

INITIAL STATEMENT OF REASONS

Title 22, California Code of Regulations, Section 72517

LGBT-Training Requirements

The California Administrative Procedure Act (APA) requires that an Initial Statement of Reasons be available to the public upon request when rulemaking action is being undertaken. The following information required by the APA pertains to this particular rulemaking action.

STATEMENT OF PURPOSE, PROBLEM, RATIONALE, AND BENEFITS

Health and Safety Code section 1257.5 enacted by Senate Bill (SB) 1729 (Migden, Chapter 550, Statutes of 2008) requires the California Department of Public Health to prescribe a training program that focuses on preventing and eliminating discrimination based on sexual orientation and gender identity in skilled nursing facilities and congregate living health facilities. The training will be mandatory for all registered nurses, certified nurse assistants, licensed vocational nurses, and physicians and surgeons working in skilled nursing facilities or congregate living health facilities.

The California Department of Public Health is charged with licensing skilled nursing facilities and congregate living health facilities (see Health and Safety Code sections 131051(b) and 1265.7). The Department also prescribes personnel standards for the healthcare practitioners in these facilities, standards that include trainings to ensure healthcare professionals are duly qualified (see Health and Safety Code section 1276(a)). Congregate living health facilities must adhere to the same regulations, with some exceptions, as skilled nursing facilities under Health and Safety Code section 1267.13(n).

With SB 1729, the Legislature sought to address the lack of cultural-competency training for healthcare providers regarding the needs of lesbian, gay, bisexual, and transgender (LGBT) seniors in long-term healthcare facilities. The Legislature found that to protect LGBT persons it was necessary to mandate training aimed at educating healthcare workers in these facilities about the unique and sometimes unexpected issues surrounding individuals who identify with the LGBT community and the importance of behaving in a nondiscriminatory way.

Older adults are the most frequent users of healthcare services. This is the case among the LGBT population as well; however, this population's use of health services may be complicated by a fear of discrimination. Discrimination against LGBT persons living in long-term-care facilities is common and leads to a poor quality of life and poor health outcomes. (Exhibits A and B.) In a study examining nursing home staff perceptions of LGBT elders, the staff's perceptions were reported as being negative and even hostile. (Exhibit B.) And a 2006 study found that providers who care for the aged were more intolerant toward LGBT persons than were providers within the mainstream healthcare system. (Exhibit C.)

It is estimated that the number of aging and older LGBT persons in the United States is approximately 3 million and could expand to 4 million by 2030. (Exhibit D.) LGBT elders represent a social minority whose members may have experienced lifetimes of social indignities; employment, economic, and housing discrimination; physical and psychological abuse; and, often, substandard healthcare. Many of today's LGBT elders lived their lives in very hostile environments, coming of age in a time when same-sex behaviors were pathologized and criminalized. A large fraction of today's LGBT elders were in their 50s when the full range of homosexuality-related "disorders" was completely removed from the *Diagnostic and Statistical Manual of Mental Disorders*.

In a study of LGBT elders, over 80% of study participants had been victimized at least once in their lives because of their sexual orientation or gender identity, and over 60% had been victimized three or more times. (Exhibit A.) In addition, discrimination is a

chronic stressor, and lifetime experiences of discrimination and internalization of heterosexism are significantly associated with poor mental health, physical health, and disability among older LGBT adults. (Exhibits A and E.)

Therefore, it is not surprising that many LGBT elders are reluctant to seek medical care and, when they do, to hide their sexual identity from healthcare providers. A recent survey found that 17% of LGBT respondents avoided or delayed seeking healthcare because of reasons having to do with their sexual orientation, making them 5 times less likely than heterosexual individuals to access available public and community services. (Exhibits F and G.)

Additionally, it has been reported that as many as one in five LGBT persons hide his or her sexual identity from his or her primary care physician, and approximately 30% of LGBT elders are not publicly open about their sexuality. (Exhibits A and G.) LGBT elders fear discrimination in long-term-healthcare facilities, which can lead them to continue or once again hide their sexual orientation. (Exhibits D and F.) Being able to be publicly open about their sexuality is often cited by older LGBT persons as being central to their satisfaction and safety within adult-care systems. (Exhibit D.) Also, hiding sexual orientation at any age increases the risk of poor mental health outcomes. (Exhibits A and E.)

LGBT persons not feeling able to be publicly open about their sexuality comes from and contributes to a general lack of exposure of healthcare workers to LGBT issues and experiences and a lack of LGBT-friendly practices and policies in the health arena. The outcome can be a lack of understanding by healthcare workers of the specific needs of this population. (Exhibits A, G, and H.)

A lack of knowledge about and sensitivity to LGBT issues extends to long-term-healthcare facilities. (Exhibits D and G.) In a recent study, 73% of LGBT survey respondents believed that LGBT residents of long-term-care facilities are victims of discrimination, and 68% of heterosexual residents believed this to be true. (Exhibit F.) In

this same study, 98% of LGBT individuals believed that a gay-friendly retirement facility would be a positive development for older LGBT people. (Exhibit F.) A study of agencies servicing the elderly showed that agencies with LGBT training were significantly more likely to also have services and outreach to the older LGBT community. (Exhibit G.)

With all this in mind, the Department has drafted a proposed regulatory amendment that prescribes the subject matter of the training course required by statute, the means of taking the training course, and the requisite timeframe for compliance.

RATIONALES FOR THE REGULATION TEXT

Subsection (c)

This subsection reiterates the statute's mandate that these four types of healthcare providers receive training, prescribed by the Department, aimed at preventing discrimination against LGBT persons in long-term-care facilities. It is the facility's responsibility to ensure these healthcare providers have received the proper training. The facility must provide for the training of the applicable healthcare workers at least one every 2 years. The facility will be found to be out of compliance if this is not the case.

This section also addresses new hires and those healthcare workers who work at more than one facility. A healthcare provider who must complete this training and who begins working at a long-term-care facility must provide sufficient proof to the facility that he or she has received, within the prior 2 years, the training mandated in Health and Safety

Code section 1257.5 and prescribed by these proposed amendments. If the new employee has not yet received the training required here or has not received it within the prior 2 years of commencing work at the facility, the facility must provide for the training of the employee within 6 months of the employee's start date at the facility. If the employee received training at a different facility, it is up to the new facility to

determine whether the training the new employee received meets the requirements of these proposed amendments. The onus of compliance with this regulation is on the facility.

Training Frequency

The proposed regulation requires the receipt of LGBT-elder training once every two years. The Department believes that training every year would be too cumbersome and that training every three years would not be sufficient to keep people engaged in thinking about nondiscrimination against LGBT elders.

Definitions

Subsection (c)(1)(A)

The enabling statute, Health and Safety Code section 1257.5, states that “gender identity” shall have the same meaning as in California Penal Code section 422.56. This Penal Code statute does not define “gender identity.” However, “gender expression” is defined in that Penal Code statute in subsection (c) and is apt for this proposed amended regulation because transgender persons and others may have an appearance and behavior that is contrary to what is typically associated with their sex at birth, which “gender expression” encompasses.

“Gender expression” applies to any gender-related expression, whether it is contrary to that person’s biological sex or not.

Subsection (c)(1)(B)

The enabling statute applies to a group of people collectively described as LGBT. The abbreviation “LGBT” is spelled out in the regulation to clarify the abbreviation’s use elsewhere in the regulation.

Subsection (c)(1)(C)

The enabling statute requires “sexual orientation” be defined as it is defined in Penal Code section 422.56. “Sexual orientation” encompasses heterosexual (one sexually and romantically attracted to the opposite gender), homosexual (one sexually and romantically attracted to the same gender as themselves), and bisexual (one sexually and romantically attracted to both genders).

Subsection (c)(1)(D)

It is proposed “transgender” be defined in the regulation as a person whose gender expression is contrary to that which is stereotypically associated with the person’s assigned sex at birth. “Transgender” is generally the preferred term of those who identify as someone meeting this definition.

Curriculum Requirements

In recent years, many studies have been conducted into what type of anti-discrimination training in senior-care facilities works best. One study conducted in nursing homes and other senior-healthcare settings surveyed 500 nurses. (Exhibit I.) The study found that teaching an introduction to essential terminology and concepts regarding LGBT persons; a clarification of health disparities unique to LGBT individuals; teaching about alternative “family” structures (that is, instances where LGBT persons consider persons other than their biological family to be their true family or “chosen family”; and an introduction to the transgender community and the unique health issues transgender individuals face, such as long-term hormone-replacement therapy and sex-reassignment surgery, resulted in statistically significant increases in knowledge outcomes. (Exhibit I.) The training also incorporated the importance of leaving personal

biases outside medical encounters. (Exhibit I.) The study's curriculum is available at http://www.howardbrown.org/hb_services.asp?id=2224.

The following proposed curriculum requirements are based on this and other studies illuminating key curriculum topics for LGBT training.

Subsections (c)(2)(A) and (B)

The Department's proposed regulation prescribes what topics must be covered in the statutorily required training. In a study of healthcare providers of seniors, 44% reported not knowing what proportion of their consumers was LGBT. (Exhibit I.) Therefore, the first two curriculum requirements proposed here is an overview of sexual orientation and gender expression and an explanation of the proper terminology related to LGBT people. Such an overview will provide an important first step toward understanding LGBT issues and, therefore, toward preventing discrimination.

The training must address the fact that "gender expression" and "sexual orientation" are distinct constructs, although inextricably intertwined. "Transgender" identity refers to an individual's innermost sense of self as female, male, or other sense of self that is incongruent with biological sex, whereas "sexual orientation" refers to an emotional, romantic, and/or sexual attraction to women, men, or both sexes, as well as to a person's sense of identity based on those attractions.

In addition, the use of gender-neutral language in assessment questions, forms, and when speaking with residents is essential to providing culturally competent care. (Exhibit G.)

Subsection (c)(2)(C)

It is proposed that subsection (C) would mandate that the training provide an overview of the social and health challenges aging LGBT persons face. Areas the training must cover are historical perspectives, such as the history of discrimination and sometimes violence experienced throughout the lifetimes of this population, and the history of discrimination in the healthcare setting.

This subsection would mandate the training include certain specific information about transgender individuals. This group in particular is at an increased risk of being misunderstood and mistreated and is the least-accepted subpopulation of sexual minorities. (Exhibits B and D.) For instance, the apparent mismatch between genital anatomy and gender of presentation can result in confusion and difficulty in obtaining appropriate, sensitive health services, including those from long-term healthcare facilities. (Exhibit B.) The National Academy of Sciences' Institute of Medicine reported that 26% of a sample of transgender persons reported being denied medical services because they were transgender. (Exhibit B.) And a few studies have found that facilities are often not prepared to accommodate transgender patients because of a lack of provider competence. (Exhibit B.) The Institute of Medicine also reported that the combined stigma of being elderly and transgender can serve as a traumatizing force, potentially exacerbating both forms of discrimination and stigma. (Exhibit B.)

In addition, transgender individuals have a separate set of health concerns than do lesbian, gays, and bisexual (LGB) persons. The Institute of Medicine reported that, whereas 31% of LGB persons were depressed, a significantly higher percentage of transgender people were: the report found 52% of older transgender people had depression. (Exhibit B.) In addition, long-term "contra gender" hormone use, coupled with normal changes associated with aging, puts transgender persons at increased risk for chronic health conditions, and many transgender individuals have had reconstructive surgeries, adding to the potential for later-in-life health complications. (Exhibits B and D.)

Subsections (c)(2)(D) and (E)

These subsections would require the training address ways to create safe environments for LGBT elders and that it emphasize the importance of leaving personal biases outside of medical encounters. When people are vulnerable and can no longer be completely independent, feeling safe is important to well-being. This part of the training

must address the need for healthcare workers to be respectful of every resident and must emphasize the importance of preserving the dignity of LGBT persons.

Subsection (c)(2)(F)

It is proposed that the last item in the curriculum cover laws and legal issues pertinent to LGBT long-term-care-facility residents in California. Pertinent laws include the patients' rights enumerated in section 72527 of Title 22 of the California Code of Regulations, as well as the Unruh Civil Rights Act at section 51 of the California Civil Code, both of which prohibit (even in non-government establishments) discrimination based on gender, gender identity, and sexual orientation.

California marriage and domestic partnership laws shall also be addressed. LGBT couples may legally marry in California and under federal law. In addition, many LGBT couples are in civil unions, such as domestic partnerships. The status of "spouse" and "domestic partner" is a legally important one with strong implications in the long-term-care setting.

Many existing elder cultural-competency training programs address legal issues, and the Institute of Medicine found that legal issues, such as end-of-life issues, may be more important for LGBT persons than for heterosexual persons because of the former's nonbiological "chosen" families and the lack of recognition by the law of certain nonbiological relationships. (Exhibit B.) Because many LGBT individuals were disowned by or otherwise alienated from their biological families, they often do not have a traditional "family." Instead, they have a close group of friends and/or life partners they consider to be their families.

With regard to life partners, the importance of legal issues to LGBT elders is exemplified by a study of harassment incidents related to sexual orientation or gender expression. The study revealed that 11% of complainants surveyed had staff refuse to accept medical power of attorney from the resident's spouse or partner. (Exhibit J.)

Training Format

The proposed amended regulation allows for both in-person and internet-based training. One study of an LGBT training for healthcare providers found that 45% of healthcare providers preferred in-person training, followed by 28% preferring online training. (Exhibit D.) However, another study, in Minnesota, found that 70% of providers preferred an online training. (Exhibit K.) The proposed regulation allows for flexibility to accommodate training preference and cost-related issues.

Subsection (c)(3)

The Department believes the provider of the training must be a person or an entity with enough expertise to transmit accurate information about the social and legal challenges faced by older LGBT persons. The person or entity should have experience in educating about and working for the rights of LGBT persons and should have a training program that meets the requirements of these proposed amendments.

Subsection (c)(4)(A)

It is proposed that in-person training be allowed. As with the other modes of training required by this regulation, proof of participant attendance must be kept at the facility. The in-person training must be provided by a person or an entity that specializes in the challenges and rights of LGBT persons.

Subsection (c)(4)(B)

The Department proposes that internet-based training be allowed when there are controls to ensure that the full training is completed and that the participant understands the material, and when personal identification of the participant is enabled and a final, printable statement proves the training was received. The internet-based training must generate proof that the training was entirely completed, without any skipping ahead. The training must therefore have controls that assign a personalized identification name or number to each participant.

The proof of completion must be maintained in the staff member's file for inspection. Such requirements are common in other internet-based trainings that are mandated by the state, and such controls allow the Department's facility evaluators to ensure the training has indeed been taken by the staff members.

Compliance Date

Subsection (c)(5)

It is proposed that the date that a facility must be in compliance with this amended regulation be August 1, 2018. This date was chosen because it will allow organizations that currently provide LGBT cultural-competency trainings to alter their curricula so that they comply with this regulation and to allow time for facilities to provide the training to their staff. The Department believes approximately 2 years is enough time for facilities to train their staff and will help keep costs manageable for the facilities by allowing the costs of the training to be spread out over that time.

EMPIRICAL STUDIES AND REPORTS RELIED UPON

A: Fredriksen-Goldsen KI, Hoy-Ellis CP, Goldsen J, Emlet CA, Hooyman NR. Creating a vision for the future: key competencies and strategies for culturally competent practice with lesbian, gay, bisexual, and transgender (LGBT) older adults in the health and human services. *J Gerontol Soc Work*. 2014;57(0):80-107.

B: Institute of Medicine. 2011. "Later Adulthood" in *The Health of Lesbian, Gay, Bisexual and Transgender People: Building a Foundation for Better Understanding*. Washington, DC: The National Academies Press.

C: Kimmel D, Rose T, David S. 2006. *Lesbian, Gay, Bisexual and Transgender Aging: Research and Clinical Perspectives*. New York, NY: Columbia University Press.

D: Hughes AK, Harold RD, Boyer JM. Awareness of LGBT aging issues among aging services network providers. *J Gerontol Soc Work*. 2011;54:659-677.

E: Fredriksen-Goldsen KI, Kim H-J, Barkan SE, Muraco A, Hoy-Ellis CP. Health disparities among lesbian, gay, and bisexual older adults: results from a population-based study. *Am J Public Health*. 2013;103(10):1802-1809.

F: Jackson NC, Johnson MJ, Roberts R. The potential impact of discrimination fears of older gays, lesbians, bisexuals and transgender individuals living in small- to moderate-sized cities on long-term health care. *J Homosexuality*. 2008;54(3):325-339.

G: Portz JD, Retrum JH, Wright LA, et al. Assessing capacity for providing culturally competent services to LGBT older adults. *J Gerontol Social Work*. 2014;57:305-321.

H: Brotman S, Ryan B, Cormier R. The health and social service needs of gay and lesbian elders and their families in Canada. *The Gerontologist*. 2003;43(2):192-202.

I: Hardacker CT, Rubinstein B, Hotton A, Houlberg M. Adding silver to the rainbow: the development of the nurses' health education about LGBT elders (HEALE) cultural competency curriculum. *J Nursing Management*. 2014;22:257-266.

J: National Senior Citizen Law Center. 2011. *LGBT Older Adults in Long-Term Care Facilities: Stories from the Field*. Available at: <http://www.nsclc.org/wp-content/uploads/2011/07/LGBT-Stories-from-the-Field.pdf>. Accessed August 11, 2014.

K: Moone RP, Cagle JG, Croghan CF, Smith J. Working with LGBT older adults: an assessment of employee training practices, needs, and preferences of senior service organizations in Minnesota. *J Gerontolog Social Work*. 2014;57:322-334.

AUTHORITY AND REFERENCE

Authority:

California Health and Safety Code section 1257.5 gives the Department the authority to prescribe standards for LGBT training through regulation, and, therefore, this statute of the Health and Safety Code is added to the “Authority” section of the regulation being amended by this current proposed action.

The “Authority” section is also amended to reflect a change in the numbering of the statutes in the Health and Safety Code. Repealed section 208 is replaced with 131050, 131051, 131052, and 131200, which provides the Department’s general authority to promulgate regulations for the execution of its duties.

Health and Safety Code section 1275, the statute that mandates the Department set personnel standards for licensed facilities, remains in the “Authority” section.

Reference:

Health and Safety Code section 1257.5 is added to the “Reference” section because the proposed regulation implements and makes specific section 1257.5.

Sections 1276 and 1276.1 remain in the “Reference” section because the regulation proposed for amendment here implements and makes specific these sections.

STATEMENTS OF DETERMINATIONS

Alternatives Considered

In considering the prescribed elements of the training program, the Department considered the following:

The use of a standard learning curriculum of a training length and modality that could be incorporated into existing staff development programs at minimal additional cost. The Department searched the available resources for existing training programs. A federal online learning tool, released in August 2014 by the US Department of Health and Human Services' Administration for Community Living, was considered. The program content of the learning tool addresses the needs and rights of older LGBT adults in long-term-care facilities and consists of six training modules lasting approximately 10 minutes each.

The Department determined that the training does not provide information about current California state law, which the Department determined is needed to ensure staff is knowledgeable about existing protections for LGBT persons under the law.

Additionally, the Department decided to allow facilities to determine the learning modality that best suited their particular needs, which includes in-person instruction.

The Department also determined that no reasonable alternative considered by the Department or that has otherwise been identified and brought to the attention of the Department would be more effective in carrying out the purpose for which the proposed regulation is created to ensure healthcare equality through staff education or would be as effective as and less burdensome to the licensed long-term-care facilities affected by the regulation than the requirements proposed here.

Local Mandate Determination

The Department has determined that the proposed regulations do not impose a mandate on local agencies or school districts that requires state reimbursement.

Economic Impact Analysis Determination

The Department has made an initial determination that these regulations would not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. The proposed regulations would not significantly affect the following:

- The creation or elimination of jobs within the State of California. The LGBT-curriculum requirement is introduced in an existing regulation requiring a variety of facility staff training programs.
- The creation of new businesses or the elimination of existing businesses within the State of California. The Department identified existing advocacy organizations that train aging providers and LGBT organization on the best ways to support LGBT older persons in long-term-care settings.
- The Department made an initial determination that the training requirement may create a business need for training programs.

Impact on Small Businesses Determination

The Department has determined that the proposed regulations would affect small businesses, but not significantly. Of the total 1,244 skilled nursing facilities, 1,085 have 150 or fewer beds; however, not all of these qualify as “small businesses” under the

Administrative Procedure Act because many are nonprofits. Of the total 113 congregate living health facilities, the bed size range is 4 to 25.

Housing Costs Determination

The Department has determined that the regulations will have no impact on housing costs. The regulations affect only licensed long-term-care facilities.

Duplication or Conflict With Federal Regulations Determination

The Department has determined that there are no federal regulations that encompass the issues sought to be addressed by this proposed regulation and that therefore there are no conflicts with or duplication of federal regulations.

Incompatibility With State Regulations Determination

The Department has determined there are no existing state regulations with which the proposed regulation conflicts or with which it is incompatible.

**FISCAL IMPACT ANALYSIS
(PUBLIC-SECTOR IMPACTS)**

Prior to the enactment of California Health and Safety Code section 1257.5 (Migden, Chapter 550, Statutes of 2008), there was no law requiring licensed skilled nursing facilities and congregate living health facilities to provide awareness training regarding lesbian, gay, bisexual, and transgender persons for staff working in long-term-care settings. Section 1257.5 mandates registered nurses, licensed vocational nurses, certified nurse assistants, and physicians and surgeons working in skilled nursing facilities and congregate living health facilities take such a training, and the statute mandates the Department prescribe such training in regulation.

The proposed regulation prescribes specific training elements in addition to existing staff training requirements at California Code of Regulations (CCR) Title 22, Division 5, section 72517, related to Staff Development in the affected facilities.

(A) The costs or savings of any state agency

There are no additional costs or savings to the Department. The enabling statute gives the Department the authority to charge a facility a fee to reimburse the Department for costs associated with enforcement of the training requirement. The Department's enforcement and oversight activities and costs related to this regulation, including nurse evaluators' time to review additional training curriculum and personnel files, is expected to be part of the usual workload of the licensing program's district offices and will have a negligible effect, if any, in the calculation of licensing fees.

About 70% of skilled nursing beds are reimbursed by Medi-Cal (Medicaid). According to the Department of Health Care Services (DHCS), facility training costs may be reimbursed by allowable "add-on" rates and, therefore, result in additional expenditures. Since facilities will have until August 2018 to comply with the regulation, no impact is expected in the current fiscal year. It is assumed that future reimbursable costs will be

built into Medi-Cal daily bed rates, the funding for which is taken approximately 50% from the General Fund and 50% from Federal Financial Participation.

(B) Impact on federal funding of the program

No federal funding of the program is affected by the staff development training requirement. Staff development programming supports healthcare facility staff to provide competent care and promotes improvement in quality of care and services to consumers. Such programming is a usual component of healthcare facility operations. (See A above for Medi-Cal reimbursement impact estimation.)

(C) Any cost to local agencies or school districts that must be reimbursed pursuant to Section 17561 of the Government Code

This proposed regulation does not impose costs on any local agency or school district for which reimbursement would be required pursuant to section 7 (commencing with section 17500) of Division 4 of the Government Code. The proposed staff training requirements affect only skilled nursing facilities and congregate living health facilities licensed by the CDPH.

(D) Other nondiscretionary costs or savings imposed on local agencies

This proposal does not impose other nondiscretionary costs or savings on local agencies.

**COST IMPACT STATEMENT REGARDING REPRESENTATIVE
PRIVATE PERSONS AND BUSINESSES REQUIRED
TO COMPLY WITH THE AMENDED REGULATION
(PRIVATE-SECTOR IMPACTS)**

The Department has determined that there will be a cost impact for skilled nursing and congregate living health facilities licensed by the Department and governed by these regulations in order for them to comply with the proposed regulation. The total cost is estimated to be \$6,580.66 per average-size facility to train all required staff. The amount will vary based on the size of the facility and number of staff employed. The costs would be incurred over an approximate two-year period for facilities to initially comply with the regulation and recur every two years for facilities to comply with the regulation's requirement for biennial re-training of staff.