

COVID-19 RESPONSE IN NURSING HOMES

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Senate Bill 1094 (H-3) as reported from House committee

Sponsor: Sen. Peter J. Lucido

House Committee: Ways and Means

Senate Committee: Health Policy and Human Services

Complete to 10-13-20

Analysis available at
<http://www.legislature.mi.gov>

SUMMARY:

Senate Bill 1094 would amend the Public Health Code to require the Department of Health and Human Services (DHHS), in consultation with the Department of Licensing and Regulatory Affairs (LARA), to provide all of the following regarding Michigan nursing homes: guidance on quality-of-life accommodations, visitation policies, a report on plans for improved testing, and a process for approving care and recovery centers and designated areas for coronavirus-positive individuals. It would also prohibit admission or retention of *coronavirus*-positive individuals in nursing homes, with certain exceptions.

Coronavirus would mean severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).

By November 15, 2020, DHHS, in consultation with LARA, would have to do all of the following:

Develop and submit a report to the House and Senate standing committees on health policy that is based on relevant guidance from the federal Centers for Disease Control and Prevention (CDC) and incorporates recommendations from the Michigan Nursing Homes COVID-19 Preparedness Task Force. The report would have to include updates to the final recommendations of the Michigan Nursing Home COVID-19 Preparedness Task Force in its August 30, 2020, report, the status on implementation of the recommendations, and a description of any barriers to their implementation. DHHS could use health care systems and hospital capacity data in preparing the report. The report would have to address each of the following quality-of-life recommendations from the task force:

- Outdoor visits
- Small-group noncontact activities
- Communal dining for residents
- Indoor visitation participation opt-in
- Resident small-group “pod” opt-in
- Increased virtual visitation opportunities
- Staff access to creative engagement ideas
- Support for meaningful engagement activities
- Ancillary service providers
- Visitation volunteers
- Off-campus health and wellness visits
- Window visits

Implement a statewide policy for nursing homes on providing in-person indoor and outdoor visitations. The policy could limit visitations for coronavirus-positive residents or if the nursing home or community is experiencing an outbreak.

Develop and submit a report to the House and Senate standing committees on health policy on DHHS's plan to identify laboratories to process and prioritize nursing home coronavirus tests. The report would have to include DHHS's plan for ensuring the processing of a high volume of tests, including rapid tests, and expedited results.

Implement a process for the creation of care and recovery centers within nursing homes to provide care to coronavirus-positive individuals who have not met the criteria for the discontinuation of transmission-based precautions from CDC. Nursing homes seeking to operate care and recovery centers would have to apply to DHHS and meet the following requirements:

- Demonstrate each of the following to DHHS:
 - That the nursing home has at least a 3-star rating based on the Five-Star Quality Rating System established by the federal Centers for Medicare and Medicaid Services.
 - That the nursing home is not operating under a denial of payment for new admissions.
 - That the nursing home is not designated as a “red hand facility,” indicating a citation for abuse.
 - That the nursing home meets capacity requirements to designate a dedicated area for coronavirus-positive individuals.
 - That the nursing home has dedicated staff to treat individuals in the care and recovery center.
- Agrees to comply with any facility requirements that DHHS considers appropriate to prevent the spread of coronavirus, including infection control safeguards, personal protective equipment, testing, and operational capacity.
- Agrees to comply with the following if an individual tests positive for coronavirus and needs to be transferred to a care or recovery center or other location:
 - Provide a notice to the individual, his or her legal representative, and (if the individual consents) his or her emergency contact.
 - That a physician, nurse practitioner, or physician's assistant must provide timely documentation that the individual is medically stable for transfer.
- Any other requirement established by DHHS in consultation with LARA.

Implement a process for the approval of designated areas within nursing homes for coronavirus-positive individuals. A nursing home seeking to establish a designated area would have to apply to DHHS and meet the following requirements:

- Demonstrate that it has a program for retaining and providing the appropriate care and meets other health and safety requirements, that its area meets proper infection control safeguards, and that there is no longer capacity at care and recovery centers.
- Agree to continually evaluate and ensure its ability to meet each requirement for the approval of a designated area.
- Any other requirements established by DHHS in consultation with LARA.

Prohibition on admitting or retaining certain coronavirus-positive individuals in a nursing home

Currently, an individual cannot be admitted or retained for care in a nursing home if the home is unable to provide for certain care or needs. The bill would add that an individual could not be admitted or retained in either of the following instances:

- The individual has tested positive for coronavirus, is currently receiving treatment at a hospital, and has less than 72 hours remaining in his or her isolation period, according to

CDC guidelines. (This provision would not apply if the hospital determined that it has reached surge capacity.)

- Beginning November 15, 2020, the individual has tested positive for coronavirus, unless the person has since recovered, the nursing home is a care and recovery center, or the nursing home demonstrates to DHHS that it meets the requirements to accept the individual into its approved designated area for coronavirus-positive individuals.

However, through December 31, 2020, a nursing home could admit or retain a coronavirus-positive individual if DHHS has not implemented a process for the creation of care and recovery centers or if the nursing home has applied for approval of a designated area but the application has not been approved.

MCL 333.21717 and proposed MCL 333.5145

BACKGROUND:

Status of executive orders

On October 2, 2020, in a 4–3 opinion, the Michigan Supreme Court ruled that the governor did not have the authority to declare a state of emergency or issue emergency orders after April 30, 2020.¹

The governor’s declarations of a state of emergency, and the executive orders issued under them, were primarily based on two acts: 1945 PA 302 (commonly known as the emergency powers of the governor act) and the Emergency Management Act (1976 PA 390).

Each act authorizes the governor to proclaim a state of emergency and issue orders responding to the emergency. 1945 PA 302 provides that these orders are effective until the state of emergency ends. Under the Emergency Management Act, a state of emergency or disaster must be terminated after 28 days unless the legislature approves an extension.

In its opinion, the Supreme Court ruled 1945 PA 302 to be an unconstitutional delegation of legislative power. Because the legislature had extended the state of emergency under the Emergency Management Act to April 30 but did not extend it past that time, the court also ruled that the governor had no authority to declare a state of emergency or issue emergency orders under that act after that date.

Although some COVID-19-related orders can be effective under other authority (the Public Health Code, for example), the governor’s orders issued after April 30 have no continuing legal effect. In a court filing, the governor said that over 30 executive orders in effect on October 2 were based on authority granted under 1945 PA 302.

Senate Bill 1094 would address the same issues as one of those orders, EO 2020-179.

Long-term care facilities

Care of individuals in nursing homes has been a subject of intense interest throughout the COVID-19 pandemic. Beginning with Executive Order 2020-50² on April 15 and continuing through five intervening EOs to the most recent rules in Executive Order 2020-179,³ Governor

¹ <https://courts.michigan.gov/Courts/MichiganSupremeCourt/Clerks/Documents/2020-2021/161492/In%20re%20Certified%20Questions-OP.pdf>

² <http://www.legislature.mi.gov/documents/2019-2020/executiveorder/pdf/2020-EO-50.pdf>

³ <https://www.legislature.mi.gov/documents/2019-2020/executiveorder/pdf/2020-EO-179.pdf>

Whitmer issued guidance specific to protections for residents and staff of long-term care facilities. Additionally, the governor established a nursing home preparedness task force intended to guard against a second wave. Their recommendations were issued August 31.⁴

Likewise, the House and Senate passed Senate Bill 956, which addressed assessment and reporting on the state's response to COVID-19 and preparation for a potential second wave of infections. Governor Whitmer vetoed the bill on July 31, 2020.

In her veto message, the governor listed the steps she and her administration had taken to protect nursing home residents, including expedited infection control surveys and ensuring adequate tests and personal protective equipment. Additionally, she pointed to the then-pending task force recommendations.⁵

FISCAL IMPACT:

Senate Bill 1094 would have cost implications in the current fiscal year for DHHS for planning and implementation of policies and procedures, and monthly reporting to the legislature. These activities are not unlike similar tasks that DHHS has undertaken during 2020 related to the COVID-19 pandemic. It is likely that costs for these administrative tasks would be supportable under the current DHHS budget and possibly by federal funds received by the state for costs related to COVID-19 response.

Senate Bill 1094 would be unlikely to have a significant fiscal impact on LARA. Any additional costs incurred under the bill (which would be mainly for administrative costs) would likely be minor and sufficiently offset by existing departmental appropriations and resources.

On a short-term basis, Senate Bill 1094 would have a minimal Medicaid services savings to the state from fewer Medicaid recipients being admitted into a nursing home. Local units of government that own and operate a nursing home could see fewer individuals admitted on a short-term basis as well, which could mean less revenue from nursing home occupancies. Any Medicaid-related savings would be shared approximately 70% federal and 30% state.

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

⁴ https://www.michigan.gov/documents/coronavirus/Nursing_Home_Final_Report_701082_7.pdf

⁵ https://content.govdelivery.com/attachments/MIEOG/2020/07/31/file_attachments/1508841/SB%20956%20Veto%20Letter.pdf