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July 31, 2018

Scott Vivona, Assistant Deputy Director
Center for Healthcare Quality

Chelsea Driscoll, Chief
Policy and Enforcement Branch
Licensing and Certification Program

California Department of Public Health
1615 Capitol Avenue, MS 3201
Sacramento, CA 95814-5015
VIA EMAIL AND U.S. MAIL

RE: SB 97 (2017) Implementation of 3.5/2.4 Staffing Requirement

Dear Mr. Vivona, Ms. Driscoll and the Department:

Thank you for the opportunity to provide comment on the final regulations implementing SB 97. Plum Healthcare Group, LLC, provides support services to 54 affiliated Skilled Nursing Facilities in California. Those affiliated Skilled Nursing Facilities provide care for thousands of residents daily. On behalf of the affiliated Skilled Nursing Facilities we submit these comments on SB 97 requiring Skilled Nursing Facilities in California to staff at an over all 3.5 Direct Care Hours Per Patient Day (DHPPD) with 2.4 of those hours being dedicated to Certified Nursing Facilities.

The new staffing requirement represents numerous challenges, importantly these staffing requirements do not assure improvements in care provided to Skilled Nursing Facility Residents. The intent of federal regulations from the Centers for Medicare and Medicaid Services ("CMS") regarding "Sufficient Staff" under 42 CFR §483.35(a) is "...To assure that sufficient qualified nursing staff are available on a daily basis to meet residents' needs for nursing care in a manner and in an environment, which promotes each resident's physical, mental and psychosocial well-being, this enhancing their quality of life." SB 97 does not provide a framework for staffing to meet the needs of Facility residents.

As presently implemented under the Emergency Regulations SB 97 quality of care is not improved or enhanced. The California Department of Public Health has numerous systems in

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place to monitor the quality of care in a healthcare Facility. Among them is the yearly recertification survey. Likewise, CDPH investigates all complaints of violations of quality of care. This regulatory framework provides the Department the comprehensive oversight authority. Likewise, SB 97 does not add any assurance of improvement for either the provider or the regulator.

There are two Waivers available for the SB 97 requirements: the Acuity Waiver and the Workforce Shortage Wavier. The concern with these Waivers is that there is currently no timeframe within which CDPH must approve or deny the Waiver once it is submitted by a Facility. However, Facilities must meet the current SB 97 requirement while waiting for a response to the Waiver application from CDPH. Although there may not be a civil money penalty imposed if a Facility does not meet the 3.5 DHPPD with 2.4 dedicated to CNA hours, a Deficiency will be issued and That will require a plan of correction to meet the mandate, even though the facility may ultimately qualify for one or both of the waivers. This is counterintuitive.

As evidenced by the materials available on the CDPH Program website, various Stakeholders have advanced competing positions on the 3.5/2.4 regulation. A few salient points do emerge from the advocacy and the discussion around this issue. We offer these comments regarding the need to develop criteria to replace or enhance the current use of the Program Flex Process for the current Acuity Waiver described in Title 22 section 72213 which requires a facility to provide:

- The regulation being waived,
- The proposed alternative methods for meeting the intent of the regulation, and
- Documentation supporting the request.

The following are some reasonable and suggested criteria to use in developing the Acuity Waiver in the final regulation.

1. Acuity Waivers should be automatically issued and renewed for licensed Sub-Acute facilities or Sub-Acute units within a Skilled Nursing Facility. We are not aware of any compelling argument in opposition to this position.

2. To the degree the Department would consider a Licensee's regulatory history to evaluate whether to issue, renew or revoke a waiver, any regulatory history should be limited to the current Licensee only, not reaching back into any former Licensee history, and should also be limited to the date of the event, not the date of issuance of the deficiency.

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3. High performing facilities, those with five stars who receive QASP recognition year after year, should be exempt from the imposition of new staffing requirements.

As to the requirement for 2.4 CNA hours, there are recognized healthcare workforce shortages in California not only for Licensed Staff but more specifically for CNA's. The estimate is that statewide there is a need for a minimum of 1,700 CNA's to begin to implement these new staffing requirements. Currently, it is averaging more than six months for a CNA program to be approved by the state before a facility can implement their own program. Therefore, with the speed at which SB 97 was implemented facilities did not have a reasonable opportunity to apply for a CNA training program. This is notwithstanding the fact that no one has advanced any credible evidence that a mandate or increase in non-nursing hours will improve patient care at all.

There are significant and substantial concerns regarding implementing SB 97 . Some of these concerns are identified in this letter, no doubt other concerns will be raised. Therefore , we strongly suggest that the Department delay the implementation of the final regulations governing SB 97
Thank you for your consideration.

Sincerely

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