

July 25, 2018

Scott Vivona, Acting Deputy Director  
Center for Health Care Quality  
Chelsea Driscoll, Chief,  
Policy and Enforcement Branch  
California Department of Public Health  
MS 3203, P.O. Box 997377  
Sacramento, CA 95899-7377

**RE: Comments on Proposed Patient Acuity Waiver for SB 97**

Dear Mr. Vivona and Ms. Driscoll:

We are writing to comment on the Department's plan to adopt regulations establishing a "patient acuity waiver" that would allow a skilled nursing facility (SNF) to waive the requirement that it provide at least 2.4 hours of direct care daily by certified nursing assistants (CNAs) per resident as long as the SNF meets the overall 3.5 direct hours requirement established by SB 97.

Contrary to the Department's contention, SB 97 does not authorize a patient acuity waiver for this purpose. The statute in question, HSC §1276.65(c), directs the Department to develop a waiver procedure **for staff-to-patient ratios**. It has nothing to do with a waiver of the 2.4 CNA hours requirement.

**California law authorizes a patient acuity waiver for staff-to-patient ratios established by the Department.**

HSC §1276.65(c) was enacted in 2001 as part of AB 1075 (Shelly), which had the express intent to require "minimum staffing requirements be set forth as ratios of patients per direct caregiver, so that residents, residents' families, facility employees, state inspectors, and others may assist in ensuring compliance with the law." Chapter 684 of 2001, Section 1.

The original requirements of HSC §1276.65(c) are set forth below:

*(c) (1) Notwithstanding any other provision of law, the State Department of Health Services shall develop regulations that become effective August 1, 2003, that establish staff-to-patient ratios for direct caregivers working in a skilled nursing facility. These ratios shall include separate licensed nurse staff-to-patient ratios in addition to the ratios established for other direct caregivers.*

*(2) The department in developing staff-to-patient ratios for direct caregivers and licensed nurses required by this section shall convert the existing requirement under Section 1276.5 of this code and Section 14110.7 of the Welfare and Institutions Code for 3.2 nursing hours per patient day of care and shall ensure that no less care is given than is required pursuant to Section 1276.5 of*

*this code and Section 14110.7 of the Welfare and Institutions Code. Further, the department shall develop the ratios in a manner that minimizes additional state costs, maximizes resident access to care, and takes into account the length of the shift worked. In developing the regulations, the department shall develop a procedure for facilities to apply for a waiver that addresses individual patient needs except that in no instance shall the minimum staff-to-patient ratios be less than the 3.2 nursing hours per patient day required under Section 1276.5 of this code and Section 14110.7 of the Welfare and Institutions Code.*

The underlined language directed the Department to establish staff-to-resident ratios for skilled nursing facilities and a waiver procedure based on individual resident needs that maintained compliance with the requirement at that time to provide at least 3.2 nursing hours per resident day.

**The Department has already adopted regulations establishing a patient acuity waiver for the staff to patient ratios.**

In 2007, following litigation over its failure to adopt the required staff-to-resident ratios, the Department adopted emergency regulations at Section 72329.1, Title 22, California Code of Regulations (22 CCR §72329.1). The final version of this section, adopted in January 2009, established staff-to-resident ratios requiring at least one direct caregiver for every 5 residents on the day shift; one direct caregiver for every 8 residents on the evening shift; and one direct caregiver for every 13 residents on the night shift. Subdivision (j) of section 72329.1 contains the procedure for seeking patient acuity waivers of the staff-to-resident ratios. The Department has not implemented this section due to its disputable contention that its requirements are contingent upon further appropriations by the Legislature.

The Department's October 2007 Notice of Emergency Rulemaking (DPH-03-010E) directly acknowledged its duty to establish the staff-to-patient ratios and procedures for a patient needs waiver.

*HSC section 1276.65 mandated the conversion of the current 3.2 nursing hours per patient day to a staff-to-patient ratio. This statute also required the Department to establish a procedure for a facility to apply for a waiver that addresses individual patient needs, except that in no instance shall the minimum staff-to-patient ratios provide less care than the 3.2 nursing hours per patient day required under section 1276.5 of the HSC and section 14110.7 of the Welfare and Institutions Code.*

The Department's rulemaking package also recognized the purpose of the staff-to-patient ratios.

*The establishment of these numeric nurse-to-resident ratios will enable HFENs, as well as the residents and their families and visitors and facility staff to quickly determine staffing compliance as required by HSC section 1276.65(g)(1), which states, ... "the department shall inspect for compliance with this section during state and federal periodic inspections ...." DPH-03-010E, Initial Statement of Reasons, October 11, 2007, at page 4.*

The original language of HSC §1276.65, AB 1075's declaration of intent and the Department's rulemaking package all reflect the Legislature's mandate to establish staff-to-patient ratios for SNFs so that residents, their families, facility caregivers, state inspectors, and others could assist in ensuring compliance with the staffing requirements. It is crystal clear that the patient acuity waiver was originally enacted to apply to the staff-to-patient ratios.

**SB 97 did not repeal the Department's duty to establish staff-to-patient ratios or change the purpose of the patient acuity waiver.**

In its series of SB 97 stakeholder meetings, CANHR has repeatedly questioned the legitimacy of the Department's plans to repeal the staff-to-patient ratios regulation and convert the patient acuity waiver into a procedure for waiving compliance with the new minimum CNA staffing requirements.

The Department's response – as set forth in the minutes of the July 10, 2018 stakeholder meeting – is that it *“has reviewed the statute in its entirety and the legislature struck staffing ratios in several places in the section. This demonstrates intent to remove the staffing ratios concept and move toward direct care hours.”*

In drawing this conclusion, the Department is ignoring the fact that the Legislature maintained the mandates in HSC §1276.65(c) that it develop regulations that establish staff to-patient ratios for direct caregivers and a waiver procedure for the staff-to-patient ratios that addresses individual patient needs. Rather than rescinding these mandates, as highlighted below, the Legislature maintained and reinforced them in SB 97 by connecting them to the new 3.5 direct care service hours per resident day requirement.

*(c) (1) (A) Notwithstanding any other law, the department shall develop regulations that become effective August 1, 2003, that establish staff-to-patient ratios for direct caregivers working in a skilled nursing facility.*

...

*(2) The department, in developing staff-to-patient ratios for direct caregivers and licensed nurses required by this section, shall convert the existing requirement under Section 1276.5 of this code and Section 14110.7 of the Welfare and Institutions Code for direct care service hours per patient day of care and shall verify that no less care is given than is required pursuant to Section 1276.5 of this code and Section 14110.7 of the Welfare and Institutions Code. Further, the department shall develop the ratios in a manner that minimizes additional state costs, maximizes resident quality of care, and takes into account the length of the shift worked. In developing the regulations, the department shall develop a procedure for facilities to apply for a waiver that addresses individual patient needs except that in no instance shall the minimum staff-to-patient ratios be less than the 3.5 direct care service hours per patient day required pursuant to subparagraph (B) of paragraph (1).*

..

*(e) No later than January 1, 2006, and every five years thereafter, the department shall consult with consumers, consumer advocates, recognized collective bargaining agents, and providers to determine the sufficiency of the staffing standards provided in this section and may adopt regulations to increase the minimum staffing ratios to adequate levels.*

Clearly, the Legislature did not repeal the mandates to develop and maintain staff-to-patient ratios and a patient acuity waiver procedure for these ratios. As was originally the case in 2001, the patient acuity waiver applies to the staff-to-patient ratios, not the new minimum staffing requirements for CNAs.

**The Department has not identified any legislative history on SB 97 to support its positions on the staff-to-resident ratios or the purpose of the patient acuity waiver.**

For nearly a year, CANHR has been seeking information and records from the Department on SB 97's changes to the minimum staffing requirements. In our first meeting on August 1, 2017, high level Department officials claimed to be in the dark about the origin and purpose of its key provisions.

On August 14, 2017, CANHR filed a Public Records Act request with the Department for all documents involving technical assistance, fiscal analysis or other comments and analysis concerning the SB 97 staffing provisions by the Department or any state official while they were being considered by the Legislature or Governor. The Department acknowledged our request but has yet to identify or release a single document.

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We strongly urge the Department to reconsider its position and halt further development of this waiver. SB 97 does not authorize the Department to establish a procedure to waive the minimum CNA staffing requirements based on resident needs. The Department's excessive focus on waiving California's minimum staffing requirements is harming residents' ability to receive needed care.

Thank you for considering our concerns and recommendations.

Sincerely,



Michael Connors  
Advocate



Patricia McGinnis  
Executive Director