May 7, 2025

Assemblymember Buffy Wicks, Chair
Appropriations Committee
1021 O St., Ste 8220
Sacramento, CA 95814

Re: AB 408 (Berman) -- Oppose -- Doctor drug and alcohol diversion program

Dear Chair Wicks,

Consumer Watchdog must oppose AB 408 (Berman) as written. Sponsored by the Medical Board of California, AB 408 would create a drug and alcohol diversion program run by the Board so doctors with substance abuse problems could be sent into rehab in lieu of board disciplinary action.

The bill would repeat the mistakes of the Medical Board's prior diversion program that allowed repeat offender doctors to evade discipline by entering the program, fail, and keep practicing. That program was shuttered for placing patients at risk for decades.

A central reason for the prior program's failures was chronic underfunding. AB 408 does nothing to correct these problems. Lack of funding both contributed to severe monitoring failures of doctors in the prior diversion program, and ensured those failures were hidden from Board management and enforcement staff. These problems are extensively documented in the Medical Board Enforcement Monitor report issued in 2004-2005 before the diversion program was shut down.[1]

By not identifying any funding source, or even a funding plan, AB 408 sets the program up to replicate these mistakes. The bill in fact eliminates funding by repealing a provision in current law – which already authorizes creation of a diversion program – that requires participating doctors to pay a fee "sufficient to cover all costs for participating in the program, including any administrative costs incurred by the board to administer the program." (B&P Section 2340.8(b))

The bill also does not require the program to demonstrate full funding or staffing at full capacity before the program opens and is the only line of protection for patients being treated by doctors in the program.

[1] http://www.cpil.org/download/MBC_Final/MBC_Enf.Monitor_Final_Report.pdf

Independent of any new diversion program the Medical Board has suffered from chronic budget problems. The Board relied on loans from other DCA boards for years. A physician licensing fee increase was finally approved by the legislature in 2023 after more than a decade. But, as this committee's analysis noted, it was significantly less than the amount the Board said it needed to remain solvent due to opposition from the medical lobby. That fee increase has still not been enough to balance the Medical Board's books. The Board in January 2025 projected needing another loan of up to $27 million to get through the year.[2] The board cannot afford the additional task of overseeing a new program – with a history of failure due to inadequate oversight – without guaranteeing the funding on the front end.

We would also like to correct several misconceptions about the bill.

As drafted, AB 408 does not require a doctor's positive drug test, skipped drug test, or other diversion program violation be reported back to Medical Board enforcement staff for review and action. The Medical Board has claimed that, "this program would be required to report non-compliant licensees to the Board so that we can discipline them."[3] What that statement does not disclose is the fact that the bill leaves the definition of noncompliance up to the program and the doctor. They will per Section 2345(e) negotiate a contract including "criteria for when the administering entity will report a participant to the board for noncompliance with the program requirements." There is no mention in the bill of requiring reporting of a failed drug test or other serious program violation.

In fact, the bill specifically exempts doctors sent to treatment by the Board from existing oversight standards and consequences for a failed drug test. After the last diversion program failed, the legislature acted to protect patients from another such breakdown. Laws were passed setting "Uniform Standards" for substance testing requirements and consequences for violations, and requiring any diversion program to follow those standards. The Board recently claimed in a hearing that, with AB 408, "We're talking about people where the uniform standards already don't apply to them because we don't even know who they are."[4] This is a half-truth.

While the diversion program created by AB 408 *could* have participating doctors who are unknown to the board, it would also exempt the program from complying with the Uniform Standards for *any* participant who chooses diversion instead of discipline. In other words: doctors known to the board because they were referred by the board. The Uniform Standards apply to these doctors facing discipline under current law today.

Proponents have also said confidentiality only applies to doctors entering the program voluntarily. This is true only because the bill's Orwellian definition of "voluntary participants" in

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[2] https://www.mbc.ca.gov/About/Meetings/Material/31421/brd-AgendaItem6D-20250213.pdf

[3] https://consumerwatchdog.org/in-the-news/san-diego-union-tribune-should-doctors-with-addictions-be-allowed-to-get-confidential-treatment/

[4] https://calmatters.digitaldemocracy.org/hearings/258963?t=284&f=0284a2867eab1b918165e6b14cab80d8

Section 2340(b)(16) includes doctors "referred by the board in lieu of the board pursuing disciplinary action." A doctor choosing diversion so they can escape discipline is not joining the program voluntarily.

Doctors who have already harmed someone are not the only ones who pose a risk to patient safety. Proponents have said that the bill does not change any requirements if a patient has been harmed. This is true. But AB 408 *does* change the rules if a doctor was caught using drugs or alcohol just short of harming someone. The bill would allow doctors to seek treatment to avoid discipline even if they were impaired on the job. For example: A San Francisco doctor suspected of stealing drugs from her hospital was recently arrested after she was found passed out in an operating room shortly after she was scheduled to participate in a toddler's surgery.[5] AB 408 could send that doctor into diversion in lieu of the disciplinary investigation, treatment oversight and consequences that are all mandatory under current law. And because the bill does not require reporting of a positive drug test to the Board, the doctor could continue treating patients while keeping her diversion program violations secret and place patients in harm's way.

The Medical Board says it has learned from past mistakes and that the bill addresses the last program's failures. However the bill, as outlined in our letter to the Business and Professions Committee which is attached, recreates those same conditions.

The goal of connecting doctors with treatment before their substance use poses a risk to patients is a laudable one. But doctors still hold lives in their hands. The Board has a responsibility to protect patient safety by acting when a doctor's problem has become acute enough to be reported to the board, whether through a patient complaint, hospital report, arrest record or other method. The legislature enacted standards for oversight and accountability to ensure any future diversion program did not expose patients to harm as the last program did.

At minimum, AB 408 should be amended to ensure the Uniform Standards – including a report to board enforcement staff when a doctor fails a drug test – are maintained for any doctor referred to the program by the board. We appreciate discussions we have had with the author in this vein and look forward to continuing that conversation.

Sincerely,

Carmen Balber

Carmen Balber

[5] San Francisco Chronicle, Megan Cassidy, "A UCSF doctor found unconscious was accused of stealing drugs. Records show a string of suspected thefts," April 25, 2025. https://www.sfchronicle.com/crime/article/ucsf-doctor-drug-propofol-20279982.php

April 15, 2025

Assemblymember Marc Berman, Chair
Business and Professions Committee
1020 N Street, Room 379
Sacramento, CA 95814

Re. AB 408 (Berman) – Oppose – Physician Drug and Alcohol Diversion Program

Dear Chair Berman,

Consumer Watchdog must oppose AB 408 as drafted because it will put patients at risk of harm at the hands of doctors abusing drugs or alcohol.

As an organization dedicated to consumer rights, we stand alongside families who have faced the heartbreak of losing loved ones to preventable medical harm. Some of these families suffer from lifelong trauma and loss due to the actions of physicians with substance abuse disorders. It is imperative that the legislature and the Medical Board prioritize accountability and public safety over support for those who have failed to uphold the sanctity of patient care.

AB 408 would create a drug and alcohol diversion program run by the Medical Board of California so doctors with abuse problems could be sent into rehab in lieu of board disciplinary action. The bill would replicate the problems with the Medical Board's prior diversion program that allowed repeat offender doctors to evade discipline by entering the program, fail, and keep practicing, placing patients at risk.

The bill would repeat the mistakes of the past.

In a move to protect public safety, the Medical Board itself unanimously voted to shut down its prior failed diversion program after five separate State Auditor General reports and the Center for Public Interest Law at the University of San Diego repeatedly found that it failed to monitor or hold accountable doctors who entered the program to avoid discipline. The result was patients being harmed by doctors who were practicing while in diversion and actively abusing substances.

Ask Tina Minasian[1] who stood before the Medical Board in California eighteen years ago and played a pivotal role in dismantling the former Diversion Program. Tina underwent elective surgery and is still grappling with the repercussions of the lasting harm she suffered. The effects

[1] https://consumerwatchdog.org/profile/injured-patients/tina-minasian/

of this medical negligence have rippled through her life, devastating her family's financial future and compromising her health. Her surgeon was a substance-abusing doctor and participant in the Diversion Program at the time she was harmed. Living with constant pain and disfigurement, Tina sought out other families who had also suffered due to his negligence. Their stories helped effect change. But she could never have imagined that she would again have to advocate against keeping doctor substance abuse secret from the Medical Board and patients.

The current language of AB 408 would recreate the failures that allowed Tina and many others to be harmed by doctors in the former diversion program.

The prior failed diversion program lacked enforceable rules, standards or expectations for participants or staff.

The Enforcement Monitor found that testing provisions – and monitoring of testing – failed in the prior diversion program. Testing is the primary way the program identified relapses. Yet doctors were tested less frequently than required; went without testing for long periods; random tests were rescheduled to predictable times; results were not timely shared with those responsible for monitoring; test results were appended to the wrong physician; and test records were inconsistent or inaccurate. These failures routinely went undetected, and doctors continued practicing while abusing substances. [2]

As the Enforcement Monitor testified to the Joint Legislative Sunset Review Committee in January 2005:

> …the Monitor team's research of participant files revealed at least five additional cases where Diversion Program participants who were permitted to practice medicine were caught using drugs while on duty by their employers. …Yet none of the Diversion Program's monitoring mechanisms detected their relapse. These cases illustrate the severe degree of risk and endangerment to which patients are exposed when the monitoring mechanisms of the Diversion Program fail.

The legislature took a pivotal step to protect patients from another such breakdown by enacting Uniform Standards for Substance-Abusing Healthcare Professionals and a requirement that any drug and alcohol treatment program follow those standards.[3] This legislation underscored lawmakers' recognition, after the failure of the Medical Board's prior diversion program, that licensing boards require clear, effective standards to empower them in their critical role.

AB 408 Section 2341(b) repeats the mistakes of the past by freeing the diversion program from these testing, monitoring, and disciplinary requirements. The proposal does not replace the law

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[2] http://www.cpil.org/download/MBC_Final/MBC_Enf.Monitor_Final_Report.pdf

[3] https://consumerwatchdog.org/healthcare/california-medical-board-proposes-legislation-to-recreate-failed-program-that-kept-doctor-substance-abuse-secret-from-regulators-and-public/

with anything, instead leaving the diversion program to decide on its own any monitoring requirements and whether there will be consequences for program noncompliance, just as the old diversion program did.

Take the example of a doctor the Medical Board filed charges against last week. In 2022 an anesthesiologist from San Diego was discovered impaired while on duty in the labor and delivery department of her hospital. Witnesses observed her staggering, walking into walls, and slurring her speech. The hospital reported the doctor to the Medical Board, and she confessed in the course of the investigation to self-administering propofol and other medications while on duty and stealing drugs from the operating room. The board placed her on probation, mandating compliance with biological fluid testing requirements. Six months later, the Medical Board imposed a fine for her failure to adhere to the mandated testing requirements. This year the Board moved again to revoke the doctor's license for failing to show up for testing, check in for tests, or cooperate with probation interviews. The probation, the fine, and the latest effort to revoke the doctor's license are filed publicly and are available to patients on the Medical Board's website.[4]

Contrast that public process to the secrecy and lack of accountability that would have governed if the program envisioned in AB 408 had been invoked. The doctor would have gone to a secret treatment program instead of facing investigation, with no public notice the doctor was on probation for using drugs on the job. The doctor's subsequent failures to take drug tests or meet other requirements could have been kept quiet by the program because AB 408 does not have mandatory consequences, and does not even require a Board enforcement investigation of a failed drug test or other program violations. Patients could be seeing this doctor today with no knowledge of her history of drug abuse or subsequent failures to comply with a drug testing program.

Chronic underfunding led to severe understaffing of the prior diversion program, which both contributed to the monitoring failures and hid them from the Board.

A diversion program employee [CSM] was responsible for "oversight and coordination for the collection system process" and "the integrity of the collection system." The Enforcement Monitor found that,

> …because of other Program responsibilities and a shortage of staff, the CSM was only able to devote two hours per month to her CSM duties; all she was able to do within that timeframe was generate the random schedule and send it to collectors.

Case managers were required to monitor participants and ensure that participants comply with all terms and conditions of their Diversion Program contracts:

[4] https://www.10news.com/news/team-10/anesthesiologist-on-probation-for-drug-use-could-have-license-pulled-after-failing-to-do-mandatory-testing

> The CMs were burdened by excessive caseloads and could barely respond to positive tests much less track whether each participant was being tested as often as required and on the random dates generated by the CSM.

By not identifying any funding source, AB 408 sets the program up to repeat these mistakes. The bill also does not require the program to demonstrate full funding or staffing at full capacity before the program opens and is the only line of protection for patients in the path of doctors with addictions.

Independent of a diversion program the Medical Board suffers from chronic budget problems. As you know, the fee increase approved by the legislature in 2023 was lower than the amount the Board said it needed to remain solvent, and has not been enough to balance the books.[5] The Board in January 2025 projected needing another loan of up to $27 million to get through the year.[6] The board cannot afford the additional task of overseeing a program without guaranteeing the funding on the front end.

The Board failed to adequately oversee the prior diversion program. The program and an unaccountable advisory committee made decisions without input or approval of Board management or enforcement staff.

Despite state law requirements that the board "administer the Diversion Program and oversee its functioning," management of the diversion program was not integrated into the board. Quite the opposite: the program was walled off from board enforcement and management.

In the Enforcement Monitor's view, one of the reasons for that failure was the "Liaison Committee to the Diversion Program" (LCD).

> Although the LCD was intended to be an advisory body that could offer clinical expertise on addiction issues to DMQ and MBC staff who administered the Diversion Program, over the years it had been delegated responsibility for or had inserted itself into operational, legal, and other issues that do not require clinical expertise.

AB 408 reproduces this unaccountable advisory committee of addiction specialists in Section 2348, and charges them with carrying out every board oversight function, including deciding whether doctors should be diverted into the program, and whether a doctor's failure to pass drug tests and other program requirements should ever result in a disciplinary investigation. Leaving these decisions to medical professionals, whose default will be to protect the doctor because their job is rehabilitation – *and who are serving a program charged with advocating for the doctor by the bill* (Section 2341(a)(C)(7)) – makes patient safety considerations second at

[5] https://abp.assembly.ca.gov/sites/abp.assembly.ca.gov/files/3-16%204.%20Medical%20Board%20of%20California%20-%20Sunset%20Background%20Paper%20%282023%29.pdf
[6] https://www.mbc.ca.gov/About/Meetings/Material/31421/brd-AgendaItem6D-20250213.pdf

best. Under this structure the committee is likely to become the de facto overseer for the board, just as in the prior program.

AB 408 does not require a doctor who fails a drug test to be reported back to enforcement for investigation. And because this advisory committee stands in for the board itself, a requirement that the program report a doctor who is terminated from the program to the board might stall at the committee without ever making it to back to enforcement staff for investigation and discipline (Section 2342(g)).

This is about doctors who pose a clear and present danger to patients.

We encourage doctors facing possible substance abuse issues to seek help. A different conversation might be had if we were discussing options for doctors who are not reacting to an imminent enforcement action by the Medical Board. But AB 408 would dismantle the most basic patient protection that the Board has: investigating doctors caught using drugs or alcohol on the job. Consumer Watchdog must urge the committee to Vote NO on AB 408.

Sincerely,

Carmen Balber

Carmen Balber

Michele Monserratt-Ramos

Michele Monserratt-Ramos