

File No. 210947

Committee Item No. _____

Board Item No. 26

COMMITTEE/BOARD OF SUPERVISORS

AGENDA PACKET CONTENTS LIST

Committee: _____

Date: _____

Board of Supervisors Meeting

Date: September 14, 2021

Cmte Board

- Motion
- Resolution
- Ordinance
- Legislative Digest
- Budget and Legislative Analyst Report
- Youth Commission Report
- Introduction Form
- Department/Agency Cover Letter and/or Report
- MOU
- Grant Information Form
- Grant Budget
- Subcontract Budget
- Contract/Agreement
- Form 126 – Ethics Commission
- Award Letter
- Application
- Public Correspondence

OTHER

- Senate Bill 219 - 10/4/17
- _____
- _____
- _____
- _____
- _____
- _____

Prepared by: Lisa Lew

Date: September 10, 2021

Prepared by: _____

Date: _____

1 [Urging the California Supreme Court to Restore LGBTQ Anti-Discrimination Protections]

2
3 **Resolution urging the California Supreme Court to review the Third District Court of**
4 **Appeals ruling in *Taking Offense v. California* and restore anti-discrimination**
5 **protections for LGBTQ residents of long-term care facilities.**

6
7 WHEREAS, In 2017 the California Legislature passed California State Senate Bill No.
8 219 (Wiener), which created an LGBT Seniors Bill of Rights for seniors living in long-term care
9 facilities; and

10 WHEREAS, Senate Bill 219 protects LGBTQ seniors from discrimination in long-term
11 care facilities, including refusing to use a resident’s preferred name or pronoun, denying
12 admission to a long-term care facility or transferring a resident within a facility or to another
13 facility based on anti-LGBTQ attitudes of other residents, or evicting or involuntarily
14 discharging a resident from a facility, on the basis of the resident’s actual or perceived sexual
15 orientation, gender, gender identity, gender expression, or HIV status; and

16 WHEREAS, The bill further requires that all long-term care facilities post a notice
17 regarding this form of discrimination where its current non-discrimination policy is posted; and

18 WHEREAS, Senate Bill 219 was supported by LGBTQ, senior and civil rights
19 organizations including Equality California, the American Civil Liberties Union, California
20 Advocates for Nursing Home Reform, Justice in Aging, the National Center for Transgender
21 Equality, the San Francisco Human Rights Commission, the National Center for Lesbian
22 Rights and Transgender Law Center; and

23 WHEREAS, LGBTQ Seniors are disproportionately vulnerable to marginalization,
24 isolation, homelessness, poverty, and premature institutionalization; and while California has
25 sought to protect the rights and dignity of its LGBTQ senior population, prior to SB 219 the

1 State had not detailed specific actions deemed discriminatory or made residents fully aware of
2 their rights in order to hold long-term care facilities more accountable; and

3 WHEREAS, According to the 2011 study "Stories from the Field; LGBT Older Adults in
4 Long-Term Care Facilities," published by the National Senior Citizens Law Center, 89% of
5 respondents indicated that they believed caretakers would discriminate against them for being
6 LGBTQ and 43% had personally witnessed or experienced mistreatment of LGBTQ seniors;
7 and

8 WHEREAS, In 2015 the San Francisco Board of Supervisors passed an Ordinance by
9 then-Supervisors Wiener and Campos amending the Police Code (1) to prohibit discrimination
10 against residents or patients at long-term care facilities in San Francisco on the basis of
11 sexual orientation or gender identity; (2) to provide aggrieved persons with the right to seek
12 investigation and mediation by the Human Rights Commission, as well as a private right of
13 action; and (3) to impose treble damages on violators; and

14 WHEREAS, On July 16, 2021, in the case of *Taking Offense v. California* the State of
15 California Third District Court of Appeals struck down the provision of SB 219 requiring
16 nursing home staff to use the correct pronouns for trans and nonbinary patients, thereby
17 eliminating critical anti-harassment protections for LGBTQ seniors in California; and

18 WHEREAS, In doing so the court failed to acknowledge the serious harm caused by
19 the intentional misuse of transgender people's names and pronouns; and

20 WHEREAS, Numerous studies of transgender and nonbinary people have found that
21 misgendering can cause great personal harm with one 2014 study of around 130 transgender
22 adults finding that 32.8% of participants said they felt "very stigmatized" when they were
23 misgendered, and a 2020 review of 20 studies published since 2009 finding that the more
24 frequently a trans person was misgendered, the more likely they were to experience distress;
25 and

1 WHEREAS, Following the Third District Court of Appeals ruling, California Attorney
2 General Rob Bonta, the California Department of Social Services and the California
3 Department of Public Health filed a petition on August 25, 2021, for review before the
4 Supreme Court of California; and

5 WHEREAS, This petition urges the Supreme Court to restore SB 219's protections for
6 LGBTQ seniors and other long-term care facility residents in California; now, therefore, be it

7 RESOLVED, That the San Francisco Board of Supervisors urges the Supreme Court of
8 California to review the Court of Appeals ruling in *Taking Offense v. California* and to restore
9 all of SB 219's protections for LGBTQ seniors and other long-term care facility residents; and,
10 be it

11 FURTHER RESOLVED, That upon final adoption of this Resolution, the Clerk of the
12 Board of Supervisors is directed to transmit a copy to the Supreme Court of California.

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Senate Bill No. 219

CHAPTER 483

An act to add Section 1569.318 to, to add Chapter 2.45 (commencing with Section 1439.50) to Division 2 of, and to add and repeal Section 1338.4 of, the Health and Safety Code, relating to health facilities.

[Approved by Governor October 4, 2017. Filed with
Secretary of State October 4, 2017.]

LEGISLATIVE COUNSEL'S DIGEST

SB 219, Wiener. Long-term care facilities: rights of residents.

Existing law provides for the licensure and regulation by the State Department of Public Health of health facilities, including skilled nursing facilities and intermediate care facilities. A violation of these provisions is a crime. Existing law, the Long-Term Care, Health, Safety, and Security Act of 1973, imposes various requirements on long-term health care facilities, as defined, and prescribes the civil penalties assessed for a violation of those requirements.

Existing law, the California Residential Care Facilities for the Elderly Act, provides for the licensure and regulation of residential care facilities for the elderly by the State Department of Social Services. Under existing law, a person who violates the act, or who willfully or repeatedly violates any rule or regulation adopted under the act, is guilty of a misdemeanor. Existing law also provides for civil penalties for a violation of the act.

Existing law, the California Fair Employment and Housing Act, 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.

This bill would enact the Lesbian, Gay, Bisexual, and Transgender Long-Term Care Facility Residents' Bill of Rights. Among other things, the bill would make it unlawful, except as specified, for any long-term care facility to take specified actions wholly or partially on the basis of a person's actual or perceived sexual orientation, gender identity, gender expression, or human immunodeficiency virus (HIV) status, including, among others, willfully and repeatedly failing to use a resident's preferred name or pronouns after being clearly informed of the preferred name or pronouns, or denying admission to a long-term care facility, transferring or refusing to transfer a resident within a facility or to another facility, or discharging or evicting a resident from a facility. The bill would also provide certain protections to all residents of long-term care facilities during, among other things, physical examinations or treatments, relating to bodily privacy. The bill would define long-term care facility for purposes of these provisions to include skilled nursing facilities, intermediate care facilities, and residential

care facilities for the elderly. The bill would also, among other things, require each facility to post a specified notice regarding discrimination alongside its current nondiscrimination policy in all places and on all materials where the nondiscrimination policy is posted. The bill would require a violation of these provisions to be treated as a violation under the Long-Term Care, Health, Safety, and Security Act of 1973, the California Residential Care Facilities for the Elderly Act, or specified provisions providing for the licensure and regulation of health facilities, which may include the imposition of civil penalties. By expanding the definition of existing crimes, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares all of the following:

(a) In 2006, the California Legislature found that “lifelong experiences of marginalization place lesbian, gay, bisexual, and transgender (LGBT) seniors at high risk for isolation, poverty, homelessness, and premature institutionalization. Moreover, many LGBT seniors are members of multiple underrepresented groups, and as a result, are doubly marginalized. Due to these factors, many LGBT seniors avoid accessing elder programs and services, even when their health, safety, and security depend on it.”

(b) Recent studies confirm the state’s findings and provide evidence that LGBT seniors experience discrimination, including in long-term care facilities where residents are particularly vulnerable because they must rely on others for necessary care and services, and may no longer enjoy the privacy of having their own home or even their own room.

(c) According to “Stories from the Field: LGBT Older Adults in Long-Term Care Facilities,” a 2011 study published by the National Senior Citizens Law Center, these issues have gone unaddressed. In that study, 43 percent of respondents reported personally witnessing or experiencing instances of mistreatment of LGBT seniors in a long-term care facility, including all of the following: being refused admission or readmission, being abruptly discharged, verbal or physical harassment from staff, staff refusal to accept medical power of attorney from the resident’s spouse or partner, discriminatory restrictions on visitation, and staff refusal to refer to a transgender resident by his or her preferred name or pronoun. Eighty-one percent of respondents believed that other residents would discriminate against an LGBT elder in a long-term care facility, 89 percent of respondents believed that staff would discriminate against an LGBT elder in a long-term care facility, and 53 percent believed that staff discrimination would rise to

the level of abuse or neglect. Though this was a national report, it included instances of severe discrimination within California.

(d) Even more recently, in 2013, the San Francisco LGBT Aging Policy Task Force commissioned a report by Professor Karen Fredriksen-Goldsen of the University of Washington, “Addressing the Needs of LGBT Older Adults in San Francisco: Recommendations for the Future,” based on information collected from over 600 LGBT seniors residing in San Francisco, including nearly 140 LGBT seniors of color. This report found that nearly 60 percent of the study participants lived alone, and of the 15 percent of the study participants who had children, 60 percent reported that these children would not be available to assist them. Many reported poor physical and mental health with nearly one-third of all respondents reported poor general health, close to one-half reported having one or more disabilities, and one-third of male participants reported that they were living with human immunodeficiency virus (HIV) or acquired immune deficiency syndrome (AIDS). These results indicate that, as compared to seniors in San Francisco generally, LGBT seniors have a heightened need for care, but often lack family support networks available to non-LGBT seniors. Further, LGBT seniors’ fear of accessing services is justified. Nearly one-half of the participants in the San Francisco study reported experiencing discrimination in the prior 12 months because of their sexual orientation or gender identity.

(e) While state and local laws already prohibit discrimination in public accommodations on the basis of actual or perceived sexual orientation, gender identity, gender expression, and HIV status, the promise of these laws has not yet been fully actualized in long-term care facilities. The purpose of this act is to accelerate the process of freeing LGBT residents and patients from discrimination, both by specifying prohibited discriminatory acts in the long-term care setting and by providing additional information and remedies to ensure that LGBT residents know their rights and have the means to vindicate them.

SEC. 2. Section 1338.4 is added to the Health and Safety Code, to read:

1338.4. (a) In addition to other training required by this article and other federal and state laws, a skilled nursing facility or intermediate care facility shall provide existing employees and new hires access to the online learning tool, “Building Respect for LGBT Older Adults,” which is available on the National Resource Center on LGBT Aging Internet Web site (www.lgbtagingcenter.org).

(b) This section shall remain in effect only until January 1, 2019, and as of that date is repealed.

SEC. 3. Chapter 2.45 (commencing with Section 1439.50) is added to Division 2 of the Health and Safety Code, to read:

CHAPTER 2.45. LESBIAN, GAY, BISEXUAL, AND TRANSGENDER LONG-TERM CARE FACILITY RESIDENTS' BILL OF RIGHTS

1439.50. For the purposes of this chapter, the following definitions shall apply:

(a) "Gender expression" has the same meaning as defined in Section 51 of the Civil Code.

(b) "Gender identity" means a person's identity based on the individual's stated gender identity, without regard to whether the self-identified gender accords with the individual's physical appearance, surgical history, genitalia, legal sex, sex assigned at birth, or name and sex, as it appears in medical records, and without regard to any contrary statement by any other person, including a family member, conservator, or legal representative. An individual who lacks the present ability to communicate his or her gender identity shall retain the gender identity most recently expressed by that individual.

(c) "Gender-nonconforming" means a person whose gender expression does not conform to stereotypical expectations of how a man or woman should appear or act.

(d) "LGBT" means lesbian, gay, bisexual, or transgender.

(e) "Long-term care facility" or "facility" includes facilities listed in Section 1418 of this code and subdivision (b) of Section 9701 of the Welfare and Institutions Code.

(f) "Long-term care facility staff" or "facility staff" means all individuals employed by or contracted directly with the facility.

(g) "Resident" means a resident or patient of a long-term care facility.

(h) "Transgender" means a person whose gender identity differs from the person's assigned or presumed sex at birth.

(i) "Transition" means to undergo a process by which a person changes physical sex characteristics or gender expression to match the person's inner sense of being male or female. This process may include, among other things, a name change, a change in preferred pronouns, and a change in social gender expression, as indicated by hairstyle, clothing, and restroom use. Transition may or may not include hormone use and surgery.

1439.51. (a) Except as provided in subdivision (b), it shall be unlawful for a long-term care facility or facility staff to take any of the following actions wholly or partially on the basis of a person's actual or perceived sexual orientation, gender identity, gender expression, or human immunodeficiency virus (HIV) status:

(1) 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.

(2) Deny a request by residents to share a room.

(3) Where rooms are assigned by gender, assigning, reassigning, or refusing 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.

(4) 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.

(5) Willfully and repeatedly fail to use a resident’s preferred name or pronouns after being clearly informed of the preferred name or pronouns.

(6) Deny a resident the right to wear or be dressed in clothing, accessories, or cosmetics that are permitted for any other resident.

(7) 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. This section does not preclude a facility from banning or restricting sexual relations, as long as the ban or restriction is applied uniformly and in a nondiscriminatory manner.

(8) 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.

(b) This section shall not apply to the extent that it is incompatible with any professionally reasonable clinical judgment.

(c) Each facility shall post the following notice alongside its current nondiscrimination policy in all places and on all materials where that policy is posted:

“[Name of facility] does not discriminate and does not permit discrimination, including, but not limited to, bullying, abuse, or harassment, on the basis of actual or perceived sexual orientation, gender identity, gender expression, or HIV status, or based on association with another individual on account of that individual’s actual or perceived sexual orientation, gender identity, gender expression, or HIV status. You may file a complaint with the Office of the State Long-Term Care Ombudsman [provide contact information] if you believe that you have experienced this kind of discrimination.”

1439.52. A facility shall 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.

1439.53. (a) Long-term care facilities shall protect personally identifiable information regarding residents’ sexual orientation, whether a resident is transgender, a resident’s transition history, and HIV status from unauthorized disclosure, as required by the federal Health Insurance Portability and Accountability Act of 1996 (42 U.S.C. Sec. 300gg), if applicable, the Confidentiality of Medical Information Act (Part 2.6 (commencing with Section 56) of Division 1 of the Civil Code), if applicable, regulations

promulgated thereunder, if applicable, and any other applicable provision of federal or state law. A facility shall take any steps 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.

(b) 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, shall not be 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 or responsible party. A facility shall 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. In addition, all residents, including, but not limited to, LGBT residents, shall 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.

1439.54. A violation of this chapter shall be treated as a violation under Chapter 2 (commencing with Section 1250), Chapter 2.4 (commencing with Section 1417), or Chapter 3.2 (commencing with Section 1569).

SEC. 4. Section 1569.318 is added to the Health and Safety Code, to read:

1569.318. Every residential care facility for the elderly shall abide by the provisions of the Lesbian, Gay, Bisexual, and Transgender Long-Term Care Facility Residents' Bill of Rights (Chapter 2.45 (commencing with Section 1439.50)).

SEC. 5. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

Introduction Form

By a Member of the Board of Supervisors or Mayor

Time stamp
or meeting date

I hereby submit the following item for introduction (select only one):

- 1. For reference to Committee. (An Ordinance, Resolution, Motion or Charter Amendment).
- 2. Request for next printed agenda Without Reference to Committee.
- 3. Request for hearing on a subject matter at Committee.
- 4. Request for letter beginning : "Supervisor inquiries"
- 5. City Attorney Request.
- 6. Call File No. from Committee.
- 7. Budget Analyst request (attached written motion).
- 8. Substitute Legislation File No.
- 9. Reactivate File No.
- 10. Topic submitted for Mayoral Appearance before the BOS on

Please check the appropriate boxes. The proposed legislation should be forwarded to the following:

- Small Business Commission
- Youth Commission
- Ethics Commission
- Planning Commission
- Building Inspection Commission

Note: For the Imperative Agenda (a resolution not on the printed agenda), use the Imperative Form.

Sponsor(s):

Subject:

The text is listed:

Signature of Sponsoring Supervisor:

For Clerk's Use Only