

# Assembly Bill 323

## Long-term Care Facilities Accountability

Assembly Member Ash Kalra

### SUMMARY

AB 323 updates long-term care facility citation penalties and standards for negligent care to safeguard nursing home and long-term care facility residents.

Specifically, the bill:

- Adopts the California State Auditor’s recommendation on skilled nursing facility citation amounts to improve quality-of-care deficiencies in nursing homes.
- Improves California’s Department of Public Health’s enforcement ability by clarifying the confusing causation standard for “AA” citations, replacing the “direct proximate cause” test with the “substantial factor” test.

### BACKGROUND

The California Department of Public Health (CDPH) Licensing and Certification Division is responsible for investigating deaths and other violations of licensing standards for long-term care facilities, including skilled nursing facilities (nursing homes), intermediate care facilities for the developmentally disabled, and congregate living health facilities.

There are three categories of citations that CDPH may issue when a facility has been found in violation of licensing standards: Class AA, Class A and Class B. The highest level of citation is a Class AA, which is issued when CDPH determines the facility’s violation caused a resident’s death.

If there is insufficient evidence that the facility’s violation is a “direct proximate cause” of the death, a Class A citation is issued instead. Criteria for Class A citations include whether a facility poses an imminent danger or there is a substantial probability of death or serious harm to residents.

Class B citations apply when there is a direct or immediate relationship to resident health, safety or security, and may include emotional and financial elements. Class B citations apply in several other circumstances, including abuse reporting and patient rights.

Under current law, the “direct proximate cause” standard for AA citations is confusing and unclear. In fact, according to CDPH, it is undefined, which makes it difficult for it to defend class AA citation appeals. Further, CDPH states that there is no “case law or jury instruction for “direct proximate cause” that can guide a court toward a clear application of the standard.”<sup>1</sup>

The California Supreme Court rejected the “proximate cause” causation standard and concluded that “substantial factor” is the proper causation standard in determining negligence.<sup>2</sup> A substantial factor is more than remote or trivial but need not be the only cause of harm.

In commenting on similar bills in 2017 and 2019 (AB 1335 and AB 506, Kalra), CDPH agreed that the substantial factor standard is better than the direct proximate cause standard. The direct proximate cause standard has created “an almost insurmountable burden to overcome” because patients often suffer from other co-morbidities.

The application of “substantial factor” is not just a regulatory action, but is also applicable in a court. If a long-term care facility appeals a Class AA citation, CDPH must prove causation in superior court to a judge. Because there is no case law on “direct proximate cause,” it has led to confusion by the courts and inconsistent application.

Between 2000 and December 15, 2020, CDPH issued 336 Class AA citations and 2,714 Class A

<sup>1</sup> CDPH Oppose Unless Amended Position on AB 506 (2019-20 Legislative Session).

<sup>2</sup> *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1056.

citations, of which 215 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 CDPH from issuing a more appropriate Class AA citation.

These Class A deaths included:

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

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. In Los Angeles County, nursing homes are struggling with the greatest number of outbreaks and a disproportionately high number of prior infection control citations.<sup>3</sup>

As AARP recently noted, “[D]ata is beginning to show linkages between nursing home quality and coronavirus cases. For example, researchers at both the University of California, San Francisco, and the University of Rochester Medical Center found that facilities that had received lower quality ratings from regulators before the pandemic were more likely to suffer outbreaks.”<sup>4</sup>

**SOLUTION**

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Moving forward, robust and clear nursing home oversight by CDPH will be critical if we are to avert further tragedies that have only been exacerbated by

<sup>3</sup> <https://www.latimes.com/california/story/2020-04-14/coronavirus-nursing-homes-infections-past-violations-citation>

<sup>4</sup> <https://www.aarp.org/caregiving/health/info-2020/covid-19-nursing-homes-who-is-to-blame.html>

the COVID-19 pandemic. 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.

According to the 2018 state audit of skilled nursing facilities, “[t]he state has not adequately addressed quality-of-care deficiencies.” The audit’s recommendations include that the Legislature “increase citation penalty amounts annually by—at a minimum—the cost of inflation.”

Because citation fines for “AA” and “A” have not increased since 2000, AB 323 makes the following increases per the recommendation of the California State Auditor:

Citation Type	Current Amount	AB 323
AA	\$25,000-\$100,000	\$30,000-\$120,000
A	\$2,000-\$20,000	\$3,500-\$25,000
B <sup>5</sup>	\$100-\$2,000	\$150-\$3,000
Material Falsification <sup>6</sup>	\$2,000-\$20,000	\$3,500-\$25,000

In addition, the bill provides for an enhanced citation for a Class “A” citation that resulted in a death to be not less than \$15,000 but not to exceed \$60,000.

**SPONSOR**

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Disability Rights California

**CONTACT**

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<sup>5</sup> Class B citation amounts were last increased in 2011

<sup>6</sup> A willful material falsification or omission in the health record of a resident by the long-term care facility