

# S.B. NO. 1361

JAN 25 2023

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## A BILL FOR AN ACT

RELATING TO THE NURSING FACILITY SUSTAINABILITY PROGRAM.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1           SECTION 1. The legislature finds that the nursing facility  
2 sustainability program was established in 2012 and has served a  
3 critical role in strengthening the long-term care system in  
4 Hawaii. In the eleven years since its inception, the nursing  
5 facility sustainability program has helped long-term care  
6 facilities treat the most vulnerable patients in the State,  
7 especially low-income individuals who require these  
8 services. The program has been carried out in a public-private  
9 partnership to ensure that patients in Hawaii can access  
10 quality, affordable care.

11           The legislature further finds that, even with this program,  
12 nursing facilities in the State face major challenges. These  
13 challenges are due in part to the health and financial pressures  
14 related to the COVID-19 pandemic. Medicaid is jointly financed  
15 by the federal and state governments by statutory formula; the  
16 federal government pays between fifty per cent and seventy-four  
17 per cent, with assistance levels determined by each state's per

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1 capita income. States with the lowest per capita income receive  
2 higher federal matching rates. Under federal rules, the state  
3 share must be public funds that are not federal funds. The  
4 legislature finds that public funding to help sustain Hawaii's  
5 nursing facilities financially may be accessed through a  
6 provider fee.

7 The legislature further finds that provider fees exist in  
8 forty-nine states and the District of Columbia as a means of  
9 drawing down federal funds to sustain their medicaid programs,  
10 increasing health care costs, and expanding medicaid  
11 enrollment. Provider fees, which are collected from specific  
12 categories of health care providers, may be imposed on different  
13 classes of health care services, including inpatient and  
14 outpatient hospital and nursing facility services.

15 The legislature therefore finds that, in Hawaii, a provider  
16 fee on nursing facilities can result in a substantial increase  
17 in medicaid payments, without putting additional constraints on  
18 the State's budget. The additional federal funds obtained via  
19 the fee program authorized by the nursing facility  
20 sustainability program can maintain access to care for medicaid  
21 recipients. This will allow nursing facilities in the State to  
22 continue to serve under- or uninsured patients in a timely,  
23 effective matter. This helps to ensure the overall

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1 sustainability of the health care system in the State during the  
2 challenging time of the COVID-19 pandemic.

3 The purpose of this Act is to preserve access to health  
4 care for medicaid recipients by continuing indefinitely the  
5 nursing facility sustainability fee program and making other  
6 nonsubstantive changes for consistency and clarity,  
7 appropriating \$15,000,000 from the nursing facility  
8 sustainability special fund, and continuing exemptions from the  
9 central service expenses assessment and the administrative  
10 expenses assessment under sections 36-27(a) and 36-30(a), Hawaii  
11 Revised Statutes, respectively.

12 SECTION 2. Section 346F-2, Hawaii Revised Statutes, is  
13 amended to read as follows:

14 "[f]§346F-2 [‡] **Findings and declaration of necessity.** It  
15 is the intent of the legislature to establish a special fund  
16 within the state treasury to receive revenue from the imposition  
17 of a nursing facility sustainability fee to be administered by  
18 the department [~~of human services~~], which shall use the revenue  
19 from the fee and associated federal medicaid matching funds  
20 exclusively to make payments to nursing facilities and for other  
21 purposes as set forth in this chapter."

22 SECTION 3. Section 346F-4, Hawaii Revised Statutes, is  
23 amended to read as follows:

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1           "§346F-4 Nursing facility sustainability program special  
2 fund. (a) There is created in the state treasury the nursing  
3 facility sustainability program special fund to be administered  
4 by the department into which shall be deposited all moneys  
5 collected under this chapter.

6           (b) Moneys in the special fund shall consist of:

7           (1) All revenues collected or received by the department  
8           from the nursing facility sustainability fee as  
9           required by this chapter;

10          ~~[(2) All federal medicaid funds received by the department  
11           as a result of matching expenditures made with the  
12           nursing facility sustainability fees,~~

13          ~~+(3)]~~ (2) Any interest or penalties levied in conjunction  
14           with the administration of this chapter; and

15          ~~[(4)]~~ (3) Any designated appropriations, federal funds,  
16           donations, gifts, or moneys from any other sources.

17           (c) ~~[Revenue]~~ Moneys from the nursing facility  
18 sustainability fee shall be used exclusively as follows:

19           (1) No less than eighty-eight per cent of the revenue from  
20           the nursing facility sustainability fee shall be used  
21           for one or more of the following:

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1 (A) To match federal medicaid funds, with the  
2 combined total to be used to enhance capitated  
3 rates to medicaid managed care health plans for  
4 the purpose of increasing medicaid payments to  
5 private nursing facilities to support the  
6 availability of services and ensure access to  
7 care for the medicaid managed care health plan  
8 enrollees; or

9 (B) To match federal medicaid funds, with the  
10 combined total to enhance capitated rates for the  
11 purpose of paying quality incentives; and

12 (2) Twelve per cent of the revenue from the nursing  
13 facility sustainability fee may be used by the  
14 department for other departmental purposes [~~and~~

15 ~~(3) All moneys remaining in the special fund on June 30,~~  
16 ~~2024, shall be distributed to nursing facilities~~  
17 ~~within thirty days in the same proportions as received~~  
18 ~~from the nursing facilities].~~

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1 (d) The department shall utilize federal funds derived  
2 from state long-term care facility certified expenditures to  
3 make ~~[supplemental]~~ payments to state long-term care facilities  
4 to the extent permitted by federal law. The department may  
5 receive intergovernmental transfers from the state long-term  
6 care facilities to support ~~[direct-supplemental]~~ payments and  
7 increased capitation rates to health plans for the benefit of  
8 the state long-term care facilities. During any period in which  
9 the nursing facility sustainability fee is in effect, certified  
10 expenditures of state long-term care facilities shall not be  
11 used to make or support ~~[direct]~~ payments to private nursing  
12 facilities."

13 SECTION 4. Section 346F-5, Hawaii Revised Statutes, is  
14 amended to read as follows:

15 "**§346F-5 Nursing facility sustainability fee.** (a)  
16 Effective July 1, 2012, the department shall charge and collect  
17 a provider fee on health care items or services provided by  
18 nursing facilities.

19 (b) The nursing ~~[+]~~facility~~[+]~~ sustainability fee shall be  
20 based on the ~~[net patient service revenue]~~ total resident days  
21 of all nursing facilities that are subject to the sustainability  
22 fee, as determined by the department.

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1 (c) The nursing facility sustainability fee shall not  
2 exceed [~~5.5~~] 6 per cent of overall net patient service revenue  
3 and shall be calculated and paid on a per resident day basis,  
4 unless the facility qualifies for an exemption identified in  
5 subsection (d)(1). The facilities described in subsection  
6 (d)(2) shall pay a reduced daily fee compared to other  
7 facilities participating in the program.

8 (d) In accordance with the redistribution method set  
9 forth in title 42 Code of Federal Regulations section  
10 433.68(e)(1) and (2), the department shall seek a waiver of the  
11 broad-based and uniformity provider fee requirements under  
12 federal law from which to exclude certain nursing facilities and  
13 to permit certain high volume medicaid nursing facilities or  
14 facilities with a high number of total annual patient days to  
15 pay the sustainability fee at a lesser amount per resident day,  
16 as follows:

17 (1) The department shall exempt the following nursing  
18 facility providers from the nursing facility  
19 sustainability fee subject to federal approval under  
20 title 42 Code of Federal Regulations section

21 433.68(e)(2):

22 (A) Nursing facilities with twenty-eight or fewer  
23 licensed beds;

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- 1 (B) Nursing facilities owned, operated by, or
- 2 affiliated with the Hawaii health systems
- 3 corporation; and
- 4 (C) Continuing care retirement communities.

5 (2) The department shall reduce the fee for [~~high volume~~  
6 ~~medicaid nursing facilities or facilities with high~~  
7 ~~patient volumes~~] facilities with high medicaid  
8 resident days in order to meet the redistributive  
9 tests of title 42 Code of Federal Regulations section  
10 433.68(e)(2).

11 (3) The department, [~~with agreement by~~] upon good faith  
12 consultation and negotiations with the nursing  
13 facility trade [associations] association located in  
14 Hawaii, may modify, add to, or [~~reduce the categories~~  
15 ~~of~~] exclude facilities [~~exempt from~~] in the assessment  
16 if necessary to obtain and maintain approval of the  
17 waiver by the Centers for Medicare and Medicaid  
18 Services, if the modification, addition, or exclusion  
19 is consistent with the purposes of this chapter."

20 SECTION 5. Section 346F-6, Hawaii Revised Statutes, is  
21 amended by amending subsection (c) to read as follows:

22 "(c) The department shall [~~collect and each nursing~~  
23 ~~facility shall pay in twelve equal installments~~] impose a

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1 nursing facility sustainability fee [~~in section 346F-5 on a~~  
2 ~~monthly basis, subject to the terms of this section. The fee~~  
3 ~~shall be due within sixty days after the end of each month, with~~  
4 ~~the initial payment due on the later of July 31, 2012, or forty-~~  
5 ~~five days after the required federal approvals for the~~  
6 ~~assessment and any increase in health plan capitation payments~~  
7 ~~have been secured from the Centers for Medicare and Medicaid~~  
8 ~~Services.] on a monthly basis, which a nursing facility shall  
9 pay no later than the sixtieth day after the end of the calendar  
10 month that the department imposed the fee; provided that, if  
11 required federal approvals have not been secured by the end of a  
12 calendar month, the fees for that month shall be paid within ten  
13 days after the notification to the nursing facilities that the  
14 required approvals have been received."~~

15 SECTION 6. Section 346F-9, Hawaii Revised Statutes, is  
16 amended by amending subsection (a) to read as follows:

17 "(a) If a nursing facility fails to pay the full amount of  
18 the nursing facility sustainability fee when due, there shall be  
19 added to the fee, unless waived by the department for reasonable  
20 cause, a penalty equal to two per cent of the fee that was not  
21 paid when due. Any subsequent payments shall be credited first  
22 to unpaid fee amounts [~~rather than to penalty or interest~~

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1 ~~amounts,~~] beginning with the most delinquent installment[~~-~~]  
2 rather than to penalty or interest amounts."

3 SECTION 7. Section 346F-10, Hawaii Revised Statutes, is  
4 amended to read as follows:

5 "**§346F-10 Enhanced rates to medicaid managed care health**  
6 **plans.** (a) In accordance with title 42 Code of Federal  
7 Regulations part 438, the department shall use revenues from the  
8 nursing facility sustainability fee and federal matching funds  
9 to enhance the capitated rates paid to medicaid managed care  
10 health plans [~~for the period of July 1 through December 31,~~  
11 ~~2021, and calendar years 2022 and 2023,~~] consistent with the  
12 following objectives:

13 (1) [~~The rate enhancement shall be used exclusively for~~  
14 ~~increasing reimbursements to private nursing~~  
15 ~~facilities to support the availability of services and~~  
16 ~~to ensure access to care to the medicaid managed care~~  
17 ~~health plan enrollees,~~] The department shall use  
18 moneys from the nursing facility sustainability  
19 program solely to fulfill the requirements of section  
20 346F-4(c);

21 (2) The rate enhancement shall be [~~made part of the~~  
22 ~~monthly capitated rates]~~ paid by the department to  
23 medicaid managed care health plans, which shall

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1 provide documentation to the department and the  
2 nursing facility trade association located in Hawaii  
3 certifying that the revenues received under paragraph  
4 [~~1~~] (3) are used in accordance with this section;

5 (3) The rate enhancement shall be used exclusively to  
6 increase reimbursements to private nursing facilities  
7 to support the availability of services and to ensure  
8 access to care for medicaid managed care health plan  
9 enrollees;

10 [~~3~~] (4) The rate enhancement shall be actuarially sound  
11 and approved by the federal government for federal  
12 fund participation;

13 [~~4~~] (5) The department shall modify the fee-for-service  
14 reimbursement rates of the nursing facilities to  
15 recognize the medicaid portion of the nursing facility  
16 sustainability fee as an additional cost of serving  
17 medicaid patients, and to provide a uniform percentage  
18 increase in preexisting facility-specific rates; [~~and~~]

19 [~~5~~] (6) Payments made by the medicaid managed care health  
20 plans shall be made within thirty calendar days upon  
21 receipt of [~~monthly capitation rates~~] payment from the  
22 department [~~-~~]; and

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1        (7) Each medicaid managed health care plan shall expend  
2                100 per cent of any increased payments it receives  
3                under this section to carry out the goals of this  
4                program.

5        (b) If federal approval pursuant to section 346F-7 is not  
6        received until after the end of any month for which the nursing  
7        facility sustainability fee is applicable, the department shall  
8        make the initial monthly payments within five days after receipt  
9        of the nursing facility sustainability fee for the respective  
10       month.

11       (c) To the extent the nursing facility sustainability  
12       program is not effective for the entire year, the nursing  
13       facility sustainability fee, the state medicaid expenses and  
14       administrative fee, and the corresponding payments to fulfill  
15       the requirements of section 346F-4(c) shall be based on the  
16       proportion of the fiscal year the program is in effect."

17       SECTION 8. Section 346F-13, Hawaii Revised Statutes, is  
18       amended to read as follows:

19       "(a) Collection of the nursing facility sustainability fee  
20       under section 346F-5 shall be discontinued if:

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- 1 (1) The waiver in section 346F-7 or the enhanced  
2 capitation rates in section 346F-10 have not been  
3 approved by the Centers for Medicare and Medicaid  
4 Services;
- 5 (2) The department reduces [~~funding for nursing facility~~  
6 ~~services below the state appropriation in effect on~~  
7 ~~June 30, 2023-2021,]~~ reimbursement rates for private  
8 nursing facility services to medicaid patients with  
9 the intention of using the sustainability funds to  
10 supplant the planned or permanent reduction in rates;
- 11 (3) The department or any other state agency uses the  
12 money in the special fund for any use other than the  
13 uses permitted pursuant to this chapter; or
- 14 (4) Federal financial participation to match the nursing  
15 facility sustainability fee becomes unavailable under  
16 federal law. In such case, the department shall  
17 terminate the collection of the fee beginning on the  
18 effective date of the federal statutory, regulatory,  
19 or interpretive change.

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1 (b) If collection of the nursing facility sustainability  
2 fee is discontinued [~~as provided in this section~~], any remaining  
3 money in the nursing facility sustainability program special  
4 fund shall be [~~returned~~] distributed to the nursing facilities  
5 [~~from which the fee was collected~~] within [~~thirty days~~] six  
6 months of the date of discontinuation in the same proportions as  
7 received from the nursing facilities."

8 SECTION 9. Act 156, Session Laws of Hawaii 2012, as  
9 amended by section 3 of Act 142, Session Laws of Hawaii 2013, as  
10 amended by section 2 of Act 124, Session Laws of Hawaii 2014, as  
11 amended by section 2 of Act 69, Session Laws of Hawaii 2015, as  
12 amended by section 2 of Act 59, Session Laws of Hawaii 2016, as  
13 amended by section 5 of Act 60, Session Laws of Hawaii 2017, as  
14 amended by section 6 of Act 163, Session Laws of Hawaii 2019, as  
15 amended by section 7 of Act 24, Session Laws of Hawaii 2021, is  
16 amended by amending section 5 to read as follows:

17 "SECTION 5. This Act shall take effect on July 1, 2012[~~7~~  
18 ~~and shall be repealed on December 31, 2023, provided that~~  
19 ~~section 4, Hawaii Revised Statutes, established by section 2 of~~  
20 ~~this Act, and the amendment made to section 36-30(a), Hawaii~~  
21 ~~Revised Statutes, in section 3 of this Act, shall be repealed on~~  
22 ~~June 30, 2024]."~~

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1 SECTION 10. Act 124, Session Laws of Hawaii 2014, as  
2 amended by section 3 of Act 69, Session Laws of Hawaii 2015, as  
3 amended by section 3 of Act 59, Session Laws of Hawaii 2016, as  
4 amended by section 6 of Act 60, Session Laws of Hawaii 2017, as  
5 amended by section 7 of Act 163, Session Laws of Hawaii 2019, as  
6 amended by section 8 of Act 24, Session Laws of Hawaii 2021, is  
7 amended by amending section 7 to read as follows:

8 "SECTION 7. This Act shall take effect on June 29, 2014 [~~+~~  
9 ~~provided that:~~

10 ~~(1) Section 5 shall take effect on July 1, 2014; and~~

11 ~~(2) The amendments made to sections 36-27(a) and 36-~~

12 ~~30(a), Hawaii Revised Statutes, in sections 3 and 4 of~~

13 ~~this Act shall be repealed on June 30, 2024]."~~

14 SECTION 11. There is appropriated out of the nursing  
15 facility sustainability program special fund the sum of  
16 \$15,000,000 or so much thereof as may be necessary for fiscal  
17 year 2023-2024 and the same sum or so much thereof as may be  
18 necessary for fiscal year 2024-2025 for uses consistent with  
19 section 346F-4, Hawaii Revised Statutes.

20 The sums appropriated shall be expended by the department  
21 of human services for the purposes of this Act.

22 SECTION 12. Statutory material to be repealed is bracketed  
23 and stricken. New statutory material is underscored.

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1 SECTION 13. This Act shall take effect upon its approval.

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INTRODUCED BY: 

4

BY REQUEST

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**Report Title:**

Nursing Facility Sustainability Program; Appropriation;  
Department of Human Services

**Description:**

Making the nursing facility sustainability program and exemptions from the special fund assessments permanent. Make changes to strengthen the nursing facility sustainability program and other nonsubstantive changes for consistency and clarify. Appropriates funds out of the nursing facility sustainability program special fund for fiscal years 2023-2024 and 2024-2025.

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*

## JUSTIFICATION SHEET

DEPARTMENT: Human Services

TITLE: A BILL FOR AN ACT RELATING TO THE NURSING FACILITY SUSTAINABILITY PROGRAM.

PURPOSE: To continue and strengthen the Nursing Facility Sustainability Program, established by Act 156, Session Laws of Hawaii 2012, last amended by Act 24, Session Laws of Hawaii 2021. This bill will remove any sunset date, update the referral dates in the statute, clarify the use of the funds, and make nonsubstantive changes for consistency and clarity. This bill appropriates funding out of the Nursing Facility Sustainability Program Special Fund for fiscal years 2023-2024 and 2024-2025. The bill also ensures that the Special Fund continues to be exempted from the central service expenses assessment and the administrative expenses assessment under sections 36-27(a) and 36-30(a), Hawaii Revised Statutes (HRS), respectively.

MEANS: Amend sections 346GF-2, 346F-4, 346F-5, 346F-6(c), 346F-9(a), 346F-10, and 346F-13 (a) and (b), HRS; amend section 5 of Act 156, Session Laws of Hawaii (SLH) 2012, as amended by Act 142, SLH 2013, Act 124, SLH 2014, Act 69, SLH 2015, Act 59, SLH 2016, Act 60, SLH 2017, and section 7 of Act 124, SLH 2014, as amended by Act 69, SLH 2015, Act 59, SLH 2016, Act 60, SLH 2017, Act 163, SLH 2019, and Act 24, SLH 2021; and appropriate funds from the Nursing Facility Sustainability Program Special Fund.

JUSTIFICATION: Act 156, SLH 2012, last amended by Act 163, SLH 2019, established a Nursing Facility Sustainability Program and the Nursing Facility Sustainability Program Special Fund (the Special Fund). The Special Fund receives moneys from the nursing facility sustainability fee, which is used to match federal Medicaid funds. These funds are

used to increase reimbursements and pay for performance payments for quality improvement activities to the nursing facilities through capitation payments with a greater benefit to those providing proportionately more services to Medicaid recipients. These additional moneys will increase the sustainability of nursing facilities in Hawaii to continue as a critical part of the safety net and incentivize quality using a pay for performance.

The department may use twelve percent of the revenues from the fees collected to increase and improve services for Medicaid program recipients.

Currently, the Nursing Facility Sustainability Program will be repealed on December 31, 2023, with funding provisions to be repealed on June 30, 2024.

This bill proposes to extend the Nursing Facility Sustainability Program and the Special Fund permanently.

This bill continues the Nursing Facility Sustainability Program and the Special Fund. Therefore, unless the proposed technical amendments are adopted, the exemptions from the central service expenses and administrative expenses assessments will be lost when sections 36-27(a)(32) and 36-30(a)(26), HRS, are repealed on December 31, 2023. The Special Fund will then be subject to those assessments. DHS estimates that the Special Fund would be subject to the annual central service expenses assessment of at least \$2,500,000 and the administrative expenses assessment of \$500,000.

Impact on the public: Hawaii residents benefit by having more sustainable nursing facilities and increasing access to necessary long-term care services. Health

care services for low-income, vulnerable residents will be increased and improved.

Impact on the department and other agencies:

The Department of Human Services will benefit by receiving additional funds to support its programs.

GENERAL FUND: None.

OTHER FUNDS: \$15,000,000 Nursing Facility Sustainability Program Special Fund for fiscal year 2023-2024 and \$15,000,000 for fiscal year 2024-2025.

PPBS PROGRAM DESIGNATION: HMS 401 and HMS 902.

OTHER AFFECTED AGENCIES: None.

EFFECTIVE DATE: Upon approval.