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Re: Need to Immediately Reinstate Nurse Aide Training Standards, and Require Compliance By the "Temporary Nurse Aides" Who Have Worked Under the Emergency Waiver

Dear Dr. Fleisher and Mr. Shulman:

During the COVID-19 public health emergency, the Centers for Medicare & Medicaid Services (CMS) has waived the nurse aide training and competency evaluation requirements, with the exception of requirements that nurse aides be competent to provide needed services. *See* 42 C.F.R. § 483.35(c), (d)(1)(i) (unwaived requirements, requiring nurse aide competence). March 28, 2021 marks the one-year anniversary of the waiver.

At the time the waiver was issued, CMS and nursing facilities were first confronting the unknown dangers posed by COVID-19. CMS waived the longstanding regulatory standards for nurse aide training due to concerns about a potential nurse aide shortage and the need to hire additional direct care staff as quickly as possible.

Now, nearly one year later, it is time to reinstate the standards. Because nurse aides provide the bulk of hands-on nursing facility care, nurse aide training is vital to ensure that residents receive the level of care that they deserve. Continuing to allow minimally trained workers to provide care puts residents at continued serious risk from COVID-19 and from medical and psychosocial harm both related and unrelated to the pandemic. Moreover, it allows waivers enacted during the emergency to become the new, dangerous normal.

We make four recommendations:

1. CMS should reinstate the nurse aide training and competency evaluation standards as soon as possible, and no later than the end of March 2021.
2. CMS should require that temporary nurse aides (those employed under the waiver) complete the training and competency evaluation set forth in federal regulations, since CMS has no authority to extend a waiver beyond a declared emergency period.
3. To ease the transition from temporary nurse aide (TNA) to certified nurse aide (CNA), CMS and states should enable and encourage TNAs to begin the certification process as soon as possible.
4. CMS should reinstate the training requirements for feeding assistants as soon as possible, and no later than the end of March 2021.

1. CMS Should Reinstate CNA Training and Competency Evaluation Standards as Soon as Possible, and No Later Than the End of March 2021.

In nursing facilities, nurse aides provide most of the direct care. As a result, the quality of that care depends heavily upon nurse aides receiving high quality training.

Under federal regulations, nurse aide training and competency evaluation programs must be approved by the state. Training is performed by or under the general supervision of a registered nurse with at least two years of experience. Instructors must be educated in teaching adults, or have experience in teaching adults or supervising nurse aides.[1]

Nurse aides must receive 75 hours of training by no later than four months after they begin work, including at least 16 hours of hands-on training supervised by a nurse.[2] Of the 75 total hours, at least 16 hours must be provided before the aide has any direct contract with residents; this initial training must include communication and interpersonal skills, infection control, safety/emergency procedures (including the Heimlich maneuver), promoting residents' independence, and respecting residents' rights. Subsequent training (the remaining 59 or more hours) must include basic nursing skills, personal care skills, mental health and social service needs, care of cognitively impaired residents, basic restorative services, and residents' rights. For these topics, the regulations specify that the training must address 36 separate sub-topics.[3]

This level of training is vital, although widely regarded as insufficient to meet all resident needs. The HHS Office of Inspector General concluded nearly 20 years ago that the federal standards were inadequate to address the increasing needs of nursing facility residents.[4] In accord, in 2008 the Institute of Medicine recommended that mandatory minimum training be increased to 120

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[1] 42 C.F.R. § 483.152(a).
[2] 42 U.S.C. §§ 1395i-3(b)(5)(A)(i)(I), 1396r(b)(5)(A)(i)(I); 42 C.F.R. §§ 483.35(d)(1)(ii)(A), 483.152(a).
[3] 42 C.F.R. § 483.152(a), (b).
[4] HHS Office of Inspector General, Nurse Aide Training, OEI-05-01-00030 (Nov. 2002).

hours.[5] Indeed, some states require significantly more training than is required by federal law: for example, California requires that nurse aides complete 160 hours of training.[6]

In stark contrast to longstanding federal requirements, under the current waiver, a person can work as a nurse aide without any specified training. CMS requires only that the person be competent to provide nursing and nursing-related services and (in a related requirement) be able to demonstrate competence in skills and techniques necessary to care for residents' needs.[7] As a practical matter, many persons have begun working as nurse aides after receiving no more training than the eight-hour on-line course created by the American Health Care Association.[8] Some may have received even less training.

Furthermore, the current waiver also has eliminated federal law's competency evaluation standards, instead permitting each facility to make an ad hoc decision as to whether an aide is competent. Under the regulations, by contrast, nurse aide certification requires satisfactory performance on a competency evaluation and a skills demonstration. The competency evaluation must be performed by either the state directly, or by a state-approved entity (that must not be a nursing facility).[9]

Thus, particularly given the chaos of the past year, temporary nurse aides (TNAs) likely possess little of the knowledge and skills required of certified nurse aides. On-the-job training is tenuous in the best of circumstances, and the pandemic presents the worst of circumstances. Notably, CMS evidently has no data regarding the use of TNAs, since CMS is allowing facilities to report TNAs as CNAs in their reporting to the public of staffing levels.[10] In addition to undermining CMS's ability to properly track and evaluate the use of TNAs, this policy results in residents and families being kept in the dark – now for an extended period of time – on the qualifications of those who provide essential care.

For these reasons, we recommend that CMS reinstate the nurse aide training and competency evaluation standards as soon as possible. Prior to the COVID-19 emergency, it would have been unthinkable and illegal for CMS or any state to certify a nurse aide based on completion of (for example) an eight-hour on-line course. Particularly as vaccinations reduce the level of risk, direct-care employees should be held to the training and competency evaluation standards that support quality of care.

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[5] Institute of Medicine Committee on the Future Health Care Workforce for Older Americans, Retooling for an Aging America: Building the Health Care Workforce, ch. 5 (The Direct-Care Workforce), Recommendation 5-1 (2008).
[6] Cal. Health & Safety Code § 1337.1(b).
[7] CMS, COVID-19 Emergency Declaration Blanket Waivers for Health Care Providers, Training and Certification of Nurse Aides.
[8] AHCA, Temporary Nurse Aide Course.
[9] 42 C.F.R. § 483.154.
[10] *See* 42 C.F.R. § 483.70(q) (submission of staffing information through payroll based journal).

2. CMS Must Require Temporary Nurse Aides to Complete the Training and Competency Evaluation Requirements.

As outlined above, federal regulations set detailed requirements for nurse aide training and competency evaluation programs. Notably, these regulations are built upon the detailed statutory requirements of the Nursing Home Reform Law and cannot be changed without undergoing a new rulemaking process. Under the Reform Law, states must approve individual training and competency evaluation programs,[11] which must include at least 75 hours of training within the first four months of employment.[12] Facilities are prohibited from operating a training program if they operate under a nurse staffing waiver, have an extended or partial extended survey, or have been assessed a civil money penalty of at least $5,000 (since increased to reflect the cost of living).[13] A state can waive such a prohibition only if there is no other training program "within a reasonable distance from the facility" and certain other conditions are met.[14] In addition, CMS can waive the prohibition if the money penalty "was not related to the quality of care provided to residents."[15]

In short, the training and competency evaluation standards are detailed and clear. And once the emergency period has ended, the Reform Law and the federal regulations will require that nurse aides meet certification standards. Otherwise, if those standards are not followed, the pandemic will lead to the doubly perverse result of lowering facility quality of care for months and years to come.

Emergency authority only gives CMS authority to alter legal standards through administrative guidance *during the emergency*. After the emergency, that authority for good reason evaporates, and CMS can alter regulatory standards only by formally amending the relevant regulations.

For these reasons, neither CMS nor the states have authority to "grandfather" TNAs by reclassifying them as CNAs. Such grandfathering would be contrary to law, not to mention short-sighted public policy. CMS should be doing what it can to enhance, rather than diminish, the quality of care provided to nursing facility residents. Accordingly, at the end of the emergency period, TNAs who are not complying with required nurse aide training and competency evaluation standards should no longer be recognized as CNAs in the Payroll Based Journal and on Care Compare. They can no longer provide hands-on care in a nursing facility.

3. CMS and States Should Enable and Encourage TNAs to Begin the Certification Process as Soon as Possible.

As discussed above, federal law requires nurse aides to complete certification requirements within four months after beginning employment. Because that requirement has been waived

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[11] 42 U.S.C. §§ 1395i-3(e)(1), 1396r(e)(1).
[12] 42 U.S.C. §§ 1395i-3(b)(5)(A)(i)(I), (f)(2)(A)(i), 1396r(b)(5)(A)(i)(I), (f)(2)(A)(i).
[13] 42 U.S.C. §§ 1395i-3(f)(2)(B)(i)-(iii), 1396r(f)(2)(B)(i)-(iii).
[14] 42 U.S.C. §§ 1395i-3(f)(2)(C), 1396r(f)(2)(C).
[15] 42 U.S.C. §§ 1395i-3(f)(2)(D), 1396r(f)(2)(D).

during the public health emergency, CMS and states should require that aides meet requirements within four months after the end of the emergency period. CMS should inform states, facilities and aides of that expectation as soon as possible, so that all parties can take the necessary steps to make the necessary training available.

4. CMS Should Reinstate the Training Requirements for Feeding Assistants as Soon as Possible, and No Later Than the End of March 2021.

Federal regulations require that feeding assistants complete eight hours of training in a state-approved training course,[16] but that required training has been reduced to one hour during the COVID-19 emergency period.[17] Our recommendations above, relating to nurse aides, apply equally to feeding assistants. The standards should be reinstated as soon as possible, so that feeding assistants will be in compliance when the emergency period ends. After the emergency period, CMS and states will have no discretion to alter the regulatory requirements, absent formal amendment of the relevant regulations.

Thank you to you and your CMS colleagues for your hard work during the pandemic. We would welcome the opportunity to discuss these issues further. As discussed above, appropriately trained nurse aides are essential in providing nursing facility residents with the high quality care that they deserve.

Sincerely,

Altarum
California Advocates for Nursing Home Reform
Center for Medicare Advocacy
Justice in Aging
Long Term Care Community Coalition
Michigan Elder Justice Initiative
National Association of Health Care Assistants
National Consumer Voice for Quality Long-Term Care

[16] 42 C.F.R. §§ 483.60(h), 483.160
[17] CMS, COVID-19 Emergency Declaration Blanket Waivers for Health Care Providers, Paid Feeding Assistants.