

August 14, 2017

Scott Vivona, Assistant Deputy Director
Center for Health Care Quality
Chelsea Driscoll, Chief,
Policy and Enforcement Branch
California Department of Public Health
MS 3203, P.O. Box 997377
Sacramento, CA 95899-7377

RE: Implementing SB 97 amendments to minimum staffing requirements for SNFs

Dear Mr. Vivona and Ms. Driscoll:

Thank you for meeting with us on August 1, 2017 to discuss implementation of SB 97's staffing requirements for skilled nursing facilities. We are writing to express concerns about SB 97 and to provide recommendations on the planned emergency regulations.

As we discussed at the meeting, we are deeply troubled that a law presumably intended to increase minimum staffing levels in nursing homes has so many provisions that are potentially harmful to nursing home residents. SB 97 exempts distinct part SNFs from the increased staffing requirements, repeals a critical provision requiring licensed nurse to resident ratios and includes two separate waiver procedures that could allow nursing homes to evade the new requirements. It also directly undermines the minimum-staffing requirement by allowing nursing homes to count uncertified nursing assistants as direct caregivers.

We are also dismayed that the Department officials at the meeting claimed to be in the dark about the origin of these provisions. To say the least, Department officials charged with protecting nursing home residents from neglect and tasked with developing emergency regulations to implement the SB 97 staffing provisions should be well informed about its legislative history. How can we as stakeholders have meaningful discussions with the Department if we cannot obtain the most basic information about the purpose and intent of these provisions?

Pursuant to the Public Records Act, we request that you send us all documents involving technical assistance, fiscal analysis or other comments and analysis concerning the SB 97 staffing provisions by the Department or any state official while they were being considered by the Legislature or Governor.

We, too, are in the dark about these provisions because there was no public process to review or comment on them. It is profoundly disturbing that laws governing minimum staffing levels for nursing home residents were apparently produced through back room deals without any

consumer or advocate involvement. No law has more impact on the quality of care for nursing home residents than the minimum staffing requirements, nor is any more vital to protecting residents from neglect and abuse. It should go without saying that a law of such importance should not be shrouded in mystery.

Through an amendment to HSC §1276.65, SB 97 directs the Department to repeal and amend existing regulations and to adopt emergency regulations to implement its provisions. In our meeting, you reported the Department had not yet identified which regulations it might amend or repeal and had not decided if it would establish new regulations. Once you have made such determinations, we request another opportunity to meet with the Department before it begins drafting the emergency regulations.

Due to the lack of clarity about which regulations might be modified or repealed, the following recommendations are not tied to specific existing regulations.

Develop ratios that maximize resident quality of care.

As amended, HSC §1276.65(c)(2) directs the Department to develop staff-to-resident ratios for direct caregivers in a manner that “maximizes resident quality of care.” This means the Department must interpret the law in a way that serves residents’ interests. Each and every change to the existing staffing regulations must meet this foremost requirement.

The current minimum staffing requirements do not maximize resident quality of care; they expose residents to harm. Set nearly two decades ago, the 3.2 nursing hours per resident day requirement was woefully inadequate when it was first adopted. Today, due to the steadily increasing acuity of resident needs over those decades, this standard is so deficient that it is endangering residents. Many California nursing homes are grossly understaffed.

Inadequate staffing is the single most important cause of the neglect and human suffering that is so commonplace in many nursing homes today. We hear daily from residents, their families and friends, and others about the impact of understaffing. They tell us that insufficient staff is the root cause of poor care that has caused bedsores, avoidable falls, infections, dehydration, chemical restraints, repeated hospitalizations and preventable deaths. Too often, they say the institutionalized nature of understaffing makes them feel hopeless about their lives.

Entire nursing home chains are understaffed. A groundbreaking November 2014 series by the Sacramento Bee that examined the quality of care in each of California’s 25 largest nursing home chains found that nursing homes owned by Shlomo Rechnitz, California’s largest nursing home operator, fell below state averages on all five staffing measures reporters investigated. Two other chains performed just as poorly.

The quality of care at the most poorly staffed nursing homes has never been worse. The terrible impact of understaffing is often depicted in the Department’s nursing home inspection and investigation reports and is a major contributing factor in the 30 percent increase in nursing home complaints during the last three years.

Residents' lives will remain at risk until California establishes safe staffing standards for all nursing homes. All of the following recommendations would create safer staffing requirements and serve the goal of maximizing resident quality of care.

Establish Minimum Licensed Nurse to Resident Ratios

It is critical that the new minimum required hours for CNAs (2.4 HPRD) not come at the expense of licensed nurse staffing in California nursing homes. The Department must establish specific minimum requirements for licensed nurses to ensure that nursing homes do not replace licensed nurses with CNAs. Operating nursing homes with skeletal levels of licensed nurses is a recipe for disaster.

Residents need sufficient numbers of licensed nurses and CNAs to meet their needs. Both types of direct caregivers are essential. The increasingly sick nursing home residents of today's nursing homes need more licensed nurses than in the past.

Over the past 25 years, numerous research studies have documented a significant relationship between nurse staffing levels, particularly RN staffing, and the outcomes of care. The benefits of higher staffing levels, especially RNs, include lower mortality rates; improved physical functioning; less antibiotic use; fewer pressure ulcers, catheterized residents, and urinary tract infections; lower hospitalization rates; and less weight loss and dehydration.

For example, a 2004 report by the Institute of Medicine found:

The relationship between nurse staffing levels and patient outcomes in nursing homes has been shown in numerous studies...Inadequate nurse staffing has been shown to be associated with malnutrition, starvation and dehydration in nursing homes. Institute of Medicine, Keeping Patients Safe; Transforming the Work Environment of Nurses, 165-166 (2004).

SB 97 does not include a specific licensed nurse to resident ratio, however, it retained the existing requirement in HSC §1276.65(c)(2) that the Department develop “*staff-to-patient ratios for direct caregivers and licensed nurses.*” Emphasis added. This duty cannot be accomplished in a manner that maximizes resident quality of care without setting specific minimum numbers of licensed nurses per resident.

We urge the Department to require 24-hour RN care in all California SNFs and to adopt the licensed nurse to resident ratios recommended by Abt Associates in its landmark 2001 report to CMS on minimum nursing home staffing requirements. Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes, Phase II Final Report, 2001, ABt Associates. It found that at least 0.75 hours of registered nurses (RNs) and 0.55 hours of licensed vocational nurses (LVNs) were needed each day per resident to protect residents from harm. We also support converting these daily ratios into shift ratios for RNs and LVNs.

These minimum requirements are achievable today. CMS reports on Nursing Home Compare that the average daily nursing hours per resident in California nursing homes is currently 52 minutes for RNs (0.86 hours) and 65 minutes for LVNs (1.08 hours).

Establish Shift Ratios for CNAs

In enacting AB 1075 (Shelley, Chapter 684) in 2001 and adding §1276.65 to the Health and Safety Code, the Legislature expressed its intent to enact legislation that does the following:

- (1) Creates a mechanism to increase minimum staffing requirements to a level that assures high quality care for patients.*
- (2) Requires that minimum staffing requirements be set forth as ratios of patients per direct caregiver, so that residents, residents' families, facility employees, state inspectors, and others may assist in ensuring compliance with the law.*

These intentions are not altered by SB 97. They are best served by establishing shift ratios for CNAs that go beyond minimum staffing requirements (2.4 hprd) and are expressed in specific numbers of CNAs per resident each shift so that residents, families, inspectors, ombudsman representatives, employees and others can easily know if a skilled nursing facility has enough CNAs on duty.

The ratios for the day and evening shifts should require the same or similar numbers of CNAs per resident. Various research studies, including the 2001 Abt report, have found that the workload during day and evening shifts is relatively comparable in many nursing homes.

The regulations should state that the ratios must be met “at all times.” Doing so will help ensure adequate care and allow residents and visitors to determine compliance at any point in time.

Restrict Counting of Uncertified Nursing Assistants

Treating nursing assistants in training programs as direct caregivers directly undermines SB 97's small increase in the minimum staffing requirement. Today's nursing homes need well-qualified staff with high skill levels and experience, not trainees who are learning on the job. Allowing skilled nursing facilities to use nurse assistant trainees in place of trained, certified staff is dangerous.

The Department can and should take steps to mitigate the harm of this provision. It should:

- Specify uncertified nursing assistants cannot be counted in determining compliance with the requirement to provide 2.4 CNA hours per resident day.
- Prohibit SNFs from counting trainees as direct caregivers for purposes of compliance with the new 3.5 HPRD direct care service requirement.
- Establish detailed procedures to ensure that trainee time is only counted as direct care service hours in instances where they are actually providing nursing services as described in Sections 72309, 72311, and 72315 of Title 22 of the California Code of Regulations. The procedures should ensure that time spent in training activities and shadowing

certified or licensed staff is not counted as direct care service hours. Time performing actual nursing services, if included at all, should be heavily discounted because trainees generally lack the skills and experience to provide care efficiently.

- Post detailed information on the HFCIS page for each nursing home showing if it is using uncertified nursing assistants to provide direct care and, if so, the number and percentage of direct care hours provided by trainees.

Require Sufficient Staff to Meet Resident Needs

The regulations should require nursing homes to have enough staff to fully meet resident needs, consistent with HSC §1276.65(d), by including the following statement:

The direct care service hour requirements established by this section are minimum standards only. Skilled nursing facilities shall employ and schedule additional staff as needed to ensure quality resident care based on the needs of individual residents and to ensure compliance with all relevant state and federal staffing requirements.

Impose Strict Restrictions on Waivers

The two staffing waivers included within SB 97 will increase understaffing and harm residents unless the Department imposes very strict restrictions on their use.

The first waiver is addressed at HSC §1276.65(c)(2). Subject to regulations to be developed by the Department, it would allow SNFs to apply for a waiver “that addresses individual resident needs.” Facilities receiving this waiver must still comply with the 3.5 direct care service hour per resident day requirement. We recommend this waiver be limited to situations in which a nursing home seeks to replace CNAs with equal numbers of licensed nurses for purposes of meeting the new requirement to provide a minimum of 2.4 hours of care by CNAs per resident each day.

The second waiver at HSC §1276.65(l) directs the Department to create a waiver of the direct care service hour requirements to address a shortage of available and appropriate health care professionals and direct caregivers. Without stringent controls, this waiver could potentially allow SNFs to staff at levels below the existing 3.2 nursing HPRD standard set in 1999.

Our strongest objection to staffing waivers is that they essentially waive necessary care to residents. Because the minimum staffing requirements being waived are so far below safe staffing levels for residents, it is all but certain that nursing homes receiving waivers will be staffed at levels where it is impossible to provide adequate care, much less maximize resident well being as required by federal law.

According to their staffing reports, most California SNFs already staff well above the 3.5 direct care service hour requirements established by SB 97. The nursing homes that do not are often among the worst in California. They include, for example, the Shlomo Rechnitz operated nursing homes that received 13 administrative penalties for failing to comply with the 3.2 NHPRD requirement (as cited by the Department in its July 8, 2016 letters denying his licensure applications to operate five nursing homes previously operated by Windsor). It is critical that the

Department's waiver procedures prevent and prohibit nursing homes that provide poor care from obtaining staffing waivers.

There is no credible way to determine if a nursing home faces a genuine shortage of nurses and CNAs. Many reasons can contribute to why a nursing home has trouble hiring staff, including, but not limited to, poor wages and benefits, a toxic reputation, a history of mistreating staff and/or residents, bad management, dangerous working conditions, and disinterest in maintaining sufficient staff. The Department must ensure that its waiver procedures do not allow nursing homes with these characteristics to obtain official permission to understaff.

A ban on admissions is a far better remedy to understaffing. Nursing homes that cannot provide safe staffing levels should reduce their census to levels that their staff can support. This approach can ensure that staffing resources meet resident needs. We discuss our recommendation on banning admissions later in this letter.

During our meeting, the Department was unable to give us any assurances that waivers associated with alleged caregiver shortages (HSC §1276.65(l)) would prohibit nursing homes from staffing below the current minimum SNF staffing requirement, 3.2 NHPRD. Such a result would turn AB 1075 (Shelley, 2001) and SB 97 on their heads by giving California nursing homes permission to staff at levels not allowed this century. To prevent this perverse outcome, the regulations addressing HSC §1276.65(l) should prohibit this waiver from permitting a facility to staff below 3.35 NHPRD.

We have the following additional recommendations, which apply to both types of waivers:

- Establish specific regulatory criteria for determining whether a requested waiver meets individual resident needs;
- Consult with the facility's resident council, family council, and the local ombudsman program before issuing a waiver to seek their views on the appropriateness of the waiver and the accuracy of the facility's representations;
- Disallow waivers of the licensed nurse component of the staffing ratio unless a facility agrees and documents that it will provide comparable licensed nurse staffing levels;
- Issue formal documents stating the terms and conditions of any waiver that must be posted in the facility in prominent locations;
- Require the Department to send notice of any waivers that are granted to the State and local Ombudsman offices within two business days;
- Require facilities to give notice of waivers to all current residents and to incoming residents prior to admission;
- Post detailed information about individual facility waivers on the HFCIS site on the pages of each nursing home that has been granted a waiver;
- Terminate waivers within 3 months of issuance unless a skilled nursing facility has justified an extension;
- Inspect compliance with waiver terms and conditions during each inspection;
- Establish authority to issue fines and ban admissions to any facility that does not comply with the terms of its waiver.

Count Only Actual Direct Care Service Hours

As amended, HSC §1276.65 defines “direct care service hours” as the “actual hours” of work performed per resident day by a direct caregiver. A qualified employee is considered a “direct caregiver” ... “while performing nursing services as described in Sections 72309, 72311, and 72315 of Title 22 of the California Code of Regulations.”

In determining compliance with the 3.5 direct care HPRD requirement and the to-be-developed staffing ratios, the Department’s regulations must ensure that SNFs only count the time of direct caregivers while they are actually performing direct care as defined by the statute. The regulations should prohibit nursing homes from counting hours of direct caregivers while they are not performing nursing services, such as during meals, breaks, rest periods, trainings and other non-nursing activities.

For purposes of setting shift ratios, the regulations should define “shift” in a consistent manner, excluding time spent by direct caregivers while performing non-nursing services.

Exclude Nursing Hours for Residents Receiving Sub-Acute Care

The regulations should specify that direct care service hours provided to residents receiving sub-acute care shall not be counted toward determining compliance with the minimum staffing requirements. Sub-acute units are subject to separate, higher staffing requirements established at 22 CCR §§51215.5 and 51215.6.

Specify Posting Requirements

The regulations should direct SNFs to comply with California and federal posting requirements on staffing and require them to post information at the beginning of each shift identifying each room and each resident to which each CNA and licensed nurse is assigned.

Retaining Staffing Records

We recommend SNFs be required to retain all staffing and patient census records for a minimum of five years.

Authorize Citations for Each Violation

The regulations should authorize citations for each violation of the minimum staffing requirements, consistent with the authority in HSC §1276.65(g)(2) to cite for “A violation” of the requirements. The Department rarely issues any citations for staffing violations, but in the instances when it has done so, we have usually seen only single "B" citations with very small fines even when the nursing home was understaffed for many days or weeks. Unless stronger enforcement practices are taken, many nursing homes will continue to ignore minimum staffing requirements, including the planned ratios.

We recommend the following language:

A citation for a class "AA", class "A" or class "B" violation may be issued for each violation of this section that meets the requirements specified in Section 1424 of the Health and Safety Code.

Ban Admissions for Understaffing

As suggested above, the Department should establish procedures to ban admissions at nursing homes that do not meet the minimum staffing requirements. We recommend the following language:

A nursing home shall not admit new residents unless it is in compliance with the staffing requirements in this section.

The Department may order a facility to cease admitting new residents if it does not meet the staffing requirements in this section or if it fails to provide staffing documentation the Department has requested pursuant to this section.

Update Requirements for Distinct Part SNFs

The exemption for DP SNFs is a mistake. Hospital-based skilled nursing facilities that serve the sickest residents should not be governed by the extraordinarily inadequate existing staffing standard.

If the Department believes residents of DP SNFs have unique staffing needs, it should adopt staffing standards that will ensure those needs are met.

Concerns on Appropriations

Since 2001, the Department has used AB 1075 language that makes implementation of the required staffing ratios contingent on an appropriation in the Budget Act as an excuse to deny nursing home residents the improved staffing levels the law intended. To this day, the Department's approach leaves nursing home residents at the mercy of operators as to whether enough staff is provided to meet their needs.

Over a period of years, CANHR and others have devoted considerable resources reviewing and commenting on the minimum staffing ratios established in §72329.1, a regulation the Department officially promulgated but never implemented due to lack of an appropriation.

SB 97 now also links implementation to an appropriation, raising serious questions about whether it is another phantom staffing increase.

Given AB 1075's history, we were appalled that Department officials at the August 1st meeting had virtually no information to share about appropriations in the current Budget Act or the need for future appropriations to implement the regulations the Department will be developing.

We request that we be fully briefed on plans to fund SB 97's minimum staffing requirements for SNFs in the near future.

To be clear, we do not believe an appropriation should be provided for this purpose. Many nursing homes already staff above the levels required by SB 97 and are already reimbursed for these costs. Under the AB 1629 reimbursement system for SNFs, Medi-Cal rates have nearly doubled since 2004 and annual spending on freestanding SNFs is approaching \$5 billion. SNFs that need to increase staffing to comply with SB 97 will ultimately be reimbursed for those costs under the existing reimbursement system. California should not be further enriching the very operators whose residents have suffered due to their choices to staff their facilities at bare minimums or below.

Thank you for considering our concerns and recommendations. Please advise us when the information we have requested is available and of further opportunities to discuss implementation of SB 97.

Sincerely,



Michael Connors
Advocate



Patricia McGinnis
Executive Director

Cc: Janne Olson-Morgan, CHHS
Jean Iacino, CDPH