

**Department of Health Care Services
Proposed Trailer Bill Legislation**

Long-Term Health Care Facility Penalties for Improper Discharges

FACT SHEET

Issue Title: Long-Term Health Care Facility Penalties for Improper Discharges. This proposal would authorize the Department of Health Care Services (DHCS) to assess monetary penalties against a long-term health care facility (nursing facility or skilled nursing facility) for noncompliance with a hearing decision issued by DHCS that orders the readmission of a resident after a finding that the facility improperly transferred, discharged, or failed to readmit a resident.

Background: Federal law protects against improper long-term health care facility resident discharge (also known as “dumping”) by requiring states to provide residents with a fair hearing whenever they have been refused readmission from a hospital (42 United States Code §§ 1395i3(c), (e)(3); 1396r(c), (e)(3)). The Ninth Circuit has held the right to a “hearing” includes the right to a meaningful result (*Anderson v. Ghaly*, 930 F.3d 1066, 1076 (9th Cir. 2019)). In California, DHCS’ Office of Administrative Hearings and Appeals (OAHA) conducts the hearing and issues a hearing Decision and Order related improper discharges, transfers, and refusals to readmit (e.g. a facility refusing to allow a resident to return to the facility after a hospital stay) for Medi-Cal, Medicare, and private licensed providers. Once OAHA issues its Decision and Order related to improper discharges, transfers and refusals to readmit, DHCS no longer has jurisdiction in the matter and has no authority to enforce its orders.

Decisions and Orders related to improper discharges issued by OAHA are referred to the California Department of Public Health (CDPH), which are handled by CDPH as complaints. Although CDPH is not bound by the OAHA hearing decision; each complaint is investigated, and if CDPH finds an improper discharge, it may issue a citation to the facility.

In addition, California law provides a private right of action for residents to “bring a civil action against the licensee of a facility who violates any rights of the residents or patient as set forth in the Patient’s Bill of Rights ... or any other right provided for by federal or state law or regulation.” (Health & Safety Code § 1430(b)). The licensee may be liable “for up to five hundred dollars (\$500) and for costs and attorney fees, and may be enjoined from permitting the violation to continue.”

Justification for the Change: The current enforcement authorities (listed above) are not immediate and may result in delays in returning residents to their facility of origin. In addition, DHCS periodically receives complaints about the failure of facilities to comply with OAHA hearing decisions finding improper transfers or discharges. While it is unknown how often facilities fail to comply with these hearing decisions, DHCS

currently lacks sufficient enforcement authority to respond effectively to those complaints it does receive prior to CDPH investigation and disposition.

This proposal would authorize DHCS to assess specified monetary penalties against a long-term health care facility that fails to timely readmit a resident after OAHA issues a hearing decision finding an improper transfer, discharge, or failure to readmit a resident. An affected facility would be required to file a certification of compliance with DHCS of the facility's compliance with the underlying OAHA decision within five calendar days of service. The ability to assess penalties would commence upon an affected facility's failure to file the necessary certification within the allotted timeframe. The penalties assessed by DHCS would be separate and distinct from any penalties assessed by CDPH's complaint investigation enforcement activities for an improper transfer and discharge or failure to readmit.

The proposed penalty amounts are \$1,000 for each calendar day the facility fails to comply with the hearing decision, beginning on the sixth calendar day after the date of service of the hearing decision, and up to \$100,000 in the aggregate for each hearing decision. The proposal authorizes DHCS to waive a portion or all penalties upon a facility's successful demonstration of hardship. The proposal would also authorize DHCS to collect the proposed penalties from Medi-Cal participating facilities by offsetting those amounts from any Medi-Cal payment made to the facility.

DHCS proposes that the penalty revenue is deposited into the State General Fund, upon appropriation by the Legislature, for the purpose of improving quality in long-term care services provided under the Medi-Cal program and to fund DHCS administrative costs associated with these types of hearings.

Summary of Arguments in support:

- Enables DHCS to expeditiously and directly address noncompliance with its OAHA hearing decisions, thereby ensuring a meaningful result for residents whose appeals are granted
- Penalties may deter noncompliance and incentivize timely readmission of residents to skilled nursing facilities
- The penalties would likely result in more timely responses to OAHA hearing decisions as compared to the existing enforcement alternatives