Legislative Analysis

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NURSING HOME:
PROVISION OF MEDICAL TREATMENT

House Bill 5375 (reported from committee as Substitute H-1)
House Bills 5376 and 5377 (reported without amendment)
Sponsor: Rep. Gail Haines
Committee: Health Policy

First Analysis (4-26-14)

BRIEF SUMMARY: The bills would allow any nursing home to employ a physician to provide a program of planned and continuing nursing care and medical treatment for residents.

FISCAL IMPACT: The bills would not have a significant fiscal impact on the state or local units of government.

THE APPARENT PROBLEM:

Currently in Michigan, only not-for-profit nursing homes may employ physicians (M.D.s or D.O.s) to provide direct medical care to residents. The policy is based on a century-old doctrine—the *learned professions doctrine*, also known as the *corporate practice of medicine doctrine* (CPOM). The practice of medicine has long been one of the professions considered a *learned profession.* Historically, the learned professions doctrine or CPOM encompasses the belief that a physician's medical decisions should be based on what is in the best interest of the patient and not on any pecuniary interest of the doctor. Thus, Michigan law has generally prohibited for-profit corporations from providing medical services that may only be rendered by licensed physicians.

For that reason, nursing facilities organized as a for-profit corporation may not lawfully directly hire physicians, and are instead limited to contractual arrangements. By contrast, not-for-profit, or nonprofit, nursing facilities are able to employ physicians based on a 1993 Michigan Attorney General Opinion (No. 6770) that concluded the learned professions doctrine did not apply to nonprofit corporations because the primary concerns underlying the doctrine (e.g., commercialization, limited liability) were addressed by formation as a nonprofit, and also by Michigan case law pertaining to nonprofit corporations.

Some, however, say that the doctrine as it relates to medicine no longer fits how short-term and long-term care services in nursing homes are provided. For example, nursing homes in general are increasingly providing care to people who used to receive such services in hospital settings. A person recovering from knee replacement or heart surgery used to stay in the hospital for several weeks while receiving rehabilitative care. Now, those patients are discharged to nursing facilities. Residents of nursing homes who used to be transferred to a hospital for skilled nursing care now often remain in place and receive that care in the nursing home. The number of dementia patients, who often have

multiple medical complaints, also are changing the landscape of long-term care facilities. In addition, providing appropriate care without duplicative services remains a challenge for "dual eligibles," persons who qualify under both Medicaid and Medicare.

Added to this are recent changes in the delivery of medical services which will require a higher degree of communication and coordination of care between hospitals and nursing facilities; in particular, no Medicare and/or Medicaid reimbursement for certain "never events" (specific medical errors) and the creation of Affordable Care Organizations (ACOs) under the Affordable Care Act. Operators of for-profit nursing homes say the inability to employ staff physicians hinders their efforts to provide high quality care in this new medical landscape.

One solution that has been offered is to create an exception to the learned professions/CPOM doctrine to allow *any* nursing home to employ physicians to provide medical services to residents, regardless of under which statute a business organizes as a corporation.

THE CONTENT OF THE BILLS:

House Bill 5375 will amend the Public Health Code (MCL 333.20109 and 333.21715) regarding nursing homes in two ways:

** The bill would specify that a nursing home, *regardless of its status as a legal entity*, could employ or contract with an individual licensed or otherwise authorized to engage in a health profession under Part 170 or 175 to provide the program of planned and continuing nursing care and medical treatment, which care and treatment would include direct clinical services to patients. [Part 170 licenses allopathic physicians (M.D.s) and Part 175 licenses doctors of osteopathic medicine and surgery (D.O.s). Parts 170 and 175 also authorize the use of Physician's Assistants under the supervision of a physician.]

** The code currently requires a nursing home to provide a program of planned and continuing *medical care* under the charge of physicians. The bill would instead require a nursing home to provide a program of planned and continuing *nursing care and medical treatment* under the charge of physicians.

"Medical treatment" would be defined to include treatment by an employee or independent contractor of the nursing home who is an individual licensed or otherwise authorized to engage in a health profession under Parts 170 or 175 of the code.

The bill also would make numerous editorial revisions, including deletion of an expired provision.

House Bill 5376 and 5377 would each amend a different act to revise the definition of "services in a learned profession." Currently, the term means services provided to the public by a dentist, osteopathic physician, physician, surgeon, doctor of divinity or other clergy, or an attorney-at-law.

The bills specify that the term "services in a learned profession" *would not include* services provided to residents of a nursing home by an osteopathic physician, physician, or surgeon who is an employee or independent contractor of the nursing home.

House Bill 5376 amends the Michigan Limited Liability Company Act (MCL 450.4102), and House Bill 5377 amends Chapter 2a (Professional Corporations) of the Business Corporation Act (MCL 450.1109). The bills are tie-barred to House Bill 4375, meaning that neither could take effect unless HB 4375 was also enacted.

ARGUMENTS:

For:

A rapidly aging population, coupled with the needs of persons with disabling medical conditions or injuries from accidents, are straining the long-term care health system. In addition, hospitals are increasingly discharging patients to nursing facilities for post-surgical and rehabilitative care that once was provided in a hospital setting. Nursing homes must therefore adopt efficient and cost-effective measures to increase the quality of care, improve resident outcomes, and contain health care costs. One way nursing homes can achieve this is to hire staff physicians. Rather than balancing the running of a private practice with making rounds at hospitals and nursing homes, a physician could simply work full or part time at a nursing home. The benefit is that staff physicians may get to know patients and their families better, enabling changes in a resident's condition to be recognized earlier, leading to receiving appropriate treatment sooner. Having doctors on site, like many hospitals and not-for-profit nursing homes do, should result in prompt treatment of emerging conditions which in turn should reduce trips to the hospital for evaluations and reduce hospital readmissions.

Whereas nonprofit nursing homes are able under Michigan laws to hire staff physicians to provide direct medical care to residents, for-profit nursing homes are not. The reason for the disparity goes back more than a century to a philosophy, or doctrine, that a *business* organized as a corporation or other legal entity such as a limited liability company *cannot* provide services in a learned profession meant to be provided by a member of that learned profession such as a physician, attorney, or member of the clergy. (Historically, the learned professions were limited to the practice of medicine, law, and divinity but have since been expanded). However, this doctrine no longer fits an evolving system of long-term care services.

Taken together, the bills would grant the same authority to for-profit nursing facilities to directly hire physicians to provide medical care to residents as enjoyed by non-profit entities. The bills are permissive; a for-profit facility could choose the best option for their size and patient needs, such as continuing with contractual arrangements or hiring staff physicians. The bills would not inhibit the ability of residents to continue to receive ongoing medical services by their primary physicians. If the ability to hire staff physicians improves the medical care provided to residents of for-profit nursing homes, many of whom are Medicare and/or Medicaid beneficiaries, and decreases medical costs related to poor care or medical errors, it would seem the bills are very good public policy.

Response:

Though no arguments against the bills were raised in committee, some may feel that such a long-held doctrine should be preserved, as any exception could erode the protections it gives to the public served by members of the learned professions.

Rebuttal:

The exception added by the bills to the learned professions, or more specifically, the CPOM doctrine is very limited and should not be a slippery slope leading to the total erosion of the protections afforded by the doctrine. The manner in which businesses incorporate evolve, medicine evolves

POSITIONS:

Representatives of the Health Care Association of Michigan testified in support of the bills. (3-25-14)

The Michigan Association of Counties indicated support for the bills. ((3-25-14)

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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.