

COVID-19 RESPONSE IN NURSING HOMES

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Senate Bill 1094 (S-2) as passed by the Senate
Sponsor: Sen. Peter J. Lucido
House Committee: [Pending]
Senate Committee: Health Policy and Human Services
Complete to 10-12-20

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 assess and report on the state's response to COVID-19 in nursing homes and plan for any future response. It would prohibit admission or retention of coronavirus-positive individuals in nursing homes. However, it would provide that the plan produced by DHHS and LARA must require a physician's written acknowledgment that the coronavirus-positive individual is medically stable for transfer and that the individual's family be notified of the transfer at least 24 hours before it occurs.

Under the bill, DHHS, in consultation with LARA, would have to do all of the following:

By November 1, 2020, conduct an evaluation of the operation, efficacy, clinical outcomes, and performance of each COVID-19 regional hub (see **Background**, below) that was implemented and operating during the state response to *coronavirus* in nursing homes and provide a detailed report on its evaluation to the House and Senate standing committees on health policy.

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

By November 1, 2020, develop and submit a plan 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 plan would have to do all of the following:

- Describe a process by which DHHS can implement dedicated facilities for use only for coronavirus-positive patients in each of the state's eight health care regions to provide care only to those ineligible for admission at a hospital, nursing home, or adult foster care facility, and how health care systems and hospitals with excess surge capacity can be utilized for those patients before their transfer to the dedicated facilities.
- Consider and address relevant challenges identified by the Task Force, including the transfer of nursing home residents, testing and laboratory priority for nursing home residents and staff, and quality-of-life considerations.
- Require that a physician provide, in writing, that a coronavirus-positive patient who needs to be transferred to a dedicated facility or other location is medically stable for the transfer.

- Require that the family or legal representative of a coronavirus-positive patient who needs to be transferred to a dedicated facility or other location be notified of the transfer at least 24 hours in advance.
- If the plan uses the regional hub design, incorporate any enhancement that DHHS considers appropriate to prevent the spread of coronavirus based on its evaluation.

By November 1, 2020, and monthly thereafter, provide a report on nursing homes to the House and Senate standing committees on health policy that includes the new and cumulative numbers of positive cases, deaths, recoveries, tests conducted, and individuals transferred to a hospital, regional hub, care and recovery center, or other facility. It would also have to include an inventory of medical supplies and personal protective equipment and the current version of any visitation policy issued by DHHS affecting nursing homes.

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).
- Beginning November 1, 2020, the individual has tested positive for coronavirus, unless the person has since recovered or the nursing home has established and demonstrated to DHHS a designated area for coronavirus-positive individuals and a program for retaining and providing the appropriate level of care to those individuals. The nursing home could not admit or retain such individuals unless approved by DHHS. An approved nursing home would have to continuously evaluate and ensure its ability to meet each standard established by DHHS at the time of initial approval. The designated area would have to meet proper infection control safeguards, and the program would have to be consistent with adequate supply, testing, dedicated staffing, and operational capacity of the nursing home at the time of the individual’s diagnosis.

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).

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

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 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 was similar to SB 1094, but did not require approval for transfer by a physician and notice of transfer to the family. 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

Regional hubs

According to current DHHS guidance:⁶

The COVID-19 *Regional Hubs* are designated facilities or units within existing nursing facilities to care for COVID-19-individuals residing in long-term care facilities who are suspected to have Coronavirus or have been confirmed to have COVID-19 but

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>

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

⁶ https://www.michigan.gov/documents/mdhhs/Guidance_and_Protocols_for_MDHHS_Designated_COVID-19_Regional_Hubs_687533_7.pdf

do not require acute care provided in a hospital. The COVID-19 Regional Hubs are also designed to support the statewide hospital discharge policy and facilitate admission into nursing facilities prepared to treat COVID-19-affected residents.

COVID-19 Regional Hubs are selected at the discretion of MDHHS based on stated factors that include stated willingness to serve as a hub facility, capacity to contribute to local need for services, proximity to acute care facilities experiencing high COVID-19 related demand, physical attributes of the facility to effectively quarantine COVID-19-affected residents, performance history of the facility, and other factors deemed relevant by MDHHS.

COVID-19 Regional Hubs must keep up to date with Centers for Medicare and Medicaid Services (CMS) and the Centers for Disease Control and Prevention (CDC) guidance and recommendations related to COVID-19 and inform employees of any changes.

FISCAL IMPACT:

Senate Bill 1094 would have cost implications in the current fiscal year for DHHS for the activities of evaluation, planning, assisting in implementation of a plan, 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 both a minimal administrative cost to the state and 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.