

CALIFORNIA ADVOCATES FOR NURSING HOME REFORM

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Office of Regulations and Hearings
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RE: Comments on Skilled Nursing Facility Staff to Patient Ratio Emergency Regulations, DPH-03-010E

Dear Sir/Madam:

These comments are submitted on behalf of California Advocates for Nursing Home Reform (CANHR).

The Emergency Regulations Defeat the Purpose of AB 1075

AB 1075 (Shelley, Chapter 684, Statutes of 2001) requires the Department to expeditiously implement its provisions by establishing regulations setting staff-to-patient ratios for direct caregivers working in a skilled nursing facility. The law required those regulations to become effective by August 1, 2003, more than four years ago.

The emergency regulations compound the Department's longstanding failure to establish the regulations by setting conditions that virtually ensure the staff to patient ratios will never be implemented. Specifically, the Department is conditioning implementation of the staff to patient ratios on an appropriation in the annual Budget Act or another statute, while saddling the regulations with an enormously inflated cost estimate.

Section 1276.65(i) of the Health and Safety Code makes implementation of the staffing ratio contingent on an appropriation in the annual Budget Act or another statute. Thus, the Department contends that the ratios cannot be implemented until the legislature appropriates funds for this purpose. However, the Department's position completely ignores the subsequent passage of AB 1629 (Frommer, Chapter 875, Statutes of 2004).

AB 1629 established a facility-specific rate-setting system and provided huge rate

increases for skilled nursing facilities, increasing Medi-Cal payments by more than \$2 billion over a four-year period. In FY 07-08, Medi-Cal is expected to pay skilled nursing facilities more than \$3.7 billion, an annual increase of \$1 billion over the \$2.7 billion paid in FY 04-05. See the February 2007 Bureau of State Audits report on AB 1629 (2006-035), page 25. Medi-Cal rates have increased by more than 30 percent during the last four years.

Under the AB 1629 rate system, each freestanding skilled nursing facility is paid according to its costs. Not only are nursing homes paid fully for their direct resident care labor costs, Medi-Cal pays them an unprecedented bonus of 8 percent on top of their labor costs. This provision, known as the labor driven operating allocation, is supposed to provide nursing homes an incentive to increase staffing. See Section 14126.023(c)(3) of the Welfare and Institutions Code.

When AB 1075 was enacted in 2001, skilled nursing facilities were paid flat rates regardless of their staffing levels. That is no longer the case. The AB 1629 reimbursement system pays nursing homes for their actual staffing costs, including when staffing levels exceed California minimum standards. If a nursing home were to increase staffing to meet the staff to patient ratios contained in the emergency regulations, its reimbursement rate would be adjusted accordingly.

Additionally, AB 1629 provides for direct pass-through of proportional Medi-Cal costs for new state and federal mandates. See Welfare and Institutions Code Section 14126.023(a)(5). To the extent that the staff to patient ratios establish a new mandate, the reimbursement system already provides a mechanism to pay for these costs.

Given the dramatic Medi-Cal reimbursement changes enacted by the legislature subsequent to AB 1075, it is at best disingenuous for the Department to act as if the legislature has not addressed this issue. Indeed, if the Department had established the staff to patient ratio regulations by August 1, 2003 as required, there is no question that AB 1629 would have met AB 1075's requirement that the legislature appropriate funds for this purpose.

If the Department truly believes that an appropriation is necessary, it's had seven years since AB 1075's enactment to seek one. The fact that it has never done so, and isn't doing so now even after issuing the emergency regulations, speaks volumes about its indifference to implementing the required staff to patient ratios.

We recommend the Department delete the language contained in each section of the regulation that conditions implementation on an appropriation.

The Department's Fiscal Estimate is Vastly Inflated

The Finding of Emergency states that State expenditures will increase by \$207 million if nursing homes comply with the staff to patient ratio requirements. However, the regulatory package provides no justification whatsoever for this extraordinarily high

fiscal estimate. It appears that the Department is creating yet another excuse for blocking establishment of the staff to patient ratios.

In 1999, the Legislature amended Health and Safety Code Section 1276.5 in AB 1107 (Cedillo, Chapter 146, Statutes of 1999) to increase the minimum number of nursing hours per patient per day (hppd) from 3.0 to 3.2, effective January 2000. Medi-Cal rates were adjusted at that time to compensate nursing homes for the additional costs of meeting that requirement. Despite the rate increases, hundreds of nursing homes failed to meet the minimum staffing requirements and many still do not comply today.

Under the AB 1629 rate system, nursing homes gained a second chance to be compensated for coming into compliance with the minimum staffing requirements. The conversion of flat rates to individual rates allowed nursing homes to gain rate increases by adding staff, even if the staff were needed to meet the minimum 3.2 hppd requirement. Nursing homes that pocketed the funds to implement AB 1107 without adding staff were paid a second time to meet the same staffing requirement.

As mentioned earlier, nursing homes that staff above the minimum requirements are already reimbursed for those staffing costs under the AB 1629 rate system.

Thus, the establishment of the staff to patient ratios will not create any new costs to the State for reimbursing nursing homes to staff up to the minimum 3.2 nursing hppd requirement or to reimburse those facilities that already exceed the standard. If there are any new State costs created by the staff to patient ratios, it is only for the incremental staffing increases above the 3.2 hppd requirement that may be required to meet the ratios, and only for those nursing homes that don't already meet the ratios. Such costs would be very small, certainly nowhere near \$207 million.

The Department's own statements support our views. The Finding of Emergency states:

"However, the Department has utilized the Office of Statewide Health Planning and Development (OSHPD) Annual Financial Data Profile (2001-2005) as a document relied upon (Exhibit H) and has determined that the current reported productive hours per patient per day closely align with the requirements of these emergency regulations."

If most nursing homes already staffed at the levels required by the staff to patient ratios in 2005, as the Department's statement indicates, then implementing the ratios should not create significant new costs now. Given the vast Medi-Cal rate increases nursing homes have received since 2005 to improve staffing, any new costs to implement the staff to patient ratios should be very small.

Due to the extraordinarily broad waiver provisions established by Section 72329.1(j) of the emergency regulations, it is highly unlikely that nursing homes will increase staff to comply with the ratios. Nursing homes that don't already meet the staff to patient ratios can simply obtain a waiver exempting them from the new requirements. By allowing

them to do so, the Department will spare nursing homes and the State of any new costs. We address concerns about the waiver later in our comments.

To the extent that there are any new costs, the Department should seek amendments to the AB 1629 rate system that would shift some or all of the Medi-Cal "labor driven operating allocation" payments to cover these costs. AB 1629 rate data indicate that Medi-Cal is paying about \$200 million per year in direct profit payments to nursing homes via the labor driven operating allocation. Certainly it would make more sense to redirect these funds to any staffing costs associated with the staff to patient ratios.

After long neglecting its duty to establish the staff to patient ratios, the Department is now obligated to ensure that the ratios are actually implemented. Otherwise the ratios are little more than an illusion, and residents will not benefit as the Legislature intended. The Department should reevaluate the potential costs consistent with our analysis and present a realistic plan to the Legislature to address any new costs, such as amending the AB 1629 rate system in the manner we suggest.

Comments on Specific Regulations

Please note that recommended deletions to the regulations are lined through and recommended additions are underlined and bolded.

1. Section 72038 Definition of Direct Caregiver

The Department should amend this section and section 72329.1(g) to ensure that time spent by caregivers while at lunch, break, training and performing non-caregiving duties cannot be counted toward meeting the staff to patient ratios or the 3.2 nursing hppd requirement. Otherwise, the staff to patient ratios may actually decrease minimum staffing requirements in violation of H&S Code Section 1276.65(c)(2), which says the Department must ensure that no less care is given than is required by the minimum staffing requirements set by Section 1276.5 of the Health and Safety Code and Section 14110.7 of the Welfare and Institutions Code.

The Initial Statement of Reasons, at page 5, states: "*This section limits the definition to direct caregivers who are actually caring for residents, not at meals or in training...*" However, the regulation language is less detailed and makes no mention of meals, training or breaks.

To ensure that the staff to patient ratios do not lessen existing staffing requirements, we recommend the following changes:

"Direct caregiver" means a registered nurse, as referred to in Section 2732 of the Business and Professions Code, a licensed vocational nurse, as referred to in Section 2864 of the Business and Professions Code, a psychiatric technician, as referred to in Section 4516 of the Business and Professions Code, and a certified nurse assistant, as defined in Section 1337 of the Health and Safety Code, while actually providing care

to patients and not while in training, at lunch or breaks."

We address this issue further in our comments on Section 72329.1.

2. Subsection 72329.1(a) Introduction to Staffing Requirements

Currently, this subsection paraphrases existing section 72501, which gives the Department authority to require a skilled nursing facility to employ additional staff. We recommend it be changed to emphasize that the staffing ratios are minimum standards only and that a skilled nursing facility must employ sufficient staff to meet resident needs. This change appropriately conveys that a facility has primary responsibility to provide sufficient staff and conforms it to Health and Safety Code Section 1276.65(d), which is not currently addressed in the emergency regulations.

We recommend the following changes:

Section 72329.1. Nursing Service--Staff.

(a) ~~Nursing service personnel shall be employed and on duty in at least the number and with the qualifications determined by the Department to provide the necessary nursing services for patients admitted for care.~~ **The staffing requirements and ratios established by this section are minimum standards only. Skilled nursing facilities shall employ and schedule additional staff as needed to ensure quality resident care based on the needs of individual residents and to ensure compliance with all relevant state and federal staffing requirements.** The Department may require a facility to provide additional staff as set forth in Section 72501(g).

3. Subsection 72329.1(f) Special Treatment Programs

Paragraph (B) of this subsection partially identifies the staffing requirements for special treatment programs, while alluding to unspecified additional requirements. The paragraph should specifically reference the statutory staffing requirements for special treatment programs established at H&S Code Section 1276.9.

We recommend the following changes:

(B) For patients certified for special treatment programs, facilities shall employ sufficient staff to provide a minimum of 2.3 nursing hours per patient day for each patient certified to the special treatment program, exclusive of additional staff required to meet the staffing standards of the special treatment program. **The facility shall also comply with the provisions of Section 1276.9 of the Health and Safety Code.**

4. Subsection 72329.1(g) Staff to Patient Ratios

As noted above, we are very concerned that the staff to patient ratios may fall below the

3.2 nursing hppd, and thus violate the terms of AB 1075. The staff to patient ratios only reach or exceed the 3.2 nursing hppd requirement if caregiving staff actually perform caregiving duties at least 8 hours per day. In many nursing homes, caregiving staff are engaged in caregiving duties less than 8 hours per day due to time spent at lunch, breaks, training and other activities. The regulation fails to direct facilities to exclude staff time spent outside of caregiving activities.

The Initial Statement of Reasons at page 3 explains that nursing homes will have to determine full-time employee equivalents (FTEs) to determine compliance. It contains this statement:

Many nursing staff providing direct care, including Registered Nurses, Licensed Vocational Nurses, Licensed Psychiatric Technicians and Certified Nurse Assistants (CNAs), may work varying time schedules. These schedules, other than eight-hour shifts, can include two-to-four hour "short shifts or split shifts" that are defined as non-consecutive working periods within a 24-hour period and extended (10 – 16 hour) shifts. If the shift exceeds the eight-hour time frame or is a fraction thereof, a formula is necessary for calculating the nursing staff-to-patient ratio.

The formulae identify direct caregivers as a full-time employee equivalent (FTE) that would equate to one person working full-time. For example, one person working full time (based upon an 8-hour shift) equals one FTE, as do two people each working four hours shifts. To determine FTEs, the SNF would multiply the number of direct care giving staff, licensed and certified, by the total number of hours worked, and then would divide the total number of hours by eight to reflect the FTE staffing for one shift.

In contrast to this statement, the regulations are silent on this issue and do not even introduce the concept of a full-time equivalent. This omission will cause great confusion and inhibit enforcement of the ratios. The Department must spell out the methodology for determining full-time equivalents within this section of the regulation, and direct facilities to exclude all time spent outside of caregiving activities, specifically excluding time spent at lunch, breaks and training.

5. Subsection 72329.1(g) Enforcing the Licensed Nurse to Patient Ratios

Section 1276.65(c)(1) of the Health and Safety Code directs the Department to establish "separate licensed nurse staff-to-patient ratios in addition to the ratios established for other direct caregivers." Although the Department has established separate licensed nurse to patient ratios in this subsection, it directly undermines them in the Initial Statement of Reasons by declaring it won't enforce them or even calculate them separately from CNA staff. At page 7, it states:

Since the skill levels and scopes of practice of LNs and CNAs are different, at no time shall the nurse-to-patient conversion be calculated solely for the LN staff or the CNA staff, but shall be a combined ratio including all staff providing direct care,

unless a determination has been made that the residents require a higher staff skill level to reach their optimum practicable functioning.

This appalling plan directly conflicts with the statute and renders the licensed nurse to patient ratio virtually meaningless. Why set such a ratio if the Department won't enforce it?

The Department must retract this statement before issuing permanent regulations and add language to this section stating that the licensed nurse to patient ratios and the CNA to patient ratios are separately enforceable.

6. Subsection 72329.1(g)(6) Citations

The Department should clarify that a citation may be issued for each violation of the staffing requirements established in this section. The Department rarely issues any citations for staffing violations, but in the instances when it has done so, we have seen only single "B" citations with very small fines even when the nursing home was understaffed for many days or weeks. Unless stronger enforcement practices are taken, many nursing homes will continue to ignore minimum staffing requirements, including the ratios.

Health and Safety Code Section 1276.65(g)(2) states that "a" violation of the regulations may constitute a Class B, A, or AA violation, so the Department has the authority to issue a separate citation for each violation that meets the statutory test.

We recommend the following change:

(6) A citation for a class "AA", class "A" or class "B" violation may be issued for a **each** violation of this section that meets the requirements specified in Section 1424 of the Health and Safety Code.

7. Subsection 72329.1(h) Authority to Ban Admissions

We support the Department's attempt to ban admissions at understaffed nursing homes, but the Department must take a stronger and more straightforward approach. The current language directs nursing homes to cease admissions when they don't provide documentation required by the Department. It fails to give the Department any authority to order or enforce a ban on admissions. Moreover, the obligation to cease admissions is triggered by a facility's failure to provide documentation requested by the Department, not by the failure to meet staffing requirements.

We recommend that this matter be addressed in separate new subsections, one directed at facilities and the other at the Department. We recommend the following language be added:

A nursing home shall not admit new residents unless it is in compliance with the

staffing requirements in this section.

The Department may order a facility to cease admitting new residents if a facility does not meet the staffing requirements in this section or if it fails to provide documentation the Department has requested pursuant to subsection (h).

8. Subsection 72329.1(h) Protocol for evaluating compliance

This subsection gives the Department access to facility staffing documentation, but it fails to establish any method for using this documentation to evaluate facility compliance with minimum staffing requirements. Because the Department has advised us that its policy on this matter is out-of-date and its authority to update and apply a new policy is suspect, the Department should rectify this problem by establishing authority in this section to issue instructions to its personnel on how to make compliance determinations.

The Department must address this concern in order to fulfill its obligations under SB 1312 (Alquist, 2006) to determine nursing home compliance with California requirements. The Legislature's foremost concern in passing SB 1312 was to ensure that the Department enforced California's nursing home staffing requirements.

AB 1075 also requires the Department to determine compliance with its staffing requirements during inspections. Section 1276.65(g) of the Health and Safety Code states "the department shall inspect for compliance with this section during state and federal periodic inspections, including, but not limited to, those inspections required under Section 1422." Without question, the Legislature has directed the Department to determine compliance during inspections.

9. Subsection 72329.1(i) Posting staffing information

We generally support the posting requirements, but recommend the Department amend this subsection to conform it to more detailed federal requirements established at 42 CFR §483.30 for purposes of consistency. The subsection should match federal requirements that facilities post the nurse staffing information at the beginning of each shift, present the data in a clear and readable format, post the information in a prominent place readily accessible to residents and visitors, and give the public access to the records.

We strongly support the requirement that facilities designate the resident assignment by specifying each room and each bed to which each CNA and licensed nurse is assigned during his or her shift. However, the information will lack value if it is not posted by the beginning of each shift.

10. Subsection 72329.1(j) Waivers

As with other features of the regulations, we are very concerned that the Department is defeating the purpose of the staff to patient ratios through its total failure to establish any

criteria for issuing a waiver. The only condition it establishes is that a facility comply with the 3.2 nursing hppd requirement, a standard that preexisted AB 1075. Most nursing homes that do not already meeting the staffing ratios will seek a waiver, and residents will be no better off than before AB 1075 was enacted seven years ago.

AB 1075 requires the Department to develop a waiver procedure that addresses individual patient needs. See H&S Code Section 1276.65(c)(2). However, the regulation does not mention this requirement or establish any criteria for determining whether a requested waiver meets individual patient needs. Absent regulatory criteria, it is not likely the Department would be able to sustain any waiver request it rejects, if that were ever to occur.

The process for requesting a waiver is incredibly vague. It states: "The facility shall submit a written request for a waiver with substantiating information to the Department." It offers no explanation of what should be substantiated.

It also fails to require any notification to residents, families or the public about a waiver, or the basis for its issuance. A statute that calls for giving residents clear information about staffing levels and staffing assignments is being implemented in a fashion that excludes residents from any information about waivers of the statute's requirements.

We recommend this section be amended to require the Department to: (1) establish regulatory criteria for determining whether a requested waiver meets individual resident needs; (2) consult with the facility's resident council, family council, and the local ombudsman program before issuing a waiver to seek their views on the appropriateness of the waiver and the accuracy of the facility's representations; (3) not issue waivers to any facility that is not in full and consistent compliance with the 3.2 nursing hppd requirement; (4) not waive the licensed nurse component of the staffing ratio unless a facility agrees and documents that it will provide comparable licensed nurse staffing levels; (5) post detailed information about individual facility waivers on its consumer information site; (6) issue formal documents stating the terms and conditions of any waiver that must be posted in the facility; (7) evaluate compliance with waiver terms and conditions during each inspection; and (8) establish authority to issue fines and ban admissions to any facility that does not comply with the terms of its waiver.

Additionally, facilities should be required to give notice of waivers to all current residents and to incoming residents prior to admission, plus post information supplied by the Department about the waiver in prominent locations throughout the facility.

Thank you for considering these comments.

Sincerely,

Handwritten signature of Patricia L. McGinnis in cursive script.

Patricia L. McGinnis
Executive Director

Handwritten signature of Michael Connors in cursive script.

Michael Connors
Advocate