FINAL STATEMENT OF REASONS

Chapter 631, Statutes of 1997, added section 1599.61 to the Health and Safety Code (HSC) requiring all licensed skilled nursing and intermediate care facilities to use a standard admission agreement developed by the Department of Health Services[1], and requiring the Department to develop a comprehensive Patients' Bill of Rights. This legislation, authored by Senator Vasconcellos, expressed the following findings and declarations of the Legislature:

1. Many nursing home admission agreements are unnecessarily long, complicated, and incomprehensible to consumers;

2. It is in the best interests of nursing home residents that admission agreements meet standards required under state and federal law and that they not violate residents' rights;

3. There is little uniformity among admission agreements and it is an unnecessary burden and expense to review all agreements for compliance with state and federal law; and,

4. A uniform admission agreement would provide consistency, promote and protect residents' rights, and conserve state resources and funds.

The bill expressed the specific intent of the Legislature to mandate a standard admission agreement to be used for all admissions to all licensed skilled nursing facilities, intermediate care facilities, and nursing facilities in California.

The Department adopted two parallel regulation sections to implement the provisions of HSC section 1599.61: section 72516 applied the statutory requirements to skilled nursing facilities and section 73518 applied the statutory

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1. The authority and reference citations are being amended, resulting in non-substantive changes pursuant to section 100 of Title 1 of the California Code of Regulations (CCR), to reflect the reorganization of the Department of Health Services into the California Department of Health Care Services and the California Department of Public Health, pursuant to SB 162 (Ortiz, Chapter 241, Statutes of 2006).

requirements to intermediate care facilities. "Skilled nursing facilities" which must use the Standard Admission Agreement are defined in 22 CCR section 72103, and include both freestanding facilities and facilities which operate as distinct parts of a hospital. 22 CCR section 73051 defines "intermediate care facilities" which must use the Standard Admission Agreement including both freestanding facilities and those that operate as a distinct part of a hospital.

The Department promulgated regulations with a Standard Admission Agreement (SAA) incorporated by reference, effective August 5, 2005. Thereafter, a suit was filed by several long-term health care facilities and the California Association of Health Facilities in which the petitioners asked the court to issue a writ requiring the Department to implement regulations and the corresponding SAA to conform with existing law; the petitioners did not believe that the regulations and agreement the Department had promulgated were consistent with existing statutes and regulations. *(Parkside Special Care Center, Inc., et al.*, v. *Sandra Shewry, Director of the California Department of Health Services, et al.*, San Diego Superior Court number GIC 860574.*)*

On August 10, 2006, the Court issued an Order in which it upheld certain provisions of the Department's regulations and SAA,[2] and found several other provisions contrary to law. On March 21, 2007, the court issued a Writ of Mandate in which it

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2. In upholding the Department's determination regarding arbitration agreements, the court stated on pages 3 and 4 of its order, "**Arbitration Agreement:** The implementing regulations' requirements that "[t]he licensee shall not present any arbitration agreement to a prospective resident as a part of the SAA" and that the "arbitration agreement shall be separate from the SAA" are not inconsistent with controlling law. [Title 22, California Code of Regulations section72516(d) and section73518(d)] Health and Safety Code § 12599.81 [sic] requires that the arbitration agreement be located on a separate document, that the admission not conditioned upon the signing of the arbitration agreement and that the resident has not waived his or her right to sue under the Patient's Bill of Rights when signing the agreement. The implementing regulations are silent as to whether or not an arbitration agreement may be presented at the same time as the contract. What is clear is that the arbitration agreement has never been a part of the contract of admission. As for the implementing regulations' requirement that the arbitration notice be in bold face font, this requirement is consistent with California law and is not a result of the Department's arbitrary, capricious, or unreasonable action." Several commenters state that the Department must amend its regulations as a decision issued after the Parkside order by the California Court of Appeal, *Hogan* v. *Country Villa Health Services* (2007) 148 Cal.App.4th 259, concluded that HSC section 1599.81 required that Arbitration Agreements be attachments to the Admission Agreement. The *Hogan* Court actually stated at page 267, "[t]he statutory framework thus *sanctions* the use, in contracts of admission, of arbitration clauses . . . ." (Emphasis added.) Several commenters also conclude that a recent case from the United States Supreme Court, *AT&T Mobility LLC* v. *Concepcion* (2011) 563 U.S ____ (Civ. No. 09-893, filed April 27, 2011), requires that the Department modify a provision in the regulation as the statute on which it is based, HSC section 1430(b), is likely preempted by the Federal Arbitration Act; even if the Department agreed with commenters, the Department's is prohibited from complying with this request by Article 3, Section 3.5 of the California Constitution.

ordered the Department to vacate and set aside several provisions of the SAA and implementing regulations and to revise and re-promulgate those provisions of the SAA and implementing regulations in a manner consistent with the Writ and the Order of August 10, 2006.

The Writ specifically ordered:

1. Authorization for Disclosure of Medical Information. The Authorization for Disclosure of Medical Information shall comply with all of the mandatory requirements of the Federal Health Insurance Portability and Accountability Act (H.I.P.P.A.) [*sic*].

2. Thirty (30) day written notice of room change. Room changes shall not require thirty (30) days written notice. Notice of room changes, shall comply with the existing legal requirements that changes may be made upon "reasonable notice" to the resident determined on a case by case basis in accord with Health and Safety Code section 1599.78 and other applicable federal requirements.

3. Resident's right to voluntarily leave a facility. Notice to residents regarding their right to voluntary right leave a facility shall be clarified to exclude from that right those residents under involuntary commitments and those suffering from severe cognitive impairment.[3]

4. Liability of 3rd Parties. Any notice to a resident's personal representative shall include language that signing in a representative capacity does not, in and of itself, result in personal liability of the representative for debts of the resident.

5. Posting requirements. The SAA and implementing regulations shall not impose posting requirements in addition to pre-existing statutory and regulatory requirements.

6. Provisions regarding refunds. Provisions regarding refunds in the SAA and implementing regulations must conform to Health and Safety Code section 1599.70(b).

7. Program Flexibility. The DHS shall establish and follow guidelines and time tables in the implementation of the program flexibility provisions pursuant to Health

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3. At a hearing on March 11, 2008, the Court did not order the Department to adopt any specific language to replace that contained in the SAA, i.e., DHS Form Number HS 327 (02/05).

and Safety Code Section 1276 consistent with Health and Safety Code section 1599.61(g).

Chapter 532, Statutes of 2009, amended section 1599.64 of the Health and Safety Code to require that all contracts of admission for a skilled nursing facility have an attachment that is placed before any other attachment that discloses the name of the owner and licensee and the name and contact information of a single entity that is responsible for all aspects of patient care and operation at the facility.

The Department is therefore amending the regulations and SAA that were effective August 5, 2005, to comply with the court's mandate, and to implement the provisions of Chapter 532, Statutes of 2009 and any other more recent statutory requirements not addressed in the original version.[4]

The specific purpose and rationale for each subsection of the newly promulgated regulations was:

Sections 72516, 73518, Subsection (a): This subsection required the licensee to use the California Standard Admission Agreement for Skilled Nursing and Intermediate Care Facilities, DHS Form Number HS 327 (02/05), which was incorporated by reference, and is attached to this document. The California Department of Public Health Form Number CDPH 327 (05/11) is the revised SAA as amended in this proposal, and is also incorporated by reference in the regulations. The Department determined that it would be more efficient and effective to incorporate the standard form by reference, rather than adopting regulations that specify format standards and specific language and requiring each facility to create its own form consistent with those standards. The Department also determined that the length of the document makes it cumbersome and impractical to publish in Title 22 of the CCR. By adopting regulations that incorporate the form by reference, the Department could make available – in hard copy, in electronic format, and on the Internet – the specific form required for use by licensees. This was also consistent with the goals of the statutory mandate to promote uniformity of admission agreements, assure compliance with all state and federal requirements, and minimize associated administrative burdens.

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4. Many comments were received that addressed other concerns that commenters wished to raise. As these were outside the scope of this filing, the Department has not provided substantive responses to them in the Addenda.

Sections 72516, 73518, Subsection (b): This subsection prohibits any alteration of the standard admission agreement by the licensee without prior written approval from the Department, except that information specific to the facility or the resident may be entered in spaces provided in the standard admission agreement form. HSC section 1599.61(b)(1) contains the prohibition that "No facility shall alter the standard agreement unless so directed by the department," in order to ensure that the admission agreement is not arbitrarily altered by the licensee, and that only the standard agreement adopted by the Department is used. The Department had originally proposed using the program flexibility procedures permitted by HSC section 1276 and 22 CCR sections 72213 and 73227 to enable facilities to seek modifications to the regulations and the SAA.

The court determined that the programs flexibility provisions needed to be modified to include guidelines and time tables. It ordered:

> 7. Program Flexibility. The DHS shall establish and follow guidelines and time tables in the implementation of the program flexibility provisions pursuant to Health and Safety Code Section 1276 consistent with Health and Safety Code section 1599.61(g).

The Department is amending subsection (b) of sections 72516 and 73518 to eliminate the use of the program flexibility procedures by facilities wishing to modify the SAA. Program flexibility procedures would continue to be used by facilities wishing to provide alternate methods of complying with the regulations, and the program flexibility statute and regulations already contain guidelines and timetables. A sentence is added to the regulations to delay the operative date to six-months after the regulations are filed with the Secretary of State to provide facilities with additional time to request alternate methods of complying with the regulations and modification of the SAA.

The subsection, as it applies to Skilled Nursing Facilities now states:

> (b) Except to enter information specific to the facility or the resident in blank spaces provided in the Standard Admission Agreement form or its attachments, the licensee shall not alter the Standard Admission unless directed to do so by the Department. A licensee wishing to receive direction from the Department that would enable the licensee to alter the Standard Admission Agreement shall submit a request to the Department. The request shall:
>
> (1) Include the identity of the facility;
>
> (2) Identify the specific language in the Standard Admission Agreement that the facility is unable to employ; and/or,

(3) Identify the specific location and language that is to be deleted, amended or appended to the form; and,

(4) Contain substantiating evidence identifying the reason that the use of the Standard Admission Agreement without the requested modification would not be possible because of some unique aspect of the facility's operation or would make it highly likely that the use of the language will create a new cause of action against the facility related to its compliance with existing statutory or regulatory requirements governing the care provided to nursing facility residents. The Department shall respond within 60 days of the receipt of the request.

The subsection, as it applies to Intermediate Care Facilities now states:

(b) Except to enter information specific to the facility or the resident in blank spaces provided in the Standard Admission Agreement form or its attachments, the licensee shall not alter the Standard Admission unless directed to do so by the Department. A licensee wishing to receive direction from the Department that would enable the licensee to alter the Standard Admission Agreement shall submit a request to the Department. The request shall:

(1) Include the identity of the facility;

(2) Identify the specific language in the Standard Admission Agreement that the facility is unable to employ; and/or,

(3) Identify the specific location and language that is to be deleted, amended or appended to the form; and,

(4) Contain substantiating evidence identifying the reason that the use of the Standard Admission Agreement without the requested modification would not be possible because of some unique aspect of the facility's operation or would make it highly likely that the use of the language will create a new cause of action against the facility related to its compliance with existing statutory or regulatory requirements governing the care provided to nursing facility residents. The Department shall respond within 60 days of the receipt of the request.

Though not specifically addressed by statute, allowing the entry of information specific to a facility and a resident is essential from a practical perspective. The California Standard Admission Agreement must offer the flexibility to identify the specific parties to the contract and to accommodate legitimate differences among facilities, such as available optional services and related charges.

The procedures adopted by the Department to enable a facility to request that the Department direct the facility to modify the SAA are more closely aligned with the

provisions of the SAA statute than the program flexibility procedures. The Department believes that the initial guideline for directing modifications of the SAA was provided by the Legislature in subsection (b) of section 1 of Stats.1997, c. 631 (S.B.1061), and applies to both the Department and facilities. That guideline is that a standard admission agreement be used for *all* admissions to *all* licensed skilled nursing facilities, intermediate care facilities, and nursing facilities in California. The Department believes that the guidelines it has included in the regulations accord with the Legislative mandate. These are: a facility must provide substantiating evidence, the current requirement for program flexibility requests, that it is unable to use the agreement without modification; if a facility is able to use the SAA without modification, no modification should be made; and/or, if a facility believes that its use of the SAA without modification will create a new cause of action against it, a result not intended by the statute, the facility is the entity that has the facts and the knowledge to justify its request for modification.

[Several commenters noted that requesting a modification of the SAA is not the same as requesting program flexibility from a regulation. The Department is therefore amending the regulation to separate requests that the Department direct a facility to alter the SAA from requests for program flexibility, and to provide facilities guidelines to use to specify the reason that the modification is required by the facility. The regulation also states that the Department will respond to the request within 60 days of the date it is received. The court in the Parkside case required that the Department provide guidelines and time frames for the processing of facilities' requests. The court and several commenters also suggested that facilities needed more time than currently provided in the program flexibility process to implement the SAA or request that modifications be made to it. The delay in the operative date to six-months after the regulations are filed with the Secretary of State provides the additional time.]

Sections 72516, 73518, Subsection (c): This subsection which provides that no resident or their representative can be required to sign any other document at the time of, or as a condition of, admission to the facility or as a condition of continued stay in the facility is not amended.

Sections 72516, 73518, Subsection (d): This subsection, which prohibits the inclusion of an arbitration agreement as part of the California Standard Admission Agreement is not amended.

California Standard Admission Agreement:

Each section of the California Standard Admission Agreement (SAA) is discussed below, with the proposed changes to the SAA language in underline or strike through and italics. A brief justification for the changes to be made because of the court's order or to comply with Chapter 532, Statutes of 2009 or other recently enacted statutory requirements is also included. Quoted portions of the SAA that are not to be changed but included for continuity, are italicized. All references to the Health and Safety Code are abbreviated "HSC", all references to Title 22 of the Code of California Regulations are abbreviated "22 CCR", and all references to Title 42 of the Code of Federal Regulations are abbreviated "42 CFR."

A non-substantive change is being made in the agency name "Health Services (DHS)" to read "Public Health (CDPH)" to designate the correct agency that oversees licensing concerns pursuant to the reorganization of the Department of Health Services on the cover page and pages 1, 3, and 10 of the SAA, pages 1 and 8 of Attachment F (previously Attachment A) and in the header of the SAA, the Table of Contents to the SAA, and to Attachments B-1, B-2, C-1, C-2, C-3, D-1, D-2, and E.

A non-substantive change is being made in the form number from HS 327 (02/05) to CDPH 327 (05/11) to indicate the change in the agency name and to indicate the date of the form revision. In the SAA, the title and headings designated by roman numerals I. through XII. and sub-headings A. through E. are underlined to conform to the existing version of the SAA as approved in 2005. For the 45-day public notice documentation, the headings were removed from the originally noticed SAA, attached as a document relied upon, to prevent confusing the reader by giving the appearance of newly adopted text.

The term "Advance Directive" in paragraphs II and III of the SAA is being changed to read "Advance Health Care Directive" to be consistent with usage elsewhere within paragraph III of the SSA.

Resident Name: _____

Admission Date: _____ *Resident Number:* _____

Facility Name:

_____

CALIFORNIA STANDARD ADMISSION AGREEMENT
FOR SKILLED NURSING FACILITIES AND INTERMEDIATE CARE FACILITIES

I. Preamble

The California Standard Admission Agreement is an admission contract that this Facility is required by state law and regulation to use. It is a legally binding agreement that defines the rights and obligations of each person (or party) signing the contract. Please read this Agreement carefully before you sign it. If you have any questions, please discuss them with Facility staff before you sign the agreement. You are encouraged to have this contract reviewed by your legal representative, or by any other advisor of your choice, before you sign it.

You may also call the Office of the State Long Term Care Ombudsman at 1-800-231-4024, for more information about this Facility.

~~*Reports of State inspections of this Facility are*~~ *The report of the most recent state licensing visit to our facility is posted _____, and a copy of it or of reports of prior inspections may be obtained from the local office of the California Department of* ~~*Health Services (DHS)*~~ *Public Health (CDPH), Licensing and Certification Division _____.*
(Location of District Office)

For clarity, the term "Health Services (DHS)" is being replaced with "Public Health (CDPH)" to designate the correct agency that oversees licensing concerns, pursuant to the reorganization of the Department of Health Services. A blank space is being added to insert the location of the district office from where a copy of prior inspection reports may be obtained.

This sentence advises prospective residents that the findings of the most recent licensing inspection performed by the Licensing and Certification Division of the Department are available in the facility and from the local office of the Licensing and Certification Division. 22 CCR section 72503 requires facilities to conspicuously post in a prominent location accessible to the public the "Most recent licensing visit

report supported by the related follow-up plan of correction visit reports." The court found that the provision in the original admission agreement promulgated by the Department that required all facilities to post all reports exceeded the Department's authority as 22 CCR section 72503 only requires the posting of the most recent licensing report, and 75% of facilities are not subject to the provisions of HSC section 1599.87, which requires more comprehensive posting. The court's order specifically stated:

> 5. Posting requirements. The SAA and implementing regulations shall not impose posting requirements in addition to pre-existing statutory and regulatory requirements.

If our facility participates in the Medi-Cal or Medicare programs, we will keep survey, certification and complaint investigation reports for the past three years and will make these reports available for anyone to review upon request.

[Several commenters noted that this language is now required because of the provisions of the federal Patient Protection and Affordable Care Act, sections 1395i-3(d)(1)(C) and 1396r(d)(1)(V) [should probably be (C)] of title 42 of the United States Code.]

If you are able to do so, you are required to sign this Agreement in order to be admitted to this Facility. If you are not able to sign this Agreement, your representative may sign it for you. You shall not be required to sign any other document at the time of, or as a condition of, admission to this Facility.

II. Identification of Parties to this Agreement

DEFINITIONS

In order to make this Agreement more easily understood, references to "we," "our," "us," "the Facility," or "our Facility" are references to:

_____

(Insert the Name of the Facility as it appears on its License)

Attachment A provides you with the name of the owner and licensee of this facility, and the name and contact information

of a single entity responsible for all aspects of patient care and operation at this facility.

Attachment A is being added to the SAA to comply with the provisions of Chapter 532, Statutes 2009.

References to "you," "your," "Patient," or "Resident" are references to _____, the person who will be receiving care in this Facility. For purposes of this Agreement, "Resident" has the same meaning as "Patient."

The parties to this agreement are the Resident, the Facility, and the Resident's Representative. References to the "Resident's Representative" are references to: _____, the person who will sign on your behalf to admit you to this Facility, and/or who is authorized to make decisions for you in the event that you are unable to. To the extent permitted by law, you may designate a person as your Representative at any time.

Note: the person indicated as your "Resident's Representative" may be a family member, or by law, any of the following: a conservator, a person designated under the Resident's Advance Health Care Directive or Power of Attorney for Health Care, the Resident's next of kin, any other person designated by the Resident consistent with State law, a person authorized by a court, or, if the Resident is a minor, a person authorized by law to represent the minor.

~~*Any Resident's Representative who signs this Agreement on your behalf assumes no PERSONAL financial liability for your care provided by this Facility.*~~

Signing this Agreement as a Resident's Representative does not, in and of itself, make the Resident's representative liable for the Resident's debts. However, a Resident's Representative acting as the Resident's financial conservator or otherwise responsible for distribution of the Resident's monies, shall provide reimbursements from the Resident's assets to the Facility in compliance with Section V. of the agreement.

This provision advises both the resident and the resident's representative, that a resident's representative, by signing this agreement on the resident's behalf, does not assume personal responsibility for covering the cost of care for the resident. It further

specifies that if the resident's representative has legal control of the income and assets of the resident (for example, as a conservator), then that representative is required to use the resident's assets and income to pay for the costs of care provided to the resident, but that representative has no personal financial liability. The signature of the resident's representative on this document only acknowledges, on behalf of a resident who cannot do so for him or herself that the representative understands the contents of the agreement and agrees to abide by its terms.

The court found that the provision in the original admission agreement promulgated by the Department that simply absolved a resident's representative from liability for paying for the resident's care was too broad in that it could be read to include persons who had a legal responsibility, e.g., financial conservators, to pay for that care from reimbursing the facility. The court, therefore, required the Department to amend the agreement by ordering that:

> 4. Liability of 3rd Parties. Any notice to a resident's personal representative shall include language that signing in a representative capacity does not, in and of itself, result in personal liability of the representative for debts of the resident.

IF OUR FACILITY PARTICIPATES IN THE MEDI-CAL OR MEDICARE PROGRAM, OUR FACILITY DOES NOT REQUIRE THAT YOU HAVE ANYONE GUARANTEE PAYMENT FOR YOUR CARE BY SIGNING OR COSIGNING THIS ADMISSION AGREEMENT AS A CONDITION OF ADMISSION.

The Parties to this Agreement are:

Resident: _____
(Type or Print Resident's Name Here)

Resident's Representative: _____
(Type or Print Representative's Name Here)

Relationship: _____

Facility: _____
(Type or Print the Facility's Name as it appears on the License)

III. Consent to Treatment

The Resident hereby consents to routine nursing care provided by this Facility, as well as emergency care that may be required.

However, you have the right, to the extent permitted by law, to refuse any treatment and the right to be informed of potential medical consequences should you refuse treatment. We will keep you informed about the routine nursing and emergency care we provide to you, and we will answer your questions about the care and services we provide you.

If you are, or become, incapable of making your own medical decisions, we will follow the direction of a person with legal authority to make medical treatment decisions on your behalf, such as a guardian, conservator, next of kin, or a person designated in an Advance Health Care Directive or Power of Attorney for Health Care.

Following admission, we encourage you to provide us with an Advance Health Care Directive specifying your wishes as to the care and services you want to receive in certain circumstances. However, you are not required to prepare one, or to provide us a copy of one, as a condition of admission to our Facility. If you already have an Advance Health Care Directive, it is important that you provide us with a copy so that we may inform our staff.

If you do not know how to prepare an Advance Health Care Directive and wish to prepare one, we will help you find someone to assist you in doing so.

IV. Your Rights as a Resident

Residents of this Facility keep all their basic rights and liberties as a citizen or resident of the United States when, and after, they are admitted. Because these rights are so important, both federal and state laws and regulations describe them in detail, and state law requires that a comprehensive Resident Bill of Rights be attached to this Agreement.

Attachment ~~A~~ F, entitled "Resident Bill of Rights," lists your rights as set forth in State and Federal law. For your information, the attachment also provides the location of your rights in statute.

A non-substantive change is being made to reflect that The Resident Bill of Rights, formerly designated as Attachment A, is now designated as Attachment F.

Violations of state laws and regulations identified above may subject our Facility and our staff to civil or criminal proceedings. You have the right to voice grievances to us without fear of any reprisal, and you may submit complaints or any questions or concerns you may have about our services or your rights to the local office of the California Department of Public Health ~~Services~~, Licensing and Certification District Office _____, or to the State Long-Term Care Ombudsman (see page 1 for contact information).

For clarity, the word "Public" is being inserted before "Health" and the word "Services" is being deleted to designate the correct agency that oversees licensing concerns, pursuant to the reorganization of the Department of Health Services.

You should review the attached "Resident Bill of Rights" very carefully. To acknowledge that you have been informed of the "Resident Bill of Rights," please sign here:

_____

V. Financial Arrangements

Beginning on _____ (date), we will provide routine nursing and emergency care and other services to you in exchange for payment.

Our Facility has been approved to receive payment from the following government insurance programs: _____ Medi-Cal _____ Medicare

At the time of admission, payment for the care we provide to you will be made by:

_____ *Resident (Private Pay)*

_____ *Medi-Cal*

_____ *Medicare Part A Medicare Part B:* _____

_____ *Private Insurance:*

_____
(Enter Insurance Company Name and Policy Number)

_____ *Managed Care Organization:*

_____

_____ *Other:*

_____

Resident's Share of Cost. Medi-Cal, Medicare, or a private payor may require that the Resident pay a co-payment, co-insurance, or a deductible, all of which the Facility considers to be the Resident's share of cost. Failure by the Resident to pay his or her share of cost is grounds for involuntary discharge of the Resident.

If you do not know whether your care in our Facility can be covered by Medi-Cal or Medicare, we will help you get the information you need. You should note that, if our Facility does not participate in Medi-Cal or Medicare and you later want these programs to cover the cost of your care, you may be required to leave our Facility.

[APPLICABLE ONLY IF DATE IS ENTERED:] On_____ (date) our Facility notified the California Department of Health Care Services of our intent to withdraw from the Medi-Cal Program. If you are admitted after that date, we cannot accept Medi-Cal reimbursement on your behalf, and we will not be required to retain you as a Resident if you convert to Medi-Cal reimbursement during your stay here. If, on the other hand, you were a Resident here on that date, we are required to accept Medi-Cal reimbursement on your behalf, even if you become eligible for Medi-Cal reimbursement after that date.

For clarity, the word "Care" is being inserted after "California Department of Health" to designate the correct agency that oversees the Medi-Cal program pursuant to the reorganization of the Department of Health Services.

YOU SHOULD BE AWARE THAT NO FACILITY THAT PARTICIPATES IN THE MEDI-CAL PROGRAM MAY REQUIRE ANY RESIDENT TO REMAIN IN PRIVATE PAY STATUS FOR ANY PERIOD OF TIME BEFORE CONVERTING TO MEDI-CAL COVERAGE. NOR, AS A CONDITION OF ADMISSION OR CONTINUED STAY IN SUCH A FACILITY, MAY THE FACILITY REQUIRE ORAL OR WRITTEN ASSURANCE FROM A RESIDENT THAT HE OR SHE IS NOT

ELIGIBLE FOR, OR WILL NOT APPLY FOR, MEDICARE OR MEDI-CAL BENEFITS.

A. Charges for Private Pay Residents

Our Facility charges the following basic daily rates:

$_____ for a private, single bed room

$_____ for a room with two beds

$_____ for a room with three beds

$_____ for _____
(Specify any other accommodation here)

The basic daily rate for private pay and privately insured Residents includes payment for the services and supplies described in Attachment B-1.

The basic daily rate will be charged for the day of admission, but not for any day beyond the day of discharge or death. However, if you are voluntarily discharged from the Facility less than 3 days after the date of admission, we may charge you for a maximum of 3 days at the basic daily rate.

We will provide you with a 30-day written notice before increasing the basic daily rate, unless the increase is required because the State increases the Medi-Cal rate to a level higher than our regular rate. In this case, state law waives the 30-day notification.

Attachment B-2 lists for private pay and privately insured Residents optional supplies and services not included in our basic daily rate, and our charges for those supplies and services. We will only charge you for optional supplies and services that you specifically request, unless the supply or service was required in an emergency. We will provide you a 30-day written notice before any increase in charges for optional supplies and services.

If you become eligible for Medi-Cal at any time after your admission, the services and supplies included in the daily rate may change, and also the list of optional supplies and

services. At the time Medi-Cal confirms it will pay for your stay in this Facility, we will review and explain any changes in coverage.

B. Security Deposits

If you are a private pay or privately insured Resident, we require a security deposit of $_____.

We will return the security deposit to you, with no deduction for administration or handling charges, within 14 days after you close your private account or we receive payment from Medi-Cal ~~.~~ , whichever is later.

State law does not prohibit facilities from collecting a security deposit from private pay or privately insured residents. Accordingly, a security deposit may be required for such residents, and this part of the standard agreement allows the facility and the resident to negotiate and record a mutually agreeable security deposit. HSC section 1599.70(b) requires that "any security deposit from a person paying privately upon admission shall be returned within 14 days of the private account being closed, or first Medi-Cal payment, whichever is later, and with no deduction for administration or handling charges."

In the SAA promulgated by the Department, the phrase from the statute, "whichever is later," was not included. The court ordered the Department to include it by stating in the Writ:

> 6. Provisions regarding Refunds. Provisions regarding refunds in the SAA and implementing regulations must conform to Health and Safety Code section 1599.70(b).

If your care in our Facility is covered by Medi-Cal or Medicare, no security deposit is required.

C. Charges for Medi-Cal, Medicare, or Insured Residents

IF YOU ARE APPROVED FOR MEDI-CAL COVERAGE AFTER YOU ARE ADMITTED TO OUR FACILITY, YOU MAY BE ENTITLED TO A REFUND. WE WILL REFUND TO YOU ANY PAYMENTS YOU MADE FOR SERVICES AND SUPPLIES THAT ARE LATER PAID FOR BY MEDI-CAL, LESS ANY DEDUCTIBLE OR SHARE OF COST. WHEN OUR FACILITY RECEIVES

PAYMENT FROM THE MEDI-CAL PROGRAM, WE WILL ISSUE A REFUND TO YOU.

If you are entitled to benefits under Medi-Cal, Medicare, or private insurance, and if we are a participating Provider, we agree to accept payment from them for our basic daily rate. NEITHER YOU NOR YOUR REPRESENTATIVE SHALL BE REQUIRED TO PAY PRIVATELY FOR ANY MEDI-CAL COVERED SERVICES PROVIDED TO YOU DURING THE TIME YOUR STAY HAS BEEN APPROVED FOR PAYMENT BY MEDI-CAL. UPON PRESENTATION OF THE MEDI-CAL CARD OR OTHER PROOF OF ELIGIBILITY, THE FACILITY SHALL SUBMIT A MEDI-CAL CLAIM FOR REIMBURSEMENT. However, you are still responsible for paying all deductibles, copayments, coinsurance, and charges for services and supplies that are not covered by Medi-Cal, Medicare, or your insurance. Please note that our Facility does not determine the amount of any deductible, copayment, or coinsurance you may be required to pay; rather, Medi-Cal, Medicare, or your insurance carrier determines these amounts.

Attachments C-1, C-2, and C-3 describe the services covered by the Medi-Cal daily rate, services that are covered by Medi-Cal but are not included in the daily rate, and services that are not covered by Medi-Cal but are available if you wish to pay for them.

Attachments D-1 and D-2 describe the services covered by Medicare, and services that are not covered by Medicare but are available if you wish to pay for them.

You should note that Medi-Cal will only pay for covered supplies and services if they are medically necessary. If Medi-Cal determines that a supply or service is not medically necessary, we will ask whether you still want that supply or service and if you are willing to pay for it yourself.

We will only charge you for optional supplies and services that you specifically request, unless the supply or service was required in an emergency. We will provide you a 30-day written notice before any increase in charges for optional supplies and services.

D. Billing and Payment

We will provide to you an itemized statement of charges that you must pay every month. You agree to pay the account monthly on _____ (enter day of month).

Payment is overdue _____ days after the due date. A late charge at an interest rate of _____% is charged on past due accounts and is calculated as follows:

_____

_____

E. Payment of Other Refunds Due To You

As indicated in Section V.C. above, refunds may be due to you as a result of Medi-Cal paying for services and supplies you had purchased before your eligibility for Medi-Cal was approved or for any security deposit you may have made. At the time of your discharge, you may also be due other refunds, such as unused advance payments you may have made for optional services not covered by the daily rate. We will refund any money due to you within 14 days of your leaving our Facility. We will not deduct any administration or handling charges from any refund due to you.

VI. Transfers and Discharges

~~*You may leave our Facility at any time without prior notice to us. We will help arrange for your voluntary discharge or transfer to another facility.*~~

We will help arrange for your voluntary discharge or transfer to another facility.

[Several commenters suggested that the language in the current agreement, "[y]ou may leave our facility at any time without prior notice to us," was too broad, and did not address problems raised because of the presence of involuntarily committed or cognitively impaired residents in facilities. While the court in the Parkside case had initially required that the language be reworded, at a hearing on March 11, 2008, the court stated that rewording

would not be necessary if the problematic language was deleted; the court believed that the problems could be addressed and corrected during the regulatory adoption process. To eliminate the concerns expressed about the language proposed by the Department, the Department has decided to eliminate the sentence in question.]

The court had ordered in the Writ:

> 3. Resident's right to voluntarily leave a facility. Notice to residents regarding their right to voluntary right leave a facility shall be clarified to exclude from that right those residents under involuntary commitments and those suffering from severe cognitive impairment.

22 CCR sections 72433(b)(5) and 73449(b)(5) require all licensed facilities to provide, "Discharge planning for each patient [resident] and implementation of the plan."

Except in an emergency, we will not transfer you to another room within our Facility~~, or to another facility, and we will not discharge you from our Facility~~ against your wishes, unless we give prior reasonable written notice to you, determined on a case by case basis, in accord with applicable state and federal requirements. For example, you have a right to refuse the transfer if the purpose of the transfer is to move you to or from a Medicare-certified bed.

[The court in the Parkside case required that the language be reworded to remove a 30-day notice requirement applicable to room-to-room transfers within a facility. This language is designed to bring the language into compliance with the court order requiring reasonable notice and mandating compliance with both state and federal requirements applicable to room to room transfers. The language implements the requirements of the court order, state law, and sections1395i-3(c)(1)(A)(x) and 1396r(c)(1)(A)(x) of title 42 of the United States Code which prohibit transfers from one room to another if "a purpose of the transfer is to relocate the resident from a portion of the facility that" is certified for Medicare to a portion of the facility that is not certified for Medicare, or from a portion of the facility that is not certified for Medicare to a portion of the facility that is certified for Medicare.]

The court ruled that the requirement that the facility provide a 30-day notice before transferring a resident

from one room to another within a facility exceeded the Department's authority. It held that the 30-day notice was applicable to transfers to another facility or discharges from the facility, but not to room-to-room transfers. It therefore ordered in the Writ:

> 2. Thirty (30) day written notice of room change. Room changes shall not require thirty (30) days written notice. Notice of room changes shall comply with the existing legal requirements that changes may be made upon "reasonable notice" to the resident determined on a case by case basis in accord with Health and Safety Code section 1599.78 and other applicable federal requirements.

The Department is therefore amending the Agreement to address the facility's obligations vis-a-vis room-to-room transfers separately from its obligation to notify residents of involuntary transfers or discharges from the facility. While the use of the word "reasonable" may sometimes be discouraged because it might not meet the clarity standard required for regulations, the Department is including it in the regulation as that is the word used in the statute and is the term required by the court order.

In the original SAA, the following language listing the grounds for a client's involuntary transfer or discharge preceded text requiring the facility to notify a client in writing of such an action.

The only reasons that we can transfer you to another facility or discharge you against your wishes are:

> *1) It is required to protect your well-being, because your needs cannot be met in our Facility;*
>
> *2) It is appropriate because your health has improved enough that you no longer need the services of our Facility;*

3) Your presence in our Facility endangers the health and safety of other individuals;

4) You have not paid for your stay in our Facility or have not arranged to have payment made under Medicare, Medi-Cal, or private insurance;

5) Our Facility ceases to operate.

6) Material or fraudulent misrepresentation of your finances to us.

If we participate in Medi-Cal or Medicare, we will not transfer you from the Facility or discharge you solely because you change from private pay or Medicare to Medi-Cal payment.

HSC section 1599.78 provides "All contracts of admission shall state that except in an emergency, no resident may be involuntarily transferred within or discharged from a long-term health care facility unless he or she is given reasonable notice in writing ...." This provision will satisfy the requirement that the statute places on the facility to provide reasonable notice prior to a transfer within the facility. The regulations are being amended so that the written notice requirement precedes the grounds that a facility may involuntarily transfer or discharge a client.

Our written notice of transfer to another facility or discharge against your wishes will be provided 30 days in advance. However, we may provide less than 30 days notice if the reason for the transfer or discharge is to protect your health and safety or the health and safety of other individuals, if your improved health allows for a shorter notice, or if you have been in our Facility for less than 30 days. Our written notice will include the effective date, the location to which you will be transferred or discharged, and the reason the action is necessary.

The only reasons that we can transfer you to another facility or discharge you against your wishes are:

1) It is required to protect your well-being, because your needs cannot be met in our Facility;

2) It is appropriate because your health has improved enough that you no longer need the services of our Facility;

3) Your presence in our Facility endangers the health and safety of other individuals;

4) You have not paid for your stay in our Facility or have not arranged to have payment made under Medicare, Medi-Cal, or private insurance;

5) Our Facility ceases to operate.

6) Material or fraudulent misrepresentation of your finances to us.

If we participate in Medi-Cal or Medicare, we will not transfer you from the Facility or discharge you solely because you change from private pay or Medicare to Medi-Cal payment.

HSC section 1599.76(a) provides that "No contract of admission shall list any ground for involuntary transfer or discharge of the resident except those grounds that are specifically enumerated in either federal or state law." 42 CFR section 483.12(a)(4) requires a facility to provide 30 days notice prior to transferring or discharging a resident. 42 CFR section 483.12(a)(2) lists reasons #1 through #5 above as the only reasons a certified facility may transfer or discharge a resident, and HSC section1439.7 specifies conditions under which reason #6 may be invoked to transfer or discharge a resident.

In our written notice, we will advise you that you have the right to appeal the transfer or discharge to the California Department of Health Care Services~~, Licensing and Certification Division~~ and we will also provide the name, address and telephone number of the State Long-Term Care Ombudsman.

For clarity, the word "Care" is being inserted after "Health" and the words "Licensing and Certification" are being deleted to designate the correct agency that oversees

transfer and discharge concerns, pursuant to the reorganization of the Department of Health Services.

If you are transferred or discharged against your wishes, we will provide transfer and discharge planning as required by law.

VII. Bed Holds and Readmission

If you must be transferred to an acute hospital for seven days or less, we will notify you or your representative that we are willing to hold your bed. You or your representative have 24 hours after receiving this notice to let us know whether you want us to hold your bed for you.

If Medi-Cal is paying for your care, then Medi-Cal will pay for up to seven days for us to hold the bed for you. If you are not eligible for Medi-Cal and the daily rate is not covered by your insurance, then you are responsible for paying $ _____ for each day we hold the bed for you. You should be aware that Medicare does not cover costs related to holding a bed for you in these situations.

If we do not follow the notification procedure described above, we are required by law (Title 22 California Code of Regulations Sections 72520(c) and 73504(c)) to offer you the next available appropriate bed in our Facility.

A non-substantive change is being made to correct the word "Regulation" to read "Regulations" in conformance with the proper usage in the California Code of Regulations.

You should also note that, if our Facility participates in Medi-Cal and you are eligible for Medi-Cal, if you are away from our Facility for more than seven days due to hospitalization or other medical treatment, we will readmit you to the first available bed in a semi-private room if you need the care provided by our Facility and wish to be readmitted.

VIII. Personal Property and Funds

Our Facility has a theft and loss prevention program as required by state law. At the time you are admitted, we will give you a

copy of our policies and procedures regarding protection of your personal property, as well as copies of the state laws that require us to have these policies and procedures.

If our Facility participates in Medi-Cal or Medicare and you give us your written authorization, we will agree to hold personal funds for you in a manner consistent with all federal and state laws and regulations. If we are not certified for Medi-Cal or Medicare, we may offer these services but are not required to. You are not required to allow us to hold your personal funds for you as a condition of admission to our Facility. At your request, we will provide you with our policies, procedures, and authorization forms related to our holding your personal funds for you.

IX. Photographs

You agree that we may take photographs of you for identification and health care purposes. We will not take a photograph of you for any other purpose, unless you give us your prior written permission to do so.

X. Confidentiality of Your Medical Information

You have a right to confidential treatment of your medical information. You may authorize us to disclose medical information about you to a family member or other person by completing the "Authorization for Disclosure of Medical Information" form in Attachment E.

HSC section1599.73 requires that "every contract of admission shall state that residents have a right to confidential treatment of medical information," and "the contract shall provide a means by which the resident may authorize the disclosure of information to specific persons, by attachment of a separate sheet." Section 164.508 of Title 45 of the Code of Federal Regulations imposes additional requirements with which facilities must comply in order to ensure they do not violate the Federal Health Insurance Portability and Accountability Act. The court ordered that these requirements be included in the "Authorization for Disclosure of Medical Information" form that the Department had included as an attachment to the SAA. The Writ states:

1. Authorization for Disclosure of Medical Information. The Authorization for Disclosure of Medical Information shall comply with all

of the mandatory requirements of the Federal Health Insurance Portability and Accountability Act (H.I.P.P.A.).

The Department is amending Attachment E to comply with this order.

XI. Facility Rules and Grievance Procedure

You agree to comply with reasonable rules, policies and procedures that we establish. When you are admitted, we will give you a copy of those rules, policies, and procedures, including a procedure for you to suggest changes to them.

A copy of the Facility grievance procedure, for resolution of resident complaints about Facility practices, is available; we will also give you a copy of our grievance procedure for resolution of any complaints you may have about our Facility. You may also contact the following agencies about any grievance or complaint you may have:

California Department of Public Health ~~Services~~
Licensing and Certification District Office
Phone number: _____

(OR)

State Long-Term Care Ombudsman Program
Phone number: _____

For clarity, the word "Public" is being inserted before "Health" and the word "Services" is being deleted to designate the correct agency that oversees licensing concerns, pursuant to the reorganization of the Department of Health Services.

XII. Entire Agreement

This Agreement and the Attachments to it constitute the entire Agreement between you and us for the purposes of your admission to our Facility. There are no other agreements, understandings, restrictions, warranties, or representations between you and us as a condition of your admission to our Facility. This Agreement supersedes any prior agreements or understandings regarding your admission to our Facility.

result, the revisions of the SAA are contrary to state law and otherwise arbitrary and capricious.
Commenter: 8.4.

Department Response: As noted in Addendum 2, commenter ignores the concluding paragraph, (d), of section 14124.7 of the Welfare and Institutions Code which states, "(d) This section shall be implemented only to the extent it does not conflict with federal law."

4. Voluntarily Leaving the Facility

A. Comment: The Department has still not addressed the patient who lacks capacity, has no responsible party, and wanders out of the facility. The first paragraph of this section would make it seem that there are only two reasons for not discharging the patient, an involuntary commitment, and the consent of the responsible party to retain the patient in the facility. It would seem otherwise the facility is in violation of this provision for the wandering patient who lacks the capacity to make decisions and has no other responsible party. Capacity determinations are often unreliable and lone doctors, acting without a universal standard of measurement, should not act as final arbiters of a patient's capacity. Federal and state laws protect the right of all citizens, including nursing home residents, to determine their residence and control their health care decisions. Until a person has become declared incompetent by a court of law, he remains legally able to direct his own affairs. A resident's decision-making capacity and right to leave a facility without advance notice is a complicated, fact-specific, medical-legal determination, which cannot be reduced to a general statement. Commenter recommends removal of the entire clause to prevent misstatements regarding residents' rights and would be particularly appropriate since the judge in Parkside v. Shewry specifically approved a complete redaction (March 11, 2008 Transcript, page 19).
Commenters: 6.6 and 7.1.

Department Response: The Department will reword the paragraph to remove the language concerning a resident's right to leave the facility at any time.

B. Comment: The first paragraph of Section VI continues to be problematic and does not comply with the court's order that found this provision to be arbitrary, capricious and unreasonable. All parties, including DPH counsel, agreed that this section should be stricken entirely from the SAA. The latest changes seem to be much worse. The Department did not eliminate language discussed at the March 2008 hearing that would be inoperable and unlawful. DPH remains in contempt of the Court's ruling. Either the section must be stricken from the regulations or be rewritten to comply with the Court's Order and writ. The following changes are recommended:

> ~~**Unless you have been involuntarily committed to the facility,**~~ [Y]ou may **discharge from** ~~**leave**~~ our Facility at any time without prior notice to us. **However, discharge planning is important and the Facility encourages you**

to give us reasonable notice to be able to contact your attending physician to help you arrange any home care or other services you may need. ~~If the right to make health care decisions for you has devolved to another person, that person must consent to your leaving the facility.~~ We will help arrange for your voluntary discharge or transfer to another facility.

Commenters:6.6 and 8.3.

Department Response: The Department will reword the paragraph to remove the language concerning a resident's right to leave the facility at any time.

5. 3rd Party Liability

6. Posting

A. Comment: The new provision in the third paragraph that anyone can review complaint investigation reports is premature and lacks statutory authority. The Department states that the provision is required by the federal Patient Protection and Affordable Care Act, section 1395i-3(d)(1)(C) and 1396r(d)(1)(V). The State has not adopted this federal legislation and the federal government has yet to issue regulations in this area or provide the "guidance" or "successor form" mentioned in the legislation. The statement, as written, is not the same as the statement in the federal Patient Protection and Affordable Care Act which reads "...have reports with respect to any surveys, certifications, and complaint investigations made respecting the facility during the 3 preceding years available for any individual to review upon request." The phrase "with respect to" recognized that, unlike the survey and certification reports, there is no guidance, process, or forms which protect the medical information and the patient's identity for complaint reports. The current provision would violate federal HIPPA (sic) laws and State Civil Code Section 56.10 that protects the confidentiality of patient information.

Commenter: 6.5.

Department Response: Section 1599.61(a) of the Health and Safety Code (HSC) requires that the SAA comply with all state and federal laws. The Patient Protection and Affordable Care Act, contained in sections 1395i-3(d)(1)(C) and 1396r(d)(1)(V) of Title 42 of the United States Code, is federal law, and the SAA must comply with it. As they must do when they make copies of documents containing confidential information available to persons who are not authorized to view the information, facilities will need to ensure they redact any information the release of which would violate state and/or federal confidentiality requirements.

7. Security Deposit Refunds

8. Program Flexibility

A. Comment: The SSOR states that the regulations are to become operative six months from filing with the Secretary of State and that the Department will respond to a

facility's request to alter the SAA within 60 days of the date received. Recent data received by the commenter indicates that the percentage of complaint investigations completed within 90 days shows that DPH only completes 70 percent of its skilled nursing facility complaint investigations within the 90-day timeframe. The SAA should be amended to state that if a request is not acted upon within 60 days, the request is automatically approved.
Commenter: 8.2.A.

Department Response: The Department must direct a facility to modify the SAA, not approve a facility's request for modification. As the Department does not believe that it will need to visit facilities to respond to their requests, the Department believes that responding within 60 days is reasonable.

B. Comment: The process outlined by DPH to respond to a facility's request to alter the SAA within 60 days is clearly biased against enabling a facility to obtain the necessary approval from DPH and the guidelines do not comply with the court's mandate that the Department adopt program flexibility guidelines that will prevent facilities from being exposed to increased liability in violation of HSC 1599.61(g).
Commenter: 8.2.B.

Department Response: The Department does not understand how a 60-day response time shows bias against facilities, and commenter does not explain the basis for this assertion. The Department believes that allowing a facility to explain why a provision or lack thereof would create a new cause of action fulfills requirement that facilities not be exposed to increased liability.

C. Comment: The Department re-issued revised regulations that adopt time frames in HSC 1276 and go beyond the guidance in Section 1276 to make a request for alteration of the SAA much more onerous that what would have been required under the program flexibility statute. The requirement for the facility to "identify the specific language in the Standard Admission Agreement that the facility is unable to employ" assumes that the facility will be deleting or altering sections of the existing SAA and does not allow a facility that wants to add a contract provision that is common for any other business in California. There is no language in the proposed SAA that can be identified that the facility would be unable to employ, yet to meet the proposed guidelines to even make a request to include language in compliance with HSC 1599.83 the facility would have to meet the "unable to employ" standard first, which makes the standard of the guidelines arbitrary and capricious. It does not prevent the process for altering the SAA from a haphazard implementation.
Commenter: 8.2.C.

Department Response: The Department will add the phrase "and/or" to subsection (b)(2) of sections 72516 and 73518 of title 22 of the California Code of Regulations (22 CCR) to clarify that facilities may request that the SAA be modified by appending language to it without needing to identify language they would like removed.

D. Comment: The requirement for "substantiating evidence" is more insufficient than the Department's first guideline. The language in the guideline creates a standard of "impossibility" and does not reflect the business realities of operating facilities of differing sizes, in differing geographic locations, with a variety of patient populations, a variety of business experiences. The language should instead incorporate real guidelines and recognize a fair process for approving requests to modify the SAA, as long as those requests can be supported by a business need or a term that is authorized by law.
Commenter: 8.2.D.

Department Response: The Legislative intent in requiring the Department to adopt a Standard Admission Agreement was that it be used statewide for all admissions to skilled nursing facilities, intermediate care facilities and nursing facilities. The Legislature authorized the Department to direct facilities to modify the agreement; this limited authorization was not given to permit the Department to undercut the Legislative intent by directing modifications that were not absolutely essential. The Department believes that it must require substantiating evidence from a facility to enable the Department to ensure that any directions for modifications of the agreement that it might direct accord with and conform to the Legislature's intent in enacting the statute.

E. Comment: An example of the "impossibility" standard is the provision which only works for SNFs specifically designated under law as a Special Treatment Program for transfers and discharges. There are several general contract provisions that facilities would want to request that stand a high probability of being rejected because the guideline requires the facility to show evidence that it cannot operate if the modification was not approved by DPH. These include provisions in a "General Terms" section of the SAA. The HSC 1599.61(g) and the Court's Writ and Order require the Department to establish guidelines to ensure that the SAA and the process for requesting amendments is implemented in a way that does not subject them to increased liability.
Commenter: 8.2.E.

Department Response: See response to comment 4.B.

F. Comment: The SAA misinterprets the Court Order, Writ and discussion at the March 2008 contempt hearing, in which the judge stated that the Order and Writ required guidelines and timetables to protect facilities from being subjected to increased liability as required by HSC 1599.61(g) and the Department's Return blatantly failed to establish those guidelines and timetables. Facilities should be allowed to include provisions that limit the exposure they have to litigation by providing information about care and service up front within the contract terms. Caregivers could read the terms and conditions upon which care will be provided in this setting.
Commenter: 8.2.F.

Department Response: Nothing prohibits a facility from providing such information at the time a resident is being admitted to the facility as long as it is not part of the SAA or is not required to be signed as a condition of admission to the facility.

G. Comment: The proposed language creates more exposure to increased liability for facilities because of the way the SAA handles the use of arbitration agreements. Studies have suggested that arbitration reduces defense costs and indemnity paid per claim. The SAA does not prevent the facility from offering the arbitration agreement during the admission process but does prohibit it from being an attachment to the SAA which is contrary to HSC 1599.81.
Commenter: 8.2.G.

Department Response: HSC § 1599.81 is permissive and does not require that arbitration agreements be attachments to the SAA. Allowing the facility to offer the agreement during the admission process will eliminate any possibility of increasing a facility's liability because of the lack of ability to discuss arbitration with prospective residents.

H. Comment: A Facility Should Notify Residents and the Ombudsman Program of Any Request to Alter the Standard Admission Agreement. The SAA has been created to benefit and protect consumers, and they should be notified whenever a facility proposes to alter the terms of the standard agreement. This notification will give residents and their representatives an opportunity to register their opinions with the Department prior to the Department's ruling on a facility's request.
Commenter: 7.4.

Department Response: The Department does not believe it would be able to provide a timely response to a facility's request if it needed to await input from residents and the ombudsman.

9. General

A. Comment: Disagree with the Department's comments in the SSOR that informed consent is referenced in Section 72527 already incorporated in the agreement as Attachment F. There is no reference to informed consent. The references are to "be(ing) fully informed and consent, but does not reference "informed consent" which is a completely different legal concept. In addition, Section 72528 clearly is not meant to be a patients' right section. In the current regulatory structure, it follows the patient rights section and is appropriately titled Informed Consent Requirements. If the Department had thought it was a patients' right, they would have added it to the patients' right section. In addition, this section clearly begins with the words "It is a responsibility of the attending licensed healthcare provider ..." and continues with responsibilities of the provider and healthcare practitioner. There is no statutory authority for making this section a patient right and to do so would cause confusion.
Commenters: 6.7 and 8.5.

Department Response: As explained in the Second Supplemental Statement of Reasons, the Department has decided to eliminate 22 CCR §§ 72528 and 73524 from Attachment F.

B. Comment: Commenter expressed disappointment that the implementation of the regulations would be delayed an additional six months from when the regulations are adopted and urges the Department to finalize the regulations as soon as possible to avoid additional delays.
Commenter: 7.5.

Department Response: The court in the *Parkside* case indicated that it believed a six-month delay was justified to enable facilities to prepare for implementation and request modifications of the SAA.

C. Comment: The APA requires the administrative agency promulgating regulations to state both the objectives and purpose of the rulemaking. The "March 17, 2011" notice SSOR states the proposed changes include information resulting from comments received during the 45-day comment period, with changes being made not only to try to come into compliance with the Parkside litigation, but to also bring new changes into the regulatory package that were not part of the stated objectives and purpose of the original 45-day comment period. This is a violation of the APA. The clearest examples include the addition of Section 72528 and 73528 to the Resident Bill of Rights and the new language requiring facilities to keep survey, certification and complaint investigation reports for the past three years and to make those reports available for anyone to review upon request.
Commenter: 8.1.

Department Response: See the responses to comments 6.A. and 9.A.

D. Comment: Commenter states that the change to Section 72516(b) that replaces "prior written authorization" with "unless directed to do so by the Department" broadens the method of communication that may occur between the Department and the provider. Besides offering a more expedient means of communication, it increases the possibility of miscommunication. Commenter states that the SSOR did not provide an explanation for this change and recommends its removal.
Commenter: 6.1.

Department Response: As the Department was quoting language from the statute, it did not believe any additional explanation was required.

E. Comment: Commenter questions the necessity for the language "create a new cause of action against the facility related to compliance ..." in Section 72516(b)(4) as there may be other valid reasons why the specific language cannot be used, such as disruption of care, special resident circumstances, inability of the resident to comprehend the language, and subject area to a service provided by the SNF.
Commenter: 6.2.

Department Response: The Department believes the facility could justify a request for the type of modifications noted in the comment by providing evidence that the modification was needed because of some unique aspect of the facility's operation.

F. Comment: Commenter recommends that Section 72516(b)(4) be amended to add a period after "facility's operation" in the third line with the removal of the rest of the sentence and that the following sentence be added for clarity:

> The request should show how the current language in the standard admission agreement would affect operations and how the proposed new language would resolve the problem.

Commenter: 6.3.

Department Response: The Department believes the regulation needs to address the potential for additional liability. The Department doubts that affecting operations would be a unique enough situation to warrant the Department directing that the agreement be modified.

G. Comment: Commenter is confused by the last statement at Section 72516(d) "This section shall become operative effective six months after the date it is filed with the Secretary of State and asks if it refers to subsection (d) only or to the entire implementation of the SAA as the court required. Commenter suggests that the words "This section" be changed to "The Standardized Admission Agreement."
Commenter: 6.4.

Department Response: . The sentence in question specifies that the entire section (72516 and 73518 respectively), not a subsection and not only the Standard Admission Agreement, shall become operative six months from filing with the Secretary of State.

H. Comment: Alternation of the Standard Admission Agreement Must Be Based on Unique Facility Characteristics, and Must be Preceded By Notice to the Community. Request modifications to Sections 72516(b) and 73518(b) as follows:

> (b) Except to enter information specific to the facility or the resident in blank spaces provided in the Standard Admission Agreement form or its attachments, the licensee shall not alter the Standard Admission Agreement unless directed to do so by the Department. A licensee wishing to receive direction from the Department that would enable the licensee to alter the Standard Admission Agreement shall submit a request to the Department, and at the same time provide a copy of the request to all current residents, all authorized resident representatives, and the local long-term care ombudsman. The request shall:
> (1) include the identity of the facility;
> (2) identify the specific language in the Standard Admission Agreement that the facility is unable to employ;
> (3) identify the specific ~~location and~~ language that is to be deleted, amended or appended to the form, and the location of that language; and,

(4) contain substantiating evidence identifying the reason that the use of the Standard Admission Agreement without the requested modification would not be possible because of some unique aspect of the facility's operation ~~or would make it highly likely that the use of the language will create a new cause of action against the facility related to its compliance with existing statutory or regulatory requirements governing the care provided to nursing facility residents.~~ The Department shall respond within 60 days of the receipt of the request.

The new cause of action in subsection (b)(4) must be deleted. The SAA has already been exhaustively examined, through the administrative procedures and litigation to ensure it does not create any new cause of action. Otherwise, the regulations would allow facilities across the state to re-open issues that have already been resolved, forcing surveyors to adjudicate legal arguments which they are not trained to evaluate. The benefit of the SAA being used by all nursing facilities would be destroyed if individual facilities were authorized to raise legal challenges to the agreement through the pretense of a request to modify the agreement. The SAA should only be modified when modification is necessary due to a facility's unique characteristics. But there can be nothing facility-specific about whether the SAA creates a new cause of action against nursing facilities.
Commenter: 7.3.

Department Response: The court required the Department to address the court's concern that something in the agreement might increase a facility's liability; this language is designed to permit a facility to demonstrate that a provision either in the agreement or missing from the agreement would increase its potential liability.

10. Comments Outside the Scope of the Regulatory Filing

A. Comment: Four issues that remain subject to challenge if not appropriately addressed through the regulatory process include: (1) DPH asserts that a "contract of admission" includes all documents which must be signed by the resident or his or her representative at the time of, or as a condition of admission, and an arbitration agreement need not be signed as a condition of admission. DPH's conclusion that an arbitration clause may not be included as an attachment to the SAA ignores HSC 1599.81 and Code of Civil Procedures 1295. (2) DPH makes no attempt to show any legal authorization to regulate the format of arbitration agreements. HSC 1599.61 does not grant DPH authority to regulate what DPH claims to be outside the SAA. (3) Subsequent case law makes it clear that HSC 1599.81 requires that arbitration clauses be fashioned as attachments to the contract of admission. DPH does not have authority to preclude that they be utilized as attachments. (4) DPH asserted that the SAA does not violate the Federal Arbitration Act (FAA) because they do not affect the enforceability or arbitration agreements. The SAA invalidates any arbitration agreement between a facility and resident which was either presented at the time of the SAA or failed to meet the form requirements. The exclusion and arbitration agreements from the

SAA and the form requirements for arbitration agreements impact on the enforceability of arbitration agreements in violation of the FAA.
Commenter: 8.2.H.

Department Response: This comment is outside the scope of the regulatory filing.

B. Comment: The Legislature intended for arbitration clauses to be handled as optional attachments to the contract of admission as plainly stated in HSC 1599.81(a)–(d).
Commenter: 8.2.I.

Department Response: This comment is outside the scope of the regulatory filing.

C. Comment: The language in the third paragraph of Section IV of the SAA is not required to appear in the body of the SAA. HSC 1599.2 requires that these "advisory" statements appear in the preamble or preliminary statement on documents informing residents of their rights. The language is only appropriate at the beginning of Attachment F. Placing it in the text of the SAA is contradictory to current law, as well as inflammatory and offensive.
Commenter: 8.6.

Department Response: This comment is outside the scope of the regulatory filing.

D. Comment: Fraudulent Misrepresentation of Finances is Not Grounds for Involuntary Transfer/Discharge Under Federal Nursing Home Reform Law (Page 9 of the SAA): The following change is necessary on page 9 of the SAA at Section VI. Transfers and Discharges:

~~6) Material or fraudulent misrepresentation of your finances to us.~~

The Nursing Home Reform Law (NHRL) allows involuntary transfer/discharge only for specified reasons, and misrepresentation of finances is ***not*** one of those reasons. Even if it did, HSC 1439.7 upon which the proposed language is based, permits an eviction for misrepresentation of finances only if a series of other criteria have also been satisfied. By purporting to allow eviction based on misrepresentation of finances alone, the draft SAA misstates the criteria presented in Section 1439.
Commenter: 7.2.

Department Response: This comment is outside the scope of the regulatory filing.

E. Comment: Commenters were concerned that section 72516, as it applied to skilled nursing facilities, would also apply to congregate living health facilities (CLHFs) because of the provisions of HSC § 1267.13(n).
Commenters: 1, 2, 3, 4, 5.

Department Response: This comment is outside the scope of the regulatory filing.

F. Comment: Commenters stated that there is already a listing of patient rights that must be presented to the patient/family (in addition to the hospice patient rights) as designated in the Medicare COPs and inquire as whether the new regulation would replace 72527 for CLHFs or would patient rights addressed in the new regulation be a third set of patient rights to be explained and signed by the patient/family.
Commenters: 1, 2, 3, 4, 5.

Department Response: This comment is outside the scope of the regulatory filing.

Addendum V: List of Commenters (Second 15-Day Notice)

Name	Organization & Title	Address	Comments Letter #	Email Address
Darla Lorenzen	Ontario Healthcare Center	161 S. Euclid Ave., Ontario, CA 91762	1	
Calvin Callaway	Folsom Convalescent Hospital	510 Mill St., Folsom, CA 95630	2	
Jerry L. Vaculin	Bishop Care Center	151 Pioneer Lane, Bishop, CA 93514	3	
Executive Director	Sierra Hills Care Center	1139 Cirby Way, Roseville, CA 95661	4	
Diana Haines	Horizon West	107 Catherine Lane, Grass Valley, CA 95945	5	
Administrator	Horizon West	5255 Hemlock St., Sacramento, CA 95841	6	
Administrator	Vista Pacifica Center	3674 Pacific Ave., Riverside, CA 92509	7	
Pamela I. Turner	Las Villas de Carlsbad	1094 Laguna Drive, Carlsbad, CA 92008	8	
Benjamin I. Larkey	Golden Living London House Sonoma	678 Second St. West, Sonoma, CA 95476	9	
Kristine M. Clark	Golden Living Center	1306 E. Sumner Ave., Fowler, CA 93625	10	
Jay W. Evans	Golden Living Center	705 Trancas St., Napa, CA 94558	11	
Robin Jensen	Kennon S. Shea & Associates, Inc.	1810 Gillespie Way, Suite 212, El Cajon, CA 92020	12	
Virginia Bruski	Hospice of the East Bay	3470 Buskirk Ave., Pleasant Hill, CA 94523	13	virginiab@hospiceeastbay.org
Anthony Hunter	Community Care on Palm	4768 Palm Ave., Riverside, CA 92501	14	
	Landmark Medical Center	2030 N. Garey Ave., Pomona, CA 91767	15	
DeAnn Walters	Golden Living	111 Barstow Ave., Clovis, CA 93612	16	
	Millbrae Serra	P.O. Box 789, Millbrae, CA 94030	17	

Name	Organization & Title	Address	Comments Letter #	Email Address
Susan Buscaglia	Hospice of East Bay	3470 Buskirk Ave., Pleasant Hill, CA 94523	18	
Cheryl Jumonville	Vista Pacific Convalescent	3662 Pacific Ave., Riverside, CA 92509	19	
Leslie Cotham	Golden Living Center	925 N. Cornelia, Fresno, CA 93706	20	
Ben Garrett	Amberwood Convalescent Hospital	6071 York Blvd., Highland Park, CA 90042	21	
Ben Garrett	Alhambra Convalescent Home, Inc.	415 S. Garfield Ave., Alhambra, CA 91801	22	
Ben Garrett	Alderwood Convalescent Hospital	115 Bridge St., San Gabriel, CA 91775	23	
Ben Garrett	The Californian – Pasadena	120 Bellefontaine, Pasadena, CA 91105	24	
Ben Garrett	Fernview Convalescent Hospital	126 N. San Gabriel Blvd., San Gabriel, CA 91775	25	
Ben Garrett	Oakview Convalescent Hospital	9166 Tujunga Canyon Blvd., Tujunga, CA 91042	26	
Nathan Echols	Golden Living Center	1221 Rose Marie Ln., Stockton, CA 95207	27	
	HorizonWest	3400 Bell Road, Auburn, CA 95602	28	
Nancy Reagan	California Association of Health Facilities	2201 K Street, Sacramento, CA 95816-4922	29	
Karol Ford	Golden Living Center	144 "F" St., Galt, CA 95632	30	
Lori Costa	Aging Services of California	1315 I St., Suite 100, Sacramento, CA 95814	31	
	Golden Living Center	3601 San Dimas, Bakersfield, CA 93301	32	
Donna Donihi	Golden Living Hy-Pana	4545 Shelley Ct., Stockton, CA 95207	33	
Doug Padgett	Mountain View Child Care, Inc.	1720 Mountain View Ave., Loma Linda, CA 92354	34	
Joseph Cunliffe	Walnut Whitney Care Center	3529 Walnut Ave., Carmichael, CA 95608	35	
Spiegel, McGinnis, Carlson	NSCLC		36	

Name	Organization & Title	Address	Comments Letter #	Email Address
Patricia L. Blaisdell	California Hospital Association	1215 K St., Suite 800, Sacramento, CA 95814	37	LCosta@aging.org
Michael Connors	CANHR	650 Harrison St., 2nd Floor, San Francisco, CA 94107	38	Michael@canhr.org

Addendum VI: Summary and Response
To Comments on the Regulations
(Second 15-Day Comment Period)

1. Comments on Changes to the Regulation Text Made in the Second 15-Day Filing.

No comments were received that addressed the scope of the proposed change to the regulation text mailed on May 26, 2011.

2. Comments on Changes to the Standard Admission Agreement (SAA) Text Made in the Second 15-Day Filing.

No comments were received that addressed the scope of the proposed changes to the SAA mailed on May 26, 2011.

3. Comments on Changes to the Text of Attachment F of the Standard Admission Agreement Made in the Second 15-Day Filing.

A. Comment: Commenters disagree with removal of Title 22, Sections 72528 and 73524, from the attachment and believe the deletion is based on misinterpretation of law. Commenters state the sections are a direct extension of the right to informed consent established at Sections 72527(a)(5) and 73523(a)(5) for SNFs and identify more specific right to information before psychotherapeutic drugs or physical restraints are used. If the Department excludes these sections from the bill of rights, residents will not be informed about their right to informed consent related to use of psychotherapeutic drugs and physical restraints. The federal Third Circuit Court of Appeals ruled that the Federal Nursing Home Amendments ("FNHRA" 42 U.S.C. Sec. 1396r et. seq.) confer rights to all nursing home residents even though some of the statutory sections do not include the word "right." Commenters state that the court, finding that the FNHRA was "replete" with rights-creating language, held that the entire FNHRA, and not just the "resident rights" portion of Section 1396r(c), conveys enforceable resident rights. *Grammer v. John J. Kane Regional Centers – Glen Hazel, 570 F.3d 520* (2009).

Commenters also believe that statements made in the Supplement to the Statement of Reasons (SSOR) for the removal of Sections 72528 and 73524 should be deleted because it implies that facilities are not responsible for meeting facility obligations. The commenters believe that the Department's position that health care providers, rather

than nursing homes, are required to comply with the requirements of these sections, has no merit. Sections 72528(c) and 73524(c) require facilities to verify that informed consent has been obtained. The SSOR is also at odds with All Facility Letters (AFLs) 11-08 and 11-31 that explain that the Department will enforce the facility verification requirements in Section 72528 regardless of where an order for psychotherapeutic drugs originated. In issuing the AFLs, the Department explained that it was purposefully overturning underground regulations that it had issued on this subject in 1992. Commenters disagree that deleting the sections from the bill of rights will avoid confusing residents.

Commenters state that HSC 1599.61(d) requires the Department to consolidate and develop one comprehensive Patient's Bill of Rights" to be attached to the SAA. Although HSC 1599.61(d) does not specifically address the inclusion of Sections 72528 and 73524, it does require that Sections 72527 and 73523 be included. In other instances the Department has included rights in the comprehensive bill of rights that are not listed in HSC 1599.61(d) but are referenced in Section 72527 and 73527 for persons with developmental disabilities established at WIC Sections 4502-4505 and the rights of persons admitted for psychiatric evaluation found at WIC Sections 5325-5326. By including these rights, the Department correctly determined that rights referenced in Sections 72527 and 73523 should be included in the comprehensive bill of rights. It should apply the same principle in restoring Sections 72528 and 73524 to the bill of rights.

Daniel Levinson, Inspector General for the U.S. Department of Health and Human Services (HHS), declared that nursing homes are often giving "potential-lethal" antipsychotic drugs to residents in violation of their rights and federal safety standards. His statement coincided with the release of an OIG report on antipsychotic drug use in nursing homes which found that, among other things, 88 percent of residents on atypical antipsychotics are diagnosed with dementia and receive them contrary to FDA "black box" warnings. The Department's stance against informing nursing home residents about their right to informed consent concerning the use of psychoactive drugs is troubling and has potentially far-reaching implications. Commenters urge the Department to retract its statements, correct the record, and restore Sections 72528 and 73524 to the bill of rights.
Commenters: 36 and 38

Department Response: The original comment to the 45-day filing was outside the scope of the regulatory filing. The Department erred by providing a substantive response to it. Providing a patient with the information needed for the patient to give informed consent to a treatment is the responsibility of the patient's health care

practitioner. If the patient is a resident of a SNF or ICF, the Department has a regulation in place, Section 72528 or 73524, to require that practitioners fulfill their responsibility to facility residents. A facility may not be the entity responsible for obtaining informed consent from a patient; this is uniquely the responsibility of the individual practitioner. The facility's responsibility to ensure that a patient has provided informed consent to a procedure is to verify that the practitioner obtaining informed consent has done what is required by 22 CCR Sections 72528 and 73524. This obligation is placed on the facility by subsections (a)(5) and (e)(1) of 22 CCR Sections 72527 and 73523. That this obligation is emphasized by being repeated in 22 CCR Sections 72528 and 73524 does not add to the facility's responsibility, and does not add any additional protections for patients other than that specified in 22 CCR Sections 72527 and 73523.

4. Comments Outside the Scope of the Filing.

A. Comment: The regulations state that the Department will respond to a facility's request to alter the SAA within 60 days of the date received. This timeframe mirrors what is required for program flexibility requests. The SAA should be amended to state that if a request is not acted upon within the 60-day timeframe, the request is automatically approved.
Commenters: 1.A., 2.A., 3.A., 4.A., 5.A., 6.A., 7.A., 8.A., 9.A., 10.A., 11.A., 12.A., 14.A., 16.A., 17.A., 19.A., 20.A., 21.A., 22.A., 23.A., 24.A., 25.A., 26.A., 27.A., 28.A., 29.A ., 30.A., 32.A., 33.A., 34.A, and 35.A.

Department Response: This comment is outside the scope of the proposed changes mailed on May 26, 2011 and was addressed in Addendum IV., pages 3 and 4, Comment 8.A.

B. Comment: The majority of residents are willing to voluntarily sign an arbitration agreement when presented at the time of admission. Will the Department allow a facility to alter the SAA to reflect the use of arbitration as one of the more common business terms and conditions used by the facility? What standard is DPH going to use to review my request to include an arbitration clause as an optional attachment to the SAA? How is the Department going to ensure that it does not arbitrarily deny requests for such a provision? Will the Department take a look at current case law in this area and base its determination on what the law currently allows facilities to include? The proposed SAA regulations must be rewritten to include a process and instruction requiring that the regulations would clearly identify mandatory components that each facility must include in every admission agreement. The regulations would clearly identify other components of the SAA that are optional and the Department should

create a process that requires it to approve any additional additions/modification to a facility's SAA as long as those components do not conflict with other law or regulations. **Commenters: 1.B., 2.B., 3.B., 4.B., 5.B., 6.B., 7.B., 8.B., 9.B., 10.B., 11.B., 12.B., 14.B., 16.B., 17.B., 19.B., 20.B., 21.B., 22.B., 23.B., 24.B., 25.B., 26.B., 27.B., 28.B., 30.B., 32.B., 33.B., 34.B., and 35.B.**

Department Response: The comments regarding the use of arbitration as a common business term and condition and that an arbitration clause be handled as an optional attachment to the SAA were responded to in Addendum II., Comment 10.A., page 18, and Comment 10.H., page 21. The comment asking if the Department will review current case law is outside the scope of this rulemaking. The statement that mandatory components of the SAA should be identified was responded to in Addendum II., Comments 8.D., page 11, and 8.B., page 10.

C. Comment: The admissions process is the appropriate point in time to discuss arbitration clauses. HSC requires that notification be given to the resident/responsible party that states, in writing, that the decision to sign an arbitration agreement is voluntary. Facilities are required to have the arbitration clause included as a separate document, requiring a separate signature, as an attachment to the admissions packet. A resident has 30 days to change their mind and retract the agreement to arbitrate future disputes and has the right to challenge the validity of an agreement to arbitrate in court if they believe it was procedurally or substantively flawed.
Commenters: 1.E., 2.E., 3.E., 4.E., 5.E., 6.E., 7.E., 8.E., 9.E., 10.E., 11.E., 12.E., 14.E., 16.E., 17.E., 19.E., 20.E., 21.E., 22.E., 23.E., 24.E., 25.E., 26.E., 27.E., 28.E., 30.E., 32.E., 33.E., 34.E., and 35.E.

Department Response: This comment is outside the scope of the proposed changes mailed on May 26, 2011 and was responded to in Addendum IV., page 6, Comment 8.G.

D. Comment: Will the Department take a look at current case law in the area of recent court decisions related to the use of arbitration agreements and base its determination on what the law currently allows facilities to include? The Legislature intended for arbitration clauses to be handled as optional attachments to the contract of admission as plainly stated in HSC 1599.81(a)–(d). Subsequent case law makes it clear that HSC 1599.81 requires that arbitration clauses be fashioned as attachments to the contract of admission. On April 27, 2011, the U.S. Supreme Court decided *AT&T Mobility LLC v. Concepcion* which upheld the doctrine that the Federal Arbitration Act (FAA) preempts individual states from enacting rules that stand as an obstacle to the accomplishment of

the FAA's objectives – i.e., to ensure the enforcement of arbitration agreements according to their terms so as to facilitate informal, streamlined proceedings.
Commenters: 1.F., 2.F., 3.F., 4.F., 5.F., 6.F., 7.F., 8.F., 9.F., 10.F., 11.F., 12.F., 14.F., 16.F., 17.F., 19.F., 20.F., 21.F., 22.F., 23.F., 24.F., 25.F., 26.F., 27.F., 28.F., 30.F., 32.F., 33.F., 34.F., and 35.F.

Department Response: The comments on current case law are outside the scope of this rulemaking.

E. Comment: The assertion by DPH that the SAA does not violate the FAA because the SAA regulations do not affect the enforceability of arbitration agreements is incorrect. In the U.S. Supreme Court decision in *AT&T Mobility LLC v. Concepcion*, the doctrine was upheld that the FAA preempts individual states from enacting rules that stand as an obstacle to the accomplishing the FAA's objectives to ensure the enforcement or arbitration agreements according to their terms to facilitate informal, streamlined proceedings. The regulations constitute an obstacle toward arbitration and the Department has an obligation to analyze the regulations in light of this new case law to determine whether the regulations were lawful. The language in the regulations and HSC 1599.81 and 1430(b) is preempted in view of the *AT&T Mobility* decision. These laws single out and discriminate against arbitration on a basis that is not at all equal to how contracts are enforced. Will the Department take a look at current case law in this area and base its determination on what the law currently allows facilities to include? Recommend the Department review current case law and determine whether certain portions of the SAA that create obstacles to the enforcement of a valid arbitration agreement are preempted by the Federal Arbitration Act.
Commenter: 29.E.

Department Response: This comment on arbitration agreements is outside the scope of the proposed changes mailed on May 26, 2011 as stated above for Comment M.

F. Comment: The revised regulations did not meaningfully address the court's mandate requiring that the Department provide guidelines and time tables for seeking program flexibility to prevent facilities from being exposed to increased liability in violation of HSC 1599.61(g). Commenter requests that Section 73518(b)(4) be modified to include "potential for deficiency or citation" in place of "cause of action" and that the SAA be amended to state that if a request for change is not acted upon within the 60-day time frame, that it be automatically deemed approved.
Commenter: 37

Department Response: Proposed amendments to sections 72516(b) and 72518(b) establish guidelines and time tables by which a facility may request the Department to direct that an SAA be altered. Regarding increased liability, the department responded in Addendum IV, page 4, Comment 8.B., and on pages 8 and 9, Comment 9.H., that the proposed amendment is written to permit a facility to demonstrate that a provision either in the agreement or missing from the agreement would **increase** its potential liability.

G. Comment: Commenters forwarded concerns previously received during the 45-day comment period (designated as commenters 124 and 128) responded to in Addendum II., Comment 9.F., and in Addendum IV., Comments 10.E. and 10.F.
Commenters: 13 and 18

Department Response: These comments concerning congregate living health facilities and hospices are outside the scope of this rulemaking and were responded to in Addendum II, page 16, Comment 9.F. (commenters 124 and 128).

H. Comment: The language in the agreement "move you to or from a Medicare Certified bed" fails to recognize that the entire facility is Medicare certified and Medicare distinct parts are not available in California, therefore, this federal provision does not apply. The entire sentence should be deleted.
Commenter: 31.B.

Department Response: This comment is outside the scope of the proposed changes mailed on May 26, 2011. The commenter is mistaken; the federal provision does apply since Medicare distinct parts are available in California. As stated in Addendum II, page 3, in response to Comment 3.A., the department proposed amendments to the SAA at the initial 15-day comment period addressing transfers to or from a Medicare certified bed.

I. Comment: The language in the preamble that allows for "complaint investigation reports" to be made "available for anyone" violates HIPPA and State laws which protect against the indiscriminate release of patient information. Recommend the words "complaint investigation reports" be deleted from the agreement.
Commenter: 31.A.

Department Response: This comment is outside the scope of the proposed changes mailed on May 26, 2011. The preamble statement is being amended to reflect the new requirement regarding access to inspection reports based on provisions of the Patient Protection and Affordable Care Act, sections 1395i-3(d)(1)(C) and 1396r(d)(1)(V)

[should probably be (C)] of title 42 of the United States Code (Page 1 of the SAA), as indicated in the response to Comment 6.A. in Addendum II, pages 8 and 9.

J. Comment: Comments did not successfully transmit to the fax transmission sheet based on a "dropped loop current."
Commenter: 15

Department Response: Attempts to determine name of sender and to retrieve intended comments were unsuccessful.

K. Comment: The revised language adds text which allows the facility the flexibility of meeting the "unable to employ" requirement or alternatively identify "the specific location and language that is to be deleted, amended or appended." The alteration doesn't address commenter's initial concern that the requirement that facilities must identify a provision of the SAA that they are unable to employ and then provide "substantiating evidence" why they can't use that provision. There is no guidance on what type or how much evidence would be required to show that a facility is unable to employ a provision. Recommend deletion of this part of the text.
Commenter: 29.B.

Department Response: This comment is outside the scope of the proposed changes mailed on May 26, 2011. The concern regarding "unable to employ" language and "substantiating evidence" was responded to in Addendum IV., pages 4 and 5, Comments 8.C. and 8.D.

L. Comment: The requirement for "substantiating evidence" is more insufficient than the Department's first guideline. The language in the guideline creates a standard of "impossibility" and does not reflect the business realities of operating facilities of differing sizes, in differing geographic locations, with a variety of patient populations, a variety of business experiences. The language should instead incorporate real guidelines and recognize a fair process for approving requests to modify the SAA, as long as those requests can be supported by a business need or a term that is authorized by law. Recommend that the portion of the regulation requiring the facility's request contain "substantiating evidence" be replaced with "evidence of a written rationale" which identifies the facility's reason for requesting an alteration/modification of the SAA.
Commenter: 1.C., 2.C., 3.C., 4.C., 5.C., 6.C., 7.C., 8.C., 9.C., 10.C., 11.C., 12.C., 14.C., 16.C., 17.C., 19.C., 20.C., 21.C., 22.C., 23.C., 24.C., 25.C., 26.C., 27.C., 28.C., 29.C ., and 30.C., 32.C., 33.C., 34.C., and 35.C.

Department Response: This comment is outside the scope of the proposed changes mailed on May 26, 2011. The discussion on "substantiating evidence" was responded to in Addendum IV., pages 4 and 5, Comments 8.C. and 8.D.

M. Comment: The language is highly likely to create a new cause of action related to facility compliance with existing statutory or regulatory requirements limited to care provided to residents. This portion of the guideline creates another extremely high burden for facilities. What type of evidence would be sufficient? The adoption of a SAA is supposed to benefit both the facility and the consumer. Creating standards that disallows a facility to include clear statements about the terms and conditions upon which care will be provided in that facility only provides a disservice to both parties.
Commenter: 1.D., 2.D., 3.D., 4.D., 5.D., 6.D., 7.D., 8.D., 9.D., 10.D., 11.D., 12.D., 14.D., 16.D., 17.D., 19.D., 20.D., 21.D., 22.D., 23.D., 24.D., 25.D., 26.D., 27.D., 28.D., 29.D ., and 30.D., 32.D., 33.D., 34.D., and 35.D.

Department Response: This comment is outside the scope of the proposed changes mailed on May 26, 2011 and was responded to in Addendum IV., pages 8 and 9, Comment 9.H. The proposed amendment is written to permit a facility to demonstrate that a provision either in the agreement or missing from the agreement would **increase** its potential liability.

N. Comment: Subsequent to the Order in Parkside, the California Court of Appeals has found that the decision to bind a resident to an arbitration clause was a "health care decision" for the purposes of the California Probate Code. In *Hogan v. Country Villa Health Services* (2007), the Court stated that "when an agent under a health care power of attorney is faced with selecting a long-term health care facility, as part of the health care decision making process, he or she may well be asked to decide to sign an arbitration agreement as part of the admissions contract package." This served to reinforce the conclusion that the execution of an arbitration clause is part of the "health care decision making process." HSC 1599.81's anti-waiver provision is likely preempted by the Federal Arbitration Act (FAA) because it singles out resident rights claims for an exemption from arbitration. When state law prohibits outright the arbitration of a particular claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.
Commenter: 29.D.

Department Response: As responded to in Addendum II, Comment 10.H., the provisions addressing arbitration are contained in subsection (d) of Sections 72516 and 73518 of title 22 of the California Code of Regulations. The court did not require that the Department make any changes to those provisions. As the proposed rulemaking only

addresses the requirements of the court order and Writ of Mandate, and Sections 72516 and 73518 were promulgated in a previous rulemaking, the comments regarding subsection (d) of these sections are outside the scope of this proposed rulemaking.

O. Comment: The proposed language creates more exposure to increased liability for facilities because of the way the SAA handles the use of arbitration agreements. Studies have suggested that arbitration reduces defense costs and indemnity paid per claim. The SAA does not prevent the facility from offering the arbitration agreement during the admission process but does prohibit it from being an attachment to the SAA which is contrary to HSC 1599.81.
Commenter: 29.D.

Department Response: This comment on arbitration agreements is outside the scope of the proposed changes mailed on May 26, 2011 as stated above for Comment M.

P. Comment: By setting up a complex program flexibility process, the Department has basically denied the facility the right to add additional provisions to the agreement as long as they don't conflict with current state and federal law. A sixty day approval process for additions to the agreement is unacceptable. What if a resident wants to sign an arbitration clause when being admitted to the facility? Does the facility have to wait sixty days to get it approved? The criteria for altering the agreement are too cumbersome. What if there is no substantiating evidence, but it is just something both parties want in the agreement? Does the Department have the right to deny the parties their right to contract? The Department should try by its regulations to allow for streamlined timelines and processes to alter or add to the document that they have drafted. The proposed program flexibility regulations will seriously compromise the admission operations of a facility .
Commenter: 31.C.

Department Response: This comment is outside the scope of the proposed changes mailed on May 26, 2011. In Addendum IV., page 4, Comment 8.A., regarding the 60-day time frame, the department responded that it must direct a facility to modify the SAA, not approve a facility's request for modification. As the Department does not believe that it will need to visit facilities to respond to their requests, the Department believes that responding within 60 days is reasonable. The issues raised by the commenter regarding the right to contract were addressed in Addendum II., page 14, Comment 8.M.

All captions and headings are for convenience purposes only, and have no independent meaning.

If any provision of this Agreement becomes invalid, the remaining provisions shall remain in full force and effect.

The Facility's acceptance of a partial payment on any occasion does not constitute a continuing waiver of the payment requirements of the Agreement, or otherwise limit the Facility's rights under the Agreement.

This Agreement shall be construed according to the laws of the State of California.

Other than as noted for a duly authorized Resident's Representative, the Resident may not assign or otherwise transfer his or her interests in this Agreement.

Upon your request, we shall provide you or your legal representative with a copy of the signed agreement, all attachments and any other documents you sign at admission and shall provide you with a receipt for any payments you make at admission.

By signing below, the Resident and the Facility agree to the terms of this Admission Agreement:

_____ _____

Representative of the Facility *Date*

_____ _____

Resident *Date*

_____ _____

Resident's Representative - if applicable *Date*

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XII. Entire Agreement and Signature Page

No changes are being proposed to page *i* of the Table of Contents (I. Preamble through XII. Entire Agreement and Signature Page).

Non-substantive changes are being made to the Table of Contents, beginning on page *ii* listing Attachments A – F in the SAA to make titles consistent in capitalization and wording to individual attachments and to ensure that all attachments are paginated.

~~*Attachment A: Resident Bill of Rights*~~

Attachment A: Facility Owner and Licensee Identification

A new Attachment A is added to comply with the provisions of Chapter 532, Statutes of 2009.

Attachment B-1: Supplies & and Services ~~Covered~~ Included ~~I~~in the Basic Daily Rate for Private Pay & and Privately Insured Residents

A non-substantive change is being made to correct the capitalization of the word "in".

Attachment B-2: Optional Supplies & and Services ~~NOT~~ Not ~~Covered~~ Included in the Basic Daily Rate for Private Pay & and Privately Insured Residents

A non-substantive change is being made to add the word "the" before "Basic".

Attachment C-1: Supplies & and Services ~~Covered~~ Included in the Basic Daily Rate for Medi-Cal Residents

The word "Denture" is being replaced with the word "Dental" to use the correct term for dental floss.

Attachment C-2: Supplies & and Services NOT ~~Covered~~ Included in the Medi-Cal Basic Daily Rate That Medi-Cal ~~WILL~~ill Pay the Dispensing Provider ~~f~~For Separately

Attachment C-3: Optional Supplies & and Services ~~NOT~~ Not Covered ~~b~~By Medi-Cal That May Be Purchased ~~b~~By Medi-Cal Residents

Attachment D-1: Supplies & and Services Covered B~~b~~y the Medicare Program ~~f~~For Medicare Residents

A non-substantive change is being made to make the capitalization consistent with the title of the attachment. Parentheses are being added to the last statement of number 5 and a comma removed to correct grammar. The word "and" is being added before "physician prescribed" to clarify that "physician-prescribed" modifies both pharmaceutical equipment and medical equipment.

Attachment D-2: Optional Supplies ~~&~~ and Services ~~NOT~~ Not Covered By Medicare That May Be Purchased By Medicare Residents

Attachment E: Authorization for Disclosure of Medical Information

As noted earlier, this attachment is required pursuant to HSC section1599.73, which requires that, "The contract shall provide a means by which the resident may authorize the disclosure of information to specific persons, by attachment of a separate sheet that conforms to the specifications of section 56 of the Civil Code." Section 56 of the Civil Code simply provides that, "This part may be cited as the Confidentiality of Medical Information Act." The Department determined that the Legislature clearly intended that the authorization required by HSC section1599.73 conform to all the provisions of the Confidentiality of Medical Information Act. Civil Code section 56.11 prescribes the requirements for a valid authorization for disclosure of medical information. Attachment E was therefore developed by the Department to conform to the standards set forth in Civil Code section 56.11.

The court held that if a facility used Attachment E, it would violate the provisions of the Federal Health Insurance Portability and Accountability Act (HIPAA), and therefore ordered the Department to amend Attachment E by ordering:

> 1. Authorization for Disclosure of Medical Information. The Authorization for Disclosure of Medical Information shall comply with all of the mandatory requirements of the Federal Health Insurance Portability and Accountability Act (H.I.P.P.A.).

The Department is amending Attachment E to include the HIPAA requirements contained in 45 CFR section 164.508 in addition to those contained in the Civil Code. The additional requirements for disclosure specified in 45 CFR section 164.508 that the Department is including in Attachment E are:

45 CFR section 164.508(c)(2)(i) - The individual's right to revoke the authorization in writing;

45 CFR section 164.508(c)(2)(ii) - The inability to condition treatment, payment, enrollment or eligibility for benefits on the authorization;

45 CFR section 164.508(c)(2)(iii) - The potential for information disclosed pursuant to the authorization to be subject to redisclosure by the recipient and no longer be protected by HIPAA; and,

45 CFR section 164.508(c)(4) - the facility must provide the individual with a copy of the signed authorization.

Attachment F: Resident Bill of Rights

The Resident Bill of Rights is being moved to Attachment F so that a new Attachment A may be included to comply with the provisions of Chapter 532, Statutes of 2009.

On page 1 of Attachment F, second paragraph, a non-substantive change to insert the word "Section" before "1599" is being added and the term "sequitur" is be replaced with "seq." after "et" in the second sentence to reflect commonly accepted usage.

On pages 3 and 4 of Attachment F, non-substantive changes are being made to paragraphs (a)(8) and (a)(17) of the quoted text from section 72527 of 22 CCR to conform the language to the current regulations filed as a change without regulatory effect on June 23, 2011 pursuant to section 100, title 1, CCR (Register 2011, No. 25). Subsection (a)(8) was adopted, subsection (a)(17) was amended, and subsections (a)(8) through (a)(26) were renumbered as (a)(9) through (a)(27). The references to provisions addressing ICFs in the quoted text of section 72527 of 22 CCR, subsections (a)(5), (a)(9), and (a)(24), are deleted as they are no longer accurate because of the non-substantive changes made to section 73523 of 22 CCR, also filed as a change without regulatory effect on June 23, 2011 pursuant to section 100, title 1, CCR (Register 2011, No. 25).

On page 4 of Attachment F, a non-substantive change to correct a typographical error is being made in paragraph (a)(23) referencing section 72012.2 which does not exist. This reference is being corrected to read 73012.2, the correct reference for the definition of chemical restraints for intermediate care facilities.

On page 5, a non-substantive change is made to capitalize the term "durable power of attorney for health care."

A non-substantive change is made to include the entire text of section 73523 of 22 CCR on pages 6 through 19 of Attachment F, after the quoted text of section 72527, to include the non-substantive changes that were made to read as the current regulation text filed as a change without regulatory effect on June 23, 2011 pursuant to section 100, title 1, CCR (Register 2011, No. 25). Subsection (a)(12) was adopted,

subsection (a)(17) was amended, and subsections (a)(12) through (a)(26) were renumbered as (a)(13) through (a)(27).

PAGE 8 of Attachment F, subsection (i) is added to the quoted language of HSC section 1599.1 to conform it to the current statute.

On page 8 of Attachment F, the parenthetical reference to California Code of Regulations is being added as that is the current name for the California Administrative Code. A non-substantive change is being made in the agency name "Department of Health Services" to read "Department of Public Health" to designate the correct agency that oversees licensing concerns pursuant to the reorganization of the Department of Health Services.

On page 10 of Attachment F, a dash is being inserted between "decision" and "making" to correct a grammatical error.

On page 14 of Attachment F, the statement, *"~~[NOTE: THIS COMPILATION OF RESIDENT RIGHTS APPLIES TO ALL RESIDENTS IN LICENSED NURSING FACILITIES THAT ARE ALSO CERTIFIED UNDER 42CFR PL 483.]~~"* is being deleted because it no long conforms to California law, under HSC section 1599.1(i).

Alternatives Considered

The Department has determined that no reasonable alternative considered by the Department or that has otherwise been identified and brought to the attention of the Department would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

Local Mandate Determination

The Department has determined that the proposed regulations do not impose a mandate on local agencies or school districts that requires state reimbursement.

Effect on Small Business

The Department has determined that these regulations have no impact on small business. Any impact on these businesses is a result of the legislation directing the Department to adopt and the facilities to use a standard admission agreement, not the result of these regulations themselves.

Documents Relied On

Writ of Mandate issued in *Parkside Special Care Center, Inc., et al.* v. *Sandra Shewry, Director of the Department of Health Services, et al.*, Superior Court of the State of California, County of San Diego, case number GIC: 860574.

Transcript of March 11, 2008 Hearing

Addendum I: List of Commenters (45-Day Public Notice)

Name	Organization & Title	Address	Comments Letter #	Email Address
Anne Butler	American River Care Center Administrator	3900 Garfield Ave., Carmichael, CA 95608	1	www.sunbridgehealthcare.com
Don Popovich	Arrowhead Home Administrator	4343 N. Sierra Way, San Bernardino, CA 92407	2	
John Henning	Country Oaks Care Center Administrator	830 East Chapel St., Santa Maria, CA 93454	3	
Eric McClellan	Devonshire Care Center Administrator	1350 East Devonshire Ave., Hemet, CA 92544	4	
Cyd Gallardo	Devonshire Care Center DON	1350 East Devonshire Ave., Hemet, CA 92544	5	
John Haedrich	Dreier's Nursing Care Center Administrator	1400 W. Glenoaks Blvd., Glendale, CA 91201-1911	6	
Mary Terrell	Fernview Convalescent Hospital Administrator	126 North San Gabriel Blvd., San Gabriel, CA 91775	7	
Henry Brumley	Gramercy Court	2200 Gramercy Dr., Sacramento, CA 95825	8	www.gramercycourt.com
Tom Kraus	Gramercy Court Administrator	2200 Gramercy Dr., Sacramento, CA 95825	9	
Angela Hopkins	Horizon Health	3034 E. Herndon Ave., Fresno, CA 93720	10	
Diesha Ayers	Horizon West	625 16th Street, Lakeport, CA 95453	11	www.HorizonWest.com
Arnece Jackson	Horizon West	625 16th Street, Lakeport, CA 95453	12	www.HorizonWest.com
Patricia Douglas	Horizon West	625 16th Street, Lakeport, CA 95453	13	www.HorizonWest.com
Earlene Taylor	Horizon West	625 16th Street, Lakeport, CA 95453	14	www.HorizonWest.com
Scott Kirby	Lemon Grove Care & Rehabilitation Administrator		15	

Name	Organization & Title	Address	Comments Letter #	Email Address
Jackie Baker	LifeHouse	1633 Cypress Lane, Paradise CA 95969	16	
Gale Bush	LifeHouse	1633 Cypress Lane, Paradise CA 95969	17	
Sandra Haskins	LifeHouse Administrator	1633 Cypress Lane, Paradise CA 95969	18	
Georgia Otterson	Napa Nursing Center	3275 Villa Lane, Napa CA 94558	19	www.HorzonWest.com
Joel Waldman	New Vista Nursing & Rehabilitation Center Administrator	8647 Fenwick St., Sunland CA 91040	20	
Joshua Torres	St. Edna Subacute & Rehabilitation Center Executive Director	1929 N. Fairview, Santa Ana, CA 92706	21	
Joshua Torres	St. Edna Subacute & Rehabilitation Center Executive Director	1929 N. Fairview, Santa Ana, CA 92706	22	
Patricia Barnes	San Mateo Convalescent Hospital Administrator	453 North San Mateo Dr., San Mateo, CA 94401-2453	23	
Patricia Barnes	San Mateo Convalescent Hospital Administrator	453 North San Mateo Dr., San Mateo, CA 94401-2453	24	
Brollier	Spring Hill Manor Rehabilitation & Convalescent Hospital Administrator	355 Joershke Drive, Grass Valley, CA 95945	25	
Trac ey Ingleman	San Miguel Villa	1050 San Miguel Rd., Concord, CA 94518	26	
Velda Pierce	San Miguel Villa Administrator	1050 San Miguel Rd., Concord, CA 94518	27	
Marlene Foster	San Miguel Villa	1050 San Miguel Rd., Concord, CA 94518	28	
Barbara Feilmoser	San Miguel Villa Director of Nursing	1050 San Miguel Rd., Concord, CA 94518	29	
Lori S. Bond	Town and Country Manor	555 East Memory Lane, Santa Ana, CA 92706	30	
H. Reninatti	Verdugo Vista HealthCare Center	3050 Montrose Ave., La Crescenta, CA 91214	31	

Name	Organization & Title	Address	Comments Letter #	Email Address
J. Shelton	Verdugo Vista HealthCare Center	3050 Montrose Ave., La Crescenta, CA 91214	32	
Lupe Barrozo	Vista Cove Care Center at Santa Paula	250 March St., Santa Paula, CA 93060	33	
Cindy Jordan	Vista Cove Care Center at Santa Paula Executive Director	250 March St., Santa Paula, CA 93060	34	
Cathy Collins	Vista Pacifica Convalescent Director of Nurses	3662 Pacific Ave., Riverside, CA 92509	35	convalescent@vistapacificaent.com
Cheryl Jumonville	Vista Pacifica Convalescent Administrator	3662 Pacific Ave., Riverside, CA 92509	36	
DohDee Phillips	Wagner Heights Nursing	9289 Branstetter Place, Stockton CA 95209	37	DPhillips@convenantcare.com
Barbara Addington	Walnut Whitney Care Center Executive Director	3529 Walnut Ave., Carmichael, CA 95608	38	www.horizonwest.com/walnutwhitney
Fresha Karongo	Walnut Whitney Care Center Director of Nursing Services	3529 Walnut Ave., Carmichael, CA 95608	39	www.horizonwest.com/walnutwhitney
Eric Roderiques	Palm Haven Care Center	469 E. North St., Manteca, CA 95336	40	
Jennifer Gonzalez	Pacific Hills Manor	370 Noble Ct., Morgan Hill, CA 95037	41	
Richard Murphy	Valley Convalescent Hospital Owner	919 Freedom Blvd., Watsonville, CA 95077-1330	42	
Josh Hedger	Roseville Care Center Executive Director	1161 Cirby Way, Roseville, CA 95661	43	www.horizonwest.com/roseville
Franco Diamond	Idylwood Care Center Administrator	1002 W. Fremont Ave., Sunnyvale, CA 94087	44	
Jen Nguyen Hone	Downey Care Center	13007 S. Paramount Blvd., Downey, CA 90242	45	
Ofelia Rodil	Downey Care Center	13007 S. Paramount Blvd., Downey, CA 90242	46	
Georgia Otterson	Napa Nursing Center Administrator/Executive Director	3275 Villa Lane, Napa CA 94558	47	www.horizonwest.com/napa

Name	Organization & Title	Address	Comments Letter #	Email Address
Valerie Alves	Pacific Hills Manor Executive Director	370 Noble Court, Morgan Hill, CA 95037	48	
Shaye Starkey	Mercy Retirement & Care Center Associate Executive Director	3431 Foothill Blvd., Oakland CA 94601	49	www.eldercarealliance.org
Sister Patty Creedon	Mercy Retirement & Care Center Executive Director	3431 Foothill Blvd., Oakland CA 94601	50	www.eldercarealliance.org
Lori K. De Kruif	Lakeview Terrace Special Care Center Administrator	9601 Foothill Blvd., Lakeview Terrace CA 91342	51	
Lilia E. Dionisio	Imperial Convalescent Hospital Director of Nursing Services	150 Bellefontaine St., Pasadena CA 91105	52	
Evangeline M. Molnar	Imperial Convalescent Hospital Administrator	150 Bellefontaine St., Pasadena CA 91105	53	
Illegible	Compass Health, Inc.	200 S. 13th St., Suite 208, Grover Beach, CA 93433	54	
Mark Woolpert	Compass Health, Inc.	200 S. 13th St., Suite 208, Grover Beach, CA 93433	55	
Harmon	Compass Health, Inc.	200 S. 13th St., Suite 208, Grover Beach, CA 93433	56	
Darren Smith	Compass Health, Inc.	200 S. 13th St., Suite 208, Grover Beach, CA 93433	57	
Illegible	Compass Health, Inc.	200 S. 13th St., Suite 208, Grover Beach, CA 93433	58	
Illegible	Compass Health, Inc. Corporate Owner	200 S. 13th St., Suite 208, Grover Beach, CA 93433	59	
L. Alexander	Compass Health, Inc.	200 S. 13th St., Suite 208, Grover Beach, CA 93433	60	
Illegible	Compass Health, Inc.	200 S. 13th St., Suite 208, Grover Beach, CA 93433	61	
Illegible	Compass Health, Inc.	200 S. 13th St., Suite 208, Grover Beach, CA 93433	62	
Illegible	Compass Health, Inc.	200 S. 13th St., Suite 208, Grover Beach, CA 93433	63	

Name	Organization & Title	Address	Comments Letter #	Email Address
Mark Donohoe	Alliance Nursing & Rehabilitation Center Administrator	3825 N. Durfee Ave., El Monte, CA 91732	64	
Ric Dee	Sierra Hills Care Center Executive Director	1139 Cirby Way, Roseville, CA 95661	65	
Pargati Garg	The Bradley Gardens Business Office Manager	980 W. 7th St., San Jacinto, CA 92582	66	
Michael Elbert	The Bradley Gardens Administrator	980 W. 7th St., San Jacinto, CA 92582	67	
Rodger Groves	Life Care Center of Menifee Executive Director	27600 Encanto Dr., Minefee, CA 92586	68	
Rodger Groves	Life Care Center of Menifee Executive Director	27600 Encanto Dr., Minefee, CA 92586	69	
Mary Ann Selak	Live Oak Manor Executive Director	9000 Larkin Road, Live Oak, CA 95953	70	
Mary Ann Selak	Live Oak Manor Executive Director	9000 Larkin Road, Live Oak, CA 95953	71	
Eric Moessing	Park View Gardens Administrator	3751 Montgomery Dr., Santa Rosa, CA 95405	72	
Terry Bane	Riverside Health Care President	1469 Humboldt Rd., Suite 175, Chico, CA 95928	73	
Patti McVay	Riverside Health Care Director of Clinical Services	1469 Humboldt Rd., Suite 175, Chico, CA 95928	74	
Sharissa McInnish	El Monte Convalescent Hospital Office Manager	4096 Easy St., El Monte, CA 91731-1091	75	
Jesse Telles	El Monte Convalescent Hospital	4096 Easy St., El Monte, CA 91731-1091	76	
Calvin Callaway	Folsom Convalescent Hospital Administrator	510 Mill Street, Folsom, CA 95630	77	
Stacy Sanchez	Knolls West/Desert Knolls NHA/CFO	16890 Green Tree Blvd., Victorville, CA 92395	78	
Christina Butterfield	Knolls West/Desert Knolls	16890 Green Tree Blvd., Victorville, CA 92395	79	

Name	Organization & Title	Address	Comments Letter #	Email Address
Leslie Beck	Kingsburg Care Center Administrator	1101 Stroud Ave., Kingsburg, CA 93631	80	www.sunbridgehealthcare.com
Elizabeth Plott Tyler	Tyler & Wilson	5455 Wilshire Blvd., Suite 1925 Los Angeles, CA 90036	81	ept@tyler-law.com
Alex Monte	Windsor Monterey Care Center Administrator	1575 Skyline Drive, Monterey, CA 93940	82	WindsorCares.com
Carol Lowe	Monterey Pines Skilled Nursing Facility Executive Director	1501 Skyline Drive, Monterey, CA 93940	83	www.horizonwest.com/monterey
Kier Taylor	Garfield Neurobehavioral Center	1451 28th Ave., Oakland, CA 94601	84	
Harvinder Sijher	Gilroy Healthcare and Rehabilitation Center Director of Nursing	8170 Murray Ave., Gilroy, CA 95020	85	
Marc Argabright	Gilroy Healthcare & Rehab. Center Director of Nursing	8170 Murray Ave., Gilroy, CA 95020	85A	
Joseph Franz		900 Santa Fe Dr., Encinitas, CA 92024	86	
Jessica Carmona	Alliance Cherrylee Center Assistant Administrator	5053 N. Peck Rd., El Monte, CA 91732	87	
Susan Floyd	Collingwood Manor Nursing Facility Administrator	553 "F" St., Chula Vista, CA 91910	88	
Joseph Franz		900 Santa Fe Dr., Encinitas, CA 92024	89	
Eli Quinones	Alliance El Monte Care Center Administrator	5043 N. Peck Rd., El Monte, CA 91732	90	
John C. Haedrich	Dreier's Nursing Care Center Administrator	1400 W. Glenoaks Blvd., Glendale CA 91201-1911	91	www.nursing-care.com
Beth Garver	Royal Care Skilled Nursing Center	2725 Pacific Ave., Long Beach, CA 90806	92	
Mark Turner	San Gorgonio Memorial Hospital Chief Executive Officer	600 N. Highland Springs Ave., Banning, CA 92220	93	
Sharon Donnelly	Valley View Skilled Nursing Center Administrator	1162 South Dora, Ukiah, CA 95482	94	www.horizonwest.com/valleyview
Ken Calvo	El Encanto Healthcare and Habilitation Center Administrator	555 S. El Encanto Rd., City of Industry, CA 91745	95	www.elencantohealthcare.com
Roland Rapp	Skilled Healthcare, LLC General Counsel & CAO	27442 Portola parkway, Suite 200, Foothill Ranch, CA 92610	96	rrapp@skilledhealthcare.com

Name	Organization & Title	Address	Comments Letter #	Email Address
	Royal Care Skilled Nursing Center	2725 Pacific Ave., Long Beach CA 90806	97	
	Royal Care Skilled Nursing Center	2725 Pacific Ave., Long Beach CA 90806	98	
	Royal Care Skilled Nursing Center	2725 Pacific Ave., Long Beach CA 90806	99	
	Royal Care Skilled Nursing Center	2725 Pacific Ave., Long Beach CA 90806	100	
	Royal Care Skilled Nursing Center	2725 Pacific Ave., Long Beach CA 90806	101	
	Royal Care Skilled Nursing Center	2725 Pacific Ave., Long Beach CA 90806	102	
	Royal Care Skilled Nursing Center	2725 Pacific Ave., Long Beach CA 90806	103	
Kelly Atkins	Skilled Healthcare	15233 Ventura Blvd., Suite 304, Sherman Oaks, CA 91403	104	
Debby Friedman	SunBridge HC Northern CA	1182 Easley Dr., Clayton, CA 94517	105	
Julianne Williams	Golden Living	650 W. Alluvial, Fresno, CA 93711	106	
Ken Evans	Golden Living Center – Fresno	2715 Fresno St., Fresno, CA 93721-1304	107	
Julie Whiteside	Golden Living Center – Reedley	1090 E. Dinuba Ave., Reedley, CA 93654-3577	108	
Terry Bane	Riverside Healthcare	1469 Humboldt Rd., Suite 175, Chico, CA 95928	109	
Phil Fogg	Marquis Companies	4560 SE International Way, Suite 100, Milwaukie, OR 97222	110	
Walter Hekimian		6531 Silent Harbor Dr., Huntington Beach, CA 92648	111	
Calvin Callaway	Folsom Convalescent Hospital	510 Mill St., Folsom, CA 95630-3641	112	
Phillip Chase	The Chase Group	3075 E. Thousand Oaks Blvd., Thousand Oaks, CA 91362-3402	113	

Name	Organization & Title	Address	Comments Letter #	Email Address
Lori Cooper	Stonebrook Healthcare Center	4367 Concord Blvd., Concord, CA 94521	114	
Michael Torgan	Country Villa Health Services	5120 W. Goldleaf Circle, Suite 400, Los Angeles, CA 90056	115	
Dan Murray	Delano District Skilled Nursing Facility	1509 Tokay Ave., Delano, CA 93215	116	
Robin Jensen	Kennon S Shea & Assoc	1810 Gillespie Way, Suite 212, El Cajon, CA 92020	117	
Eli Quinones	Alliance Nursing & Rehab Center	3825 N. Durfee Ave., El Monte, CA 91732	118	
Gregory Stapley	Ensign Group	27101 Puerta Real, Suite 450, Mission Viejo, CA 92691	119	
Jody Spiegel Patricia McGinnis Eric Carlson	California Advocates for Nursing Home Reform	650 Harrison St., 2nd Floor, San Francisco, CA 94107	120	
Lori Costa	Aging Services of California	1315 I St., Suite 100, Sacramento, CA 95814	121	
Bob Macaluso	Crestwood Behavioral Health, Inc. Director of Governmental Affairs	520 Capitol Mall, Suite 800, Sacramento, CA 95814	122	
Michael Gassis	Shandin Hills Behavioral Health Center Administrator	4164 N. 4th Ave., San Bernardino, CA 92407	123	
Virginia Bruski	Hospice of the East Bay	3470 Buskirk Ave., Pleasant Hill, CA 94523	124	
Nancy Reagan	CAHF Director, Legislative Affairs	2201 K St., Sacramento CA 95816	125	nreagan@cahf.org
Patricia Blaisdell	California Hospital Association	1215 K St., Suite 800 Sacramento, CA 95814	126	www.calhospital.org
Hon Chan	Dept. of Mental Health	1600 Ninth St., Room 433 Sacramento, CA 95814	127	
Susan Negreen	California Hospice and Palliative Care Association Executive Director	3841 North Freeway Blvd., #225, Sacramento, CA 95834	128	

Addendum II: Summary and Response
To Comments on the Regulations
(45-Day Public Notice)

1. Court Order

A. Comment: In its recent rulemaking for the Standard Admission Agreement (SAA), the Department has willfully failed to comply with the Court's Order and directive in the *Parkside Care Center v. Shewry* action and made material misrepresentations regarding the judicial process in that case. This conduct places the Department in contempt. For this reason, the department must withdraw the rulemaking and correct these failures.
Commenters: 104.03, 105.03, 106.03, 107.03, 108.03, 109.03, 110.03, 111.03, 112.03, 113.03, 114.03, 115.03, 116.03, 117.03, 118.03, 119.03, 125.01.

Department Response: The Department misunderstood the location where the discussion of certain matters took place, but believes it has complied with the wishes expressed by the court during the discussion by making changes during this regulation adoption process. For example, see the responses to 8.D. and 4.A. To accept recommendations outside of the regulatory adoption process would have been accepting comments outside the comment period which is not permitted.

B. Comment: The Department's Return to the Court Order that it should clarify Section VI of the SAA "to exclude from that right those residents under involuntary commitments and those suffering from severe cognitive impairments", places an additional limitation of those suffering from "severe cognitive impairments" from leaving the facility unless they were "accompanied by the person responsible for consenting to your treatment." The Court was concerned that the Return did not "hit the mark" and strongly suggested the removal of the language allowing certain residents to voluntarily leave. The language appearing in the current rulemaking on this issue is identical to what was present in the original SAA. The Department states in the Initial Statement of Reasons (ISOR) that a meeting in chambers on March 11, 2008 rescinded the requirement and that no changes were required to the wording in the SAA as adopted. This is a blatantly false statement. The court recommended that the language be removed from the SAA altogether. It did not rescind the requirement as directed by the writ. The Department willfully failed to conform the rulemaking to the Court's rulings and directives and misrepresented the judicial proceeding in the ISOR. The Department should withdraw its rulemaking and correct these failures.
Commenters: 104.07, 105.07, 106.07, 107.07, 108.07, 109.07, 110.07, 111.07, 112.07, 113.07, 114.07, 115.07, 116.07, 117.07, 118.07, 119.07, 125.05, 126.02.

Department Response: Other commenters disagree with this assessment. However, since no specific language was ordered to be added or removed, the Department retained the language then present with the intention (which it has done) of modifying it during the regulation adoption process. See also the response to comment 1.A.

2. Authorization for Disclosure

A. Comment: The authorization for disclosure of medical information unnecessarily authorizes re-disclosures of private health information (Attachment E to the SAA). Attachment E to the SAA includes a statement that allows the disclosure of medical information to be re-disclosed without the resident's prior permission. The statement gives non-health care provider recipients of otherwise private health information the authority to re-disclose that information without limitation. Suggest that residents and their representatives simply be made aware that non-health care providers may not be bound by the law to seek additional releases in order to make re-disclosures. The revised statement would read:

> However, if I authorize the disclosure of my medical information to person(s) and/or organization(s) who are not health care providers or other people who are not subject to laws governing the disclosure of medical information, they may be permitted to redisclose the information without my prior permission. Re-disclosure in such cases may not be limited by state or federal law.

Commenter: 120.09

Department Response: The Department agrees with this statement and will include the requested language.

B. Comment: In Section X, Confidentiality of Your Medical Information, page 11, Form HS 327, Attachment E is recommended for deletion to be replaced with an authorization for disclosure of medical information that meets federal and state laws and is HIPAA compliant. Attachment E does not comply with HIPAA requirements or with LPS requirements for residents with psychiatric needs and should be replaced with an authorization for the use or disclosure of protected health information to be written in plain English, or other authorization forms, and include specified information. Each request for release of records would be thoroughly reviewed to ensure HIPAA compliance.
Commenters: 125.16.

Department Response: The federal HIPAA requirements are already included in Attachment E. See also the response to comment 2.C.

C. Comment: In X. Confidentiality of Medical Information, the Department addressed some HIPAA issues but the Authorization for Disclosure of Medical Information form in Attachment E still does not clarify that certain medical information such as drug, alcohol, HIV and mental health information releases have specific requirements that would not allow the release of such information. This needs to be clarified.
Commenters: 121.10Q, 125.16.

Department Response: The Department does not believe that the Agreement needs to include specialized consent forms as these need to be tailored to individual residents and drafted to allow a resident to consent to specific disclosures.

3. Room to Room and Other Transfers

A. Comment: Room to room transfers must comply with state and federal laws (page 7 of the SAA). The following change is necessary on page 7 of the SAA at Section VI. Transfers and Discharges:

> Except in an emergency, we will not transfer you to another room within our Facility against your wishes, unless~~, as determined on a case by case basis,~~ we give prior reasonable written notice to you determined on a case by case basis in accord with applicable state and federal requirements. For example, you have a right to refuse the transfer if the purpose of the transfer is to move you to or from a Medicare-certified bed.

These changes are consistent with the Court's language in its Writ of mandate, the Nursing Home Reform Law, state law, the Proposed Writ of Mandate, and the Final Writ of Mandate. The proposed language is the best way to meet the court's requirements.
Commenter: 120.05, 125.12B, 125.12E.

Department Response: The Department agrees with this statement and will include the requested language. While the Department would prefer not having to include the example, it is obvious from remarks made by other commenters that they do not understand the federal requirement which prohibits a move to or from a Medicare certified bed, from or to either a non-certified bed or a Medi-Cal certified bed.

B. Comment: The phrase "another room within our Facility, or to" is recommended for deletion in Section VI, Transfers and Discharges, page 9, Form HS 327 because it would cause operations burdens that would outweigh any benefit to residents. The facility needs flexibility to move residents with less than a 30-day notice for many reasons, including but not limited to: (1) preventing violence between residents, (2) assuring that residents released to an acute care hospital on a bed-hold can be re-admitted to the facility, (3) assuring facility has an appropriate gender-mix in each room, (4) transferring residents from private rooms to semi-private rooms, (5) transferring residents for change in health care needs, and/or (6) bed retention would result in there being no available Medicare designated beds within the facility. Language conflicts with 42 CFR 483.12(a)(1) which states "Transfer or discharge does not refer to movement of a resident to a bed within the same certified facility." The Department's grafting of these requirements onto room changes within the facility is an additional requirement and in violation of HSC 1599.61(g) which states that nothing is intended to change existing statutory or regulatory requirements governing the care provided to nursing facility residents.
Commenters: 125.12E, 125.16.

Department Response: The 30-day notice requirement for room to room transfers has already been removed from the agreement.

C. Comment: In VI. Transfers and Discharges, it must be ascertained when the requirement applies. Does it apply to a voluntary discharge, an involuntary discharge, in certain circumstances such as when a facility is closing? The second paragraph misstates the federal requirements in 42 CFR 483.12(a)(1). This section allows the facility to transfer residents from one room to another at any time without notice. To not allow this would be disruptive of care. Frequently providers have to move residents who have become acutely ill nearer to the nurses' station or infection control concerns may require movement of a patient.
Commenters: 121.10N, 121.10O, 125.12E, 126.03.

Department Response: The transfer from the facility and discharges are addressed in VI where it states: Our written notice of transfer *to another facility* or discharge against your wishes will be provided 30 days in advance. (Italics added.)
As noted in the response to comment 3.A., commenters, along with many others misinterpret the federal requirements concerning room to room transfers. Section 483.12(a) of title 42 of the Code of Federal Regulations (42 CFR) provides:

> 483.12(a)Transfer and discharge--
>
> (1) Definition: Transfer and discharge includes movement of a resident to a bed outside of the *certified* facility whether that bed is in the same physical plant or not. Transfer and discharge does not refer to movement of a resident to a bed within the *same certified* facility. (Italics added.)

This regulation implements sections1395i-3(c)(1)(A)(x) and 1396r(c)(1)(A)(x) of title 42 of the United States Code which prohibit transfers from one room to another if "a purpose of the transfer is to relocate the resident from a portion of the facility that" is certified for Medicare to a portion of the facility that is not certified for Medicare, or from a portion of the facility that is not certified for Medicare to a portion of the facility that is certified for Medicare. While section 14124.7 of the Welfare and Institutions Code appears to allow such transfers in subsection (c), under subsection (d), this allowance is only applicable to the extent that it does not conflict with federal law.

D. Comment: While the court order required reasonable notice, the regulation requires written notice. The requirement for written notice exceeds the court order and the statute, and should be eliminated.
Commenter: 126.03.

Department Response: Section 1599.78 of the Health and Safety Code (HSC) requires, "that except in an emergency, no resident may be involuntarily *transferred within* or discharged from a long-term health care facility unless he or she is given reasonable notice *in writing* and transfer or discharge planning as required by law." (Italics added.)

E. Comment: Disagree with estimate made in the notice. A "30-day written notice requirement" could create significant financial impacts should bed management be limited for new admissions, or if the immediate reassignment of an unwilling patient results in State sanctions against a nursing home. It is unclear whether a violation of a 30-day written notice policy could potentially trigger civil liability and lawsuits against operators.
Commenter: 40.2.

Department Response: The 30-day notice for room to room transfers has already been removed from the agreement.

F. Comment: Oppose forcing nursing home operators to issue 30-day written notices to residents who refuse bed assignment changes. The 30-day written notification rule contradicts the federal OBRA guidelines stated in F-157, Section 483.12. Beleaguered nursing home providers cannot sustain such bureaucratic hurdles as a 30-day written notice to perform what should be a routine "bed management" task. Contemporary nursing home operators need the flexibility to properly run their businesses.
Commenters: 40.1.

Department Response: The 30-day notice for room to room transfers has already been removed from the agreement.

G. Comment: Language in this proposed section of the Admission Agreement governing "Transfers and Discharges" includes phrases that are misleading to the consumer and inconsistent with statutory requirements. The terms "involuntary transfer" and "involuntary discharge" are terms of art. There are only two types of transfers or discharges recognized under law: (1) there are "voluntary" transfers or discharges, which are requested or initiated by the resident; and (2) there are all other transfers or discharges, which are categorized as "involuntary."
Commenter: 125.12C.

Department Response: The Department disagrees with commenter's characterization of "involuntary" as referring to any transfers not requested or initiated by a resident. If a facility informs a resident that he or she should be discharged because his or her condition has improved to the extent that the level of care provided by the facility is no longer needed, and the resident agrees to the discharge, the Department would not consider this an "involuntary" discharge even though the resident neither requested nor initiated the process.

H. Comment: By replacing the specific term "involuntary" with the phrase "against your wishes," the DPH has changed the meaning to attach a negative connotation (implying that the resident was opposed to the transfer or discharge) by the mere fact that the transfer or discharge meets the definition/criteria established by statute. This is an inaccurate and misleading reference to these laws. The Admission Agreement must use the correct terminology when referring to this category of transfers or discharges. The DPH needs to revise this section to replace all

terminology in the newly added language that states "against you *[sic]* wishes" and replace it with the correct terminology: "involuntary discharge".
Commenter: 125.12D.

Department Response: The Department disagrees with the need for this change. The plain English phrase "against your wishes" does not contradict the meaning of the word "involuntary," and does not counter statutory language used to describe an involuntary transfer or discharge, as in HSC § 1599.76 and 42 CFR § 483.12 et seq. Also, "against your wishes" conforms to the definition of "involuntary" as stated in Webster's New World Dictionary (Third College Edition, 1988), "not done of one's own free will; not done by choice."

I. Comment: The following language must be eliminated:
~~In our written notice, we will advise you that you have the right to appeal the transfer or discharge to the California Department of Health Services, Licensing and Certification Division and we will also provide the name, address and telephone number of the State Long-Term Care Ombudsman.~~
This language is not required to be included in the Standard Admission Agreement. In fact, it references a requirement in federal law which prescribes the elements required to be included in any written notice of transfer. Ironically, the federal regulation also prescribes other required activities a facility must do when transferring a resident, including recording the reasons for transfer in the medical record. (42 CFR 483.12(4). *[sic]*) The DPH has appropriately not included this element in the Admission Agreement. However, by including the language above, the DPH has made the act of advising residents of their appeal rights a contract term for which a facility may incur additional liability based on a breach of contract theory. Therefore, the language should be eliminated.
Commenter: 125.12F

Department Response: HSC section 1599.1(i) provides, "(i) Effective July 1, 2007, Sections 483.10, 483.12, 483.13, and 483.15 of Title 42 of the Code of Federal Regulations in effect on July 1, 2006, shall apply to each skilled nursing facility and intermediate care facility, regardless of a resident's payment source or the Medi-Cal or Medicare certification status of the skilled nursing facility or intermediate care facility in which the resident resides, except that a noncertified facility is not obligated to provide notice of Medicaid or Medicare benefits, covered services, or eligibility procedures." The language quoted in the comment now applies to all licensed skilled nursing and intermediate care facilities in California. See also the response to comment 9.B.

J. Comment: Anti-discrimination law applies whether original bed was private-pay, or certified for Medicare or Medi-Cal reimbursement (Page 9 of the SAA). Support the following language on page 9 of the SAA at Section VI. Transfers and Discharges which conforms to California law:

If we participate in Medi-Cal or Medicare, we will not transfer you from the Facility or discharge you solely because you change from private pay or Medicare to Medi-Cal payment.

Commenter: 120.07.

Department Response: The Department appreciates commenter's support.

K. Comment: The proposed agreement accurately states a resident's right to written notice of transfer or discharge (page 8 of the SAA). Support deletion of the statement in the SAA that the purpose of advance notice of transfer or discharge is to allow the resident "to participate with the Facility in planning for the transfer or discharge." Believe the SAA now more accurately summarizes a resident's right to notice prior to transfer or discharge.

Commenter: 120.08.

Department Response: The Department appreciates commenter's support.

4. Voluntarily Leaving the Facility

A. Support the statement regarding a resident's right to leave a facility at any time without prior notice. It accurately and succinctly reflects the law and is consistent with the Court's March 11, 2008 finding in chambers that the resident's right to leave, as stated in the original SAA, need not be altered.

Commenter: 120.04, 126.02.

Department Response: The Department appreciates the commenter's support, but will change the language to avoid any confusion for either residents or facilities. The Department intends to reword the statement to read:

> Unless you have been involuntarily committed to the facility, you may leave our Facility at any time without prior notice to us. If the right to make health care decisions for you has devolved to another person, that person must consent to your leaving the facility. We will help arrange for your voluntary discharge or transfer to another facility.

B. Comment: The current set of proposed regulations and SAA fail to appropriately revise the language as to residents' ability to voluntarily leave the facility to eliminate the language altogether (SAA. Sec. VI).

Commenters: 104.09, 105.09, 106.09, 107.09, 108.09, 109.09, 110.09, 111.09, 112.09, 113.09, 114.09, 115.09, 116.09, 117.09, 118.09, 119.09, 125.12A, 126.02.

Department Response: See the response to comment 4.A.

C. Comment: The facilities that care for special populations (i.e., residents with behavioral, health, mental health or dementia needs) will not be able to include all of the modifications to the admissions agreement that they need. For example, language in

the first paragraph of Section VI of the proposed SAA related to residents being able to leave at any time does not work for facilities with special populations. This language was included in the prior version of the regulations and was found to be unlawful, yet it continues to remain in the proposed regulations and is completely unchanged. The proposed language causes difficulty for most facilities, especially for those that care for patients with dementia and/or conserved patients who have unique requirements/restrictions because of mental health needs.
Commenters: 84.03, 106.09, 108.09, 115.09, 116.09, 118.09, 119.09, 121.02, 125.05.

Department Response: See the response to comment 4.A.

D. Comment: The Department's Return to the Court Order that it should clarify Section VI of the SAA "to exclude from that right those residents under involuntary commitments and those suffering from severe cognitive impairments", places an additional limitation of those suffering from "severe cognitive impairments" from leaving the facility unless they were "accompanied by the person responsible for consenting to your treatment." The Court was concerned that the Return did not "hit the mark" and strongly suggested the removal of the language allowing certain residents to voluntarily leave. The language appearing in the current rulemaking on this issue is identical to what was present in the original SAA.
Commenters: 104.07, 105.07, 106.07, 107.07, 108.07, 109.07, 110.07, 111.07, 112.07, 113.07, 114.07, 115.07, 116.07, 117.07, 118.07, 119.07, 125.05.

Department Response: Other commenters disagree with this assessment. However, since no specific language was ordered to be added or removed, the Department retained the language then present with the intention (which it has done) of modifying it during the regulation adoption process as discussed by the court at the March 11, 2008, hearing.

5. 3rd Party Liability

A. Comment: Support the Department's revision on page 2 pertaining to a resident's representative. The admission agreement appropriately does not make a representative responsible from his or her own funds to pay for nursing home services. The point of the standardized admission agreement is to set forth conditions of admission, so there cannot be any financial guarantee language in the standardized admission agreement.
Commenter: 120.03.

Department Response: The Department appreciates commenter's support.

6. Posting

A. Comment: The Preamble should explain access to inspection reports under the PPACA (Page 1 of the SAA). The Department should update the preamble statement to reflect new requirements of the federal Patient Protection and Affordable Care Act (PPACA) signed by President Obama on March 23, 2010. Effective March 11, 2011, the

PPACA requires all federally certified nursing facilities and skilled nursing facilities to allow residents and others to review upon request "reports with respect to any surveys, certifications, and complaint investigations made respecting the facility during the 3 preceding years." The following sentence should be added to the second paragraph of the preamble so that residents and their representatives know that much more comprehensive inspection information is available for their review at the facility:

> If our facility participates in the Medi-Cal or Medicare programs, we will keep survey, certification and complaint investigation reports for the past three years and will make these reports available for anyone to review upon request.

Commenter: 120.02.

Department Response: The Department agrees with the comment and will make the changes requested.

7. Security Deposit Refunds

Comments: None Received.

8. Program Flexibility

A. Comment: The proposal may impact the ability to contract and the SAA represents an unconstitutional abridgement of the "freedom of contract." Recommend that the provision prohibiting the licensee to alter the SAA without prior written authorization of the Department, which must be requested through the program flexibility procedures specified in Section 73227, be stricken. It does not reflect the business realities of operating facilities of differing size and in differing geographic locations, with a variety of patient populations, and a variety of business experiences that lead to implementation of important policy and procedures. There are no time frames listed in which a facility (1) has "ramp up" time to review the SAA and determine what contract terms need to be added or deleted and (2) time for the department to approve the requests. The language does not include any standard by which the department must act in granting or denying a program flexibility request, nor include timeframes and guidelines for a facility to make a request for modification and have the request approved in a timely manner.

Commenters: 5.01, 5.04, 7.01, 12.01, 13.01, 18.01, 19.02, 20.02, 21.01, 22.02, 23.02, 24.01, 26.01, 28.01, 30.01, 32.01, 33.01, 36.01, 39.01, 41.01, 42.01, 43.01, 44.01, 46.01, 47.01, 49.01, 52.01, 54.01, 58.01, 59.01, 62.01, 64.01, 65.01, 66.01, 69.01, 74.01, 76.01, 77.02, 79.01, 81.02, 83.01, 85.01, 86.01, 92.01, 94.01, 96.01, 96A.01, 99.01, 100.01, 101.01, 102.01, 125.02, 125.03, 125.04, 126.01.

Department Response: The Department disagrees with comments that the Standard Admission Agreement is arbitrary, or that it abridges a facility's "freedom of contract," for a number of reasons. The Standard Admission Agreement Statute (SB 1061 [Chapter 631, Statutes of 1997]), (hereinafter, "the SAA Statute") clearly "mandate[s] a Standard Admission Agreement to be used for all admissions to skilled nursing facilities, intermediate care facilities, and nursing facilities in California." The law also mandated

that "no facility shall alter the standard agreement unless so directed by the Department," and required that the Agreement comply with all applicable state and federal laws.
Furthermore, Article 3, Section 3.5 of the California Constitution provides that "An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
(b) To declare a statute unconstitutional;
To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations."
The Department agrees that facilities shall not alter the SAA, as specified in HSC § 1599.61(b)(1). In addition, under HSC § 123222.2(a)(2)(B), "[t]he facility may also provide written materials regarding the facility's expectations of patients and patients' responsibilities while the patient is receiving care at the facility." This must be provided separately from the Agreement. See also the response to comment 8.D. concerning time frames, guidelines, and "ramp up" time for facilities.

B. Comment: The regulation should state that the Department must approve any request, within a specified period of time, as long as the request is reasonable and reflects the current business practices of the facility or the request is being made to accommodate legitimate differences among facility operations.
Commenters: 5.02, 7.02, 12.02, 13.02, 18.02, 21.02, 24.02, 28.02, 30.02, 32.02, 33.02, 36.02, 39.02, 41.02, 42.02, 43.03, 44.02, 46.02, 47.03, 49.02, 52.02, 54.02, 58.02, 59.02, 62.02, 64.02, 65.02, 66.02, 69.02, 74.02, 76.02, 79.02, 83.03, 85.02, 86.02, 92.02, 94.03, 96.03, 96A.03, 99.02, 100.02, 101.02, 102.02, 122.04, 125.04.

Department Response: The SAA Statute mandated that "no facility shall alter the standard agreement unless so directed by the Department." The Department is not able to adopt a regulation that conflicts with this Legislative mandate.

C. Comment: The term "program flexibility" is not outlined with respect to what terms and/or conditions will be allowed to be added to the SAA. For example, if the facility has determined that it prefers to use arbitration as a method of settling legal disputes without litigation, and finds that the majority of residents are willing to voluntarily sign an arbitration agreement when presented at time of admission, will the Department allow the facility to alter the SAA to reflect the use of arbitration as one of the more common business terms and conditions used by the facility?
Commenters: 5.03, 7.03, 12.03, 13.03, 18.03, 21.03, 26.02, 28.03, 30.03, 32.03, 33.03, 36.03, 39.03, 41.03, 42.03, 43.05, 44.03, 46.03, 47.05, 49.03, 52.03, 54.03, 58.03, 59.03, 62.03, 64.03, 65.03, 66.03, 69.03, 74.03, 76.03, 79.03, 83.05, 85.03, 86.03, 92.03, 94.05, 96.05, 96A.04, 99.03, 100.03, 101.03, 102.03.

Department Response: The mandate of the Legislature noted in response to comment 8.B. requires that the Department direct facilities to alter the agreement, not "allow" them to. As nothing in the regulations prohibit facilities from discussing arbitration or other facility-specific matters once the resident has been admitted, as evidenced by the signing of the agreement by all parties, program flexibility as described by commenters would not be required.

D. Comment: When the prior version of the SAA regulations was released, to be effective January 1, 2006, the facility was prohibited from making changes to the SAA without prior approval, or the facility submitted a program flexibility request or letters asking for guidance, that were denied by, or not responded to, by the Department. That prior process was challenged in court and found to be unlawful. The incorporation of HSC Section 1276 in the regulations continues to be arbitrary and capricious in three ways: (1) it fails to give facilities sufficient notice of implementation, (2) it fails to provide enough time to request program flexibility before implementation of the SAA, and (3) it fails to give any assurance that program flexibility will not be implemented in the arbitrary and capricious manner as it as during the first implementation of the SAA regulations. As already determined by the court, these guidelines are necessary to prevent facilities from being exposed to increased liability.
Commenters: 43.02, 47.02, 77.01, 81.01, 82.03, 83.02, 84.01, 93.01, 94.02, 95.01, 96.02, 96A.02, 104.01, 105.01, 106.01, 107.01, 108.01, 109.01, 110.01, 111.01, 112.01, 113.01, 114.01, 115.01, 116.01, 117.01, 118.01, 119.01, 121.03, 123.01, 125.02.

Department Response: As noted in the response to comment 8.G., the Department agrees with commenters that requesting a modification of the SAA is not the same as requesting program flexibility from a regulation. The Department is therefore amending the regulation to separate requests that the Department direct a facility to alter the SAA from requests for program flexibility. The Department is amending section (b) of the regulations to provide instructions to facilities about how to seek direction from the Department that will allow them to alter the SAA. The Department will add a provision to each regulation that provides: "This section shall become operative six months after it is filed with the Secretary of State," to provide facilities time to train their staffs on the use of the SAA, and, if necessary, to request that the Department direct a facility to modify the SAA.

E. Comment: In addition to the recommendation above in comment 8.B. above that the Department be required to approve any reasonable request, it is also recommended that the Department approve a facility's program flexibility request, including provisions or attachments used in contracts of admission prior to the effective date of the SAA.
Commenters: 43.04, 47.04, 83.04, 94.04, 96.04, 122.05, 125.02.

Department Response: See response to comment 8.B.

F. Comment: The use of the program flexibility process that facilities must use to alter the SAA is essentially the same language that was used in the prior SAA regulations

which was determined to be unlawful. Recommend this language be stricken from the regulations. The SAA regulations should mandate "certain components that must be present in every contract of admission, and then provide an opportunity for facilities to either alter those provisions or to add additional provisions that meet the needs of that facility's operations."
Commenters: 43.01, 77.04, 93.02, 95.02, 96A.01, 104.04, 105.04, 106.04, 107.04, 108.04, 109.04, 110.04, 111.04, 112.04, 113.04, 114.04, 115.04, 116.04, 117.04, 118.04, 119.04, 123.02, 125.04.

Department Response: See the responses to comments 8.D. and 8.B.

G. Comment: The use of the program flexibility process is arbitrary for the following reason: Facilities are not making what the Department has deemed to be a traditional program flexibility request. In this case, facilities would be asking for approval to alter the proposed SAA to include terms and conditions that the facility has a right and a need to include, in order to run a successful business operation. Therefore, the use of the traditional program flexibility request process is arbitrary and should be replaced by a system in which facilities are not "asking for approval to alter or modify" the SAA, but instead the process should allow facilities to "notify" the Department of any changes or additions to the SAA, and the Department can deny a change only if it does meet statutory requirements.
Commenters: 77.02, 82.02, 84.02, 93.03, 95.03, 123.03.

Department Response: The Department agrees that requests to alter the agreement are not traditional program flexibility requests, and will change the process as noted in response to comment 8.D.; as far as allowing facilities to notify the Department about alterations, see the response to comment 8.B.

H. Comment: The use of the program flexibility process is arbitrary for the following reasons: HSC 1276(b) only permits program flexibility "by the use of alternate concepts, methods, procedures, techniques, equipment, personnel qualifications, bulk purchasing or pharmaceuticals, or conducting of pilot projects as long as statutory requirements are met and the use has the prior written approval of the department or the office, as applicable." The statutory standards are arbitrary because they do not appear to apply in the current context, where a facility is requesting approval to alter the SAA to include ordinary and customary business terms that the facility has determined are necessary and desirable for the operation of that facility. The Department needs to specifically state that the reference to using the "process required by section 1276" only refers to the fact that facilities would be required to submit any alterations that the facility intends to make to the SAA on the existing "program flexibility request form" and the regulations should also clearly state the "requests shall be approved as long as statutory requirements are met."
Commenters: 77.02, 82.02, 84.02, 93.03, 95.03, 104.06, 105.06, 106.06, 107.06, 108.06, 109.06, 110.06, 111.06, 112.06, 113.06, 114.06, 115.06, 116.06, 117.06, 118.06, 119.06.

Department Response: As noted in the response to comment 8.D., the Department agrees that the procedure, not the grounds, for requesting program flexibility is what the regulation had required. As noted in the response to comment 8.B., the Department cannot approve requests, but must direct alterations of the agreement.

I. Comment: There is no process for facilities to send program flexibility requests to a central office at Sacramento headquarters. This means the facilities have to file such a request to each local CDPH district office. That makes the use of the proposed process in HSC 1276 arbitrary because, without standards or guidelines, it will lead to inconsistent determinations by each of the 15 local CDPH offices.
Commenters: 77.02, 84.02, 104.06, 105.06, 106.06, 107.06, 108.06, 109.06, 110.06, 111.06, 112.06, 113.06, 114.06, 115.06, 116.06, 117.06, 118.06, 119.06.

Department Response: See the response to comment 8.D.

J. Comment: Use of program flexibility should be rare. Commenter is concerned that program flexibility procedures could be misused. The Department should rarely approve alterations of the SAA because changes to it would undermine its purpose. The Department must not allow the use of program flexibility procedures through the regulations to defeat the Legislature's intent to establish a uniform admission agreement that protects and promotes the rights of residents.
Commenter: 120.01.

Department Response: The Department agrees with commenter's position, and intends to limit alterations to the agreement to only those instances when a failure to direct an alteration will severely hamper a facility's ability to operate or will expose a facility to probable liability.

K. **Comment:** Submission of program flexibility requests for several SNFs resulted in some approvals and some denials. The proposed regulations fail to provide facilities enough time to request program flexibility before implementation of the SAA. The court recommended a six-month advance time for facilities to submit a program flexibility request to prevent exposure to increased liability. Without reasonable guidelines, the Department may arbitrarily deny legitimate requests. The Department should be required to provide a reasonable period of time in advance of implementation for facilities to request alterations or modification to the SAA.
Commenter: 122.03, 125.03.

Department Response: See response to comments 8.D. and 8.K.

L. Comment: The program flexibility authority the Department proposes to use for accommodating alteration requests is for regulatory requirements and the Department has not placed the SAA in regulation. The incorporation by reference is ambiguous at best. What standards will be used for approving or disapproving alterations? Will there be an appeal mechanism? What are the time frames for the process? The Department fails to address the time frames, guidelines and other parameters that will be used for

approving or disapproving a request for program flexibility. The result of failing to address this issue ordered by the court is that the decisions from requests for program flexibility have been arbitrary and capricious.
Commenter: 121.07.

Department Response: See response to comment 8.D. The Department is not authorized to provide an appeal mechanism for alteration of the SAA.

M. Comment: Providers may have other contractual relationships with the resident that impacts the admission process. Nothing in the enabling legislation set forth at HSC Section 1599.61 prohibits the skilled nursing facility from having other contracts. However, conflicts and clarity can only be resolved through requests for program flexibility.
Commenter: 121.07.

Department Response: The Department agrees that facilities are not precluded from entering into other agreements; per HSC §1599.61(b)(3), "Nothing in this section shall prevent a skilled nursing facility, an intermediate care facility, or a nursing facility from distributing written explanations of facility-specific rules and procedures, provided that the written explanations are not included or incorporated in, or attached to the Standard Admission Agreement, nor signed by the resident or his or her representative."

As the commenter notes, facilities may have other contractual relationships with residents in support of their daily care. Facility-specific rules, procedures and other matters of a resident's care may be presented and resolved, provided they are not included in the Standard Admission Agreement or presented as a condition of admission or continued stay in the facility. Alteration to the SAA is not required to accomplish what is allowed in statute. See also the response to comment 8.C.

N. Comment: The incorporation of the arbitrary program flexibility request process, coupled with contract terms that don't meet the needs of facilities serving special populations continues to show that the Department's actions are arbitrary and capricious.
Commenters: 84.03, 106.09, 108.09, 115.09, 116.09, 118.09, 119.09, 121.02, 125.05, 126.02.

Department Response: The Department believes the amendments it has made to for alterations to the SAA and references to allowing residents to voluntarily leave the facility address commenters' concerns.

O. Comment: The Court instructed the Department to establish and follow guidelines and time tables in the implementation of the program flexibility provisions pursuant to Section 1276 consistent with Health and Safety Code section 1599.61(g). When the Department filed its Return to Writ of Mandate, it did nothing more than cite to the statute and regulation governing program flexibility.

Commenters: 43.06, 96A.05, 104.05, 105.05, 106.05, 107.05, 108.05, 109.05, 110.05, 111.05, 112.05, 113.05, 114.05, 115.05, 116.05, 117.05, 118.05, 119.05, 125.03.

Department Response: As discussed by the court, the Department is making appropriate changes during the regulation adoption process.

9. General

A. Comment: Release and implementation of the final amended regulations should take place as soon as is practically possible.
Commenter: 120.12.

Department Response: The Department agrees with this comment, but also believes that it needs to provide facilities an opportunity to train staff and to determine how best to comply, or request direction for modification.

B. Comment: Corrections to the Resident Bill of Rights are needed (Attachment F to the SAA). Attachment F to the SAA must be amended to include an updated version of Health and Safety Code Section 1599.1. The proposed bill of rights is missing subdivision (i) of this section which was added by SB 248 (Chapter 530, Statutes of 2006). A related change is needed on page 15 of the proposed bill of rights. The following statement must be deleted prior to the listing of rights from the Code of Federal Regulations:

> ~~[NOTE: THIS COMPILATION OF RESIDENT RIGHTS APPLIES TO ALL RESIDENTS IN LICENSED NURSING FACILITIES THAT ARE ALSO CERTIFIED UNDER 42 CFR PL 483.]~~

SB 1248 amended Health and Safety Code Section 1599.1 to state that Sections 483.10, 483.12, 483.13 and 483.15 of Title 42 of the Code of Federal Regulations apply to each SNF and ICF, regardless of the certification status of the facility. Thus, it is no longer appropriate for the bill of rights to state that the federal rights only apply to residents of certified facilities.
Commenter: 120.10.

Department Response: The Department agrees with this comment and will make the recommended changes.

C. Comment: Strongly recommend that the bill of rights be amended to include Sections 72528 and 73524 of Title 22, CCR. These sections establish fundamental rights concerning informed consent for residents of SNFs and ICFs. The bill of rights is incomplete without their inclusion.
Commenter: 120.10.

Department Response: The Department agrees that these sections should be included as they are already referenced in Attachment F, the Resident Bill of Rights, in sections 72527 and 73523 of Title 22 CCR and will make the recommended changes.

D. Comment: It is incumbent upon DPH to respect and give due deference to the courts. That these matters are likely to be the subject of further litigation, on issues that have already been ruled upon, is not acceptable. Taxpayers deserve a more efficient use of resources.
Commenter: 121.04.

Department Response: The Department believes it has given respect and due deference to the courts.

E. Comment: The current set of proposed regulations does not do what the Court ordered the Department to do, is arbitrary, and places the Department in contempt. Recommend that the provision prohibiting the licensee to alter the SAA without prior written authorization of the Department, which must be requested through the program flexibility procedures specified in Section 73227, be stricken.
Commenters: 43.01, 82.01, 84.01, 96A.01, 125.01, 126.01.

Department Response: The law mandated that "no facility shall alter the standard agreement unless so directed by the Department," and required that the Agreement comply with all applicable state and federal laws. The Department notes that the court denied the petitioners' contentions that differences among facilities required that the Department promulgate a flexible SAA.

F. Comment: Several commenters were concerned that section 72516, as it applied to skilled nursing facilities, would also apply to congregate living health facilities (CLHFs) because of the provisions of HSC § 1267.13(n).
Commenters: 124, 128.

Department Response: As HSC § 1599.61 is very specific concerning the types of facilities to which its requirements apply (skilled nursing facilities, as defined in subdivision (c) of Section 1250, intermediate care facilities, as defined in subdivision (d) of Section 1250, and nursing facilities, as defined in subdivision (k) of Section 1250), the Department does not believe that it was the intent of the Legislature that CLHFs would be required to adopt the SAA required by that section. Additionally, HSC § 1267.13(n) requires that CLHFs conform to the regulations that applied to SNFs as of April 1, 1988, and provides a list of regulations that applied to SNFs that would not apply to CLHFs. Commenters are concerned that as section 72516 was not included in the list of non-applicable regulations, CLHFs would have to comply with it. As section 72516 did not become operative until January 2, 2006, it would not be one of the regulations with which HSC § 1267.13(n) would require CLHF conformity.

G. Comment: Commenter asks that the Department not apply the provisions of the SAA Statute to facilities operated by the Department of Mental Health.

Commenter: 127.

Department Response: As the Department of Mental Health does not operate any of the facilities specified in HSC § 1599.61 (skilled nursing facilities, as defined in subdivision (c) of Section 1250, intermediate care facilities, as defined in subdivision (d) of Section 1250, and nursing facilities, as defined in subdivision (k) of Section 1250), the requirements the statute places on the Admission Agreements used by those facilities would not apply to facilities operated by the Department of Mental Health.

H. Comment: Recommend the Department withdraw and revise this regulatory package because: (1) It is inconsistent in its use and fails to follow the provisions of HSC Section 1599.60 et. seq.; (2) It fails to follow the Court's order in many sections of the regulations and agreement; (3) The SAA contains several provisions which lack statutory authority or reference, are unnecessary, and lack clarity; (4) Although a state skilled nursing facility licensure requirement authorizes federal regulations for authority when such authority has not been adopted by the state, the federal authority is often misstated or misrepresented; (5) The SAA that fails in its effort to provide flexibility is an illegal contract which takes away the provider's ability to contract for services.
Commenter: 121.10T.

Department Response: The Department asserts that it has followed the mandates of the statutes, and all current state and federal legislation, in drafting the Standard Admission Agreement. Additionally, the Department has addressed a number of specific concerns and made changes to the Standard Admission Agreement in response to commenters' suggestions.

I. Comment: There must be language added to indicate that if the resident is admitted to the facility, the resident will be bound by the terms of the Admission Agreement even though the Agreement is not signed by either the resident or the resident's responsible party.
Commenter: 125.07.

Department Response: The Department is not aware of any provision of law that would authorize it to add this requirement to the SAA.

10. Comments Outside the Scope of the Regulatory Filing

A. Comment: Presenting a voluntary arbitration agreement during the admission process is a very common business practice and needs to be addressed. Any prohibition on the current practice would be contrary to current law, which allows a facility to include arbitration clauses in contracts of admission in long-term facilities as long as the clauses are signed voluntarily by the resident and meet the statutory requirements. Health and Safety Code (HSC) Section 1599.81 establishes the requirements for placement and presentation of such clauses as attachments to the admission agreement, the scope of such clauses, as well as the prohibition of their use as a condition of admission. HSC Section 1295 sets forth requirements for agreements

to arbitrate certain actions against healthcare providers. The proposed regulation needs to clarify that a voluntary arbitration agreement can be presented at the same time that the admission agreement is executed and be attached to the Standard Admission Agreement (SAA).
Commenters: 1.01, 2.01, 3.01, 4.01, 6.01, 8.01, 9.01, 10.01, 11.01, 14.01, 16.01, 17.01, 19.01, 20.01, 22.01, 23.01, 25.01, 27.01, 29.01, 31.01, 34.01, 35.01, 37.01, 38.01, 45.01, 48.01, 50.01, 51.01, 53.01, 55.01, 56.01, 57.01, 60.01, 61.01, 63.01, 67.01, 68.01, 70.01, 71.01, 72.01, 73.01, 75.01, 78.01, 80.01, 85A.01, 87.01, 88.01, 89.01, 90.01, 91.01, 97.01, 98.01, 103.01, 122.01, 125.06, 126.05.

Department Response: The provisions addressing arbitration are contained in subsection (d) of sections 72516 and 73518 of title 22 of the California Code of Regulations. The court did not require that the Department make any changes to those provisions, and none were made. As the proposed rulemaking only addresses the requirements of the court order and Writ of Mandate, and Sections 72516 and 73518 were promulgated in a previous rulemaking, the comments regarding subsection (d) of these sections are outside the scope of this proposed rulemaking.

B. Comment: The proposed SAA regulations need to clarify that a voluntary arbitration agreement can be presented at the same time an admission agreement is executed and that a voluntary agreement to arbitrate disputes can be an attachment to the SAA. The practical impact of trying to get the parties together again to discuss signing an agreement to settle disputes through arbitration after the admission process has concluded is that very few arbitration clauses would be signed. Making facilities present the arbitration clause at a separate time would be arbitrary and capricious.
Commenters: 1.02, 2.02, 3.02, 4.02, 6.02, 8.02, 9.02, 10.02, 11.02, 14.02, 16.02, 17.02, 25.02, 27.02, 29.02, 31.02, 34.02, 35.02, 37.02, 38.02, 48.02, 50.02, 51.02, 53.02, 55.02, 56.02, 57.02, 60.02, 61.02, 63.02, 67.02, 68.02, 70.02, 71.02, 72.02, 73.01, 75.02, 78.01, 80.02, 85A.02, 87.02, 88.02, 89.02, 90.02, 91.02, 97.02, 98.02, 103.02, 122.02.

Department Response: The provisions addressing arbitration are contained in subsection (d) of sections 72516 and 73518 of title 22 of the California Code of Regulations. The court did not require that the Department make any changes to those provisions. As the proposed rulemaking only addresses the requirements of the court order and Writ of Mandate, and Sections 72516 and 73518 were promulgated in a previous rulemaking, the comments regarding subsection (d) of these sections are outside the scope of this proposed rulemaking.

C. Comment: Given that there is a nationwide trend towards alternative dispute resolution because the court system is so cumbersome, slow, expensive and unpredictable, these proposed regulations would effectively undermine the purpose of having an alternative dispute resolution process.
Commenters: 4.03, 10.03, 16.03, 17.03, 25.03, 27.03, 29.03, 31.03, 51.03, 68.03, 85A.03.

Department Response: The provisions addressing arbitration are contained in subsection (d) of sections 72516 and 73518 of title 22 of the California Code of Regulations. The court did not require that the Department make any changes to those provisions. As the proposed rulemaking only addresses the requirements of the court order and Writ of Mandate, and Sections 72516 and 73518 were promulgated in a previous rulemaking, the comments regarding subsection (d) of these sections are outside the scope of this proposed rulemaking.

D. Comment: DPH asserts that a "contract of admission" includes all documents which must be signed by the resident or his or her representative at the time of, or as a condition of admission, and an arbitration agreement need not be signed as condition of admission. However, HSC Section 1599.81 intended for arbitration clauses to be handled as optional attachments to the contract of admission. The only way to reconcile this is to allow, as an option, facilities to include contract language on the first page of the SAA, which would introduce the concept of arbitration, and then to add an attachment, if the resident wants to voluntarily sign an arbitration clause. The Department's attempt to regulate the use of arbitration agreements through regulations is arbitrary given the current protections in state and federal law. The result of this type of arbitration regulation will be: (1) To increase litigation and result in more costly litigation; (2) To divert much needed resources from staffing, employee wages and patient care; (3) Make it unaffordable for facilities to find the insurance necessary to compensate legitimate resident grievances and protect the viability of facility operations; and (4) Increase litigation costs which will ultimately result in increased costs to the state's Medi-Cal Program as funds must be added to the long-term care rate to cover the increases in the liability component of the rate. The Department must withdraw the rulemaking, correct these failures, and mandate that certain components must be present in every contract of admission, and then provide an opportunity for facilities to either alter those provisions or to add additional provisions that meet the needs of that facility's operations.
Commenter: 104.08, 105.08, 106.08, 107.08, 108.08, 109.08, 110.08, 111.08, 112.08, 113.08, 114.08, 115.08, 116.08, 117.08, 118.08, 119.08, 125.04, 125.06.

Department Response: The provisions addressing arbitration are contained in subsection (d) of sections 72516 and 73518 of title 22 of the California Code of Regulations. The court did not require that the Department make any changes to those provisions. As the proposed rulemaking only addresses the requirements of the court order and Writ of Mandate, and Sections 72516 and 73518 were promulgated in a previous rulemaking, the comments regarding subsection (d) of these sections are outside the scope of this proposed rulemaking.

E. Comment: The Court Order states that the regulatory requirements that "the licensee shall not present any arbitration agreement to a prospective resident as part of the SAA" and that the "arbitration agreement shall be separate from the SAA" are not consistent *[sic]* with controlling law. The revised regulations continue to prohibit any arbitration agreement between a facility and resident presented at the time of the SAA or failed to meet the form requirements.

Commenter: 121.01.

Department Response: The provisions addressing arbitration are contained in subsection (d) of sections 72516 and 73518 of title 22 of the California Code of Regulations. The court did not require that the Department make any changes to those provisions. As the proposed rulemaking only addresses the requirements of the court order and Writ of Mandate, and Sections 72516 and 73518 were promulgated in a previous rulemaking, the comments regarding subsection (d) of these sections are outside the scope of this proposed rulemaking.

F. Comment: The current set of proposed regulations and SAA fail to allow, as an option, facilities to include contract language on the first page of the SAA, which would introduce the concept of arbitration, and then to allow facilities to add an attachment to the SAA, if a resident wants to voluntarily sign an arbitration clause.
Commenter: 104.02, 105.02, 106.02, 107.02, 108.02, 109.02, 110.02, 111.02, 112.02, 113.02, 114.02, 115.02, 116.02, 117.02, 118.02, 119.02.

Department Response: The provisions addressing arbitration are contained in subsection (d) of sections 72516 and 73518 of title 22 of the California Code of Regulations. The court did not require that the Department make any changes to those provisions. As the proposed rulemaking only addresses the requirements of the court order and Writ of Mandate, and Sections 72516 and 73518 were promulgated in a previous rulemaking, the comments regarding subsection (d) of these sections are outside the scope of this proposed rulemaking.

G. Comment: DPH makes no attempt to show any legal authorization granted to it to regulate the format of arbitration agreements. While §1599.61 grants DPH the authorization to adopt regulations regarding the standard admission agreement, it grants DPH **no authority** to regulate what DPH claims to be outside the standard admission agreement.
Commenter: 125.06B.

Department Response: The provisions addressing arbitration are contained in subsection (d) of sections 72516 and 73518 of title 22 of the California Code of Regulations. The court did not require that the Department make any changes to those provisions. As the proposed rulemaking only addresses the requirements of the court order and Writ of Mandate, and Sections 72516 and 73518 were promulgated in a previous rulemaking, the comments regarding subsection (d) of these sections are outside the scope of this proposed rulemaking.

H. Comment: Subsequent case law makes it clear that Section 1599.81 requires that arbitration clauses be fashioned as attachments to the contract of admission. See, *Hogan v. Country Villa Health Services* (2007) 148 Cal. App. 4th 259, 267. As a result, the Department does not have the authority to preclude that they be utilized as attachments.
Commenter: 125.06C.

Department Response: The provisions addressing arbitration are contained in subsection (d) of sections 72516 and 73518 of title 22 of the California Code of Regulations. The court did not require that the Department make any changes to those provisions. As the proposed rulemaking only addresses the requirements of the court order and Writ of Mandate, and Sections 72516 and 73518 were promulgated in a previous rulemaking, the comments regarding subsection (d) of these sections are outside the scope of this proposed rulemaking.

I. Comment: DPH has acknowledged in court that the Federal Arbitration Act ("FAA") applies to arbitration agreements between facilities and residents and that the FAA prohibits states from regulating arbitration agreements in a manner only applicable to arbitration agreements. However, DPH has asserted that the SAA does not violate the FAA because they *[sic]* do not affect the enforceability of arbitration agreements. The SAA invalidates any arbitration agreement between a facility and resident which was either presented at the time of the SAA or failed to meet the form requirements. Clearly, both the exclusion of arbitration agreements from the SAA and the form requirements for arbitration agreements impact the enforceability of arbitration agreements in violation of the FAA. (MPA for Mandate at 11-12; see also *Hedges v. Carrigan* (2004) 117 Cal.App.4th 578.)
Commenter: 125.06D.

Department Response: The provisions addressing arbitration are contained in subsection (d) of sections 72516 and 73518 of title 22 of the California Code of Regulations. The court did not require that the Department make any changes to those provisions. As the proposed rulemaking only addresses the requirements of the court order and Writ of Mandate, and Sections 72516 and 73518 were promulgated in a previous rulemaking, the comments regarding subsection (d) of these sections are outside the scope of this proposed rulemaking.

J. Comment: It is inappropriate to "incorporate by reference" the Admission Agreement form (HS 327 (05/10). What should be included in the regulations is an outline of the areas that must be addressed in the admission agreement. A clear reading of the statute demonstrates that the Department must "adopt" an admission agreement. This clearly indicates a regulatory process. The Department has included the SAA in the regulation notice, but has labeled it a "form incorporated by reference in the regulation." This is confusing. Including all contractual language would be prohibitive. By not including some guidance in the regulation a high risk of confusion for facilities trying to keep up to date on the latest mandatory form and admission agreement provisions are is created. The ISOR does not discuss how the form might be updated for new statutory provisions or how facilities would be notified that there was a new admission agreement "form." Urge that the SAA be included in the regulations at Section 72516.
Commenter: 121.06, 125.04.

Department Response: Since the incorporation by reference of the SAA was approved in a previous rulemaking, the fact of its incorporation by reference is outside the scope of this proposed rulemaking.

K. Comment: Title 22 CCR Sections 72516(c) and 72518(c) *[sic]* are contrary to HSC Section 1599.61 and other law provisions requiring the signature of a person being admitted to a skilled nursing facility. The revised SAA lacks consistency. Opposed to the language that states, "No resident or his or her legal representative shall be required to sign any other document at the time of, or a condition of, admission to the licensee's facility, or as a condition of continued stay in the facility." Several documents are required at the time of admission and many require the signature of the resident or his or her legal representative. Recommend this language be deleted. HSC Section 1599.61(b)(1) and (3) do not allow the facility to alter the agreement or attach its rules and procedures as part of the agreement, but is silent as to other agreements which can be signed at the time of admission.
Commenter: 121.08, 126.08B.

Department Response: The proposed rulemaking only addresses the requirements of the court order and Writ of Mandate. Sections 72516 and 73518 were promulgated in a previous rulemaking. The comments regarding subsection (c) of these sections are outside the scope of this proposed rulemaking.

L. Comment: DPH's assertion that the language "as a condition of continued stay in the facility" is to prevent potential confusion is in and of itself confusing. It is also inconsistent with HSC Section 1599.60(b) which does not include any language concerning continued stay in the facility. The language concerning continued stay should be deleted.
Commenter: 121.08, 126.08B.

Department Response: [NOTE: The Department is unable to locate this assertion in the current filing.] The proposed rulemaking only addresses the requirements of the court order and Writ of Mandate. Sections 72516 and 73518 were promulgated in a previous rulemaking. The comments regarding subsection (c), which contains the phrase "as a condition of continued stay in the facility," of these sections are outside the scope of this proposed rulemaking.

M. Comment: Opposed to and recommend deletion of Title 22 CCR Sections 72516(d) and 72518(d) *[sic]* as they prohibit the "inclusion" of an arbitration agreement as part of the SAA. HSC Section 1599.81 allowed for arbitration. If the legislature had wanted to delete the arbitration clauses from the SAA, it would have done so in its 1997 amendments. The 1997 amendments did not change HSC Section 1599.81 setting forth certain protections that must be observed when using an arbitration clause, such as separation of medical malpractice clause, notice regarding waiver of ability to sue for patient's Bill of Rights violations and making an arbitration agreement an attachment to the agreement. HSC Section 1599.60 et. seq. shows that it was intended that a contract of admission include "all documents which a resident or his or her representative must sign at the time of, or as a condition of , admission to a long term care facility." The Department's surveyor guidelines for assessing compliance include the arbitration clause. HSC Section 1599.81(a) states that "all contracts of admission that contain an

arbitration clause ..." clearly signify the contract of admission contains an arbitration clause. HSC Section 1599.81(b), (c) and (d) speak to the arbitration clauses as attachments. Subsection (d) lacks authority, makes the meaning of Section 1599.81 unclear, and is unnecessary to carry out the purpose of the statute.
Commenter: 121.09.

Department Response: The proposed rulemaking only addresses the requirements of the court order and Writ of Mandate. Sections 72516 and 73518 were promulgated in a previous rulemaking. The comments regarding subsection (d) of these sections are outside the scope of this proposed rulemaking.

N. Comment: Fraudulent Misrepresentation of Finances is Not Grounds for Involuntary Transfer/Discharge Under Federal Nursing Home Reform Law (Page 9 of the SAA): The following change is necessary on page 9 of the SAA at Section VI. Transfers and Discharges:

~~6) Material or fraudulent misrepresentation of your finances to us.~~

The Nursing Home Reform Law (NHRL) allows involuntary transfer/discharge only for specified reasons, and misrepresentation of finances is ***not*** one of those reasons. California law to the contrary is overridden in any facility certified under Medicare, Medi-Cal, or both. NHRL prohibits a nursing facility from discriminating against Medi-Cal eligible residents in regards to "transfer, discharge, and covered services." A "misrepresentation of finances" transfer/discharge violates the federal anti-discrimination law by authorizing a facility to evict a resident because the resident has become eligible for Medi-Cal more quickly than the facility has anticipated.
Commenter: 120.06.

Department Response: The subject of the SAA addresses the requirements of the court order and Writ of Mandate. Although the Department appreciates the concerns expressed by commenter, the comments concerning the inclusion of misrepresenting finances as a ground for discharging a resident is outside the scope of this rulemaking.

O. Comment: The Resident Bill of Rights Must be Translated Into Spanish, Chinese and Other Languages (Attachment F to the SAA): The Department has not complied with the requirement in Health and Safety Code Section 1599.61 to ensure translation of the patients' Bill of Rights be made in Spanish, Chinese and other languages by January 1, 2000 and be made available to all long term care facilities. Attachment F provides the English version of the Resident Bill of Rights. The Department contends in a November 9, 2010 letter from Kathleen Billingsley to CANHR that it has posted translated versions on its website. The two-page documents posted provide a very brief summary of key rights, not the more comprehensive 34-page list of rights found in Attachment F.
Commenter: 120.11.

Department Response: The subject of the SAA addresses the requirements of the court order and Writ of Mandate. Although the Department appreciates the concerns expressed by commenter, the comments concerning translation of the patients' Bill of Rights is outside the scope of this rulemaking.

P. Comment: The revised proposed SAA continues to assert that the entirety of the SAA must be used without alteration except in limited, ill-defined circumstances. Freedom of Contract is protected by the Due Process clause of the U.S. Constitution. The revised SAA asserts an extreme position in restricting any ability on the part of the licensee to "alter the contract." The Department does little to offer a resolution to this dilemma. What are private facilities to do about all the provisions that pertain to Medi-Cal certified facilities only? If CCRC contracts contain conflicting mandated provisions with the skilled nursing facility contract what can be done? For residents who sign arbitration agreements what is to be done if the Department arbitrarily disapproves an optional attachment of an arbitration agreement?
Commenter: 121.05.

Department Response: The proposed rulemaking only addresses the requirements of the court order and Writ of Mandate. Sections 72516 and 73518 were promulgated in a previous rulemaking. The comments regarding the unchanged language in subsection (b) of these sections are outside the scope of this proposed rulemaking.

Q. Comment: Believe this is a regulatory mandate and not just a form. The broad contractual areas should be included in regulation as well and there should be a provision concerning general contract terms which a facility has a right to contract as long as they do not conflict with the general areas of federal and/or state law. Recommend that the agreement follow basic contract formatting guidelines. For example, the name of the parties to the agreement should be on the first page; it needs to be dated; the signature page should contain the designation of the parties signing the agreement.
Commenters: 121.10A, 121.10B, 125.18.

Department Response: Although the Department appreciates the concerns expressed by the commenter, the issues raised in this comment were addressed in a previous rulemaking and are outside the scope of this rulemaking.

R. Comment: The purpose of the reference to the Ombudsman in the second paragraph in I. Preamble is unclear. The Ombudsman is not a party to the contract and they *[sic]* are not there to discuss the terms and content of the SAA. The second paragraph should be labeled to identify its purpose, such as "For further information about nursing homes ..." to distinguish the role of the Ombudsman as functioning in its mandated role.
Commenters: 121.10C.

Department Response: The subject of the SAA (Form CDPH 327 (05/10)) addresses the requirements of the court order and Writ of Mandate. Although the Department

appreciates the concerns expressed by the commenter, the comments concerning the Ombudsman in paragraph I, are outside the scope of this rulemaking.

S. Comment: In II. Identification of Parties to this Agreement, language before identifying the Parties to the Agreement, in bold capital letters, last paragraph, is inconsistent with Welfare and Institutions Code Section 14110.8(b) and (c) and HSC Section 1599.65 dealing with third party payer issues. This language should be replaced with statutory language which is clear on its face.
Commenters: 121.10D, 125.08B.

Department Response: The subject of the SAA (Form CDPH 327 (05/10)) addresses the requirements of the court order and Writ of Mandate. Although the Department appreciates the concerns expressed by the commenter, the comments concerning the bolded statement in paragraph II are outside the scope of this rulemaking.

T. Comment: In III. Consent to Treatment, DPH confuses the issue of consent. The licensee does not inform the patient as to medical care; it is clearly the responsibility of the physician.
Commenters: 121.10E, 125.09A, 126.04.

Department Response: The subject of the SAA (Form CDPH 327 (05/10)) addresses the requirements of the court order and Writ of Mandate. Although the Department appreciates the concerns expressed by the commenter, the comments concerning Consent to Treatment in paragraph III are outside the scope of this rulemaking.

U. Comment: The next to last paragraph concerning advance directives is confusing. In order to provide care according to the patient's wishes the facility must have a copy of the patient's advance directive if one exists. It is clear that a patient need not execute an advance directive. The SAA awkwardly associates these concepts so as to confuse them. The language as written sounds as if the resident need not provide the facility with a copy of its advance directive if one has been executed. The paragraph should be rewritten so that the resident must give the facility a copy of the advance directive that he or she executed, similar to "If you have an advance directive you must provide the facility with a copy."
Commenters: 121.10F, 125.09B.

Department Response: The subject of the SAA (Form CDPH 327 (05/10)) addresses the requirements of the court order and Writ of Mandate. Although the Department appreciates the concerns expressed by the commenter, the comments concerning Advance Directives in paragraph III are outside the scope of this rulemaking.

V. Comment: In V. Financial Arrangements, the Department cites federal regulations as authority. Believe that federal law cannot be used as statutory authority for state regulation unless a law has been adopted by the state. Provision misstates the federal requirement and expands the duty of the licensee. The federal requirement states that facilities are required "to furnish a written description of the requirements and

procedures for establishing eligibility for Medicaid." Welfare and Institutions Code Section 14110(e) only requires that facilities "make reasonable attempts to assist residents in contacting the county to obtain estimates of the resident's share of cost." Recommend elimination of this language. The paragraph in bold capitol letters near the top of page 5 of the SAA does not match the requirements of HSC Section 1599.69. Recommend provision be conformed to statutory language which is deemed to be drafted in "plain language." The SAA applies to licensed only facilities (not certified for Medi-Cal or Medicare) which are all private pay and inclusion of requirements that apply to Medi-Cal certified facilities only is confusing and lacks clarity. This language should be eliminated from the private pay resident agreements as well as the other Medicare and Medi-Cal language.
Commenters: 121.10G, 121.10H, 121.10I, 121.10J, 125.11A.

Department Response: The subject of the SAA (Form CDPH 327 (05/10)) addresses the requirements of the court order and Writ of Mandate. Although the Department appreciates the concerns expressed by the commenter, the comments concerning paragraph V are outside the scope of this rulemaking.

W. Comment: In Subsection A. Charges for Private Pay Residents, the payment sections and the services that are covered by the various payments are confusing. Medi-Cal and Medicare legislation, regulation and policy constantly change as to what is a covered or non-covered service, how much is the payment for that service and whether or not there is a beneficiary obligation to pay for part of the service. Question whether attachments in B-1 and B-2 are correct as to what is and is not a covered service. Recommend that DPH review these attachments again. When a Medi-Cal Treatment Authorization is denied, there are several options. Paragraph C on page 6 is not always what transpires and misleads the resident. Facilities may have an agreement with residents for the provision of pharmacy services. The SAA does not address this issue and it is unclear as to whether or not these agreements can be obtained at admission or need to be part of some protected "program flexibility" process. The agreement is necessary so that services can be provided to the resident from the first day of admission. DPH needs to clarify this issue.
Commenters: 121.10K, 121.10L, 121.10M.

Department Response The subject of the SAA (Form CDPH 327 (05/10)) addresses the requirements of the court order and Writ of Mandate. Although the Department appreciates the concerns expressed by the commenter, the comments concerning paragraph V are outside the scope of this rulemaking.

X. Comment: In VIII. Personal Property and Fund, there is inconsistent use of the provisions of HSC Section 1599.60 et. seq. It appears that DPH chose some provisions in HSC 1599.60 et. seq. such as theft and loss to be included in the SAA and eliminated others such as arbitration. What is the basis for DPH decision? As a whole the SAA lacks consistency.
Commenters: 121.10P, 125.14A.

Department Response: The subject of the SAA (Form CDPH 327 (05/10)) addresses the requirements of the court order and Writ of Mandate. Although the Department appreciates the concerns expressed by the commenter, the comments concerning paragraph VIII are outside the scope of this rulemaking.

Y. Comment: In XI. Facility Rules and Grievance Procedures, it is recommended that DPH conform these procedures to HSC Section 1599.61(b).
Commenters: 121.10R, 125.17.

Department Response: The subject of the SAA (Form CDPH 327 (05/10)) addresses the requirements of the court order and Writ of Mandate. Although the Department appreciates the concerns expressed by the commenter, the comment concerning paragraph XI are outside the scope of this rulemaking.

Z. Comment: In XII. Entire Agreement, the provision that this agreement supersedes any prior agreements or understandings regarding admission is unclear. HSC Section 1599.65 allows for a modification process for a resident being readmitted to a facility where previously executed agreement exists. This provision is inconsistent with that section. Must the facility execute a new agreement for readmitted residents?
Commenters: 121.10S, 125.18A.

Department Response: The subject of the SAA (Form CDPH 327 (05/10)) addresses the requirements of the court order and Writ of Mandate. Although the Department appreciates the concerns expressed by the commenter, the comments regarding paragraph XII are outside the scope of this rulemaking.

AA. Comment: In II. Identification of Parties to this Agreement, under the "Definitions" section, there is language which states that "You may designate a person as your Representative at any time." *[sic]* Under current law, certain individuals are not allowed to designate a Representative. For example, if the individual has been conserved or if the individual is a parolee, the law would preclude this. This language should be clarified to state that "Except as provided by current law, you may designate a person as your Representative at any time."
Commenter: 125.08A.

Department Response: Since the language contained in the agreement, "To the extent permitted by law, you may designate a person as your Representative at any time," was approved at a prior rulemaking, the comment is outside the scope of this rulemaking.

AB. Comment: In the next paragraph, the Department includes the first in a series of proposed language regarding advance health care directives. These provisions about advance directives are not required to be in the Admission Agreement and, in fact, the information a resident would need to execute an advance directive is usually provided with other materials given to residents on admission.

More specifically, the proposed SAA regulations state: "If you do not know how to prepare an Advance Health Care Directive and wish to prepare one, we will help you find someone to assist you in doing so." Section 4677 of the Probate Code prohibits a licensee from requiring (or prohibiting) the execution of an advance directive as a condition for admission to a facility, and Section 1599.73 specifically states that "After admission, the facility shall encourage residents having capacity to make health care decisions to execute an advance health care directive in the event that he or she becomes unable to consent for disclosure." Therefore, the proposed regulatory language, should be eliminated.
Commenter: 125.09B, 126.04.

Department Response: The subject of the SAA (Form CDPH 327 (05/10)) addresses the requirements of the court order and Writ of Mandate. Although the Department appreciates the concerns expressed by the commenter, the comments concerning Advance Health Care Directives in paragraph III are outside the scope of this rulemaking.

AC. Comment: The proposed language in the third paragraph of Section IV of the proposed SAA states: Violations of state laws and regulations identified above may subject our Facility and our staff to civil or criminal proceedings. You have the right to voice grievances to us without fear of any reprisal, and you may submit complaints or any questions or concerns you may have about our services or your rights to the local office of the California Department of Public Health, Licensing and Certification District Office _____, or to the State Long-Term Care Ombudsman (see page 1 for contact information).
This language is not required to appear in the body of the Admission Agreement. Rather, Section 1599.2 of the Health and Safety Code requires that these "advisory" statements appear in the preamble or preliminary statement on documents informing residents of their rights. As a result, this language is only appropriate at the beginning of Attachment F. Placing it in the text of the Admission Agreement is contradictory to current law, as well as inflammatory and offensive.
Commenter: 125.10.

Department Response: The subject of the SAA (Form CDPH 327 (05/10)) addresses the requirements of the court order and Writ of Mandate. Although the Department appreciates the concerns expressed by the commenter, the comments concerning the language in paragraph IV are outside the scope of this rulemaking.

AD. Comment: In the paragraph directly before "A. Charges for Private Pay Residents," under V. Financial Arrangements, there is language in bold, capital letters, that states:
YOU SHOULD BE AWARE THAT NO FACILITY THAT PARTICIPATES IN THE MEDI-CAL PROGRAM MAY REQUIRE ANY RESIDENT TO REMAIN IN PRIVATE PAY STATUS FOR ANY PERIOD OF TIME BEFORE CONVERTING TO MEDI-CAL COVERAGE. NOR, AS A CONDITION OF ADMISSION OR CONTINUED STAY IN SUCH A FACILITY, MAY THE FACILITY

REQUIRE ORAL OR WRITTEN ASSURANCE FROM A RESIDENT THAT HE OR SHE IS NOT ELIGIBLE FOR, OR WILL NOT APPLY FOR, MEDICARE OR MEDICAL BENEFITS.
This language does not align itself to the wording required by state statute. Section 1599.69 of the Health and Safety Code requires the following language:
NO MEDI-CAL CERTIFIED FACILITY MAY REQUIRE AS A CONDITION OF ADMISSION, EITHER IN ITS CONTRACT OF ADMISSION OR BY ORAL PROMISE PRIOR TO SIGNING THE CONTRACT, THAT A RESIDENT REMAIN IN PRIVATE PAY STATUS FOR ANY SPECIFIED PERIOD OF TIME.
Because the statutory language is deemed to be drafted in "plain language," we recommend that the Standard Admission Agreement adopt the exact wording, or as close to it as possible, required by statute. In addition, the requirements of Section 1599.69 only apply to Medi-Cal certified facilities. To the extent that a facility is not Medi-Cal certified (for example, a skilled nursing facility that is part of a Continuing Care Retirement Community), the facility should be allowed "program flexibility" to exclude this provision from their Admission Agreements, which is consistent with current law.
Commenter: 125.11B.

Department Response: The subject of the SAA (Form CDPH 327 (05/10)) addresses the requirements of the court order and Writ of Mandate. Although the Department appreciates the concerns expressed by the commenter, the comments concerning the language quoted from paragraph V are outside the scope of this rulemaking.

AE. Comment: The language in Subsection A of Section V of the SAA refers to attachments B-1 and B-2 in which the facility is supposed to include a description of (required and optional) services and supplies for both private pay and privately insured residents. CAHF is concerned with the reference to "privately insured Residents" as there is a difference between services and supplies that are provided to residents who have private insurance through a managed care plan that the facility has a contract with and for residents who have health insurance coverage through a plan that the facility does not have a contract with. We suggest that another attachment be available for the facility to include the services and supplies for any "contracted" health maintenance organization.
Commenter: 125.11C.

Department Response: The subject of the SAA (Form CDPH 327 (05/10)) addresses the requirements of the court order and Writ of Mandate. Although the Department appreciates the concerns expressed by the commenter, the comments concerning the language contained in section A of paragraph V are outside the scope of this rulemaking.

AF. Comment: The language in the second paragraph in Subsection C of Section V, states:

If you are entitled to benefits under Medi-Cal, Medicare, or private insurance, and if we are a participating Provider, we agree to accept payment from them for our basic daily rate. This language is not required by law, nor is it an essential contract term. It doesn't address that payment of Share of Cost, co-pays and deductibles are required. It should be eliminated.
Commenter: 125.11D.

Department Response: The subject of the SAA (Form CDPH 327 (05/10)) addresses the requirements of the court order and Writ of Mandate. Although the Department appreciates the concerns expressed by the commenter, the comments concerning the language quoted from paragraph V are outside the scope of this rulemaking.

AG. Comment: In V. Financial Arrangements, we request the following changes: You should note that Medi-Cal, **Medicare, or other insurance pavors** will only pay for covered supplies and services if they are medically necessary. ~~If Medi-Cal determines that a supply or service is not medically necessary, we will ask whether you still want that supply or service and if you are willing to pay for it yourself.~~
The language that we recommend to be eliminated above is necessary in recognition of the practical operational functions a facility performs. First, the draft language does not recognize or anticipate that decisions regarding medical necessity impact more than just Medi-Cal program beneficiaries or that such determinations may be appealed.
Second, there are common instances where a certain pharmaceutical agent will be denied and a facility might be able to work with the attending physician to prescribe the generic version, or other equivalent medication, that would qualify for payment coverage. The language DPH proposes is too prescriptive and is not required to be part of the Standard Admission Agreement, and, therefore, should be eliminated.
Commenter: 125.11E.

Department Response: The subject of the SAA (Form CDPH 327 (05/10)) addresses the requirements of the court order and Writ of Mandate. Although the Department appreciates the concerns expressed by the commenter, the comments concerning the language quoted from paragraph V are outside the scope of this rulemaking.

AH. Comment: In E. Payment of Other Refunds Due to You, under V. Financial Arrangements, DPH has included language to require facilities, **within 14 days after a resident has been discharged,** to provide a refund of any "other refunds, such as unused advance payments the resident may have made for optional services not covered by the daily rate." This 14 day refund time line is not required by law. More importantly, however, DPH does not have the authority to take a statutory requirement that is applicable to one concept and extend it to another area simply because "the Department believes it is a reasonable interpretation of Legislative intent." Administrative agencies have only such powers as have been conferred on them, expressly or by implication, by constitution or statute. *(Fredig* v. *State Personnel Board,* 71 Cal.2d 96 (1969).) When an administrative agency acts in excess of or in

violation of the powers conferred upon it, its action thus taken is void. *(Id.)* This language, therefore, must be eliminated.
Commenter: 125.11F.

Department Response: The subject of the SAA (Form CDPH 327 (05/10)) addresses the requirements of the court order and Writ of Mandate. Although the Department appreciates the concerns expressed by the commenter, the comments concerning subparagraph E. of paragraph V are outside the scope of this rulemaking.

AI. Comment: To be consistent with current law, CAHF requests the following changes to the last paragraph in this section, paragraph VI, as follows:
Except in an emergency, if you are involuntarily transferred or discharged ~~against your wishes~~, we will provide transfer and discharge planning as required by law.
This is another example where DPH has omitted statutory language and has changed the meaning of a requirement.
Commenter: 125.12G.

Department Response: The subject of the SAA (Form CDPH 327 (05/10)) addresses the requirements of the court order and Writ of Mandate. Although the Department appreciates the concerns expressed by the commenter, the comments concerning the last paragraph of paragraph VI are outside the scope of this rulemaking.

AJ. Comment: CAHF requests the following changes to the second paragraph of the DPH proposed regulatory language of paragraph VII.:
If Medi-Cal is paying for your care, then Medi-Cal will pay for up to seven days for us to hold the bed for you. If you are not eligible for Medi-Cal and the daily rate is not covered by your insurance, then you are responsible for paying $_____ for each day we hold the bed for you. You should be aware that Medicare does not cover costs related to holding a bed for you in these situations.
We recommend eliminating the blank left open to designate an amount to be charged to the resident. As an alternative, we would recommend that the phrase "the daily rate" replace the language proposed for elimination above.
Commenter: 125.13A.

Department Response: The subject of the SAA (Form CDPH 327 (05/10)) addresses the requirements of the court order and Writ of Mandate. Although the Department appreciates the concerns expressed by the commenter, the comments concerning paragraph VII are outside the scope of this rulemaking.

AK. Comment: CAHF requests elimination of the fourth paragraph in this section, paragraph VII, as follows:
~~You should also note that, if our Facility participates in Medi-Cal and you are eligible for Medi-Cal, if you are away from our Facility for more than seven days due to hospitalization or other medical treatment, we will readmit you to the first available bed in a semi-private room if you need the care provided by our Facility and wish to be readmitted.~~

This language is not required to be included in the Admission Agreement. It is a federal requirement that **only** applies **(1)** to Medi-Cal certified facilities, and **only** (2) if the resident's hospitalization leave exceeds the seven day bed hold period. The federal law requires that this language be established in facility policy, which can be provided to a resident at the time of transfer, along with the notice of the rights to a bed hold required pursuant to Section 1599.79 of the Health and Safety Code. Therefore, we request that this language be eliminated.
Commenter: 125.13B.

Department Response: The subject of the SAA (Form CDPH 327 (05/10)) addresses the requirements of the court order and Writ of Mandate. Although the Department appreciates the concerns expressed by the commenter, the comments concerning paragraph VII are outside the scope of this rulemaking.

AL. Comment: The following changes should be made to the first paragraph of this section, paragraph VIII, as follows:
Our Facility has a theft and loss prevention program as required by state law. ~~At the time you are admitted, we will give you a copy of our policies and procedures regarding protection of your personal property, as well as copies of the state laws that require us to have these policies and procedures.~~
This language is not required to be included in the Admission Agreement. Further, by including the language above, the DPH has made this statement a contract term for which a facility may incur additional liability for the alleged failure to provide facility policies and procedures, based on a breach of contract theory. CAHF objects to the creation of this additional contractual obligation on facilities, especially when there has been no further clarification that facilities will be able to request that residents sign a form acknowledging the information and materials that they receive during or after the admission process. Therefore, the language should be eliminated.
Commenter: 125.14B.

Department Response: The subject of the SAA (Form CDPH 327 (05/10)) addresses the requirements of the court order and Writ of Mandate. Although the Department appreciates the concerns expressed by the commenter, the comments concerning paragraph VIII are outside the scope of this rulemaking.

AM. Comment: CAHF recommends the language in this section, paragraph IX, referring to photographs be eliminated. This language is not required to be included in the Admission Agreement. While this language describes a provision that is arguably essential from a practical perspective, it is not a duty that Section 1599.80 requires to be included in the Agreement As an alternative, the Admission Agreement should contain a separate attachment in order for the resident to give written consent to be photographed.
Commenter: 125.15.

Department Response: The subject of the SAA (Form CDPH 327 (05/10)) addresses the requirements of the court order and Writ of Mandate. Although the Department

appreciates the concerns expressed by the commenter, the comments concerning paragraph IX are outside the scope of this rulemaking.

AN. Comment: CAHF requests the following language: **GENERAL TERMS**

A. Complete Agreement: This Agreement along with all of its attachments is the only agreement between the parties.

B. Invalid Provisions: If any provision of this agreement is invalid, the remaining provisions shall remain in full force and effect.

C. Waiver: The Facility's acceptance of a partial payment on any occasion does not constitute a continuing waiver of the payment requirements of this Agreement or otherwise limit the Facility's rights under this Agreement.

D. Force Majeure: If either party is prevented from performing its obligations under this Agreement by Force Majeure, then such performance is excused so long as the Force Majeure remains in effect.

E. Captions and Headings: All captions and headings are for convenience purposes only and have no independent meaning.

F. Construction and Jurisdiction for Disputes: This Agreement shall be construed according to the laws of the State of California and any legal action shall be filed in the judicial jurisdiction where the facility is located.

G. Attorney's Fees: If any legal action is commenced to enforce the provisions of this Agreement, the non-prevailing party shall pay to the prevailing party reasonable attorney's fees and costs.

H. No Assignment: The resident may not assign or otherwise transfer his or her interests in this Agreement.

Commenter: 125.18B.

Department Response: The subject of the SAA (Form CDPH 327 (05/10)) addresses the requirements of the court order and Writ of Mandate. Although the Department appreciates the concerns expressed by the commenter, the comments concerning paragraph XII are outside the scope of this rulemaking.

AO. Comment: The SAA regulations should mandate "certain components that must be present in every contract of admission, and then provide an opportunity for facilities to either alter those provisions or to add additional provisions that meet the needs of that facility's operations."

Commenters: 104.04, 105.04, 106.04, 107.04, 108.04, 109.04, 110.04, 111.04, 112.04, 113.04, 114.04, 115.04, 116.04, 117.04, 118.04, 119.04.

Department Response: The proposed rulemaking only addresses the requirements of the court order and Writ of Mandate. Sections 72516 and 73518 were promulgated in a previous rulemaking. The comments concerning the first sentence of subsection (d) of these sections are outside the scope of this proposed rulemaking.

Addendum III: List of Commenters (15-Day Notice)

Name	Organization & Title	Address	Comments Letter #	Email Address
Susan Buscaglia	Hospice of the East Bay	3470 Buskirk Ave., Pleasant Hill, CA 94523	1	susanb@hospiceeastbay.org
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Cindy Hatton	Hospice of the East Bay	3470 Buskirk Ave., Pleasant Hill, CA 94523	3	cindyh@hospiceeastbay.org
Andrew Bouty	Hospice of the East Bay	3470 Buskirk Ave., Pleasant Hill, CA 94523	4	andreeb@hospiceeastbay.org
Shoshanna Gard	Hospice of the East Bay	3470 Buskirk Ave., Pleasant Hill, CA 94523	5	shoshannag@hospiceeastbay.org
Lori Costa	Aging Services of California	1315 I St., Suite 100, Sacramento, CA 95814	6	LCosta@aging.org
Michael Connors	CANHR		7	Michael@canhr.org
Nancy Reagan	CAHF	2201 K St., Sacramento, CA 95816-4922	8	

Addendum IV: Summary and Response To Comments on the Regulations (15-Day Comment Period)

1. Court Order

2. Authorization for Disclosure

3. Room to Room and Other Transfers

A. Comment: The change made to resident room changes violates law by including language that prohibits the transfer of a resident from one bed in a dually-certified facility to another bed in that same facility, and has given the resident a contractual right to refuse transfer. Federal and state laws do not provide what DPH claims they do. Federal law grants to residents the right to refuse transfers from a portion of the facility that is solely certified for Medicare to a portion of the facility that is not certified for Medicare, and vice versa. The SAA does not reflect this narrow prohibition. Commenter believes that it is DPH's position that if a facility participates in the Medicare and Medicaid programs, all portions of the facility are deemed to be dually certified. As a result, the revisions of the SAA are contrary to federal law and otherwise arbitrary and capricious. **Commenter: 8.4.**

Department Response: The Department explained in its responses to comments on the 45-day filing that it based its use of the language on the requirements of federal law. If a facility is either dually certified with some beds certified only for Medi-Cal, or certified only for Medicare with other beds for residents paying privately, the resident has the right to refuse a transfer from a bed not certified for Medicare, whether it be certified for Medi-Cal or not certified, to a bed certified for Medicare, and vice versa. If a facility is dually certified and all of the beds are certified for both Medicare and Medi-Cal, all of the beds would therefore be certified for Medicare, so any transfer would be from a Medicare bed to a Medicare bed. The statement in the Standard Admission Agreement (SAA) that a resident has the right to refuse the transfer if the purpose of the transfer is to move the resident to or from a Medicare-certified bed is accurate.

B. Comment: There is no reference in the "Supplement to the Statement of Reasons" to state law, which is clear on this point. Specifically, Welfare and Institutions Code Section 14124.7 deals with the issue of prohibiting room-to-room transfers based on a resident's changing payment method from private pay or Medicare, to payment from Medicaid. The statute provides exceptions for room changes from a private room to a semi-private room and states: "Nothing in this section shall limit a facility's ability to transfer a resident within a facility, as provided by law, because of a change in a resident's health care needs or if the bed retention would result in there being no available Medicare-designated beds within a facility." As a