CALIFORNIA DEPARTMENT OF CONSUMER AFFAIRS

BUSINESS, CONSUMER SERVICES AND HOUSING AGENCY • GAVIN NEWSOM, GOVERNOR

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DATE	November 1, 2025
TO	Board Members
FROM	Elaine Yamaguchi Executive Officer
SUBJECT	Implementation of Section 1399.365 and Possible Actions

SUMMARY

The purpose of this memo is to provide background and analysis for the Board of Vocational Nursing and Psychiatric Technicians (BVNPT) to discuss the implementation of section 1399.365 (Section 1399.365) of title 16 of the California Code of Regulations (CCR), promulgated by the Respiratory Care Board and possible proposals to ensure patient safety in the event of an emergency.

BACKGROUND

Respiratory Care Practitioners (RCPs) are experts in their specialized field. Licensed Vocational Nurses (LVNs) are general practitioners, who care for the entire patient, who may have conditions beyond any respiratory factors. There are about 25,000 RCPs in California, and about 110,000 LVNs. LVNs provide 24/7 bedside care at tens of thousands of homes and residential care facilities throughout the state.

Basic Respiratory Tasks and Services

The Respiratory Care Board (RCB) adopted section 1399.365 (Section 1399.365) of title 16 of the California Code of Regulations (CCR), which were effective October 1, 2025. Section 1399.365(b) defines basic respiratory tasks and services, which do not require the provider be an RCP (that is, may be performed by individuals other than licensed RCPs), and identifies eight such tasks and services.

Section 1399.365, subdivision (c), states that the following **are not** basic respiratory tasks and services:

1. Manipulation of an invasive or non-invasive ventilator.
2. Assessment or evaluation of observed and gathered data from chest auscultation, palpation, and percussion.
3. Pre-treatment or post-treatment assessment.

4. Use of medical gas mixtures other than oxygen.
5. Preoxygenation, or endotracheal or nasal suctioning.
6. Initial setup, change out, or replacement of a breathing circuit or adjustment of oxygen liter flow or oxygen concentration.
7. Tracheal suctioning, cuff inflation/deflation, use or removal of an external speaking valve, or removal and replacement of the tracheostomy tube or inner cannula.

Vocational Nursing (VN) Education

The following procedures are taught in VN schools and programs and tested in the NCLEX-PN (the license examination for VN licensure used in California). They are also specifically identified in the LVN/LPN scopes of practice in Texas, New York, South Carolina, Illinois, Washington, Kentucky, Oklahoma, New Mexico, Nevada and Ohio:

- Tracheostomy care
- Suctioning (nasopharyngeal, endotracheal)
- Pulse Oximetry
- Incentive Spirometer
- Nebulizer treatment

Regulation Adoption / Public Comment

BVNPT communicated concerns with these provisions several times during the approval process. A letter to RCB dated October 24, 2024 stated in part:

> *Chiefly, we urge you to include preoxygenation or nasal suctioning; tracheal suctioning, cuff inflation/deflation, use or removal of an external speaking valve, or removal and replacement of the tracheostomy tube or inner cannula, and adjusting O2 as directed in the list of basic respiratory tasks. These are common and essential tasks performed by LVNs and are specifically included in their licensure training.*
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> *In addition, we urge the Respiratory Care Board to include express "safe harbor" language for licensed vocational nurses in the proposed regulatory language so that our regulated community has a clear understanding of the basic respiratory tasks and services that may be performed without be considered in violation of the Respiratory Care Practice Act. This language would read:*
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> > ***Basic respiratory tasks and services shall not be considered the practice of respiratory care by the Board when performed by a licensed***

vocational nurse meeting the criteria in this section and B&P section 2860.

Without this language, we have concerns that it may be unclear to the regulated community what may be practiced lawfully in accordance with both boards respective practice acts.

Ensuring Adequate and Safe Patient Care Staffing

Section 2861.5 of the Vocational Nursing Practice Act[1] states:

> A person licensed under this chapter who in good faith renders emergency care at the scene of an emergency which occurs outside both the place and the course of his employment shall not be liable for any civil damages as the result of acts or omissions in rendering the emergency care. This section shall not be construed to grant immunity from civil damage to any person whose conduct in rendering emergency care is grossly negligent. (Bus. & Prof. Code, § 2861.5.)

This section, added in 1974, is intended to comply with California's Good Samaritan Law (Health and Safety Code Section 1799.102). The Good Samaritan Law provides legal protection to individuals who voluntarily offer emergency care at the scene of various emergency situations, including medical emergencies, accidents, and natural disasters. It alleviates the hesitation rescuers might feel due to the fear of being sued for unintentional harm caused while providing assistance. Rescuers must genuinely intend to help without seeking payment for their efforts. Protection is limited to acts or omissions during the provision of emergency care, meaning actions taken after the emergency may not be covered.

In addition to the laws above, Senate Bill 389 (Chapter 582 of the Statutes of 2025, Ochoa Bogh) (SB 389) amends Business and Professions Code section 3765 and Education Code section 49423.5, effective January 1, 2026, ensuring students with special needs "continue to receive the care they need" from LVNs in the school setting. SB 389 specifically authorizes suctioning and other basic respiratory tasks and services by an LVN under the supervision of a credentialed school nurse.

ISSUES

Since the effective date of Section 1399.365, BVNPT has been receiving dozens of emails, calls and official complaints from individual licensees, facilities, employers,

[1] Business and Professions Code section 2840 et seq.

educators, and concerned families regarding the adoption of this regulation and its implementation. Absent the implementation of the RCB rulemaking packages identified below and the establishment of training requirements, LVNs and their employers are uncertain what LVNs are legally permitted to do (and prohibited from doing) in specified settings, and what directives regarding respiratory care from Registered Nurses (RNs) and physicians LVNs are legally authorized to perform. This confusion places patients at risk for several reasons:

1. Potential delays in the provision of care if the bedside LVN needs to find another caregiver authorized to provide the service or call 911.
2. Inconsistency of care for patients from setting to setting
3. Potential constriction of career mobility for LVNs
4. Potential problems for California LVNs seeking to transfer to other states and vice-versa
5. Potential lack of clarity from supervisors

Under Section 1399.365, without any other clarifying regulations, an LVN in a home health or residential care facility caring for a patient who needed immediate suctioning, would not be permitted to perform the suctioning. Rather, the LVN would be required to call their supervising RN or physician or 911 and wait for a provider authorized to provide suctioning, which could delay the provision of this life saving measure. This would also add to the over-burdened emergency response system, especially in remote areas of the state and in the middle of the night. If the LVN provides immediate life-saving care while waiting for an emergency medical technician (EMT), the LVN could assist the patient, unless there are indications that the patient needs more advanced care.

UPCOMING REGULATION PACKAGES

At the RCB's October 24, 2025, meeting, RCB authorized draft language for a new regulation (Section 1399.361) to establish the specific respiratory care tasks and services that LVNs may perform in the following settings:

(A) At a congregate living health facility licensed by the State Department of Public Health that is designated as six beds or fewer.
(B) At an intermediate care facility licensed by the State Department of Public Health that is designated as six beds or fewer.

(C) At an adult day health care center licensed by the State Department of Public Health.
(D) As an employee of a home health agency licensed by the State Department of Public Health or an individual nurse provider working in a residential home.
(E) At a pediatric day health and respite care facility licensed by the State Department of Public Health.
(F) At a small family home licensed by the State Department of Social Services that is designated as six beds or fewer.
(G) As a private duty nurse as part of daily transportation and activities outside a patient's residence or family respite for home- and community-based patients.

RCB indicated that another entity has expressed intent to request legislation that may conflict with the other rulemaking packages on the RCB's rulemaking calendar (regarding training on respiratory care tasks for LVNs in the facilities listed above). RCB opted to proceed with the rulemaking for only Section 1399.361 at this time.

The other two future packages currently on RCB's rulemaking calendar are:

- New – § 1399.362 – Employer-provided patient-specific training guidelines (to be developed in collaboration with the BVNPT)
- New – § 1399.363 – Guidelines for Demonstrated Limited-Competency Certification issued by the California Society for Respiratory Care (CSRC), the California Association of Medical Product Suppliers (CAMPS), or other similar entities yet to be identified.

LVN TRAINING

Since 2019, BVNPT has advocated for a post-licensure certification program that provides a rigorous training on the respiratory care tasks set forth in Section 1399.365, subdivision (c), to be developed jointly with RCB and other respiratory care experts. This training approach is intended to assist with serving the large and growing patient population requiring respiratory care services as opposed to a series of legal "carve-outs" that would allow the provisions of respiratory care and services by individuals other than RCPs.

Unlike the existing Intravenous (IV) and Blood Withdrawal certifications offered by BVNPT, BVNPT contemplates that maintaining this certification would require regular

renewals of the entire course, and an LVN would be required to have this certification for employers to assign an LVN to a patient with respiratory conditions requiring nursing care.

RECOMMENDATIONS

1. Staff recommends seeking amendments to BPC 2861.5 as follows:
   (a) A person licensed under this chapter, who in good faith renders emergency care at the scene of an emergency whether or not the emergency ~~which~~ occurs in ~~outside~~ ~~both~~ the place and the course of ~~his~~ employment, shall not be liable for any civil damages as the result of acts or omissions in rendering the emergency care. This section shall not be construed to grant immunity from civil damage to any person whose conduct in rendering emergency care is grossly negligent.

   (b) "Emergency care" means preserving basic life functions and ensuring patient safety, including but not limited to injury involving great bodily harm, severe blood loss, difficulty breathing, anaphylactic shock, cardio-pulmonary events, strokes, and diabetic events.

2. Staff recommends that the Board authorize the Executive Officer to communicate with the RCB regarding the ongoing concerns about limiting what tasks LVNs are authorized to perform based on their workplace type.

3. Staff recommends that the Board direct the Education and Practice Committee to discuss possible legislative proposals for post-licensure certification on respiratory care for LVNs and make recommendations to the full Board.