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California Long-Term Care Ombudsman Association

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October 30, 2024

Department of Health Care Services
Via email: SNFASP@dhcs.ca.gov

RE: Public Comment to DHCS AB-186 ASP Program Year 2025 Changes

To Whom It May Concern:

On behalf of the California Long-Term Care Ombudsman Association (CLTCOA), we respectfully submit our public comments on DHCS's AB-186 Accountability Sanctions Program (ASP) changes for Program Year 2025 as requested at your stakeholder meeting on October 21, 2024.

We appreciate DHCS's willingness to meet with CLTCOA and other consumer advocates, such as California Advocates for Nursing Home Reform (CANHR) and Geriatric Circle, to solicit our feedback on your ASP measures for Program Year 2025. We are particularly thankful for your suggestion to add complaints to California's Long-Term Care Ombudsman Program (LTCOP) against skilled nursing facilities as a potential ASP measure. We look forward to many more fruitful conversations with DHCS about this and other potential metrics for ASP in future program years.

At the same time, we want to express our frustration with the fact that DHCS only met with all three organizations for a combined 30 minutes on a Friday afternoon to update us on your expected changes to ASP for Program Year 2025. We do not believe such meetings are sufficiently long enough to provide a meaningful opportunity for consumer advocates to provide feedback on those important changes before they're announced to the public. We hope that DHCS will consider scheduling longer meetings with all these organizations (and more) individually and as a group before committing to WQIP and ASP measures going forward.

Regarding the development of AB-186 programs, DHCS has stated:

> AB 186 makes reforms to the skilled nursing facility financing methodology that will:
> - Better incentivize and hold facilities accountable for quality patient care.
> - Emphasize the critical role of the workforce.
> - Better balance distribution of annual rate increases.
> - Result in the long-term financial viability of facilities in the Medi-Cal managed care environment.[1]

[1] DHCS, *AB 186 Nursing Facility Financing Reform October 25,2022 Stakeholder Meeting*, https://www.dhcs.ca.gov/services/medi-cal/Documents/AB-186-Nursing-Facility-Financing-Reform.pdf.

AB-186 revised and recast the former Quality and Accountability Supplemental Payment Program (QASP)[2] jointly administered by the California Department of Public Health (CDPH) Licensing & Certification Program and DHCS in the form of the Workforce & Quality Incentive Program (WQIP),[3] now solely administered by DHCS, where skilled nursing facilities similarly receive performance-based incentive payments based on metrics designed by DHCS with feedback from stakeholders like CLTCOA. Except now, under WQIP, those payments come directly from the Managed Care plans with which the facilities contract rather than from DHCS, as they did under QASP. The Accountability Sanctions Program (ASP)[4] was a new program created by AB-186 to provide a corresponding system for penalizing facilities that failed to meet quality measures established by DHCS in conjunction with WQIP.[5] Previously, these "sanctions" or payment exclusions were part of QASP.

CLTCOA participated in almost every stakeholder meeting around the development of WQIP and ASP since 2022. At your first stakeholder meeting on October 25, 2022, DHCS claimed that "WQIP design will be informed by CMS' August 22, 2022 Informational Bulletin: Medicaid Nursing Facility Payment Approaches to Advance Health Equity and Improve Health Outcomes."[6] The CMS bulletin you referenced emphasizes that "CMS is launching new initiatives in both Medicare and Medicaid to ensure that nursing facility residents get the quality care they need. <u>These initiatives are intended to help ensure adequate staffing, dignity, and safety in resident accommodations, as well as high-quality care, including: establishing a minimum nursing home staffing requirement</u>…"[7] Advocates for nursing home reforms across the U.S., including CLTCOA, consistently emphasize how staffing is the single most important indicator of quality in nursing homes. And nursing homes are already required under California law to maintain a minimum level of care staff to ensure a baseline measure of quality for all nursing home residents.

Unlawful understaffing in nursing homes continues to be a pervasive problem in California. Since 2020, CDPH issued nearly 900 citations and administrative penalties amounting to $18,405,000 in fines to nursing homes for falling below the minimum required levels of staffing.[8] Yet nursing homes continue to habitually understaff because it ultimately remains more profitable for them to do so in the long-term. According to California Health & Human Services Agency (CalHHS) data, just between 2018 and 2022, California nursing homes raked in a total of $61,542,129,252 in revenue yet spent only 52% of their budgets on direct care.[9] At the same

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[2] CDPH, *Quality and Accountability Supplemental Payment Program Existing Measures: 2019-20 Point Allocation by Measurement Area* (Feb 24, 2020), https://www.cdph.ca.gov/Programs/CHCQ/LCP/Pages/QASP_Existing Measures.aspx.
[3] DHCS, *Skilled Nursing Facility Workforce and Quality Incentive Program* (2024), https://www.dhcs.ca.gov/services/Pages/SNF-WQIP.aspx.
[4] DHCS, *Skilled Nursing Facility Accountability Sanctions Program* (ASP) (2024), https://www.dhcs.ca.gov/services/Pages/SNF-ASP.aspx.
[5] DHCS, *supra* Note 1; DHCS, *supra* Note 3.
[6] DHCS, *supra* Note 1 at slide 15.
[7] CMS, *Medicaid nursing facility payment approaches to advance health equity and improve health outcomes* (Aug. 22, 2022), HHS-0938-2022-F-9772, https://www.hhs.gov/guidance/document/medicaid-nursing-facility-payment-approaches-advance-health-equity-and-improve-health.
[8] CDPH CHCQ, State Enforcement Actions Dashboard (Oct. 22, 2024), https://www.cdph.ca.gov/Programs/CHCQ/LCP/Pages/StateEnforcementActionsDashboard.aspx (penalties between January 1, 2020 and October 22, 2024).
[9] CalHHS, *Long-term Care Facility Integrated Disclosure and Medi-Cal Cost Report Data & Pivot Tables 2019-2023 Trends*, https://data.chhs.ca.gov/dataset/long-term-care-facility-disclosure-report-data/resource/023998f6-5da3-413c-bd4e-3fe16a468a6c.

time, average wages for CNAs are still only hovering around $18.25 hourly and staff turnover is typically over 50% annually.[10] For direct care hours for Registered Nurses (RNs), California ranks 48 out of 52 states and U.S. territories as of 2024.[11] This data paints an extremely poor picture of staffing practices in nursing homes across California.

A significant part of what continues to drive understaffing in California is the fact that CDPH's administrative penalties for nursing home staffing audits are currently capped at $50,000 under Section 1276.66 of the Health and Safety Code.[12] This is less than the typical annual wage for a single full-time LVN working in a nursing home in California.[13] Yet, by understaffing, a nursing home can save hundreds of thousands of dollars annually by understaffing and just paying these penalties to CDPH.[14] If that's the case, then understaffing is simply a "cost of doing business" in California. This becomes even more evident when you consider that AB-186 has simultaneously given DHCS the authority to provide up to $280 million in taxpayer subsidies to nursing homes for workforce and quality improvement through WQIP. Yet, WQIP only ties 35% of potential points or incentive payments to acuity-adjusted staffing hours out of the up to $280 million in taxpayer subsidies available to facilities under AB-186 programs – over three times more than the $84 million dedicated to QASP incentives prior to WQIP.[15] This means that facilities can theoretically do nothing to improve their staffing levels under WQIP and still receive more than double what they previously received in incentive payments from QASP.

Such a regulatory system does not support DHCS's own commitment to quality healthcare or health equity in California nursing homes.[16] It certainly does not protect consumers from neglect or abuse caused by understaffing from the perspective of the Long-Term Care Ombudsman who investigate those mandated reports in California. And it is not consistent with DHCS's and CDPH's joint methodology for QASP, the precursor to WQIP, which required facilities to comply with minimum staffing requirements for the entire program year or else they would be excluded from any QASP payment for that program year entirely.[17] In contrast, WQIP only reduces a facilities points and therefore total incentive payments if they do not comply with minimum staffing requirements throughout the program year, but they still receive incentive payments based on other WQIP measures regardless.[18] Even if a facility receives an administrative penalty from a CDPH staffing audit in a given program year, that citation and

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[10] *Id.*
[11] LTCCC, *Nursing Home Staffing Q1 2024*, https://nursinghome411.org/data/staffing/staffing-q1-2024/ (based on CMS payroll-based journal data).
[12] HSC 1276.66; *see also* CDPH, AFL 21-11 (May 17, 2021), https://www.cdph.ca.gov/Programs/CHCQ/LCP/Pages/AFL-21-11.aspx.
[13] CalHHS, *supra* Note 9.
[14] Bedsore Law, Using a Nursing Home's Own Data to Prove Understaffing (Oct. 17, 2023), https://www.bedsore.law/news/using-a-nursing-homes-own-data-to-prove-understaffing/#:~:text=Since%20RNs%20are%20the%20most,occasionally%20more%20with%20bigger%20facilities.
[15] CMS, *Approval Letter for State Plan Amendment CA-22-0011* (May 3, 2022), https://www.dhcs.ca.gov/formsandpubs/laws/Documents/CA-22-0011-Approved.pdf.
[16] DHCS, *Comprehensive Quality Strategy* (2022), https://www.dhcs.ca.gov/services/Documents/Formatted-Combined-CQS-2-4-22.pdf.
[17] HSAG, *2019–2020 Annual Report Methodology Updates Due to COVID-19* (2021), https://www.cdph.ca.gov/Programs/CHCQ/LCP/CDPH%20Document%20Library/CDPH_19-20%20Annual%20Report%20Methodology%20Updates%20Due%20to%20COVID-19_F1.pdf; Jennifer Breen, *Understanding California's Quality and Accountability Supplemental Payment Program*, CAHF (Oct. 30, 2019), https://www.cahf.org/Portals/29/Meetings/QASP.pdf?ver=2019-10-30-131923-780.
[18] DHCS, *Skilled Nursing Facility Workforce & Quality Incentive Program: 2024 Final Technical Program Guide* (Sept. 2024), https://www.dhcs.ca.gov/services/Documents/WQIP-PY-2-Technical-Program-Guide.pdf.

penalty is not considered an A or AA-level citation that would disqualify a facility from WQIP payments for that program year like it would have through QASP.[19]

In fact, in DHCS's first proposed design of the WQIP scoring methodology presented to stakeholders on November 18, 2022, you even proposed to give facilities partial points if they fell below the 25th percentile for staffing, which would be under the legal minimum, and therefore breaking the law.[20]

Similarly, through WQIP, DHCS rolled back some of the prior sanctions for facilities that received A or AA citations under QASP.[21] Rather than excluding facilities which receive either an A or AA-level citation from WQIP incentive payments for the entire program year, as was the case with QASP,[22] DHCS now only reduces their incentive payments by 40% for receiving an A-level citation.[23] This change, combined with DHCS removing CDPH staffing audit penalties as a reason for holding back incentive payments, would have made WQIP an even bigger government handout for facilities that were underperforming than QASP, which was a common criticism of QASP by CLTCOA and other advocates.

CLTCOA continues to urge DHCS to include ASP measures and sanctions for unlawful understaffing to address these gaps in the regulation of nursing home staffing in California. DHCS has repeatedly stated that it does not want AB-186 programs like WQIP and ASP to overlap with CDPH's enforcement authority. Yet that's exactly the relationship that existed between DHCS and CDPH under QASP, and nothing in the text or legislative history of AB-186 indicates the Legislature intended for DCHS to depart from that dynamic under WQIP or ASP.[24]

Regarding ASP, DHCS has stated:[25]

> DHCS is developing the accountability measures taking into consideration:
> - High impact/priority areas
> - Readily available data with established metric definitions
> - Use of baseline data to set reasonable thresholds
> - Strategically align with but not duplicate California Department of Public Health (CDPH) oversight authority

Staffing is a high-impact and high-priority area for consumer advocates that is based on readily available data (*i.e.* CMS PBJ data) with established definitions (*i.e.* direct care nursing hours) that has a logical, built-in baseline threshold (*i.e.* the legal minimum of 3.5 hours per patient per

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[19] *Id.*
[20] DHCS, *AB 186 Nursing Facility Financing Reform November 18, 2022 Stakeholder Meeting*, https://www.dhcs.ca.gov/services/medi-cal/Documents/AB-186-Nursing-Facility-Financing-Reform-Stakeholder-Meeting-.pdf.
[21] DHCS, *AB 186 Nursing Facility Financing Reform December 21, 2022 Stakeholder Meeting*, https://www.dhcs.ca.gov/services/medi-cal/Documents/AB-186-Nursing-Facility-Financing-Reform-Stakeholder-Meeting-3.pdf.
[22] HSAG & CAHF, *supra* Note 17.
[23] *Id.*
[24] AB-186 (2022), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB186.
[25] DHCS, *AB 186 Nursing Facility Financing Reform July 27, 2023 Stakeholder Meeting*, https://www.dhcs.ca.gov/services/medi-cal/Documents/AB186%20Workforce%20Standards/AB-186-Nursing-Facility-Financing-Reform-Stakeholder-Meeting-8.pdf.

day) that strategically aligns with but does not duplicate CDPH's oversight authority. In fact, AB-186 explicitly states:

> Any [ASP] sanction issued pursuant to this section shall not prohibit any state or federal enforcement action, including, but not limited to, the State Department of Public Health's investigation process or issuance of deficiencies or citations under Chapter 2.4 (commencing with Section 1417) of Division 2 of the Health and Safety Code.[26]

The Legislature clearly envisioned a regulatory framework where both DHCS and CDPH could share oversight for staffing and quality improvement in nursing homes under AB-186. There is no apparent "overlap" between an administrative penalty issued by CDPH, which requires facilities to affirmatively pay a fine from their already-earned income, and the withholding of WQIP incentives by DHCS through ASP, which facilities have not earned until DHCS authorizes the Managed Care plan to issue those payments. DHCS's decision not to issue ASP sanctions for poor performance that would otherwise result in an administrative penalty or citation by CDPH is therefore a self-imposed limitation that seemingly only benefits the nursing home industry at the expense of quality care for residents. Once again, this is not the way that CDPH and DHCS jointly administered QASP prior to WQIP and ASP, and it has come as quite a surprise to advocates following DHCS's development of AB-186 programs.

CLTCOA therefore strongly recommends the following changes to ASP, starting with Program Year 2025:

1. Exclude facilities that receive an administrative penalty from CDPH for understaffing from receiving any WQIP payments for the program year in which the penalty was issued;
2. Reduce facilities total WQIP payments proportionately to how far below the legal minimum staffing level they fall; and
3. Start meeting with CDPH regularly to coordinate regulation of nursing home staffing through CDPH citations and administrative penalties, WQIP, and ASP.

The necessity of an ASP measure and sanction for understaffing is underscored by the fact that most of the MDS and claims-based clinical measures DHCS chose for WQIP and ASP – such as "Percent of Residents Who Lose Too Much Weight, Long Stay," "Percent of Residents Experiencing One or More Falls with Major Injury, Long Stay," and Outpatient ED Visits per 1,000 Long-Stay Resident Days" – are logical consequences of understaffing. It makes no sense to CLTCOA for DHCS to target these indicators of poor quality without targeting their root cause, which consumer advocates agree is understaffing. Refusing to include an ASP measure for understaffing makes even less sense in the context of DHCS basing all the existing ASP measures off existing WQIP measures: specifically, "Percent of Residents Experiencing One or More Falls with Major Injury, Long Stay," "Percent of Residents Who Received Antipsychotic Medications, Long Stay," and "Percent of Residents Who Lose Too Much Weight, Long Stay."[27] If that is the case, why is staffing not included given it accounts for 50% of total WQIP points?

[26] WIC 14126.026.
[27] DHCS, *AB 186 Nursing Facility Financing ReformAccountability Sanctions Program October 21, 2024 Stakeholder Webinar*.

Through AB-186 programs, DHCS has a real opportunity to address some of the issues that cause the most harm to nursing home residents. Long-Term Care Ombudsman receive calls, emails, and mandated reports daily from nursing home residents, staff, and families deeply concerned with the level of staffing in facilities. Residents across California are experiencing serious preventable illnesses and injuries and even dying because nursing homes are consistently not following state and federal staffing laws. We have no sympathy for facilities which, through intentional understaffing or their own negligence, continue to put residents who need intensive medical care in situations where they are not receiving it. It is both illegal and immoral. It also amounts to public benefits fraud considering that Medicare and Medi-Cal are paying for a substantial amount of care delivered in skilled nursing facilities.

DHCS and CDPH have worked together on addressing these issues in the past through QASP, and consumer advocates like CLTCOA expect them to do so going forward through WQIP and ASP; specifically, through penalizing unlawful understaffing more in California. Until that happens, CLTCOA and our partners will continue to attend your stakeholder meetings to call for DHCS to add a measure and sanction for understaffing to ASP. We have already reached out to CDPH's and CDA's leadership in coordination with fellow advocates to make them aware of this inherent contradiction in DHCS's development of WQIP and ASP. The next logical step will be to engage with the Legislature to provide support in making headway on this issue considering that after two years none has been made.

Thank you again for your consideration. We look forward to continuing this dialogue with DHCS in future stakeholder meetings around AB-186. Please do not hesitate to reach out to us to schedule a meeting to discuss further in the meantime.

Respectfully,

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