

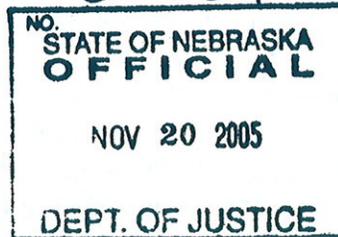


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#05015



SUBJECT: Applicability of the Medication Aide Act to Staff Members of Schools

REQUESTED BY: Dr. Douglas D. Christensen, Commissioner of Education
Dr. Joann Schaefer, Director, Regulation & Licensure

WRITTEN BY: Jon Bruning, Attorney General
Leslie S. Donley, Assistant Attorney General

You have requested our opinion with respect to the Medication Aide Act, Neb. Rev. Stat. §§ 71-6718 through 71-6742 (2003; Cum Supp. 2004), and its application to staff members in Nebraska schools. In your opinion request letter you indicate that while there is no apparent conflict on the face of the regulations promulgated by each of your respective agencies, there exists a longstanding disagreement between your agencies with respect to "the statutory language of Section 71-6723 R.R.S. and the application of the agency regulations that negatively impacts the ability of our respective agencies to communicate consistently with school staff across the state." Consequently, you have requested our "opinion regarding appropriate interpretation of Section 71-6723 R.R.S. and [our] direction as to which staff members of a school, under the Act, are required to receive a competency determination prior to providing medication." Our response to your inquiry is set forth below.

BACKGROUND

The Medication Aide Act (the "Act") was enacted in 1998 with the passage of LB 1354,¹ and became effective July 1, 1999. Under the Act, both the Nebraska Department of Education ("NDE") and the Department of Health and Human Services Regulation and Licensure ("HHSR&L") were authorized to adopt and promulgate regulations. HHSR&L subsequently promulgated two sets of regulations: Title 172, *Nebraska Administrative Code*, Chapter 95, "Regulations Governing the Provision of Medications by Medication Aides and Other Unlicensed Persons" and Title 172, *Nebraska Administrative Code*, Chapter 96, "Medication Aide Registry." NDE promulgated Title 92, *Nebraska Administrative Code*, Chapter 59, "Regulations for School Health and Safety." We note that both agencies have amended their regulations since their original adoption dates. Further, while the Act itself has been revised in subsequent legislative years, no substantive language with respect to staff members of schools has been added or repealed.

You indicate that NDE has interpreted the Act, and in particular § 71-6723, as requiring staff members of schools to undergo competency assessment only when providing medication via additional routes or by PRN. "Additional routes" are those routes not listed in subsection (1) of § 79-6723, i.e. oral, inhalation, topical and instillation into the eyes, ears, and nose. "PRN" is defined as an "administration scheme in which a medication is not routine, is taken as needed, and requires assessment for need and effectiveness." See § 71-6721(20).

HHSR&L, on the other hand, believes this interpretation is too narrow, and disregards the language in § 71-6739, which provides, in relevant part:

On and after July 1, 1999, no person, facility, or school shall use or employ any individual to provide medications to a recipient unless the individual is a medication aide registered under the Medication Aide Act or is otherwise authorized to administer or provide medication, except that . . . a school may use or employ a staff member of a school determined to be competent under the act.

HHSR&L has interpreted this language as requiring a competency determination for all individuals. Finally, you state:

¹ The Act was originally introduced in the 1997 legislative session in Legislative Bill 783, and was subsequently amended into Legislative Bill 1354 during the 1998 session.

HHSR&L further believes that Section 71-6725 R.R.S. subsection (1) sets out the minimum competencies required for all individuals, and subsection (2) authorizes HHSR&L to set the minimum standards for those competencies, and subsection (2) authorizes NDE only to set methods for competency assessment for school staff members.

ANALYSIS

The statute at the center of this debate, Neb. Rev. Stat. § 71-6723 (2003), provides:

(1) A medication aide, a person licensed to operate a child care facility or a staff member of a child care facility, or a staff member of a school may provide routine² medications by the following routes: (a) Oral; (b) inhalation; (c) topical; and (d) instillation into the eyes, ears, and nose.

(2) A medication aide, a person licensed to operate a child care facility or a staff member of a child care facility, or staff member of a school may provide medication by additional routes not listed in subsection (1) of this section, provide PRN medication, or participate in observing and reporting for monitoring medications only under the following conditions:

(a) A determination has been made by a competent individual, a caretaker, or a licensed health care professional and placed in writing that the medication aide, person licensed to operate a child care facility or staff member of a child care facility, or staff member of a school is competent to perform these activities; and

(b) It has been determined by a licensed health care professional and placed in writing that these activities can be done safely for a specified recipient.

Direction for additional routes not listed in subsection (1) of this section must be for recipient-specific procedures and must be in writing. Direction for PRN medication must be in writing and include the parameters for provision of the PRN medication. Direction for observing and reporting for monitoring medication must be in writing and include the parameters for the observation and reporting. A medication aide, a person licensed to operate a child care facility or a staff member of a child care facility, or a staff

² Under the Act, "routine, with reference to medication, means the frequency of administration, amount, strength, and method are specifically fixed" See Neb. Rev. Stat. § 71-6721(22).

member of a school acting under this subsection shall comply with the written directions. Subdivision (b) of this subsection does not apply to nonprescription drugs when direction and monitoring is done by a competent individual for himself or herself or by a caretaker.

Clearly, subsection (1) allows a medication aide, a person licensed to operate a child care facility, a staff member of a child care facility or a staff member of a school to administer routine medication by four defined routes: oral, inhalation, topical or instillation into the eyes, ears, and nose. Subsection (2) indicates that those same individuals may provide medication by additional routes not listed in subsection (1) above, by PRN, or may participate in observing and reporting for monitoring medications only if certain conditions are met. Those conditions include a determination by a competent individual, a caretaker, or a licensed health care professional that the individual is *competent* to perform the activities, and a determination by a licensed health care professional that the activities can be done safely for a specified recipient. Subsection (2)(b) further sets out additional requirements: (i) Direction for additional routes (not listed in subsection (1)) must be "for recipient-specific procedures"; (ii) direction for PRN medication must include the parameters for provision; (iii) direction for observing and reporting for monitoring medication must set forth the parameters for the observation and reporting; and (iv) all of the aforesaid directions must be in writing.

Standing alone, § 71-6723 could be read to support the current practice adopted by NDE that requires a staff member of a school to undergo a competency determination only when that individual administers medication by alternate routes not listed in subsection (1), by PRN or when participating in monitoring medications. However, it could also be argued that § 71-6723 merely provides the conditions that must be met in order to provide medication via the additional methods, with the underlying assumption that these individuals possess, at the very least, a minimum level of competency to administer or monitor any medications. We believe that since an obvious ambiguity exists in the construction of § 71-6723, an examination of its legislative history becomes necessary.

LEGISLATIVE HISTORY

One of the fundamental principles of statutory construction is to attempt to ascertain the legislative intent and to give effect to that intent. *Spence v. Terry*, 215 Neb. 810, 814, 340 N.W.2d 884, 886 (1983). We find that the legislative history, particularly committee hearing testimony from two of the bill's proponents, sheds light on what the Legislature intended when it enacted this legislation. For example, then-Director of HHSR&L, Deb Thomas, offered the following statement in her introduction of LB 783:

Currently, the statutes have two different schemes for assistive personnel who provide medications. They are both regulated by different processes and they are restricted to certain settings and, of course, there's no overlap.

This repeal . . . this bill would repeal those current statutes and, instead, put in place a regulatory approach that will cross all settings. Basically, the bill defines medication administration as a comprehensive activity that provides three components. The first one is providing medication according to the five rights³. . . . The second component of providing medication is recording the medication provision. . . . The third component of medication administration is to observe and monitor for any adverse reactions, side effects, interactions, et cetera. . . . Well, what this bill calls for is the creation of a medication aide who would be able to do number one and number two. They'd be able to give medicines if they are oral, topical, installation in the ear, eye, nose, and record it properly. They'd have to show competencies that they could meet the five rights and that they could document accurately. They could do this by simply passing a test and, again, trying not to be terribly prescriptive in requiring a particular curriculum or requiring a particular test because different people are at different levels of their competence depending upon what facility they work in, and so it's hard to say one curriculum is necessary. But if they show a competency in that regard that they can prove the five rights, they know how to appropriately give the five rights and the routes and how it's done and record it properly, then they would be able to be eligible to put on a central registry, not unlike what we have right now for our two other categories of medication assistants.

Committee Records on LB 783, 95th Leg., 1st Sess., 69-70 (February 13, 1997) (emphasis added). We also find persuasive the testimony of Ann Oertwich, who spoke on behalf of the Nebraska Nurses Association. Ms. Oertwich stated:

. . . I was one of the committee members who was on the Partnership work team who looked at this particular issue and so I feel that I've got a pretty good grasp on how it works. And NNA [Nebraska Nurses Association] does support what this bill is doing as it begins that process of streamlining levels of unlicensed care providers. Specifically, what we're looking at with this bill is medication administration and, again, it sets a minimum standard for competence of any individual that is involved in the medication administration process. . . . One of the things that we really sought when we worked on this particular piece of legislation was some sort of minimum standard of competency that would go across all settings.

³ The "five rights" means getting the right drug to the right recipient in the right dosage by the right route at the right time. See Neb. Rev. Stat. § 71-6721(9).

Id. at 76 (emphasis added). We believe this testimony indicates a legislative intent to require that all persons administering medicines under the Act be deemed competent to do so.

Our conclusions are further supported when all of the statutes in the Medication Aide Act are construed together. When considering a series or collection of statutes pertaining to a certain subject matter which are *in pari materia*, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible. *Forget v. State Board of Public Accountancy*, 265 Neb. 488, 494, 658 N.W.2d 271, 276 (2003). With this in mind, we find the following provisions of the Act relevant to our discussion:

The Legislature finds that the administration of medications by persons other than oneself or one's caretaker should be a regulated act and there is a need to define a system to safely assist individuals to take medications who do not have the ability to take medications independently. The Medication Aide Act sets forth provisions of such a system.

Neb. Rev. Stat. § 71-6719.

The purposes of the Medication Aide Act are to ensure the health, safety, and welfare of the public by providing for the accurate, cost-effective, efficient, and safe utilization of medication aides to assist in the administration of medications by (1) competent individuals, (2) caretakers who are parents, foster parents, family, friends or legal guardians, and (3) licensed health care professionals. The act applies to all settings in which medications are administered except the home.

Neb. Rev. § 71-6720.

The minimum competencies for a medication aide, a person licensed to operate a child care facility or a staff member of a child care facility, or a staff member of a school shall include (a) maintaining confidentiality, (b) complying with a recipient's right to refuse to take medication, (c) maintaining hygiene and current accepted standards for infection control, (d) documenting accurately and completely, (e) providing medications according to the five rights, (f) having the ability to understand and follow instructions, (g) practicing safety in application of medication procedures, (h) complying with limitations and conditions under which a medication aide may provide medications, and (i) having an awareness of abuse and neglect reporting requirements and any other areas as shall be determined by rules or regulations.

Dr. Douglas D. Christensen
Dr. Joann Schaefer
Page 7

Section 71-6725(1). Finally, § 71-6739 states, in part:

On and after July 1, 1999, no person, facility, or school shall use or employ any individual to provide medications to a recipient unless the individual is a medication aide registered under the Medication Aide Act or is otherwise authorized to administer or provide medication, except that . . . a school may use or employ a staff member of a school determined to be competent under the act.

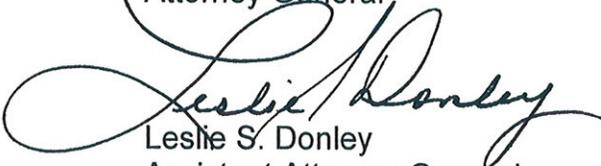
CONCLUSION

In view of the foregoing, we believe that the Medication Aide Act was a legislative attempt to regulate unlicensed individuals who administer medication or who participate in monitoring medications. We further believe that the Act requires that staff members of schools be assessed to determine whether they possess a minimum level of competency to perform the activities listed therein. While our conclusion may be a departure from the NDE's current interpretation, we note that the rulemaking authority relating to the competency assessment of school staff members continues to rest with the Department of Education. As we see it, NDE's promulgated assessment may be as minimal as feasible, as long as the minimum competencies are addressed and met.

Alternatively, in light of our conclusion herein, the NDE may wish to seek remedial legislation with respect to the duties of school staff members under the Act.

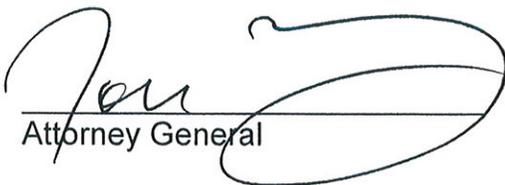
Sincerely,

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Approved by:



Attorney General

