Recommendations for the Master Plan on Aging

Long-Term Services and Supports Subcommittee Meeting #6

submitted by

California Advocates for Nursing Home Reform

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I. Nursing Homes

1. Require Adequate Staffing to Meet the Needs of All Residents

In 2017, the California legislature increased the minimum hours of staffing in nursing homes to 3.5 per resident per day (hprd), significantly below the 4.1 hours per resident per day that CANHR has long advocated for. In addition, state law now allows facilities to seek waivers of the minimum staffing requirements, meaning the residents of those facilities receive fewer hours of care than the MINIMUM required by state law. The 4.1 hprd recommendation is based on a 2001 Congressional report. Since that time, the average acuity (resident care needs) has increased while staffing to address resident needs has not kept up. As a result, the current state minimum is failing the average nursing home resident and complaints against nursing homes are at an all-time high. Adequate staffing is the most critical variable in the delivery of nursing home care; without it, residents suffer severe neglect.

Recommendation: Increase the state minimum hprd to 4.1, including at least 0.75 registered nurse staffing hours, and eliminate the dangerous waivers.

2. Reform Licensing System to Prevent Squatting by Bad Operators

Despite a law that says nobody "shall operate, establish, manage, conduct, or maintain a health facility in this state, without first obtaining a license," (Health and Safety Code Sec. 1253) organizations routinely operate facilities without a license. New operators, usually those with horrible track records for running nursing homes, file their applications for a license after, if at all, they have already taken control of a facility. DPH then often takes years to act on those applications. Cunning operators have learned to exploit the slow approval process to gain control of facilities without approval.

No state permits people to operate a vehicle without a license, yet California inexplicably permits bad operators to undertake skilled nursing care for hundreds or thousands of frail and disabled residents without a license.

Recommendation: Require operators to obtain state approval before they can take over a nursing home. Withhold state funds from any facility that is being operated by an unapproved person or entity.

3. Reform the Current Medi-Cal Reimbursement System

California pours more than $5 billion in taxpayer money into nursing homes every year using a Medi-Cal reimbursement system that enriches operators at the expense of residents. The system reimburses nursing home costs and ensures profits but does not meaningfully reward quality of care. While nursing homes receive guaranteed annual rate increases at the taxpayers' expense, complaints against nursing homes are at record levels. The reimbursement system is supposed to ensure access for Medi-Cal beneficiaries but they continue to face significant discrimination and exclusion.

Recommendation: Tie additional spending increases to minimum staffing levels so that our dollars are connected to care. For more detailed recommendations, please see the attached report, Bad Deal, Bad Care.

4. Limit Related Party Transactions

A recent report from the State Auditor's Office (#2017-109) examined the extent to which nursing homes use "related parties," organizations run by a mutual owner, to extract unreported profit away from resident care. Related parties have been notoriously misused by some of the worst nursing home chains in the state.

Recommendation: Compel nursing home chains to produce consolidated financial statements as part of their annual cost reporting.

5. Include Chain Information on Calhealthfind Website

DPH knows which nursing homes are part of corporate chains but it does not connect nursing homes by chain for consumers looking at facility information on calhealthfind. Residents, prospective residents, and their representatives would benefit tremendously by knowing which facilities are attached to chains so they can assess the entire chain when making a decision about moving into or remaining at a particular facility. The largest for-profit chains generally have the worst staffing and the worst quality compared with other ownership groups. Residents and their representatives deserve to know which chain a facility is connected to.

Recommendation: Add chain information to the facility profiles on calhealthfind.

6. Prohibit Mandatory Pre-Dispute Arbitration Agreements

In 2016, the Centers for Medicare and Medicaid Services (CMS) banned the use of predispute arbitration agreements in nursing homes. CMS cited to the patent unfairness of having frail and infirm residents waive important constitutional rights as part of a confusing and extensive admission process and added that there is "ample basis" to demonstrate a connection between pre-dispute arbitration and harm to "the health and safety of LTC facility residents." (81 Federal Register 68793).

In 2019, the Trump administration repealed the ban, permitting nursing homes to use predispute arbitration agreements to lock residents into a dispute resolution forum that nursing homes prefer. Any state legislative or regulatory effort to limit the use of arbitration agreements may have federal preemption problems because of the Federal Arbitration Act. However, California can revise its Medi-Cal provider agreements to require nursing homes to forego pre-dispute arbitration agreements as a condition of receiving state Medi-Cal money.

Recommendation: Amend the Medi-Cal provider agreements to prohibit the use of pre-dispute arbitration agreements.

II. Residential Care Facilities and DSS/Community Care Licensing

California's current "one size fits all" approach to licensing and regulating RCFEs is clearly inadequate, given the growing consumer demand for assisted living and the increased acuity levels of RCFE residents. An underfunded inspection system, inadequate staffing and "paper tiger" resident rights provisions that provide no enforcement power to residents - all contribute to a system that is unsafe for RCFE consumers, while leaving RCFEs essentially unregulated and unaccountable for their actions. California must fully fund DSS/Community Care Licensing to meet the demands for community-based care and update its model of care to ensure that the health and safety of RCFE residents takes priority. eliminate the dangerous waivers.

1. Levels of Care: Fund and Implement Tiered Levels of Care

In 1985, the California Legislature passed the California Residential Care Facilities for the Elderly Act, which established a separate category for Residential Care Facilities for the Elderly (RCFE) facilities licensed by the Department of Social Services (DSS). The legislative intent of the RCFE Act of 1985 was to establish three levels of care within the RCFE regulatory structure to address the fluctuating health and care needs of older residents. Unfortunately, this section of the act is subject to Budget Act appropriations and has never been implemented. Thus, for the past 35 years, CCL (due to legislative inaction) has maintained a "one size fits all" approach to residential care for elders, stretching the regulations to accommodate an ever-growing acuity level among residents, and allowing non-medical RCFEs – regardless of size – to accept and retain residents with acute medical needs.

Recommendation: In 1985, the California Legislature recognized a need for a tiered level of care system that would represent the range of care needs of elderly residents including basic care and supervision, non-medical personal care, and health assistance. (Health & Safety Code §1569.70) It is now time to fund and implement this tiered level of care system.

2. Adequately Fund DSS/Community Care Licensing – Adult and Senior Care

The Department of Social Services' (DSS) Community Care Licensing Division is responsible for regulatory oversight of over 70,000 different programs and facilities statewide, 7,240+ of which are RCFEs serving 155,700+ residents. Although DSS/CCL's Adult and Senior Care Unit is clearly dedicated to its mission of consumer protections, over the years, the DSS/CCL budget was cut repeatedly and never fully funded. With annual inspections, an increase in licensee applications and understaffed Centralized Applications and Policy Units, the Department has struggled to meet its mission of serving consumers and ensuring quality care.

Recommendation: Provide additional funding to the DSS Adult and Senior Care Unit via an increase in licensee fees and general funds. Residents deserve a fully funded and comprehensive regulatory oversight system to ensure compliance with the rules designed to protect them, and DSS deserves to have the funding needed to do the job it is clearly eager to do.

3. Remedies for RCFE Residents

Residents' rights are frequently violated in RCFEs and the victims have to rely on uncertain DSS investigations to receive any resolution. Nursing home residents, by contrast, have a private right of action to enforce their rights without intervention by state regulatory agencies. This disparity means that RCFEs are often unaccountable to residents for poor or unsafe care or violations of their rights. One way to increase enforcement without requiring any additional expenditure of state resources is to give RCFE residents a private right of action to remedy violations of care standards and resident rights. From an enforcement perspective, residents, family and friends are best suited to monitor care and pursue appropriate remedies.

Recommendation: Establish a private right of action that includes: the ability to seek a court order to stop illegal RCFE activities, compensation to the resident for each violation of his or her rights, and a "private attorney general" component allowing any member of the public to enforce RCFE standards that protect resident health or safety.

III. Home & Community Based Services

California should prioritize Home and Community-Based Services (HCBS), which are Medi-Cal programs that offer long-term services in the community as an alternative to nursing homes. Consumers overwhelmingly prefer to age in place and access care in the community, and HCBS programs are administered at a fraction of the cost of institutional nursing home care. Yet, California still pours roughly $5 billion Medi-Cal dollars annually into nursing homes, while offering only a limited number of HCBS programs with strict enrollment caps, lengthy waitlists, and confusing eligibility criteria.

RECOMMENDATIONS:

1. Create a Single Point of Entry for HCBS Applications

The Department of Health Care Services (DHCS) administers more than one dozen HCBS programs, each with distinct eligibility criteria and a unique application process. DHCS should create a single point of entry for its HCBS programs through a universal assessment tool and application, reducing administrative inefficiencies.

2. Strengthen the Assisted Living Waiver

The Assisted Living Waiver (ALW) is a program administered by DHCS, which offers Medi-Cal funding for assisted living care. The ALW is critical for individuals who require out-of-home placement, but who understandably prefer to receive services outside of nursing homes. Apart from the ALW, most HCBS programs require the participant to live at home, which is not feasible for many.

While the ALW has been invaluable to thousands of Californians, the program has severe limitations: it is limited to 15 counties, and has an enrollment cap of 5,744, with a current waitlist in the thousands. Low provider rates do little to incentivize participation by facilities.

California must increase the ALW's enrollment, expand the program regionally to serve all 58 counties, and increase provider rates to reflect recent statewide minimum wage increases. In the long term, California should explore options to fund assisted living outside of the waiver model.

3. Make Spousal Impoverishment Protections for HCBS Permanent

To encourage older adults to age in place, California's Medi-Cal eligibility rules must incentivize community-based care. The "spousal impoverishment protections" are Medi-Cal eligibility rules that permit certain married individuals to qualify for Medi-Cal, while allowing the spouse to retain a modest amount of income and resources. While spousal impoverishment protections apply to Medi-Cal beneficiaries in nursing homes, the federal application of these protections to home and community-based service programs sunset on December 31, 2019. Rather than revert to a system that incentivizes nursing home care, California should make the spousal impoverishment protections for home and community-based services permanent.

IV. Elder and Dependent Adult Abuse

1. Assist the Private Bar to Do the Enforcement the State Won't Do

While cases of elder abuse or neglect with large jury awards or sensational facts occasionally make the headlines, the yeoman work of trial lawyers is quietly one of the most important components of safe aging. In long-term care, abuse/neglect attorneys routinely secure judgments that stop abuse and neglect, enforce resident rights, compensate victims, and penalize wrongdoers. They do this despite significant barriers to justice, from the high burden of proof required in civil elder abuse cases to the lack of a meaningful private right of action in rights violation cases. Attorneys often secure injunctive relief orders, which compel care providers to comply with the law but are stayed for years when defendants file frivolous appeals.

Recommendation: Reduce the burden of proof in civil elder abuse and neglect cases from clear and convincing evidence to the lower preponderance of the evidence standard. Create statutory private rights of action for long term care facility residents that includes inflation-indexed statutory damages. End the automatic stay of injunctive relief on appeal.

2. Enable Victims of Elder Financial Abuse to Better Seek Justice

California's senior population of four million is expected to double to eight million over the next two decades. Every year, hundreds of thousands of seniors are being victimized by financial abusers. The loses to the individuals can range from a few hundred dollars to thousands, and even millions. Financial elder abuse also puts a strain on the family members who have to use their assets for their parent or loved one's economic survival. Tragically, the instance of death goes up three-fold for those who are financially abused.

More resources and education are needed to combat elder financial abuse. Too often, victims are told by law enforcement that their matter is only "a civil case," when, in fact, it is also a criminal case that needs to be prosecuted. Because of the difficulty in representing elders who may be reluctant or incapable of aggressively pursuing a civil case, and the lack of clarity in some of the elder abuse statutes, few civil litigators are willing to pursue financial abuse cases.

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Penal Code section 368 prohibits situations involving "theft, embezzlement, forgery, fraud, or identity theft." With the anticipated growth in the vulnerable population, the California Penal Code should be amended to provide for situations where a criminal defendant uses a relationship and power to gain control over the decision making of an elder and uses that exploitation to obtain property from the vulnerable elder through deception, persuasion, intimidation, threats, isolation, fraudulent affection or otherwise inducing an elder to act in a manner detrimental to their own interests.

In cases of civil elder financial abuse, there is currently confusion as to what constitutes assisting a perpetrator. The law needs to be clarified to specify that a person will be deemed an assistor of financial elder abuse if that person knows or should know that their conduct is likely to be harmful - which is the standard used for the person who does the actual taking.

RECOMMENDATIONS:

(1) Amend Welfare and Institutions Code §15600 to include language declaring that elders and dependent adults have a civil right to be free of the abuse which EADACPA prohibits and that "abuse of an elder or dependent adult" as defined in WIC §15610.07 constitutes a violation of the victim's civil rights.

(2) Amend Welfare and Institution Code 15610.30a to clarify that "assisting" in financial abuse applies to those who know or should know that their conduct is likely to be harmful.

(3) Amend Penal Code § 368 to include "Undue Influence."

(4) Provide funding to the Attorney General's Office to develop a comprehensive plan to combat financial abuse and other financial exploitation of older adults and adults with disabilities.