

Date of Hearing: April 24, 2017

ASSEMBLY COMMITTEE ON AGING AND LONG-TERM CARE

Ash Kalra, Chair

AB 1335 (Kalra) – As Amended March 30, 2017

SUBJECT: Long-term health facilities.

SUMMARY: This bill redefines a class “A” violation issued by the Department of Public Health by replacing the causal connection that must exist between the violation and the death of a patient from direct “approximate” cause, to “substantial factor.” Specifically, **this bill:**

- 1) Redefines a class “A” violation issued by the Department of Public Health by replacing the causal connection that must exist between the violation and the death of a patient from direct “approximate” cause, to “substantial factor,” and,
 - a) That the death resulted from an occurrence of a nature that the regulation was designed to prevent; or,
 - b) That the conduct was of a nature that a reasonable person would consider likely to result in death.
- 2) Defines “substantial factor” to mean a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.
- 3) When a class “A” violation occurs that does not meet the requirements to be a class “AA” violation, but where a resident death occurred, the department shall do the following:
 - a) For a second violation of this type in a 12-month period, consider suspending or revoking the facility’s license.
 - b) For a third or subsequent violation of this type in the same 12-month period, begin proceedings to suspend or revoke the facility’s license.

EXISTING LAW:

- 1) Provides for the licensure and regulation of long-term health facilities by the State Department of Public Health (DPH) and establishes an inspection and reporting system to ensure that long-term health care facilities are in compliance with state statutes and regulations pertaining to patient care.
- 2) Provide a system for the imposition of prompt and effective civil sanctions against long-term health care facilities in violation of the laws and regulations of this state.
- 3) Defines a class “A” violation as a violation that DPH determines presents either:
 - a) Imminent danger that death or serious harm to the patients or residents of the long-term health care facility would result; or,

- b) Substantial probability that death or serious physical harm to patients or residents of the long-term health care facility would result.
- 4) Defines a class “AA” violation as a class “A” violation that DPH determines to have been the direct proximate cause of death of a patient or resident of the facility. In order to enforce a class “AA” citation, existing law requires DPH to prove, among other things, that the death resulted from an occurrence of a nature that the regulation was designed to prevent.
- 5) Requires DPH, upon a 2nd class “AA” violation in a 12-month period, to consider suspending or revoking the facility’s license and, upon a 3rd or subsequent class “AA” violation in an 18-month period, to commence action to suspend or revoke the facility’s license.

FISCAL EFFECT: Unknown.

COMMENTS:

Author’s Statement: “AB 1335 establishes consistency and conformity in the law by providing a more accurate, updated definition in determining if the actions of staff or the long-term care facility substantially contributed to the death of a resident. This will allow the Department to properly impose Class AA citations when warranted, thereby safeguarding nursing home and other long-term health facility residents by enforcing higher citations for negligent care resulting in death.

“Reoccurring Class A violations resulting in resident death must also be taken seriously because if ignored could lead to further incidents of harm or death that could have been prevented. AB 1335 sets forth a process for the Department to suspend or revoke a facility’s license when multiple and continuous Class A violations occur that is similar to actions taken in repeated Class AA involving a resident death.”

Background: The Department of Public Health (DPH) Licensing and Certification Division is responsible for investigating suspicious deaths of residents of long-term health care facilities and issuing citations.

DPH defines a LTC facility as a licensed facility that is any of the following:

- a) Skilled Nursing Facility (SNF);
- b) Intermediate care facility (ICF);
- c) Intermediate care facility/developmentally disabled;
- d) Intermediate care facility/developmentally disabled-habilitative;
- e) Intermediate care facility/developmentally disabled-nursing;
- f) Congregate living health facility;
- g) Nursing facility; or,
- h) Intermediate care facility/developmentally disabled-continuous nursing.

The highest level of citation that the DPH issues is Class AA and is issued when DPH determines that the facility’s violation is a “direct proximate cause” of death of a patient or

resident. Financial penalties for Class AA citations range from \$25,000 to \$100,000, and if the facility receives more than one Class AA citation in a two-year period, then DPH must begin proceedings to revoke or suspend their license.

If DPH determines there is insufficient evidence that the violation resulting in death was a “direct proximate cause” by the facility, then a lower level of citation, Class A, is issued. For Class A, the DPH determines that the facility’s conduct posed an imminent danger or a substantial probability that death or serious harm to residents would result and financial penalties range from \$2,000 to \$20,000.

What is the process for issuing an AA citation? Most frequently, an AA citation is based on an investigation of a complaint received by DPH or a report from a facility about a potential violation. In some cases, the violation may be detected during a recertification or licensing survey. Once identified, staff conducts a thorough investigation using principals of documentation that include record reviews, direct observations and interviews. Once the investigation is completed and the findings written, the report is reviewed by the District Office manager. If the manager concurs that the violation warrants an AA citation, the findings are submitted to a medical consultant, the DPH’s Office of Legal Services and the Field Operations Branch Chief for review and approval. If all reviewers concur with the findings, then the District Office issues the citation to the facility.

A facility can appeal either to the DPH for a Citation Review Conference or appeal directly to court. The outcome of the citation and collection of any fines assessed are not final until all appeals have been exhausted.

According to Disability Rights California’s report, *Keeping Nursing Home Residents Safe*, published January 2017, between 2000 and 2014, DPH issued 259 Class AA citations and 1,774 Class A citations of which 287 involved resident deaths. Their investigative report 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 the “direct proximate cause” standard may have prevented DPH from issuing a Class AA.

These Class A deaths included:

- Untreated pressure sores;
- Catching on fire while smoking unsupervised;
- Severe, untreated dehydration;
- Punctured G-tube and septic shock; and,
- Choking to death.

Over time, courts, including the California Supreme Court in *Mitchell v. Gonzales*, and legal experts have concluded that “direct proximate cause” is confusing and should be eliminated as the standard for causation for jury instruction. California has since adopted the “substantial factor” definition in its jury instruction for causation. However, the use of “direct proximate cause” continues. This has hindered the ability of DPH to assign Class AA violations because phrase “direct proximate cause” is unclear and lacks reliable legal precedent.

Arguments in Support: The letter from Disability Rights California states, “‘Direct proximate cause’ is an outdated term that has created confusion and inconsistency in determining whether a long-term care facility should be given a Class AA or lower level of citation in the case of a residents death. In 1991, the California Supreme Court rejected the ‘proximate cause’ term and replaced it with the ‘substantial factor’ standard for determining causation in civil actions. AB 1335 similarly seeks to confirm the standard now used for determining causation in other actions by replacing ‘direct proximate cause’ with ‘substantial factor.’”

Arguments in Opposition: The California Hospital Association states in their letter, “... the goal of the bill is to modify the standards for ‘A’ citations where a death has occurred, not adding a standard for when harm occurs. However, in its current form, the “substantial factor” definition is placed in Health & Safety Code section 1418, where its application is not limited to situations where there has been a patient death. CHA believes the “substantial factor” definition should be removed from section 1418 and put in section 1424, which creates standards for CDPH to issue citations to long-term care facilities. Further, the bill’s definition of “substantial factor” is that it has “contributed to the **harm**” (emphasis added); this is unnecessarily broad, given that death is the only harm that is at issue.”

Author Amendments:

If AB 1335 should pass this committee, the author has agreed to take the following amendments in the Assembly Health Committee:

- (1) Removes from Section 1418 of the Health and Safety Code the “substantial factor” definition and places it in Section 1424 of the Health and Safety Code;
- (2) Replaces the current definition of substantial factor in the bill with the definition below: “A substantial factor must be more than a remote or trivial factor, but does not have to be the only cause of the death. Conduct is not a substantial factor in causing the death if the death would have occurred without that conduct;” and,
- (3) Deletes from Section 1424.5 of the Health and Safety Code the license revocation and suspension provision that allowed the Department of Public Health to suspend or revoke a facilities license for subsequent violations that occurred in a 12 and 18 month period.

Mockup Language:

1424 (c) A class “AA” violation is a violation that meets the criteria for a class “A” violation and that the department determines to have been a ~~direct proximate cause of~~ *substantial factor in the* death of a patient or resident of a long-term health care facility. Except as provided in Section 1424.5, a class “AA” citation is subject to a civil penalty in the amount of not less than five thousand dollars (\$5,000) and not exceeding twenty-five thousand dollars (\$25,000) for each citation. In any action to enforce a citation issued under this subdivision, the department shall prove all of the following:

- (1) The violation was a ~~direct proximate cause of~~ *substantial factor in the* death of a patient or resident. **A substantial factor must be more than a remote or trivial factor, but does not have to be the only cause of the death. Conduct is not a substantial factor in causing the death if the death would have occurred without that conduct.**

(2) The death resulted from an occurrence of a nature that the regulation was designed to prevent. ~~prevent. or resulted from conduct that a reasonable person would consider likely to result in death.~~

1424.5 A class “A” citation is subject to a civil penalty in an amount not less than one thousand dollars (\$1,000) and not exceeding ten thousand dollars (\$10,000) for each and every citation.

~~(1) When a class “A” violation occurs that does not meet the requirements to be a class “AA” violation, but where a resident death occurred, the department shall do the following:~~

~~(A) For a second violation of this type in a 12-month period, consider suspending or revoking the facility’s license pursuant to Section 1294.~~

~~(B) For a third or subsequent violation of this type in an 18-month period, begin proceedings to suspend or revoke the facility’s license pursuant to Section 1294.~~

REGISTERED SUPPORT / OPPOSITION:

Support

Disability Rights California – Sponsor
The Arc and United Cerebral Palsy California Collaboration
Justice in Aging
Office of the State Long-Term Care Ombudsman

Opposition

California Association of Health Facilities (CAHF) – Oppose Unless Amended
California Hospital Association (CHA) – Oppose Unless Amended

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