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ASSOCIATION



NATIONAL NURSES
ORGANIZING COMMITTEE

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April 14, 2010

Senator Gloria Negrete McLeod
Chair, Senate Committee on Business, Professions, and
Economic Development
State Capitol, Room 2053
Sacramento, CA 95814

RE: SB 1111, as amended April 12, 2010, OPPOSE UNLESS AMENDED

Dear Senator Negrete McLeod:

The 86,000 registered nurses (RN) of the California Nurses Association (CNA) oppose SB 1111 unless amended to address a number of concerns including those regarding due process for RNs; new disciplinary powers for the Department of Consumer Affairs (DCA) director; employer reporting requirements; and, the elimination of healing arts board diversion programs.

CNA strongly supports efforts to strengthen enforcement programs within the state's healing arts boards, including the Board of Registered Nursing (BRN), in order to ensure strong protections are in place for California patients. Since last year's publication of the Los Angeles Times articles, which exposed significant systemic deficiencies in the enforcement and disciplinary processes, CNA has contributed to the efforts of the BRN, DCA, and the Legislature to improve enforcement by providing feedback and recommendations on actions the state may take to provide fair and just enforcement and discipline, and boost public protection.

As such, we appreciate your efforts to author a bill that attempts to achieve systemic reforms among healing arts boards. SB 1111 contains numerous provisions with which our organization firmly agrees. For example, we support provisions that authorize BRN to hire investigators and nurse consultants to help streamline complaint investigations; suspend and/or revoke licenses of incarcerated licensees, and sex offenders; require boards to check national databases to review the backgrounds of licensees from other states; and, authorize implementation of vertical enforcement and prosecution models.

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Additionally, thank you for considering our concerns regarding RN privacy and security. We appreciate your recent amendments to the bill eliminating requirements for RNs to post an "address of record" on the BRNs website. We also appreciate other amendments, including the elimination of provisions that would have given the DCA director the authority to increase licensee fee ceilings.

However, bill still contains a number of provisions with which our organization has strong concerns. These concerns are outlined below:

1. Elimination of diversion programs

Diversion programs are an essential component in the recovery and rehabilitation of RNs and other licensees with substance abuse issues. As an organization, we strongly support the principles of rehabilitation. Eliminating diversion programs would result in greater harm to patients, because a licensee with substance abuse problems would likely not seek assistance from the board for fear of jeopardizing his or her license. We have grave concerns that these licensees will continue to practice rather than seek rehabilitation, because discipline will be the only alternative available to them.

Over half of the RNs who enter into the BRN's diversion program successfully complete the program. Furthermore, currently, the BRN inactivates the licenses of RNs who enter diversion. This is an appropriate safeguard to remove RNs with substance abuse problems from practice while they are in rehabilitation.

We ought not outright eliminate diversion programs, but rather assess how they may be improved so as to help licensees rehabilitate, recover, and return to safe practice. As such, we must continue to oppose the provisions in the bill that would do away with healing arts board diversion programs.

2. DCA director authority to suspend licenses

This bill would authorize the DCA director to order a licensee to immediately cease practice if the director opines that, by a preponderance of the evidence that an imminent risk of serious harm to the public health, safety, or welfare exists.

We remain opposed to this provision. The BRN currently has the statutory authority to immediately suspend a license by issuing an interim suspension order (ISO). Current law also affords licensees certain rights under the ISO process, such as notice and hearing rights that are not provided for in SB 1111.

This provision erodes due process by allowing the director to suspend the license of a licensee, and to publicize the suspension on the board's website, without first having any proof that the licensee had violated the law. We appreciate the amendments inserting language requiring preponderance of the evidence, but this does not go far enough to preserve due process, especially when the licensee's license could be

suspended for up to 90 days without any proof that the initial complaint or other evidence has any merit.

The director is not a healing arts professional, and may not be qualified to assess a licensee's practice when determining whether or not to suspend the licensee's practice. Furthermore, we have concerns with the ability of the director to balance public protection with due process, considering that he or she would be a political appointee that does not have to undergo the same level of public scrutiny as a board does.

The authority to suspend RN licenses should remain with the BRN, a publicly accountable board. If the ISO process is not sufficient, it should be improved before any new authority and power is given to the DCA director. We continue to oppose this provision in its entirety.

3. Employer reporting

While the amended version of the bill provides some additional guidance with regard to the grounds for which employers must report suspensions, terminations or resignations in lieu of suspensions or terminations, we continue to oppose the employer reporting provisions, because the bill does not require employers to substantiate their disciplinary actions. Further, the bill does not specify what the board would do with these reports.

RNs are required by law to advocate in the sole interest of the patient, which many times puts them in conflict with their employers. We would be concerned with the impact that these reporting requirements would have on whistleblowers, and other nurses who are disciplined or terminated by their employers for fulfilling their duties as patient advocates.

Most RNs are at will employees who do not have the benefit of a publicly accountable or otherwise transparent disciplinary process imposed by the health facility. Thus, there is no process to ensure that suspensions or terminations of licensees actually mean that that licensee practiced negligently, incompetently, or committed any other illegal act specified in the bill. Furthermore, we are aware of many cases in which RNs do not wish to fight their employer, even if they did not commit any violations, and choose to resign rather than be terminated. Under this bill, those resignations would be reported, and there likely would be a presumption of guilt surrounding that licensee even if there is no proof to support such a presumption.

Additionally, by requiring a Skelly hearing prior to the imposition of license suspension of publicly employed licensees, an inconsistent disciplinary process for private and public employees would be created. Public employees would have the benefit of a formal hearing and review of the employer's disciplinary action prior to reporting, whereas private employees would not.

4. Emergency Health Care Enforcement Reserve

It appears as though the new provisions establishing the reserve fund attempt to afford additional spending authority to the boards, which is necessary, especially for the BRN which maintained a relatively large reserve, but has been unable to tap into the funds to augment its own enforcement program. However, we continue to have concerns that the bill will not prohibit regular borrowing of funds by the governor's administration to augment the General Fund.

We also do not support provisions that would allow the DCA to loan funds from one board to another in order to fund enforcement programs. It is unclear why RNs, or any other type of licensee, should pay fees in order to have them diverted to the regulation of another healing arts profession.

5. Board authority regarding mental and physical illness and disability

It remains unclear how the board would implement this new authority on license applicants. It is also important to note that RNs have widely disparate functions. For example, some RNs sit at desks processing case reviews, or perform other tasks that a physical disability may not inhibit. It is unclear how the board would objectively apply this provision to an applicant, and guarantee protections against discrimination.

It is also unclear how the BRN would implement a "limited license" as required by the bill for applicants with physical disabilities. This provision would create additional burdens and costs to the board in order to determine how to fairly and appropriately determine the specific type of functions an RN may perform under a limited license.

We continue to have concerns that under these provisions, the BRN would be vulnerable to violations of the Americans with Disabilities Act, or the California Fair Employment and Housing Act.

6. Citation and fine appeals process

Section 9 of the bill would create an inconsistent appeal process for licensees who wish to contest citations and fines, because the board could pick and choose "at its discretion" which appeals to hear. This also undermines due process by eliminating the opportunity for an impartial third party, an ALJ, to hear appeals only for certain licensees.

Further, because the bill would allow boards to hold these hearings outside of the requirements of the Administrative Procedures Act, it would be up to each board to adopt its own regulations to implement the hearing process. Although recent amendments offer additional guidance to boards on what to include in the regulations, the bill would still result in inconsistent appeal procedures across healing arts boards. Additionally, the recent amendment allowing an appeal of the citation decision by filing a petition for a writ of mandate is an impractical solution for licensees, as it would likely be cost prohibitive to seek such an appeal in a higher court.

We understand the intent to streamline appeals and reduce costs. However, we are concerned that this provision does so at the expense of due process, and creates a subjective and inconsistent hearing process.

7. Records

The provision relieving licensees from requirements to turn over "certified medical records" that they do not have control over, or access to, is too narrow. There are other types of documentation and records such as timekeeping, payroll, staffing, and electronic tracking records, which employed RNs do not own or control, but that may be relevant to an investigation and requested of them.

The bill would exempt communications between licensees and patients from existing legal confidentiality requirements during investigations or proceedings conducted by the board, which raises HIPAA concerns, and should trigger stronger patient consent requirements.

Facilities would receive notice that failure to turn over records could result in some form of penalty. Licensees would not receive such notice, but should so that they are fully aware of the consequences that could be imposed for failure to comply with document and record requests.

8. Licensee repayment of enforcement costs

We appreciate the recent amendments which would bring back requirements to pay "reasonable" costs instead of "actual" enforcement costs. However, we do have concerns with the new provisions requiring licensees to pay for probation monitoring costs. These costs could be very high to licensees. Those who would be unable to pay these costs may have to forgo probation, which could put them out of practice. Furthermore, the new provisions that would prohibit a board from terminating probation due to nonpayment could create catch-22 situation in which the licensee may not be able to afford to pay for the probation costs, and thus must remain on probation for nonpayment, causing even higher probation costs to accrue.

9. Executive Officer Authority to adopt default decisions and stipulated settlements

Currently, the BRN members vote on whether or not to adopt default decisions (which result in license revocation), and stipulated settlements (which may result in probation, or license suspension or revocation). Under this bill, the BRN could delegate this authority to the executive officer.

While the authority granted to the executive officer is narrow, power to invoke revocation would be consolidated from a publicly accountable board, to one individual, the executive officer. In order to maintain public accountability, the bill should contain an explicit requirement for the executive officer to report to the board on any actions

he or she takes to sign default decisions and settlement agreements under this new authority.

10. Reporting requirements for arrests and charges

We continue to have concerns with requirements to report arrests and felony charges, even when there is no subsequent conviction. Our concerns are exacerbated by new provisions added that would require a licensee to declare his or her status as a healing arts licensee upon arrest.

11. IT system

While a new information technology system may help streamline and improve enforcement efforts, it would be a costly endeavor to implement – especially in light of the state budget deficit, and the devastating cuts to essential programs and services that have taken place and continue to be proposed. We would like to know how such a system would be funded.

12. Intent to improve efficiency

The bill declares legislative intent to improve efficiency and reduce the average timeframe for investigating and prosecuting cases to 12 to 18 months. In order to achieve true efficiency and public protection, it would seem appropriate to consider reducing the investigation and prosecution timeframe to 6 months. By aiming higher and shortening the target timeframe, it would be more likely that the level of efficiency desired would be achieved. Additionally, it is important to note that as long as the boards continue to undergo budget reductions, and staff furloughs, efforts to improve efficiency will be hampered.

Thank you in advance for your consideration of our concerns. Because the amendments to this bill were published on the same day as the committee deadline for position letters, we have not had adequate time to properly vet the amendments as of the time of the writing of this letter. Thus, we have some outstanding questions about the new provisions, particularly relating to the proposed enforcement reserve fund, and a requirement for the BRN to maintain a fund reserve between 3 to 6 months of operating expenditures. We also have some technical questions regarding the amendments. We will continue analyzing the bill in the days leading up to the hearing, and hope that we can work with you to obtain answers to our remaining questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kelly Green', with a long horizontal line extending to the right.

Kelly Green
Regulatory Policy Specialist

cc: Members, Senate Business, Professions, and Economic Development Committee