



Center for Health Care Facility Planning, Licensure, and Finance

Division of Hospitals and Diagnostic & Treatment Centers (Regional Office) Bureau of Architecture & Engineering Review (BAER)

Center for the Office of Aging and Long Term Care

Division of Long Term Care & ICF/ID Surveillance (Regional Office)

Waiver and Equivalency Submission Guidelines

Table listing sections: State Waiver (Section A), Federal Waiver (Section B), Federal Equivalency (Section C), Federal Post Waiver Approval (Section D), Common Questions (Section E)

SECTION A: STATE WAIVER

The Department (NYSDOH) is authorized to approve and issue construction waivers in accordance with State Hospital Code (SHC), NYCRR Title 10, Part 711.9. Waiver requests shall comply with this Part and specify the pertinent regulatory standards, codes, and edition from Parts 711-717 for which the waiver is sought.

- Permanent waiver (exception) for equivalent or innovative construction included in a Certificate of Need (CON) application: Facilities may request compliance to Facility Guidelines Institute (FGI), Americans with Disabilities Act (ADA), or provisions under state regulation be waived when it is impractical, unduly burdensome, or would impede the implementation of an improvement in the design, function, or construction of the facility.
Permanent waiver resulting from a survey of licensed facilities: Permanent waivers may be requested for FGI, ADA, or provisions under state regulation cited during surveys. Waivers may be granted due to demonstrated hardship where the deficiency is not detrimental to the health and safety of the occupants.

**State Waiver Instructions:**

1. Follow the chart below for the waiver type to be requested. The facility is responsible for submitting technical documentation that is timely, accurate and consistent across all documents. Errors and incomplete submissions will delay the review.
2. Provide information to sufficiently document the deficiency, such as photos, scaled floor plans, details, or a technical investigation of existing conditions prepared by a qualified professional.
3. Upon receipt of a waiver request due to survey, the facility will be notified of their assigned NYSDOH waiver number to be included in the email subject line for all correspondence. An exception is requested through Schedule 6 of the CON application. The Department will contact the applicant if additional information is needed.

Permanent Waiver (Exception) for CON	Permanent Waiver due to Survey
<p>Waivers/Exceptions to physical space requirements are not granted for initial licensure; provisions for compliance must be provided. Renovations of existing licensed spaces may request an exception due to structural limitations.</p>	<p>Upon the Regional Office's issuance of the Statement of Deficiencies CMS-2567, the facility shall document a request of a waiver on the Plan of Correction CMS-2567 for each applicable tag.</p>
<p>Requests for an exception, to waive a requirement, must be acknowledged in the CON submission:</p> <ul style="list-style-type: none"> <li>• Indicate the cited regulatory standards, codes, and edition for the exception requested.</li> <li>• Provide justification explaining the existing condition and why it cannot be corrected.</li> <li>• Explain the alternate or equivalent provisions to be provided.</li> </ul>	<p>Waiver requests shall be documented on the State Waiver Request form DOH-5223 available at <a href="http://www.health.ny.gov/facilities/cons/">www.health.ny.gov/facilities/cons/</a></p> <ul style="list-style-type: none"> <li>• Complete one form for each waiver request.</li> <li>• Indicate the cited regulatory standards, codes, and edition for which the waiver is sought.</li> <li>• Provide justification explaining the existing condition and why it cannot be corrected.</li> </ul>
<p><b>REQUIRED DOCUMENTS:</b></p> <ul style="list-style-type: none"> <li>✓ List the regulatory sections under "Exceptions" on the stamped, signed, and notarized Architectural/Engineering Certification Letter.</li> <li>✓ List the requested exception and alternate provisions within the Schedule 6 Architectural/Engineering Narrative.</li> <li>✓ Note areas impacted on the drawings.</li> </ul> <p><b>ALL FACILITIES</b> Submit all documentation (PDF format) in NYSECON under Schedule 6 of the Applications tab.</p>	<p><b>REQUIRED DOCUMENTS:</b></p> <ul style="list-style-type: none"> <li>✓ Plan of Correction CMS-2567</li> <li>✓ Form DOH-5223</li> <li>✓ Supporting documentation where applicable</li> <li>✓ Floor plans, dimensioned with the deficiency noted.</li> </ul> <p><b>HOSPITAL, ASC, ESRD</b> Submit all documentation (PDF format) in one email to: <a href="mailto:BAERwaivers1861@health.ny.gov">BAERwaivers1861@health.ny.gov</a>. Include the facility name in the email subject line.</p> <p><b>LONG TERM CARE</b> Submit all documentation (PDF format) in one email to: <a href="mailto:LTCLSCwaivers@health.ny.gov">LTCLSCwaivers@health.ny.gov</a>. Include the facility name in the email subject line.</p>
<p>The request is reviewed as part of the Architectural/Engineering CON review. CON approval constitutes approval of the requested exception.</p>	<p>The Regional Office will notify the facility of the State's determination.</p>
<p>Approvals remain valid for the duration of the operating certificate and are transferable to new ownership. The facility must retain documentation of the approved exception. Future alterations affecting the waived condition must be brought to the Department's attention.</p>	<p>Approvals remain valid for the duration of the operating certificate and are transferable to new ownership. The facility must retain documentation of the approval for future surveys. Future alterations affecting the waived condition must be brought to the Department's attention.</p>

## SECTION B: FEDERAL WAIVER

The Center for Medicare & Medicaid Services (CMS) is authorized to approve Life Safety Code (LSC) waivers based on the Department of Health and Human Services Rules and Regulations Volume 81, No. 86, dated 5/4/16. Waiver requests shall be compliant to 42 CFR Parts 416, 482, 483, 494 and the CMS State Operations Manual (SOM).

Federal waiver reviews are time sensitive; a facility utilizing a waiver remains out of compliance until CMS approves the waiver request. Delays in providing the required waiver documentation may result in civil money penalties or termination from the Medicare/Medicaid program.

Long Term Care Facilities should be aware of potential Denial of Payment for New Admissions (DOPNA), by CMS, while waivers are under review. When a facility is not in compliance with federal requirements, the CMS SOM states the facility will be terminated from the Medicare/Medicaid program six months from start of the enforcement cycle.

Waiver requests are submitted to the authority that conducted the survey. Requests due to survey by an accreditation agency are submitted directly to the agency, per their submission requirements.

- **Temporary Waiver (Time Limited Waiver):**  
Temporary waivers are granted when a facility cannot come into compliance by ninety (90) days from the survey date. The waiver is to allow the facility sufficient time to correct the deficiency. The waiver is not approval of the remedial work.
- **Continuing Waiver:**  
Continuing waivers are granted due to a demonstrated hardship when a deficiency cannot be feasibly corrected. The deficiency must not be detrimental to the health and safety of the occupants.
- **Categorical Waiver:**  
CMS issues Survey & Certification (S&C) memos to allow facilities to use specified portions of a later edition of the Life Safety Code for alternate compliance. See [www.cms.gov](http://www.cms.gov) for issued memos.

### Federal Waiver Instructions:

1. Upon the Regional Office's issuance of the Statement of Deficiencies with requirement of a facility Plan of Correction (POC) on form CMS-2567, the facility shall document a request of a waiver (to waive time or to waive code) on the POC for each applicable tag. The POC is the official record of the waiver request. An acceptable POC does not constitute an approved waiver.
2. Follow the chart below to submit a temporary or continuing waiver. Follow the CMS SOM and applicable S&C memo to submit a categorical waiver. The facility is responsible for submitting technical documentation that is timely, accurate and consistent across all documents. Errors and incomplete submissions will delay the review.
3. Upon receipt of the waiver request, the facility will be notified of their assigned NYSDOH waiver number to be included in the email subject line for all correspondence. The Department will contact the applicant if additional information is needed.
4. Based on the supplied documentation, the Regional Office will recommend approval or disapproval to CMS for their review and ultimate determination.
5. CMS will notify the Regional Office of waiver determinations. If documentation is insufficient to render a determination, the facility shall submit additional information to the satisfaction of the Department and CMS.

<b>Temporary Waiver</b>
Request to waive time to come into compliance.
Delineate on the POC if the corrective work to be completed during the waiver timeframe will <u>meet the prescriptive code</u> , NFPA 101-2012 or NFPA 99-1012, or will <u>achieve an equivalency</u> via NFPA 101A-2013 (FSES).
<p>Waiver requests must include:</p> <ul style="list-style-type: none"> <li>• A requested end date on the POC; the date the corrective work will be completed.</li> <li>• The timeframe may include design in addition to the required construction. It is the responsibility of the facility to determine and provide code compliant corrective work.</li> <li>• A list of timeframe milestones (mm/dd/year) on the POC such as the time to procure design professionals, provide construction documents, bidding, obtain permits, and construction duration with phasing.</li> <li>• If the waiver request is to provide corrective work to achieve a passing FSES as an equivalency, the submission of the FSES is required as a final milestone in the POC for the Department’s review and acceptance of completed work.</li> </ul>
<p><b>REQUIRED DOCUMENTS:</b></p> <ul style="list-style-type: none"> <li>✓ Plan of Correction CMS-2567</li> <li>✓ Supporting documentation where applicable</li> <li>✓ LSC floor plans, dimensioned with deficiency noted. (Floor plans typically are not required for mechanical/electrical deficiencies.)</li> </ul>
<p><b>HOSPITAL, ASC, ESRD</b> If the Regional Office conducted the survey, submit all documentation (PDF format) in one email to: <a href="mailto:BAERwaivers1861@health.ny.gov">BAERwaivers1861@health.ny.gov</a>. Include the facility name in the email subject line.</p>
<p><b>LONG TERM CARE</b> Submit all documentation (PDF format) in one email to: <a href="mailto:LTCLSCwaivers@health.ny.gov">LTCLSCwaivers@health.ny.gov</a>. Include the facility name in the email subject line.</p>
Promptly provide construction repairs, do not wait for waiver approval. The Regional Office will inform the facility of CMS’s determination.
The waiver remains valid until CMS’s specified expiration date. CMS will not grant waiver extensions. See <u>Section D, Federal Post Waiver Approval</u> , for facility requirements to confirm completed construction.

<b>Continuing Wavier</b>
Request to waive code requirement due to hardship.
Explain the existing condition and why it cannot be corrected. Waiving a Life Safety Code (LSC) provision is only considered when the corrective work would impose an unreasonable hardship to an existing, licensed facility.
<p>Waiver requests must include financial documentation per CMS SOM, Chapter 2, 2480C, Elements Considered in Determination of Unreasonable Hardship:</p> <ul style="list-style-type: none"> <li>• Estimated cost of installation; the applicant is required to demonstrate the costs involved by either submitting actual cost estimates from a contractor or a cost opinion from a design professional.</li> <li>• Extent and duration of the disruption of normal use of patient areas resulting from construction work.</li> <li>• Description of the disruption to the areas involved, may include floors above and below the areas in question.</li> <li>• Estimated period over which cost would be recovered through reduced insurance premiums and increased payment related to cost.</li> <li>• Remaining useful life of the building.</li> </ul>
<p><b>REQUIRED DOCUMENTS:</b></p> <ul style="list-style-type: none"> <li>✓ Plan of Correction CMS-2567</li> <li>✓ Financial documentation</li> <li>✓ LSC floor plans, dimensioned with deficiency noted. (Floor plans typically are not required for mechanical/electrical deficiencies.)</li> </ul>
<p><b>HOSPITAL, ASC, ESRD</b> If the Regional Office conducted the survey, submit all documentation (PDF format) in one email to: <a href="mailto:BAERwaivers1861@health.ny.gov">BAERwaivers1861@health.ny.gov</a>. Include the facility name in the email subject line.</p>
<p><b>LONG TERM CARE</b> Submit all documentation (PDF format) in one email to: <a href="mailto:LTCLSCwaivers@health.ny.gov">LTCLSCwaivers@health.ny.gov</a>. Include the facility name in the email subject line.</p>
The Regional Office will inform the facility of CMS’s determination.
The waiver remains valid until CMS’s specified expiration date. CMS will not grant permanent waivers. Upon waiver expiration, the facility will be recited for the deficiency at the next survey and may then reapply for a new waiver.

## SECTION C: FEDERAL EQUIVALENCY

The Center for Medicare & Medicaid Services (CMS) is authorized to approve Life Safety Code (LSC) equivalencies based on the Department of Health and Human Services Rules and Regulations Volume 81, No. 86, dated 5/4/16 . Equivalency requests shall be compliant with 42 CFR Parts 416, 482, 483, 494 and the CMS State Operations Manual (SOM).

- **Federal Equivalency:**

An equivalency may be applied where a deficiency is determined not to be detrimental to the health and safety of the occupants. In lieu of meeting the prescriptive Life Safety Code, NFPA 101-2012, facilities may request an equivalency utilizing NFPA 101A-2013, Guide on Alternative Approaches to Life Safety, Fire Safety Evaluation Systems (FSES).

### Equivalency Instructions:

1. Upon the Regional Office's issuance of the Statement of Deficiencies (CMS-2567) with requirement of a facility Plan of Correction (POC), the facility shall document their use of a Fire Safety Evaluation System (FSES) as an equivalency on the POC for each applicable tag. The POC shall be the official record of the use of a passing FSES for equivalency. An acceptable POC does not constitute an approved equivalency.
2. Upon the Regional Office's request to verify the facility's POC was implemented, the facility shall supply the completed FSES showing passing conclusions with assumed scoring. The FSES justification letter, scored worksheets, and floor plans should be compiled into one PDF document and submitted to the Regional Office.
3. Based on the supplied documentation, the Regional Office will recommend approval or disapproval to CMS for their review and final approval.
4. CMS will notify the Regional Office once it has granted final approval of the submitted FSES. If documents are insufficient to render a determination, the facility shall submit additional information to the satisfaction of the Department and CMS.
5. An approved equivalency remains valid until the next survey. If the deficiency remains, the facility will be recited upon the next survey, and may reapply by submitting a new NFPA 101A (FSES) as part of the POC. The FSES must reflect the building's current conditions including scoring for all other life safety deficiencies identified by the survey.

## SECTION D: FEDERAL POST WAIVER APPROVAL

1. The facility shall supply updates to the Regional Office at intervals not exceeding 3-months on the progress made toward compliance/equivalency.
2. The facility is responsible for ensuring corrective work is code compliant. At the completion of all project milestones and construction within the plan of correction, the following information shall be required:
  - Mandatory notification to Regional Office that the work has been completed at each milestone. Documentation shall be provided at each milestone for verification purposes and notification to the Regional Office.
  - Mandatory notification to Regional Office that all work has been completed and the facility is compliant with codes or equivalency. Documentation shall be provided at this final milestone for verification purposes and notification to the Regional Office.

## SECTION E: COMMON QUESTIONS

### What can facilities do to prevent survey citations?

Certain citations can be avoided during survey when the facility maintains a complete and accurate set of construction documents available for the surveyor's review. Ensure designated staff are knowledgeable of the building's construction type, shaft locations, smoke and fire barrier locations, required exits, and essential electrical system (EES). Have the required testing and maintenance records documented and available for inspection.

Continuously review the life safety conditions of the building. When maintenance or construction is conducted, ensure that smoke and fire barriers are maintained, replacement materials have the required fire ratings, equipment meets required specifications, labels are present on fire-rated door assemblies, means of egress complies with NFPA 101-2012 chapter 7, and where required, an EES complies with NFPA 99-2012, chapter 6 and the CMS Emergency Preparedness Rule.

### Which deficiencies will CMS not permit an equivalency or continuing waiver?

The Department is aware CMS will not permit an equivalency or a continuing waiver (hardship) for deficiencies pertaining to egress for NFPA Health Care Occupancies, EES, and sprinkler installation. These deficiencies must be corrected and may utilize a temporary waiver only.

### How do I address a Construction Type deficiency?

Confirm the building's NFPA 101 Construction Type per the original construction documents or as determined by a licensed design professional, and as required per the NFPA 101 occupancy.

Confirm the deficiency by verifying the existing conditions of the building's floor/ceiling assemblies in conjunction with the required fire-rated UL Design Assembly. Inspect the entire building to determine the extents of the deficiency in all zones.

Determine the plan to address the deficiency. If requesting an equivalency or a waiver in an open enforcement, consult the revised CMS S&C 17-15-LSC letter dated 10/26/2022, as the requirements have changed. A waiver no longer requires the submission of a failing FSES, and using the amended FSES values for an equivalency is permitted when the facility was cited previously and a passing 2001 NFPA 101A (FSES) was utilized. A prior approved FSES is an equivalency, not a waiver. Health Care Occupancies of Type II (2,2,2) Construction and  $\geq 3$ -stories, with a construction type deficiency, will not pass a FSES using the 2013 FSES values (worksheet 4.7.8B).

### How do I ensure the FSES report is complete and scored correctly?

Facilities may elect to commission a design professional to provide the building evaluation for the NFPA 101A-2013 FSES report. Refer to the NFPA 101A-2013 Handbook Commentary at [www.NFPA.org](http://www.NFPA.org) for scoring instructions and explanations. The FSES report must include:

- A justification letter describing the building conditions to support the scoring. The entire building must be scored.
- All survey citations and discovered deficiencies that have not been corrected at the time of the building evaluation must be scored accordingly.
- Floor plans showing life safety components and zones labeled corresponding with the zones on the FSES worksheets.
- Compile the FSES justification letter, worksheets, and floor plans into one PDF document for submission. Revisions to the FSES requires the report to be recompiled and submitted as one document.

There is no FSES for NFPA Ambulatory Health Care Occupancies.

## How do I address an Essential Electrical System (EES) deficiency?

Have the building's NFPA 99-2012 EES installation inspected by a licensed design professional or qualified contractor.

- Review NFPA 99, chapter 6 and the CMS Emergency Preparedness Rule to determine the type of EES required.
- Determine the extent of the deficiency and estimated timeframe needed to provide corrections. Request a temporary waiver on the POC for time needed beyond 90 days from survey. The waiver may include time to provide a compliant design and construction documents.
- Completed work must be verified by a licensed design professional or qualified contractor proficient with NFPA 99 EES requirements. Upon completion, submit to the Regional Office photos and documentation for each branch panel showing the connections of the required systems and equipment, and a line diagram of the EES.

## What happens if CMS denies the waiver request?

CMS may determine corrective work must be promptly provided if the deficiency impacts the health and safety of the residents. They may also deny a request if the submitted Plan of Correction is inaccurate, unclear, or incomplete. CMS may request corrections or additional documentation be provided. When CMS issues a denial, the Regional Office will work with the facility on an alternate path to compliance.

## What determines the correction date as it relates to DOPNA?

CMS issues a letter to the Long Term Care Facility stipulating DOPNA enforcement if the citation has not been satisfied within 90 days from the open enforcement cycle. For waiver and equivalency requests, the date of correction is when the facility last provided a Plan of Correction and supporting documents, as needed, that was sufficient for CMS to approve the request. Requests that are not approvable include:

- Information on the Plan of Correction that does not align with supporting documentation, contains errors or is missing critical information.
- Plan of Corrections submitted without the required supporting documentation such as financial documents, FSES, or floor plans.
- Inaccurate FSES scoring and misrepresentations on the floor plans.

## Does the waiver construction work require a Construction Notice or Certificate of Need application?

Construction Notices are described at [https://www.health.ny.gov/facilities/cons/construction\\_notices/](https://www.health.ny.gov/facilities/cons/construction_notices/). Certificate of Need projects are described at <https://www.health.ny.gov/facilities/cons/>.

## What happens if the corrective work is not completed by the approved waiver end date?

Documentation shall be provided at each milestone to the Regional Office. Delays shall be brought to the attention of the Regional Office; however, CMS does not grant waiver extensions. Facilities should proceed with the work. Unresolved deficiencies will be recited upon the next survey.