

No Standards: How Nursing Homes Attempted to Undermine California's Standard Admission Agreement and Diminish Residents' Rights

A SPECIAL REPORT BY:

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Executive Summary

California nursing homes are required to use a standard admission agreement (SAA) to set forth all the contractual terms of service with their residents. (California Health and Safety Code § 1599.61) The adoption of the SAA took twelve contentious years, due to concerns over the content highlighted by a facility-led lawsuit against the state's Department of Public Health (DPH). When the dust settled, California had a nursing home SAA that had been through two rounds of regulatory adoption procedures with extensive public comment and a lawsuit where all of the nursing home industry's objections were heard by a state Superior Court judge.

Despite twelve years' worth of input and commentary on the SAA, individual nursing homes were given the opportunity to seek modifications to their admission agreement forms if they could demonstrate unique circumstances. Over 300 nursing homes sought modifications, resulting in 4,660 total requests.

CANHR's in-depth review of each of the 4,660 modification requests demonstrates an industry-wide effort to undermine the SAA. Hundreds of facilities sought changes that had been specifically overruled by DPH or the court, recycling old, unsuccessful arguments. Hundreds of facilities sought changes to the SAA that would increase their already significant disparity in power over residents, proposing to eliminate residents' legal rights and limiting their ability to seek remedies for injuries. In the end, DPH was flooded with boilerplate requests coordinated by a handful of nursing home lawyers and consultants seeking to change the SAA to maximize revenue at the expense of resident rights.

Fortunately, only four percent of the requested modifications were approved by DPH and only a tiny fraction of those had anything to do with the relationship between facility and resident. Nonetheless, DPH surely used substantial resources to handle the thousands of requests it received. In addition, the costs paid by nursing homes in drafting and submitting their requests may have been reported to the state Medi-Cal program, meaning California taxpayers may have ultimately paid the entire bill for this attempt to exploit nursing home residents and their families.

A Brief History of the Standard Admission Agreement

Nursing homes have used their written contracts with residents, known as admission agreements, to their advantage for a long time. In 1996, Bet Tzedek Legal Services (Bet Tzedek) released a report entitled “If I Had Only Known.” The report summarized the review of dozens of nursing home admission agreements. The review found the vast majority of admission agreements had illegal provisions, including prohibited clauses and misstatements of the applicable laws.

In 1997, CANHR and Bet Tzedek sponsored Senate Bill 1061, legislation to require nursing homes to use a standardized admission agreement form, with a comprehensive resident bill of rights. There was no opposition to the bill. It was signed into law, giving the Department of Public Health (DPH) until January 1, 2000 to create the form.

On January 1, 2006, six years after its legislative deadline, DPH issued a standard admission agreement (SAA). Eight months later, a nursing home trade association, California Association of Health Facilities (CAHF), filed a lawsuit to stop the SAA. The case was called Parkside v. Shewry.¹ The judge dismissed some of CAHF’s complaints but accepted others and ordered DPH to re-draft the SAA.

One of CAHF’s concerns in the Parkside v. Shewry case involved “program flexibility.” Nursing homes wanted a process for altering the standard admission agreement to address the specific needs of individual facilities. The court ordered DPH to include a method for considering nursing home requests for altering the SAA, which it did when it adopted 22 California Code of Regulations § 72516(b):

(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. 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.

On September 19, 2011, DPH issued an All-Facilities Letter (“AFL”) to all nursing homes in California explaining the procedures for modifying the SAA. ([AFL 11-42](#)) The AFL required

¹ For a fairly comprehensive review of the state’s adoption of the SAA, including Parkside v. Shewry, go to <http://www.cdph.ca.gov/services/DPOPP/regs/Pages/DPH-05-022,StandardAdmissionAgreement.aspx>

facilities to submit a separate request for each SAA modification and to “identify some unique aspect of the facility’s operation that makes it unable to comply with an SAA provision and explain the specific need for the modification.” The facility could alternatively argue that “using the SAA without modification will create a new cause of action against the facility” (increase the chances the facility could get sued). Facilities were told they could submit their requests when the new SAA regulations became operative.

On April 6, 2012, the final SAA was, at long last, in place. By April 30, 2012, 4,660 separate requests to modify the SAA had been made to DPH by a total of 315 nursing homes.

CANHR’s Data Collection Methodology

On June 19, 2012, CANHR submitted a Public Records Act (PRA) request for copies of all requests by nursing homes to alter the SAA. On January 29, 2013, CANHR received over 13,000 pages in response to our PRA request. Our staff reviewed each of the requests, recording the specific provisions of the SAA for which changes were sought. When we received copies of DPH’s responses to the SAA modification requests, we matched the responses to the requests, noting how many modification requests were approved.

Overview

The review of SAA modification requests was revealing. Hundreds of nursing homes sought to modify the SAA. Each facility request included an average of fourteen proposed changes.

While the volume of requests was noteworthy, the similarity of the requests was striking. We saw the same requests repeated over and over, often word for word, from facilities that bore little relation to one another. Our analysis revealed that the vast majority of facilities had adopted a template for SAA modification requests. The requests had nothing to do with the individualized considerations that were meant to be the heart of “program flexibility.” Rather, DPH had been flooded with a bunch of copy-and-paste jobs that were the quite the opposite of individualized considerations.

Standard Admission Agreement Findings

1) Nursing Homes Use Boilerplate Language to Show Their “Unique Aspects.”

In our review of each of the 4,660 requests to modify the SAA, we discovered an exceptional level of coordination. The text of the requests from each facility were often identical, demonstrating that most requests were simple copies of templates that had been created by a couple of law offices or nursing home consultants. One facility inadvertently stated “we took this from the CAHF website.” The vast majority of requests can be traced to two boilerplates that included up to 37 requests for SAA modification.

The amazing similarity of the myriad SAA requests demonstrates an attempt to circumvent the spirit of program flexibility that gave rise to the modification opportunities in the first place.

Modification requests were supposed to be based on the “unique aspects” of a facility’s operation; instead, nursing homes copied and repeated generic requests that supposedly applied to hundreds of facilities. In other words, nursing homes were arguing against the standardization of admission agreements – in defiance of the spirit of the SAA – while using arguments that had been made and rejected in the SAA regulation adoption process and a subsequent lawsuit filed by the nursing home industry.

2) Nursing Homes Attempt to Use SAA Modifications to Erode Resident Rights.

Most of the nursing homes that requested SAA modifications unapologetically sought to curtail resident rights guaranteed by state and federal laws. One request made by at least 236 nursing homes was to delete an entire paragraph of the SAA regarding the facility’s liability for violating the law and the residents’ rights to file grievances and seek complaint assistance from DPH or the Long-Term Care Ombudsman. The facilities’ argument that the paragraph should be relegated to the appendix list of resident rights was wholly rejected by DPH – none of the 236 requests were granted.

An even more common SAA modification request (343 requests) asked to delete a reference to resident rights regarding room changes. This reference merely tells residents about their lawful right not to be moved to another room in the facility against their wishes unless they receive prior written notice. It also tells residents they have the right to refuse a room transfer if the reason is a change in payment status. Many of the requests misstated federal law and outright ignored state law, erroneously arguing that residents don’t in fact have a right to advance notice of a room change. DPH did not approve a single request to modify this portion of the SAA.

3) Arbitration Machinations.

Two-hundred fifty-three facilities requested their SAA be modified to make a mandatory arbitration agreement part of the admission agreement despite a clear state prohibition against it. (Health and Safety Code §1599.81, 22 California Code of Regulations §73518) Mandatory arbitration agreements bind residents or their heirs to give up their right to seek justice in a court of law for injuries in favor of an often-biased arbitration process to resolve disputes.² Nursing homes often pressure residents to bind themselves to arbitration in advance of an actual dispute because it reduces the chances they will be subject to a court order to comply with the law or have to compensate victims of poor care.

The reasoning supplied by many of the nursing homes in favor of illegally including arbitration agreements demonstrate their strong belief that arbitration benefits facilities and not consumers. Arbitration agreements enable facilities to “predict and implement reduced health care costs.” The savings, of course, come from reduced awards to residents. Arbitrators are known to rule against consumers and to pay out less compensation when consumers do prevail.

Many of the nursing homes that asked to include the arbitration agreement in the SAA included samples of the full agreement they hoped to include as part of their admission packet. The

² For more information about arbitration agreements in nursing homes, go to <http://canhr.org/arbitration/>

agreements often required residents to pay their own costs of arbitrating their dispute, even if they prevailed.

4) Nursing Homes Want to Require Non-Residents to Sign the Agreements.

Two-hundred and sixteen of the SAA modification requests erroneously sought to require residents' "responsible parties" to sign the SAA if the resident was unable to sign due to a cognitive disability.³ Ninety of the requests asked to add a statement that representatives can be held personally liable for the resident's nursing home bill if they commit fraud. The requests to bind third party non-residents to the agreement appeared designed as a tool to intimidate these third parties to pay up when the resident is unable to. Eighty-nine facilities requested to tell responsible parties that they can voluntarily pay for the resident's care, most likely in an effort to maximize the facility's revenue. Requiring third parties to pay for a resident's care is illegal under federal law. (42 Code of Federal Regulations § 483.12(d)(2))

5) Other Noteworthy Nursing Home Requests.

Many SAA modification requests included other noteworthy items:

- Three-hundred and sixty-eight requests referred to "unscrupulous residents" who may not pay for additional services if their care needs increase.
- One group of 11 requests sought to add a disclaimer attachment, telling DPH: "this language is necessary to inform the prospective resident or his/her responsible party that the Center is not additionally liable for physicians, absolute safety, personal property, activities, or temporary leave." The proposed waiver included a total release for lost or damaged property or injuries incurred during resident activities.
- There were 89 requests to require residents to obtain prior approval before putting anything on the nursing home's walls or rearranging furniture in the resident's room.
- One facility asked to modify the SAA to include three provisions that would violate current California law – the SAA trifecta. It first asked for an attachment to which third parties could guarantee payment on behalf of residents.⁴ To support its request, the facility stated:

This Facility operates under serious financial constraints, which constraints have recently been heightened by significant cuts in both MediCare and Medi-Cal reimbursement rates. Past experience has shown that the ability to look to a "Responsible Party" for payments that are owed by Residents can contribute greatly to the ability of the Facility to deliver the highest quality of care and living environment to its Residents.

³ Responsible parties are typically a resident's surrogate decision-maker.

⁴ Third party guarantees regarding payment are not enforceable in California (Podolsky v. First Healthcare Corp. (1996) 50 Cal. App. 4th 632).

The facility also requested a modification to tell residents that it may be required to become a “representative payee” for government benefits or pension payouts. 22 California Code of Regulations Section 72529(c) specifically prohibits nursing homes from operating as a resident’s “rep payee” because of the obvious conflicts of interest in giving a service provider for-hire control over the customer’s money.

The facility’s final illegal request was to change federal law regarding the justifications for a resident eviction. The facility sought to add interference with the quiet enjoyment of the other residents as a grounds for eviction, promising to rely on its “good faith determination” of a residents’ conduct before removing them from their homes.

DPH’s Response

To its credit, DPH dismissed nearly all of the SAA modification requests. Of the 4,660 requests, only 194, or barely 4%, were granted. Of the 194 approved modifications, 182 were about reducing the font size of the SAA attachments while the remaining 12 were regarding nursing homes with special populations (continuing care retirement communities, sub-acute facilities, and facilities specializing in behavioral health). While DPH protected the SAA, it probably spent hundreds of staff hours in processing and responding to requests.

Conclusion

Even a superficial review of the 4,660 requests to modify the SAA demonstrates a well-coordinated effort to undermine the purpose of using a standardized admission form in California nursing homes. Most of the facilities making modification requests sought changes designed to gain contractual advantages over residents or to assure the facilities’ bottom line by maximizing revenue or limiting costs and liability – despite the fact the SAA was specifically adopted to end the widespread deception and asymmetry of power between facility and resident during the resident admissions process. The SAA modification requests were all about preserving the facilities’ pre-existing business model, characterized by the ability to move and evict residents who have exhausted their Medicare (with its higher reimbursement rates) eligibility, the avoidance of lawsuits to compensate victims of poor care, and to increase the likelihood that families will pay for residents who cannot pay for themselves.

One other concern about the SAA modification requests is the significant cost they must have imposed on DPH and, possibly, the state’s taxpayers. Handling 4,660 requests - even if many of them were boilerplate - must have taken DPH a considerable amount of time to organize and address. On the other side, the money facilities spent in preparing their requests or having the requests prepared on their behalf may have been reported to the state Medi-Cal nursing home reimbursement program, meaning the state’s taxpayers paid the entire bill for nursing homes’ attempts to undermine state and federal law meant to protect residents.

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