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DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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July 3, 1985

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SUBJECT: Relationship of Staff to Permissible Level of Care in an 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: Will the minimum staffing requirements for an ICF I under Laws 1985, LB 253, set the maximum level of care in such a facility?

ANSWER: The maximum level of nursing care authorized for an ICF I is all nursing services which are not skilled nursing services or skilled rehabilitation services to the extent that such nursing services are within the scope of practice of persons on duty when such services are needed, as discussed below. Thus minimum staffing requirements may set the actual level of nursing care other than skilled nursing care permitted in a facility if that is all the staff the facility has.

An ICF I and an ICF II are facilities providing accommodations and board and "nursing care and related services" for individuals "who are ill, injured, or disabled but not in need of hospital care, but who . . . require such nursing care." Laws 1985, LB 253, Section 4(6) and (7).

The level of care just above an ICF I is a SNF. It "is primarily devoted to providing to inpatients skilled nursing care and related services for patients who require medical or nursing care or rehabilitation services." Laws 1985, LB 253, Section 4(5).

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The level of care just below an ICF II is an ICF III. It provides "accommodation, board and nursing care" for "individuals who are ill, injured, or disabled but not in need of hospital care, but who . . . need care and assistance in taking their medication." Laws 1985, LB 253, Section 4(8).

Thus the "nursing care" permitted in an ICF I and an ICF II is less than the "skilled nursing care" permitted in a SNF and more than the nursing care specified as "assistance in taking their medication" needed by individuals in an ICF III.

The "practice of nursing" is defined in Neb.Rev.Stat. §71-1,132.05(3) (Reissue 1981). The "practice of nursing by a registered nurse" is defined in Neb.Rev.Stat. §71-1,132.05(4). It includes "[e]xecuting diagnostic and therapeutic regimens prescribed by duly licensed practitioners" and "[a]dministering, supervising, delegating and evaluating nursing activities." The "practice of nursing by a licensed practical nurse" is defined in Neb.Rev.Stat. §71-1,132.05(5). It includes "the assumption of responsibilities and the performing of acts, within the educational background of the practical nurse." Such practice must be "under the direction of a licensed physician, dentist, osteopath, podiatrist, or registered nurse." (Emphasis added.) Id. Thus, by definition a LPN cannot be the nurse in charge of an ICF facility.

Accordingly the distinction between the "skilled nursing care" permitted in a SNF and the "nursing care" permitted in an ICF I and an ICF II is not defined by the difference in the scope of practice of the persons who may be in charge. It also follows that a RN cannot practice the full scope of her practice in an ICF I or there will be no distinction between "skilled nursing care" and "nursing care."

Neither "skilled nursing services" nor "nursing services" is defined in the Nebraska statutes. However, both terms have acquired a usual and ordinary meaning within the nursing home industry from the definitions in the regulations governing certification as a SNF or an ICF for participation in the Medicare and Medicaid programs because most nursing homes are so certified. In the absence of anything to indicate the contrary, words in a statute will be given their ordinary meaning. See, Kellogg Co. v. Herrington, 216 Neb. 138, 144, 343 N.W.2d 326 (1984).

"Skilled nursing services" and "skilled rehabilitation services" are defined in 42 CFR §409.31 of those federal regulations. They are services that:

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1. Are ordered by a physician.
2. Require the skills of technical or professional personnel such as registered nurses, licensed practical nurses, physical therapists, occupational therapists, and speech pathologists or audiologists.
3. Are furnished directly by or under the supervision of such personnel.
4. Must, as a practical matter, be provided only in a SNF, on an inpatient basis.

The beneficiary must require skilled nursing or skilled rehabilitation services, or both, on a daily basis. Those services must be furnished for a condition for which the beneficiary received inpatient hospital services or which arose while the beneficiary was receiving care in a SNF or swing-bed hospital for a condition for which he or she received inpatient hospital services.

The criteria for such services are set out in 42 CFR §409.32:

1. The service must be so inherently complex that it can be safely and effectively performed only by, or under the supervision of, professional or technical personnel.
2. A condition that does not ordinarily require skilled services may require them because of special medical complications.
3. A patient may need skilled services to prevent further deterioration or to preserve current capabilities even if full recovery or medical improvement is not possible.

Specific services which are either skilled or skilled rehabilitative are set out in 42 CFR §409.33(a), (b), and (c). Specific services which are not skilled services unless there are special medical complications are set out in 42 CFR §409.33(d). It follows that they are nursing services which may be provided in an ICF.

42 CFR §409.34 requires that skilled nursing services or skilled rehabilitation services must be needed and provided seven days a week unless not available seven days a week. Then those services must be needed and provided at least five days a week. 42 CFR §405.1124 requires a SNF to have "an organized nursing service" with a sufficient number of qualified nursing personnel to meet the total nursing needs of all patients in the facility. The facility must provide 24 hour service by licensed nurses,

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including the services of a registered nurse at least during the day tour of duty seven days a week. (Note the waiver in 42 CFR §405.1911(a) of the seven day registered nurse requirement when a facility is located in a rural area and other conditions are met.)

Under 42 CFR §442.340 an ICF must have responsible staff members on duty and awake 24 hours a day to take prompt appropriate action in case of injury, illness, fire or other emergency. Under 42 CFR §442.342 an ICF must provide nursing care for each resident as needed, including restorative nursing care that enables each resident to achieve and maintain the highest possible degree of function, self care and independence. Under 42 CFR §442.339, an ICF must have a registered nurse or a licensed practical nurse to supervise the ICF's health services full time, seven days a week, on the day shift. If the ICF employs a licensed practical nurse to supervise health services, the ICF must have a formal contract with a registered nurse to consult with the licensed practical nurse at regular intervals, but not less than four hours each week.

Under Laws 1985, LB 253, minimum staffing is the same for a SNF and an ICF I and includes 24 hour nursing services (a RN on the day shift seven days a week and a RN or LPN on the other two shifts). An ICF II must have a RN or LPN on the day shift seven days a week, but the balance of time may be covered by a CSM. Any SNF, ICF I and ICF II must have a RN as the Director of Nursing. There is no express requirement that an ICF III have a RN as the Director of Nursing, but there is a requirement of a LPN on the day shift seven days per week and the provision that the Health Service Supervisor may be a licensed practical nurse. (Neb.Rev.Stat. §71-1,132.05(5) requires such LPN to be under the direction of a licensee listed in that statute.)

Such minimum staffing is the least staff a facility must have to secure and maintain its license. However, having such minimum staff does not insure licensure if, for example, the needs of the residents are not being met. This may happen if there are more residents than such minimum staff can care for in a way that meets other standards. This may also happen if the facility admits any residents who have needs for nursing care beyond the scope of practice of the persons from such minimum staff actually on duty when such services are needed.

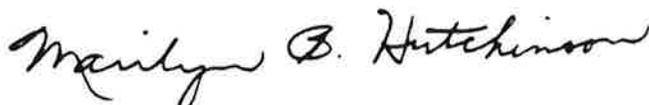
In conclusion, the maximum level of nursing care authorized for an ICF I is all nursing services that are not skilled nursing services to the extent that such nursing services are within the

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scope of practice of persons on duty when such services are needed. It is only within this context that the minimum staffing requirements ever set the maximum level of nursing care that can be provided in a nursing home.

Sincerely yours,

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APPROVED:

  
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