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## **NURSING HOMES: REVISE INVESTIGATION AND DISCIPLINARY PROCEEDINGS**

### **House Bill 4940 (Substitute H-1) First Analysis (4-30-98)**

**Sponsor: Rep. David Anthony  
Committee: Health Policy**

#### ***THE APPARENT PROBLEM:***

Under existing provisions in the Public Health Code, any person may report cases of physical, mental, or emotional abuse; mistreatment; or neglect of a nursing home resident by a nursing home licensee, administrator, or employee to the Department of Consumer and Industry Services (DCIS). Nursing home employees are required to report incidents to the home's administrator or nursing director, who then is required to make a report to the DCIS. (Physicians and other licensed health care professionals at facilities where patients are transferred to must also report any prohibited acts to the department.) The code requires the department to then investigate the reported incident, and nursing homes are prohibited from evicting, harassing, dismissing, or retaliating against a patient, his or her representative, or an employee who makes a report. Departmental policy is to investigate non-facility generated reports within 24 hours to 45 days, depending on the seriousness of the complaint. In the case of a facility-generated complaint of abuse or misappropriation of a resident's property, the facility is required under federal guidelines to conduct a thorough investigation and report the findings, with appropriate documentation, to the department. If the department is not satisfied, for any reason, with the home's investigation, the department will conduct one of its own. The employee who is the subject of the complaint or the person making the complaint can request a departmental hearing if he or she is not satisfied with the findings of either the facility or departmental investigation and findings. Reportedly, these somewhat informal hearings allow the department to expedite complaints without overburdening staff. However, some people feel that the state law and departmental policy are inadequate in providing sufficient protection to nursing home residents, leading to some employees continuing to work in nursing homes despite substantiation of abuse of residents.

Testimony offered by an administrator of a nursing home in Escanaba underscored what are seen as inadequacies in the current reporting and investigation system. In May of 1995, a competency evaluated nurse aide (CENA) committed several acts that constituted abuse of a resident in the home. (Reportedly, the aide utilized a mechanical restraint to involuntarily tie the resident to her side rail when the resident refused to be repositioned. In the process, the aide pinned the resident down by leaning on her arms and chest, and turned off the resident's TV and removed the TV controls from her reach.) The departmental investigation concluded that resident abuse had occurred and recommended the aide be reported to the Michigan Nurse Aide Registry, sometimes referred to as the abuse registry. (Under federal regulations, a competency evaluated nurse aide is flagged on the registry if there is a court conviction of nursing home abuse or if a departmental investigation substantiates abuse, neglect, or theft of a resident's property. Long-term care facilities in the state are prohibited from hiring a CENA without verifying that the person does have a certificate and is in good standing.) Though the aide admitted to her actions, she appealed the department's decision and an informal hearing was held. According to the home's administrator, the informal hearing was conducted in a haphazard manner, with certain information concerning the abuse ignored or excused by the hearing officer. The result was that the decision to flag the aide on the nurse aide registry was overturned, allowing the person to continue to work in the nursing home industry.

On the federal level, legislation has been enacted to require that state agencies with oversight responsibilities for nursing homes provide a process for "the receipt and timely review and investigation of allegations of neglect and abuse and misappropriation

of resident property” by a nurse aide or others used by a facility to provide services to residents [Section 1819 (g) (1) (C) of Part A of Title XVIII of the Social Security Act, 42 U.S.C. 1395i-3]. The federal regulation further requires a state to give the nurse aide or other employee a written notice of the allegations, including a statement of the availability of a hearing to rebut the allegations. States have to give the opportunity for a hearing on the record and make a written finding as to the accuracy of the allegations. In the case of nurse aides, the state would have to notify the registry if the allegations were supported. For other employees, the appropriate licensure authority would have to be notified.

In light of situations like the one occurring in the Escanaba nursing home, some people believe that the state law should be amended to provide more structure to the department’s investigative and hearing procedures, and to conform more closely to the federal requirements.

### ***THE CONTENT OF THE BILL:***

House Bill 4940 would amend Part 217 of the Public Health Code, entitled “Nursing Homes,” to bring existing reporting requirements into conformity with the federal requirements.

Under the bill, the Department of Industry and Consumer Services would have to begin an investigation into reports of physical, mental, or emotional abuse, mistreatment, or harmful neglect of a patient, or the misappropriation of personal property of patients, within 10 days and complete the investigation within 30 days of receiving the report. The investigation would have to be done in accordance with provisions in Section 1819 (g) (1) (C) of Part A of Title XVIII of the Social Security Act (42 U.S.C. 1395i-3), which require that the employee involved in the complaint be notified in writing of the allegations and the opportunity for a hearing. Within 10 days after completing the investigation, the department would have to give written notification in compliance with the federal regulations to the individual and provide a copy of the notice to the nursing home involved in the investigation.

The bill would specify that a hearing held by the department in accordance with the federal regulation would have to be conducted as a contested case hearing under Chapter 4 of the Administrative

Procedures Act of 1969 (MCL 24.271 to 24.287). The department would have to be a party to the hearing and would be represented by the Department of Attorney General at the hearing. The department would also have to give notice and an opportunity to intervene in the proceedings to the nursing home that employed the person who was the subject of the hearing. Further, within 10 days after the completion of the hearing, the department would have to notify the person of the results of the hearing, and, if the person were a nurse’s aide, also notify the Nurse’s Aide Registry that is maintained by the department.

MCL 333.21771

### ***FISCAL IMPLICATIONS:***

Fiscal information is not available.

### ***ARGUMENTS:***

#### ***For:***

Though the majority of nursing homes work hard to provide a safe environment with a high level of care for the state’s elderly and infirm residents, complaints against nursing homes are increasing. According to the attorney general, 1,499 complaints were filed in 1996 and 1,760 in 1997. This year is expected to see an 11 percent increase in complaints over last year. Where many of the problems may be attributed to staff shortages rather than to the actions of a single individual, abuses of residents and thefts of resident’s property do happen. Though the Public Health Code already provides a mechanism for reporting and investigating physical and mental abuse or neglect, the bill would add the misappropriation of residents’ property to the list of reportable offenses. The bill would also provide for departmental investigations by the Department of Consumer and Industry Services to be initiated within 10 days of notification and be concluded within 30 days. In addition, when the employee charged with a violation requests a hearing, the bill would provide for a contested case hearing where the department, represented by the Department of Attorney General, would be one of the parties. If an infraction by a nurse aide were substantiated, then the department would have to report it to the Michigan Nurse Aide Registry.

Under current departmental practice, an investigation may not be conducted for up to 45 days after receiving a complaint from someone other than a facility. In

cases of a facility-reported complaint, the department expects the home to immediately conduct its own investigation and present appropriate documentation of

the findings. The department only conducts an investigation if it is not satisfied with the home's investigation. However, since it is reported by the attorney general that 10 to 15 percent of homes are guilty of abuses such as neglect of patients and forcing employees to cover up accidents or falsify records, it would appear that a conflict of interest exists that could allow some abusive situations to not be caught in a timely manner by the department. The bill's requirements that all cases of abuse, neglect, or theft of resident's property be investigated by the department may serve to catch those instances of fraudulent reporting.

Further, the bill's requirement for the department to be a party in a more formalized contested case hearing when an employee requests a hearing would be superior to current practice as far as establishing a statewide standard of resolving issues rather than the inconsistencies of the current system as illustrated in the incident with the nursing home in Escanaba. Had the department been a party in the hearing involving the Escanaba nurse aide, the decision to flag the aide in the Michigan Nurse Aide Registry may not have been overturned. Therefore, this provision may help weed out workers at the first sign of problems, rather than waiting for the abusive behavior to escalate to a point of serious injury to a resident.

#### ***Against:***

According to department staff, a 10-day turnaround on beginning investigations is unnecessary for all complaints received. Currently, the department operates on a system of prioritizing complaints and reports of abuse. Those deemed most critical are actually investigated within 24 hours. Often, investigations of less serious events are integrated into the overall survey of the home (under the Public Health Code, nursing homes must be inspected every 9 to 15 months), but within a time frame of up to 45 days. This not only results in a savings to taxpayers by more efficiently utilizing department staff, it also allows a more thorough investigation as to whether other residents are experiencing similar problems. Requiring all investigations to commence within 10 days of receiving a report, regardless of urgency, would require the hiring of additional inspectors, which would necessitate funding increases to the department.

Further, under federal guidelines, facilities are already required to conduct thorough investigations within five days and report promptly to the department. Depending on the seriousness of the alleged infractions, and the supporting documentation provided by the home, it may not be necessary for the

department to duplicate an investigation into a complaint. According to departmental staff, at current staffing levels, investigating all complaints within a 30-day time frame could not be done.

#### ***Against:***

As to the bill's requirement that the department be a party in a contested case hearing, the department believes that the majority of complaints can be resolved through informal hearings, which tend to expedite matters and do not tie up staff so much as the contested case hearings tend to do. The department believes that the dispute is between the facility and the complainant as to whether a complaint is valid. It feels that the current system of making the complainant and the facility parties has allowed the informal resolution of the vast majority of cases involving people who are dissatisfied with the findings and recommendations of an investigation and so should be continued. Further, informal hearings tend to be more family-friendly than do the more formalized contested case hearings. Though the department feels that it should not be a party in the hearings, it does recommend that it be required to reinvestigate an incident if the hearing officer so rules.

#### ***Response:***

The contested case hearing provision of the bill would only come into play in those instances when a nursing home employee requests a hearing in response to allegations of abuse, neglect, or theft of residents' property. In those cases, the department is a more appropriate party than the nursing home, which may have a conflict of interest, especially in those situations where the facility is at least partly culpable. Complaints involving other issues, or requests for hearings by individuals other than the employee charged in a complaint about abuse, could still be settled via the current departmental system of informal hearings.

#### ***POSITIONS:***

The Michigan Nurses Association supports the bill. (4-28-98)

The Health Care Association of Michigan supports the bill. (4-28-98)

The Department of Consumer and Industry Services does not support the bill. (4-28-98) Analyst: S. Stutzky

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.