

February 9, 2018

Chelsea Driscoll
Chief, Policy and Enforcement Branch
California Department of Public Health, Licensing and Certification Program
MS 3203, P.O. Box 997377
Sacramento, CA 95899-7377

RE: Comments on Patient Acuity Waiver and Workforce Shortage Waiver Draft Language for SB 97

Ms. Driscoll:

SEIU Local 2015 appreciates the opportunity to provide additional written comments in response to the Workforce Shortage Draft Waiver as well as the Patient Acuity Waiver. We have found the stakeholder meetings to be informative and are looking forward to continuing to enhance the draft waiver language through our conversations and feedback. We recognize that the Department has made tangible modifications to the Workforce Shortage Waiver based on the feedback received from SEIU and the rest of the stakeholders; we are encouraged by this progress to strengthen the waiver, and would like to revisit some of the items recommended in our letter to CDPH dated December 8, 2017 that were not explicitly addressed in the latest draft waiver nor at the January 22nd stakeholder meeting.

Patient Acuity Waiver

Regarding the Patient Acuity Waiver, SEIU has reviewed the Health and Safety code as well as the Welfare and Institutions Code that the waiver would be based on. We have also reflected on the potential structure of such a waiver, and the myriad of unknown factors that would affect the functioning of the waiver, and in turn, the effects on direct care staffing at Skilled Nursing Facilities (SNFs). We do not support the creation of a Patient Acuity Waiver for the 3.5 hprd/2.4 CNA hprd minimum hours requirement, as it fundamentally undermines the intent of SB 97, which is to not only increase the overall hours per resident day requirements, but to also increase the hours per resident day worked by Certified Nursing Assistants (CNAs), which are known to be essential to the hands-on care rendered at SNFs. We are extremely concerned with the potential adverse effects a patient acuity waiver could have on both workers and residents. Furthermore, we assert that the language in Health and Safety Code 1276.65 that allows for a patient acuity waiver is only in reference to nursing staff to resident ratios, not the minimum hours per resident day requirement. If the Department is going to update patient acuity waiver requirements from Title 22 Section 72329.1, then the nurse-to-resident regulations should be fully updated through a newly established stakeholder process. Establishing a waiver of this nature would be complex and would require in-depth discussions and considerations to implement it in a manner that does not disrupt the new staffing requirements and does not encourage the avoidance of meeting the 2.4 hprd CNA component. As this waiver is not part of the SB 97 emergency regulations, we strongly urge CDPH to focus on the immediate needs of SB 97

implementation, including the workforce shortage waiver and other implementation issues identified by stakeholders.

Guidelines for Waiver Application -Evidence of Workforce Shortage

SEIU raised concerns over utilizing the Office of Statewide Health Planning and Development (OSHPD) data identifying registered nurse (RN) shortages in the county where the facility is located. CDPH can easily develop RN, LVN, and CNA shortage areas based on available information from CDPH, OSHPD, and the Department of Consumer Affairs.

The January draft of the Workforce Shortage Waiver added that “if there is a CNA shortage, identify the shortage using the CNA calculation template.” SEIU supports this addition and will offer specific comments on the template when it is made available by the department.

SEIU is still highly concerned over the proposed usage of county-level data from the Employment Development Department (EDD) as it will not always accurately reflect the characteristics of a particular facility due to the wide variances in areas within one county, especially larger counties such as Los Angeles. We are again submitting the following recommendations on creating a methodology to more precisely define workforce shortage areas.

Recommendations on Evidence of Workforce Shortage

- SEIU recommends that CDPH create their own methodology to designate a workforce shortage area for each of the nursing classifications of RNs, LVNs, and CNAs using a similar method to that of OSHPD to compare the active licensed/certified RNs, LVNs, and CNAs to patient/resident days in a sub-county geography.
 - Rather than using county level information, a smaller geography should be used, such as OSHPD Medical Service Study Areas (MSSA)¹ that are sub-county geographical units and are used for the OSHPD primary care, dental, and mental health shortage area designations.
 - For the first year of implementation, SEIU proposes using OSHPD Health Facility Planning Areas (HFPA) for the geographic comparison since this information is readily available in the OSHPD Long Term Care Facilities Annual Financial Pivot Profile² and it is easy to identify which HFPA each SNF is located in.
 - CDPH can request a cross-walk of the zip codes contained in each HFPA from OSHPD so they can easily assign the RN, LVN, and CNA addresses to the correct HFPA. Since CDPH maintains the CNA registry list, the data is readily available to sum the number of active CNAs by HFPA. CDPH can work with the Department of Consumer Affairs to receive the number of active licensed RNs and LVNs.
 - To determine the number of total SNF resident days and total Hospital patient days, this information can be gathered by HFPA from the most recently available OSHPD LTC facilities annual financial pivot profile and OSHPD Hospital annual financial pivot profile.
 - To determine what portion of SNF and hospital patient days to use for the shortage ratio calculation, a ratio of the number of CNA Full-time equivalent (FTE) employees in hospitals in the HFPA divided by the total number of CNA FTEs employed for both hospitals and SNFs in the HFPA based on OSHPD annual financial data can be applied to the total hospital patient days, and a ratio of the number of CNA FTEs employees in SNFs divided by the total number of

¹ <https://www.oshpd.ca.gov/HWDD/MSSA.html>

² <https://www.oshpd.ca.gov/HID/LTC-Financial.asp#Profile>

CNA FTEs employed for both hospitals and SNFs based on OSHPD annual financial data can be applied to the total SNF resident days. There is a variance among the HFPAs in their staffing mix, so it is more accurate to use the OSHPD LTC facility and Hospital financial data rather than apply a universal percentage to all of the HFPAs, such as 8% of a SNF patient days should be used in the calculation to determine if there is an RN shortage.

- In order for a HFA to be designated as having a shortage, its ratio of staff to patient days should be in the top 25% of all HFPAs.
- Here is an example of an alternative workforce shortage area designation methodology table:

Direct Care Occupation (A)	County (B)	Health Facility Planning Area (C)	Active Licensed/Registered (D)	% employed by SNFs (E)	SNF Total Patient Days (F)	% employed by Hospitals (G)	Hospital Patient Days (H)	Shortage Ratio ((E*F)+(G*H))/D)	Designated (Yes, if ratio is in top 25% of all HFPAs)
RN	Yuba/Sutter	227	465	7.5%	165,000	90%	53,000	132.0	Yes
LVN	Yuba/Sutter	227	65	95%	165,000	1%	53,000	2521.2	Yes
CNA	Yuba/Sutter	227	330	75%	165,000	20%	53,000	415.1	Yes

- CDPH should post the sub-county workforce shortage designated areas on their website, so facilities can assess whether they are located in such an area. CDPH should make it very clear a facility located in a geographic area designated as having either a RN, LVN, or CNA shortage is not automatically eligible for a staffing waiver.
- If EDD is not able to produce sub-county industry and occupation salary range information for nursing staff employed by nursing facilities, one alternative for facilities to provide the wage and benefit expenditure ranges for non-temporary employees for each of the nursing staff job classifications based on OSHPD LTC Facilities Annual Financial pivot profile for the HFA that the SNF is located in. Here is an example:

Sample SNF Hourly Salary & Benefit Estimates by HFA (Based on OSHPD LTC Facilities Annual Financial data)

HFA	Nursing Staff Job Classification	Minimum	Weighted Average	Median	75 th Percentile	Max
925	NA	\$11.37	\$15.66	\$15.76	\$17.07	\$21.17
925	LVN	\$23.89	\$32.26	\$32.25	\$33.59	\$45.13
925	RN	\$30.22	\$44.08	\$44.22	\$46.72	\$58.92

Note: OSHPD LTC Facilities Annual Financial Data includes salary & wage expenditures by job classification and an overall employee benefit factor for each facility that submits a report. To determine the hourly salary & benefit estimate, calculate the

Salary & Wages/Productive Hours for each nursing job classification and multiply it by (1+benefit factor). The benefit factor is Total Benefits divided by Total Salary & Wages.

Additionally, SEIU strongly urges the department to require Skilled Nursing Facilities (SNFs) to provide staff turnover and retention data for the direct care positions they are requesting a workforce shortage waiver for. It is imperative that facilities demonstrate that there is not a pattern of high staff turnover or an inability to retain staff due to working conditions, salary, benefits, or other internal factors that would be the underlying cause of a workforce shortage.

Guidelines for Waiver Application – Evidence of efforts to address the workforce shortage & action plans

In our previous letter to CDPH, we offered detailed suggestions on the evidence that is required to be submitted by SNFs when applying for a workforce shortage waiver. SEIU agrees with the additions made in Section II- Guidelines for Waiver Application, subsection (b) that requires a SNF to submit detailed information on their recruitment strategies, as well as subsections (c) and (d) that lay out deadlines for submitting an action plan and resident assessments. We are encouraged by the additional guidelines developed in this section, and would like to reiterate the following additional suggestions for items we believe should be included in the evidence submitted to the department:

- The facility must demonstrate that they are offering a base hourly wage that is at least at the 75th percentile for the job classification for their defined geography.
- The facility must show evidence that they advertised the job opportunity on at least 4 healthcare profession recruitment websites, in addition to their facility or corporate website, the Employment Development Department (EDD) website, and in the local newspaper, and must provide documentation such as invoices and copies of the job opportunity postings.
- The facility must submit staff turnover rates for each nursing job classification for each of the past 12 months to measure the facility's ability to offer a stable workplace environment and retain staff. The facility must demonstrate that its turnover level for the job classification is below the average for their HFPA or other sub-county geography during the preceding year.
- The facility must submit staff retention rates for each nursing job classification for each of the past 12 months to measure the facility's ability to offer a stable workplace environment and retain staff and must demonstrate that its retention level for the job classification is above the average for their HFPA or other sub-county geography during the preceding year. The OSHPD annual financial data contains a labor report for each facility which contains the average number of employees, total employees over the course of the reporting year, employees with continuous service, turnover percentage, and continuous service employees as a % of average employees. This data can be easily viewed by HFPA.
- The facility must provide a nursing staff hiring report for the preceding 12 months, which lists the vacant position, how many people applied for the position, how many people were interviewed for the position, and for all those offered the position, how many years of experience did they have, what was the salary offered, did the person accept the job, and if the person accepted the job are they still employed at the facility currently. Such information is helpful to compare facilities recruitment to other facilities that apply for a waiver and determine if the facility's difficulty with recruitment is due to the salary offered or a workforce shortage.

SEIU also strongly encourages the department to commit to conducting onsite investigations of facilities that submit waiver applications to verify the facility’s assertions that it is fully able to meet residents’ needs and ensure quality of care” if they are granted a staffing waiver. A cornerstone of allowing waivers should be to ensure residents continue to be cared for safely and fully.

Evaluation of Waiver Requests

SEIU supports the guidelines in Section III-Evaluation of Waiver Requests, and is requesting the department continue to consider adding the following item:

- SEIU recommends that a central office be responsible for evaluating all of the incoming waiver applications, rather than each district field office. It is important that there is consistency in determining whether a facility should be granted a waiver. The CDPH waiver evaluation staff should determine if the facility provided complete and accurate documentation of the workforce shortage, demonstrated adequate recruitment efforts to address the workforce shortage.

Processing Waiver Requests

SEIU supports the addition to the waiver draft to send written notice of any waiver application to the state and the local Ombudsman, but we find it essential that all affected parties including the facility’s resident council, family council, the union representative (if there is one for that particular facility), and any other related stakeholders also be notified. In its notification, CDPH should inform all parties of the date by which a decision will be made if the waiver is granted or denied, and will notify all parties when the decision has been made, with details about why that decision was made.

Waiver Approvals

SEIU agrees with the department’s update to the waiver approval language that requires facilities to continue staffing at the 3.2 hprd level while they are granted a waiver, and that potential residents be notified prior to admission.

Waiver Revocations

SEIU supports the terms of waiver revocations in the waiver draft, however we strongly believe that additional requirements be added. The following additional components should be considered as grounds for waiver revocation:

- Direct care staffing hours fall below 3.2 hours per resident day
 - CDPH should review CMS Payroll Based Journal (PBJ) staffing data for facilities that are granted waivers to ensure they are not staffing below 3.2 hprd. If a facility has a waiver for the overall 3.5 hprd requirement but not the 2.4 C.N.A. hprd requirement, PBJ data should be used to verify that the facility is not falling below the 2.4 C.N.A. hprd requirement. PBJ data is released on a quarterly basis and the review should be done at least quarterly.
- The SNF’s CMS Five-Star overall rating decreases to at or below 2 stars.
- A quarterly reevaluation by CDPH of 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 (as recommended by CANHR)

Other Comments

SEIU would like to add that we think it is crucial the department adds language that makes it clear that the implementation of SB 97 does not open the door for SNFs to hire additional CNAs at the expense of other licensed nursing staff such as RNs and LVNs to meet the new 3.5 hprd/2.4 C.N.A. hprd minimum requirement. SB 97 is meant to enhance staffing at SNFs for the betterment of both workers and residents, not to alter the staffing plan that addresses the needs at a facility.

Lastly, SEIU supports a voluntary ban on new admissions for SNFs that apply for, and are granted a waiver from either the 3.5 hprd or 2.4 hprd requirements. This provision ensures that the needs of the residents are being fully met, and that more residents are not being admitted to a facility that is not fully staffed. The ban on new admissions should allow some flexibility for residents living in rural or other remote areas that don't have reasonable access to more than one SNF, and would need to utilize the services of the SNF with a waiver. Potential residents and their families should be made aware that the facility holds a waiver due to staffing shortages, and agree to be placed in that facility.

We again thank you for the opportunity to provide written comments and hope you will take our concerns and suggestions into consideration. Please contact Amanda Steele: amandas@seiu2015.org or Dionne Jimenez: Dionne.jimenez@seiu.org if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Laphonza Butler". The signature is written in a cursive, flowing style.

Laphonza Butler
President
SEIU Local 2015