

February 28, 2018

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

RE: Comments on Draft SB 97 Workforce Shortage Waiver Provisions

Dear Chelsea:

Thank you for your coordination of the stakeholder workgroups regarding the proposed workforce shortage waiver. We appreciate the opportunity to comment on the drafts of the waiver and to participate in the meetings.

Since the next draft of the waiver will likely be the final, we strongly urge you to change some of the proposed waiver language that endangers the health and safety of nursing home residents in facilities that are unable to meet the new 3.5 hppd standard.

Ban on Admissions

The simplest and best way to ensure residents are not harmed when a facility is unable to meet California's minimal staffing standard is to impose a ban on admissions until the facility is able to meet that standard. In prior letters, we have expressed our reasoning in favor of an admissions ban.

At last week's meeting, Scott Vivona stated that a ban on admissions would effectively mean there is no workforce shortage waiver, since all facilities with less than 3.5 hppd would, by force of resident attrition and math, eventually reach 3.5 hppd. That is, in fact, the best argument in favor of a ban on admissions. Contrary to Scott's assertion, the waiver would have salience – it would give providers a respite from the 3.5 hppd requirement and allow them to continue to provide care while understaffed, for the period of time it takes to get to 3.5 hppd. Since the facility seeking the waiver is unable to improve its hppd by hiring staff, it is therefore required to improve hppd by eventually serving fewer residents. That could take weeks or months, depending on how often residents leave the facility, during which time the facility's waiver would be operable.

It is reckless to allow nursing homes with a staffing level that fails to meet California's minimum to continue to accept new residents for whom it cannot mathematically provide adequate care and who drive the facility's hppd down even further. We implore you to include a ban on admissions as part of the workforce shortage waiver approval.

Meeting Residents Needs

It is critical that the waiver process ensure nursing homes have enough staff to meet each resident's needs throughout the duration of an approved waiver. The current draft of the waiver deletes the requirement that a facility's plan on how the facility will meet residents' needs include an assessment of each resident and the direct care staffing resources to fully meet each resident's needs. This provision should be restored.

Onsite Investigation

The proposed waiver evaluation process in the latest draft does not include any onsite investigation by DPH to verify the facility is able to meet the needs of the residents despite its failure to have enough staff. We urge the Department to include some sort of onsite component to the waiver request evaluation process.

Compliance with Federal and California Standards

The latest draft considerably weakens the precondition that a SNF be in compliance with state and federal regulations to be considered for a waiver. The Department should restore provisions that disqualify facilities that received "G" or higher-level deficiencies or had substantiated findings of abuse or neglect during the three-year period prior to application. Residents living in poorly performing nursing homes must be protected from further harm.

Resident Consultation

Similar to an onsite investigation, speaking with actual residents or resident representatives, seems critical to evaluating a facility's ability to provide adequate care despite its inability to provide adequate staffing. Failing to gain the unique and fundamental input of residents regarding the adequacy of the facility's care is demeaning to the resident experience and certain to severely limit the accuracy of the waiver request evaluation.

One-Year Waivers

The current proposed waiver permits facilities a full year of staffing below 3.5 hppd with no reviews or check-ins from the Department. This seems much too long a period of time for a facility to be non-compliant with minimal care standards.

Public Notification

We reiterate that any waiver must be made known to the public and should be prominently posted on Cal Health Find, for the benefit of both current residents and prospective residents who are deciding what nursing home to move to. Given the fundamental importance of staffing on quality of care, the existence of a waiver would be a very important piece of information for residents and prospective residents.

We reiterate and stand by all of the recommendations made in our previous correspondence to the Department and were particularly disheartened that some of our recommendations that had been adopted in prior drafts were left out of the most recent draft. The foregoing list of concerns are the most pressing for resident health and safety.

One last note: we were shocked to hear the Department's contention that SB 97 requires or even permits deleting the staff-to-resident ratio regulations. Despite the changes to Health and Safety Code Section 1276.65 in SB 97, subsection (c)(1)(A) continues to require the Department to have "staff-to-patient ratios for direct caregivers working in a skilled nursing facility" which is supplemented in subsections (c)(2) and (e). Deleting the staff-to-resident ratios in Title 22 would mean the Department is non-compliant with the statutory requirements.

Thank you for your continued consideration of our suggestions and for all of your work to implement SB 97.

Sincerely,



Anthony Chicotel
Staff Attorney



Patricia McGinnis
Executive Director