

November 30, 2017

Jean Iacino, 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: Comments on Draft SB 97 Workforce Shortage Waiver Provisions

Dear Ms. Iacino and Ms. Driscoll:

We are writing to comment on the draft SB 97 workforce shortage waiver provisions that the Department presented at its November 17, 2017 meeting with stakeholders.

CANHR strongly opposes waivers of the minimum staffing requirements because the waivers will expose residents to neglect and harm. Residents of today's nursing homes need substantially more than 3.5 hours of care each day to meet their needs and to ensure their well-being. Creating a process to waive these fundamental requirements is a profoundly dangerous plan.

SB 97 requires a waiver process, however, it does not diminish existing California and federal requirements that should strictly limit the use of waivers. One such requirement, HSC §1276.65(d), states: "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 requirements."

The Department's draft waiver guidelines need considerable strengthening in order to prevent the quality of resident care from being sacrificed. Our recommendations serve that goal.

Ban on Admissions

A voluntary ban on new admissions should be a prerequisite for SNF waiver requests. This approach would demonstrate that the nursing home is taking a serious step to match staffing resources to residents' needs and to reduce resident exposure to neglect. The ban on new admissions should remain in place until the facility is in full compliance with federal and state staffing requirements.

Recommendation on Ban on Admission

A SNF waiver request must document that it has established a voluntary ban on new admissions that will be maintained until the waiver is terminated.

Evidence of Workforce Shortage

The draft guidelines states SNFs may submit Office of Statewide Health Planning and Development (OSHPD) data identifying registered nurse (RN) shortages in the county where the facility is located as evidence of a workforce shortage. We recommend this provision be deleted because SB 97 did not establish new requirements on RN staffing. Nursing homes should not be allowed to use irrelevant and questionable data on RN availability to evade the new staffing requirements for certified nursing assistants (CNAs) set by SB 97.

We have additional concerns about the relevance and value of the OSHPD data for this purpose. Currently, the referenced OSHPD report classifies almost all large California counties – where the vast majority of nursing homes are located – as having a shortage of RNs. Los Angeles County, with a third of California nursing homes, is among them. Residents would not be well served by such an indiscriminate, dated measure.

Recommendations on Evidence of Workforce Shortage:

A wavier applicant must submit independently verified evidence that:

- A majority of SNFs within a 25-mile radius are unable to hire sufficient numbers of CNAs to comply with the 2.4 CNA requirement;
- Its retention level for CNAs is above community and county SNF averages during the preceding year;
- Its turnover level for CNAs is below community and county SNF averages during the preceding year; and
- Its salaries and benefits for CNAs match or exceed those of SNFs within a 25-mile radius.

How Facilities Will Meet Residents' Needs

The draft guidelines include the following requirement: “SNFs must provide a detailed plan that specifies how the facility will meet residents’ needs and ensure quality care despite the workforce shortage.”

Although this provision gets to the heart of the matter, the draft guidelines are completely silent on the content of such plans and how they will be evaluated. The guidelines should be revised to ensure these plans are meaningful and are carefully evaluated.

Recommendations on Plans Specifying How Facilities Will Meet Residents' Needs

- In developing its plan, a facility shall be required to conduct an updated assessment of each resident; prepare updated care plans for each resident; and quantify, both individually and

collectively, the direct caregiving staffing resources needed to fully meet the residents' needs. The findings shall be summarized in the plan.

- A facility must demonstrate that its direct caregiver staffing levels meets or exceeds the current expected staffing level calculated for it by the Centers for Medicare and Medicaid Services (CMS) and commit to maintaining staffing at or above the expected staffing level, as adjusted by CMS, throughout the duration of the waiver.
- Prior to acting on the waiver, the Department shall conduct an onsite investigation to verify the facility's assertions that it is fully able to meet residents' needs and ensure quality of care.

Evaluation of Waiver Requests

This section of the draft is extremely underdeveloped. It sets an exceedingly low bar for evaluating waiver requests.

Recommendations on Evaluating Waiver Requests

The Department shall consult with the facility's resident council, family council, the local ombudsman program and union representatives to seek their views on the appropriateness of the waiver, the adequacy of resident care, the existence of a workforce shortage, and the accuracy of the facility's representations.

SNFs that are not compliant with state and federal regulations are not eligible for waivers. A SNF applicant shall be considered non-compliant in any of the following situations:

- During the prior three years, it has received one or more California citations, been subject to federal or California enforcement actions, received deficiencies or administrative penalties for insufficient staffing, been cited for harm-level or substandard quality of care deficiencies, or been the subject of any law enforcement charges or prosecutions.
- The inspection component of its current CMS Five-Star quality rating is below five stars.
- The Department has received complaints on insufficient staffing, neglect or abuse at the facility during the prior 12 months.

A SNF's waiver application shall trigger a thorough onsite inspection of the facility to determine or verify:

- The adequacy of its staffing and care;
- Resident and family concerns on the waiver application
- The accuracy and credibility of the facility's assertions that it is fully able to meet residents' needs and ensure quality of care;
- Has the facility provided complete and accurate documentation of the workforce shortage;
- Has the facility demonstrated recruitment efforts to address the workforce shortage; and
- Is the facility effectively implementing its action plan to comply with the 3.5 and/or 2.4 standards?

If the Department determines that a facility submitted false information in its application, it shall deny the waiver request and impose a Class A citation against the facility.

The Department shall deny waiver applications if its inspection and review determine that the quality of resident care is, or is likely to be, compromised in any way by the facility's failure to meet California's minimum staffing requirements.

Duration of Waivers

The draft guidelines would allow the Department to extend waivers up to four years. We understand from discussion at the November 17th meeting that the Department intended the limit to be three years, not four. Either way, it is unsafe and unfair to allow residents to be subjected to understaffing for years at a time.

Recommendations on Duration of Waivers

The Department shall conduct onsite reevaluations of an approved waiver every three months and terminate it unless the facility justifies the extension.

The maximum length of a waiver shall be one year.

Terminating Waivers

The draft guidelines inexplicably fail to address terminations of waivers.

Recommendations on Terminating Waivers

The Department shall issue formal documents stating the terms and conditions of any waiver that must be posted in the facility in prominent locations. During every investigation and inspection the Department conducts while the waiver is in effect, it shall inspect compliance with waiver terms and conditions and terminate the facility's waiver if it finds violations or determines that resident care is compromised in any way.

A SNF with an approved waiver shall be required to submit detailed monthly reports on actions it took to resolve its workforce shortage and to hire qualified staff to comply with minimum staffing requirements. The monthly reports shall be sent to the Department and posted in prominent locations in the facility that are accessible to residents, families, staff and the public. The Department shall terminate the waiver if the facility fails to submit these reports in a timely manner or fails to demonstrate that it has taken meaningful actions, in accordance with its approved plan, to resolve its workforce shortage.

Additionally, an approved waiver shall be immediately terminated whenever any of the following circumstances occur while the waiver is in effect:

- The facility admits one or more new residents;
- Direct caregiver staffing levels fall below the CMS calculated expected staffing levels for the facility;
- Direct care staffing hours fall below 3.35 hours per resident per day;
- The facility receives one or more California citations, is subject to federal or California enforcement actions, receives deficiencies or administrative penalties for insufficient

staffing, is cited for harm-level or substandard quality of care deficiencies, or is the subject of any law enforcement charges or prosecutions;

- The inspection component of its CMS Five-Star quality rating drops below five stars;
- The Department receives complaints on insufficient staffing, neglect or abuse at the facility while the waiver is in effect; or
- A quarterly reevaluation by the Department or any other inspection or investigation determines that resident quality of care is compromised by the waiver or the lack of sufficient staff to meet residents' needs.

Posting and Notification Requirements

The draft guidelines would require SNFs to post approved waivers in a public location and the Department to post the facility's waiver status on its website. These requirements should be strengthened.

Recommendations on Posting and Notification Requirements

The Department shall send written notice of any waivers that are granted to the State and local Ombudsman offices within two business days.

The SNF shall give written notice of waivers to all current residents within two business days of approval and written notice to incoming residents prior to admission. The form and content of these notices shall be set by the Department.

Waiver information posted on the Department's website should advise consumers that the facility is staffed below the 3.5 nhprd requirement and give other details about the status of the waiver.

Preventing Erosion of Current Minimum Staffing Requirements

We remain concerned that the existing staffing requirements are being diluted by the inclusion of non-certified nursing assistant trainees. To ensure that SNFs operating under workforce shortage waivers do not staff below current minimum requirements set by AB 1075 (Shelley, 2001), we recommend the Department prohibit them from staffing below 3.35 nhprd.

Thank you for considering our concerns and recommendations.

Sincerely,



Michael Connors
Advocate



Patricia McGinnis
Executive Director