



**THE NEW YORK CITY DEPARTMENT OF EDUCATION**

**JOEL I. KLEIN, *Chancellor***

**BRIAN FLEISCHER, *Auditor General***

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**DATE:** OCTOBER 31, 2007

**SUBJECT:**

FEDERAL, STATE AND CITY FALSE CLAIM ACTS PERTAINING TO MEDICAID SCHOOL BASED SERVICES AND WHISTLEBLOWER PROTECTIONS FOR INDIVIDUALS REPORTING VIOLATIONS OF THE ACTS

**TO:**

- Michael Best, General Counsel, Office of the General Counsel
- Ted Brodheim, Chief Information Officer, Division of Instructional and Information Technology
- Bonnie Brown, Superintendent, D.75
- Evelyn Castro, Executive Director, Office of Early Childhood Education
- Richard J. Condon, Special Commissioner, Office of the Special Commissioner of Investigations for the New York City School District
- Vincent A. Giordano, Executive Director, Division of Financial Operations
- Eric Goldstein, Chief Executive, Office of School Support Services
- Maurice Miller, Executive Director, Office of Compliance Services
- Susan Olds, Executive Budget Director, Division of Budget Operations and Review
- David N. Ross, Executive Director, Division of Contracts and Purchasing
- David Schacher, Ethics Officer, Department of Ethics and Conflicts of Interest
- Carl Schneider, Executive Director, Division of Revenue Operations
- Linda Wernikoff, Senior Instructional Manager - Special Education, Office Special Education Initiatives
- All Integrated Service Center Executive Directors
- All Principals (by Principals' Weekly)

**CC:**

- Christopher D. Cerf, Deputy Chancellor, Organizational Strategy, Human Capital, and External Affairs
- Kathleen Grimm, Deputy Chancellor, Finance and Administration
- Kristen Kane, Chief Operating Officer
- Marcia V. Lyles, Deputy Chancellor, Teaching and Learning and Learning Support Organizations
- Sam Mehta, Consultant, Deputy Chancellor for Operations

**FROM:**

Brian Fleischer, Auditor General, Office of the Auditor General

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**POLICY**

It is the policy of NYCDOE to comply with all applicable federal, state and local laws pertaining to fraud, waste and abuse in federal health care programs including Section 6032 of the Deficit Reduction Act of 2005. In the service of these requirements, NYCDOE disseminates information to its employees, management, and to its contractors and agents regarding federal laws and administrative remedies, as well as state and city laws related to false claims and statements. This includes "whistleblower" protections under such laws, and the role of such laws in preventing and detecting fraud, waste and abuse in federal health care programs.

NYCDOE is committed to investigating any such allegation of fraud, waste, abuse or other improper conduct. It devotes substantial resources to investigate allegations of fraud and abuse and therefore believes that all employees should bring their concerns to NYCDOE first so that it can redress and correct any fraudulent activity. Any employee of NYCDOE who reports such information may do so anonymously and will be protected against retaliation for coming forward with such information both under NYCDOE's internal compliance policies and procedures as well as federal, state and city law.

This memo serves to outline the policy and procedures followed by the NYCDOE for detecting and preventing fraud, waste and abuse, and related “whistleblower” protections pertaining to the laws addressed in this policy. The memo also provides a summary of those laws.

This memo can be found by going to:

<http://schools.nyc.gov/Administration/Offices/GeneralCounsel/AuditorGeneral/Links/default.htm>

For a summary of relevant State and federal laws, please go to:

<http://www.omig.state.ny.us/data/content/view/81/65/>

For further information on the False Claims Act, please go to:

<http://www.cms.hhs.gov/smdl/downloads/SMD032207Att1.pdf>

For a summary of New York City laws, please go to:

<http://www.nyc.gov/html/law>

## **PREVENTION MEASURES**

- **Office of Auditor General** performs ongoing risk assessments of the fiscal and operational controls of the institution, including both school-related and ancillary service expenditures; conducts audits to test controls and identify deficiencies and beneficial practices; conducts audits and reviews of private contract vendors to test programmatic and fiscal compliance with key contract provisions; and develops and assists with implementation of recommendations and corrective actions to improve fiscal and operational processes.
- **Division of Revenue Operations** has retained a private contractor assigned to collect, image, convert to electronic data, and maintain manual records of related service delivery as well as several other student-related documents that are key to supporting claims.
- **Archive Center** has issued policies and procedures to standardize and improve controls over the archiving and storage of supporting documentation. Personnel have an on-going involvement in the implementation of corrective actions, including visitation to all Regional Operations Centers and other administrative offices to distribute copies of the New York State Document Retention Schedule and to train Department personnel on the retention rules.
- **Office of Special Education Initiatives** monitors special education service delivery through management reports and results of audit activity.
- **Division of Budget Operations and Review** monitors budgets (including reimbursable funds) of schools, regions, and central offices.

## **EDUCATION**

NYCDOE provides the education and training that address these issues through a number of initiatives, including:

- **Department’s Ethics Officer** provides advice and counsel to all Department employees on the Conflicts of Interest Law of the City of New York and the *Chancellor’s Regulations* on conflicts of interest.
- **Integrated Service Center** (ISC) conducts training and general oversight of schools’ activity on control-related matters, compliance with procurement requirements for non-contract OTPS purchases, and accuracy and completeness of documentation. Supports in these fiscal control areas are provided by the **Network Support Teams** (NST) in coordination with the ISC.
- **Universal Pre-Kindergarten** regional and central programmatic and operational offices share responsibility for oversight of the DOE’s contracts with private Universal Pre-K program providers. Those providers are subject to on-site reviews and must submit annual budgets and disclosures of expenditures twice yearly to ISC Pre-K Contract Borough Managers.

## **BACKGROUND CHECKS**

- **Office of Personnel Investigation** is responsible for screening all new staff hired by the NYC Department of Education to ensure the safety and well being of students and staff. State Education Laws and the Department of Education policy and practice mandate the taking of fingerprints as a prerequisite for licensure and/or employment. A criminal background check is performed on individuals following an offer of employment, but prior to the individual starting work.
- **Division of Contracts and Purchasing**, **Office of Policy and Vendor Performance** further strengthens the Department’s infrastructure against potential fraud and corruption for contracts projected to exceed \$1M, as well

as for selected smaller contracts. In those circumstances, all prospective vendors are subject to an extensive background check.

- **Division of Human Resources** oversees employee fingerprinting and background checks, hiring processes and qualifications.

## **REPORTING MECHANISMS**

### **The Special Commissioner of Investigation for the New York City School District :**

Anyone may report concerns through the 7-day / 24-hour hotline:  
(212) 510-1500. Toll Free: (877) 888-TELL (8355)  
Website: <http://www.nycsci.org/>  
All calls are confidential. “Whistleblowers” are protected.

## **DETECTION MEASURES**

NYCDOE has implemented various billing and coding edit software packages to assist in detecting billing and coding which is not compliant with rules associated with Federal health care programs.

## **AUDITS**

- **Office of Pupil Transportation** (OPT) oversees contract compliance of bus vendors.
- **Office of the Auditor General**: reviews programs and fiscal contract compliance with regard to pres-school programs on a real-time basis.

## **SUMMARY OF FEDERAL, NEW YORK STATE AND NEW YORK CITY LAWS RELATED TO FRAUD, WASTE AND ABUSE IN FEDERAL HEALTH CARE PROGRAMS**

### **FEDERAL LAWS**

#### **False Claims Act (31 U.S.C. §§ 3729-3733)**

The Federal False Claims Act (the “FCA”) imposes liability on any person who submits a claim to the Federal Government that he or she knows (or should know) is false. It was designed to enhance the government’s ability to identify and recover losses due to fraud by creating strong financial incentives for entities to maintain vigorous compliance programs. The penalties for violating the statute are severe and range from \$5,500 to \$11,000 for each false claim and up to three times the amount of actual damages that the government proves it sustained as a result of the prohibited conduct. In addition, the United States Department of Health and Human Services (HHS) Office of the Inspector General (OIG) may exclude the violator from participating in Federal health care programs.

The FCA provides, in part, that:

Any person who (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; (3) conspires to defraud the Government by getting a false or fraudulent claim paid or approved by the Government; ...or (7) 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 Government, is liable to the United States Government for a civil penalty of not less than \$5,000, and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person. . . . (31 U.S.C. § 3729 )

In addition to its substantive provisions that provide a direct right of action by the government, the FCA provides that private parties may bring an action on behalf of the United States. 31 U.S.C. § 3730(b). These private parties, known

as “*qui tam* relators,” may share in a percentage of the proceeds from an FCA action or settlement.

The FCA provides protection to *qui tam* relators who are discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against in the terms and conditions of their employment as a result of their furtherance of an action under the FCA. 31 U.S.C. § 3730(h). Remedies include reinstatement with comparable seniority as the *qui tam* relator would have had but for the discrimination, two times the amount of any back pay, interest on any back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys’ fees.

#### **Administrative Remedies for False Claims (31 U.S.C. §§ 3801 – 3812)**

A different Federal law also provides for administrative remedies for situations in which a person or entity submits a claim if the claimant has reason to know such claims are false or are supported by a materially false statement. “Administrative remedies” means that a Federal agency responsible for enforcement conducts the investigation and proceedings, determines whether the claim is false and imposes fines and penalties, instead of prosecution of the matter in the Federal court system. The law applies to all claims made to the Federal government including Medicaid claims because Medicaid is partially funded by the Federal government. Unlike the FCA, a violation of this law occurs when a false claim is submitted, not when it is paid.

#### **Program Fraud Civil Remedies Act (“PFCRA”):**

This Federal law is similar in structure to the FCA, but provides administrative remedies against persons or entities that make or cause to be made a false claim for money, property or services to certain federal agencies, including the Department of Health and Human Services, which operates the Medicare and Medicaid programs. The PFCRA provides that any person making, presenting, submitting or causing to submit a claim that the person knows or has reason to know is false, fictitious or fraudulent is subject to civil monetary penalties of up to \$5,000, per false claim and up to twice the amount of the fraudulent claim. The PFCRA uses the same definition of “knows or has reason to know” as used in the FCA and explained above. Violations are investigated by the Department of Health and Human Services and enforcement actions must be approved by the Attorney General.

### **NY STATE LAWS**

New York’s false claims laws fall into two categories: civil and administrative; and criminal laws. Some apply to recipient false claims and some apply to provider false claims, and while most are specific to healthcare or Medicaid, some of the “common law” crimes apply to areas of interaction with the government.

#### **Civil and Administrative Laws**

##### **NY False Claims Act (State Finance Law, §§ 187-194)**

The NY False Claims Act closely tracks the Federal FCA. It imposes penalties and fines on individuals and entities that file false or fraudulent claims for payment from any state or local government, including health care programs such as Medicaid.

The New York Act allows private individuals to file lawsuits in state court, just as if they were state or local government parties. If the suit eventually concludes with payments back to the government, the person who started the case can recover 25-30% of the proceeds if the government did not participate in the suit or 15-25% if the government did participate in the suit.

##### **Social Services Law § 145 Penalties**

Any person who submits false statements or deliberately conceals material information in order to receive public assistance, including Medicaid, is guilty of a misdemeanor.

##### **Social Services Law § 145-b False Statements**

It is a violation to knowingly obtain or attempt to obtain payment for items or services furnished under any Social Services program, including Medicaid, by use of a false statement, deliberate concealment or other fraudulent scheme

or device. The State or the local Social Services district may recover three times the amount incorrectly paid. In addition, the Department of Health may impose a civil penalty of up to \$2,000 per violation.

#### **Social Services Law § 145-c Sanctions**

If any person applies for or receives public assistance, including Medicaid, by intentionally making a false or misleading statement, or intending to do so, such person's needs are not taken into account in determining the needs of that person or his or her family for such assistance for 6 months if a first offense, 12 months if a second, 18 months if a third (or once if benefits received are over \$3,900) and five years for 4 or more offenses.

#### **Social Services Law § 366-b Penalties for Fraudulent Practices**

Applies to any person who obtains or attempts to obtain, for himself or others, medical assistance by means of a false statement, concealment of material facts, impersonation or other fraudulent means as well as to any person who, with intent to defraud, presents for payment any false or fraudulent claim for furnishing services, knowingly submits false information to obtain greater Medicaid compensation or knowingly submits false information in order to obtain authorization to provide items or services.

#### **Criminal Laws**

##### **Penal Law Article 155 Larceny**

The crime of larceny applies to a person who, with intent to deprive another of his property, obtains, takes or withholds the property by means of trick, embezzlement, false pretense, false promise, including a scheme to defraud, or other similar behavior. It has been applied to Medicaid fraud cases.

##### **Penal Law Article 175 False Written Statements**

Four crimes in this Article relate to filing false information or claims and have been applied in Medicaid fraud prosecutions.

##### **Penal Law Article 176 Insurance Fraud**

Applies to claims for insurance payment, including Medicaid or other health insurance and contains six crimes.

##### **Penal Law Article 177 Health Care Fraud**

Applies to claims for health insurance payment, including Medicaid, and contains five crimes.

#### **WHISTLEBLOWER PROTECTION**

##### **Federal False Claims Act (31 U.S.C. § 3730(h))**

The FCA provides protection to *qui tam* relators who are discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of their employment as a result of their furtherance of an action under the FCA. 31 U.S.C. § 3730(h). Remedies include reinstatement with comparable seniority as the *qui tam* relator would have had but for the discrimination, two times the amount of any back pay, interest on any back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees.

##### **NY False Claims Act (State Finance Law § 191)**

The False Claims Act also provides protection to *qui tam* relators who are discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of their employment as a result of their furtherance of an action under the Act. Remedies include reinstatement with comparable seniority as the *qui tam* relator would have had but for the discrimination, two times the amount of any back pay, interest on any back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees.

##### **New York Labor Law § 740**

An employer may not take any retaliatory action against an employee if the employee discloses information about the employer's policies, practices or activities to a regulatory, law enforcement or other similar agency or public official.

Protected disclosures are those that assert that the employer is in violation of a law that creates a substantial and specific danger to the public health and safety or which constitutes health care fraud under Penal Law § 177 (knowingly filing, with intent to defraud, a claim for payment that intentionally has false information or omissions). The employee's disclosure is protected only if the employee first brought up the matter with a supervisor and gave the employer a reasonable opportunity to correct the alleged violation. If an employer takes a retaliatory action against the employee, the employee may sue in state court for reinstatement to the same, or an equivalent position, any lost back wages and benefits and attorneys' fees. If the employer is a health provider and the court finds that the employer's retaliatory action was in bad faith, it may impose a civil penalty of \$10,000 on the employer.

#### **New York Labor Law § 741**

A health care employer may not take any retaliatory action against an employee if the employee discloses certain information about the employer's policies, practices or activities to a regulatory, law enforcement or other similar agency or public official. Protected disclosures are those that assert that, in good faith, the employee believes constitute improper quality of patient care. The employee's disclosure is protected only if the employee first brought up the matter with a supervisor and gave the employer a reasonable opportunity to correct the alleged violation, unless the danger is imminent to the public or patient and the employee believes in good faith that reporting to a supervisor would not result in corrective action. If an employer takes a retaliatory action against the employee, the employee may sue in state court for reinstatement to the same, or an equivalent position, any lost back wages and benefits and attorneys' fees. If the employer is a health provider and the court finds that the employer's retaliatory action was in bad faith, it may impose a civil penalty of \$10,000 on the employer.

### **NEW YORK CITY**

#### **New York City False Claims Act**

Signed into law on May 19, 2005 the New York City False Claims Act (Local Law 53 of 2005) authorizes citizens to bring lawsuits on behalf of the City to recover treble damages for fraudulent claims submitted to the City. An important new tool with which the City can fight fraud perpetrated against it, the statute creates a way for people to help the City recover money lost through fraud, and is patterned after the federal "Qui Tam" statute. As an incentive to bring suits, this new law allows successful citizen plaintiffs, under certain circumstances, to keep as much as 30% of funds they help recover.

The law also requires the City's Law Department and the Department of Investigation to promulgate rules governing the protocol for processing proposed civil complaints under the False Claims Act. Such rules became effective on August 8, 2005, upon publication in the City Record.