August 19, 2021

James Frederick
Acting Assistant Secretary of Labor for
Occupational Safety and Health
Occupational Safety and Health Administration
200 Constitution Ave NW
Washington, DC 20210

RE: Occupational Exposure to COVID-19; Emergency Standard
OSHA – 2020 – 0004; ANCOR Written Comments

Dear Acting Assistant Secretary Frederick:

On behalf of the American Network of Community Options and Resources (ANCOR), thank you for the opportunity to provide feedback to the Occupational Safety and Health Administration's (OSHA) emergency temporary standard (ETS). We understand and support OSHA's intent to protect healthcare and healthcare support service workers from occupational exposure to COVID-19. However, we are concerned that the rule remains unclear in its scope of implementation and may further exacerbate the current workforce crisis impacting services and supports for individuals with intellectual and developmental disabilities (I/DD).

ANCOR is a national, nonprofit trade association representing more than 1,600 private community providers of services to people with I/DD. Combined, we support over one million individuals with disabilities and work collaboratively to shape policy, share solutions, and strengthen community. Our members assist people with I/DD to live full and independent lives by providing services and support for instrumental activities of daily living.

ANCOR surveyed community providers over a five-week period beginning in February 2020 to glean a deeper understanding of how the direct support workforce crisis is impacting their ability to deliver the highest-quality supports possible. This pre-pandemic survey found that 66% of providers were turning away new referrals, 34% of providers were discontinuing programs and services, and 65% of providers were delaying the launch of new programs or services due to lack of staffing.[1] Survey results further indicated the average provider spent an additional $904,000 annually in costs attributable to the workforce shortage. In a subsequent survey in April 2020, more than half of the surveyed providers reported an additional $77,000 per month on average associated with staff overtime.[2]

ANCOR offers the following comments, suggestions, and requests for clarification to the ETS. Our recommendations are framed to support uniformity in implementation with acknowledgment

[1] See The State of America's Direct Support Workforce
[2] See Impact of COVID-19 on Organizations Serving Individuals with Intellectual and Developmental Disabilities

for the impact of subsequent regulatory restrictions on the current direct care workforce shortages. We have organized our feedback by section below, touching upon broad themes and specific recommendations that arose within those topics.

Implementation Extension

We request that OSHA delay the ETS compliance dates for an additional six (6) months with a good faith showing of progress toward compliance.

Under current rule, complete compliance was required by July 21, 2021.[3] However, the rule makes use of broad and ambiguous terminology which necessitates further clarification to ensure appropriate implementation. With the comment period extended to August 20, 2021, allowing additional time to review comment and provide appropriate guidance prior to compliance supports consistency in implementation. Further, the ETS requires significant physical and personnel changes which necessitates time for implementation and transition.

Additional time is necessary for OSHA to confer with the Centers for Medicare and Medicaid Services (CMS) to clarify expectations and direct necessary funding increases. The nationwide direct care workforce crisis is due to providers' inability to compete with the private market stemming from stagnant Medicaid reimbursement rates left unadjusted for inflation, rising costs, and competitive industry standards. With underfunding, providers have already reduced and terminated programs, employee benefits, and general administrative maintenance to remain operational. Providers are unable to survive new and expensive compliance mandates under current budgetary constraints without state and federal support.

Scope and Application

ANCOR requests further clarification of the use of the term "professional healthcare practitioners"[4] and "for the purpose of promoting, maintaining, monitoring, or restoring health"[5] as it relates to direct support professionals and assistance with activities of daily living.

Professional Healthcare Practitioners

OSHA's definition of "healthcare services" indicates services provided by "professional healthcare practitioners" and proceeds to give examples including "doctors, nurses, emergency medical personnel, [and] oral health professionals."[6] However, professional healthcare practitioners are not defined further in rule leaving the term open to broad interpretation. While the examples appear to be united in their requirement of licensure and third-party board of overseers, this is not explicitly stated anywhere in the rule. Rather, there appears to be separate reference to "licensed healthcare providers" in isolated instances when diagnosing COVID-19

[3] 29 C.F.R. § 1910.502(s)
[4] 29 C.F.R. § 1910.502(b)
[5] Id.
[6] Id.

and "where emergency responders or other licensed healthcare providers enter a non-healthcare setting to provide healthcare services."[7]

Direct support professionals are individuals who provide services to individuals with disabilities that promote the individual's independence and community inclusion. These services include coaching and supporting individuals in communicating needs, pursuing personal goals, and aiding activities of daily living, such as meal preparation, bathing, and ambulation. These services are provided in a variety of environments including home, work, school, or any other community setting.

Direct support professionals are not licensed in the same was as doctors or nurses and are almost exclusively funded through Medicaid programs. These supports and services, provided in a variety of settings, have varying applicability in federal and state statutory and regulatory oversight of the healthcare industry. For example, use of Coronavirus Relief Funds and vaccine priority for healthcare professionals has differed from state to state in approach to include or exclude direct support professionals from the definition. Without further clarification, OSHA risks inconsistency in regional interpretation and enforcement.

Promoting, Maintaining, Monitoring, or Restoring Health

Similarly, while some activities performed by direct support professionals may be related to medical health maintenance, others are focused support for activities of community inclusion. Career planning and employment support, for example, are individualized services and training activities provided to improve an individual's ability to independently maintain competitive integrated employment. Without further definition of "health," it is unclear whether these community integration activities fall within the ETS scope as directly related to promoting, maintaining, monitoring, or restoring health. Moreover, it is unclear whether the scope is defined by the activities performed or the availability of certain services if needed.

<u>Setting</u>

ANCOR members have also expressed concern and requests for clarification regarding use of the term "setting"[8] and applicability of the ETS to services performed within a beneficiary's home.

Though a COVID-19 plan is required for each workplace, the ETS requirements appear to apply different standards for physical locations controlled by the employer and those "controlled by a person not covered by the OSH Act (e.g., homeowners, sole proprietors)."[9] In-home support services by direct support professionals take place in a variety of licensed and unlicensed settings, including but not limited to houses, apartments, and care facilities. Though some of these homes may be leased, subleased, and/or certified as residential care facilities or intermediate care facilities, state and federal statute and regulation provide protections to beneficiaries to exert control and autonomy over their environment.

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[7] 29 C.F.R. § 1910.502(a)(3)(ii)
[8] 29 C.F.R. § 1910.502(a)(1)
[9] 29 C.F.R. § 1910.502(c)(7)(iii)

Recent changes to regulations governing home and community-based services (i.e., the Home and Community Based Services Settings Rule)[10] established new standards to enhance the quality of services and provide specific setting requirements to establish new protections for participants. For example, though a house may be licensed as a residential care facility, it is also required to have a legally enforceable rental agreement with the beneficiary establishing and entitling tenancy rights and responsibilities. In these instances, providers may own the property; however, it is "controlled" by an individual not covered by the OSH Act and opposed to certain requirements of the ETS, such as mask mandates and physical barriers.

Medical Removal and Paid Benefits

ANCOR requests further clarification of (1) medical removal requirements when such removal presents immediate harm to the beneficiary and (2) the scope of OSHA's legal authority to institute new paid leave requirements.

Medical Removal

With vacancy and turnover rates at an all-time high, providers are struggling to meet minimum staffing ratios at extreme rates of overtime and vacancies. If unable to meet sufficient staffing thresholds, providers face potential civil and criminal punitive measures when such withdrawal puts beneficiaries' health and safety at increased risk. This places providers between a metaphorical rock and a hard place when statute and regulation require both removal and continued placement.

OSHA's ETS FAQ appears to provide flexibility in circumstances of staff shortages when "other amelioration strategies have already been tried, patients have been notified, and workers are using additional PPE at all times."[11] However, this language does not appear to be codified in the rule itself, but rather exists as a note to paragraph (l) and refers back to CDC guidance which is both subject to change and specific to healthcare facilities. Without explicit exception in rule, providers will have difficulty relying on shifting guidance and subjectivity in regional interpretation.

Medical Removal Protection Benefits

As previously stated, providers are struggling to meet increased expenses with stagnant funding and limited resources. The new mandate of additional paid leave benefits for purposes of receiving and recovering from vaccination and during periods of medical removal are likely to further devastate the provider network and access to community services. The rule appears to have few limitations to paid leave regardless of whether the infection occurred during employment[12] and, in some cases, for unlimited durations when the individual is medically unable to return to work.[13]

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[10] 42 C.F.R. § 430 *et seq.*
[11] OSHA ETS FAQ #80
[12] OSHA ETS FAQ #75
[13] OSHA ETS FAQ #77

ANCOR members have expressed concern that the imposition of paid leave goes beyond the scope of OSHA's authority to establish occupational safety and health standards. Though OSHA may be granted "almost unlimited discretion to devise means to achieve the congressionally mandated goal,"[14] the concept of paid leave in relation to COVID-19 has been congressionally reviewed and decided. A more limited paid leave was mandated through the Families First Coronavirus Response Act which expired December 31, 2020 and directed exemption for healthcare providers. Again, this issue was discussed and decided in the recent passage of the American Rescue Plan Act, which offers tax credit reimbursement for voluntary continuation of paid leave benefits.

With respect, we request further clarification of OSHA's scope of legal authority to impose new standards for paid leave after congressional review. We also request clarification of OSHA's intent and standards of review for COVID-19 as a continuing grave danger with respect to vaccine availability and the declaration of a public health emergency. The availability and improving efficacy of COVID-19 vaccines may significantly reduce the risk of grave danger while the nation also continues its declaration of a public health emergency.

Personal Protective Equipment

ANCOR requests further clarification regarding the requirement of face masks when supporting individuals with unique sensory and communication needs. Beneficiaries may have strong concerns that the use of face masks for themselves and supporting staff may exacerbate sensory needs and/or obstruct visual gestural communication. The mask requirement may also have the impact of further exacerbating the workforce crisis when competing entry-level industries are not requiring face coverings.

As a separate concern, with the onset of the COVID-19 pandemic, providers have often found themselves scrambling to acquire sufficient personal protective equipment (PPE) to meet staffing needs. As cases surge, it is possible providers may find themselves in a similar position where they are healthcare workers for purposes of a PPE mandate without designation as healthcare workers for PPE priority. If services for individuals with IDD are determined to be within the scope of the ETS, we request exemption from PPE requirements with a good faith showing of attempted acquisition.

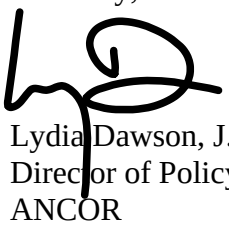
Good Faith Efforts

We greatly appreciate the inclusion of OSHA's ETS FAQ #98 which states OSHA "is willing to use its enforcement discretion in situations where an employer can show it has made good faith efforts to comply with the requirements of the standard, but has been unable to do so."[15] As currently drafted, we anticipate there are many requirements providers will be unable to comply with despite good faith efforts. We request this provision be codified in rule to prevent regional inconsistency in when and how compliance officers implement this discretion.

[14] See *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189
[15] OSHA ETS FAQ #98

Thank you for this opportunity to provide comment. Please reach out to me at ldawson@ancor.org if we can provide further clarification or information regarding the above.

Sincerely,



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