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December 10, 2017

(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 the opportunity to comment on the California Department of Public Health's (the Department) guidelines on the SNF Staffing Requirements and Workforce Shortage Waiver. These following comments are consistent with and reinforce the comments that I provided at the stakeholder meeting on November 17, 2017. The comments following the outline of the draft Workforce Shortage Waiver Guidelines that we reviewed at that meeting.

I. Guidelines for Waiver Application

A. Contents of Waiver Request

Disability Rights California (DRC) strongly supports the Department's requirement that a facility requesting the waiver provide objective, independent supporting evidence of a workforce shortage in the community or region of the facility. DRC is not aware of sources where this information may be best accessed but supports the Department's attempt to identify public sources for this information.

B. Efforts to Address Workforce Shortage

1. Recruitment Plan

In addition to requiring that a facility submit a description of their recruitment plan, 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 plans 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.

2. Advertising of Vacancies

DRC encourages the Department to require facilities to submit evidence of advertising, not merely rely upon a facility's claim of when, where and how longstanding vacancies were advertised. Evidence may include copies of the advertisements and invoices or service contracts for the places where the positions were advertised.

6. Salary Scale

DRC supports the Department's requirement that the facility provide the salary scale for the vacant position(s). The Department must ensure that the salaries for the vacant positions are competitive. One reason for a workforce shortage is that a facility's compensation is not competitive and that qualified applicants are taking jobs in other facilities with higher wages. The Department should compare the salaries of a facility applying for a waiver with those of neighboring facilities, including specifically those not owned by the same corporation, in order to evaluate if the facility's salaries are competitive with like facilities in the region.

9. Use of Registry Services

DRC supports the Department's requirement that a facility submit detailed information about their use of registry services. If the facility is not using registry staffing to fill vacancies, they should be required to retain a registry while they work to fill vacancies. If the retained registry is not providing sufficient staff to meet the facility's vacancy needs, the facility should be required to provide evidence of recruiting other registries to meet their staffing needs. A facility that is meeting the staffing requirements with registry personnel should not be granted a waiver to avoid the higher cost of registry personnel.

C. Plan to Resolve Workforce Shortage

Before applying for a waiver, DRC recommends that the facility be required to implement a plan to resolve the shortage. As written, the proposed language implies that the facility is not required to implement a plan before applying for a waiver. Similar to our comments about the recruitment plan, the workforce shortage plan should be specific to the areas impacted by the workforce shortage and the facility should be required to provide documentation of how the workforce shortage plan has evolved over time as the facility has experienced on-going staffing shortages.

The workforce shortage plans should include the use of registry personnel and process of sharing staff from neighboring facilities owned by the same corporation.

D. Plan to Meet Resident Needs

Consistent with recommendations by CANHR and the State Long Term Care Ombudsman, 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 presenting residing in nursing facilities during Department-sanctioned staffing shortages lasting, potentially, a year or more.

The Department's guidelines must include an absolute minimum direct care staffing threshold. DRC recommends that this threshold be consistent with

the previous statutory requirement of 3.2 direct care services hours per patient day.

II. Evaluation of Waiver Requests

DRC suggests 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. The Department is in the unique position of gauging claims of a community's workforce availability based on whether other facilities in the region 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.

The Department must 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.

A. Application

1. Complies with state and federal regulations

DRC supports the Department's requirement that a facility have a track record of complying with state and federal requirements. DRC recommends that the applying facility must meet all state and federal requirements, at the time of the application, other than the direct care service hours requirement.

In addition, 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. The number of

the violations and severity of harm resulting therefrom must be a factor in the Department's decision to grant a waiver.

Any violation in the past three years in which staffing shortages were a contributing factor should be an absolute bar from that facility being granted a workforce shortage waiver. Similarly, any facility with more than two (2) Class A citations or one (1) Class AA citation in the past four years should be prohibited from being granted a waiver, regardless of if staffing was a contributing factor. 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.

2. License Suspension or Revocation

DRC strongly recommends that any facility that has had its license suspended or revoked, or was placed into receivership, in the past five years be excluded from receiving a workforce shortage waiver.

3. Documentation of Workforce Shortage

DRC recommends the Department require that the facility provide complete and accurate "evidence," not merely "documentation," of the workforce shortage. "Documentation" could include a facility's self-serving description of alleged shortages without an objective supporting evidence.

5. Located in Rural Area

DRC presumes that the Department suggested this as a factor because workforce shortages are more prevalent in rural areas. We request confirmation that this is why this factor was suggested and, if so, supporting evidence.

B. Renewal Application

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

1. Facility's failure to implement their augmented and targeted workforce recruitment plan;
2. Facility's failure to implement its workforce shortage action plan;
3. Failure to suspend new resident admissions; and

4. Any violations or deficiencies issued to the facility in which staffing shortages or workforce shortages were a contributing factor.

III. Processing Waiver Requests

As stated in our letter dated August 25, 2017, DRC strongly opposes any waiver lasting longer than a few months, although we recognize that the language of SB 97 proposes an annual renewal. 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.

C.4. Repeated Waiver Renewals

DRC is strongly opposed to the Department's draft guidelines which permit three consecutive waiver renewals, essentially permitting a facility to chronically staff its facility below statutory requirements for four consecutive years. DRC recommends the Department to prohibit renewal of any individual waiver more than once.

Furthermore, DRC recommends that the Department limit the number of waivers that may be granted to a facility in a five year period and set a minimum time period within which a new application would not be entertained. Specifically, DRC recommends that the Department require, minimally, that three years lapse before a new waiver application is eligible for consideration.

IV. Other Remarks

A. Engaging Residents

It is disappointing that the Department's draft guidelines overlooked obtaining input from those directly impacted by workforce shortages. DRC supports the recommendation by CANHR about consulting with residents and family members 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 will or are impacting 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.

B. Conducting an On-Site Inspection

DRC supports the recommendation by CANHR and others 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.

C. Terminating Waivers

DRC recommends that the Department consider what conduct would trigger termination of a waiver and hopes the Department will engage stakeholders in a discussion about criteria for waiver termination at our next meeting. Certainly any violation or deficiency in which staffing was a contributing factor should prompt review of the waiver. Any violation involving a resident death or serious injury (Class A or AA), regardless of whether staffing was a contributing factor, should be grounds for immediate waiver termination.

D. Publishing List of Waiver Facilities

DRC requests that the Department track and make publically available the list of waivers granted by facility corporate ownership, in addition to facility name. This information is essential for residents of nursing homes and their loved ones as well as advocates, including DRC who often investigates allegations of abuse or neglect in which workforce shortages and accompanying staff burn-out may be a contributing factor.

E. Nursing Assistant Trainees Included in the Direct Care Services Hours

As stated in our letter dated August 25, 2017, DRC is concerned that nursing assistants in training programs are considered direct caregivers and included in the direct care service hour calculation. These students

have limited direct care experience, if any. DRC recommends that the Department limit the maximum number of direct care service hours provided by nursing assistants in training or prohibit including trainees entirely in the new 3.5 hours per patient day direct care service hour requirement. Furthermore, we recommend that the Department clearly prohibit including trainees in the requirement to provide 2.4 certified nurse assistant hours per resident day.

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