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## REVISE NURSING HOME SURVEY PROCESS

### House Bill 5460 (Substitute H-2) First Analysis (4-25-00)

**Sponsor: Rep. Michael Green**  
**Committee: Senior Health, Security and  
Retirement**

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

In its role as the state's regulator of nursing homes, the Department of Consumer and Industry Services is required to make annual visits to each nursing home for the purpose of survey, evaluation, and consultation. In addition to these visits, survey teams return to nursing homes to follow up on citations issued and to ensure that corrective measures have been taken. Further, the department makes unannounced visits to investigate complaints.

Citations that are disputed by nursing home administrators can be reviewed by the Michigan Peer Review Organization in an informal deficiency dispute resolution process. The MPRO is a five-member group consisting of active and former nursing home professionals. If the home still disputes a citation after review by the MPRO, a formal appeal process is available, consisting of a hearing before an administrative law judge (at either the state or federal level, depending on the citation). A ruling by an administrative law judge may be appealed through the judicial system.

Depending on how serious and widespread the deficiencies found, regulators may impose sanctions ranging from repeat visits by surveyors, greater oversight, civil fines, and, most seriously, the loss of Medicaid certification, loss of authority to provide on-the-job training for nurses' aides (requiring training to be done at greater cost in other training programs), and ultimately, loss of licensure for the facility.

Representatives of nursing home administrators report that they see many inconsistencies in the way survey teams operate, and they believe these inconsistencies are due to differing interpretations of key terms used by regulators to cite deficiencies of care, and in some cases due to a lack of training and experience on the part of surveyors. Reportedly, some surveyors do not give the reason for issuing citations, giving providers no opportunity to correct the deficiency. And, nursing

home administrators argue, the interpretation of federal nursing home regulations by state regulators has been consistently out of step with the practice of other states, so much so that Michigan nursing homes are perceived as giving poor quality care (on the basis of number of citations issued) in comparison with other states, when other indicators of quality demonstrate that Michigan nursing homes perform at least at the national average. Nursing home industry representatives argue that this "highly subjective" regulatory climate contributes to high staff turnover, difficulties in training staff, difficulty in recruiting and retaining management staff, and denial of Medicare and Medicaid reimbursement, which in turn leads to major financial problems culminating in more cases of homes closing and nursing home care chains going bankrupt.

Industry representatives suggest that the current regulatory climate could be improved through instituting a more collaborative process, rather than a punitive one, to ensure quality of care in Michigan nursing homes.

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

The bill would amend the nursing home survey provisions of the Public Health Code to require certain experience among survey team members, require these surveyors to participate in training, require the Department of Consumer and Industry Services to report to the legislature on its survey process and results, and require the department to clarify certain terms as they are applied in the regulatory process.

Survey team membership. The bill would amend the code to require that, within one year after the effective date of the bill, survey, evaluation, and consultation visits to nursing homes be conducted by a team that includes at least one surveyor who is a licensed registered professional nurse with at least three years experience as a health professional employee of a

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licensed nursing home. This person would have to be employed by or under contract to the department. Further, the bill specifies that a member of a survey team could not be a current employee of a nursing home or a nursing home management company doing business in the state at the time of conducting an inspection. And, the department could not allow a licensed registered professional nurse who had been involuntarily discharged from employment with a nursing home or other long-term care facility within the previous five years to be assigned to a survey team. The bill further specifies that the department could not assign an individual to be a member of a survey team for a visit at a nursing home in which he or she had been employed within the preceding five years.

Continuing education. The department would be required to provide, semiannually, for joint training with nursing home surveyors and providers on at least one of the ten most frequently issued federal citations in the state during the past calendar year. And, the bill would require nursing home survey team members who are licensed health professionals to earn at least 50 percent of their required continuing education credits in the field of geriatric care.

Departmental reports to the legislature. The bill would require the Department of Consumer and Industry Services to develop a protocol for the review of the complaint and citation patterns of nursing home surveyors. The review would have to result in a report to the legislature containing, at a minimum, the number and pattern of complaints, the number and pattern of citations, and any corrective action undertaken by the department.

In addition, the bill would require the department to report by March 1 of each year to the House and Senate appropriations subcommittees, the fiscal agencies, and the standing committees having jurisdiction over issues involving senior citizens on:

- the number of surveys conducted;
- the number requiring follow-up surveys;
- the number referred to the Michigan Public Health Institute for remediation;
- the number of citations per home;
- the number of night and weekend complaints filed;
- the number of night and weekend responses to complaints conducted by the department;

- the average length of time for the department to respond to a complaint filed against a nursing home;
- the number and percentage of citations appealed; and
- the number and percentage of citations overturned and/or modified.

In addition, the department would have to report annually to the House and Senate Appropriations Committees and to the House and Senate standing committees having jurisdiction over issues involving senior citizens on the percentage of nursing home citations that are appealed, and the percentage of nursing home citations that are appealed and amended through the informal deficiency dispute resolution process.

Clarification of terms. The Department of Consumer and Industry Services, in consultation with nursing home provider groups, the Department of Community Health, the state long term care ombudsman, and the federal Health Care Finance Administration, would be required to clarify certain terms, as those terms are used in Title XVIII and Title XIX of the federal Social Security Act and as applied by the department. The terms to be defined are: a) “immediate jeopardy”; b) “harm”; c) “potential harm”; d) “avoidable”; and e) “unavoidable”. Further, the department would be required to instruct and train surveyors in the use of these clarifications in citing deficiencies.

(Note: House Bill 5252, reported by the House Health Policy Committee on April 20, 2000, would also amend this section of the Public Health Code. Among other things, it would specify that certain inspections of county medical care facilities, homes for the aged, nursing homes, and hospice residences would be conducted by both the Department of Consumer and Industry Services and a local health department. House Bill 5460 also includes this language. For further information, see the House Legislative Analysis Section’s analysis of House Bill 5252, dated 4-26-00.)

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

According to the House Fiscal Agency, the bill would result in an indeterminate increase in state costs. The agency reports that requiring the department to have at least one member of each survey team be a licensed registered professional nurse with experience working in a nursing home could increase staffing costs for the department. The joint training and additional reporting

requirements could also increase departmental costs. (4-24-00)

**ARGUMENTS:**

**For:**

Nursing homes are among the most highly regulated facilities overseen by state government. Those who administer nursing homes face the enormous challenge of providing high quality, humane care to a population that is increasingly medically fragile, where chronic underfunding, difficulties in attracting and retaining qualified staff, and intense scrutiny from regulators, media, and the public are constant factors. Michigan nursing home administrators cite many examples of overzealous state regulators who, instead of helping to improve nursing home care, simply make a difficult task more difficult. Proponents of the bill provide examples such as: citations issued for a home failing to hang pictures in a resident's room, when the resident did not desire pictures to be displayed; for having a coffee pot in the family visiting lounge; for certain bathroom heating fixtures purported to be a burn hazard, though no resident had ever been injured by them in 25 years; for not locking the door to a room containing fire alarm equipment, though the local fire inspectors required the door to be unlocked; and for paint peeling off a wall in an administrator's office. These examples demonstrate a regulatory attitude that is focused less on quality of care issues than on a desire to punish or intimidate providers. What is needed, industry officials say, is more understanding between parties of what is expected during survey visits, and a more collaborative approach to achieving quality care.

The bill would move the state's nursing home regulators in this direction by, among other things, requiring at least one survey team member to be a registered nurse with at least three years experience working in a nursing home setting; requiring joint training between surveyors and providers on frequently issued citations; and requiring that surveyors who are licensed (nurses, dietitians, sanitarians, and the like) to include geriatric care among their continuing education requirements. These requirements would improve the level of understanding among surveyors about what it is like to work in and run a nursing home, and help them to make sounder judgments about whether so-called offenses are actually problems that threaten resident safety or care. Industry officials say that citations ought to be focused on serious, quality of care issues, and not on cosmetic or other frivolous matters.

In addition, the bill would help to reign in those individual surveyors who are overzealous. It would require the department to develop a protocol to review the complaint and citation patterns of nursing home surveyors, and would require a report to the legislature on these matters. Further, it would disqualify people who had been fired from nursing home employment (and who may have a retaliatory attitude) from being surveyors. And, it would require the department to report more generally on enforcement issues to the legislature, to assist the legislature in its oversight function in this important area.

Finally, a significant aspect of the bill is its requirement that certain terms be clarified, so all concerned with nursing home quality may have greater understanding of the terms and how they are to be applied by regulators in assessing the quality of care in nursing homes. For example, clarification of terms such as "avoidable" and "unavoidable", as they are applied to a decline in a resident's health, will help those providing treatment in a home and surveyors to come to a common understanding about methods of assessment and care. The bill would require the department to clarify the terms in consultation with nursing home providers, the Department of Community Health, the state long term care ombudsman, and federal regulators.

**Against:**

The Department of Consumer and Industry Services points out that, of the 3,919 nursing home citations issued by surveyors in 1999, only 709 were submitted to the peer review organization for review, and of those, 79 percent were supported in full, 11 percent were amended in some way, and 10 percent were deleted (or overruled). This amounts to only 3.8 percent of the total number of citations issued being amended or overruled – and 96 percent upheld or not appealed. This kind of record directly refutes arguments that surveyors are issuing too many unsupported citations. It should be noted that the review panel that looks at disputed citations is composed of active and retired nursing home administrators - peers of the people who are being regulated. This organization upholds the department's surveyors in the great majority of cases. And, it should be noted, citations are not issued by individual surveyors, but are issued by the department after review by the entire survey team and by supervisors.

What is more, the department is already engaged in joint training with the regulated providers, and these training sessions have been well attended and well received by all those who have attended.

The bill's requirement that surveyor teams include at least one registered nurse with three years experience working in a nursing home seems an attempt to bias teams toward the point of view of nursing home management. It will also make it even more difficult for the department to fill these jobs. There is already some difficulty in attracting qualified candidates, and currently there is about a 10 percent vacancy rate. It is likely that imposing this additional requirement will necessitate increasing salaries to attract qualified candidates. Will the legislature appropriate funds to meet that demand? The department argues that its training program is adequate to teach staff what they need to know to perform the survey work, and that this fact is attested to by the high rate of citations that are upheld in the review process. The three-year experience requirement may also raise constitutional issues: reportedly, the attorney general has ruled that the legislature may not set specific employment standards for civil service employees, as this is within the purview of the executive branch. Perhaps a better approach would be to include several weeks of job-shadowing in a nursing home as part of the training for surveyors (and likewise, it has been suggested that nursing home administrators would benefit from job-shadowing with surveyors on their rounds).

Further, the bill's requirement that people who had been involuntarily discharged from a nursing home be prohibited from working as surveyors would rule out those people who may have been fired because they acted as advocates for residents against the wishes of nursing home management.

The legislation can be viewed as an attempt to intimidate regulators into issuing fewer citations, or perhaps to prevent the department from being able to staff the positions needed to perform its regulatory duties. It would tip the scale – which many would argue is already skewed – even further in the direction of the industry. Yes, Michigan's nursing homes are cited for violations more frequently than in many other states. But other states reportedly issue more fines, or higher fines, than does Michigan. This may simply reflect the manner in which Michigan has chosen to administer its regulatory program, as states are given broad latitude by the federal Health Care Financing Administration to design their regulatory programs. The state has placed its emphasis on attaining compliance with standards, rather than on being punitive. In fact, state regulators report that they are pressured by the federal HCFA and by consumer and advocacy groups to provide stricter enforcement, not less. Indeed, a recent federal General Accounting

Office (GAO) study was critical of the state's complaint investigation process, calling it inadequate to protect residents from abuse, neglect, preventable accidents, and medication errors. Rather than directing efforts at "regulating the regulators", the legislature should be attending to serious quality of care issues and taking substantive steps toward serious solutions.

### **POSITIONS:**

The Health Care Association of Michigan supports the bill. (4-19-00)

The Michigan Association of Homes and Services for the Aging supports the bill. (4-19-00)

A representative of the Michigan County Medical Care Facility Council testified in support of the bill. (4-19-00)

A representative of the Michigan Medical Directors Association testified in support of the bill. (4-19-00)

Citizens for Better Care has not yet taken a position on the bill. (4-19-00)

A representative of the Campaign for Quality Care testified in opposition to the bill. (4-19-00)

The Michigan Long Term Care Ombudsman Program opposes the bill. (4-18-00)

The Department of Consumer and Industry Services opposes the bill. (4-19-00)

Analyst: D. Martens

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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.