

BEFORE THE DEPARTMENT OF INSPECTIONS AND APPEALS

Petition by the Iowa Health Care Association:

for the waiver of 481 I.A.C. § 58.11(1)(i); 481 I.A.C. § 58.11(1)(k) and 481 § 58.21(6)(e):

relating to temporary suspension of certified nurses' aide training requirements.

PETITION FOR WAIVER

Include the following information in the petition for waiver where applicable and known:

1. Provide the petitioner's (the person that is asking for the waiver or variance) name, address and telephone number.

RESPONSE: Iowa Health Care Association, 1775 90th St., West Des Moines, IA 50266-1563 (515) 978-2204. The Iowa Health Care Association is a not-for-profit trade association that represents approximately 360 licensed nursing facilities, residential care facilities, and intermediate care facilities caring for persons with intellectual disabilities and mental illness.

2. Describe and cite the specific rule from which a waiver or variance is requested.

RESPONSE: 481 I.A.C. § 58.11(1)(i); 481 I.A.C. § 58.11(1)(k); 481 § 58.21(6)(e). Petitioner is also seeking an Exception to Policy from the Iowa Department of Human Services relating to the following rules: 481 I.A.C. § 81.13(19)(e)(2)(2); 481 I.A.C. §§ 81.16(5)(b)(2)(3) and (5)(c)(5)(2); and 481 I.A.C. § 81.16(3).

3. Describe the specific waiver or variance requested, include the exact scope and time period that the waiver or variance will extend.

RESPONSE: Following the COVID-19 outbreak and the declaration of a national public health emergency by the U.S. Department of Health and Human Services, in March 2020 Governor Kim Reynolds issued the first of several Proclamations of Disaster Emergency, using her executive authority to temporarily suspend the statutory and regulatory provisions of laws and rules, finding that strict compliance would prevent, hinder, or delay necessary action in coping with the disaster.

At the same time, the Department of Health and Human Services issued blanket federal waivers, including a waiver of the requirements at 42 CFR § 483.35(d) which require that a SNF and NF may not employ anyone for longer than four months unless they met the training and certification requirements under § 483.35(d), acknowledging the

potential staffing shortages seen with the COVID-19 pandemic. These waivers allowed nursing facilities to hire temporary nurses' aides and waive the 75 hour training requirement.

Iowa's prior and current Proclamations of Disaster Emergency provide that Iowa has temporarily suspended the regulatory provisions of any statute or administrative rule that impedes the implementation of a federal waiver issued by the Secretary of the Department of Health and Human Services and Centers for Medicare and Medicaid Services pursuant to section 1135 of the Social Security Act. The Governor has indicated that this Proclamation is not expected to be extended beyond August 22, 2021. This will result in the loss of the current arrangement that allows for the use of temporary nurses' aides who had undergone training through a Department approved course for nurses' aides.

Petitioner, on behalf of its members and other licensed health care facilities in Iowa seeks a temporary waiver of the application of the above-described rules to provide relief to certified nurse aide training and competency evaluations through the continuation of the suspension of the rules that existed pursuant to Proclamations of Disaster Emergency that are set to expire on August 22, 2021.

Petitioner seeks to have the waivers for the identified rules issued no later than August 22, 2021 and remain in place until the federal waivers relating to certified nurses' aide training are extinguished, which is likely not to occur until sometime in 2022. The issuance of the waivers will allow facilities to continue to utilize the current CMS waivers related to certified nurse aides. On the date the requested waiver expires, affected providers would be granted four months to have their nurses' aides become certified and placed on the direct care workforce registry.

4. Explain the important facts that the petitioner believes justify the waiver or variance. Include in your explanation

- (a) why application of the rule would pose an undue hardship to the petitioner;

RESPONSE:

Even prior to the global pandemic, long term care providers had been working through a workforce problem, relating to the supply of certified nurses' aides. When the pandemic surged in March 2020, community college classes offering certified nursing aide classes were cancelled and many existing personnel resigned their positions, creating a staffing crisis.

The waivers issued by HHS and CMS as well as the Proclamations of Disaster Emergency issued in Iowa relating to waiving certain provisions relating to certified nurses' aide training. Specifically, the waivers provided for the allowance of

Temporary Nurses' Aides (TNA) and granting authority to train the TNAs through an eight-hour course for non-certified employees/ The waivers also required Registered Nurses in the building perform competency checks on any tasks that the TNA would be assigned. To date, Iowa has had 2,103 individuals utilize this program, which has had a significant impact in combating the workforce crisis during this public health emergency and removal of this program would cause undue hardship to long term care providers, lowering the numbers of nursing employees in Iowa's nursing facilities. CMS has acknowledged this hardship by continuing the implementation of the existing blanket waivers.

(b) why granting the waiver or variance would not prejudice the substantial legal rights of any person;

RESPONSE: Since long term care providers are still battling COVID-19 and variants are becoming more prominent across the country, losing the skills acquired by the Temporary Nurse Aide to meet workforce demands would hinder provider's ability to continue to deliver cares on the front lines. Petitioner does not feel that continuing the TNA program prejudices any individual served by the TNA as all their cares have met competency requirements as approved by a registered nurse. Nursing facility resident care has improved based on the addition of over 2,000 caregivers who would not have been available without the existing federal waivers and Proclamations.

(c) state whether the provisions of a rule subject to this petition are specifically mandated by statute or another provision of law; and

RESPONSE: The rules subject to this Petition are not specifically mandated by Iowa statute, but for Medicare/Medicaid certified nursing facilities, federal certification guidelines are applicable, but as noted above, these federal provisions are currently subject to the blanket waiver.

(d) state whether public health, safety and welfare will be affected if the requested waiver or variance is granted.

RESPONSE: Granting the waivers which would allow for the continuing use of Temporary Nurses' Aides would not violate the legal rights of any individuals being served. Facilities have been operating with the use of Temporary Nurse Aides for over sixteen months since the beginning of the public health emergency. Providers of long-term care services and supports have maintained the high quality of care provided due in part to the ability of TNAs to continue meeting resident needs and nurse oversight of the temporary nurses' aides.

5. Provide history of prior contacts between the department and the petitioner relating to the regulated activity, license, audit, investigation, inspection or representation that would be affected by the waiver or variance. In that history, include a description of each affected

regulated activity, license, appeal, hearing, audit, investigation, inspection, representation or other assigned function of the department, any notices of violation, contested case hearings, or investigative reports relating to the regulated activity, license, appeal, hearing, audit, investigation, inspection, representation or other assigned function of the department within the last five years.

RESPONSE: As a trade association representing licensed or certified health care facilities and other long term care providers, Iowa Health Care Association has routine contact with the representatives of the Iowa Department of Inspections and Appeals in order to assist its members in maintaining compliance with applicable state and federal regulations. Those contacts include making written comments to new rules proposed by the Department as well as making oral comments before legislative rules committees. The Iowa Health Care Association has not been a party to any appeal, administrative hearing, or other contested case proceeding involving the Department in the past five years.

6. Provide information known to the petitioner regarding the department's treatment of similar cases.

RESPONSE: To Petitioner's knowledge there are no prior examples relating to the Department's treatment of similar cases or requests for waiver.

7. Provide the name, address and telephone number of any public agency or political subdivision which also regulates the activity in question, or which might be affected by the grant of a waiver or variance.

RESPONSE: Iowa Department of Human Services, Department of Human Services, 1305 E Walnut Street, 5th Floor, Des Moines, IA 50319 1-800-972-2017

8. Provide the name, address and telephone number of any person or entity that would be adversely affected or disadvantaged by the grant of the waiver or variance.

RESPONSE: Community Colleges in Iowa that offer nurse aide training courses may see a delay in prospective students returning to classes or applying for testing in order to be placed on the direct care workforce registry.

9. Provide signed releases of information authorizing persons with knowledge regarding the request to furnish the department with information relevant to the waiver or variance.

RESPONSE: Will provide upon request.

I hereby attest to the accuracy and truthfulness of the above information.

IOWA HEALTH CARE ASSOCIATION

A handwritten signature in black ink, appearing to read "Brent Willett", written over a horizontal line.

Brent Willett, President and CEO

Date: 08/03/20



KIM REYNOLDS, GOVERNOR
ADAM GREGG, LT. GOVERNOR

LARRY JOHNSON, JR., DIRECTOR

August 16, 2021

Brent Willet,
Iowa Health Care Association
Via email to: Brent@iowahealthcare.org

Re: Petition for Waiver of 481 I.A.C. r. 58.11(1)(i); 58.11(1)(k); 58.21(6)(e)

Dear Mr. Willet:

The Department is in receipt of your Petition for Waiver of 481 Iowa Administrative Code rules 58.11(1)(i), 58.11(1)(k), and 58.21(6)(e) filed on August 3, 2021. Those rules state:

481—58.11(1)“j”:

Those persons employed as nurse’s aides, orderlies, or attendants in a nursing facility who have not completed the state-approved 75-hour nurse’s aide program shall be required to participate in a structured on-the-job training program of 20 hours’ duration to be conducted prior to any resident contact, except that contact required by the training program. This educational program shall be in addition to facility orientation. Each individual shall demonstrate competencies covered by the curriculum. This shall be observed and documented by an R.N. and maintained in the personnel file. No aide shall work independently until this is accomplished, nor shall the aide’s hours count toward meeting the minimum hours of nursing care required by the department. The curriculum shall be approved by the department. An aide who has completed the state-approved 75-hour course may model skills to be learned.

Further, such personnel shall be enrolled in a state-approved 75-hour nurse’s aide program to be completed no later than six months from the date of employment. If the state-approved 75-hour program has been completed prior to employment, the on-the-job training program requirement is waived. The 20-hour course is in addition to the 75-hour course and is not a substitute in whole or in part. The 75-hour program, approved by the department, may be provided by the facility or academic institution.

Newly hired aides who have completed the state-approved 75-hour course shall demonstrate competencies taught in the 20-hour course upon hire. This shall be observed and documented by an R.N. and maintained in the personnel file. All personnel administering medications must have completed the state-approved training program in medication administration. (II)

481—58.11(1)“k”:

Nurse aides, orderlies or attendants in a nursing facility who have received training other than the Iowa state-approved program, must pass a challenge examination approved by the department of inspections and appeals. Evidence of prior formal training in a nursing aide, orderly, attendant, or other comparable program must be presented to the facility or institution conducting the challenge examination before the examination is given. The approved facility or institution, following department of inspections and appeals guidelines, shall make the determination of who is qualified to take the examination. Documentation of the challenge examinations administered shall be maintained.

481—58.21(6)“e”:

A person who has written documentation of certification as a medication aide in another state may become a medication aide in Iowa by successfully completing a department-approved nurse aide competency examination and a medication aide challenge examination.

The Iowa Health Care Association (“IHCA”) is requesting, on behalf of its members and licensed health care facilities in Iowa, a temporary waiver of the above-referenced rules as a continuation of regulatory suspensions that have existed pursuant to the State’s Proclamations of Disaster Emergency. The most recent Proclamation, issued on July 23, 2021 and set to expire on August 22, 2021, allows health care facilities to continue to utilize federal waivers issued by the Centers for Medicare and Medicaid Services (“CMS”) related to certified nurse aides. IHCA states that since health care facilities are still battling COVID-19 and variants are becoming more prominent across the country, losing the skills acquired by caregivers who have utilized the waivers would hinder facilities’ ability to continue to deliver care on the front lines. Continuing the requested waivers would not prejudice the substantial legal rights of any person as the care provided by this segment of the workforce has met competency requirements as approved by a registered nurse. IHCA states nursing facility resident care has improved based on the addition of over 2,000 caregivers who would not have been available without the existing federal waivers and Proclamations.

The current Proclamation suspends “the regulatory provisions of any statute or administrative rule that impedes the implementation of a federal waiver issued by the Secretary of the Department of Health and Human Services and Centers for Medicare and Medicaid Services pursuant to section 1135 of the Social Security Act. Iowans should not expect this suspension to be extended beyond August 22, 2021.”

The Secretary of the Department of Health and Human Services and Centers for Medicare and Medicaid Services pursuant to section 1135 of the Social Security Act have issued the following pertinent federal waivers:

Training and Certification of Nurse Aides. CMS is waiving the requirements at 42 CFR 483.35(d) (with the exception of 42 CFR 483.35(d)(1)(i)), which require that a SNF and NF may not employ anyone for longer than four months unless they met the training and certification requirements under § 483.35(d). CMS is waiving these requirements to assist in potential staffing shortages seen with the COVID-19 pandemic. To ensure the health and safety of nursing home residents, CMS is not waiving 42 CFR § 483.35(d)(1)(i), which requires facilities to not use any individual working as a nurse aide for more than four months, on a full-time basis, unless that individual is competent to provide nursing and nursing related services. We further note that we are not waiving § 483.35(c), which requires facilities to ensure that nurse aides are able to demonstrate competency in skills and techniques necessary to care for residents’ needs, as identified through resident assessments, and described in the plan of care.

In-Service Training: CMS is modifying the nurse aide training requirements at §483.95(g)(1) for SNFs and NFs, which requires the nursing assistant to receive at least 12 hours of in-service training annually. In accordance with section 1135(b)(5) of the Act, we are postponing the deadline for completing this requirement throughout the COVID-19 PHE until the end of the first full quarter after the declaration of the PHE concludes.

Notably, IHCA has submitted a Petition for Exception to Policy to the Iowa Department of Human Services (“DHS”) seeking a waiver of rules administered by DHS that significantly overlap with the rules at issue under this Petition for Waiver. 2021 Iowa Acts House File 891, a bill relating to appropriations for health and human services, expressly states that “[f]or the time period beginning on the effective date of this division of this

Act, and ending June 30, 2022, notwithstanding state administrative rules to the contrary, to the extent federal regulations relating to the COVID-19 pandemic differ from state administrative rules, including applicable federal waivers, the federal regulations are controlling during the pendency of the federally declared state of emergency and for such period of time following the end of the federally declared state of emergency applicable to the respective federal regulations.”

The Department hereby **grants** IHCA’s request for temporary waiver to licensed health care facilities in Iowa, effective immediately and until the cessation of the federally declared state of emergency and for such period of time following the end of the federally declared state of emergency applicable to the respective 1135 blanket waivers issued by CMS, pursuant to the following conditions:

- 481-58.11(1)“i,” requiring a nurse aide who has not completed the state-approved 75-hour nurse’s aide program be required to participate in a structured on-the-job training program of 20 hours’ duration, is waived to the extent that the individual has completed a comparable training course approved by the department of inspections and appeals or has completed at least 20 hours of the state-approved 75-hour nurse’s aide program and the facility has documentation that it has implemented training and supervision measures to ensure the individual’s competency in any tasks performed.
- 481-58.11(1)“k,” requiring that certified nurse aides who have received training other than the Iowa state-approved program must pass a challenge examination, is waived to the extent that the individual is able to demonstrate competency in skills and techniques necessary to care for residents’ needs as required by 42 CFR § 483.35(c) and (d)(l)(i).
- 481-58.21(6)“e,” requiring a person who has written documentation of certification as a medication aide in another state complete a department-approved nurse aide competency examination and medication aide challenge examination, is waived to the extent the individual is able to demonstrate competency in safe medication administration.

The Department finds that under the circumstances at issue, application of these rule would pose an undue hardship on licensed health care facilities; waiver from the requirements of these rules under the particular circumstances described would not prejudice the substantial legal rights of any person; the provisions of these rules are not specifically mandated by statute; and substantially equal protection of public health, safety, and welfare will continue to be afforded.

If you have any questions related to this waiver, please contact Ashleigh Hackel, General Counsel for the Department, at Ashleigh.Hackel@dia.iowa.gov or (515) 250-3746.

Respectfully,



Larry Johnson, Jr.,
Director

cc: Ken Watkins
Via email to: kenwatkinslaw@gmail.com