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L A T E

March 20, 2012

TO: The Honorable Ryan I. Yamane, Chair
House Committee on Health

The Honorable John M. Mizuno, Chair
House Committee on Human Services

FROM: Patricia McManaman, Director

SUBJECT: **S.B. 2466, S.D.2 - RELATING TO LONG-TERM CARE FACILITIES**

Hearing: Tuesday, March 20, 2012; 10:00 a.m.
Conference Room 329, State Capitol

PURPOSE: The purpose of the bill is to establish the Nursing Facility Sustainability Program special fund into which nursing facility sustainability fees shall be deposited and requires the department of human services to charge and collect a provider fee on health care items or services provided by nursing facilities.

DEPARTMENT'S POSITION: The Department of Human Services (DHS) supports increasing the sustainability of the long-term care services delivery system. The DHS has continued to work with stakeholders to develop a model so that proposed language may be provided to amend the bill. We have submitted a proposed long term care model to the Hawaii Association of Hospitals and the Hawaii Long Term Care Association last week and are awaiting comments.

Provider assessments are commonly used to generate revenue for a state by leveraging federal funds through Medicaid. The DHS and stakeholders recognize that the provider fee would provide an opportunity for the State to obtain additional federal matching funds which will reduce the amount of losses incurred by nursing facilities.

There are many methods in which provider fees have been implemented in other states. Under federal law, provider fees must meet three essential tests: the tax must be broad-based; uniformly imposed; and cannot exceed the maximum allowed by federal regulation.

The DHS has examined several different models for Hawai'i and proposes to amend this bill to reflect the model we believe is best suited for Hawai'i. Highlights of the proposed amendment include:

- 1) The nursing facilities will be assessed a provider fee based, not to exceed 3%, on revenues calculated utilizing total patient days beginning July 1, 2012. The revenues would exclude non-patient services such as beauty or barber shop services, vending income and all outpatient revenues.
- 2) The DHS would collect the provider fees, seek a match of the provider fees from the Centers for Medicare and Medicaid Services (CMS) and deposit all funds into the nursing facility sustainability special fund.
- 3) The special funds will then be used by DHS to enhance capitation rates to the QUEST and QExA plans for the purpose of increasing Medicaid nursing facility payments to the maximum permitted by federal law.
- 4) The DHS will seek a waiver from CMS to exclude nursing facilities with less than 10 licensed Medicaid beds, nursing facilities owned and operated by the Hawaii Health System Corporation, and continuing care retirement communities. In addition the department may seek additional exemptions to satisfy CMS rules.

A portion of the revenue would be available to the DHS to support the overall Medicaid program to ensure maximum services to beneficiaries by leveraging additional federal matches where appropriate. The exact percentage for the provider fee has not been yet agreed upon by all parties.

The Department believes that this methodology offers the greatest benefits to the nursing facilities that provide needed long term care beds for Medicaid beneficiaries. This proposal also compensates long term care facilities for their uncompensated or under compensated services to Medicaid patients and the uninsured.

Thank you for the opportunity to testify on this bill.

S.B. NO.2466

PROPOSED HD1

A BILL FOR AN ACT

RELATING TO LONG-TERM CARE FACILITIES.

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

1 SECTION 1. Long-term care facilities in the State face
2 major financial challenges in providing quality health care for
3 Hawaii residents. These challenges are largely the result of
4 payments to medicaid enrollees for care that do not cover the
5 actual costs of care. The legislature finds that federal
6 funding to help sustain Hawaii's long-term care facilities
7 financially may be accessed through a provider fee.

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

15 Medicaid is jointly financed by the federal and state
16 government, but by statutory formula, the federal government
17 pays between fifty per cent and seventy-six per cent of medicaid

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1 costs incurred by states for care delivered to their medicaid
2 beneficiaries. Federal assistance percentages vary by state,
3 with states that have lower per capita incomes receiving higher
4 federal matching rates. Under federal rules, the state share
5 must be public funds that are not federal funds.

6 Provider fees, which are collected from specific categories
7 of health care providers that agree to the fee, may be imposed
8 on nineteen different classes of health care services, including
9 inpatient and outpatient hospital and nursing facility
10 services. However, there are limitations on the way provider
11 fees are structured. The Medicaid Voluntary Contribution and
12 Provider-Specific Tax Amendments of 1991, P.L. 102-234, passed
13 by Congress in 1991, imposes the following requirements:

14 (1) Broad-based. To be considered broad-based, a provider
15 fee must be imposed on all health care items or
16 services furnished by all non-federal, non-public
17 providers in the class in the State. Provider fee
18 programs may exclude public facilities without
19 violating federal law;

20 (2) Uniformly imposed. In general, a provider fee is
21 uniformly imposed if it is the same amount or rate for
22 each provider in the class; and

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1 (3) Hold harmless prohibition. States may not hold
2 providers harmless. A provider fee is considered to
3 hold the provider harmless if the providers paying the
4 fee receive, directly or indirectly, a non-medicaid
5 payment from the state or any offset or waiver that
6 guarantees to hold the provider harmless for all or a
7 portion of the fee. A provider fee is also considered
8 to hold the provider harmless if the medicaid payments
9 to the provider vary based only on the amount of the
10 fees paid by the provider.

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

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1 provider fees are essential for most states to maintain a
2 stable, functioning medicaid program.

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

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

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

19 **"CHAPTER**

20 **NURSING FACILITY SUSTAINABILITY PROGRAM**

21 § -1 **Title.** This chapter shall be known and may be cited
22 as the "Nursing Facility Sustainability Program Act".

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1 § -2 **Findings and declaration of necessity.** It is the
2 intent of the legislature to encourage the maximum drawdown of
3 federal medicaid funds by establishing a special fund within the
4 state treasury to receive revenue from the nursing facility
5 sustainability fee to be administered by the department and to
6 use it to receive federal medicaid matching funds under the
7 Section 1115 waiver.

8 § -3 **Definitions.** As used in this chapter:

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

17 "Department" means the department of human services.

18 "Net patient service revenue" means gross inpatient
19 revenues from services provided to nursing facility patients
20 less reductions from gross inpatient revenue resulting from an
21 inability to collect payment of charges. Inpatient service
22 revenue excludes non-patient care revenues, such as revenues

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1 from beauty and barber services, vending income, interest and
2 contributions, revenues from the sale of meals, and all
3 outpatient revenues. Reductions from gross revenue include bad
4 debt; contractual adjustments; uncompensated care;
5 administrative, courtesy, and policy discounts and adjustments;
6 and other revenue deductions.

7 "Nursing facility" means any facility licensed pursuant to
8 chapter 11-94.1, Hawaii administrative rules.

9 "Resident day" means a calendar day of care provided to a
10 nursing facility resident, including the day of admission and
11 excluding the day of discharge; provided that one resident day
12 shall be deemed to exist when admission and discharge occur on
13 the same day. A resident day includes a day on which a bed is
14 held for a patient and for which the facility receives
15 compensation for holding the bed.

16 § -4 **Nursing facility sustainability program special**
17 **fund.** (a) There is created in the state treasury the nursing
18 facility sustainability program special fund to be administered
19 by the department into which shall be deposited all moneys
20 collected under this chapter.

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

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- 1 (1) All revenues collected or received by the department
2 from the nursing facility sustainability fee required
3 by this chapter;
- 4 (2) All federal matching funds received by the department
5 as a result of expenditures made by the department
6 that are attributable to moneys deposited into the
7 special fund;
- 8 (3) Any interest or penalties levied in conjunction with
9 the administration of this chapter; and
- 10 (4) Any appropriations, federal funds, donations, gifts,
11 or moneys from any other sources.
- 12 (c) Revenue from the nursing facility sustainability fee
13 shall be used exclusively as follows:
- 14 (1) No less than _____per cent of the revenue from the
15 nursing facility sustainability fee shall be used to
16 match federal medicaid funds, with the combined total
17 to be used to enhance capitated rates to the QUEST and
18 QUEST expanded access plans for the purpose of
19 increasing medicaid nursing facility payments to the
20 maximum permitted by federal law; and
- 21 (2) Any portion of the revenue not used as set forth in
22 paragraph (a) may be used to support the overall

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1 medicaid program of the department including payment
2 of administrative expenses.

3 § -5 **Nursing facility sustainability fee.** (a)

4 Effective July 1, 2012, the department shall charge and collect
5 a provider fee on health care items or services provided by
6 nursing facilities.

7 (b) The nursing home sustainability fee shall be based on
8 the net patient service revenue or the resident days of all
9 nursing facilities that are subject to the sustainability fee,
10 as determined by the Department.

11 (c) The nursing facility sustainability fee shall not
12 exceed three per cent of net patient service revenue. The fee
13 shall be the same amount for each affected facility, except as
14 prescribed in subsection (d) (2).

15 (d) In accordance with the redistribution method set forth
16 in title 42 Code of Federal Regulations section 433.68(e)(1) and
17 (2), the department shall seek a waiver of the broad-based
18 provider fee requirements under federal law to exclude certain
19 nursing facilities from, as follows:

20 (1) The department shall exempt the following nursing
21 facility providers from the nursing facility
22 sustainability fee subject to federal approval under

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1 title 42 Code of Federal Regulations section
2 433.68(e)(2):
3 (A) Nursing facilities with fewer than ten medicaid
4 licensed beds;
5 (B) Nursing facilities owned or operated by the
6 Hawaii Health Systems Corporation; and
7 (C) Continuing care retirement communities; and
8 (2) The department may modify, add to or reduce the
9 categories of facilities exempt from the assessment if
10 necessary to obtain and maintain approval of the
11 waiver by the Centers for Medicare and Medicaid
12 Services, if the modification is consistent with the
13 purposes of this chapter.

14 § -6 Nursing facility sustainability fee assessment.

15 (a) Nursing facilities shall pay the nursing facility
16 sustainability fee to the nursing facility sustainability
17 program special fund in accordance with this chapter.

18 (b) The department shall determine, in conjunction with
19 the Health Care Association of Hawaii or its successor
20 organization and the Hawaii Long Term Care Association or its
21 successor organization, the fee rate prospectively for the
22 applicable fiscal year.

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1 (c) The department shall collect, and each nursing
2 facility shall pay, the nursing facility sustainability fee on a
3 monthly basis, subject to the terms of this section. The fee
4 shall be due on the first day of each month, with the initial
5 payment due on the first day of the ensuing quarter after the
6 required federal approvals for the assessment and any increase
7 in health plan capitation payments have been secured from the
8 Centers for Medicare and Medicaid Services.

9 § -7 **Federal approval.** The department shall seek a
10 waiver and other approvals from the Centers for Medicare and
11 Medicaid Services that may be necessary to implement the nursing
12 facility sustainability program, including the approval of the
13 contracts between the State and the medicaid health plans.

14 § -8 **Multifacility locations.** If an entity conducts,
15 operates, or maintains more than one nursing facility, the
16 entity shall pay the nursing facility sustainability fee for
17 each nursing facility separately.

18 § -9 **Penalties for failure to pay nursing facility**
19 **sustainability fee.** (a) If a nursing facility fails to pay the
20 full amount of the nursing facility sustainability fee when due,
21 there shall be added to the fee, unless waived by the department
22 for reasonable cause, a penalty equal to five per cent of the

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1 fee that was not paid when due. Any subsequent payments shall
2 be credited first to unpaid fee amounts rather than to penalty
3 or interest amounts, beginning with the most delinquent
4 installment.

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

8 (1) Withholding any medical assistance reimbursement
9 payments until such time as the fee amount is paid in
10 full;

11 (2) Suspension or revocation of the nursing facility
12 license; or

13 (3) Development of a plan that requires the nursing
14 facility to pay any delinquent fee in installments.

15 § -10 **Enhanced rates to QUEST expanded access plans.** In
16 accordance with title 42 Code of Federal Regulations section
17 438, the department shall use revenues from the nursing facility
18 sustainability fee and federal matching funds to enhance the
19 capitated rates paid to the QUEST expanded access plans for the
20 subject fiscal year consistent with the following objectives:

21 (1) The rate enhancement shall be used exclusively for
22 increasing nursing facility reimbursements to support

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1 the availability of services and to ensure access to
2 care to QUEST expanded access enrollees;

3 (2) The rate enhancement shall be made part of the monthly
4 capitated rates by the department to the QUEST
5 expanded access plans, which shall provide
6 documentation to the department, the Health Care
7 Association of Hawaii or its successor organization
8 and the Hawaii Long Term Care Association or its
9 successor organization, certifying that the revenues
10 received under paragraph (1) are used in accordance
11 with this section;

12 (3) The rate enhancement shall be actuarially sound and
13 approved by the federal government for federal fund
14 participation.

15 § -11 **Termination.** (a) Collection of the nursing
16 facility sustainability fee under section -5 shall be
17 discontinued if:

18 (1) The waiver in section -7 or the enhanced capitation
19 rates in section 10 have not been approved by the
20 Centers for Medicare and Medicaid Services;

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1 (2) The department reduces funding for nursing facility
2 services below the state appropriation in effect on
3 June 30, 2012;

4 (3) The department or any other state agency uses the
5 money in the special fund for any use other than the
6 uses permitted pursuant to this chapter; or

7 (4) Federal financial participation to match the nursing
8 facility sustainability fee becomes unavailable under
9 federal law. In such case, the department shall
10 terminate the collection of the fee beginning on the
11 effective date of the federal statutory, regulatory,
12 or interpretive change.

13 (b) If collection of the nursing facility sustainability
14 fee is discontinued as provided in this section, all money in
15 the special fund shall be returned to the nursing facilities
16 from which the fee was collected on the same basis as the fee
17 was assessed.

18 § -12 **Severability.** If any provision of this chapter or
19 the application thereof to any person or circumstances is held
20 invalid, the invalidity shall not affect other provisions or
21 applications of the chapter which can be given effect without

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1 the invalid provision or application, and to this end the
2 provisions of this chapter are severable."

3 SECTION 3. This Act shall take effect on July 1, 2012.

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Report Title:

Long-Term Care Facilities; Nursing Sustainability Fee; Nursing Facility Sustainability Program Special Fund

Description:

Establishes the nursing facility sustainability program special fund into which nursing facility sustainability fees shall be deposited. Requires DHS to charge and collect a provider fee on health care items or services provided by nursing facilities. Effective 07/01/2012.

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

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WRITTEN ONLY

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TESTIMONY BY KALBERT K. YOUNG
DIRECTOR, DEPARTMENT OF BUDGET AND FINANCE
STATE OF HAWAII
TO THE HOUSE COMMITTEES ON HEALTH AND HUMAN SERVICES
ON
SENATE BILL NO. 2466, S.D. 2

March 20, 2012

RELATING TO LONG-TERM CARE FACILITIES

Senate Bill No. 2466, S.D. 2, establishes a Nursing Facility Sustainability Program Special Fund into which shall be deposited nursing facility provider fees which will be used to match federal Medicaid funds to increase Medicaid payments to nursing facilities.

While the Department of Budget and Finance does not take any position on the policy of establishing a nursing facility sustainability program, as a matter of general policy, the department does not support the creation of special funds which do not meet the requirements of Section 37-52.3, Hawaii Revised Statutes. Special or revolving funds should: 1) reflect a clear nexus between the benefits sought and charges made upon the users or beneficiaries of the program; 2) provide an appropriate means of financing for the program or activity; and 3) demonstrate the capacity to be financially self-sustaining. In regards to Senate Bill No. 2466, S.D. 2, it is difficult to determine whether there is a clear nexus between the nursing facilities which are assessed fees and the nursing facilities which receive increased Medicaid payments, and it does not appear that the special fund will be self-sustaining.

I encourage the Legislature to scrutinize the fiscal and operational plan for this program to ensure that it does conform to the requirements of Section 37-52.3, Hawaii Revised Statutes.