

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 323 (Kalra)
Version: January 26, 2021
Hearing Date: July 13, 2021
Fiscal: Yes
Urgency: No

SUBJECT

Long-term health facilities

DIGEST

This bill changes the standard for the California Department of Public Health (CDPH) when issuing penalties against certain long-term care facilities for violations that result in the death of a resident and increases the minimum civil penalties that may be assessed against those facilities for various violations.

EXECUTIVE SUMMARY

Current law authorizes CDPH to regulate, investigate, and penalize certain long-term care facilities, including skilled nursing facilities and intermediate care facilities. CDPH's enforcement mechanisms include issuing citations for violations of its regulations, with the severity of the violation corresponding to the cost and consequences of the citation. The highest level citation, class AA, can be issued against a facility for a violation that posed a high risk of imminent harm or death to a resident and the violation was the "direct proximate cause" of the death of a resident. According to the author and the sponsor, this "direct proximate cause" standard has caused confusion in the courts and has hamstrung CDPH in its ability to impose class AA citations against facilities whose violations resulted in the death of a resident. This bill replaces the "direct proximate cause" standard with the requirement that CDPH prove the facility's violation of a regulation was a "substantial factor" in the patient's death, and defines "substantial factor" as more than a remote or trivial factor, but not necessarily the only cause of the harm. The bill also updates the dollar ranges of the existing penalties, and creates a new class of penalty that may be assessed when a facility's violation involved the death of a resident, but did not amount to a substantial cause of the death. The author has agreed to a minor amendment clarifying the relationship between the violation and the death for this new class of penalty.

This bill is sponsored by Disability Rights California and supported by the State Council on Developmental Disabilities and AARP California. It is opposed by the California Association of Health Facilities, the California Hospital Association, the Developmental

Services Network, and LeadingAge California This bill was passed out of the Senate Health Committee with a 10-0 vote.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Requires CDPH to license and regulate health facilities, including nursing and long-term health care facilities. (Health & Saf. Code, §§ 1250, 1251, 1254.)
- 2) Establishes the Long-Term Care, Health, Safety, and Security Act of 1973, which creates a citation system for the imposition of civil sanctions against long-term health care facilities (defined to include nursing facilities) in violation of relevant state and federal laws and regulations and an inspection regime through which DPH can investigate complaints of potential violations. (Health & Saf. Code, div. 2, ch. 2.4, §§ 1417 et seq.)
- 3) Provides that, if the director of CDPH determines, after inspection or investigation, that a long-term health care facility is in violation of any statutory provision or regulation relating to the operation or maintenance of the facility, the director may:
 - a) Recommend the imposition of a federal enforcement remedy or remedies in accordance with federal law regarding nursing facilities;
 - b) Issue a citation under state law and, if the facility is a federally regulated nursing facility, also recommend federal enforcement; or
 - c) Take no action, if a violation has not caused harm, if the facility has promptly taken reasonable measures to correct the violation, and the violation was an “unusual occurrence” as determined by the director. (Health & Saf. Code, § 1423.)
- 4) Establishes a classification structure for violations by long-term health care facilities:
 - a) A “class AA” violation meets the criteria for Class A violations *and* CDPH determines the violation was a “direct proximate cause” in the death of a patient or resident at a long-term care facility.
 - b) A “class A” violation is a violation determined by CDPH to present either (1) imminent danger that death or serious harm to the patients or residents of the facility would result therefrom, or (2) substantial probability that death or serious physical harm to patients or residents would result therefrom.
 - c) A “class B” violation is a violation that CDPH determines to have a direct or immediate relationship to the health, safety, or security of patients or residents, other than class AA or class A violations. (Health & Saf. Code, §§ 1424 & 1424.5.)
- 5) Requires CDPH to prove in an action to enforce a class AA violation that (1) the violation was a direct cause of the death of a patient or resident; (2) the death resulted from an occurrence of a nature the regulation was designed to prevent; and

- (3) the patient or resident suffering the death was among the class of persons for whose protection the regulation was adopted. The facility may rebut CDPH's showing by proving that it did what might be reasonably expected by a facility under similar circumstances to comply with the regulation. (Health & Saf. Code, § 1424(c).)
- 6) Establishes citation penalty amounts for violations, with a lower range for certain facilities and a higher range for skilled nursing and intermediate care facilities. The penalty ranges for skilled nursing and intermediate care facilities are as follows:
- a) For a class AA violation, between \$25,000 and \$100,000 for every citation. For a second or subsequent class AA citation, CDPH must commence an action to suspend or revoke the facility's license.
 - b) For a class A violation, between \$2,000 and \$20,000 for every citation.
 - c) For a class B violation, between \$100 and \$2,000 for every citation.
 - d) For a willful material falsification of, or willful material omission in, a resident's health record, between \$2,000 and \$20,000. (Health & Saf. Code, §§ 1424 & 1424.5.)
- 7) Provides that a facility may contest a citation for an AA or A violation¹ by providing notice to the director of CDPH and filing an action to contest the citation in the superior court in the county in which the facility is located. In such an appeal, CDPH has the burden of establishing by a preponderance of the evidence that (1) the alleged violation did occur, (2) the alleged violation met the criteria for the class of citation alleged, (3) the assessed penalty was appropriate, and (4) the assessment of a civil penalty shall be upheld. (Health & Saf. Code, § 1428(b) & (e).)
- 8) The superior court, in an appeal action, may affirm, modify, or dismiss the citation, the level of the citation, or the amount of the citation. In assessing the penalty, the court should consider all relevant factors, including:
- a) The probability and severity of the risk which the violation presents to the patient's or resident's mental and physical condition.
 - b) The patient's or resident's medical condition.
 - c) The patient's or resident's mental condition and his or her history of mental disability.
 - d) The good faith exercised by the facility to prevent the violation from occurring.
 - e) The licensee's history of complying with regulations. (Health & Saf. Code, § 1428(b)& (f).)

¹ There are also procedures to contest a class B citation which are not relevant to this bill. (See Health & Saf. Code, § 1428(c).)

This bill:

- 1) In the list of factors that CDPH must prove to establish a class AA violation, eliminates the requirement that CDPH show that the violation was a “direct proximate cause” of the death of a resident and replaces it with the requirement that CDPH show that the violation was a “substantial factor in the death of a resident.”
- 2) Defines “substantial factor,” for purposes of 1) as “more than a remote or trivial factor, but is not required to be the only cause of harm.”
- 3) Increases the civil penalty ranges for skilled nursing facilities and intermediate care facilities as follows:
 - a) For a class AA violation, between \$30,000 and \$120,000 for each citation.
 - b) For a class A violation, between \$3,500 and \$25,000 for each citation.
 - c) For a class B violation, not less than \$150 and not more than \$3,000 for each citation.
 - d) For a willful material falsification of, or willful material omission in, a resident’s health record, between \$3,500 and \$25,000.
- 4) Adds a new penalty range, in addition to the penalty increases in 3), for “A” citations that resulted in the death of a patient or resident so that these citations are subject to a penalty range of \$15,000 to \$60,000.
- 5) Makes other nonsubstantive technical and conforming changes.

COMMENTS

1. Author’s comment

According to the author:

For the health and safety of residents in nursing homes and other Long-term Care Facilities, AB 323 will allow for more consistent oversight by creating a clear legal standard with which to hold these facilities accountable for deaths caused by negligence and poor care. The current “direct proximate cause” legal standard in statute has created inconsistency when applying violations in our state’s nursing homes and its application on proving causation in determining negligence has been rejected by the California Supreme Court. Additionally, the State Auditor highlighted inadequacies on how we hold these facilities accountable through penalty amounts as the amounts have been unchanged since 2000.

During the COVID-19 pandemic, consistent application of citation standards has been shown to be even more needed. COVID-19 has not only disproportionately affected nursing home residents, it has revealed underlying problems such as

understaffing and mismanagement that existed before the pandemic. Moving forward AB 323 will help ensure that the California Department of Public Health (CDPH) is able to properly apply oversight to long-term care facilities and hold accountable those found to be responsible for a resident's harm or death.

2. Overview of the CDPH's citation and appeal procedures

CDPH, which regulates long-term health care facilities, has the authority to investigate and issue citations to long-term care facilities for violating CDPH's regulations.²

Citations come in three classes:

- Class B, for a violation that has a direct or immediate relationship to the health, safety, or security of patients or residents, but does not rise to the level of class A or class AA.³
- Class A, for a violation that presents either (1) imminent danger that death or serious harm to residents of the facility would result therefrom, or (2) substantial probability that death or serious physical harm to residents would result therefrom.⁴
- Class AA, for a violation that satisfies the requirements of class A and all of the following:
 - The violation was direct proximate cause of the resident's death;
 - The death was the result of an occurrence that the regulation was designed to prevent; and
 - The resident who died was among the class of residents for whose protection the regulation was adopted.⁵

For skilled nursing facilities and long-term care facilities (collectively, facilities), the possible citation range is \$200-2,000 for a class B citation, \$2,000-20,000 for a class A citation, and \$25,000-100,000 for a class AA citation.⁶ The intent of these assessments – and the publication of citations – is primarily “remedial,” and CDPH's central focus in regulating facilities is “ ‘preventative.’ ”⁷

A facility that receives a class A or class AA citation may either (1) pay the citation amount, reduced to either the lowest penalty in the class range or 65 percent of the

² Health & Saf. Code, § 1423.

³ *Id.*, § 1424(e).

⁴ *Id.*, § 1424(d).

⁵ *Id.*, § 1424(c).

⁶ *Id.*, § 1424.5(a).

⁷ *Jarman v. HCR ManorCare, Inc.* (2020) 10 Cal.5th 375, 383. A separate statute allows a current or former resident of a facility to bring a civil action for damages for violating any right in the Patients' Bill of Rights or any other right provided for by state or federal law or regulation. (Health & Saf. Code, § 1430.) A current or former resident may bring such an action only in cases where CDPH did not take action against the facility, or where the violations were not corrected to CDPH's satisfaction. (*Id.*, § 1430(a).) A facility's potential liability in such a private action is at issue in AB 849 (Reyes, 2021), which was passed out by this Committee on June 22, 2021.

amount assessed in the citation, whichever is greater,⁸ or (2) contest the citation.⁹ If the facility chooses to contest the citation, the matter is heard in a bench trial before the superior court, and CDPH must prove by a preponderance of the evidence that the violation occurred, the violation met the criteria for the class of citation imposed, the assessed penalty was appropriate.¹⁰ The court may affirm, modify, or dismiss the citation or the level of the citation.¹¹ With respect to the amount to be paid for the violation, CDPH must request that the court levy a civil penalty and prove by a preponderance of the evidence that the assessment of a civil penalty may be upheld; the court may impose a civil penalty in the amount requested by CDPH, increase or reduce it, or decide that no penalty should be assessed.¹²

3. Criticisms of CDPH's regulation of, and imposition of penalties on, long-term health care facilities

In 2018, the State Auditor issued a report on long-term health care facilities prepared at the request of the Joint Legislative Audit Committee (the Auditor's Report).¹³ The report, titled "Absent Effective State Oversight, Substandard Quality of Care Has Continued," concluded that "the state has not adequately addressed ongoing deficiencies related to the quality of care" that long-term health care facilities provide.¹⁴ Between 2006 and 2015, the number of federal deficiencies that CDPH identified at LTC facilities increased by more than 30 percent; however, during the same time period, the number of state citations decreased by 34 percent.¹⁵ According to the report, CDPH believes one reason for the difficulty in issuing citations is that the burden of proof required for state citations is higher than for federal deficiencies, even though the criteria for the citations align.¹⁶ The Auditor's Report made several recommendations to the Legislature regarding actions that could be taken to improve the quality of care in LTC facilities, including increasing the amount of civil penalties.¹⁷

The year before, Disability Rights California (DRC), the sponsor of this bill, issued a report that analyzed hundreds of cases where CDPH issued citations other than AA citations even though poor care and actions of facility staff directly contributed to a

⁸ *Id.*, § 1424.5(b). Under this system, a facility that received a \$25,000 class AA citation could pay \$20,000 early, because 65 percent of \$25,000 (\$16,250) is lower than the low end of the class AA penalty range (\$20,000). A facility that received a \$55,000 class AA citation could pay \$35,750 early, because 65 percent of \$55,000 (35,750) is higher than the low end of the class AA penalty range (\$20,000).

⁹ Health & Saf. Code, § 1428.

¹⁰ *Id.*, § 1428(e).

¹¹ *Id.*, § 1428(b).

¹² *Id.*, § 1424(b) & (e).

¹³ See California State Auditor, *Skilled Nursing Facilities: Absent Effective State Oversight, Substandard Quality of Care Has Continued*, Report No. 2017-109, Cal. State. Auditor (May 2018), at p. 1, available at <https://www.auditor.ca.gov/pdfs/reports/2017-109.pdf> [last visited Jul. 9, 2021] (hereafter Auditor's Report).

¹⁴ *Ibid.*

¹⁵ *Id.* at p. 14.

¹⁶ *Id.* at p. 15.

¹⁷ *Id.* at p. 24.

resident's death.¹⁸ The report found that CDPH "failed to consistently apply the same citation level when staff misconduct is a direct proximate cause of a resident's death," and that CDPH "appears to lack consistent standards for issuing citations in the case of a resident's death."¹⁹ According to the report:

Disability Rights California reviewed all of the Class A and AA citations issued to long term health care facilities between 2000 and 2014, a total of 2,033 citations: 1,774 Class A citations and 259 AA citations. Of the 1,774 Class A citations, 287, or 16 [percent], involved resident deaths. In other words, nearly 1/5 of all Class A citations involved a resident death that was the result of staff conduct but, according to Licensing, was not a direct proximate cause. In over half of the resident deaths, Licensing concluded that staff misconduct posed an imminent danger or substantial probability of death but was not a proximate cause. More deaths were given a Class A citation than a Class AA death citation. As described further below, Disability Rights California compared these 287 Class A deaths with the 259 Class AA deaths, and could not discern a factual basis for why some deaths warranted a Class A (the lower level penalty) rather than a Class AA citation.²⁰

DRC's report makes several recommendations for how to better protect residents at long-term care facilities: CDPH should consistently issue AA citations when staff conduct is a direct proximate cause of a resident's death; CDPH should apply consistent standards for issuing citations; CDPH should provide greater transparency regarding the facts supporting a finding of inadequate probable cause in the case of resident deaths; and the Legislature should increase the penalty amount for citations involving resident deaths indirectly resulting from staff conduct.²¹

This bill adopts some of the recommendations from the State Auditor and the DRC.

4. This bill revises the causation standard for establishing class AA citations

This bill modifies one of the factors CDPH must prove to establish a class AA citation. Specifically, the bill replaces the existing requirement that CDPH prove a facility's violation was a "direct proximate cause" of a resident's death with the requirement that CDPH prove a facility's violation was a "substantial factor" in the resident's death, and defines a substantial factor as "more than a remote or trivial factor, but is not required to be the only cause of harm."

¹⁸ Disability Rights California staff, *Keeping Nursing Home Residents Safe: The State Must Hold Nursing Homes Accountable for Resident Deaths*, Disability Rights California (Jan. 2017) at p. 1, available at <https://www.disabilityrightsca.org/publications/keep-nursing-home-residents-safe-the-state-must-hold-nursing-homes-accountable-for> [last visited Jul. 9, 2021].

¹⁹ *Id.* at p. 2.

²⁰ *Id.* at 18.

²¹ *Id.* at 2.

The term “proximate cause” mostly arises in the tort context, where it is used to describe the causal relationship between a breach of duty and an injury in a negligence action.²² In tort, a proximate cause must be a cause-in-fact, i.e., “a necessary antecedent of” the event in question.²³ In the last few decades, however – recognizing that “ [t]he concept of proximate cause has given courts and commentators consummate difficulty and has in truth defied precise definition’ ” – California has moved away from using proximate cause in jury instructions and replaced it with “substantial factor” causation.²⁴ A factor is a substantial one in causing harm “if a reasonable person would consider it to have contributed to the harm”; it must be more than a remote or trivial factor, but need not be the only cause of the harm.²⁵ The substantial factor test is not concomitant with proximate cause, but is intended to capture acts that would not have happened without the bad act in question.²⁶

The conceptual difficulty of proximate cause is heightened by the fact that the class AA penalty requires a *direct* proximate cause. Although California’s courts have referred to the “direct proximate cause” standard for decades, Committee staff is unaware of any case law that attempts to explain what “direct proximate cause” really means, in particular, whether it requires a different showing than plain old proximate cause.²⁷

According to the author, the lack of clarity surrounding the direct proximate cause standard is hampering CDPH’s ability to successfully prove class AA citations. The author believes that moving to the substantial factor standard will provide clarity and guidance to CDPH and long-term care facilities as to when a class AA citation is warranted. The bill does not change the remaining factors that a facility must prove to establish a class AA citation, so a facility would still be required to prove all of the following:

- That the violation met the criteria for a class A citation, i.e., presented either (1) imminent danger that death or serious harm to the residents would result therefrom, or (2) substantial probability that death or serious physical harm to residents would result therefrom;²⁸
- That a resident of the facility died;
- That the facility’s violation was a substantial factor in the resident’s death;

²² E.g., *Ladd v. County of San Mateo* (1996) 12 Ca.4th 913, 917 (“The elements of a cause of action for negligence are well established. They are “(a) a *legal duty* to use due care; (b) a *breach* of such legal duty; [and] (c) the breach as the *proximate or legal cause* of the resulting injury.””).

²³ *PPG Industries, Inc. v. Transamerica Insurance Co.* (1999) 20 Cal.4th 310, 315.

²⁴ See *Mitchell v. Gonzalez* (1991) 54 Cal.3d 1041, 1049, 1052-1053; CACI No. 430.

²⁵ *Mitchell, supra*, 53 Cal.3d at p. 1052; CACI No. 430.

²⁶ *Mitchell, supra*, 53 Cal.3d at p. 1053.

²⁷ E.g., *Jarman v. HCR ManorCare, Inc.* (2020) 10 Cal.5th 375, 383; *California Association of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 291; *Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 142.

²⁸ The bill’s opponents argue that the bill brings the causation standard for a class AA citation to below that of a class A citation; it is unclear how this could be the case, given that a prerequisite for proving a class AA citation is proving a class A citation, plus several additional factors.

- That the resident's death resulted from an occurrence of the nature that the violated regulation was designed to prevent; and
- That the resident who died was among the class of persons for whose protection the regulation was adopted.

If CDPH successfully proves all of these factors, thereby establishing a class AA citation, the maximum penalty that can be assessed is \$100,000; as discussed further below in Part 5, this bill would increase the maximum to \$125,000.

Opponents of the bill argue that the bill should include an additional causal factor for an AA citation, relating to whether the death was foreseeable in light of the violation. In 2019, the author introduced a bill that would have made the same "substantial factor" change as this bill and also required that CDPH prove that "the facts and circumstances demonstrate that the death was a foreseeable result of the violation."²⁹ This so-called "two-part" test was never endorsed by CDPH, and the bill was vetoed. In connection with this bill, opponents have proposed "foreseeability" factors similar to the one in the vetoed bill, such as requiring CDPH to prove a "reasonable connection" between the violation and the resident's death. The opponents have also proposed language that would put the burden on licensees to prove "that the death was not the foreseeable result of the violation"; if the licensee can meet its burden of showing the death was not the only foreseeable result, the violation would be reduced to class A.

CDPH has responded that these proposals continue to introduce an unnecessary foreseeability factor into their burden of establishing class AA violations. CDPH also notes that, because of facility residents' inherent comorbidities, a foreseeability element would make it exceedingly difficult to prove foreseeability; according to CDPH, facilities would rarely be held liable for even gross violations under the opposition's preferred standard because any medical intervention or preexisting condition could be a superseding cause that negates an element of proving up an AA citation. CDPH also points to the two additional factors that it has to prove – that (1) the resident's death resulted from an occurrence the nature of which the regulation was intended to prevent, and (2) the resident was of the class of residents whom the regulation was adopted to protect – as already imposing a foreseeability component on their burden of proof. These two prongs operate to require CDPH to prove that the resident was the type of resident who was at risk from the type of act the regulation was intended to prevent, thereby preventing CDPH from imposing a class AA violation for a violation that results in a death unconnected to the purpose of the regulation. The opponents' latest proposal – that licensees prove the death was not the foreseeable result of the violation – appears to be contrary to those additional factors. If a citation could be reduced to a class A violation whenever a facility could show the resident's death was not the only possible result of a violation, the existing factors requiring CDPH to establish that the resident was in the general class of residents to be protected, from the

²⁹ See AB 506 (Kalra, 2019).

general type of incident the regulation was intended to avoid, would be rendered a nullity whenever a facility could show the specific death was not inevitable.

5. This bill increases the civil penalty ranges for class AA, A, and B citations, and for the willful material falsification of resident health records

In light of the State Auditor’s report and the DRC’s report, this bill seeks to address issues in enforcement and regulation of facilities by CDPH. Consistent with the auditor’s recommendation to increase civil penalties, the bill increases all the civil penalties for skilled nursing facilities and long-term care facilities for all classes of citations and the willful material falsification or omission in the health record of a resident. The existing penalties and the bill’s increases are as follows:

Type of violation (Health & Saf. Code § 1424.5)	Existing civil penalty	Increase proposed by bill
Class AA violations	Not less than \$25,000 and no more than \$100,000	Not less than \$30,000 and no more than \$120,000
Class A violations	Not less than \$2,000 and no more than \$20,000	Not less than \$3,500 and no more than \$25,000
Class B violations	Not less than \$100 and no more than \$2,000	Not less than \$150 and no more than \$3,000
Willful material falsification or omission in the health record of a resident	Not less than \$2,000 and no more than \$20,000.	Not less than \$3,500 and no more than \$25,000

As noted in the Auditor’s Report, the class B civil penalties were last increased in 2011, and the class A and AA civil penalties were last increased in 2000.³⁰ The penalties have thus failed to keep up with inflation.³¹ The increases reflected in this bill are, in fact, still below the rate of inflation over the last 21 years – the \$100,000 penalty put in place in 2000 would need to be increased to over \$158,000 in order to have the same financial impact today.³² The bill’s more modest penalty increases therefore do not present a significant departure from the penalty regime as originally put in place.

³⁰ Auditor’s Report, *supra*, fn. 13, at p. 24.

³¹ *Ibid.*

³² United States Bureau of Labor Statistics, *CPI Inflation Calculator*, https://www.bls.gov/data/inflation_calculator.htm [last visited Jul. 9, 2021].

6. This bill creates a new penalty range for class A violations involving the death of a resident

In addition to increasing the existing civil penalty ranges, this bill adds a new type of class A violation with a higher penalty range. This “heightened class A” penalty could be assessed by CDPH when a violation satisfies the criteria for a class A citation and a patient died in connection with that violation, but the connection between the violation and the death is not close enough to establish a class AA citation. The amount of the heightened class A penalty created by the bill ranges from \$15,000 to \$60,000. Committee staff is not aware of any opposition to this portion of the bill.

Given that this heightened class A citation is intended to apply in circumstances that do not rise to a class AA citation, the bill’s current use of the word “resulted in” could give rise to confusion over the necessary causal link between the violation and the resident’s death. The term “resulted in” could be interpreted to require an even more direct connection between the violation and the death than the “substantial factor” causation standard being put in place by the bill, or even the current “direct proximate cause” language. To ensure that the heightened class A citation is applied appropriately and not rendered a legal nullity, the author has agreed to amend the bill to clarify that the class heightened A citation is appropriate where a class A citation involved the death of the patient.

7. Amendments

As discussed above in Part 5, the author has agreed to amend the bill to rephrase the necessary connection between a class A citation and the death of a patient to clarify when CDPH may assess a heightened class A penalty. The amendments also add Senator Stern as a coauthor. The specific amendments are set forth below.

Amendment 1

In the heading, below line 1, insert “(Coauthor: Senator Stern)”

Amendment 2

On page 9, in line 23, strike out “resulted in” and insert “involved”

8. Arguments in support

According to bill sponsor Disability Rights California:

During the COVID-19 pandemic, consistent application of citation standards has been shown to be ever more needed. COVID-19 has not only disproportionately affected nursing home residents, it has revealed underlying problems such as understaffing and mismanagement that existed before the pandemic. In Los

Angeles County, nursing homes are struggling with the greatest number of outbreaks and a disproportionately high number of prior infection control citations.

Between 2000 and 2014, DPH issued 259 Class AA citations and 1,774 Class A citations, of which 287 involved resident deaths. A January 2017 investigative report by Disability Rights California concluded that deaths in these facilities were inappropriately classified as Class A violations, even in cases of severe neglect. In some cases, the confusion created by applying the “direct proximate cause” standard may have prevented DPH from issuing a more appropriate Class AA citation[...]

Nursing home residents desperately need more robust penalties against facilities that abuse and neglect them or violate their rights. AB 323 will allow for more consistent oversight of nursing homes by creating a clear legal standard with which to hold nursing homes accountable for deaths caused by negligence and poor care.

9. Arguments in opposition

According to the California Association of Health Facilities, the California Hospital Association, the Developmental Services Network, and LeadingAge California, who take an “oppose unless amended” position:

Our organizations are opposed unless amended to AB 323 due to the lowering of the evidence standard for an AA citation below what is required for an “A” citation. “AA” citations are meant to be issued when a long-term facility is directly responsible for the death of a resident. The issuance of this high level citation has a significant impact on facilities subjecting them to high federal and state penalties, loss of eligibility for quarterly incentive payments, and risk of closure to name just a few. The evidence standard for an AA citation should correlate with the direct responsibility of the provider[...]

The coalition has been engaged in discussions with the author, sponsor and CDPH this year in an attempt to develop alternative language in AB 323 that clarifies rather than lowers the evidence standard for an “AA” violation. Other proposed amendments that have been rejected would have required CDPH to prove there was “foreseeability” or “reasonable connection” between the action by the facility and the death of the resident.

SUPPORT

Disability Rights California (sponsor)
AARP California
Association of Regional Center Agencies

California Continuing Care Residents Association
California Long-Term Care Ombudsman Association
California Retired Teachers Association
Contra Costa Advisory Council on Aging
SEIU California
State Council on Developmental Disabilities

OPPOSITION

California Association of Health Facilities
California Hospital Association
Developmental Services Network
LeadingAge California

RELATED LEGISLATION

Pending Legislation:

AB 1042 (Jones-Sawyer, 2021) authorizes CDPH to take specified actions against facilities who have failed to pay penalties assessed for violations and to impose a quality assurance fee on facilities pursuant to a prescribed formula. AB 1042 is pending before the Senate Appropriations Committee.

AB 849 (Reyes, 2021) clarifies that, when a current or former resident brings a civil action against a skilled nursing facility for violations, the facility may be liable for up to \$500 per violation. AB 849 is pending before the Senate Floor.

Prior Legislation:

AB 2254 (Kalra, 2020) was substantially similar to this bill. AB 2245 was held in the Assembly Health Committee due to the shortened legislative calendar as a result of the COVID-19 pandemic.

AB 506 (Kalra, 2019) would have removed the “direct proximate cause” standard for AA violations, adopted a definition of “substantial factor” similar to the one in this bill, and increased civil penalties for Class AA, A, and B violations. AB 506 was vetoed by Governor Gavin Newsom, who stated in his veto message that the bill would cause more confusion than clarity and encouraged stakeholders to work with CDPH on a resolution that would better hold facilities accountable for causing the death of a patient or resident.

AB 1335 (Kalra, 2017) would have eliminated the “direct proximate cause” standard in lieu of a substantial factor standard for class AA violations and imposed additional potential violations for class A violations that resulted in a resident death. AB 1335 was gutted and amended to address a different subject matter.

PRIOR VOTES:

Senate Health Committee (Ayes 10, Noes 0)
Assembly Floor (Ayes 54, Noes 12)
Assembly Appropriations Committee (Ayes 13, Noes 3)
Assembly Health Committee (Ayes 11, Noes 1)
