In December 2004, the Centers for Medicare and Medicaid Services (CMS) issued guidance on the reporting requirements for nursing homes when there are alleged violations related to mistreatment, neglect, abuse, injuries of unknown origin and misappropriation of resident property.

To respond to provider inquiries regarding compliance with State law and federal regulations related to reporting responsibilities, timeframes and expectations, the Department is issuing this letter to provide clarification regarding the following:

- nursing home requirements to report incidents of alleged abuse, neglect and mistreatment to DOH
- provider responsibilities to investigate incidents, and
- nursing home requirements to comply with the Abuse Prohibition Protocol.

This letter supplements and does not replace, the information previously distributed in the March 2000 DAL (00-04).

State and Federal Definitions

The table found as Appendix A to this letter presents the relevant definitions under Federal and State requirements.

What to Report

Federal regulations (42 CFR 483.13), and state regulations (10NYCRR 415.4) require the reporting of alleged violations of abuse, mistreatment and neglect, including injuries of unknown origin, immediately to the facility administrator and in accordance with state law, to the Department of Health. In addition, Federal regulations require that alleged violations of misappropriation of resident property be reported. CMS has defined 'immediately' as, "as soon as possible, but not to exceed 24 hours after the discovery of the incident".

NYS Public Health Law (PHL) Section 2803-d requires the reporting of abuse, mistreatment or neglect immediately to the Department upon having "reasonable cause" to believe that abuse, neglect, or mistreatment has occurred. Department regulations at section 81.1(d) (10NYCRR section 81.1(d)) defines "reasonable cause" to mean that upon a review of the circumstances, there is sufficient evidence for a prudent person to believe that physical abuse, mistreatment or neglect has occurred.

Circumstances to be reviewed that may lead to a "reasonable cause" conclusion might include, but are not limited to:

- a statement that physical abuse, mistreatment, or neglect has occurred;
- the presence of a physical condition (e.g. a bruise) which is inconsistent with the history or course of treatment of the resident; or
- a visual or aural observation of an act or condition of abuse, mistreatment or neglect.

Providers will comply with that part of the Federal reporting requirement to state officials in accordance with state law as contained in 42CFR 483.13 by following the "reasonable cause" requirement defined in the PHL, Section 2803-d. Federal regulations require that, "the facility must ensure that all alleged violations involving mistreatment, neglect and abuse..." are reported immediately to the administrator of the facility **and to other officials in accordance with State law**."

Providers should report to the Department alleged violations of abuse, mistreatment, neglect, injuries of unknown origin, or misappropriation of resident property, only if and when the "reasonable cause" threshold has been achieved. **This might occur before the provider investigation into the incident has begun or at any time during the investigation. If the "reasonable cause" threshold has not been achieved, notification to the DOH is not required under the aforementioned federal and state regulations and state law.**

Who Must Report

Public Health Law Section 2803-d identifies mandatory reporters as those professionals who care for nursing home residents. Those who care for residents include health care workers who provide services to nursing home residents in other health care settings and those who provide services under contract. Anyone may report alleged abuse, mistreatment, or neglect. All nursing home staff should be aware of their responsibility to report to the Department.

Facility Investigations of Incidents

Federal and State regulations (42 CFR 483.10(f) and 42 CFR 483.13(c) and 10NYCRR 415.4(b)(2)(3)(4), 415.26(b)(6)) require that providers investigate incidents and complaints. The results of an investigation of abuse, mistreatment, neglect or misappropriation of resident property must be reported both to the administrator (or designees) and to other officials (including the Department of Health) within **5 working days of the incident** (42CFR 483.13(c)(4)). An allegation, as previously stated, must be reported immediately to the Department when meeting the reasonable cause standard.

It is important that provider investigations are thoroughly documented. A thorough investigation includes the following:

- The date and time the incident was discovered;
- Who discovered the incident;
- How the incident was discovered;
- A description of the resident and any pertinent information regarding their condition (medical, psychological, behavioral, etc.) noted prior to discovery of the incident;
- A description of the resident and the area where the incident occurred;
- An interview log that includes:

    - Names of staff interviewed along with their **signed and dated** statements;
    - Staff who the facility decided not to interview, and why it was decided not to interview these staff;
    - A list of the questions posed to the staff interviewed;
    - A statement from the resident, if they are able to provide a statement about the incident; And,
    - statements from roommates, volunteers, visitors any other individual who may have been in the area the incident took place and may have been a witness to the incident.

Department of Health staff will continue to review the handling of these types of allegations during survey/complaint investigation by application of the CMS Abuse Prohibition Protocol. Facilities are strongly encouraged to review with staff the Abuse Prohibition Protocols and the seven areas covered (Screening, Training, Identification, Resident Protection, Investigation, Report/Response and Prevention). (See Appendix B)

Providers must be able to provide evidence that once an allegation of abuse (neglect, mistreatment, misappropriation of resident property) was made, that the investigation was commenced **immediately** regardless of the time of the day or the day of the week that the incident occurred. Evidence of an investigation includes:

- An explanation of the evidence reviewed;
- What documents (i.e. care plans, policies and procedures) were reviewed and why these documents were selected for review;
- The conclusion reached as a result of the investigation with a discussion of its basis; and

- Any changes implemented to care plans, policies, and procedures to prevent recurrence, as a result of the investigation.

Other Issues

Providers should be aware that verbal abuse must be reported to the Department of Health. In addition, resident-to-resident abuse must be reported if one or both of the following exist:

- There are repeated instances of aggressive resident behavior that the facility has not satisfactorily identified, or implemented a care plan to intervene, **OR**
- Residents have been physically or mentally harmed by the aggressor.

As also articulated in the DAL 00-04, providers must report to the Department instances in which there is a failure to follow the care plan, when:

- There are repeated failures by staff to follow the care plan; **OR**
- Resident harm has occurred.

Failure to Report

The Department has analyzed the types and number of complaints that have been reported to the Centralized Complaint Intake Program (CCIP). The Department has concluded that some facilities have not differentiated between complaints where the Department is required to be notified (abuse, neglect, mistreatment, misappropriation of resident property), and those that do not have to be reported (i.e. personnel issues).

As a routine part of every standard survey and for selected complaint surveys, the Department completes an abuse prohibition protocol that is designed to determine whether staff is fully aware of their internal reporting responsibility in the facility as well as their reporting responsibilities to the Department of Health. An analysis of the data shows that in FFY 2004, there were only a small number of citations for failure to report, and suggests that there is an overall understanding of reporting requirements. Therefore, providers may be reporting in an effort to insulate themselves from a potential citation for failure to report by reporting every incident that occurs.

The Department's position has been and remains, that a provider will not be cited for failure to report if there was not "reasonable cause" to believe that abuse, neglect, mistreatment or misappropriation of property has occurred. In such cases, notification to the Department is not required under either Federal or NYS regulations.

The focus of survey staff in determining how facilities respond to allegations will reflect the seven elements outlined in the Abuse Prohibition Protocol. If the provider can successfully demonstrate that an investigation of an incident/allegation was 'immediately' commenced, the provider's investigation contains all elements of the investigation previously described in this letter, and the conclusion of the investigation is supported by the evidence gathered, the Department will not cite the provider for failure to adequately investigate the incident.

If the Department's review of the incident determines that a violation of either Federal or NYS regulations took place (i.e. quality of life, quality of care), those specific violations will be cited.

Please share this letter with all facility staff, as it is the responsibility of the facility to insure that all staff is familiar with the requirements for reporting of abuse, neglect, mistreatment and misappropriation of resident property.

Please contact the Division of Quality and Surveillance for Nursing Homes and ICFs/MR, at (518) 408-1267, if you have any questions regarding this letter. Thank you for your cooperation and your ongoing efforts to ensure high-quality care and a dignified, respectful quality of life for all residents of New York State nursing facilities.

Sincerely,

Keith W. Servis, Director
Division of Quality and Surveillance
for Nursing Homes and ICFs/MR

APPENDIX A

NEW YORK STATE AND FEDERAL DEFINITIONS

Item	NYS Definition	CMS Definition
Mistreatment	The inappropriate use of medications, inappropriate isolation or inappropriate use of physical or chemical restraints on a resident of a residential health care facility, while the resident is under the supervision of the facility.	None at this time.
Neglect	The failure to provide timely, consistent, safe, adequate and appropriate services, treatment and/or care to a resident of a residential health care facility while the resident is under the supervision of the facility, including but not limited to: nutrition, medication, therapies, sanitary clothing and surroundings, and activities of daily living.	Failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness.
Abuse	Inappropriate physical contact with a resident of a residential health care facility, while the resident is under the supervision of the facility, which harms or is likely to harm the resident. Inappropriate physical contact includes, but is not limited to, striking, pinching, kicking, shoving, bumping, and sexual molestation.	The willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish.
Injuries of Unknown Origin	None at this time.	To be classified as an injury of unknown origin both of the following conditions must exist: *The source of the injury was not observed by any person **or** the source of the injury could not be explained by the resident; **and** *The injury is suspicious because the extent of the injury **or** the location of the injury (e.g., the injury is located in an area not generally vulnerable to trauma) **or** the number of injuries observed at one particular point in time **or** the incidence of injuries over time.
Misappropriation of resident property	The theft, unauthorized use or removal, embezzlement or intentional destruction of the resident's personal property including but not limited to money, clothing, furniture, appliances, jewelry, works of art, and such other possessions and articles belonging to the resident regardless of monetary value.	The deliberate misplacement, exploitation, or wrongful, temporary, or permanent use of a resident's belongings or money without the resident's consent.

APPENDIX B

Abuse Prohibition Protocol includes the following:

In order to assure a consistent approach in reviewing the issue of abuse in nursing homes, surveyors are required to complete an "Abuse Protocol" during every standard survey. This investigative tool requires the review of policies and procedures in the survey. This investigative tool requires the review of policies and procedures in the home regarding abuse and the interview of staff members, residents and families to test individual knowledge of the policies and the implementation of the policies. There are seven factors included in this investigative protocol:

Screening	Has the facility screened potential employees against the Nursing Home Nurse Aid Registry and other responsible background checks?
Training	Has staff been trained regarding what abuse is and what to do about it? Is the training ongoing?
Identification	Do the policies and procedures identify a system for how the potential for abuse may be identified before it happens as well as identify behavior of both residents and staff as being abusive? Example: Do staff members know that if they see a bruise, it may have been the result of abuse and should be reported?
Protection of Residents	Is there a system for keeping residents free from physical, mental, sexual, verbal and psychological abuse all the time and particularly when either a staff member or another resident is alleged to have committed abuse? Facility policies should address how all residents are kept safe.
Investigation	The facility must identify an individual who will collect the facts once an allegation of abuse is made. There needs to be training of staff on investigative technique. There must be a system for investigating the incident immediately, regardless of the time of day or day of the week.
Report/Response	Facilities must have a system for the reporting of all alleged violations to the Department of Health and any other agency as appropriate.
Prevention	Facilities must actively engage in a process designed to prevent abuse from occurring.