DEPARTMENT OF JUSTICE
STATE OF NEBRASKA
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SUBJECT: Relationship of Staff to Permissible Level of Care in ICF I

REQUESTED BY: Gregg F. Wright, M.D., M.Ed.
Director of Health

OPINION BY: Robert M. Spire, Attorney General
Marilyn B. Hutchinson, Assistant Attorney General

QUESTION: If the standards for licensure of an ICF I facility require a minimum staff to include a licensed practical nurse on the day shift, seven days per week, and require only non-licensed personnel on the remaining shifts each day:

a. May a licensed ICF I facility meeting only such minimum staffing requirements care for residents that require nursing services outside the hours when a licensed practical nurse is available?

b. If a licensed ICF I facility has a registered nurse on the day shift, may such facility admit residents who require nursing care above that provided by a licensed practical nurse, that is, may the registered nurse function in a registered nurse capacity?

c. If a licensed ICF I facility has licensed nurses on duty 24 hours a day, may such a facility admit residents needing nursing care 24 hours a day?

d. In a licensed ICF I facility may unlicensed personnel such as nursing assistants or care staff members administer oxygen to residents

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in the presence of or in the absence of licensed nursing personnel?

CONCLUSION: a. No.

b. No.

c. Yes, to the extent such nursing care is within the maximum level of care the facility can provide and does not exceed the scope of practice of the person providing such care, as discussed below.

d. No.

An intermediate care facility one (ICF I) is defined in Neb.Rev.Stat. §71-2017.01(6) (Reissue 1981) as:

> [A]ny institution, facility, place, or building in which accommodation and board for a period exceeding twenty-four consecutive hours and also nursing care and related medical services are provided for two or more nonrelated individuals who are ill, injured, or disabled but not in need of hospital care, but who, by reason of illness, disease, injury, deformity, disability, convalescence, or physical or mental infirmity require such nursing care.

Such a facility is a home for the aged or infirmed as defined in Neb.Rev.Stat. §71-2017.03 (Reissue 1981). The current rules and regulations setting standards for such facilities are found in 175 NAC 8. Care in such a facility is defined in Regulation 001.03C:

> Intermediate Care Facility I Care shall mean care of the sick or infirmed residents and administration of medicines (drugs), as prescribed by a Licensed Physician, given by a Registered Nurse, Licensed Practical Nurse, or care staff member under the responsibility or supervision of a Registered Nurse or Licensed Practical Nurse. The care staff member shall be on duty at all times, awake and fully dressed.

Under Regulation 006.11A the nurse in charge of an ICF I facility may be either a registered nurse or a licensed practical nurse. Under Regulation 006.11D, the nurse in charge shall be responsible for and in charge of nursing service. She shall be

on duty a minimum of eight hours per day with coverage at least five days a week.

ICF I facilities which meet applicable standards are licensed by the Department of Health. See, Neb.Rev.Stat. §§71-2018 and 71-2020 (Reissue 1981) and Neb.Rev.Stat. §§71-2024 and 71-6018 (Supp. 1984). This is a facility license. It is this license which sets the maximum level of care that can be provided in a facility. It does not authorize all staff in that facility to provide such maximum level of care.

The maximum level of care that can be provided by any staff member is determined by that staff person's licensure as a health care practitioner. Such a person can only provide the level of care that is within the scope of practice of the profession for which such person is licensed. Thus a registered nurse may not provide care beyond the scope of practice of a licensed professional nurse. A licensed practical nurse may not provide care at a level beyond the scope of practice for a licensed practical nurse. A care staff member may not provide nursing care beyond the care that may be provided by a nursing assistant except that such a person may also administer oral and external medication. See, Neb.Rev.Stat. §§71-6038(2) and 71-6009 (Supp. 1984). A nursing assistant may not provide nursing care beyond non-specialized tasks related to the personal care and comfort of residents for the purpose of aiding a registered or licensed practical nurse. See, Neb.Rev.Stat. §§71-6038(3) and 71-6014 (Supp. 1984).

A licensed professional nurse and a licensed practical nurse are subject to disciplinary action against their licenses if they practice beyond the authorized scope of their respective professions. See, Neb.Rev.Stat. §§71-1,132.29 (Supp. 1984) and 71-147(5)(b) (Reissue 1981). They are also subject to disciplinary action if they promote, aid or abet the practice of a profession or the performance of activities requiring a license by a person not licensed to do so. Neb.Rev.Stat. §71-147(8). The nursing home itself is subject to disciplinary action as provided in Neb.Rev.Stat. §71-6042 (Supp. 1984) if its staff members perform unauthorized nursing duties.

In conclusion, a person on the staff of an ICF I facility may not practice beyond the scope of his or her own licensure, regardless of the level of care the facility where he or she practices is authorized by its license to provide. A licensed ICF I facility cannot provide health care above the level authorized by its license, regardless of the scope of practice of the licensure of its staff members. In other words, the level of

care a facility is authorized to provide does not expand the scope of practice of any of its staff members. The scope of practice of any of its staff members does not expand the level of care a facility may provide.

Very truly yours,

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APPROVED:

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