



The Association of the Bar of the City of New York

August 15, 2005

The State Education Department/The University of the State of New York
Office of the Professions
475 Park Avenue South, 2nd Floor
New York, NY 10016-6901
Attn: Director Louis Catone

Re: Department of Education investigation of Prison Health Services, Inc.

Dear Mr. Catone:

I. The Committee Urges the Department of Education to Conduct a Prompt and Thorough Investigation of Prison Health Services, Inc.

The Committee on Mental Health Law (the Committee) of the Association of the Bar of the City of New York understands that the State Education Department (the Department) is reviewing the legality of the \$300 million contract executed in December of 2004 between Prison Health Services, Inc. (Prison Health) and the City of New York. In light of the serious conclusions in the reports issued over the years by the New York State Commission of Correction (the Commission), as highlighted in *The New York Times* recent three-part series,ⁱ the Committee urges the Department to conduct a prompt and thorough review of that contract and of Prison Health's operations.

The Committee has reviewed correspondence between the Department, the Commission and the Office of the Attorney General (the Attorney General) concerning Prison Health between 2001 and 2004. By letter dated December 4, 2001, the Department informed the Commission that the Department had determined that Prison Health was offering professional services in New York in violation of the Education Law, and that it had advised the Attorney General of the matter. A few days earlier, by letter to the Attorney General dated November 29, 2001, the Department requested that the Attorney General commence a criminal action against Prison Health pursuant to Executive Law § 63(3).

By letter to the Commission dated October 12, 2004, the Attorney General essentially declined to take any action regarding Prison Health. That letter shows that the Attorney General understood that two professional corporations affiliated with Prison

Health were in contract with county and local detention and correctional facilities in New York to provide medical care for inmates. The letter further indicates that the Attorney General was content to rely on representations by counsel for American Service Group, Prison Health's parent corporation, to the effect that the two professional corporations affiliated with Prison Health were wholly-owned by a physician licensed in New York.

By letter to the Attorney General dated November 5, 2004, the Commission stated its position that Prison Health, a foreign corporation, itself was in direct contract with counties in the State of New York and with the City of New York. The November 5th letter further stated that the Commission previously communicated to the Attorney General its position that the contractual arrangements involving the Prison Health affiliates were shams created to enable PHS, Inc., to perpetrate the appearance of legality in the State of New York, and that at best these affiliates were still engaging in illegal fee-splitting. The letter further stated that the representations by Prison Health as to its affiliates upon which the Attorney General was content to rely were those which the Department debunked in its prior investigation. According to the Committee's reading of the Commission's letter, to the extent that Prison Health is not itself party to the contracts at issue, Prison Health nonetheless continues to control provision of medical services within the state, notwithstanding the formal existence of two affiliated New York professional corporations.

II. The Serious Conclusions Regarding Prison Health Appear to Exemplify Why the State of New York Prohibits the Corporate Practice of Medicine.

As the Department is well aware, New York State prohibits the corporate practice of medicine. That is, Education Law § 6522 provides that "[o]nly a person licensed or otherwise authorized under this article shall practice medicine... As the Department's Office of the Professions makes clear on its website,ⁱⁱ business corporations may offer the services of licensed professionals only if, inter alia, all shareholders are licensees of that profession. Thus, a business corporation cannot simply hire a licensee to provide professional services. The purpose of such a regulatory statute is to protect the public from a business relationship that could place constraints upon professional judgment, unduly limit professional practice, invade the professional integrity of the profession[], or permit the business corporation to make professional decisions.ⁱⁱⁱ

As is relevant here, the Committee is not merely concerned with an alleged failure to comply with some arcane procedural formality. Rather, a review of the Commission's reports pertaining to Prison Health reveal that there have been numerous suicides and other deaths of inmates and detainees held in facilities entrusted to Prison Health for the provision of medical care. The Committee is, of course, particularly disturbed by the description of suicides of persons with mental health conditions who were allowed to deteriorate and decompensate while held in an environment in which Prison Health was

the sole provider of healthcare services. In that regard, the Commission's reports found, for instance, that under Prison Health's supervision at Rikers Island:

Notwithstanding that he was supposed to be on suicide watch, Jose Cruz hanged himself after a corrections officer placed him at the end of a cellblock where officers could not see him from their post;^{iv}

David Pennington killed himself after corrections officers sent him to the jail's mental health clinic three times over a three-day period—where each time he left untreated—and a doctor even sent him to a psychiatrist, but the psychiatrist declined to perform an evaluation, and sent Pennington back to his cell in the jail's general population.^v

James Davis was found in his cell with a bootlace tied around his neck; a doctor, two nurses and two guards spent 15 minutes futilely administering CPR, unaware that oxygen tanks and cardiac medication were nearby; additionally, no one thought to unknot the bootlace;^{vi}

Joseph Hughes, who had a history of hallucinations and suicidal gestures, hanged himself four hours after a jail psychiatrist wrote that he was no danger to himself;^{vii}

Carina Montes hanged herself after the mental health specialist caring for her never saw her medical file, which included information that a jail social worker had placed her on suicide watch, because the file was missing; additionally, in her five months at Rikers, Ms. Montes—who had a history of sexual abuse as a child, a diagnosis of manic depression and a suicide attempt at age 13—never saw a psychiatrist;^{viii}

A common thread among these incidents is that Prison Health failed to comply with 9 NYCRR Part 7003, which contains various requirements regarding determining when an inmate requires additional supervision and ensuring he or she receives it.^{ix} It should therefore come as no surprise that the Commission has used harsh words to describe Prison Health's operations. In the case of David Pennington, above, the Commission's Amended Final Report specifically stated: [t]his deliberate refusal to provide treatment to a patient with active suicidal ideation who was directly referred by another physician constitutes professional medical misconduct on the part of the psychiatrist and flagrantly inadequate mental health care by PHS, Inc.^x Further, in an October 11, 2002 letter written by Frederick C. Lamy, Chairman of the Commission's Medical Review Board, he described Prison Health as reckless and unprincipled in its corporate pursuits, irrespective of patient care, and added that [t]he lack of credentials, lack of training, shocking incompetence and outright misconduct of the doctors and nurses in that particular case were emblematic of P.H.S., Inc.'s conduct as a business corporation, holding himself out as a medical care provider while seemingly bereft of any quality control.^{xi}

The conclusions within these Commission papers appear to exemplify why New York prohibits the corporate practice of medicine. This long-standing policy is intended to guard against the dangers of: 1) lay control of medical decisions by corporate managers over professional medical judgment; 2) commercial exploitation and a lowering of professional standards deriving from the overriding profit motive of corporations; and 3) the division of the practitioner's loyalty between the patient and the profit-making employer.^{xii} The circumstances described in *The New York Times* articles raise all three of these concerns.

Moreover, although the largest spate of suicides at Rikers Island occurred in 2003, there is little reason to believe that Prison Health has changed its operations entirely. Indeed, just this past Spring, the city Department of Health and Mental Hygiene concluded that in the first quarter of 2005, Prison Health failed 12 of 39 performance indicators the city sets for treating jail inmates, and fined Prison Health \$55,000. Prison Health's performance was therefore determined to be worse than in the fourth quarter of 2004, when it failed 6 performance indicators, and was fined \$35,000.^{xiii}

Historically, the courts in this state have not hesitated to find that organizations practicing medicine without a license practice illegally (see e.g. People v. John H. Woodbury Dermatological Institute, 192 N.Y. 454 [1908]; United Calendar Mfg. Corp. v. Huang, 94 A.D.2d 176 [2nd Dept 1983]; State v. Abortion Information Agency, Inc., 30 N.Y.2d 779 [1972] ; see also Matter of Co-operative Law Co., 198 N. Y. 479, 484 [1910]). A corporation can neither practice law nor hire lawyers to carry on the business of practicing law for it any more than it can practice medicine or dentistry by hiring doctors or dentists to act for it"). Indeed, Education Law § 6512, which makes it a crime for a person or organization to practice a profession without a license, was the statutory section the Department invoked in its December 4, 2001, letter to the Commission.

III. Prompt Governmental Action is Imperative

The Commission's correspondence with the Attorney General's office indicates that it believes that 1) governmental entities within the state have contracted with a private, profit-oriented corporation to provide medical care for a confined population that has no other access to healthcare; (2) that corporation has consistently followed a practice of providing inadequate services for the purpose of reducing expenses, and 3) numerous fatalities have resulted from this practice. Obviously, the Committee has become very concerned that, among other things, inmates with serious mental illnesses are being overlooked for the sake of cutting costs.

This matter, therefore, challenges the government agencies charged with protecting the interests of the citizens of New York which include vulnerable populations in prisons and jails to do their utmost to investigate Prison Health and, if warranted, to take aggressive action in the event they find a violation of the laws governing the provision of healthcare services. The Department's strong investigative action as to Prison Health in 2001 gives the Committee reason to believe that the Department will again conduct a thorough investigation now. We await your conclusions.

Thank you for efforts in this regard.

Respectfully submitted,

Virginia K. Trunkes, Esq.
Chair, Committee on Mental Health Law

cc: Peter Pope, Esq., Office of the Attorney General, Criminal Prosecutions Bureau
Michael F. Donegan, Esq., State Commission of Correction

Committee on Mental Health Law
Virginia K. Trunkes (Chair)
Peter Yoerg (Secretary)

Joshua Bernstein
Susan Canter
Ed Geffner
John Gresham
Fred Levine
Abigail Levy
Noah Potter*
Judith Scholl
Claire B. Steinberger
Vuka Stricevic
Kimberly Tate-Brown

* Drafter of the letter

i. Paul von Zielbauer, "Private Health Care in Jails Can Be a Death Sentence," February 27, 2005; "In City's Jails, Missed Signals Open Way to Season of Suicides," February 28, 2005; "A Spotty Record of Health Care at Juvenile Sites in New York," March 1, 2005.

ii. www.op.nysed.gov/corppractice.htm

iii. *Id.*

4. *See* Final Report of the New York State Commission of Correction, dated September 17, 2003.

v. *See* Amended Final Report of the New York State Commission of Correction, dated March 15, 2005.

vi. *See* Final Report of the New York State Commission of Correction, dated September 24, 2004.

vii. *See*, Paul von Zielbauer, "Private Health Care in Jails Can Be a Death Sentence," NY TIMES, February 27, 2005.

viii. *See id.*

ix. *See e.g.* Final Report of Jose Cruz, p.2, 6, p.3, 2; Amended Final Report of David Pennington, p. 3, 8; Final Report of Joseph Hughes, p.4, 13.

10. *See* Amended Final Report of David Pennington, p. 4.

xi. Letter to Tracy M. Larocque, Esq., pp. 2 and 4.

xii. Alanson Willcox, *Hospitals and the Corporate Practice of Medicine*, 45 CORNELL L.Q. 432, 442-43 (1960).

xiii. *See* Memorandum of June 3, 2005 from James L. Capozziello, Deputy Commissioner of the Division of Health Care Access and Treatment to Thomas R. Frieden, Commissioner of the Department of Health and Mental Hygiene, and Martin Horn, Commission of the Department of Corrections.