



March 28, 2016

Assembly Member Ian Calderon
Room 2148 State Capitol
Sacramento, CA 95814

Re: Oppose AB 2231 as Introduced

Dear Assembly Member Calderon:

6Beds, Inc. (“6Beds”) is an association of more than 1,400 small-home residential care facilities for the elderly and adult residential facilities.

Civil Penalty Amounts

We are disappointed that the Department has moved away from the concept of scaling down the size of civil penalties for small-home Residential Care Facilities for the Elderly (RCFEs) and Adult Residential Facilities (ARFs) serving six or fewer persons. However, we do appreciate that the Department has chosen from previous proposals the lower penalty amounts that would be imposed upon failure to correct general violations as well as immediate civil penalty/zero tolerance violations.

Notwithstanding the civil penalty amounts currently proposed for failure to correct a general violation and immediate civil penalty/zero tolerance violations, 6Beds would like to underscore the need for scaling down of civil penalties for violations that result in death or serious bodily injury. A single penalty of either \$15,000 or \$10,000 represents months of income for some small residential care facilities, especially those that primarily take care of SSI residents and other low-income residents. It is difficult to ignore the disproportionate economic impact that these large penalties have on small residential care facilities relative to larger facilities. Penalties that result in the closure of facilities cause transfer trauma for the residents involved and also 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.

Recommendation: With regard to civil penalties imposed for violations that result in death or serious bodily injury, we strongly urge adopting for RCFEs and ARFs that serve six or fewer persons the previously contemplated civil penalty amounts of \$5,000 and \$2,500, respectively, an approach parallel to that in current law (enacted in AB 2236) for child care homes and facilities, adult day care facilities, transitional shelter care facilities and others. We believe that these amounts would have the Department’s desired effect of altering behavior, but without posing as great a threat to the economic viability of small-home residential care facilities.

Imposition of Separate Civil Penalty for Underlying Violations

We appreciate the Department's receptiveness to removing the previously contemplated provision requiring the imposition of a separate civil penalty for underlying violations the Department determines resulted in death, physical abuse, or serious bodily injury, which are already subject to civil penalty amounts significantly higher than those associated with the underlying violations.

Repeat Violations Should Be Better Defined

6Beds has previously expressed concern to the Department regarding the subjective nature of determining whether a violation constitutes a repeat of a previous violation. In response to our concern, the Department has proposed language that would define a repeat violation as a violation under the same statutory or regulatory combination of letters and numerals. 6Beds believes the proposed definition falls short of addressing the fact that a number of violations with different facts and circumstances could potentially fall under the same statutory or regulatory combination of letters and numerals.

While 6Beds believes that the problem of having a number of violations with different facts and circumstances falling under the same statutory or regulatory combination of letters and numerals exists for violations proposed as serious (e.g. absence of supervision, accessible bodies of water, etc.), 6Beds believes this problem is exacerbated in the context of less serious violations, which statistically represent the largest universe of violations, may fall under a number of broad catch-all regulations and, therefore, are most prone to subjective and inconsistent application of repeat violation labeling by local Department staff throughout the State.

For example, a document published by the Department's Quality Assurance, Advocacy, and Technical Support Bureau, published in October of 2015, identified that Title 22, 87468(a)(2), which states that each resident shall be accorded safe, healthful and comfortable accommodations, furnishings and equipment, and Title 22, 87303(a), which states that the facility shall be clean, safe, sanitary, and in good repair at all times, ranked as the second and third most common substantiated complaint deficiencies in 2014 among RCFEs with a capacity of six or fewer persons. Given the 365 day, 24 hour per day operating nature of RCFEs, a facility can be found to be in violation of broad-spectrum, catch-all regulations, such as the aforementioned and others like them, across a number of instances with wide-varying facts and circumstances.

Recommendation: 6Beds proposes the following repeat definition language:

"(2)(A) Any agency or facility that repeats a violation specified in paragraph (1) within twelve months of a prior violation having a substantially similar factual description of the deficiency, including, if applicable, the particular place or area of the facility in which the deficiency occurred, and having the same statutory or regulatory combination of letters and numerals as stated on the prior notification of deficiency, shall be subject to an immediate civil penalty of two hundred fifty dollars (\$250) per violation and one hundred dollars (\$100) for each day the violation continues after citation. The notification of deficiency shall fully state the manner in

which the deficiency constitutes a repeat violation as stated in the prior notification of deficiency."

The amounts found in the definition above are in reference to penalties for failure to correct a deficiency. The same language can be used for other categories of deficiencies.

6Beds also recommends that higher level CCL management approval be required for the imposition of a civil penalty for a repeat violation.

Violations Subject To Immediate Civil Penalties Are Overly Broad

6Beds believes that a number of the violations subject to an immediate civil penalty are not narrow-scope violations, but rather represent broad-spectrum violation categories open to the subjective judgment of Department staff throughout the State. These broad violation categories include, but are not limited to, absence of supervision, accessible bodies of water, a variety of fire clearance related violations, and any violation that results in injury or illness of a person in care.

Given that current statute already establishes a higher civil penalty amount for serious bodily injury, 6Beds believes that it's unclear as to what, specifically, constitutes injury or illness that is not "serious." In addition, because local Department personnel throughout the State often do not have a medical background, such personnel's authority to impose an immediate civil penalty for a violation that results in the injury or illness of a person in care, which requires judgment regarding causation, is a cause for concern.

Some of these broad violation categories not only involve subjective judgement, but also sometimes require a medical background as in the case of violations that result in injury or illness, which is just one example of where a medical background may be necessary.

Although we are aware that these broad violation categories that call for an immediate civil penalty already exist in statute, 6Beds believes that proposing to significantly increase the civil penalties associated with these violations and, more generally, with repeat violations warrants increased scrutiny as to how these violation categories are defined and enforced. 6Beds is not questioning the rationale for immediate civil penalties for certain serious violations and repeat violations, but is rather concerned with fair and consistent enforcement application throughout the State. 6Beds is concerned that subjective and inconsistent enforcement with the backdrop of civil penalties that are too high, (1) may lead to an influx of licensee appeals that will overly burden the newly reformed, but untested appeal process effectuated by AB 1387 and (2) may unintentionally create a disincentive for licensees to self-report injuries that occur in their facilities as is required by regulation, thereby potentially disrupting a channel of information the Department relies on to stay abreast of what is happening in licensed facilities.

Recommendation: More narrowly define violation categories subject to immediate civil penalty for certain violations; require higher level CCL management approval prior to imposition of immediate civil penalties.

Payment of Civil Penalties

It has been fairly common practice that civil penalties, if appealed, are not payable unless the civil penalty is upheld after the licensee has exhausted all available appeal opportunities. 6Beds has learned, however, that there have been some instances that licensees have been billed for civil penalties prior to the conclusion of a pending appeal.

Based on the Department's most recent AB 2231 stakeholder meeting, we are also now aware of the Department's intent to add language requiring payment of a civil penalty even while the deficiency is under appeal, providing a refund to licensees only upon a successful appeal. 6Beds believes that this is highly problematic given that the Department's position assumes that all appeals will be responded to in a timely manner based on the new licensee appeal process that was effectuated by AB 1387. Even if the Department is able to adhere to appeal response timelines, licensees could wait well over 120 business days for an appeal process to run its full course. However, the new appeal process still does not have a track record. As such, it is still unclear whether the Department will even be able to consistently meet appeal response timelines. Failure to meet appeal response timelines would only exacerbate the adverse economic impact of having to wait for a refund, assuming the deficiency is ultimately overturned.

Recommendation: Codify what is today common practice by adding a provision that would make civil penalties that are under appeal payable only after a civil penalty is upheld after the licensee has exhausted all available appeal opportunities.

Overhaul of Investigation Finding Types

At the Department's most recent AB 2231 stakeholder meeting, the Department proposed replacing the current investigation finding types of "Substantiated", "Inconclusive", and "Unfounded" with "Substantiated" and "Unsubstantiated". Conceptually, 6Beds supports the Department's proposal and looks forward to reviewing the specific language that would detail this change.

Respectfully,



George K. Kutnerian
6Beds, Inc.
Director & Co-Chair, Legislative Committee