

July 23, 2018

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Chief, Policy and Enforcement Branch
California Department of Public Health, Licensing and Certification Program
MS 3203, P.O. Box 997377
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RE: Comments on Patient Needs Waiver for SB 97

Ms. Driscoll:

SEIU Local 2015 appreciates the opportunity to provide written comments on the Patient Needs Waiver that was discussed at the last stakeholder meeting on July 10th. Many questions were posed by CDPH regarding this waiver, and while we still feel that there is a lack of detailed information available to respond to, we will provide input on the components that will be most crucial to the operation of this waiver.

Is there a need to have a more specific process than the program flex?

When the 3.2 hours per resident day (hprd) regulations for Skilled Nursing Facilities (SNFs) were established in 2000 via AB 1107, a waiver process was not created to allow facilities to circumvent the staffing requirements. While we believe the updated staffing requirements established through SB 97 likewise should not include the availability of waivers, SEIU understands the requirement is in statute, so we are advocating for a robust system that is well-defined and includes specific application guidelines. The program flexibility guidelines as outlined in Title 22 section 72329.2 and 72213 do not provide adequate information for how the process will be carried out in relation to SB 97. A review of current usages of the program flex process in other settings such as hospitals indicates that the process is mainly used in emergency situations, medical equipment, or procedures. As applied to SNFs, the program flex process has the potential for undermining the intent of SB 97 with the sentiment that it is possible for every facility operating at 3.5 hprd but not 2.4 hprd for CNAs to obtain a waiver. SEIU adamantly opposes this possibility, as many SNFs would be able to utilize the patient needs waiver with no basis in resident needs.

Are there alternative processes that CDPH should consider?

The process used by SNFs to apply for a patient needs waiver must take into account the many different factors that affect the number and type of direct care staff utilized to provide care for SNF residents. SEIU recognizes that residents have a spectrum of needs ranging from basic care to highly complex that may require different types of direct care staff. We also recognize that CNAs, RNs, and LVNs each have defined roles that are intended to provide comprehensive care to each resident. A CNA's primary job is to attend to a resident's Activities of Daily Living (ADLs) including turning the resident, showering them, and safely transferring them in and out of bed, among other tasks. While it is accurate that an RN or LVN is able to perform those same tasks, that is not their role. RNs and LVNs are there to provide more complex care like wound treatment, and to complete assessment and care planning for residents. Licensed nurses do not have the time, nor are they expected to, perform the duties of a CNA. SB 97 requires 2.4 hprd of CNA care to ensure that SNF residents are

healthy and safe, and that there are enough staff attending to their ADLs.

The baseline requirement for SNFs to obtain a patient needs waiver under SB 97 should be that the majority (more than 50%) of their residents have documented higher acuity needs that require a higher ratio of licensed nurses to CNAs. For SNFs that are providing care for a smaller proportion of higher needs residents, they are expected to provide the necessary care to those residents without compromising the care of other residents that would benefit from 2.4 hprd of CNA care. The process for patient needs waiver applications must include a detailed description by the SNF of its resident mix, the estimated nursing hours per resident day broken down by the types of staff, including licensed nurses and CNAs,, and how often that staff mix changes. SNFs should be required to inform CDPH of how many of their current residents require higher-skilled care, and for how long they expect those residents to need that level of care.

The department should use the eligibility criteria for subacute care set forth in the Medi-Cal Provider Manual that defines the level and specific type of care needed by residents as a guideline for evaluating patient needs waiver applications. The Manual outlines the different types of eligibility criteria and treatment procedures used to designate adult subacute level of care.

Lastly, a SNF should be prohibited from applying for, or receiving, a patient needs waiver if they have received certain state and/or federal-level citations and/or deficiencies. This includes SNFs that have received state-level citations including A and AA in the last five years, or that have had their license revoked or suspended. Federal-level deficiencies at levels 3 and 4 that include harm to resident health or safety would also be grounds for a SNF to be ineligible for the waiver. If a SNF has failed to comply with the 3.2 hprd direct care staffing regulations in place since 2000, or if they have received complaints and/or citations in relation to staffing levels and their impact on the quality of care received at the facility, they should automatically be prohibited from consideration for a waiver. SEIU believes it is incredibly important to put these measures in place to prevent SNFs with a history of poor quality care, especially related to staffing, from obtaining a waiver that would further impact their ability to provide optimal care for its residents.

How frequently should the Department reassess eligibility for the patient needs waiver?

The Department should reassess eligibility for the patient needs waiver every month due to the fact that resident needs can change frequently, and the majority of nursing home residents in California have a stay of three months or less. The patient needs waiver should not be a permanent fixture at any SNF; it should only be in place to address resident needs for a defined time period, after which CDPH should reevaluate the facility to determine if the waiver is still warranted. The SNF must submit a detailed resident care plan for those residents requiring a higher level of care with an anticipated date of recovery, discharge, or a date by which the resident is expected to return to a state that wouldn't require a higher ratio of licensed nurses to CNAs. The SNF must immediately update the department as soon as the condition of their resident(s) change(s) and they no longer have higher acuity needs.

Should there be a limit on the number of waiver renewals?

It is extremely important that there be a limit on the number of waiver renewals, much like there is one for the workforce shortage waiver. A patient needs waiver should only be used to address the resident needs for a certain amount of time, after which all SNFs will need to abide by the 3.5/2.4 hprd staffing regulations. The 3.5/2.4 hprd is still well below the federally recommended 4.1 hprd for SNFs, so SNFs with higher acuity residents should be staffing above the 3.5/2.4 hprd to adequately address their needs. As of 2019-2020, all waivers should be phased out so that each SNF is abiding by the 3.5/2.4 hprd staffing regulations.

Should there be different rules for subacute units related to the patient needs waiver?

Subacute hours that are worked in a subacute unit that is housed within a freestanding SNF should not be part of the calculation for the SNF's overall hprd that determines if they are meeting the 3.5/2.4 hprd requirements. Title 22 section 51215.5 of the California Code of Regulations states that "nursing staff assigned to the subacute care unit shall not be assigned other duties outside of the subacute care unit during any given

shift." Although subacute units must staff at a higher 5.8 hprd overall, the staff assigned to those units are not providing direct care to residents outside of the subacute unit and therefore should not be counted in the SNF's overall hprd.

Because subacute facilities use fewer than 2.4 CNAs, should these facilities have specialized consideration for the patient needs waiver?

Subacute facilities, or subacute units within a SNF, should not be eligible to apply for a patient needs waiver as they are already staffing below 2.4 hprd for CNA hours; they should not be permitted to fall below the established subacute standard of 2.0 hprd. A patient needs waiver is specifically intended for SNFs that have an overall 3.5 hprd but lower than a 2.4 hprd for CNAs. As stated previously, the hours worked in subacute units should not count towards a facility's overall hprd and should not be taken into consideration when determining if a facility is meeting the 3.5/2.4 hprd.

Should special consideration be given to SHSNFs applying for a patient needs waiver?

SEIU does not have a position on Small House Skilled Nursing Facilities (SHSNFs) waivers as there are a very limited number of those types of SNFs in California, and we do not have enough information to put forth an informed opinion.

SEIU hopes the department will seriously consider the implications of implementing a patient needs waiver in SNFs, and the need to ensure that only SNFs with documented high-need residents are approved for this type of waiver. The program flex process is simply not developed enough to adequately evaluate the many SNFs that are likely to apply for this very broad waiver. We have provided a number of suggested measures that would create more clearly defined guidelines for SNFs in applying for a patient needs waiver, and for the department in making determinations about the waiver applications. We look forward to continuing to have more in-depth discussions around this waiver as the process continues.

Please contact Amanda Steele, Deputy Policy Director at amandas@seiu2015.org should you have any questions regarding our comments related to SB 97 and the patient needs waiver.

Sincerely,



Laphonza Butler

President

SEIU Local 2015