

ACT 156

S.B. NO. 2466

A Bill for an Act Relating to Long-Term Care Facilities.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Long-term care facilities in the State face major financial challenges in providing quality health care for Hawaii residents. These challenges are largely the result of payments to medicaid enrollees for care that do not cover

the actual costs of care. The legislature finds that federal funding to help sustain Hawaii's long-term care facilities financially may be accessed through a provider fee.

Provider fees exist in forty-seven states and the District of Columbia as a means of drawing down federal funds to sustain their medicaid programs due to rising state budget deficits, increasing health care costs, and expanding medicaid rolls. Implementation of a provider fee in Hawaii would help stabilize declining medicaid payments to facilities and slow the erosion of access to care for beneficiaries served by the program.

Medicaid is jointly financed by the federal and state government, but by statutory formula, the federal government pays between fifty per cent and seventy-four per cent of medicaid costs incurred by states for care delivered to their medicaid beneficiaries. Federal medical assistance percentages vary by state, with states that have lower per capita incomes receiving higher federal matching rates. Under federal rules, the state share must be public funds that are not federal funds.

Provider fees, which are collected from specific categories of health care items and services, may be assessed on nineteen different classes of health care services, including inpatient and outpatient hospital and nursing facility services. However, there are limitations on the way provider fees are structured. The Medicaid Voluntary Contribution and Provider-Specific Tax Amendments of 1991, P.L. 102-234, passed by Congress in 1991, imposes the following requirements:

- (1) Broad-based. To be considered broad-based, a provider fee must be imposed on all health care items or services furnished by all non-federal, non-public providers in the class in the State. Provider fee programs may exclude public facilities without violating federal law;
- (2) Uniformly imposed. In general, a provider fee is uniformly imposed if it is the same amount or rate for each provider in the class; and
- (3) Hold harmless prohibition. States may not hold providers harmless. A provider fee is considered to hold the provider harmless if the providers paying the fee receive, directly or indirectly, a non-medicaid payment from the state or any offset or waiver that guarantees to hold the provider harmless for all or a portion of the fee. A provider fee is also considered to hold the provider harmless if the medicaid payments to the provider vary based only on the amount of the fees paid by the provider.

The maximum provider fee a state may receive is currently six per cent of net patient revenue. A number of proposals have been made, but not implemented, to eliminate medicaid provider fee programs in order to reduce the federal deficit. However, since provider fees are used by so many states, many of those who are knowledgeable about this subject view elimination of provider fees as unlikely due to strong political support for the program. A more realistic expectation is a reduction of the provider fee maximum, as proposed by President Barack Obama's fiscal year 2012 budget, which would reduce the maximum to three and one-half per cent in 2017. This proposal recognizes that provider fees are essential for most states to maintain a stable, functioning medicaid program.

In Hawaii, a provider fee would increase medicaid payments at a time when constraints on the State's budget have forced a reduction in payments and optional benefits. The additional federal funds obtained via the fee program would reduce the amount of losses incurred by nursing facilities. As such, the provider fee would help preserve access to health care for the medicaid population and sustain the State's entire health care system.

State long-term care facilities shall not be covered by the nursing facility sustainability fee. However, other provisions of this Act are intended to assure that state facilities will benefit from the use of their certified expenditures and intergovernmental transfers to generate federal funds to cover their operating expenses.

The purpose of this Act is to ensure access to health care for medicaid recipients by establishing a nursing facility sustainability fee and a special fund to receive moneys from the nursing facility sustainability fee in order to receive federal medicaid matching funds under the QUEST expanded medicaid section 1115 demonstration waiver.

SECTION 2. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

**“CHAPTER
NURSING FACILITY SUSTAINABILITY PROGRAM**

§ -1 **Title.** This chapter shall be known and may be cited as the “Nursing Facility Sustainability Program Act”.

§ -2 **Findings and declaration of necessity.** It is the intent of the legislature to establish a special fund within the state treasury to receive revenue from the nursing facility sustainability fee to be administered by the department and to use it to receive federal medicaid matching funds under the section 1115 waiver.

§ -3 **Definitions.** As used in this chapter:

“Continuing care retirement community” means an entity providing nursing facility services, along with assisted living or independent living on a contiguous campus with the number of assisted living and independent living beds in the aggregate being at least twice the number of nursing facility beds. For purposes of this definition, “contiguous” means land adjoining or touching other property held by the same or related organization, and includes land divided by a public road.

“Department” means the department of human services.

“Net patient service revenue” means gross inpatient revenues from services provided to nursing facility patients less reductions from gross inpatient revenue resulting from an inability to collect payment of charges. Inpatient service revenue excludes non-patient care revenues, such as revenues from beauty and barber services, vending income, interest and contributions, revenues from the sale of meals, and all outpatient revenues. Reductions from gross revenue include contractual adjustments, uncompensated care, administrative, courtesy, and policy discounts and adjustments, and other revenue deductions.

“Nursing facility” means any facility licensed pursuant to chapter 11-94.1, Hawaii administrative rules.

“QUEST” means the demonstration project developed by the department described in Hawaii’s section 1115 waiver and includes the QUEST, QUEST-Net, and QUEST-ACE components.

“QUEST expanded access” means the demonstration project developed by the department described in Hawaii’s section 1115 waiver.

“Resident day” means a calendar day of care provided to a nursing facility resident, including the day of admission and excluding the day of discharge; provided that one resident day shall be deemed to exist when admission and discharge occur on the same day. A resident day includes a day on which a bed

is held for a patient and for which the facility receives compensation for holding the bed.

“Section 1115 waiver” means the QUEST expanded medicaid section 1115 demonstration waiver (Number 11-W-00001/9).

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

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

- (1) All revenues collected or received by the department from the nursing facility sustainability fee required by this chapter;
- (2) All federal medicaid funds received by the department as a result of matching expenditures made with the nursing facility sustainability fees;
- (3) Any interest or penalties levied in conjunction with the administration of this chapter; and
- (4) Any appropriations, federal funds, donations, gifts, or moneys from any other sources.

(c) Revenue from the nursing facility sustainability fee shall be used exclusively as follows:

- (1) No less than eighty-eight per cent of the revenue from the nursing facility sustainability fee shall be used to match federal medicaid funds, with the combined total to be used to enhance capitated rates to the QUEST expanded access plans for the purpose of increasing medicaid payments to private nursing facilities;
- (2) Twelve per cent of the revenue from the nursing facility sustainability fee shall be used by the department to restore funding for the three per cent reduction in reimbursements to nursing facilities effective 2012, and to the extent remaining after restoring the three per cent reduction for other purposes; and
- (3) All moneys remaining in the special fund on December 30, 2013, shall be distributed to nursing facilities within thirty days in the same proportions as received from the nursing facilities.

(d) The department shall utilize federal funds derived from state long-term care facility certified expenditures to make supplemental payments to state long-term care facilities to the extent permitted by federal law. The department may receive intergovernmental transfers from the state long-term care facilities to support increased capitation rates to health plans for the benefit of the state long-term care facilities. During any period in which the nursing facility sustainability fee is in effect, certified expenditures of state long-term care facilities shall not be used to make or support direct payments to private nursing facilities.

(e) The nursing facility sustainability program special fund ceiling appropriation shall be \$12,000,000 for fiscal year 2012-2013 and \$10,000,000 in federal funds for HMS 401 for fiscal year 2012-2013.

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

(b) The nursing home sustainability fee shall be based on the net patient service revenue of all nursing facilities that are subject to the sustainability fee, as determined by the department.

(c) The nursing facility sustainability fee shall not exceed four per cent of net patient service revenue and shall be calculated and paid on a per resident

day basis. The per resident daily fee shall be the same amount for each affected facility, except as prescribed in subsection (d)(2).

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

- (1) The department shall exempt the following nursing facility providers from the nursing facility sustainability fee subject to federal approval under title 42 Code of Federal Regulations section 433.68 (e)(2):
 - (A) Nursing facilities with twenty-eight or fewer licensed beds;
 - (B) Nursing facilities owned or operated by the Hawaii health systems corporation; and
 - (C) Continuing care retirement communities.
- (2) The department shall reduce the fee for high volume medicaid nursing facilities or facilities with high patient volumes in order to meet the redistributive tests of title 42 Code of Federal Regulations section 433.68(e)(2).
- (3) The department, with agreement by the nursing facility trade associations located in Hawaii, may modify, add to, or reduce the categories of facilities exempt from the assessment if necessary to obtain and maintain approval of the waiver by the Centers for Medicare and Medicaid Services, if the modification is consistent with the purposes of this chapter.

§ -6 Nursing facility sustainability fee assessment. (a) Nursing facilities shall pay the nursing facility sustainability fee to the nursing facility sustainability program special fund in accordance with this chapter.

(b) The department shall determine, with agreement by the nursing facility trade associations located in Hawaii, the fee rate prospectively for the applicable fiscal year.

(c) The department shall collect and each nursing facility shall pay in twelve equal installments the nursing facility sustainability fee in section -5 on a monthly basis, subject to the terms of this section. The fee shall be due within thirty days after the end of each month, with the initial payment due on the later of July 31, 2012, or forty-five days after the required federal approvals for the assessment and any increase in health plan capitation payments have been secured from the Centers for Medicare and Medicaid Services.

§ -7 Federal approval. The department shall seek a waiver and other approvals from the Centers for Medicare and Medicaid Services that may be necessary to implement the nursing facility sustainability program, including the approval of the contracts between the State and the QUEST and QUEST expanded access health plans.

§ -8 Multifacility locations. If an entity conducts, operates, or maintains more than one nursing facility, the entity shall pay the nursing facility sustainability fee for each nursing facility separately.

§ -9 Penalties for failure to pay nursing facility sustainability fee. (a) If a nursing facility fails to pay the full amount of the nursing facility sustain-

ability fee when due, there shall be added to the fee, unless waived by the department for reasonable cause, a penalty equal to two per cent of the fee that was not paid when due. Any subsequent payments shall be credited first to unpaid fee amounts rather than to penalty or interest amounts, beginning with the most delinquent installment.

(b) In addition to the penalty identified in this section, the department may seek any of the following remedies for failure of any nursing facility to pay its fee when due:

- (1) Withholding any medical assistance reimbursement payments until such time as the fee amount is paid in full;
- (2) Suspension or revocation of the nursing facility license; or
- (3) Development of a plan that requires the nursing facility to pay any delinquent fee in installments.

§ -10 Enhanced rates to QUEST expanded access plans. In accordance with title 42 Code of Federal Regulations section 438, the department shall use revenues from the nursing facility sustainability fee and federal matching funds to enhance the capitated rates paid to the QUEST expanded access plans for the state fiscal year 2012-2013 consistent with the following objectives:

- (1) The rate enhancement shall be used exclusively for increasing reimbursements to private nursing facilities to support the availability of services and to ensure access to care to QUEST expanded access enrollees;
- (2) The rate enhancement shall be made part of the monthly capitated rates by the department to the QUEST expanded access plans, which shall provide documentation to the department and the nursing facility trade associations located in Hawaii certifying that the revenues received under paragraph (1) are used in accordance with this section;
- (3) The rate enhancement shall be actuarially sound and approved by the federal government for federal fund participation; and
- (4) The department shall modify the fee-for-service reimbursement rates of the nursing facilities to recognize the medicaid portion of the nursing facility sustainability fee as an additional cost of serving medicaid patients, and to provide a uniform percentage increase in pre-existing facility-specific rates.

§ -11 Payment of rate enhancement. The rate enhancements referred to in section -10 shall be retroactive to the effective date of this legislation. Retroactive rate enhancements shall be paid within thirty days of notification by the Centers for Medicare and Medicaid Services to the department of all necessary approvals.

§ -12 Special designation of nursing facility sustainability program special fund. Notwithstanding section 37-53 and any law or administrative rule to the contrary, the specific purposes set out in section -4(c) are established as being pre-eminent uses of the nursing facility sustainability program special fund and shall not be used for any other purposes, notwithstanding any authority granted to the governor or any other state official by any other statutory provisions relating to the allocation or reallocation of funds.

§ -13 Termination. (a) Collection of the nursing facility sustainability fee under section -5 shall be discontinued if:

- (1) The waiver in section -7 or the enhanced capitation rates in section -10 have not been approved by the Centers for Medicare and Medicaid Services;
- (2) The department reduces funding for nursing facility services below the state appropriation in effect on June 30, 2012;
- (3) The department or any other state agency uses the money in the special fund for any use other than the uses permitted pursuant to this chapter; or
- (4) Federal financial participation to match the nursing facility sustainability fee becomes unavailable under federal law. In such case, the department shall terminate the collection of the fee beginning on the effective date of the federal statutory, regulatory, or interpretive change.

(b) If collection of the nursing facility sustainability fee is discontinued as provided in this section, any remaining money in the special fund shall be returned to the nursing facilities from which the fee was collected within thirty days in the same proportions as received from the nursing facilities.

§ -14 Severability. If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.”

SECTION 3. Section 36-30, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) Each special fund, except the:

- (1) Transportation use special fund established by section 261D-1;
- (2) Special out-of-school time instructional program fund under section 302A-1310;
- (3) School cafeteria special funds of the department of education;
- (4) Special funds of the University of Hawaii;
- (5) State educational facilities improvement special fund;
- (6) Special funds established by section 206E-6;
- (7) Aloha Tower fund created by section 206J-17;
- (8) Funds of the employees’ retirement system created by section 88-109;
- (9) Unemployment compensation fund established under section 383-121;
- (10) Hawaii hurricane relief fund established under section 431P-2;
- (11) Convention center enterprise special fund established under section 201B-8;
- (12) Hawaii health systems corporation special funds and the subaccounts of its regional system boards;
- (13) Tourism special fund established under section 201B-11;
- (14) Universal service fund established under section 269-42;
- (15) Emergency and budget reserve fund under section 328L-3;
- (16) Public schools special fees and charges fund under section 302A-1130;
- (17) Sport fish special fund under section 187A-9.5;
- (18) Center for nursing special fund under section 304A-2163;
- (19) Passenger facility charge special fund established by section 261-5.5;
- (20) Court interpreting services revolving fund under section 607-1.5;

- (21) Hawaii cancer research special fund;
- (22) Community health centers special fund;
- (23) Emergency medical services special fund;
- (24) Rental motor vehicle customer facility charge special fund established under section 261-5.6; ~~and~~
- (25) Shared services technology special fund under section 27-43[5]; and
- (26) Nursing facility sustainability program special fund.

shall be responsible for its pro rata share of the administrative expenses incurred by the department responsible for the operations supported by the special fund concerned.”

SECTION 4. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 5. This Act shall take effect on July 1, 2012, and shall be repealed on June 30, 2013; provided that section ~~4(c)~~, Hawaii Revised Statutes, established by section 2 of this Act, shall be repealed on December 31, 2013.

(Approved June 26, 2012.)