



Department of Health

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May 11, 2023

DAL: NH 23-04
Subject: Waiver and Equivalency Submission Guidelines

Dear Nursing Home Operators and Administrators:

The purpose of this Dear Administrator Letter (DAL) is to inform nursing home operators and administrators of changes to the process of submitting a request to the Department of Health (“Department”) for a waiver of Federal and/or State fire safety and environmental regulations. Facilities should follow the process detailed in this DAL effective immediately from the date of this letter forward.

Nursing homes are required to be in compliance with the Center for Medicare and Medicaid Services’ (CMS) adoption of the 2012 edition of the National Fire Protection Association (NFPA) 101 - *Life Safety Code (LSC, the Code)* and 2012 edition of the NFPA 99 - *Health Care Facilities Code (HCFC)*; NFPA Tentative Interim Amendments (TIA); applicable CMS Quality Safety & Oversight memoranda; CMS’ Emergency Preparedness Final Rule; and Title 10 of the New York Codes, Rules and Regulations subparts 713-1 through 713-4, New York State Department of Health Standards of Construction for Nursing Home Facilities. When a facility is cited for not having met the regulatory requirements, as documented on a Statement of Deficiency (SOD), facilities are required to make every effort to correct the deficiency.

Achieving Compliance by Equivalency

If the facility is unable to come into code compliance for a specific citation/tag, the facility may choose to use an alternative system, method, or device to reach a level of safety equivalent or superior to that achieved by following *the Code* within the start of any open survey enforcement cycle (allotted timeframe). A facility should request a waiver if they cannot achieve equivalency within 90 days from the start of any open enforcement cycle due to unavoidable extenuating circumstances.

There are several ways to reach equivalency with provisions of *the Code*. Some alternative systems or methods include the Fire Safety Evaluation System (FSES), found in the 2013 edition of NFPA 101A - *Guide on Alternative Approaches to Life Safety*, or performance-based design, found in Chapter 5 of *the Code*. The use of the FSES is the most common method. If the facility elects to reach equivalency with a cited Federal regulation by passing FSES, they must document this on the Plan of Correction (POC) then, after POC approval and at the time of survey revisit, the following documents must be provided for review to the appropriate Regional Office of the Department:

1. Justification letter (cover letter),

- The cover letter shall include, at minimum, the building's construction type, number of stories, and any other special conditions of the building's floors, zones or units.
 - The cover letter must explain the existing conditions to justify the scoring for the FSES worksheets; describe the deficient condition and where it exists in the building. A cover letter that only restates the FSES scores shall be deemed insufficient.
2. FSES worksheets,
 - If there are other citations from the same survey, and they have been corrected prior to the date of the FSES report, the corrective work shall be explained within the POC and/or FSES document package.
 3. LSC drawings/floor plans.
 - LSC plans for all levels with each smoke compartment zone shall be provided and labeled according to the zones on the FSES worksheets.

Per CMS State Operations Manual [Appendix I. Survey Procedures for Life Safety Code Surveys](#), FSES's submitted by the facility as part of the survey POC must be reviewed by the DOH RO. Those FSES's that receive a passing score and a Department recommendation must be forwarded to the CMS Regional Office for review and final approval. The CMS Regional Office will notify the Department and the facility upon its final approval of the submitted FSES.

If Unable to Meet Compliance by Equivalency

If the facility is unable to come into compliance within the allotted timeframe due to unavoidable extenuating circumstances, the facility may submit a request for a temporary, or time-limited, or continuing waiver. To request a waiver:

- The facility shall consult the [Waiver and Equivalency Submission Guidelines](#) located at <https://www.health.ny.gov/facilities/cons/>.
- The facility shall document such waiver requests under the appropriate tag in their POC. The POC is the official record of the waiver request. **An acceptable POC in Health Commerce System does not constitute an approved waiver.**
- Waiver supporting documentation shall be submitted to the Department Regional Office via email to LTCLSCwaivers@health.ny.gov.

All correspondence regarding the waiver request shall be conducted through the referenced email address: LTCLSCwaivers@health.ny.gov. The Department Regional Office will consult with other Department staff as necessary. Additional supporting documentation may be requested at the discretion of the Department and/or CMS for sufficient information to render a waiver recommendation and/or determination. There should be no discrepancies between the POC and supporting documentation. If a facility makes changes during the waiver review process, the changes must be communicated to the Department at LTCLSCwaivers@health.ny.gov and the facility must ensure that the submitted information across all documents aligns as one cohesive waiver package.

Waiver requests documented via the POC shall include all necessary information including, but not limited to:

1. Detailed information to explain why the facility cannot achieve compliance.
 - a. For temporary waivers: within the allotted timeframe.
 - b. For continuing waivers: why compliance is not achievable.

2. The type of waiver requested.
3. The requested expiration/end date for the waiver.
4. Interim life safety measures that are in place while the deficiency exists.
5. Applicable elements as required by CMS, including but not limited to those in the CMS Operations Manual, Chapter 2, The Certification Process, Sections 2480, *LSC Waivers*, and 2480C, *Elements Considered in Determination of Unreasonable Hardship*, as available at <https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs-Items/CMS1201984>; and CMS memo [S&C 17-15-LSC](#), Revised 10/26/2022, *Use of the Fire Safety Evaluation System (FSES), National Fire Protection Association (NFPA) 101A, Guide on Alternative Approaches to Life Safety, 2013 Edition by Health Care Occupancies and Board and Care Occupancies*.

In addition, for temporary waivers, the POC shall include:

6. A statement that the facility will determine applicability of the Certificate of Need (CON) process, as required by Public Health Law Article 28, and will submit CON projects or notifications as necessary.
7. A narrative that explains if, after work, the result will be to meet prescriptive code or equivalency.
 - a. If equivalency, the facility shall document on the POC that upon work completion, the facility will meet equivalency with a passing FSES in accordance with the 2013 edition of NFPA 101A - *Guide on Alternative Approaches to Life Safety*. The POC shall be the official record of the use of a passing FSES.
8. The projected timeframe for corrective action with milestone dates (MM-DD-YY) organized by floor or zone.
9. A statement that the facility will submit progress reports to LTCLSCwaivers@health.ny.gov at least quarterly from the date of waiver approval.

For Waiver Requests of Federal Code

When the Department Regional Office has received and reviewed all necessary documentation and deemed the request sufficient to render a determination, the Department will submit the waiver request to CMS. Please note that although the Department issues recommendations, CMS is the approval authority for Federal waivers as only CMS can grant waivers of Federal code requirements. Facilities will be notified of CMS's decision via email from LTCLSCwaivers@health.ny.gov. Facilities are reminded that all waiver requests must be submitted timely to allow for sufficient review time. The Department cannot guarantee that CMS will approve a waiver request or a passing FSES before the Mandatory Denial of Payments for New Admissions date. Facilities are considered out of compliance until each deficiency is corrected or CMS approves the waiver request or CMS approves the passing FSES. CMS does not grant permanent waivers or waiver extensions.

Questions

If you have any questions regarding this correspondence, please email the Department at:
LTCLSCwaivers@health.ny.gov.

Sincerely,

Heidi L. Hayes, Director
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Office of Aging and Long-Term Care