

# HOUSE BILL No. 5794

April 21, 2004, Introduced by Reps. Richardville and Hunter and referred to the Committee on Senior Health, Security and Retirement.

A bill to amend 1978 PA 368, entitled  
"Public health code,"  
by amending section 20155 (MCL 333.20155), as amended by 2001 PA 218, and by adding section 21753.

**THE PEOPLE OF THE STATE OF MICHIGAN ENACT:**

1       Sec. 20155. (1) Except as otherwise provided in this  
2 section, the department ~~of consumer and industry services~~ shall  
3 make annual and other visits to each health facility or agency  
4 licensed under this article for the purposes of survey,  
5 evaluation, and consultation. A visit made pursuant to a  
6 complaint shall be unannounced. Except for a county medical care  
7 facility, a home for the aged, a nursing home, or a hospice  
8 residence, the department shall determine whether the visits that  
9 are not made pursuant to a complaint are announced or  
10 unannounced. Beginning June 20, 2001, the department shall

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1 assure that each newly hired nursing home surveyor, as part of  
2 his or her basic training, is assigned full-time to a licensed  
3 nursing home for at least 10 days within a 14-day period to  
4 observe actual operations outside of the survey process before  
5 the trainee begins oversight responsibilities. A member of a  
6 survey team shall not be employed by a licensed nursing home or a  
7 nursing home management company doing business in this state at  
8 the time of conducting a survey under this section. The  
9 department shall not assign an individual to be a member of a  
10 survey team for purposes of a survey, evaluation, or consultation  
11 visit at a nursing home in which he or she was an employee within  
12 the preceding 5 years.

13 (2) The department ~~of consumer and industry services~~ shall  
14 make at least a biennial visit to each licensed clinical  
15 laboratory, each nursing home, and each hospice residence for the  
16 purposes of survey, evaluation, and consultation. The department  
17 ~~of consumer and industry services~~ shall semiannually provide  
18 for joint training with nursing home surveyors and providers on  
19 at least 1 of the 10 most frequently issued federal citations in  
20 this state during the past calendar year. The department ~~of~~  
21 ~~consumer and industry services~~ shall develop a protocol for the  
22 review of citation patterns compared to regional outcomes and  
23 standards and complaints regarding the nursing home survey  
24 process. The review will result in a report provided to the  
25 legislature. Except as otherwise provided in this subsection,  
26 beginning with his or her first full relicensure period after  
27 June 20, 2000, each member of a department ~~of consumer and~~

1 ~~industry services~~ nursing home survey team who is a health  
 2 professional licensee under article 15 shall earn not less than  
 3 50% of his or her required continuing education credits, if any,  
 4 in geriatric care. If a member of a nursing home survey team is  
 5 a pharmacist licensed under article 15, he or she shall earn not  
 6 less than 30% of his or her required continuing education credits  
 7 in geriatric care.

8 (3) The department ~~of consumer and industry services~~ shall  
 9 make a biennial visit to each hospital for survey and evaluation  
 10 for the purpose of licensure. Subject to subsection (6), the  
 11 department may waive the biennial visit required by this  
 12 subsection if a hospital, as part of a timely application for  
 13 license renewal, requests a waiver and submits both of the  
 14 following and if all of the requirements of subsection (5) are  
 15 met:

16 (a) Evidence that it is currently fully accredited by a body  
 17 with expertise in hospital accreditation whose hospital  
 18 accreditations are accepted by the United States department of  
 19 health and human services for purposes of section 1865 of part C  
 20 of title XVIII of the social security act, 42 ~~U.S.C.~~ **USC**  
 21 1395bb.

22 (b) A copy of the most recent accreditation report for the  
 23 hospital issued by a body described in subdivision (a) ~~—~~ and  
 24 the hospital's responses to the accreditation report.

25 (4) Except as provided in subsection (8), accreditation  
 26 information provided to the department ~~of consumer and industry~~  
 27 ~~services~~ under subsection (3) is confidential, is not a public

1 record, and is not subject to court subpoena. The department  
2 shall use the accreditation information only as provided in this  
3 section and shall return the accreditation information to the  
4 hospital within a reasonable time after a decision on the waiver  
5 request is made.

6 (5) The department ~~of consumer and industry services~~ shall  
7 grant a waiver under subsection (3) if the accreditation report  
8 submitted under subsection (3)(b) is less than 2 years old and  
9 there is no indication of substantial noncompliance with  
10 licensure standards or of deficiencies that represent a threat to  
11 public safety or patient care in the report, in complaints  
12 involving the hospital, or in any other information available to  
13 the department. If the accreditation report is 2 or more years  
14 old, the department may do 1 of the following:

15 (a) Grant an extension of the hospital's current license  
16 until the next accreditation survey is completed by the body  
17 described in subsection (3)(a).

18 (b) Grant a waiver under subsection (3) based on the  
19 accreditation report that is 2 or more years old, on condition  
20 that the hospital promptly submit the next accreditation report  
21 to the department.

22 (c) Deny the waiver request and conduct the visits required  
23 under subsection (3).

24 (6) This section does not prohibit the department from citing  
25 a violation of this part during a survey, conducting  
26 investigations or inspections pursuant to section 20156, or  
27 conducting surveys of health facilities or agencies for the

1 purpose of complaint investigations or federal certification.  
2 This section does not prohibit the state fire marshal from  
3 conducting annual surveys of hospitals, nursing homes, and county  
4 medical care facilities.

5 (7) At the request of a health facility or agency, the  
6 department ~~of consumer and industry services~~ may conduct a  
7 consultation engineering survey of a health facility and provide  
8 professional advice and consultation regarding health facility  
9 construction and design. A health facility or agency may request  
10 a voluntary consultation survey under this subsection at any time  
11 between licensure surveys. The fees for a consultation  
12 engineering survey are the same as the fees established for  
13 waivers under section 20161(10).

14 (8) If the department ~~of consumer and industry services~~  
15 determines that substantial noncompliance with licensure  
16 standards exists or that deficiencies that represent a threat to  
17 public safety or patient care exist based on a review of an  
18 accreditation report submitted pursuant to subsection (3)(b), the  
19 department shall prepare a written summary of the substantial  
20 noncompliance or deficiencies and the hospital's response to the  
21 department's determination. The department's written summary and  
22 the hospital's response are public documents.

23 (9) The department ~~of consumer and industry services~~ or a  
24 local health department shall conduct investigations or  
25 inspections, other than inspections of financial records, of a  
26 county medical care facility, home for the aged, nursing home, or  
27 hospice residence without prior notice to the health facility or

1 agency. An employee of a state agency charged with investigating  
2 or inspecting the health facility or agency or an employee of a  
3 local health department who directly or indirectly gives prior  
4 notice regarding an investigation or an inspection, other than an  
5 inspection of the financial records, to the health facility or  
6 agency or to an employee of the health facility or agency, is  
7 guilty of a misdemeanor. Consultation visits that are not for  
8 the purpose of annual or follow-up inspection or survey may be  
9 announced.

10 (10) The department ~~of consumer and industry services~~ shall  
11 maintain a record indicating whether a visit and inspection is  
12 announced or unannounced. Information gathered at each visit and  
13 inspection, whether announced or unannounced, shall be taken into  
14 account in licensure decisions.

15 (11) The department ~~of consumer and industry services~~ shall  
16 require periodic reports and a health facility or agency shall  
17 give the department access to books, records, and other documents  
18 maintained by a health facility or agency to the extent necessary  
19 to carry out the purpose of this article and the rules  
20 promulgated under this article. The department shall respect the  
21 confidentiality of a patient's clinical record and shall not  
22 divulge or disclose the contents of the records in a manner that  
23 identifies an individual except under court order. The  
24 department may copy health facility or agency records as required  
25 to document findings.

26 (12) The department ~~of consumer and industry services~~ may  
27 delegate survey, evaluation, or consultation functions to another

1 state agency or to a local health department qualified to perform  
2 those functions. However, the department shall not delegate  
3 survey, evaluation, or consultation functions to a local health  
4 department that owns or operates a hospice or hospice residence  
5 licensed under this article. The delegation shall be by cost  
6 reimbursement contract between the department and the state  
7 agency or local health department. Survey, evaluation, or  
8 consultation functions shall not be delegated to nongovernmental  
9 agencies, except as provided in this section. The department may  
10 accept voluntary inspections performed by an accrediting body  
11 with expertise in clinical laboratory accreditation under part  
12 205 if the accrediting body utilizes forms acceptable to the  
13 department, applies the same licensing standards as applied to  
14 other clinical laboratories and provides the same information and  
15 data usually filed by the department's own employees when engaged  
16 in similar inspections or surveys. The voluntary inspection  
17 described in this subsection shall be agreed upon by both the  
18 licensee and the department.

19 (13) If, upon investigation, the department ~~of consumer and~~  
20 ~~industry services~~ or a state agency determines that an  
21 individual licensed to practice a profession in this state has  
22 violated the applicable licensure statute or the rules  
23 promulgated under that statute, the department, state agency, or  
24 local health department shall forward the evidence it has to the  
25 appropriate licensing agency.

26 (14) The department ~~of consumer and industry services~~ shall  
27 report to the appropriations subcommittees, the senate and house

1 of representatives standing committees having jurisdiction over  
2 issues involving senior citizens, and the fiscal agencies on  
3 March 1 of each year on the initial and follow-up surveys  
4 conducted on all nursing homes in this state. The report shall  
5 include all of the following information:

6 (a) The number of surveys conducted.

7 (b) The number requiring follow-up surveys.

8 (c) The number referred to the Michigan public health  
9 institute for remediation.

10 (d) The number of citations per nursing home.

11 (e) The number of night and weekend complaints filed.

12 (f) The number of night and weekend responses to complaints  
13 conducted by the department.

14 (g) The average length of time for the department to respond  
15 to a complaint filed against a nursing home.

16 (h) The number and percentage of citations appealed.

17 (i) The number and percentage of citations overturned or  
18 modified, or both.

19 (15) The department ~~of consumer and industry services~~ shall  
20 report annually to the standing committees on appropriations and  
21 the standing committees having jurisdiction over issues involving  
22 senior citizens in the senate and the house of representatives on  
23 the percentage of nursing home citations that are appealed and  
24 the percentage of nursing home citations that are appealed and  
25 amended through the informal deficiency dispute resolution  
26 process.

27 (16) Subject to subsection (17), a clarification work group



1 comprised of the department ~~of consumer and industry services~~  
2 in consultation with a nursing home resident or a member of a  
3 nursing home resident's family, nursing home provider groups, the  
4 American medical directors association, the department of  
5 community health, the state long-term care ombudsman, and the  
6 federal centers for medicare and medicaid services shall clarify  
7 the following terms as those terms are used in title XVIII and  
8 title XIX and applied by the department to provide more  
9 consistent regulation of nursing homes in Michigan:

10 (a) Immediate jeopardy.

11 (b) Harm.

12 (c) Potential harm.

13 (d) Avoidable.

14 (e) Unavoidable.

15 (17) All of the following clarifications developed under  
16 subsection (16) apply for purposes of subsection (16):

17 (a) Specifically, the term "immediate jeopardy" means "a  
18 situation in which immediate corrective action is necessary  
19 because the nursing home's noncompliance with 1 or more  
20 requirements of participation has caused or is likely to cause  
21 serious injury, harm, impairment, or death to a resident  
22 receiving care in a nursing home".

23 (b) The likelihood of immediate jeopardy is reasonably higher  
24 if there is evidence of a flagrant failure by the nursing home to  
25 comply with a clinical process guideline adopted under subsection  
26 (18) than if the nursing home has substantially and continuously  
27 complied with those guidelines. If federal regulations and

1 guidelines are not clear — and if the clinical process  
2 guidelines have been recognized, a process failure giving rise to  
3 an immediate jeopardy may involve an egregious widespread or  
4 repeated process failure and the absence of reasonable efforts to  
5 detect and prevent the process failure.

6 (c) In determining whether or not there is immediate  
7 jeopardy, the survey agency should consider at least all of the  
8 following:

9 (i) Whether the nursing home could reasonably have been  
10 expected to know about the deficient practice and to stop it, but  
11 did not stop the deficient practice.

12 (ii) Whether the nursing home could reasonably have been  
13 expected to identify the deficient practice and to correct it,  
14 but did not correct the deficient practice.

15 (iii) Whether the nursing home could reasonably have been  
16 expected to anticipate that serious injury, serious harm,  
17 impairment, or death might result from continuing the deficient  
18 practice, but did not so anticipate.

19 (iv) Whether the nursing home could reasonably have been  
20 expected to know that a widely accepted high-risk practice is or  
21 could be problematic, but did not know.

22 (v) Whether the nursing home could reasonably have been  
23 expected to detect the process problem in a more timely fashion,  
24 but did not so detect.

25 (d) The existence of 1 or more of the factors described in  
26 subdivision (c), and especially the existence of 3 or more of  
27 those factors simultaneously, may lead to a conclusion that the

1 situation is one in which the nursing home's practice makes  
2 adverse events likely to occur if immediate intervention is not  
3 undertaken — and therefore constitutes immediate jeopardy. If  
4 none of the factors described in subdivision (c) is present, the  
5 situation may involve harm or potential harm that is not  
6 immediate jeopardy.

7 (e) Specifically, "actual harm" means "a negative outcome to  
8 a resident that has compromised the resident's ability to  
9 maintain or reach, or both, his or her highest practicable  
10 physical, mental, and psychosocial well-being as defined by an  
11 accurate and comprehensive resident assessment, plan of care, and  
12 provision of services". Harm does not include a deficient  
13 practice that only may cause or has caused limited consequences  
14 to the resident.

15 (f) For purposes of subdivision (e), in determining whether a  
16 negative outcome is of limited consequence, if the "state  
17 operations manual" or "the guidance to surveyors" published by  
18 the federal centers for medicare and medicaid services does not  
19 provide specific guidance, the department may consider whether  
20 most people in similar circumstances would feel that the damage  
21 was of such short duration or impact as to be inconsequential or  
22 trivial. In such a case, the consequence of a negative outcome  
23 may be considered more limited if it occurs in the context of  
24 overall procedural consistency with an accepted clinical process  
25 guideline adopted pursuant to subsection (18), as compared to a  
26 substantial inconsistency with or variance from the guideline.

27 (g) For purposes of subdivision (e), if the publications

1 described in subdivision (f) do not provide specific guidance,  
2 the department may consider the degree of a nursing home's  
3 adherence to a clinical process guideline adopted pursuant to  
4 subsection (18) in considering whether the degree of compromise  
5 and future risk to the resident constitutes actual harm. The  
6 risk of significant compromise to the resident may be considered  
7 greater in the context of substantial deviation from the  
8 guidelines than in the case of overall adherence.

9 (h) To improve consistency and to avoid disputes over  
10 "avoidable" and "unavoidable" negative outcomes, nursing homes  
11 and survey agencies must have a common understanding of accepted  
12 process guidelines and of the circumstances under which it can  
13 reasonably be said that certain actions or inactions will lead to  
14 avoidable negative outcomes. If the "state operations manual" or  
15 "the guidance to surveyors" published by the federal centers for  
16 medicare and medicaid services is not specific, a nursing home's  
17 overall documentation of adherence to a clinical process  
18 guideline with a process indicator adopted pursuant to  
19 subsection (18) is relevant information in considering whether a  
20 negative outcome was "avoidable" or "unavoidable" and may be  
21 considered in the application of that term.

22 (18) Subject to subsection (19), the department, in  
23 consultation with the clarification work group appointed under  
24 subsection (16), shall develop and adopt clinical process  
25 guidelines that shall be used in applying the terms set forth in  
26 subsection (16). The department shall establish and adopt  
27 clinical process guidelines and compliance protocols with outcome

1 measures for all of the following areas and for other topics  
2 where the department determines that clarification will benefit  
3 providers and consumers of long-term care:

4 (a) Bed rails.

5 (b) Adverse drug effects.

6 (c) Falls.

7 (d) Pressure sores.

8 (e) Nutrition and hydration including, but not limited to,  
9 heat-related stress.

10 (f) Pain management.

11 (g) Depression and depression pharmacotherapy.

12 (h) Heart failure.

13 (i) Urinary incontinence.

14 (j) Dementia.

15 (k) Osteoporosis.

16 (l) Altered mental states.

17 (m) Physical and chemical restraints.

18 (19) The department shall create a clinical advisory  
19 committee to review and make recommendations regarding the  
20 clinical process guidelines with outcome measures adopted under  
21 subsection (18). The department shall appoint physicians,  
22 registered professional nurses, and licensed practical nurses to  
23 the clinical advisory committee, along with professionals who  
24 have expertise in long-term care services, some of whom may be  
25 employed by long-term care facilities. The clarification work  
26 group created under subsection (16) shall review the clinical  
27 process guidelines and outcome measures after the clinical

1 advisory committee and shall make the final recommendations to  
2 the department before the clinical process guidelines are  
3 adopted.

4 (20) The department shall create a process by which the  
5 director of the division of nursing home monitoring or his or her  
6 designee or the director of the division of operations or his or  
7 her designee reviews and authorizes the issuance of a citation  
8 for immediate jeopardy or substandard quality of care before the  
9 statement of deficiencies is made final. The review shall be to  
10 assure that the applicable concepts, clinical process guidelines,  
11 and other tools contained in subsections (17) to (19) are being  
12 used consistently, accurately, and effectively. As used in this  
13 subsection, "immediate jeopardy" and "substandard quality of  
14 care" mean those terms as defined by the federal centers for  
15 medicare and medicaid services.

16 (21) The department may give grants, awards, or other  
17 recognition to nursing homes to encourage the rapid  
18 implementation of the clinical process guidelines adopted under  
19 subsection (18).

20 (22) The department shall assess the effectiveness of the  
21 amendatory act that added this subsection. The department shall  
22 file an annual report on the implementation of the clinical  
23 process guidelines and the impact of the guidelines on resident  
24 care with the standing committee in the legislature with  
25 jurisdiction over matters pertaining to nursing homes. The first  
26 report shall be filed on July 1, ~~of the year following the year~~  
27 ~~in which the amendatory act that added this subsection takes~~

1 ~~effect~~ 2002.

2 (23) The department ~~of consumer and industry services~~ shall  
3 instruct and train the surveyors in the use of the clarifications  
4 described in subsection (17) and the clinical process guidelines  
5 adopted under subsection (18) in citing deficiencies.

6 (24) **The department shall transmit a written copy of the**  
7 **results of each visit and survey conducted under this section to**  
8 **the nursing home visited within 30 days after the visit is**  
9 **conducted.** A nursing home shall post the nursing home's survey  
10 report in a conspicuous place within the nursing home for public  
11 review **and shall provide each nursing home resident or the**  
12 **resident's family with a copy of the results.** The department  
13 **shall also post the results in a searchable format on the**  
14 **department's website.**

15 (25) Nothing in this amendatory act shall be construed to  
16 limit the requirements of related state and federal law.

17 (26) As used in this section:

18 (a) "Title XVIII" means title XVIII of the social security  
19 act, ~~chapter 531, 49 Stat. 620, 42 U.S.C. 1395 to 1395b,~~  
20 ~~1395b-2, 1395b-6 to 1395b-7, 1395c to 1395i, 1395i-2 to 1395i-5,~~  
21 ~~1395j to 1395t, 1395u to 1395w, 1395w-2 to 1395w-4, 1395w-21 to~~  
22 ~~1395w-28, 1395x to 1395yy, and 1395bbb to 1395ggg~~ **42 USC 1395 to**  
23 **1395ggg.**

24 (b) "Title XIX" means title XIX of the social security act,  
25 ~~chapter 531, 49 Stat. 620, 42 U.S.C. 1396 to 1396f, 1396g-1 to~~  
26 ~~1396r-6, and 1396r-8 to 1396v~~ **42 USC 1396 to 1396v.**

27 **Sec. 21753. Before issuing or renewing a license, the**

1 department shall review the most recent inspection, survey, and  
2 evaluation of that facility and any written determination made  
3 concerning a complaint filed under section 21799a within the past  
4 2 years.

5 Enacting section 1. This amendatory act does not take  
6 effect unless Senate Bill No. \_\_\_\_\_ or House Bill No. 5795  
7 (request no. 04811'03 \*) of the 92nd Legislature is enacted into  
8 law.