

Addressing and Reporting Abuse and Neglect in the Care and Treatment of Individuals with Developmental Disabilities

JAMES C. COX

ACTING NEW YORK MEDICAID INSPECTOR GENERAL

James.Cox@OMIG.NY.GOV

518-473-3782

COURTNEY BURKE, COMMISSIONER, OPWDD

People.first@opwdd.ny.gov

MONICA HICKEY-MARTIN

SPECIAL DEPUTY ATTORNEY GENERAL and DIRECTOR, AG MFCU

Monica.hickeymartin@ag.ny.gov 212-417-5250

MEET THE NEW MEDICAID INSPECTOR GENERAL, JAMES C. COX

- Nominated by Governor Cuomo July 8
- Started work 7/13 as Acting Medicaid Inspector General
- 23 years in the U.S. Health and Human Services Office of the Inspector General's Office of Audit Services, most recently as Regional Inspector General for Region V
- Extensive audit experience in New York
- Jim Cox "is an exemplary professional with an impeccable public service record and extensive knowledge of health and human services. . . his experience with the auditing process will help create a more efficient and cost effective system that will monitor the delivery of crucial services across the state." Governor Cuomo

PURPOSE OF OMIG WEBINARS- FULFILLING OMIG'S DUTY IN NYS PHL SECTION 32 -

- § 32(17) " . . . to conduct educational programs for medical assistance program providers, vendors, contractors and recipients designed to limit fraud and abuse within the medical assistance program."
- These programs will be scheduled as needed by the provider community. Your feedback on this program, and suggestions for new topics are appreciated.

GOALS OF THIS PROGRAM

- Reporting requirements for allegations of abuse
- Relationship between abuse and neglect concerns and the Medicaid requirements for an effective compliance program
- Identifying individuals who have engaged in abuse and neglect, developing evidence and witnesses supporting or refuting allegations
- Developing business processes to prevent abuse
- Patient abuse and neglect prosecutions
- NOTE: We will not be discussing technical details of reporting to IRMA (Incident Reporting and Management Application) (subject of separate training)

CONCERNS OF THIS PROGRAM

- Providing direct care services in 1051 state operated and about 5,430 privately operated residential facilities to OPWDD consumers is a rewarding but difficult responsibility
- Medicaid consumers are entitled to live free of abuse, neglect, financial and sexual exploitation
- Medicaid consumers are entitled to a process for investigating and resolving allegations of abuse promptly, without fear of retaliation
- Direct care employees are entitled to fair process which allows them to be advised of allegations against them, and an opportunity to contest those allegations
- Reporting rules are derived from a number of federal and state statutory, regulatory, and policy requirements developed over a period of years

COURTNEY BURKE, COMMISSIONER OPWDD

- Courtney Burke has a long career in health and disability policy, where she has focused on improving the quality of, and access to, government services. Prior to her confirmation in April, 2011 Burke served as director of The Nelson A. Rockefeller Institute of Government's New York State Health Policy Research Center. She began her career at the Office of the Advocate for Persons with Disabilities, which has since become the Commission on Quality of Care and Advocacy for Persons with Disabilities. Commissioner Burke is a graduate of the University of Connecticut and earned her master's degree in health policy and management from the University at Albany's School of Public Health.

MONICA HICKEY-MARTIN, SPECIAL DEPUTY ATTORNEY GENERAL AND DIRECTOR, MEDICAID FRAUD CONTROL UNIT

- Responsibility of MFCU for patient/consumer abuse and neglect
- MFCU received national awards for work in patient protection

THE FEDERAL REQUIREMENT FOR INDEPENDENT OVERSIGHT TO ADDRESS ABUSE AND NEGLECT

- Developmental Disabilities Assistance and Bill of Rights Act of 2000 (the DD Act):
- Provides for a program and funds a Protection & Advocacy (P&A) System to protect and advocate for persons with developmental disabilities
- -The Commission on Quality of Care and Advocacy for Persons With Disabilities (CQCAPD) is the designated Protection and Advocacy Agency for New York State. CQCAPD contracts out this work with various legal services organizations throughout the State.
- -CQCAPD also has oversight functions with respect to the organization and operation of OPWDD
- Website: <http://cqc.ny.gov/>

Federal Civil Rights of Institutionalized Persons Act (CRIPA) 42 U.S.C. § 1997 et seq.

- Authorizes the U.S. Attorney General to investigate conditions of confinement at State and local government institutions including publicly operated nursing homes, and institutions for people with developmental disabilities.
- Lead case-Embreeville Center for Disabled Persons- **“an undercover agent working at Embreeville for some nine weeks in 1991 personally observed eight incidents of abuse or neglect of residents in just this brief period of time. . . We have concluded that Embreeville's internal control system of incident reports and abuse investigations is simply not effective in uncovering and addressing abuse and neglect at the facility.” (DOJ report, 11/26/91)**
- See, U.S. v. Pennsylvania, 863 F. Supp. 217 (E.D.Pa. 1994)

FEDERAL CONCERNS

- HHS/OIG Report “Reporting Abuses of Persons with Disabilities (A-01-00-02502)”
“We recommend that HCFA, ACF, SAHHS, and FDA work cooperatively to provide information and technical assistance to States that would: (1) improve the reporting of potential abuse: or neglect of persons with disabilities; (2) strengthen investigative and resolution processes; (3) facilitate the analysis of incident data to identify trends indicative of systemic problems; and (4) identify the nature and cause of incidents to prevent future abuse”
- GAO Report Medicaid Home and Community-Based Waivers: CMS Should Encourage States to Conduct Mortality Reviews for Individuals with Developmental Disabilities
- GAO-08-529 May 23, 2008
- HHS Administration for Children and Families website:
 - “One in three children with an identified disability for which they receive special education services are victims of some type of maltreatment (i.e., either neglect, physical abuse, or sexual abuse) whereas one in 10 nondisabled children experience abuse. Children with any type of disability are 3.44 times more likely to be a victim of some type of abuse compared to children without disabilities.” citing Sullivan & Knutson, 2000. (HHS Administration for Children and Families website)

Protecting Individuals With Developmental Disabilities from abuse and neglect

- OPWDD and its voluntary provider system facilities are required to report and investigate abuse and neglect by operation of federal and State law, as well as OPWDD policy.
- Reporting obligations are also imposed upon individual mandated reporters who must report child abuse in their capacity as a staff member of certain facilities, institutions, programs, or schools, including all OPWDD facilities and programs.

OVERSIGHT

- OPWDD INTERNAL OVERSIGHT-OPWDD responsible as the caregiver for consumers in its facilities, employer of staff
- OPWDD/OMIG REGULATORY OVERSIGHT-OPWDD responsible for regulation and survey of licensed facilities providing care, including OPWDD facilities; OMIG responsible for enforcing Medicaid payment rules and addressing “unacceptable practices”
- CHILD ABUSE REPORTING-mandated by statute to address child protection both in the community and in facilities-overseen by CQC for OPWDD facilities. “All employees and volunteers of residential care facilities, including all staff of OMRDD operated and certified residential facilities that serve children, are mandated reporters”
- **Update on Child Abuse Reporting and Investigations
November, 2008**
http://www.opwdd.ny.gov/wt/publications/wt_publications_childabuse_reporting.jsp

WHERE DOES OMIG FIT?

- 18 NYCRR 521-Medicaid requirement for an “effective” compliance program as a condition of payment
- Section 6402(a) reporting of improper payments
- Corporate Integrity Agreements (in consultation with OPWDD)
- Exclusion of individuals
 - Who pose an imminent endangerment to public health or welfare 18 NYCRR 515.7 (d)
 - Who fail to meet recognized standards (e.g., no system for reporting abuse) 18 NYCRR 515.2
 - Who have been convicted of crime related to the ordering or furnishing of medical care (e.g., patient neglect or abuse)

WHERE DOES THE MEDICAID FRAUD CONTROL UNIT FIT?

- Criminal violations of state statutes governing abuse and neglect
- Criminal violations involving improper payments
- False Claims Act recoveries for “failure of care” based on neglect or abuse
- Protection of whistleblowers who come forward with information

OPWDD 2011 Initiatives for Incident Management

- 2011 Initiative
 - Incident Management Team- charged with oversight and follow-up on all reports of incidents of abuse and neglect in **both** the State and nonprofit provider systems
 - psychological and fitness testing, mandatory drug testing, and criminal background checks for new direct care employees
 - **OPWDD's toll free Information Line** for Public Use in Making Inquiries and Reporting Quality of Care Concerns
 - Voice: 1-866-946-9733
 - TTY: 1-866-933-4889
- (OPWDD employees are instructed to report allegations of abuse to their supervisors so that immediate protective action can be taken)

OPWDD Regulatory Requirements for Incident Management

- Established review panel to ensure that disciplinary sanctions are administered consistently for all employees in state-operated OPWDD system;
- Focused training to existing direct care, clinical and supervisory state staff to reinforce duties in care of vulnerable persons, methods of preventing and reporting abuse and neglect
- Agency leadership visit all 1,051 state-operated homes to examine the quality of care, meet with staff and individuals to reinforce expectations for quality care

OPWDD Regulatory Requirements for Incident Management – State and Voluntary Operated Programs

- 14 NYCRR Part 624 (OPWDD regulation)
- Part 624 Guidance Document (3 pages)
http://www.opwdd.ny.gov/document/image/hp_brochures_incident.pdf
- Part 624 Handbook (331 pages, revised 4/25/2011)
http://www.opwdd.ny.gov/images/hp_mauual_part624_handbook.pdf
- OPWDD FORM 147 (2 pages, revised 4/2011)
http://www.opwdd.ny.gov/wt/images/ir/wt_form_147.pdf
- Medicaid Compliance Requirement 18 NYCRR PART 521

OPWDD Regulatory Requirements for Incident Management – State and Voluntary Operated Programs

- Ensure that staff report untoward events or situations;
- Give immediate care and protection and protect the dignity of people with developmental disabilities involved in an incident or allegation of abuse;

OPWDD Regulatory Requirements for Incident Management – State and Voluntary Operated Programs

- Investigate why incidents and abuse occur and take steps to prevent a similar incident from happening again;
- Establish a Standing Committee on Incident Review to review specific incidents and allegations of abuse and examine trends;
- Develop procedures and provide staff training to prevent similar incidents in the future.

Reportable Events in the OPWDD System

- OPWDD FORM 147
 - Reportable Incidents
 - Serious Reportable Incidents
 - Allegations of Abuse, including physical, sexual and psychological abuse

Required Notifications for Allegations of Abuse

- Notifications of reports of allegations of abuse must be made to the following:
- Agency's Chief Executive Officer or designee
- OPWDD DDSO, for voluntary agencies
- Law enforcement, where a crime may have been committed
- NYS Central Register for child abuse, when allegation involves a child

Required Notifications for Allegations of Abuse (continued)

- Notifications of reports of allegations of abuse must be made to the following:
- CQC, and, for Willowbrook Class members, to Consumer Advisory Board
- Guardian, parent or correspondent/advocate and service coordinator
- Mental Hygiene Legal Services, for individuals in certified residences
- Board of Visitors, for state operated facilities

OPWDD Child Abuse Reporting Requirements

- Central Register of Child Abuse and Maltreatment-maintained by Office of Child and Family Services <http://www.ocfs.state.ny.us/main/cps/>
- Since 10/1/2007-Mandated reporters who must report child abuse in their capacity as a staff member of certain facilities, institutions, programs, or schools, including all OMRDD facilities and programs, must now personally make the report to the State Central Register. Following the report, the mandated reporter must immediately notify the person in charge of the facility, or the designated agent, that the report has been made.
- **All employees and volunteers of residential care facilities, including all staff of OMRDD operated and certified residential facilities that serve children, are mandated reporters**
- In addition to OPWDD reporting duties, not instead of OPWDD reporting

OPWDD Child Abuse Reporting Requirements

- Mandated Reporters Hotline for making child abuse and maltreatment reports:
1-800-635-1522
- **Report Form LDSS-2221A**

MANDATED REPORTERS to Central Register of Child Abuse and Maltreatment

- Medical and hospital personnel
- School officials
- Social service workers
- Child care workers
- Residential care workers and volunteers
- Law enforcement personnel
- Summary Guide for Mandated Reporters:
- <http://www.ocfs.state.ny.us/main/publications/Pub1159.pdf>
- On-line training from Office of the Professions, Department of Education <http://www.nysmandatedreporter.org/>

MANDATED REPORTS

- “Reasonably suspect”
- Mandated reporters who fail to report suspected child abuse or maltreatment can be charged with a Class A misdemeanor
- Mandated reporters can be sued in a civil court for monetary damages for any harm caused by the mandated reporter's failure to make a report

OTHER AUDIT/INVESTIGATIVE RISKS

- New York Attorney General actions under the New York False Claims Act
- Whistleblower actions under the New York False Claims Act (these cases limited to private entities)
- Claims under the federal False Claims Act

“ABUSE” IN MEDICAID IS NOT IDENTICAL WITH “ABUSE” FOR REPORTING PURPOSES OR PROSECUTIONS

- “Abuse means provider practices that are inconsistent with sound fiscal, business, or medical practices, and result in an unnecessary cost to the Medicaid program, or in reimbursement for services that are not medically necessary or that fail to meet professionally recognized standards for health care. It also includes recipient practices that result in unnecessary cost to the Medicaid program.” 42 CFR 455.2-similar provision in state regulations 18 NYCRR 515.1 (b)
- “Abuse” does not require intentional conduct-it is measured by objective measures
 - Medically unnecessary care
 - Care that fails to meet recognized professional standards
 - “Provider practices that are inconsistent with sound fiscal . . . practices”

MFCU Abuse and Neglect Jurisdiction

- Resident Abuse, Neglect and Misappropriation of Funds
- Operation, Management and funding of Residential Health Care facilities including hospitals, nursing homes, clinics, adult care facilities

SOURCES OF MFCU INVESTIGATIONS

- REFERRALS FROM
 - STATE DOH/OMIG
 - LOCAL, STATE OR FEDERAL AGENCIES
- RESIDENT AND FAMILY MEMBER COMPLAINTS
- FACILITY EMPLOYEES/WHISTLEBLOWERS
- SPIN-OFFS FROM OTHER CASES
- SELF-GENERATED INVESTIGATIONS

CRIMES CHARGED IN ABUSE AND NEGLECT CASES

- Assault, Penal Law Article 120
- Endangering the Welfare of
 - Child, Penal Law § 260.10 (misdemeanor)
 - Incompetent or Physically Disabled Person, Penal Law § 260.25 (misdemeanor)
 - Vulnerable Elderly Person or Incompetent or Physically Disabled Person
 - Second Degree, Penal Law § 260.32 (class E felony)
 - First Degree, Penal Law § 260.34 (class D felony)
- Offenses involving Falsifying Records
 - Falsifying Business Records in the First Degree, Penal Law § 175.10 (class E felony)
 - Making a Punishable False Written Statement, Penal Law § 210.45 (misdemeanor)
- Sexual Abuse & Rape – both by force and inability of victim to consent
 - Rape , Penal Law § 130.25, 30 and 35, (class E, D and B felonies)
 - Sexual Abuse, Penal Law § 130. 55, 60 and 65 (Misdemeanors and D felony)

CRIMES CHARGED IN ABUSE AND NEGLECT CASES

- In addition, it is a violation of the Public Health Law to physically abuse, neglect or mistreat a patient in residential care facility or to fail to report such an act.
- Public Health Law § 2803-d(1):
 - In addition to any other penalties prescribed by law, any person who commits an act of physical abuse, neglect or mistreatment or who fails to report such an act as provided in this section, shall be deemed to have violated this section and shall be liable for a penalty pursuant to section twelve of this chapter.
- Public Health Law § 12-b(2):
 - Any person who willfully violates any provisions of the Health Law, or any regulation promulgated there under, commits a crime and may be punished by a term of imprisonment not exceeding 1 year, or by a fine not exceeding \$2,000 or both.

CRIMES CHARGED IN ABUSE AND NEGLECT CASES

– Public Health Law –

- Every resident “shall have the right to receive adequate and appropriate medical care” Public Health § 2802-c(3)(e) and “be free from mental and physical abuse and from physical and chemical restraints” Public Health § 2802-c(3)(e)

MFCU INVESTIGATIONS

- Resources for Abuse and Neglect:
 - Nurse Investigators
 - Experience includes Director of Nursing, Compliance, Risk Management, Unit supervisor
 - Worked in hospitals, nursing homes, drug and alcohol clinics, home healthcare
 - Review resident records, staffing, conduct interviews
 - Review hidden camera recordings

MFCU INVESTIGATIONS

- Resources for Abuse and Neglect:
 - Investigators
 - All MFCU investigators are police officers
 - Trained in abuse and neglect investigations
 - Experienced Special Victims detectives
 - Expertise in conducting “hidden camera investigations”
 - Due its size, NYC region has a Patient Protection Unit staffed with attorneys, nurse investigators and investigator dedicated to these investigations

MFCU CASE PROFILES

- Robert Gundersen – Northwoods –Troy
 - Certified Nurse Aide
 - Charged with
 - Sexual Abuse 1st Degree (victim 1)
 - Sexual Abuse 3rd Degree (victim 2)
 - Plead Guilty to Attempted Sexual Abuse 1st
 - Sentenced to 10 years probation
 - Adjudicated Level 2 Sex Offender

MFCU CASE PROFILES

- Robert Gundersen – Sexual Abuse
- Hidden Camera Cases – Neglect
- Shane Spooner -
 - “Sexted” Photo of Resident
- Jesse Joiner
 - Abuse and Neglect
 - Theft of Narcotics from facility

RISK: Using Excluded Persons to Provide Services Reimbursable by Medicaid

- See OMIG's Exclusion Webinar on our website at http://www.omig.ny.gov/data/images/stories/Webinar/6-8-10_exclusion_webinar_final.ppt

CMS EXCLUSION REGULATION

- “No payment will be made by Medicare, Medicaid or any of the other federal health care programs for any item or service furnished by an excluded individual or entity, or at the medical direction or on the prescription of a physician or other authorized individual who is excluded when the person furnishing such item or service knew or had reason to know of the exclusion.” 42 CFR 1001.1901 (b)
- Focus is not on the relationship but on the **payment**

PROGRAM EXCLUSION

- Federal authority and requirement on providers
 - No claims based on work of excluded persons
- Federal authority and mandate on state Medicaid programs
 - No state Medicaid claims to CMS based on work of excluded persons

Impact of Exclusion on Health Care Providers

- Once exclusion occurs, health care providers:
 - May employ or contract with excluded persons, but may not allow excluded persons to provide or to direct the ordering or delivery of services or supplies, or to undertake certain administrative duties (IFSP team evaluator, service providers, service coordinators, local early intervention official)
 - Whether or not direct care activities are involved
 - If any part of the task is reimbursed by federal program (Medicaid) dollars
 - Note: Staffing agencies must screen potential candidates to ensure that they have not been excluded prior to being sent to providers for work. Providers must develop and enforce contractual agreements to ensure prescreening occurs

THE NEW YORK STATE EXCLUSION REGULATION

- **18 NYCRR 515.5** Sanctions effect: (a)
No payments will be made to or on behalf of any person for the medical care, services or supplies furnished by or under the supervision of the person during a period of exclusion or in violation of any condition of participation in the program.

RISK #2: Failing to Maintain an “Effective” Compliance Program as Required by 18 NYCRR 521 (if billing over \$500,000 per year)

- See OMIG Webinar: Evaluating Effectiveness of Compliance Programs
- http://www.omig.ny.gov/data/images/stories/Webinar/compliance_webinar_11-17-10.ppt

Maintaining an “Effective” Compliance Program

- 18 NYCRR 521
- Requires an 8 step effective compliance program
- Requires an annual certification by December 31 of each year
- Applies to both governments and providers (directly or indirectly)

CQC

- **New York State Commission on Quality of Care for the Mentally Disabled**
401 State Street, Schenectady, NY 12305
Telephone (518) 388-2888
- FAX-518 388-2860 (Cindy Davidson) for OPWDD 147 submission

MENTAL HYGIENE LEGAL SERVICES

- **MHLS Departmental Offices**
First Judicial Department
41 Madison Avenue, 2nd Floor
New York, NY 10010 (646) 386-5891 (Bronx and Manhattan) FAX: (212) 779-1894
- Second Judicial Department
170 Old Country Road
Mineola, NY 11501
(516) 746-4545 (Dutchess, Kings, Nassau, Orange, Putnam, Queens, Richmond, Rockland, Suffolk, Westchester)
FAX: (516) 746 4372

MENTAL HYGIENE LEGAL SERVICES

- **MHLS Departmental Offices**

- Third Judicial Department

40 Steuben Street, Suite 501

Albany, NY 12207

(518) 451-8710 (Albany, Broome, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Madison, Montgomery, Otsego, Rensselaer, St. Lawrence, Saratoga, Schenectady, Schoharie, Schuyler, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington)

FAX: (518) 473-5849

-

Fourth Judicial Department

50 East Avenue, Suite 402

Rochester, NY 14604

(585) 530-3050 (Allegany, Cattaraugus, Cayuga, Chautauqau, Erie, Genesee, Herkimer, Jefferson, Lewis, Livingston, Monroe, Niagara, Oneida, Onondaga, Ontario, Orleans, Oswego, Seneca, Steuben, Wayne, Wyoming, Yates)

FAX: (585) 530-3079

Contact MFCU

- Deputy AG/Director – Monica J. Hickey-Martin
212-417-5250 Monica.HickeyMartin@ag.ny.gov
- Assistant Deputy AG – Paul J. Mahoney
212-417-5254 Paul.Mahoney@ag.ny.gov
- Attorney General's Medicaid Fraud Hotline
1 (800) 771-7755
- www.ag.ny.gov

SYRACUSE
615 Erie Boulevard West
Syracuse, New York 13204
(315) 423-1104

ROCHESTER
144 Exchange Boulevard, Suite 600
Rochester, New York 14614
(585) 262-2860

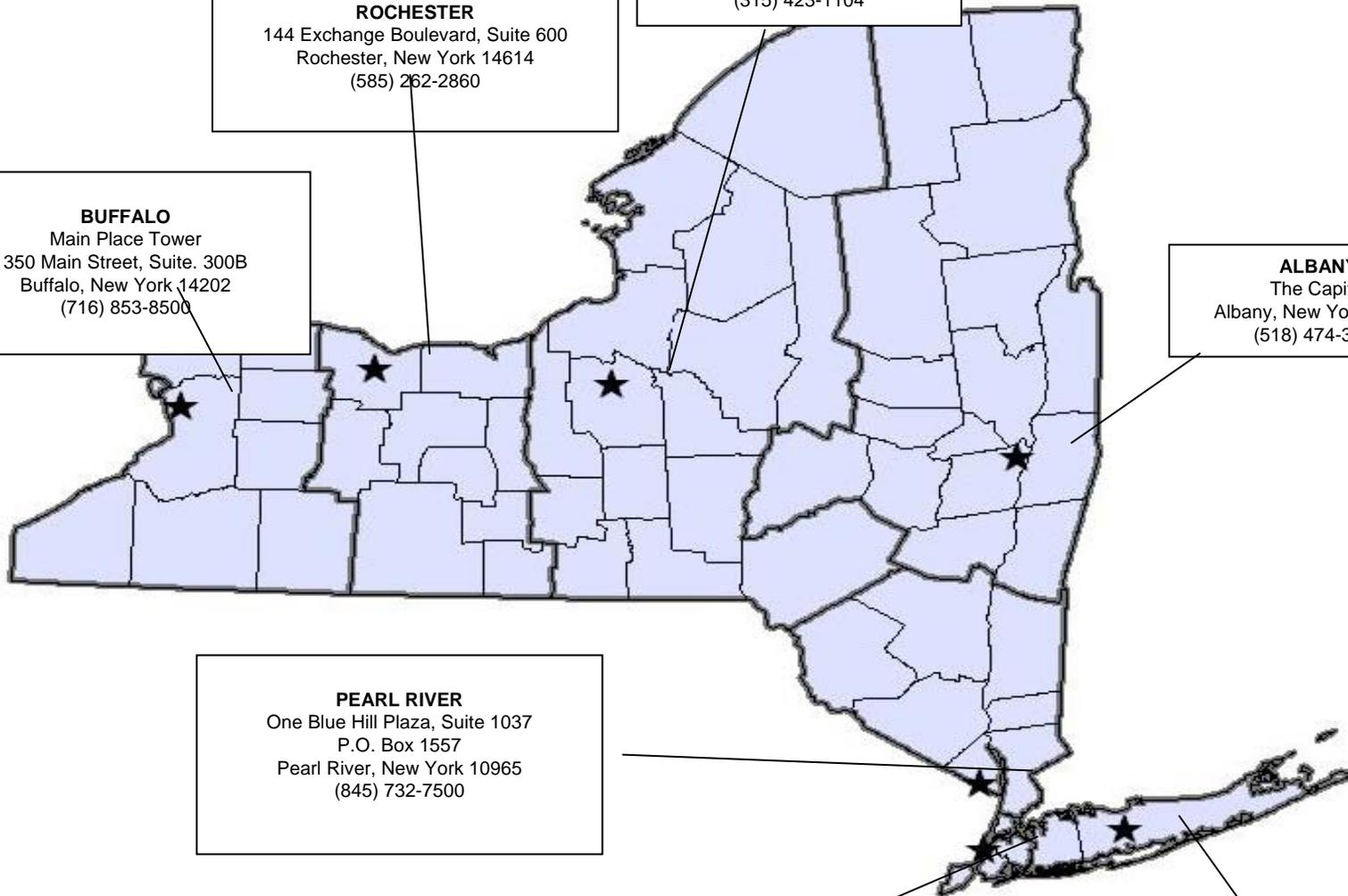
BUFFALO
Main Place Tower
350 Main Street, Suite. 300B
Buffalo, New York 14202
(716) 853-8500

ALBANY
The Capitol
Albany, New York 12224
(518) 474-3032

PEARL RIVER
One Blue Hill Plaza, Suite 1037
P.O. Box 1557
Pearl River, New York 10965
(845) 732-7500

NEW YORK CITY
120 Broadway, 13th Floor
New York, New York 10271
(212) 417-5300

HAUPPAUGE
300 Motor Parkway Suite 210
Hauppauge, New York 11788
(631) 952-6400



FREE STUFF FROM OMIG

- OMIG website - www.OMIG.ny.gov
- Mandatory compliance program-hospitals, managed care, all providers over \$500,000/year
- Over 3000 provider audit reports, detailing findings in specific industry
- Listserv (put your name in, get emailed updates)
- New York excluded provider list
- Follow us on Twitter: NYSOMIG