

Pursuant to the authority vested in the Public Health and Health Planning Council and Commissioner of Health by sections 2803 and 2895-b of the Public Health Law, Sections 415.2 and 415.13 of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR) is hereby amended, to be effective upon publication of a Notice of Adoption in the New York State Register, to read as follows:

Subdivision (h) of Section 415.2 is amended to read as follows:

(h) Nurse aide (see section [415.13(c)(1)] 415.13(d)(1) of this Part).

Section 415.13, and the title thereof, are amended to read as follows:

Section 415.13 Nursing Services and Minimum Nursing Staff Requirements.

(a) Staffing standards. The facility shall have sufficient nursing staff to provide nursing and related services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, as determined by resident assessments and individual plans of care. The facility shall further assure that staffing levels enable each resident to receive[s] treatments, medications, diets and other health services in accordance with individual care plans. At a minimum, the facility shall ensure its daily nursing staff levels comply with paragraph (2) of subdivision (b) of this Section; provided, however, that compliance with paragraph (2) of subdivision (b) of this Section shall not serve as a defense where the facility has failed to provide sufficient nursing care to residents in accordance with their resident assessment and individual plans of care, or the facility failed to ensure residents received ordered treatments, medications, diets or other health services consistent with the residents' individual plans of care and in accordance with federal and State law and regulations.

[(a)] (b) Sufficient staff.

(1) The facility shall provide services by sufficient numbers of each of the following types of personnel on a 24-hour basis to provide nursing care to all residents in accordance with resident care plans:

- (i) registered professional nurses or licensed practical nurses;
- (ii) certified nurse aides, meaning any person included in the nursing home nurse aide registry pursuant to Section 2803-j of the Public Health Law; and
- (iii) other nursing personnel.

(2) Minimum Nursing Staff Requirements. At a minimum, the facility shall employ certified nurse aides, registered professional nurses, licensed practical nurses, or nurse aides sufficient to maintain the following daily staffing hours per resident:

(i) From January first, two thousand twenty-two through December thirty-first, two thousand twenty-two, the facility shall maintain daily average staffing hours equal to 3.5 hours of care per resident per day by a certified nurse aide, registered professional nurse, licensed practical nurse, or nurse aide. Out of such 3.5 hours, no less than 2.2 hours of care per resident per day shall be provided by a certified nurse aide or a nurse aide, and no less than 1.1 hours of care per resident per day shall be provided by a registered professional nurse or licensed practical nurse.

(ii) Beginning January first, two thousand twenty-three and thereafter, every nursing home shall maintain daily average staffing hours equal to 3.5 hours of care per resident per day by a certified nurse aide, registered professional nurse, or licensed practical nurse. Out of such 3.5 hours, no less than 2.2 hours of care per resident per day shall be provided by a certified nurse aide, and no less than 1.1 hours of care per resident per day shall be provided by a registered professional nurse or licensed practical nurse.

[(2)] (3) The facility shall designate a registered professional nurse or licensed practical nurse to serve as a charge nurse on each tour of duty who is responsible for the supervision of total nursing activities in the facility. Alternatively, as necessitated by resident care needs, the facility may designate one charge nurse for each tour of duty on each resident care unit or on proximate nursing care units in the facility provided that each nursing care unit in the facility is under the supervision of a charge nurse.

[(b)] (c) Registered professional nurse.

(1) The facility shall use the services of a registered professional nurse for at least 8 consecutive hours a day, 7 days a week, or more often as necessary to comply with the minimum staffing requirements set forth in paragraph (2) of subdivision (b) of this Section.

* * *

[(c)] (d) Nurse aide.

(1) For the purpose of this section and section 415.26(d) of this Part, nurse aide shall mean any person [who provides direct personal resident care and services including, but not limited to, safety, comfort, personal hygiene or resident protection services, for compensation, under the supervision of a registered professional nurse or licensed practical nurse in the facility] who is included in the nurse aide hour component of the federal Centers for Medicare and Medicaid Services payroll based journal for long-term care facilities but has not yet been certified as a certified nurse aide, including individuals who are in the first four months of employment and who are receiving training in a Department-approved nurse aide training and competency evaluation program and are providing nursing or nursing-related services for which they have been trained and are under the supervision of a licensed or registered nurse, or individuals, other than a licensed professional, who have been approved by the Department to

administer medications to residents. For the purposes of this section and section 415.26(d) of this Part, a nurse aide does not include volunteers or [except for] those individuals who furnish services to residents only as feeding assistants as defined in Section [415.13(d)] 415.13(e) of this Part. Certification of such nurse aide shall be in accordance with the provisions of section 415.26(d) of this Part.

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[(d)] (e) Feeding Assistant.

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(f) Non-Compliance with Staffing Standards.

(1) Compliance with the minimum nursing staff requirements set forth in paragraph (2) of subdivision (b) of this Section shall be determined on a quarterly basis, as determined by the Department, by comparing the daily average of the number of hours provided per resident, per day, using the most recent data available from the federal Centers for Medicare and Medicaid Services payroll based journal and the facility's average daily census on a daily basis.

(i) The Department shall initially determine whether a facility is compliant or non-compliant with the minimum nursing staff requirements by conducting the following three assessments:

(a) Assessing whether the total daily staffing hours provided per resident by nurse aides (only from January first, two thousand twenty-two through December thirty-first, two thousand twenty-two), certified nurse aides, licensed practical nurses, or registered nurses fell below 3.5 hours of care per resident on average over the course of the quarter; and

(b) Assessing whether at least 2.2 hours of care per resident per day was provided by a certified nurse aide or a nurse aide (only from January first, two thousand twenty-two through December thirty-first, two thousand twenty-two) on average over the course of the quarter; and

(c) Assessing whether at least 1.1 hours of care per resident per day was provided by a registered professional nurse or licensed practical nurse on average over the course of the quarter.

(ii) A facility that, on average over the course of the quarter, fell below the hourly requirements set forth in clauses (a) through (c) of subparagraph (i) will be considered non-compliant for the purposes of this Section. Any facility that the Department finds non-compliant shall have progressive penalties assessed based upon the number of days per quarter in which the daily staffing hours provided per resident fell below the minimum hourly requirements set forth in paragraph (2) of subdivision (b) of this Section.

(iii) For the purposes of determining compliance, an individual shall not be counted while performing administrative services, as defined in the Centers for Medicare and Medicaid Services payroll based journal for long-term care facilities. Further, individuals who are attending training, either onsite or offsite, and are not available to perform their primary job duties shall not be counted for purposes of determining compliance with the minimum daily staffing hours.

(2) Penalties.

(i) The Department shall impose a penalty of up to two thousand (2,000) dollars per day for each day in a quarter that a facility fails to comply with the minimum nursing staff requirements set forth in paragraph (2) of subdivision (b) of this Section, unless mitigating or aggravating factors exist.

(ii) Mitigating Factors. The Department may reduce penalties in a quarter that a facility is non-compliant, if the Department determines, in its sole discretion, that any of the following mitigating circumstances existed during the period of non-compliance:

(a) Extraordinary circumstances faced the facility. For the purposes of this clause, extraordinary circumstances shall mean that the facility experienced a natural disaster; a national emergency affecting the facility has been officially declared; a State or municipal emergency affecting the facility has been declared pursuant to Article 2-B of the Executive Law; or the facility experienced a catastrophic event that caused physical damage to the facility or impaired the ability of facility personnel to access the facility. Provided, however, that the facility must first demonstrate, to the satisfaction of the Department, that such extraordinary circumstances could not have been prevented or mitigated through effective implementation of the facility's pandemic emergency plan, prepared pursuant to Section 2803(12) of the Public Health Law, and that the facility complied with the disaster and emergency preparedness requirements set forth in Section 415.26(f) of this Part; or

(b) An acute labor supply shortage of nurse aides, certified nurse aides, licensed practical nurses, or registered nurses exists in the Metropolitan and Nonmetropolitan Area in which the facility is located, as such areas are defined by the federal Bureau of Labor Statistics.

(l) For the purposes of determining whether a facility was located in an area experiencing an acute labor supply shortage during the period of non-compliance, the Commissioner shall issue a determination on a quarterly basis as to whether an acute labor supply shortage of nurse aides, certified nurse aides, licensed practical nurses, or registered nurses exists in any Metropolitan or Nonmetropolitan Area of New York State. Such determination shall be made in consultation with the New York State Department of Labor and shall take into account job availability metrics developed by the New York State Department of Labor, which may include but is not limited to the list of job openings in New York State.

(2) The fact that the facility is located in an area experiencing an acute labor supply shortage pursuant to this clause shall not serve as a mitigating factor unless the facility has demonstrated, to the satisfaction of the Department, reasonable attempts to procure sufficient staffing during the period of non-compliance, notwithstanding the acute labor supply shortage. Reasonable attempts may include, but not be limited to, incentivizing new personnel through increased wage and benefit offers and searching for personnel outside of the Metropolitan and Nonmetropolitan Area in which the facility is located;

(3) The fact that the facility is located in an area experiencing an acute labor supply shortage pursuant to this clause shall not serve as a mitigating factor unless the facility has demonstrated, to the satisfaction of the Department, that it has taken steps over the course of the quarter to ensure resident health and safety notwithstanding any labor supply shortage, including but not limited to discontinuing admissions or transferring residents to another appropriate facility; or

(c) A verifiable union dispute exists between the facility and nurse aides, certified nurse aides, licensed practical nurses, or registered nurses employed or contracted by such facility, resulting in a labor shortage at the facility.

(g) Eligibility for Funding to Comply with Minimum Nursing Staff Requirements.

The Department shall determine which nursing homes are anticipated to be in compliance with Section 2828 of the Public Health Law based on the most current, available Residential Health Care Facility cost report data, or such other source of cost information as the Department shall identify. Pursuant to methodology set forth in the current Medicaid State Plan Amendment, the Department shall determine whether such nursing homes must expend additional funds to comply with this Section, beyond any costs necessary to comply with Section 2828 of the Public Health Law. Any such nursing home that the Department finds will be required to expend

additional funds to comply with this Section shall be eligible to receive from the Department additional funds, subject to availability from the New York State Division of the Budget, to hire nursing staff necessary to achieve the minimum nursing staff requirements set forth in paragraph (2) of subdivision (b) of this Section.

REGULATORY IMPACT STATEMENT

Statutory Authority:

The statutory authority is provided under sections 2803 and 2895-b of the Public Health Law, which provides that the Commissioner of Health enact regulations establishing standard nursing home staffing levels.

Legislative Objectives:

The legislative objective of PHL section 2895-b is to ensure safe and appropriate levels of nurse staffing in nursing homes in order to improve the care for residents of nursing homes.

Needs and Benefits:

These regulations are necessary to implement the statutory directive of PHL section 2895-b. Specifically, pursuant to the statute, the regulations: (1) set forth minimum nurse staffing standards; (2) provide for the imposition of penalties for failure to meet minimum staffing standards; (3) provide for mitigating factors for failure to meet the minimum staffing requirements; and (4) set forth a process for the Department to determine facilities that are in need of assistance to meet the staffing requirements.

Research has demonstrated that as nurse turnover increases in nursing homes, the quality of resident care declines. Therefore, having adequate nurse staffing levels provides residents with the highest quality of care. Requiring these facilities to meet this minimum level of staffing will help ensure patient safety and improve the quality of care received by the residents of the nursing home.

Costs:**Costs for the Implementation of, and Continuing Compliance with the Regulation to the Regulated Entity:**

This regulation seeks to implement standard minimum nursing home staffing levels. Residential health care facilities are not necessarily required to expend additional resources to meet these minimum staffing requirements, but rather may appropriately manage expenditures to balance overall expenditures to meet the minimum staffing thresholds. In any event, if costs are borne by residential health care facilities, compliance with these minimum staffing requirements is mandated by Public Health Law section 2895-b, and as such these regulatory amendments are necessary.

Costs to State and Local Governments:

This regulation will not impact local or State governments unless they operate a residential health care facility, in which case the costs will be the same as for privately-operated facilities. Currently, there are 21 residential health care facilities operated by local governments (counties and municipalities) and 6 residential health care facilities operated by the State.

Costs to the Department of Health:

This regulation will not result in any additional operational costs to the Department of Health.

Local Government Mandates:

Residential health care facilities operated by local governments will be affected and will be subject to the same requirements as any other residential health care facility licensed under PHL Article 28.

Paperwork:

This regulation generally imposes no additional paperwork requirements. Although facilities will be required to submit staffing and care information through the facility's average daily census on a daily basis, such reporting is already required. Therefore, the submission of this data does not create a new requirement, and the Department does not anticipate that this requirement will be unduly burdensome for the residential health care facilities.

Duplication:

These regulations do not duplicate any State or federal rules.

Alternatives:

These regulations are mandated pursuant to PHL section 2895-b. Accordingly, the alternative of not issuing these regulations was rejected. The Department considered different alternatives for the imposition of civil penalties and determined that penalties need to be high enough to prevent facilities from simply paying the penalty as a cost of doing business rather than complying with the law.

Federal Standards:

No federal standards apply.

Compliance Schedule:

The regulations incorporate the compliance dates contained in the Public Health Law section 2895-b, which requires a certain level of staffing by January 1, 2022, and a certain level by January 1, 2023.

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REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES AND LOCAL GOVERNMENTS

Effect of Rule:

This regulation implements PHL Section 2895-b, which provides the Commissioner of Health authority to establish minimum staffing standards for nursing homes and impose civil penalties for nursing homes that fail to adhere to the minimum standards. These minimum standards, which take effect January 1, 2022, require every nursing home to maintain daily staffing hours equal to 3.5 hours of care per resident per day by a certified nurse aide (CNA), licensed practical nurse, or registered nurse with at least 2.2 hours of care per resident per day being provided by a CNA and at least 1.1 hours of care per resident per day provided by a licensed nurse. The nursing home must post information regarding nurse staffing at the facility. Penalties may not be assessed against nursing homes until April 1, 2022, and the Commissioner may take into consideration several mitigating factors when issuing penalties including declared disaster emergencies, the frequency of non-compliance, and regional labor supply shortages.

Currently, there are 21 residential health care facilities operated by local governments (counties and municipalities) and there are 115 providers that reported 100 or fewer employees according to recently filed cost data reports.

Compliance Requirements:

This regulation generally imposes no additional paperwork requirements. Although facilities will be required to submit staffing and care information through the facility's average daily census on a daily basis, such reporting is already required. Therefore, the submission of this

data does not create any new requirement, and the Department does not anticipate that this requirement will be unduly burdensome for the residential health care facilities.

Professional Services:

No professional services are required by this regulation.

Compliance Costs:

This regulation seeks to implementing standard minimum nursing home staffing levels. Residential health care facilities are not necessarily required to expend additional resources to meet these minimum staffing requirements, but rather may appropriately manage expenditures to balance overall expenditures to meet the minimum staffing thresholds. In any event, if costs are borne by residential health care facilities, compliance with these minimum staffing requirements is mandated by Public Health Law section 2895-b, and as such these regulatory amendments are necessary.

Economic and Technological Feasibility:

There are no economic or technological impediments to the rule changes.

Minimizing Adverse Impact:

This regulation is mandated pursuant to PHL section 2895-b and necessary to ensure that direct resident care is prioritized by setting forth minimum staffing requirements for such care. Therefore, any adverse impacts are outweighed by the regulation's health and safety benefits to residents as well as the legal mandate for promulgation.

Additionally, regulations provide that the Department shall determine whether nursing homes must expend additional funds to comply, and nursing homes that the Department finds will be required to expend additional funds to comply may be eligible to receive from the Department additional funds, subject to availability from the New York State Division of the Budget, to hire nursing staff necessary to achieve the minimum nursing staff requirements.

Further, regulations establishing the civil penalties include mitigating factors to account for: (1) extraordinary circumstances facing the facility such as officially declared emergencies or natural disasters; (2) the frequency of the violations of the facility; and (3) the existence of a nurse labor shortage in the area of the nursing home.

Small Business and Local Government Participation:

The Department will notify such entities of the existence of these regulations and the opportunity to submit comments or questions to the Department. The Department will engage in active discussions and dialogue with all interested parties, including industry associations directly impacted by this regulation, to inform them of their need to comply, to answer questions and listen to comments they may have on this regulation.

The Department has already taken several steps to notify the nursing home industry on the effects of this regulation and has provided the opportunity for public comment. On October 7, 2021, at the Public Health and Health Planning Council (PHHPC), the Department presented this regulation for information and discussion purposes. At that meeting the regulation was reviewed and discussed by PHHPC members. In addition, the public, including the effected parties to this regulation, were afforded and opportunity to ask questions and provide comments.

In addition, there were conference calls made to the various associations representing the nursing home industry to inform them of the regulation and to provide an opportunity to ask questions.

Further, the regulation will be filed in the State Register, providing another opportunity for public comments and review. Once completed, the regulation will again go to PHHPC where there will be another opportunity for public comment.

For Rules That Either Establish or Modify a Violation or Penalties Associated with a Violation:

The governing statute directs the Commissioner of Health to establish civil penalties for those facilities that fail to comply with the minimum staffing requirements. However, there are several mitigating factors set forth in the regulation to potentially reduce the fine amount; additionally, the regulation provides for a progressive system of penalties depending on the number of days per quarter the facility was out of compliance with the minimum staffing requirements.

Rural Area Flexibility Analysis

Types and Estimated Numbers of Rural Areas:

This rule applies uniformly throughout the state, including rural areas. Rural areas are defined as counties with a population less than 200,000 and counties with a population of 200,000 or greater that have towns with population densities of 150 persons or fewer per square mile. The following 43 counties have a population of less than 200,000 based upon the United States Census estimated county populations for 2010 (<https://www.census.gov/quickfacts/>).

Approximately 17% of small health care facilities are located in rural areas.

Allegany County	Greene County	Schoharie County
Cattaraugus County	Hamilton County	Schuyler County
Cayuga County	Herkimer County	Seneca County
Chautauqua County	Jefferson County	St. Lawrence County
Chemung County	Lewis County	Steuben County
Chenango County	Livingston County	Sullivan County
Clinton County	Madison County	Tioga County
Columbia County	Montgomery County	Tompkins County
Cortland County	Ontario County	Ulster County
Delaware County	Orleans County	Warren County
Essex County	Oswego County	Washington County
Franklin County	Otsego County	Wayne County
Fulton County	Putnam County	Wyoming County
Genesee County	Rensselaer County	Yates County
	Schenectady County	

The following counties have a population of 200,000 or greater and towns with population densities of 150 persons or fewer per square mile. Data is based upon the United States Census estimated county populations for 2010.

Albany County	Monroe County	Orange County
Broome County	Niagara County	Saratoga County
Dutchess County	Oneida County	Suffolk County
Erie County	Onondaga County	

Licensed residential health care facilities are located in these identified rural areas.

Reporting, Recordkeeping and Other Compliance Requirements; and Professional Services:

This regulation generally imposes no additional paperwork requirements. Although facilities will be required to submit staffing and care information through the facility's average daily census on a daily basis, such reporting is already required. Therefore, the submission of this data does not form any new requirement, and the Department does not anticipate that this requirement will be unduly burdensome for the residential health care facilities.

Costs:

This regulation seeks to implementing standard minimum nursing home staffing levels. Residential health care facilities are not necessarily required to expend additional resources to meet these minimum staffing requirements, but rather may appropriately manage expenditures to balance overall expenditures to meet the minimum staffing thresholds. In any event, if costs are borne by residential health care facilities, compliance with these minimum staffing requirements is mandated by Public Health Law section 2895-b, and as such these regulatory amendments are necessary.

Minimizing Adverse Impact:

This regulation is mandated pursuant to PHL section 2895-b and necessary to ensure that direct resident care is prioritized by setting forth minimum staffing requirements for such care. Therefore, any adverse impacts are outweighed by the regulation's health and safety benefits to residents as well as the legal mandate for promulgation.

Additionally, regulations provide that the Department shall determine whether nursing homes must expend additional funds to comply, and nursing home that the Department finds will be required to expend additional funds to comply may be eligible to receive from the Department additional funds, subject to availability from the New York State Division of the Budget, to hire nursing staff necessary to achieve the minimum nursing staff requirements.

Further, regulations establishing the civil penalties include mitigating factors to account for: (1) extraordinary circumstances facing the facility such as officially declared emergencies or natural disasters; (2) the frequency of the violations of the facility; and (3) the existence of a nurse labor shortage in the area of the nursing home

Rural Area Participation:

The Department will notify all residential health care facilities, including those located in rural areas, of the existence of these regulations and the opportunity to submit public comments or questions to the Department. The Department will engage in active discussions and dialogue with all interested parties, including industry associations directly impacted by this regulation, to inform them of their need to comply, to answer questions and listen to comments they may have on this regulation.

STATEMENT IN LIEU OF JOB IMPACT STATEMENT

A Job Impact Statement for these regulations is not being submitted because it is apparent from the nature and purposes of the amendments that they will not have a substantial adverse impact on jobs and/or employment opportunities. To the contrary, given the minimum requirements for nursing staff, including nurse aides, certified nurse aides, licensed practical nurses, and registered nurses, the Department anticipates that these regulations will have a positive impact on nursing jobs throughout the State, to the extent these regulations will help incentivize hiring in these professions.

ASSESSMENT OF PUBLIC COMMENT

The New York State Department of Health (Department) received comments on the Revised Rule from organizations, individual nursing homes, and individuals. The comments and the Department's responses are summarized below.

Comment: The Department received numerous comments from individuals indicating opposition to determining compliance with the minimum staffing standards using an average over the quarter, rather than assessing compliance daily.

Response: The Department's first Assessment of Public Comment already responded to this comment when this Revised Rule was published:

https://regs.health.ny.gov/sites/default/files/proposed-regulations/Minimum%20Staffing%20Requirements%20for%20Nursing%20Homes_0.pdf. The Revised Rule did not make changes in response to this comment.

Comment: Commenters indicated that potential fines in the amount of \$2,000 per day would exacerbate the current healthcare worker crisis. They indicated that due to the well-documented shortage of healthcare staff, facilities would be unable to comply with the staffing standards despite numerous and innovative efforts to recruit and retain staff. Commenters also indicated that the staffing mandate will drive up the cost of contracted services. Facilities indicated they would not be able to generate the necessary revenues as staffing shortages do not allow new admissions. They additionally questioned why highly rated facilities providing quality care would be penalized.

Response: The penalty of up to \$2,000 per day is necessary to ensure compliance with the statute. The Department is obligated to implement and enforce PHL Section 2895-b and does not agree that enforcing the law would exacerbate the current healthcare worker shortage. The Department may take into consideration several mitigating factors when issuing penalties, including regional labor supply shortages. Facilities identified by the Department as located in areas experiencing an acute labor shortage will have the opportunity to apply for waivers due to this mitigating circumstance. The regulation no longer contains the minimum \$300 per day penalty, which provides the Department greater discretion in assessing penalties. No changes to the regulation have been made in response to this comment.

Comment: One commenter asked that the regulation include language to place a moratorium on fines until the healthcare worker shortage is manageable. This commenter also urged the State to expand mitigating penalty factors while the staffing crisis exists.

Response: In response to comments on the original Proposed Rule, the Revised Rule no longer requires the Department to impose a minimum \$300 per day penalty regardless of mitigating circumstances. No changes to the regulation have been made in response to this comment.

Comment: Some commenters expressed concerns that the staffing standards do not consider the case-mix of facilities.

Response: PHL Section 2895-b does not take into account the case-mix of facilities. No changes to the regulation have been made in response to these comments.

Comment: Multiple residential health care facilities indicated that the Department should not enforce the regulations retroactively, and that the Department should clearly indicate the date on which compliance was required.

Response: PHL Section 2895-b went into effect June 18, 2021, and the staffing standard must be met under PHL Section 2895-b beginning January 1, 2022. Under Executive Order 4.4 (codified in 9 NYCRR § 9.4.4), which was in effect from January 1, 2022, through March 31, 2022, compliance was not required until April 1, 2022. Since the staffing standards have been in place since April 1, 2022, enforcement of the statute from that date forward is not retroactive. No changes to the regulation have been made in response to this comment.

Comment: Some nursing homes indicated that the 3.5-hour staffing mandate is inconsistent with the 70-40-5 spending rule, because the spending rule includes ancillary and program services in resident-facing staff, while the 3.5-hour rule excludes ancillary program services.

Response: It is possible for nursing homes to comply with both regulations, so the two regulations are not inconsistent. No changes to the regulation have been made in response to these comments.

Comment: Commenters indicated that the regulations should make clear that failing to meet any one of the three minimum nurse staffing requirements will be considered non-compliant.

Response: Nursing homes must comply with each separate component of the minimum staffing standards. No changes to the regulation are necessary in response to these comments.

Comment: Some commentors requested that the minimum penalty of \$300 be restored.

Response: In response to comments on the original Proposed Rule, this Revised Rule no longer requires the Department to impose a minimum \$300 per day penalty regardless of mitigating circumstances. The Department does not believe that it would be practical or fair to impose a minimum \$300 per day penalty regardless of mitigating circumstances and having authority to issue penalties of up to \$2,000 per day is sufficient to ensure compliance with the statute. No changes to the regulation have been made in response to these comments.

Comment: One commenter opposed the removal of the reference to “closing units” in the list of examples of how nursing homes could take steps to ensure resident health and safety notwithstanding any labor supply shortage under Section 415.26(f)(2)(ii)(b)(3). The commenter expressed concern that this would allow facilities to transfer residents to other facilities and potentially cause trauma, rather than consolidating units in their own facility. Another commenter indicated that including “discontinuing admissions” in the list of examples does not take into consideration consequential issues, such as hospitals being unable to discharge patients to the care of nursing homes.

Response: The Department removed the phrase “closing units,” because the Department did not want the regulation to imply that nursing homes were at liberty to close units without getting approval from the Department as required by 10 NYCRR §§ 401.3(h) and 401.3(i). The Department believes that “discontinuing admissions” is a way a nursing home could ensure adequate staffing. No changes to the regulation have been made in response to these comments.

Comment: Some commenters strongly supported removal of the \$300 minimum penalty from the regulations given the existing statewide healthcare staffing shortages and the penalty's potential financial burden on facilities.

Response: The Department appreciates the support for the change made in the Revised Rule.

Comment: One association indicated that a facility's quality of care should be considered when determining eligibility for funding to comply with the minimum staffing requirements.

Response: The intent of the funding is to allow nursing homes to come into compliance with the staffing standards in PHL § 2895-b. The Department believes that all nursing homes should come into compliance regardless of their quality of care. No changes to the regulation have been made in response to this comment.

Comment: Commenters also recommended that the State strongly consider including additional clinical staff titles in the minimum staffing requirement to better evaluate the overall staffing model and care at state nursing homes.

Response: The Department's regulation implements PHL § 2895-b and includes the titles that are included in that section of the law. No changes to the regulation have been made in response to these comments.

Comment: The Department received comments indicating that the regulations should allow the minimum staffing requirements for nurses and nurse aides to be met with other types of personnel, such as medication technicians, feeding assistants, temporary nurse aides, graduates

of nursing programs and individuals who are on other states' certified nurse aide (CNA) registries and are awaiting New York State certification.

Response: PHL § 2895-b contains minimum staffing requirements for nurses and nurse aides, not other types of personnel. A nurse aide means any person included in the nursing home nurse aide registry pursuant to Section 2803-j of the Public Health Law. No changes to the regulation have been made in response to this comment.

Comment: One commenter indicated that the regulations should include “the frequency and nature of non-compliance” as a mitigating factor that the Department should consider in penalty determinations and provide guidance as to how this standard will be applied.

Response: The Department is aware that the frequency and nature of non-compliance is a mitigating factor under Public Health Law § 2895-b(2)(b)(ii), and the amount of civil penalty assessed will vary depending upon the frequency and nature of non-compliance. No changes to the regulation have been made in response to this comment.

Comment: A commenter stated that the regulations do not include the process facilities will need to follow to demonstrate the existence of mitigating factors.

Response: The Department will issue further guidance regarding the process for demonstrating that mitigating factors exist. No changes to the regulation have been made in response to this comment.

Comment: A commenter suggested the Department define “acute labor supply shortage” more specifically and include a methodology for determining whether an acute labor shortage exists.

Response: As stated in Section 415.26(f)(2)(ii)(b)(1), “the Commissioner shall issue a determination on a quarterly basis as to whether an acute labor supply shortage of nurse aides, certified nurse aides, licensed practical nurses, or registered nurses exists in any Metropolitan or Nonmetropolitan Area of New York State. Such determination shall be made in consultation with the New York State Department of Labor and shall take into account job availability metrics developed by the New York State Department of Labor, which may include but is not limited to the list of job openings in New York State.” No changes to the regulation have been made in response to this comment.

Comment: Commenters criticized the Department’s proposed Medicaid State Plan Amendment to implement Section 415.26(g).

Response: Comments on the State Plan Amendment are outside the scope of this regulation. No changes to the regulation have been made in response to these comments.

Comment: Clarification was requested on regulations that require nursing homes to post information regarding nurse staffing that the facility is required to make available to the public under Public Health Law § 2805-t.

Response: This comment is outside the scope of this regulation. No changes to the regulation have been made in response to this comment.

Comment: One commenter objected to language that is already in section 415.13(a) requiring the facility to “assure that each resident receives treatments, medications, diets and other health services in accordance with individual care plans.”

Response: This language is already in the regulation, and the Department does not believe that PHL § 2895-b requires the Department to remove or edit this requirement. No changes to the regulation have been made in response to this comment.

Comment: A commenter stated that section 415.13(g) conditions eligibility to receive funding on complying with PHL § 2828; however, compliance with this standard is established based on the most recent Medicaid cost report filed by each facility. The commenter noted that there is typically a 21-to-23-month lag between the start of the cost reporting year and the date when the cost report data becomes available, whereas compliance with the regulation is based on quarterly reports. The commenter concluded that using this asynchronous data could result in conditioning a facility's current eligibility for minimum nurse staffing funding on data that may not reflect its current spending.

Response: The Department will address this issue as needed in the methodology set forth in the Medicaid State Plan Amendment that describes eligibility for funding to comply with the minimum staffing requirements. No changes to the regulation have been made in response to this comment.

Comment: One commenter indicated that compliance with staffing levels should be based solely on weekends, as they have observed the normal staffing on weekdays is greater than weekends.

Response: The Department is implementing PHL § 2895-b as written, without any distinction between staffing levels on weekdays and weekends. No changes to the regulation have been made in response to this comment.

Comment: Another commenter indicated that facilities should be prohibited from accepting new patients for long-term care or rehabilitation until they maintain safe staffing levels.

Response: As indicated in response to another comment, “discontinuing admissions” is one way of taking steps to ensure adequate staffing. No changes to the regulation have been made in response to this comment.