

Date of Hearing: April 12, 2016

ASSEMBLY COMMITTEE ON HUMAN SERVICES

Susan Bonilla, Chair

AB 2231 (Calderon) – As Amended April 6, 2016

SUBJECT: Care facilities: civil penalties

SUMMARY: Increases the civil penalties for specified violations and adopts penalties for repeat violations in licensed community care facilities.

Specifically, **this bill:**

- 1) Makes a number of changes to civil penalty structure and enforcement for various community care facilities including, but not limited to, Residential Care Facilities for Persons With Chronic Life-Threatening Illness (RCFCIs), Residential Care Facilities for the Elderly (RCFEs), Day Care Centers, and Family Day Care Homes:
 - a) Deletes language permitting DSS to impose specified civil penalties, and instead makes such imposition required;
 - b) Increases the civil penalty amount that DSS may levy to \$100 per day for each violation if an agency or facility fails to correct a deficiency within a specified amount of time;
 - c) Requires, if a licensee or licensee’s representative submits evidence to DSS that a deficiency has been corrected, the penalty to cease as of the day DSS receives notification that a correction has been made;
 - d) Creates a process through which correction of a violation can be verified, as specified;
 - e) Subjects any agency or facility that repeats a violation to an immediate civil penalty of \$250 per repeat violation, and \$100 for each day the repeat violation continues after citation;
 - f) Defines a “repeat violation” as a violation within 12 months of a prior violation of a statutory or regulatory provision designated by the same combination of letters or numerals, or both letters and numerals;
 - g) Prohibits correction of a deficiency from impacting the imposition of a civil penalty if a violation is serious or occurs with such frequency that the violation warrants a higher penalty or immediate civil penalty.
 - h) Makes a number of changes to civil penalties assessed for more serious violations, such as fire clearance violations and accessible bodies of water, that include:
 - i) Adding to the list of more serious violations any violation that the department determines resulted in the injury or illness of a person in care;
 - ii) Deleting language authorizing an assessment of \$150 per violation per day, and instead requiring the assessment of an immediate civil penalty of \$500 per violation and \$100 for each day the violation continues; and

- iii) Requiring DSS to assess an immediate civil penalty of \$1,000 per repeat violation and \$100 for each day a repeat violation occurs if an agency or facility is cited by the department for a repeat violation;
- i) Includes homes licensed as an adult residential facilities and adult residential facility for persons with special health care needs among facilities that are subject to specified civil penalties if a violation is determined to result in either the death of a resident, or to constitute physical abuse of or result in seriously bodily injury to a resident;
- j) Requires the department to levy a civil penalty of \$7,500 if DSS determines that a violation resulted in the death of a child receiving care through a foster family agency or in the death of an individual receiving care or services through a full-service or noncustodial adoption agency;
- k) Requires DSS to levy a civil penalty of \$2,500 if DSS determines that a violation constitutes physical abuse, or resulted in serious bodily injury to a child receiving care through a foster family agency or a full-service or noncustodial adoption agency;
- l) Includes small family home, crisis nursery, group home, and enhanced behavioral supports home licensed as a group home as facilities that are subject to specified civil penalties, the amount of which is based on facility capacity, for a violation determined to result to result in either the death of an individual, or to constitute physical abuse of or result in seriously bodily injury to an individual;
- m) Reduces the civil penalty amount due by the penalty already assessed for the underlying violation when the violation resulted in death or serious bodily injury;
- n) Requires the larger amount to prevail and be due and payable as already assessed by the department if the assessed amount of the civil penalty for an underlying violation is greater than the civil penalty assessed for a violation that resulted in death or serious bodily injury;
- o) Requires that any civil penalties that have already been paid and are, upon appeal, determined not to have been assessed in accordance with applicable statutes or regulations, be refunded within 10 business days of a final determination by an administrative law judge;
- p) Requires DSS to make a good faith effort to work with the licensee to determine the cause of the deficiency and ways to prevent any repeat violations;
- q) Requires DSS to adopt regulations setting forth the appeal procedures for deficiencies; and
- r) Makes additional technical changes.

EXISTING LAW:

- 1) Establishes the California RCFE Act, which requires facilities that provide personal care and supervision, protective supervision or health related services for persons 60 years of age or

- older who voluntarily choose to reside in that facility to be licensed by DSS. (H&S Code 1569 and 1569.1)
- 2) Permits any person to request an inspection of a RCFE through the filing of a complaint, which may be made either orally or in writing. (H&S Code 1569.35(a))
 - 3) Prohibits the substance of the complaint from being provided to the licensee sooner than at the time of the inspection, unless otherwise permitted by the complainant, as specified. (H&S Code 1569.25(b))
 - 4) Requires DSS to review a complaint alleging denial of a statutory right of access to a RCFE and promptly notify the complainant of the department's proposed course of action. (H&S Code 1569.35(d))
 - 5) Establishes, beginning July 1, 2015, a new framework for civil penalties applicable to violations determined by DSS to have resulted in death or serious bodily injury, or determined by DSS to constitute physical abuse for all facilities licensed by DSS as follows. (HSC 1543, *et seq.*)
 - 6) Defines physical abuse, serious injury, and death pursuant to existing definitions in the Welfare and Institutions Code and Penal Code, as specified. (WIC 15610.63 *et seq.* and PEN 243 *et seq.*)
 - 7) Requires the administrator of the Community Care Licensing Division to approve the civil penalty assessment. (HSC 1548 *et seq.*)
 - 8) Provides a licensee shall have the right to submit a written request for a formal review of a civil penalty within 10 days of receipt of the notice of a civil penalty assessment and requires the licensee to provide all supporting documentation at that time. (HSC 1548 *et seq.*)
 - 9) Requires the review be conducted by a regional manager of the Community Care Licensing Division, who may amend or dismiss the penalty if they determine that the civil penalty was not assessed in accordance with applicable statutes or regulations of DSS, and requires the licensee be notified in writing of the regional manager's decision within 60 days of the request to review the assessment of the civil penalty. (HSC 1548 *et seq.*)
 - 10) Provides the licensee may further appeal to the program administrator of the Community Care Licensing Division within 10 days of receipt of the notice of the regional manager's decision and shall provide all supporting documentation at that time. If the program administrator determines that the civil penalty was not assessed in accordance with applicable statutes or regulations, they may amend or dismiss the civil penalty. Requires the licensee be notified in writing of the program administrator's decision within 60 days of the request to review the regional manager's decision. (HSC 1548 *et seq.*)
 - 11) Provides upon exhausting the deputy director review, a licensee may appeal a civil penalty assessed to an administrative law judge, as specified. (HSC 1548 *et seq.*)
 - 12) Provides if, in addition to an assessment of civil penalties, DSS elects to file an administrative action to suspend or revoke the facility license that includes violations relating

to the assessment of the civil penalties, DSS review of the pending appeal shall cease and the assessment of the civil penalties shall be heard as part of the administrative action process. (HSC 1548 *et seq.*)

- 13) Requires DSS to assess a civil penalty of no less than \$25 and no more than \$50 per violation per day for all serious deficiencies, up to a maximum of \$150 per day, unless the seriousness or frequency of the violation warrants a higher or immediate civil penalty. (H&S Code 1569.49(b) and Section 87761(a) of Title 22, CCR)
- 14) Requires DSS to assess an immediate civil penalty of \$150 per day per violation for serious violations, as specified. (H&S Code 1569.49(c))
- 15) Pursuant to regulations, requires DSS to assess an immediate civil penalty of \$100 per violation per day for a maximum of five days if a licensee is found to be employing an individual who has not obtained a criminal background check and clearance, as specified. (Section 87761(b) of Title 22, CCR)
- 16) Requires DSS to assess tiered immediate civil penalties for multiple repeated violations ranging from an immediate civil penalty of \$150 and \$50 per an initial repeated violation per day to an immediate civil penalty of \$1,000 and \$100 per subsequent repeated violation per day within a 12 month period for each day the violation continues until the deficiency is corrected. (H&S Code 1569.49(d) and (e))

FISCAL EFFECT: Unknown.

COMMENTS:

DSS Community Care Licensing Division (CCLD): Facilities licensed by CCLD, which include Community Care Facilities, Residential Care Facilities for the Elderly, and child care facilities, typically provide non-medical care and supervision for children and adults in need, which includes persons with disabilities, seniors in need of residential care, children in foster care and at-risk children needing shelter services, families in need of early childhood education (child care), and adult care services. CCLD is responsible for the licensing of all community care facilities and for investigating all complaints against those facilities.

Current civil penalty structure: The current civil penalty structure for the state's community care facilities remained virtually unchanged for 30 years until the passage of AB 2236 (Maienschein) Chapter 813, Statutes of 2014, which created a new framework for civil penalties for violations that resulted in death or serious bodily injury, or is determined by DSS to constitute physical abuse, as follows:

Facility type	Size	Serious Bodily Injury/ Physical Abuse	Death
RCFE/ARF/CCH/SRF/EBSH	All sizes	\$10,000	\$15,000
Emergency Homeless Youth Shelter	≤25 beds	\$1,000	\$5,000
Small Child Care Home	≤8 children	\$1,000	\$5,000
Large Child Care Home	9-14 children	\$2,000	\$7,500
Child Care Facility	1 – 30 children	\$2,500	\$7,500
Child Care Facility	31 – 100 children	\$5,000	\$10,000
Child Care Facility	100+ children	\$10,000	\$15,000
Adult Day	≤50 adults	\$2,500	\$7,500
Adult Day	50+ adults	\$5,000	\$10,000
FFA/GH/TSCF/THPP/CTF	≤40 youth	\$2,500	\$7,500
FFA/GH/TSCF/THPP/CTF	41 – 100 youth	\$5,000	\$10,000
FFA/GH/TSCF/THPP/CTF	100+ youth	\$10,000	\$15,000

ARF	Adult Residential Facility
CCH	Community Crisis Home
CTF	Community Treatment Facility
EBSH	Enhanced Behavioral Supports Home
FFA	Foster Family Agency
GH	Group Home
RCFE	Residential Care Facility for the Elderly
SRF	Social Rehabilitation Facility
THPP	Transitional Housing Placement Provider
TSCF	Transitional Shelter Care Facility

Appeals process: Following the adoption of AB 2236, a subsequent bill, AB 1387 (Chu) Chapter 486, Statutes of 2015, was introduced in order to streamline the appeals process for community care facility civil penalty and violation appeals and enhanced the complaint process for residential care facilities for the elderly. Specifically, AB 1387 provided for a two-level appeals process for a civil penalty assessed that DSS determined resulted in the death, physical abuse, or serious bodily injury of an individual, with the first level involving a review by the deputy director of CCLD, and the second level involving an appeal to an administrative law judge. It also established a separate two-step process for lesser violations. The bill required that a licensee submit a request for a formal review within 15 days of receipt of the notice of the civil penalty assessment of decision, and required that the licensee provide all available supporting documentation at the time a request for a formal review of a civil penalty is submitted.

Need for this bill: According to the author's office, "Other than those penalties increased in AB 2236, civil penalties for DSS-licensed facilities have not been increased for almost 30 years. This includes penalties for violations like the presence of a person specifically excluded from the facility or the absence of supervision of individuals in care. The current maximum penalty amount of \$150 if DSS discovers a serious violation is a relic from 3 decades ago. [This bill] provides the long overdue adjustment by increasing civil penalties for the violations which were not addressed in AB 2236. It also corrects drafting errors and omissions from AB 2236. This bill will once again make civil penalties a relevant tool to achieve compliance and will help DSS protect the health and safety of those in care."

Opposition: Some groups have expressed concern about the language of the bill, citing the need to scale down civil penalties based on the size of the facility for violations that result in death or serious bodily injury. According to 6Beds, Inc., “A single penalty of either \$15,000 or \$10,000 represents months of income for some small residential care facilities, especially those that take care of SSI residents and other low-income residents. It is difficult to ignore the disproportionate economic impact that these large penalties have...penalties that result in the closure of facilities...reduce the number of available beds in the marketplace at a time when beds are needed to serve California’s growing population of older adults.”

Additional concerns: Several groups have raised additional concerns with regards to the definition of “repeat violation.” The bill defines a repeat violation as having the same statutory or regulatory citation within 12 months of the prior violation, and defines citation as the same statutory or regulatory combination of letters and numerals. However, some have expressed concern that regulations are vague and may trigger a civil penalty for a repeat violation even though the facts of the situations were completely unrelated. Concerns have also been raised with regards to when fees assessed should be paid. Some groups contend that fees should be paid upon the completion of the appeals process in order to eliminate the need for CCLD to create and manage a refund process. By requiring that fees be paid upon completion of the appeals process, a licensee will not be forced to pay a significant fine when the fine was in fact issued in error.

PRIOR LEGISLATION

AB 1387 (Chu), Chapter 486, Statutes of 2015, Established in statute an appeals process for civil penalties.

AB 1467 (Bloom), 2015, would have introduced a system of civil penalties tiered based on facility capacity and contained other provisions substantially similar to this bill. It died in the Assembly Human Services Committee.

AB 2236 (Maienschein and Stone), Chapter 813, Statutes of 2014, increased monetary civil penalties assessed for violations which resulted in the death, serious bodily injury, or physical abuse of a person receiving care in various DSS-licensed facilities.

AB 978 (Benoit), Chapter 291, Statutes of 2008, required DSS to assess immediate civil penalties of \$150 per day per violation for serious violations of health and safety statutes or regulations.

REGISTERED SUPPORT / OPPOSITION:

Support

California Long-Term Care Ombudsman Association (CLTCOA)
National Association of Social Workers, CA Chapter (NASW-CA)

Opposition

6Beds, Inc.

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