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(Via Electronic Mail Chelsea.driscoll@cdph.ca.gov & U.S. Mail)

Chelsea Driscoll
Chief, Policy and Enforcement Branch
Department of Public Health, Licensing and Certification Program
MS 3203, P.O. Box 997377
Sacramento, CA 95899-7377

RE: Comments on SB 97 Implements Regulations

Dear Ms. Driscoll:

Thank you for engaging stakeholders in discussions regarding the California Department of Public Health's (the Department) guidelines implementing the Workforce Shortage and Patient Acuity Waivers, following implementation of Senate Bill 97. Disability Rights California (DRC) offers the following comments.

I. Opening Remarks

A. Limiting Census during Pendency of Workforce Shortage

As previously stated, if a facility is unable to maintain sufficient staffing to meet the statutory requirements for any extended duration, the facility should be required to implement preliminary steps to reduce its census until the facility has restored staffing to statutory requirements rather than be permitted to operate with insufficient staffing to care for existing residents.

B. Repeal of Staff to Resident Staffing Ratios

DRC was surprised to learn that the Department interpreted that passage of SB 97 would repeal existing staff to resident ratios in state regulation.

We encourage the Department to reconsider this statutory interpretation and engage stakeholders in future discussions about the implication of determination.

II. Guidelines for Waiver Application

A. No Requirement to Submit Evidence of Workforce Shortage

DRC understands that the Department has eliminated the requirement that a facility submit evidence of a work force shortage from their waiver application. In lieu of such a requirement, we understand that the Department will be establishing a list of counties which it has designated as having “Geographic Staffing Shortages” based on labor supply and demand data (EDD and OSHPD data respective). While DRC appreciates that there is limited objective and timely workforce data available, we maintain that facilities should still be required to submit evidence of a workforce shortage in their area or community. As was discussed at stakeholder meetings, making determinations of geographic workforce shortages on a county level is a gross and inaccurate measure, particularly in larger and diverse counties.

DRC recommends that the Department require that facilities submit evidence of a workforce shortage in their community without further detail or specificity, in addition to utilizing the Department’s designation of a geographic staffing shortage in the county. Furthermore, as requested on the meeting on February 22, 2018, DRC requests that the Department publish a list of counties which the Department has designated as a geographic shortage area.

B. Waiver Request Requirements

The current draft guidelines do not require that a facility attempt any recruitment or retention activities to address a workforce shortage in advance of applying for a waiver. DRC recommends that the Department not approve any facility for a waiver until that facility has attempted recruitment and retention activities to address the workforce shortage. Applicants should be required to provide “a detailed plan that specifies actions that the facility will take to resolve the workforce shortage” as was required in the January 19, 2018 draft.

We understand that facilities may not have substantial evidence of recruitment and retention activities at the start of the waiver implementation this July but these guidelines will extend beyond the implementation period. However, facilities have had a year to prepare for this new requirement and should have been augmenting their recruitment and retention in anticipation of its implementation.

The facility should be required to provide the specific recruitment plan(s) for the position(s) experiencing workforce shortages. A facility's general recruitment plan may be inadequate and not sufficiently tailored for certain positions. Similarly, positions that are difficult to fill will likely require a more targeted recruitment plan and facilities should be expected to have developed such position-specific plans before requesting a waiver.

DRC further recommends that the facility be required to provide documentation of how the recruitment plan(s) evolved over time as the facility has experienced on-going staffing shortages. This should demonstrate what actions the facility implemented over time to increase and target their recruitment efforts. Facilities in regions with staffing shortages should be expected to modify and enhance their recruitment efforts over time for positions where there is a workforce shortage.

C. Plan to Meet Resident Needs

As recommended previously, DRC recommends that the detailed plans for meeting resident needs and ensuring quality of care during times of extended workforce shortages include **suspension of admission of residents until the workforce shortage is resolved**. While DRC recognizes the potential impact a reduction in the availability of nursing home beds may have on a community, we remain equally concerned about the quality of care provided to residents residing in nursing facilities during Department-sanctioned staffing shortages lasting, potentially, a year or more.

III. Evaluation of Waiver Request

A. Department Independent Evaluation

1. Community Experience of Workforce Shortage

The Department is in the unique position of gauging claims of a community's workforce shortage based on whether neighboring competing facilities in the community are experiencing similar shortages. This information should be available to the Department as they (1) conduct compliance surveys and evaluate compliance with direct care service hour requirements; and (2) process workforce shortage waiver requests. DRC recommends that the Department consider whether other long term care facilities in the community have reported workforce shortages and/or have requested a waiver as an additional factor in evaluating a waiver request.

2. Engaging Residents

As previously stated, it is disappointing that the Department's draft guidelines continue to omit obtaining input from residents and family members/legal representatives in evaluating waiver requests. These are the very individuals directly impacted by workforce shortages. The Department's draft guidelines require the Department to notify the state and local ombudsman offices of waiver applications but does not attempt to reach out of residents directly, including notifying resident councils.

DRC renews its recommendation that the Department consult with residents and family members/legal representatives as a component of the waiver application and renewal process. It is essential that the Department independently engage the consumer in the process and evaluate how workforce shortages impact the consumer.

In addition to consulting with resident and family councils, DRC encourages the Department to meet individually and privately with 5-10% of facility residents prior to granting a waiver or waiver renewal and query them about their experience regarding quality of care and the actual or potential impact of the workforce shortage on their care.

In processing a waiver request (section IV (c)), DRC recommends that facility residents, family members or legal representatives, and resident councils also receive notification of a facility's waiver application.

3. Conducting an On-Site Inspection

The Department deleted from the January 11th draft the provision that "the Department may conduct an onsite visit to investigation quality of care

concerns.” Language permitting the Department to conduct an on-site inspection before authorizing a facility to staff below statutory requirements is minimally necessary for any facility where there are known quality of care concerns.

DRC renews its recommendation that the Department conduct an on-site inspection prior to granting a waiver and waiver renewal. This inspection should emphasize or focus on the anticipated impact of the workforce shortage on care. Interviewing residents, as described above, could occur at this time.

B. Compliance with State and Federal Regulations

The Department assured stakeholders that compliance with federal requirements, including staffing standards, was implicit in III (b)(1). Given the numerous questions that arose at the stakeholders’ meeting amongst a group of informed advocates, DRC recommends that compliance with federal CMS standards and prohibition of any quality of care violation with the scope and severity of G or higher be expressly added. There should also be an outside number of Class B citations after which a waiver should be denied. DRC recommends the Department consider setting the standard based on a ratio of Class B citations per facility census.

DRC renews its recommendation that the Department must consider the facility’s history of compliance with state and federal regulations, including all deficiencies and citations issued by the Department in the past five years. DRC further recommends that the Department clearly state that the relevant time period for facility compliance extend the listed exclusionary criteria in III (a) through (c).

C. Application and Renewal Review

1. Consideration of Application Elements

While DRC appreciates the Department’s attempt to streamline these guidelines, in doing so it deleted important criteria for evaluating workforce shortage waiver applications and renewal applications. As written, the Department does not appear to consider important factors which the facility was required to address in its application, including the number of vacancies and length of the vacancies (an indication of chronic

understaffing), salary scales for vacant positions (an indication of competitive wages), and the facility's attempted recruitment or retention activities, plan, and compliance with plan (an indication of whether the facility has made any attempts to address the workforce shortage). The weight of these increases with each renewal application and should be expressly referenced as criteria for evaluating waiver application and renewal requests.

2. Renewal Application Prohibitions

DRC recommends that the following criteria be an absolute bar to waiver renewal:

- Facility's failure to implement their augmented and targeted workforce recruitment plan;
- Facility's failure to implement its workforce shortage action plan;
- Failure to suspend new resident admissions; and
- Any violations or deficiencies issued to the facility in which staffing shortages or workforce shortages were a contributing factor.

3. Multiple Waivers in One Community

The Department must also consider the impact of granting multiple waivers in one community on the community's skilled nursing facility residents. Granting multiple waivers in one community risks resetting the standard of care in that community to one that is chronically substandard and understaffed. Furthermore, as several of the criteria for evaluating a waiver request are based on comparing the applying facility's experience with that of other neighboring facilities (i.e. salary, community workforce shortage), granting waivers to multiple facilities in one community taints the validity of these measures intended to provide some objective standard for comparison.

D. Repeated Waiver Renewals

DRC is strongly opposed to the Department's draft guidelines which permit two consecutive waiver renewals, essentially permitting a facility to chronically staff its facility below statutory requirements for three

consecutive years. DRC recommends the Department to prohibit renewal of any individual waiver more than once.

The current draft guidelines imply that a facility may only be granted one waiver and two consecutive waiver renewals and is, thereafter, not eligible for a second waiver application, even after waiting one year. DRC supports this limitation. However, if the Department did not mean to set this limitation, DRC recommends that the Department require, minimally, that three years lapse before a new waiver application is eligible for consideration.

IV. **Waiver Approval**

A. Posting Approved Waiver

DRC renews our request that the Department post a list of all facilities granted a workforce shortage waiver on their public website. Furthermore, a prominent and readily visible notice of the Department's approval of workforce shortage waiver should be prominently posted the facility's information page on the Department's Health Facilities Consumer Information System.

V. **Conclusion**

DRC appreciates the Department continuing to include us and other stakeholders as they draft these guidelines. Please do not hesitate to contact me if you have any questions or would like to discuss further our comments above.

Sincerely,

A handwritten signature in blue ink, appearing to read "Leslie Morrison", followed by a horizontal line.

Leslie Morrison
Director of Investigations and Grants Administration

cc: Scott Vivona