

July 9, 2015

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California Department of Social Services
Community Care Licensing Division
744 P Street, MS 8-17-17
Sacramento, CA 95814

RE: Comments on DSS May 15, 2015 Proposed Video Surveillance Policy in Adult
Community Care and Residential Care Facilities for the Elderly

Once again, we appreciate the opportunity to comment on the Department's proposed policies on the use of video cameras in adult community care and Residential Care Facilities for the Elderly.

CANHR previously submitted comments to the Department's draft Evaluator Manual Surveillance Waiver Process on February 24, 2015. These comments raised issues involving the legality of the policy process, resident rights, right to privacy, and the failure of the policy to address the use of video surveillance by consumers. The Department's Response wholly fails to address any of the concerns raised by CANHR in its initial comments. (Those comments are attached as well.)

It's not often that we actually agree with the provider community, but in this case, we too, disagree that a waiver is required for the use of video cameras in common/public areas, since there is no law preventing their use - as long as they do not violate the privacy of residents and as long as residents are informed of their use. Nor are there any laws prohibiting residents and their representatives from using cameras in their rooms. Any policy developed by the Department should recognize these facts.

1. CONTENT OF CDSS VIDEO SURVEILLANCE POLICY

We are confused as to what policy is being updated by the Response, and where is it set forth? Does the policy include the draft Evaluator Manual language sent to us in January? Are there other documents included in the video surveillance policy?

Which law, regulation or standard is the RCFE being asked to waive by the "Surveillance Waiver Process"? If the Department plans to institute a video camera surveillance policy via a waiver process, it is critical that the policy describe the nature of the item being waived.

2. UNDERGROUND REGULATIONS

As stated previously, we do not think that the Policy set forth in the Response is within the Department's legal authority insofar as it attempts to implement extensive rules and standards for licensees outside the scope of its program flexibility authority. The policy, best practices or whatever they are titled remain underground regulations. California's administrative procedures law requires that regulatory standards be developed through specified procedures.

If the Department wishes to pursue extensive video surveillance rights to providers, we suggest that the Department pursue legislative authority. In the meantime, we suggest that use of video surveillance by providers be restricted to public areas, and that the Department uphold the right of residents or their representatives to use video cameras in their rooms.

3. UPDATING ADMISSION AGREEMENTS

The proposed policy indicates that licensees would be required to update their admission agreements of existing residents to comply with the video surveillance policy if they institute a new video surveillance service. New admission agreements are clearly a concern, since the proposed policy does not indicate that a revised admission agreement should be limited only to the video surveillance policy. This opens the door for providers to add new elements and fees to an existing admissions agreement. Nor is there anything in the Health & Safety Code allowing such revised admission agreements.

4. OVERSIGHT AND ENFORCEMENT

The Response fails to adequately address oversight and enforcement, because the Department cannot enforce policies or best practices. For example, if a facility does not store recordings in resident records, provide an updated facility sketch and/or post signs, will the Department issue a deficiency, and on what basis? If a resident wants to file a complaint about the improper use of videocameras, how will the Department enforce the violation of its "policy"?

5. INFORMED CONSENT

The Response provides definitions of "Informed Consent" and "Full Knowledge," and identifies circumstances under which it is required, but fails to address issues involving incapacitated residents. For example, with respect to "Existing Resident with New Video Surveillance," the Response states that the licensee would be required to update the admission agreement of each resident which would include the informed consent for the use of video surveillance. It further provides that if an existing resident refuses to sign the updated admission agreement then the facility would not be able to turn on video surveillance in the common areas or applicable private areas. If an existing resident lacks the capacity to provide informed consent, does that mean that a facility cannot install new video surveillance in common areas or applicable private areas?

We are also concerned the Response does not address what form of surrogate decision-maker will be able to provide informed consent to video surveillance. With such intimate privacy at stake in the case of video surveillance, CANHR strongly believes that only legal representatives with express authority to waive highly personal rights (i.e., court-appointed conservators with special powers) will be able to provide legal consent.

6. MONITORING OF CAMERAS

The Response does not address how cameras will be monitored during operation, and how residents' privacy will be protected during monitoring.

Nor does the response address audio recordings. Video surveillance equipment in RCFES must not have audio capability. Audio recording of resident, visitor or staff conversations is already strictly regulated under state and federal laws and needs to be acknowledged in any policy on video surveillance.

7. ACCESS TO VIDEORECORDINGS

The Response does not adequately address who will have access to the recordings. Instead, it variously refers to “those with legal authority,” and “persons or entities authorized by law.” How will the Department determine which persons or entities have authority to access the recordings and under what circumstances? For example, 22 CCR section 87506 regarding Resident Records provides that records must be “readily available to facility staff and to licensing agency staff,” but does not address resident or residents’ authorized representatives’ access to records. Similarly, the Response fails to address resident access to video recordings.

8. PRIVATE MEETINGS

The Response does not address meetings with ombudsman, family members or other situations in which a resident is entitled to confidential communications. Residents should have the right to have video cameras turned off during such meetings, even if they previously consented to their use in public or private areas.

9. OFFENSIVE LANGUAGE

The Department should delete all references to “Granny cameras” in its policy, and note the bias in its Response, which describes facility use of video cameras as “video surveillance,” and resident use of video cameras as “Granny cameras.”

The Department’s proposed video surveillance policy fails to address resident use of video cameras, and instead addresses only limited aspects of the use of video surveillance by a facility. It fails to address and protect resident rights, including the right to privacy. It fails to set forth clear, enforceable standards. Consumers, facilities and licensing staff would benefit from a comprehensive policy vetted by all stakeholders through the regulatory process.

Sincerely,



Patricia L. McGinnis
Executive Director