

Date of Hearing: June 20, 2017

ASSEMBLY COMMITTEE ON AGING AND LONG-TERM CARE

Ash Kalra, Chair

SB 219 (Wiener) – As Amended May 26, 2017

SENATE VOTE: 26-12

SUBJECT: Long-term care facilities: rights of residents.

SUMMARY: This bill enacts the Lesbian, Gay, Bisexual and Transgender Long-Term Care Facility Resident's Bill of Rights and makes it unlawful for any long-term care facility to take specified actions on the basis of a person's actual or perceived sexual orientation, gender identity, gender expression, or human immunodeficiency virus (HIV) status.

Specifically, **this bill:**

- 1) Makes it unlawful, except as provided, for a long-term care facility or facility staff to take any of the following actions on the basis of a person's actual or perceived sexual orientation, gender identity, gender expression, or HIV status:
 - a) Deny admission to a long-term care facility, transfer or refuse to transfer a resident within a facility or to another facility, or discharge or evict a resident from a facility.
 - b) Deny a request by residents to share a room.
 - c) Where rooms are assigned by gender, assign or refuse to assign a room to a transgender resident other than in accordance with the transgender resident's gender identity, unless at the transgender resident's request.
 - d) Involuntarily reassign a resident to a different room based on any person's complaints or concerns about that resident's gender identity or gender expression, unless no other option is available.
 - e) Prohibit a resident from using, or harass a resident who seeks to use or does use, a restroom available to other persons of the same gender identity, regardless of whether the resident is making a gender transition or appears to be gender-nonconforming. Harassment includes, but is not limited to, requiring a resident to show identity documents in order to gain entrance to a restroom available to other persons of the same gender identity.
 - f) Willfully and repeatedly fail to use a resident's preferred name or pronouns after being clearly informed of the preferred name or pronoun.
 - g) Deny a resident the right to wear or be dressed in clothing, accessories, or cosmetics that are permitted for any other resident.
 - h) Restrict a resident's right to associate with other residents or with visitors, including the right to consensual sexual relations, unless the restriction is uniformly applied to all residents in a nondiscriminatory manner. However, a facility is not precluded from

banning or restricting sexual relations, as long as the ban or restriction is applied uniformly and in a nondiscriminatory manner.

- i) Deny or restrict medical or nonmedical care that is appropriate to a resident's organs and bodily needs, or provide medical or nonmedical care in a manner that to a similarly situated reasonable person unduly demeans the resident's dignity or causes avoidable discomfort.
- 2) Provides that this section shall not apply to the extent that it is incompatible with any professionally reasonable clinical judgment.
- 3) Requires each facility to post a nondiscriminatory notice regarding an individual's actual or perceived sexual orientation, gender identity, gender expression, or HIV status.
- 4) Requires a facility to employ procedures for recordkeeping, including, but not limited to, records generated at the time of admission, that include the gender identity, correct name, as indicated by the resident, and pronoun of each resident, as indicated by the resident.
- 5) Requires long-term care facilities to protect personally identifiable information regarding residents' sexual orientation, whether a resident is transgender, a resident's transition history, and HIV status from unauthorized disclosure.
- 6) Requires facilities to take any steps as reasonably necessary to minimize the likelihood of inadvertent or incidental disclosure of that information to other residents, visitors, or facility staff, except to the minimum extent necessary for facility staff to perform their duties.
- 7) Prohibits long-term care facility staff not directly involved in providing direct care to a resident, including, but not limited to, a transgender or gender-nonconforming resident, from being present during physical examination or the provision of personal care to that resident if the resident is partially or fully unclothed without the express permission of that resident, or his or her legally authorized representative and responsible party.
- 8) Requires facilities to use doors, curtains, screens, or other effective visual barriers to provide bodily privacy for all residents, including but not limited to, transgender or gender-nonconforming residents, whenever they are partially or fully unclothed.
- 9) Requires all residents, including, but not limited to, LGBT residents, to be informed of and have the right to refuse to be examined, observed, or treated by any facility staff when the primary purpose is educational or informational rather than therapeutic, or for resident appraisal or reappraisal, and that refusal shall not diminish the resident's access to care for the primary purpose of diagnosis or treatment.
- 10) Requires that a violation of provisions in the bill to be treated as a violation under the Long-Term Care, Health, Safety, and Security Act of 1973, the California RCFE Act, or specified provisions providing for the licensure and regulation of health facilities.
- 11) Provides that, notwithstanding any other law, an alleged violation of this chapter shall not serve as the basis for a cause of action against a healthcare professional acting within the scope of his or her licensure and the healthcare professional shall not be subject to civil, administrative, disciplinary, or medical staff action, sanction, penalty, or liability for any

loss, injury, or damage caused by the healthcare professional's failure to act pursuant to this chapter when the act or failure to act is reasonably necessary for the care, health or safety of the resident.

- 12) Requires a Skilled Nursing Facility (SNF) or an Intermediate Care Facility (ICF) to provide existing employees and new hires access to the online learning tool, "Building Respect for LGBT Older Adults." Repeals this requirement effective January 1, 2019.

EXISTING LAW:

- 1) Makes it unlawful to discriminate against any person in any housing accommodation on the basis of, among others, sex, gender, gender identity, gender expression, or sexual orientation, via the California Fair Employment and Housing Act.
- 2) California Department of Public Health provides for the licensure and regulation of health facilities, including skilled nursing facilities (SNF) and intermediate care facilities (ICF) and makes a violation of these provisions a crime.
- 3) Requires medical staff, as defined, working in SNFs or congregate living health facilities to participate in a training that focuses on preventing and eliminating discrimination based on sexual orientation and gender identity.
- 4) Establishes the California Community Care Facilities Act, which provides regulatory structure for coordinated and comprehensive statewide system of care for people, who are mentally ill, developmentally and physically disabled, and children and adults who require care or services provided by licensed community care facilities.
- 5) Provides for the licensure and regulation of Residential Care Facilities for the Elderly (RCFE) by the California Department of Social Services via the RCFE Act and provides that a person who violates the RCFE Act, or who willfully or repeatedly violates any rule or regulation adopted under the act, is guilty of a misdemeanor.
- 6) Establishes the RCFE Resident's Bill of Rights and requires that a list of specified rights be posted at each RCFE.
- 7) Prohibits an RCFE from discriminating against a person seeking admission or a resident based on sex, race, color, religion, national origin, marital status, registered domestic partner status, ancestry, actual or perceived sexual orientation, or actual or perceived gender identity.
- 8) Requires RCFE caregivers and administrators to receive training that includes cultural competency and sensitivity in issues relating to the underserved, aging, lesbian, gay, bisexual, and transgender community.
- 9) Requires RCFEs to provide or post a list of personal rights as defined in California Code of Regulations.
- 10) Establishes the Patient's Bill of Rights, which requires written policies to be available to the patient, to any guardian, next of kin, sponsoring agency or representative payee to the public and that such policies and procedures ensure patients have specified rights.

FISCAL EFFECT: According to the Senate Appropriations Committee:

- No significant licensing costs are anticipated by the Department of Public Health, which licenses skilled nursing facilities. The Department anticipates that any additional licensing activity or enforcement due to complaints received under the bill would be minor.
- No significant licensing costs are anticipated by the Department of Social Services, which licenses residential care facilities for the elderly. The Department anticipates that any additional licensing activity or enforcement due to complaints received under the bill would be minor.

COMMENTS:

According to the author, “SB 219 would help protect LGBT seniors in long-term care facilities from discrimination, and will make these seniors more aware of their rights. LGBT seniors have a heightened need for care provided by long-term care facilities, and often lack traditional family support networks available to non-LGBT seniors....”

“While California has sought to protect the rights and dignity of its LGBT senior population, the State has not detailed specific actions deemed discriminatory nor made residents fully aware of their rights in order to hold long-term care facilities more accountable.”

Long-Term Care Facilities: Licensed long-term care facilities generally fall into one of three categories: RCFEs, SNFs or ICFs. RCFEs are non-medical facilities, but SNFs and ICFs each provide different levels of health care. While all three can serve elderly clients, each facility type operates under different laws and requirements.

Unique Needs of California’s Senior LGBT Population: In 2013, the San Francisco LGBT Aging Policy Task Force commissioned a report by Professor Karen Fredriksen-Goldsen looking at the needs of older LGBT adults in San Francisco. This report found that nearly 60 percent of the study participants lived alone, and, that of the 15 percent of those that had children, 60 percent believed their children would not be available to assist them. Many of those surveyed reported poor physical and mental health. Just under half of all respondents reporting they were living with one or more disabilities, and one-third of male respondents reporting they were living with HIV or AIDS. These findings indicate that many LGBT seniors have a heightened need for care when compared to seniors in San Francisco generally, but often lack the family support networks available to non-LGBT seniors. This suggests California’s LGBT seniors may rely more heavily on long-term care or face fewer options for assistance.

In a 2011 study published by the National Senior Citizens Law Center, 81 percent of respondents believed that other residents would discriminate against an LGBT elder in a long-term care facility and 89 percent believed staff would discriminate against them. Furthermore, 53 percent feared staff discrimination would rise to the level of abuse or neglect. Nearly half of the participants in the San Francisco study reported experiencing discrimination during the prior 12 months because of their sexual orientation or gender identity.

Forty-three percent of the respondents to the National Senior Citizens Law Center study reported personally witnessing or experiencing instances of mistreatment of LGBT seniors in a long-term care facility. These instances of mistreatment included being refused admission, abrupt

discharges, verbal or physical harassment from staff, discriminatory restrictions on visitation, and staff refusing to refer to a transgender resident by their preferred name or pronoun.

Argument in Support: Equality California states “This bill is needed to affirm the protections that LGBT older adults can already rely on under California law and provide specific guidance to facilities and staff on caring for their residents regardless of sexual orientation or gender identity. SB 219 will ensure that LGBT older adults can advocate for their rights and dignity by specifically prohibiting discrimination in admissions, transfer, eviction, room assignment, and visitation.”

Argument in Opposition: The California Hospital Association (CHA) states, “In California, the Unruh Civil Rights Act specifically outlaws discrimination based on sex, race, color, religion, ancestry, national origin, age, disability, medical condition, marital status, or sexual orientation, and applies to all businesses including hospitals and SNFs. The Act defines “sex” to include a person’s gender, gender identity and gender expression.

“SNFs must also demonstrate compliance with specific federal requirements established by the Centers for Medicare and Medicaid Services (CMS) in order to maintain certification as a provider of services reimbursed by Medicare and/or Medi-Cal. CMS recently reformed the requirements for long-term care facilities, including updating of language governing resident rights. The current requirements became effective November 28, 2016, and include a requirement that a facility must recognize each resident’s individuality and protect and promote the rights of the resident. Additional language also prohibits restriction of visitors based on gender identity, sexual orientation or disability.

“CHA believes that SB 219 is unnecessary and duplicative of current law. CHA respectfully asks for your “NO” vote on SB 219.”

REGISTERED SUPPORT / OPPOSITION:

Support

Equality California (EQCA) – Sponsor

AARP

Alzheimer’s Orange County

American Civil Liberties Union of California

APLA Health

California Advocates for nursing Home Reform (CANHR)

California Assisted Living Association (CALA) – Support if Amended

California Association of Public Authorities (CAPA)

California Commission on Aging

California Labor Federation

California Retired Teachers Association (CalRTA)

City of West Hollywood

Consumer Attorneys of California

County Welfare Directors Association of California (CWDA)

Forge Transgender Aging Network

Justice in Aging

Los Angeles LGBT Center

National Association of Social Workers, California Chapter (NASW-CA)

National Center for Lesbian Rights
National Center for Transgender Equality
The Source LGBT + Center
Transgender Law Center
Western Center on Law and Poverty

Opposition

California Association of Health Facilities' (CAHF)
California Hospital Association (CHA)
California Right to Life Committee, Inc.
Capitol Resource Institute
Civil Justice Association of California (CJAC)
LeadingAge – Oppose Unless Amended
Pacific Justice Institute-Center for Public Policy

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