

**INITIAL STATEMENT OF REASONS
FOR PROPOSED BUILDING STANDARDS
OF THE CALIFORNIA DEPARTMENT OF PUBLIC HEALTH
REGARDING THE 2018 BUILDING CODE
CALIFORNIA CODE OF REGULATIONS, TITLE 24, PART 2**

CDPH-01-18

The 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 SPECIFIC PURPOSE, PROBLEM, RATIONALE, and BENEFITS

The California Department of Public Health (Department) is authorized to establish public swimming pool regulations under Health and Safety Code sections 116025 through 116068. The existing public swimming pool regulations in Title 24 California Code of Regulations (California Building Standards Code), Part 2, Chapter 31B, establish minimum building and construction standards for public swimming pools, including requirements related to signage.

This proposal seeks to amend existing requirements.

Section 3120B.4 No lifeguard sign

This section requires that any public swimming pools for which no lifeguard service is provided—including public pools located in recreational vehicle or mobile home parks, apartment houses, condominiums, townhouses, and homeowner associations—have a posted sign stating, “NO LIFEGUARD ON DUTY.” The posted sign must also include specific language addressing use of the swimming pool by children, stating, “Children under age 14 shall not use pool without a parent or adult guardian in attendance.”

The Department and the California Business, Consumer Services, and Housing Agency (BCSH) have received correspondence from stakeholders raising concerns that the signage requirement included in this section of the California Building Standards Code may subject owners or operators of public swimming pools to liability for unlawful discrimination based on familial status.

Housing discrimination based on familial status is illegal under both federal and state law. (42 U.S.C. § 3604(b); Gov. Code, § 12955, subd. (a).) In general, “familial status” means one or more individuals under 18 years of age living with a parent, a legal guardian, or the designee of a parent or legal guardian. (42 U.S.C. § 3602(k); Gov. Code, § 12955.2.) Discrimination based on familial status can occur when a housing accommodation, such as a condominium or a mobile home park, imposes rules on its residents that treat children, and therefore families with children, differently and less favorably than adults-only households. Some stakeholders have raised concerns that section 3120B.4’s signage requirement compels housing accommodations that own or operate public swimming pools to discriminate against residents with children in violation of federal and state anti-discrimination laws.

Section 3120B.4 is proposed for amendment in order to achieve greater alignment between federal and state anti-discrimination laws, the California Building Standards Code’s signage requirements for public swimming pools, and the Department’s duty to protect the health and safety of persons using public swimming pools. (See Health & Saf. Code, § 116035.)

The proposed amendment would delete the phrase “under age 14” as a modifier of the word “children.” As stated above, section 3120B.4 currently requires that public swimming pools where no lifeguard service is provided have a sign posted stating: “Children under age 14 shall not use pool without a parent or adult guardian in attendance.” Similar age-based restrictions on pool usage that have been imposed on residents

by apartment houses or mobile home parks have been successfully challenged in federal district courts.¹ Courts have found such age-based restrictions on pool usage discriminatory because they explicitly treat children differently and less favorably than adults by requiring that the children under a certain age either (a) be supervised by an adult while swimming or (b) forego use of the pool altogether.² When a rule explicitly treats children (and therefore families with children) differently and less favorably than adults-only households, and is therefore discriminatory on its face, the housing accommodation must establish that the rule constitutes a “compelling business necessity” and is the “least restrictive means” for achieving the compelling business necessity.³ Courts have made clear that protecting the health and safety of swimmers (and children in particular) is a compelling business necessity. However, rules aimed at achieving that end must be reasonable and cannot be overbroad or unduly restrictive.⁴ Courts have struck down certain age-based restrictions on pool usage, reasoning that a child’s age does not necessarily correlate with his or her swimming proficiency.⁵ Children younger than 14 may be more adept swimmers than children age 14 or older, and some children, such as a 17-year-old lifeguard,⁶ likely require no supervision at all in order to safely use the pool. Because age is not determinative of a child’s swimming proficiency, the Department proposes to delete the phrase “under age 14” from the required signage language under section 3120B.4.

The proposed amendment would also delete the signage language requiring a “parent or adult guardian in attendance” and replace it with the more general phrase “adult supervision.” Courts have recognized that protecting the health and safety of persons using a housing accommodation’s public swimming pool is a compelling business necessity.⁷ However, parents and guardians are not the only adults capable of providing adequate supervision to children using a public pool. Other adults, such as caretakers or non-custodial relatives, are also capable of providing supervision and promoting safety.⁸ In order to address concerns that the current signage requirements may unduly burden children and their families by unnecessarily restricting which adults may provide supervision, the Department is proposing to eliminate the

¹ (See *Iniestra v. Cliff Warren Investments, Inc.* (C.D. Cal. 2012) 886 F. Supp. 2d 1161, 1167–68; *United States v. Plaza Mobile Estates* (C.D. Cal. 2003) 273 F. Supp. 2d 1084, 1092–95.)

² (*Iniestra, supra*, 886 F. Supp. 2d at p. 1167 (“The Pool Use Rule—which uniformly prevents children under 18 from entering the pool without an adult—is not an efficient method of achieving pool safety.”); see also *Plaza Mobile Estates, supra*, 273 F. Supp. 2d at p. 1091–92; *Fair Housing Congress v. Weber* (C.D. Cal. 1997) 993 F. Supp. 1286, 1292 (“*Weber*”).)

³ (*Plaza Mobile Estates, supra*, 273 F. Supp. 2d at p. 1091 [quoting *Weber, supra*, 993 F. Supp. at p. 1292].)

⁴ (*Plaza Mobile Estates, supra*, 273 F. Supp. 2d at p. 1092 [“Although the health and safety of the children and other residents of the park are legitimate concerns, these absolute prohibitions are not the least restrictive means to achieve such ends.”].)

⁵ (*Ibid*; see also *Pack v. Fort Washington II* (E.D. Cal. 2009) 689 F. Supp. 2d 1237, 1243–44 [noting that although housing accommodations “are free to impose rules for health and safety reasons, such rules must be reasonable” and cannot be “overbroad and unduly restrictive”].)

⁶ (*Iniestra, supra*, 886 F. Supp. 2d at p. 1167–68 [“[I]t is entirely possible that younger children might be more adept swimmers than their older counterparts.”]; *Plaza Mobile Estates, supra*, 273 F. Supp. 2d at p. 1092 [“[T]here is nothing magical about the age of 18 or 14 years old if defendants’ concerns are for the protection of the health and safety of the children or other residents. . . using. . . the swimming pool. . .”].) The hypothetical application of an age-based pool use restriction to a 17-year-old lifeguard, who is arguably more than capable of swimming unaccompanied or even supervising others, has been cited by more than one court as an example of an overly restrictive rule. (See *Iniestra, supra*, 886 F. Supp. 2d at p. 1168; *Weber, supra*, 993 F. Supp. at p. 1292.)

⁷ (See *Plaza Mobile Estates, supra*, 273 F. Supp. 2d at p. 1092 [“[T]he health and safety of the children and other residents of the park are legitimate concerns”]; see also *Weber, supra*, 993 F. Supp. at p. 1292.)

⁸ (*Pack, supra*, 689 F. Supp. 2d at p. 1246 [“This rule requires children under 14 to be supervised by a parent or legal guardian while using the Pool and Spa. An ordinary reader would interpret this as a limitation on children, especially since the child specifically needs supervision from a parent or legal guardian. This means that children under 14 cannot use the pool with the supervision of other adults, such as older siblings, adult babysitters or even other adult family members. Defendants again point to safety reasons, and while the Court recognizes the inherent dangers of unsupervised swimming, the requirement of parent or legal guardian supervision transforms this rule from one that could be reasonably interpreted as a safety precaution to one that simply limits children and their families.”].)

requirement that the adult supervising a child who uses a public swimming pool be the child's parent or guardian.

The proposed amendment would also delete the word "shall" and replace it with the word "should." Section 3120B.4's signage requirements are intended to promote the safe and healthful use of public swimming pools by warning against conduct, such as a lack of supervision, which could prove harmful to the public and children in particular. According to findings by the United States Congress, drowning is one of the leading causes of injury-related deaths among children ages 1 to 14. (15 U.S.C. § 8001(1).) The Department strongly advocates that children be supervised by adults while swimming in order to guard against preventable injuries and deaths. The Department also acknowledges, as the federal courts have, that children possess varying skill levels and proficiencies when it comes to swimming and pool safety, and not all children require adult supervision in order to safely use a public swimming pool.⁹ In the interest of aligning the Department's health and safety prerogatives with federal and state anti-discrimination law, the Department is proposing to amend the required signage language to replace the word "shall" with "should." In light of the dangers associated with swimming, including those risks that disproportionately impact children, the Department firmly advises that children using a public swimming pool be supervised by an adult; the proposed amendment to section 3120B.4 reflects this position.

Section 3120B.7 Warning sign for a spa pool

This section requires that spa pools have a posted sign that reads "CAUTION" and offers several warnings, including language stating, "Unsupervised use by children under the age of 14 is prohibited." As with the public swimming pool signage requirement, stakeholders have raised concerns to the Department and BCSH that this spa pool-related signage requirement may subject owners or operators of spa pools to liability for unlawful discrimination based on familial status.

The proposed amendment to section 3120B.7 would amend the signage language for spa pools to state: "Children should not use spa without adult supervision." As with swimming pool rules, when establishing spa pool rules to promote health and safety that disproportionately burden children and their families, housing accommodations must rely on the "least restrictive means" to achieve this compelling business necessity.¹⁰ To account for the concerns raised by stakeholders, the proposed amendment would delete the phrase "under age 14" as a modifier of the word "children." As stated above with relation to section 3120B.4, because age is not determinative of a child's swimming proficiency or ability to safely use a swimming pool or spa pool, the Department proposes to delete the phrase "under age 14" from the required signage language under section 3120B.7.

The proposed amendment would also delete the language stating that unsupervised use of a spa pool by children "is prohibited" and replace it with the warning that children "should not use spa without adult supervision." Acknowledging that a child's swimming proficiency and safety consciousness is not necessarily determined by his or her age, this change is intended to better align the Department's health and safety objectives with federal and state laws that prohibit housing discrimination based on familial status. As with swimming pools, the Department strongly advises that children using a spa pool be supervised by an adult.

TECHNICAL, THEORETICAL, AND EMPIRICAL STUDY, REPORT, OR SIMILAR DOCUMENTS

1. *Fair Housing Act*, Title 42 United States Code sections 3601–3604
2. *Virginia Graeme Baker Pool and Spa Safety Act*, Title 15 United States Code sections 8001–8008
3. *California Fair Employment and Housing Act*, Government Code, sections 12920, 12955, subdivision (a), 12955.2
4. *Iniestra v. Cliff Warren Investments, Inc.* (C.D. Cal. 2012) 886 F. Supp. 2d 1161
5. *Pack v. Fort Washington II* (E.D. Cal. 2009) 689 F. Supp. 2d 1237
6. *United States v. Plaza Mobile Estates* (C.D. Cal. 2003) 273 F. Supp. 2d 1084

⁹ (See *Iniestra*, *supra*, 886 F. Supp. 2d at p. 1167–68; *Plaza Mobile Estates*, *supra*, 273 F. Supp. 2d at p. 1092; see also *Weber*, *supra*, 993 F. Supp. at p. 1292.)

¹⁰ (*Plaza Mobile Estates*, *supra*, 273 F. Supp. 2d at p. 1092; see also *Pack*, *supra*, 689 F. Supp. 2d at p. 1246.)

7. *Fair Housing Congress v. Weber* (C.D. Cal. 1997) 993 F. Supp. 1286, 1292

STATEMENT OF JUSTIFICATION FOR PRESCRIPTIVE STANDARDS

The Department believes it is essential and necessary that the swimming pool and spa pool signage requirements set out in Title 24 California Code of Regulations, Part 2, Chapter 31B, be amended to achieve greater alignment and consistency with federal and state standards governing housing discrimination.

CONSIDERATION OF REASONABLE ALTERNATIVES

The Department has determined that no alternative considered by the Department would be more effective in carrying out the purpose for which the action is proposed or would be as effective as and less burdensome to affected private persons than the proposed action.¹¹

REASONABLE ALTERNATIVES THE AGENCY HAS IDENTIFIED THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

The Department has determined that there are no reasonable alternatives that would lessen any adverse impact on small business. There is no impact on small business due to this proposal.

FACTS, EVIDENCE, DOCUMENTS, TESTIMONY, OR OTHER EVIDENCE OF NO SIGNIFICANT ADVERSE IMPACT ON BUSINESS

Existing law limits application of building standards according to Health and Safety Code, sections 18938.5 and 116050. Adoption of this proposal will not adversely impact business.

ASSESSMENT OF EFFECT OF REGULATIONS UPON JOBS AND BUSINESS EXPANSION, ELIMINATION OR CREATION

The California Department of Public Health has assessed whether or not and to what extent this proposal will affect the following:

A. The creation or elimination of jobs within the State of California.

This proposal will not create or eliminate jobs within the State of California. This proposal only seeks to modify existing language on a sign that is currently required to be posted at a public swimming pool or spa pool.

B. The creation of new businesses or the elimination of existing businesses within the State of California.

This proposal will not create new businesses or eliminate existing businesses with the State of California. Any business that exists in the state of California that manufactures signs for public pools will be required to modify the language on their signs should this proposal be adopted. It is not anticipated that new business will be created since there is an existing industry that produces signs for public pools.

C. The expansion of businesses currently doing business within the State of California.

This proposal will not create new businesses or eliminate existing businesses with the State of California. This proposal simply seeks to modify language on a sign that is currently required to be posted at a public swimming pool or spa pool.

¹¹ The Department understands that at least one federal court has suggested that the promotion of pool safety "would be better served with a proficiency requirement" rather than an age-based restriction. (*Plaza Mobile Estates, supra*, 273 F. Supp. 2d at p. 1092.) However, the court offered no objective, readily discernable means by which a child's swimming proficiency should be assessed. Additionally, neither the Department nor the housing accommodations subject to the anti-discrimination laws described above are in a position to test or verify the swimming abilities of each and every child who seeks to use a public swimming pool or spa pool.

D. The benefits of the regulation to the health and welfare of California residents, worker safety, and the state's environment.

The proposal will benefit to the health and welfare of California residents who swim in public swimming pools and spa pools by providing warnings that children using swimming pools or spa pools should be supervised by an adult.

ESTIMATED COST OF COMPLIANCE, ESTIMATED POTENTIAL BENEFITS, AND RELATED ASSUMPTIONS USED FOR BUILDING STANDARDS

As written, the proposed regulations will not financially impact existing public swimming pools' daily operations. California Health and Safety Code, section 116050, states in part that, "no rule or regulation as to design or construction of pools shall apply to any pool that has been constructed before the adoption of the regulation, if the pool as constructed is reasonably safe and the manner of the construction does not preclude compliance with the requirements of the regulations as to bacteriological and chemical quality and clarity of the water in the pool." This proposal affects a code section in Chapter 31B of the Building Code. Building Code requirements in Chapter 31B only apply to new construction, installation, renovation, alteration, addition, relocation, replacement, or use of any public pool and their ancillary facilities, mechanical equipment, and related piping. This proposal will not apply to existing pool sites and if adopted will not require a pool owner to replace the current required signage at a pool site. This proposal simply seeks to modify the language of swimming pool and spa pool signs to address the concerns of stakeholders related to liability for familial discrimination and to provide a less restrictive means for protecting and promoting the health and safety of swimmers and children in particular. It is not anticipated that the cost of a sign with fewer words will change the price of the sign. The Department's proposed provisions are aimed at balancing the requirements of federal and state anti-discrimination laws with the Department's directive to protect and promote the health and safety of public swimming pool users.

DUPLICATION OR CONFLICTS WITH FEDERAL REGULATIONS

Not applicable. Federal regulations specific to the operation and maintenance of public swimming pools do not exist.