

Policy: Compliance - Detection and Prevention of Fraud, Waste, and Abuse

Effective Date: 12/08/2016

Regulatory Reference: Section 6032 of the Federal Deficit Reduction Act of 2005

The Federal False Claims Act, 31 USC §3279, *et seq*

The Program Fraud Civil Remedies Act of 1986, 31 USC §3801, *et seq*

New York Social Services Law §145-b

New York Social Services Law §366-b (2)

New York Penal Law §177

New York Labor Law §740, §741

Document Owner: Dana Penny

Accountable: Compliance, Human Resources, Administration, All Employees, Trustees, Contractors and Agents

Divisions/Programs: System, Manhattan Nursing Home, Westchester Nursing Home, Adult Day Services, CHHA, HAPI, Care Management, Solutions at Home, NORCS, ALP, Kittay Senior Apartments, TNJH Housing (Weinberg Riverdale House, Weinberg Gardens).

Policy: The New Jewish Home is committed to complying with the Federal and State Laws and to preventing and detecting any fraud, waste, or abuse in its organization. To this end, The New Jewish Home maintains a compliance program and strives to educate our work force on fraud and abuse laws, including the importance of submitting accurate claims and reports to the Federal and State governments. The New Jewish Home compliance policies and procedures are set forth in detail in our compliance program handbook, which is available on-line internally and on our web-site and available to each employee in printed form.

In furtherance of this policy, The New Jewish Home provides the following information about its policies and certain relevant Federal and State laws. In particular The New Jewish Home prohibits the knowing submission of a false claim for payment from a Federally or State funded health care program such as Medicare and Medicaid. Such a submission is a violation of Federal and State law and can result in significant administrative and civil penalties under the Federal False Claims Act, a Federal statute that allows private persons to help reduce fraud against the United States government. Please see more information about the Federal False Claims Act below.

In addition, in New York State the submission of a false claim can result in civil and criminal penalties under portions of the New York State Social Services Law and Penal Law, among other State statutes. Please see more information about these New York State laws below.

Definitions: The following definitions are important in understanding this policy

Fraud: “Knowingly and willfully executing, or attempting to execute, a scheme or artifice to defraud any health care benefit program; or to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program.” (18 United States Code §1347)

Waste and Abuse: Requesting payment for items and services when there is no legal entitlement to payment. Unlike fraud, the provider has not knowingly and/or intentionally misrepresented facts to obtain payment. Liability may result from failure to control errors that result in improper payments.

Kickback: A form of fraud, waste or abuse. To participate in a kickback scheme is to knowingly and willfully offer, pay, solicit, or receive any remuneration to induce, or in return for, referrals of items or services reimbursable by a Federal health care program. Kickbacks are illegal at both the Federal and State Levels.

Duty to Report: To assist The New Jewish Home in meeting its legal and ethical obligations, any employee who reasonably suspects or is aware of the preparation or submission of a false claim or report or any other potential fraud, waste, or abuse related to a Federally or State funded health care program is required to report such information to his/her supervisor or The New Jewish Home’s Chief Compliance Officer. The Chief Compliance Officer can be reached at 212-870-4752 or toll-free at 1-800 448-3598. The New Jewish Home Chief Compliance Officer is required to keep the source of any information confidential if so requested.

Reports may also be made anonymously using our toll-free hotline at 1-877-778-5463 or by using the confidential reporting application available on the The New Jewish Home website. You may also by-pass our website by going directly to:

Our ReportIT Compliance reporting application at:

<http://www.reportit.net>

USER NAME: JewishHome

PASSWORD: compliance

Confidential reports made in this manner will be reported directly to the Chair of the Board’s Audit and Compliance Committee and to the Chair of the Board of Directors without first going through management.

Any possible Fraud, Waste and Abuse will be reported to the appropriate Medicare Advantage or Prescription Drug Plan or appropriate State or Federal Authorities.

You can also contact:

- Office of the Inspector General (OIG) National Hotline: **1-800-323-8603**
OIG Fax: 202-254-4292 OIG Email: DHSOIGhotline@dhs.gov
- Centers for Medicare & Medicaid Services (CMS): **1-800-633-4227**
- The Joint Commission at 800-994-6610 or complaint@jointcommission.org
- The New York State Department of Health Nursing Home Hotline: **1-888-201-4563**
- The New York State Department of Health Home Health Hotline: **1-800-628-5972**

As an organization, The New Jewish Home commits itself to investigate any suspicions of fraud, waste, or abuse swiftly and thoroughly and requires all employees to assist in such investigations. If an employee believes that The New Jewish Home is not responding to his or her report within a reasonable period of time, the employee shall bring these concerns about The New Jewish Home's perceived inaction to The New Jewish Home's Chief Compliance Officer. Failure to report and disclose or assist in an investigation of fraud and abuse is a breach of the employee's obligations to The New Jewish Home and may result in disciplinary action.

Non-Retaliation: Any employee of The New Jewish Home who reports such information will have the right and opportunity to do so anonymously and will be protected against retaliation for coming forward with such information both under The New Jewish Home's internal compliance policies and procedures and Federal and State law. However, The New Jewish Home retains the right to take appropriate action against an employee who has participated in a violation of Federal or State law or organization policy.

Procedure:

Responsibility

All Employees, Trustees, Contractors, Volunteers and Agents

Action

- Report any information relating to the preparation or submission of a false claim or report or any other potential fraud, waste, or abuse related to a Federally or State funded health care program to his/her supervisor, Administrator or to The New Jewish Home's Chief Compliance Officer

Human Resources

- Include policy and “plain-English” summary in New Employee Orientation
- Ensure that policy is distributed and available through usual channels
- Ensure that non-retaliation policy is enforced

Compliance

- Incorporate education on policy in annual compliance in-services and new hire orientations
- Offers guidance and implements process for investigating allegations of false claims, fraud, waste and abuse

Administration

- Distributes policy to contractors and vendors
- Ensure that any issues raised pursuant to this policy are forwarded to appropriate parties for action
- Ensures that non-retaliation policy is adhered to by all staff.

Policy Manager:

Dana Penny
Chief Compliance Officer

Approved by:

Audrey Weiner, DSW, MPH
President & CEO

Date Approved: 12/08/2016

FEDERAL AND STATE STATUTES

The following is a summary of the Federal False Claims Act, the Program Fraud Civil Remedies Act and certain relevant State laws.

Federal False Claims Act

The Federal False Claims Act, 31 USC §3279, *et seq*, establishes liability for any person who engages in certain acts, including:

- knowingly presenting or causing to be presented a false or fraudulent claim to the Federal government for payment;
- knowingly making, using, or causing to be made or used, a false statement to get a false or fraudulent claim paid by the Federal government; or
- conspiring to defraud the Federal government by getting a false or fraudulent claim allowed or paid.

Under the Federal False Claims Act, a person acts “knowingly” if s/he:

- has actual knowledge of the information;
- acts in deliberate ignorance of the truth or falsity of the information; or
- acts in reckless disregard of the truth or falsity of the information.

There is no requirement that the person specifically intended to defraud the government through his or her actions.

Under the Federal False Claims Act, a “claim” is any request or demand for money or property if the Federal government provides any portion of the money or property in question. This includes requests or demands submitted to a contractor of the Government and includes Medicaid and Medicare claims.

A violation of the Federal False Claims Act results in a civil penalty between \$10,781 to \$21,563 for each false claim submitted, plus up to three times the amount of the damages sustained by the Government because of the violation. In addition, the United States Department of Health and Human Services (HHS) Office of the Inspector General (OIG) may exclude the violator from participation in Federal health care programs.

The False Claims Act allows a private person to file a *qui tam* lawsuit on behalf of the Federal government. This person, also called a relator or whistleblower, must file his or her lawsuit under seal in a federal district court. The government may decide to intervene with the lawsuit, in which case the United States Department of Justice will direct the prosecution. If the government does not decide to intervene, the relator may still continue the lawsuit independently.

If a *qui tam* lawsuit is successful, the relator may receive between 10 to 30% of the recovery, depending on the level of the government’s participation and other factors, as well as reasonable attorney’s fees and costs. In addition, there can be no retaliation against the relator for filing or participating in the lawsuit in good faith. At the same time, however, any person who brings a clearly frivolous case can be held liable for the defendant’s attorney’s fees and costs.

Federal Program Fraud Civil Remedies Act of 1986

The Program Fraud Civil Remedies Act of 1986, 31 USC §3801, *et seq*, is similar to the False Claims Act, establishing an administrative remedy against any person who presents or causes to be presented a claim or written statement that the person knows or has reason to know is false, fictitious, or fraudulent to certain Federal agencies, including HHS, and again, includes Medicaid and Medicare claims.

Similar to the False Claims Act, a person who “knows or has reason to know” is defined as one who:

- has actual knowledge of the information;
- acts in deliberate ignorance of the truth or falsity of the information; or
- acts in reckless disregard of the truth or falsity of the information.

Once again, there is no necessary proof of specific intent to defraud the government.

A violation of the Program Fraud Civil Remedies Act can result in a civil monetary penalty of up to \$5,500 per false claim and an assessment of twice the amount of the false claim. The penalty can be imposed through an administrative hearing after investigation by HHS and approval by the United States Attorney General.

The Anti-Kickback Statute

One purpose of the anti-kickback statute is to protect patients from inappropriate medical referrals or recommendations by health care professionals who may be unduly influenced by financial incentives. Section 1128B(b) of the Social Security Act (the Act) makes it a criminal offense to knowingly and willfully offer, pay, solicit, or receive any remuneration to induce, or in return for, referrals of items or services reimbursable by a Federal health care program. When remuneration is paid purposefully to induce or reward referrals of items or services payable by a Federal health care program, the anti-kickback statute is violated. By its terms, the statute ascribes criminal liability to parties on both sides of an impermissible “kickback” transaction. Violation of the statute constitutes a felony punishable by a maximum fine of \$25,000, imprisonment up to 5 years, or both. Conviction will also lead to exclusion from Federal health care programs, including Medicare and Medicaid. OIG may also initiate administrative proceedings to exclude persons from the Federal health care programs or to impose civil money penalties for fraud, kickbacks, and other prohibited activities under sections 1128(b)(7) and 1128A(a)(7) of the Act.

New York State Laws

New York State has enacted a State False Claims Act that allows for participation by private persons as *qui tam* relators or whistleblowers. The New York State False Claims Act (NYSFCA) provides, in pertinent part, that:

Any Person who:

- a. knowingly presents, or causes to be presented, to any employee, officer or agent of the State or a local government a false or fraudulent claim for payment or approval;
- b. knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim or approved by the State or a local government;
- c. conspires to defraud the State or a local government by getting a false or fraudulent claim allowed or paid;...or
- d. knowingly makes, uses or causes to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the State or a local government...

is liable (1) to the State of New York for a civil penalty of not less than six thousand dollars, plus three times the amount of damages that the State sustains because of the act of that person; and (2) to any local government for

three times the amount of damages sustained by such government because of the act of that person.

For purposes of this section, the terms “knowing” and “knowingly” mean that with respect to a claim, or information relating to a claim, a person

- a. has actual knowledge of such claim or information;
- b. acts in deliberate ignorance of the truth or falsity of such claim or information; or
- c. acts in reckless disregard of the truth or falsity of such a claim or information.

Proof of specific intent to defraud is not required, but acts occurring by mistake or due to mere negligence are not covered by this law.

Under the NYSFCA, a “claim” means any request or demand for money or property that is made to any employee, officer, or agent of the State or a local government. This includes requests or demands submitted to a contractor of the government and includes Medicaid claims, among other items.

The NYSFCA also provides that private parties may bring an action on behalf of the State or a local government . These private parties, known as “*qui tam* relators,” may share in a percentage of the proceeds from a NYSFCA action or settlement. The law provides, with some exceptions, that a *qui tam* relator shall be entitled to receive between 15-20% of the proceeds recovered if the State attorney general or a local government converts the action into an enforcement action or intervenes in the *qui tam* lawsuit. The relator shall be entitled to receive between 25-30% of the proceeds if the State or a local government does not intervene or convert the action, and the action is successful.

The NY SFCA provides protection to any employee of any private or public employer who is discharged, demoted, suspended, threatened, harassed, or otherwise discriminated against in the terms and conditions of employment by his or her employer because of lawful acts taken by the employee in furtherance of an action under the NY SFCA. Remedies for such discrimination include reinstatement, two times back pay, and compensation for any special damages sustained as a result of the discrimination.

New York State law also prohibits false claims in other statutes. Certain relevant portions of the New York State Code are summarized below.

Under New York Social Services Law §145-b, it is unlawful to knowingly make a false statement or representation, or to deliberately conceal any material fact, or engage in any other fraudulent scheme or device, to obtain or attempt to obtain payments under the New York State Medicaid program. For a violation of this law, the local Social services district or the State has a right to recover civil damages equal to three times the amount by which any figure is falsely overstated. In the case of non-monetary false statements, the local Social Service district or State may recover three times the damages (or \$5,000, whichever is greater) sustained by the government due to the violation.

The law also empowers the New York State Department of Health to impose a monetary penalty on any person who, among other actions, causes Medicaid payments to be made if the person knew or had reason to know that:

- the payment involved care, services, or supplies that were medically improper, unnecessary, or excessive;
- the care, services or supplies were not provided as claimed;
- the person who ordered or prescribed the improper, unnecessary, or excessive care, services, or supplies was suspended or excluded from the Medicaid program at the time the care, services, or supplies were furnished; or
- the services or supplies were not in fact provided.

The monetary penalty shall not exceed \$2,000 for each item or service in question, unless a penalty under the section has been imposed within the previous five years, in which case the penalty shall not exceed \$7500 per item or service.

Under New York Social Services Law §366-b (2), any person who, with intent to defraud, presents for allowance or payment any false or fraudulent claim for furnishing services or merchandise, or knowingly submits false information for the purpose of obtaining compensation greater than that to which s/he is legally entitled for furnishing services or merchandise shall be guilty of a class A misdemeanor. If such an act constitutes a violation of a provision of the penal law of the state of New York, the person committing the act shall be punished in accordance with the penalties fixed by such law.

In addition, New York Penal Law §177 establishes the crime of Health Care Fraud. A person commits such a crime when, with the intent to defraud Medicaid (or other health plans, including non-governmental plans), s/he knowingly and willfully provides false information or omits material information for the purpose of requesting payment for a health care item or service and, as a result of the false information or omission, receives such a payment in an amount to which s/he is not entitled. Health Care Fraud is punished with fines and jail time based on the amount of payment inappropriately received due to the commission of the crime; the higher the payments in a one year period, the more severe the punishments, which currently range up to 25 years if more than \$1 million in improper payments are involved.

New York law also affords protections to employees who may notice and report inappropriate activities. Under New York Labor Law §740, an employer shall not take any retaliatory personnel action against an employee because the employee:

- discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety, or which constitutes health care fraud;
- provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any such violation of a law, rule or regulation by such employer; or
- objects to, or refuses to participate in any such activity, policy or practice in violation of a law, rule or regulation.

To bring an action under this provision, the employee generally must first bring the alleged violation to the attention of the employer and give the employer a reasonable opportunity to correct the allegedly unlawful practice. The law allows employees who are the subject of a retaliatory action to bring a civil action in court and seek relief such as injunctive relief to restrain continued retaliation; reinstatement, back-pay and compensation of reasonable costs. The law also provides that employees who bring an action without basis in law or fact may be held liable to the employer for its attorneys' fees and costs.

What is a False Claims Act?

Federal and State laws provide for penalties to be imposed on anyone who is found to have presented a bill or claim for payment to a government agency that is untruthful or otherwise requests payment for services that were not provided as required.

Federal law has recently been used to penalize healthcare providers who have billed Medicare for services that were not provided or that did not reach an agreed upon quality of care. The Jewish Home is subject to Federal and New York State False Claims Acts.

False Claims Acts allow for “*qui tam*” (also known as “*whistleblower*”) lawsuits. This is when an employee (the whistleblower) who knows that an organization is acting fraudulently in its Medicare or Medicaid billing practices (including billing for egregiously sub-standard care), has brought these practices to the attention of management and management has been unwilling to stop the practices. The employee then has the right to sue the employer on behalf of the government agency involved. If the lawsuit is successful, the employee is entitled to anywhere between 10% and 30% of the amounts recovered plus any penalties.

The False Claims Acts allow the government to recover three times the amount of the value of any false claim, plus civil monetary penalties. The civil monetary penalties under the Federal False Claims Act are from \$10,781 to \$21,563 per claim. Under the New York State False Claims Act the range is different, from \$6,000 to \$12,000.

Both the Federal and New York State False Claims Acts also provide protection to a whistleblower against retaliation. Any whistleblower who is fired, demoted, suspended, threatened, harassed or otherwise discriminated against by his employer in the terms and conditions of his employment because of engaging in lawful acts of any whistleblower action under this statute, can recover damages against the employer and shall be entitled to relief to make the employee whole.

Generally, a whistleblower needs to show that they attempted to get the employer to address the problem and the employer refused and that the employee was not performing any illegal activity themselves. Jewish Home policies on this matter require all employees who know of any improper or illegal activities to bring it to the attention to management.

The full Jewish Home Policy on these matters is available in the on-line Corporate Policy application (PolicyTech), or the Compliance section of the The New Jewish Home Intranet, and Web-site and as a hard copy to anyone who requests it.

If you have any questions on these regulations or policies, please contact Dana Penny, Chief Compliance officer at 212-870-4752 or at dpenny@jewishhome.org