New York State Bar Association

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NYSBA

Memorandum in Opposition

HEALTH LAW SECTION

Health # 3 May 19, 2014

S. 3691-A By: Senator Hannon
A. 6571 By: M. of A. Gottfried
Senate Committee: Health
Assembly Committee: Health
Effective Date: 180th day after it shall have become a law

AN ACT to amend the public health law, in relation to enacting the "safe staffing for quality care act"

LAW AND SECTION REFERRED TO: Paragraph (a) and (b) of subdivision 2 of section 2805 of the public health law

THE HEALTH LAW SECTION OPPOSES THIS LEGISLATION

The New York State Bar Association (NYSBA) Health Law Section is opposed to this legislation (Bill) which would establish fixed nurse-patient ratios, reporting requirements and a private right of action for nurses who claim discrimination after refusing an unlawful work assignment, as defined in the Bill. Significantly, the Bill poses a significant burden on hospitals from an operational, quality and financial standpoint.

The bill would create an impediment to patient safety by freezing the hand of professional nursing staff in assigning resources and coverage for care, based on the dynamic needs of patients- known as *patient acuity*. The term "acuity system" is defined in the Bill, to indicate the means by which nursing care requirements may be predicted for individualized patients **"based on severity of patient illness"** and patient needs in relation to *nursing resources*. The complexity of matching resources to patient needs is therefore acknowledged by the Bill, but is then ultimately displaced by a regressive imposition of staffing mandates. This approach fails to take into account the evolving model of care and the critical importance of real-time planning for the needs of patient.

Significantly, the Joint Commission on Accreditation of Health Care Organizations requires staffing levels for nursing to be set based on competency and skill mix of the nurse, in relation to patient acuity. This approach appreciates the complexity of care

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planning. The imposition of staffing ratios by New York State would impose standards which are also out of step with those required by the Medicare Conditions of Participation, which establish standards for an institution's eligibility to receive federal funds and also provides a comprehensive framework to protect patients. No studies or review are available showing whether there would be a significant adverse impact on Federal funding as a result of the proposed mandated staffing ratios. In addition, no studies or hearings have apparently been held or made available on assessing the proposed impact of the legislation as to the State and Federal initiatives in collaborative care, quality of care and/or value based payment initiatives.

The proposed staffing requirements would interfere with the ability of providers to use appropriate staffing mixes such as nurse extenders and support staff in the clinical setting (which can be both quality and cost effective in this day of ever rising healthcare costs), as resources would be disproportionately used for licensed nurses, without regard to actual need. This bill would simply force institutions to hire and pay nurses to perform tasks that can be performed more efficiently and with better quality outcomes through the application of innovative uses of health information technology, *telehealth* or collaborative care - since the mandate requires that only nurses count towards the staffing ratios.

Some areas of the State are still experiencing nursing shortages. Staffing ratios do not draw nurses into the field, but simply cause hospitals to raise salaries to attempt to recruit staff from other area hospitals, which increases healthcare costs without increasing patient care. In the event that a hospital cannot meet the required staffing ratios, such may have the unintended effect of causing institutions to attempt to close beds, divert emergency cases, or aggressively discharge patients, in an effort to accommodate a mandated nurse-patient ratio, all results negative to patient care. The historical consideration of staffing ratios by the New York State Attorney General's Office (AG) and the Department of Health & Human Services (HHS) do not support the conclusion that mandatory staffing ratios are advisable. A 2006 survey by the New York State AG fell short of even recommending such mandates for nursing homes in particular and instead cautioned that *"by issuing this report, we are not suggesting that levels of staffing, alone, guarantee quality care. Much goes into quality care beyond numbers. Staff motivation and competence is vitally important. And as we describe below, the significance of a home's staffing levels may be affected by the needs of its resident population; a home with sicker residents may need more staff."* (See http://www.ag.ny.gov/sites/default/files/press-releases/archived/final.pdf, at page 3). The survey also cited to extensive HHS research in the area of nursing home staffing patterns, quoting from the HHS Secretary's view point: *"The question of the relationship between the number of staff and quality of care is complex and the Phase I and Phase II studies made good faith efforts at addressing the question. However, the Department has concluded that these studies are insufficient for determining the appropriateness of staffing ratios in a number of respects. Specifically, we have serious reservations about the reliability of staffing data at the nursing home level and with the feasibility of establishing staff ratios to improve quality given the variety of quality measures used and the perpetual shifting of such measures."* (*Id.* t page 13.)

In contrast, better *care management* is likely to improve quality and permits a measured approach to allocating resources and costs. This is especially critical in the current environment of Medicaid capped spending.

The improvement of quality of care is associated with evidence-based practices to improve care and outcomes. A *patient-centered* approach to the delivery of care cannot be static, as it requires an appreciation for the fluidity of patient needs, and the dynamic environment in which care is delivered. Staff ratios cannot be a proxy for quality of care. There is a palpable absence of a meaningful description of how the staff ratios will be calculated, and how frequently. For example, is this to be done with each new admission? Will the nurse manager or supervisor be required to calculate the staffing ratios on an ongoing basis? This will commit nursing leadership to an inflexible, time-consuming calculus, which will also require mass training of staff involved in scheduling, at significant expense. Given the inevitable complexity of applying mandated *nurse: patient ratios*, there may be a need for software programs to provide a means of calculating staffing assignments – all at great cost to hospitals. Moreover, there is no provision for adjusting staffing according to the relative experience and skill set of individual nurses. This deprives patients and staff of the application of mature nursing judgment in the allocation of resources. Addressing the anticipated care of patients requires flexibility in the assignment of professional nurses. Patient care needs, education and discharge planning, vary greatly. The requirement for set ratios will deprive patients of safe and effective care by freezing staff assignments.

The inability to maintain fluidity of staffing assignments, according to patient needs will dramatically drive up the cost of delivering care. The proposed staffing ratios may cause the concentration of nursing resources in the inpatient setting, negatively impacting outpatient services provided by hospitals, which have enhanced affordable care. This may cause decreased access and serve as an impediment to quality of care, as professional nurses may be reassigned to the inpatient setting. The mandates in the Bill will erode public confidence in the healthcare system by placing a tremendous financial burden on the providers, who will be forced to decrease access, to limit the number of patients in accordance with available nurses.

Review of patient safety and quality of care should be evidence-based, looking at **results,** to assist providers in identifying measures to achieve quality outcomes. There is no indication that staff ratios are either a proxy for quality or improve care.

Moreover, the Bill's private right of action for an aggrieved employee, including a provision for attorney's fees, would further impose unnecessary costs on providers, as the escalation of staffing disputes is incentivized by the Bill's provisions. This bill simply encourages claims that will further clog the State's judicial system and cost hospitals more resources that could be put into patient care.

The bill is not feasible and would be detrimental to the public. The Public Health Law, as an expression of public policy, should not reflexively establish unfunded mandates which increase the cost of healthcare delivery. The United States currently spends eighteen

percent of its gross domestic product on healthcare, and as our nation is exploring how to reduce unnecessary healthcare costs, imposing greater costs on hospitals is contrary to the concept that wiser healthcare spending can better serve the public health and allow more people to access care. This proposed bill will only drive up costs and decrease resources that could best be used for efficient care.

For the reasons stated above, the Health Law Section of the New York State Bar Association **OPPOSES** this legislation.

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