House
Legislative
Analysis
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NURSING HOME REGULATION GUIDELINES

House Bill 5146
Sponsor: Rep. Joanne Voorhees
Committee: Senior Health, Security and Retirement

Complete to 10-5-01

A SUMMARY OF HOUSE BILL 5146 AS INTRODUCED 10-4-01

Public Act 171 of 2000 (enrolled House Bill 5460) required the Department of Consumer and Industry Services to clarify certain terms as they are used in the regulation of nursing homes. The 2000 legislation required the department to consult with nursing home provider groups, the American Medical Directors Association, the Department of Community Health, the state long term care ombudsman, and the federal Health Care Finance Administration (now the Centers for Medicare and Medicaid Services, or CMMS) in clarifying the terms. The terms include: "immediate jeopardy", "harm", "potential harm", "avoidable", and "unavoidable".

House Bill 5146 would amend the Public Health Code (MCL 333.20155) to place in the statute definitions of the specified terms, and to require the department to develop clinical process guidelines for applying the terms. The language in the bill is nearly the same as that in the workgroup's report, entitled "Clarification of Terms Used in Long Term Care Enforcement", dated June 1, 2001, published by the Department of Consumer and Industry Services.

"Immediate jeopardy". The term would be defined to mean "a situation in which immediate corrective action in necessary because the nursing home's noncompliance with one or more requirements of participation has caused or is likely to cause serious injury, harm, impairment, or death to a resident receiving care in a nursing home".

Further, the bill would specify that the likelihood of immediate jeopardy is reasonably higher if there is evidence of a flagrant failure by the nursing home to comply with a clinical process guideline established under the bill than if the nursing home has substantially and continuously complied with those guidelines. If federal regulations and guidelines are not clear, and if the clinical process guidelines have been recognized, a process failure giving rise to an immediate jeopardy could involve an egregious widespread or repeated process failure and the absence of reasonable efforts to detect and prevent the process failure.

In determining whether or not there is immediate jeopardy, the survey agency would have to consider at least all of the following:

- Whether the nursing home could reasonably have been expected to know about the deficient practice and to stop it, but did not stop it;

- Whether the nursing home could reasonably have been expected to identify the deficient practice and to correct it, but did not correct it;

• Whether the nursing home could reasonably have been expected to anticipate that serious injury, serious harm, impairment, or death might result from continuing the deficient practice, but did not so anticipate;

• Whether the nursing home could reasonably have been expected to know that a widely accepted high-risk practice is or could be problematic, but did not know; and,

• Whether the nursing home could reasonably have been expected to detect the process problem in a more timely fashion, but did not.

The bill specifies that the existence of one or more of the above-listed factors, and especially the existence of three or more of those factors simultaneously, could lead to a conclusion that the situation is one in which the nursing home's practice makes adverse events likely to occur if immediate intervention is not undertaken, and therefore constitutes "immediate jeopardy". Further, the bill says that if none of the factors are present, the situation could involve harm or potential harm that is not "immediate jeopardy".

"Actual harm". The bill would define "actual harm" to mean "a negative outcome to a resident that has compromised the resident's ability to maintain or reach, or both, his or her highest practicable physical, mental, and psychosocial well-being as defined by an accurate and comprehensive resident assessment, plan of care, and provision of services". "Harm" would not include a deficient practice that only may cause or has caused limited consequences to the resident.

In determining whether a negative outcome is of limited consequence, if the "State Operations Manual" or "The Guidance to Surveyors" published by the federal Centers for Medicare and Medicaid Services does not provide specific guidance, the department could consider whether most people in similar circumstances would feel that the damage was of such short duration or impact as to be inconsequential or trivial. In such a case, the consequence of a negative outcome could be considered more limited if it occurs in the context of overall procedural consistency with an accepted clinical practice guideline adopted under the bill, as compared to a substantial inconsistency with or variance from the guideline.

Further, if the publications do not provide specific guidance, the department could consider the degree of a nursing home's adherence to a clinical process guideline adopted under the bill in considering whether the degree of compromise and future risk to the resident constitutes actual harm. The bill specifies that the risk of significant compromise to the resident could be considered greater in the context of substantial deviation from the guidelines than in the case of overall adherence.

"Avoidable" and "unavoidable". The bill states that "to improve consistency and to avoid disputes over 'avoidable' and 'unavoidable' outcomes, nursing homes and survey agencies must have a common understanding of accepted process guidelines and of the circumstances under which it can reasonably be said that certain actions or inactions will lead to avoidable negative outcomes". If the state and federal publications cited above were not specific, a nursing home's overall documentation of compliance with a process indicator adopted according to the bill would be relevant information in considering whether a negative outcome was "avoidable" or "unavoidable", and could be considered in the application of that term.

Clinical process guidelines. The Department of Consumer and Industry Services would be required to develop and adopt clinical process guidelines to be used in applying the terms "immediate jeopardy", "harm", "potential harm", "avoidable", and "unavoidable". In developing the guidelines, the department would have to consult with the same entities who participated in clarifying the terms as required in the 2000 legislation. Clinical process guidelines and compliance protocols would have to be developed for all of the following areas, and for others if determined beneficial by the department: bed rails, adverse drug effects, falls, pressure sores, nutrition and hydration, pain management, depression and depression pharmacology, heart failure, urinary incontinence, dementia, osteoporosis, and altered mental states.

Further, the department would be required to create a clinical advisory committee to review and make recommendations regarding the clinical process guidelines. The committee would have to include physicians, registered professional nurses, and licensed practical nurses, and at least some of them would have to be nursing home employees. The clarification workgroup would review the guidelines after the clinical advisory committee, and make the final recommendations to the department before the guidelines were adopted.

The department would be required to train nursing home surveyors in the use of the clinical process guidelines adopted under the bill.

Other DCIS responsibilities. The department would have to create a validation committee consisting of department employees, which would assess the most serious nursing home citations as they occur in the survey process. The committee would review citations of immediate jeopardy and substandard quality of care to assure that the concepts, clinical process guidelines, and other tools developed under the bill were being used consistently, accurately, and effectively.

The department could make awards to nursing homes to encourage the rapid implementation of the clinical process guidelines adopted under the bill.

Finally, the department would be required to establish quality outcome measures to assess the effectiveness of the bill. Outcome measures would be required for each of the areas covered by the clinical process guidelines (e.g., bed rails, adverse drug effects, etc.). The department would have to apply the outcome measures and file an annual report on the implementation of the clinical process guidelines with the legislative committees with jurisdiction over matters pertaining to nursing homes. The first report would have to be filed on July 1 of the year following the year the bill took effect.

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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.