

LETTER OPINION
93-L-294

October 19, 1993

Dr. Jon R. Rice
State Health Officer
State Capitol
Bismarck, ND 58505-0200

Dear Dr. Rice:

Thank you for your letter regarding the State Department of Health and Consolidated Laboratories' role in the establishment and operation of a nurse aide registry.

Under federal law, a state must meet certain requirements relating to "skilled nursing facilities" and "nursing facilities" for purposes of Medicare and Medicaid participation. See 42 U.S.C.A. ?? 1395i-3(e) and 1396r(e). One such requirement is for the establishment and maintenance of a nurse aide registry of all individuals who have satisfactorily completed a specified nurse aide training and competency evaluation program or a nurse aide competency evaluation program. Id. The federally required registry must provide for the inclusion of specific documented findings by a state of resident neglect or abuse or misappropriation of resident property involving an individual listed on the registry. Id. Further, the state must provide for a process for the receipt and timely review and investigation of allegations of neglect and abuse and misappropriation of resident property by a nurse aide through the state agency responsible for the survey and certification of nursing facilities . 42 U.S.C.A. ?? 1395i-3(g)(1)(c) and 1396r(g)(1)(c).

The Health Care Financing Administration within the Federal Department of Health and Human Services has adopted rules surrounding the requirements for states and long term care facilities for Medicare and

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Medicaid participation purposes. See 42 C.F.R. pt. 483. All skilled nursing facilities and nursing facilities must report all "alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source, and misappropriation of resident property" as well as the "results of all investigations" to the State survey and certification agency. 42 C.F.R. ? 483.13(c)(2) and (4). Furthermore, the regulation dealing with the operation of the nurse aide registry, provides that "[t]he State may contract the daily operation and maintenance of the registry to a nonstate entity. However, the State must maintain accountability for overall operation of the registry and compliance with these regulations. [Additionally], [o]nly the State survey and certification agency may place on the registry findings of abuse, neglect, or misappropriation of property." 42 C.F.R. ? 483.156(b).

In North Dakota, the State Department of Health and Consolidated Laboratories, as the state entity responsible for licensing most health institutions under N.D.C.C. ? 23-16-03, is the state survey and certification agency. See 42 U.S.C.A. ?? 1395aa and 1396a(a)(33). Agreements with the Secretary of Health and Human Services as well as agreements or memorandums of understanding between the State Health Department and the State Department of Human Services, as the designated state agency to administer the medical assistance program, see 42 U.S.C.A. ? 1396a(a)(5) and N.D.C.C. ?? 50-06-05.1(1) and 50-24.1-01.1, have been reached to facilitate this role of the State Health Department. See generally N.D.C.C. ? 23-01-11.

You indicate that the State Health Department has from the start assumed responsibility for establishing and maintaining a nurse aid registry for Medicare and Medicaid participation purposes. An agreement between the State Department of Human Services and the State Department of Health and Consolidated Laboratories was entered into in 1989 for the Health Department to establish and maintain a nurse aide registry for purposes of medical assistance. See 42 U.S.C.A.

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? 1396r(e)(2). You indicate that the State Health Department initially contracted with the North Dakota Board of Nursing to establish and manage the nurse aide registry but that all investigation of allegations of abuse, neglect and misappropriation of resident property were and are conducted by the Department directly. You indicate that the Department decided not to renew the contract with the Board of Nursing in July of 1992.

In 1991, the North Dakota Legislature amended North Dakota Century Code ch. 43-12.1 giving the Board of Nursing regulatory authority over "assistants to the nurse" as well as establishing under the Board of Nursing a registry of each person meeting the definition of an assistant to the nurse. See 1991 N.D. Sess. Laws ch. 453. Your questions essentially ask what effect these legislative changes have on the Department of Health's authority and obligation to ensure that a nurse aide registry meeting the federal requirements is maintained.

As alluded to above under the federal requirements a process for the receipt and timely review and investigation of allegations of neglect, abuse, and misappropriation of resident property by nurse aides must be established through the agency responsible for survey and certification of nursing facilities. 42 U.S.C.A. ?? 1395i-3(g)(1)(c) and 1396r(g)(1)(c). Although any state agency may maintain and operate the registry and conduct investigations into alleged incidents of abuse, neglect, or misappropriation by nurse aides, only the survey and certification agency may place findings of abuse, neglect or misappropriation on the registry. 42 C.F.R. ? 483.156(b)(2). Further the state survey and certification agency must receive reports of alleged incidents of abuse, neglect, or misappropriation from the long term facilities in which the alleged incidents have occurred. 42 C.F.R. ? 483.13(c)(4). No provisions for these requirements were contained in the 1991 or subsequent amendments to North Dakota Century Code ch. 43-12.1.

In your letter you suggest that the regulatory authority of the Board of Nursing over "assistants of the nurse" (defined in N.D.C.C. ? 43-12.1-02(1) as persons performing functions delegated and supervised by a licensed nurse) does not extend to all persons

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who are defined as nurse aides for federal purposes which includes all persons providing nursing or nursing related services regardless of whether or not such activities are delegated and supervised by a licensed nurse. 42 U.S.C.A. ?? 1395i-3(b)(5)(F) and 1396r(b)(5)(F). Additionally, you point out a number of statutory and administrative provisions of the Board of Nursing which appear at odds with the federal requirements. Pertinent, I believe, is N.D. Admin. Code ? 54-07-01-01 relating to the Board of Nursing's statement of intent regarding its administrative rules governing assistants to the nurse:

The 1991 legislative assembly enacted legislation declaring that it is the policy of the state to regulate through the board of nursing the practice of nursing, those engaged in licensed nursing practice, and those persons who assist in the practice of nursing. Other governmental agencies, through implementation of federal standards and regulation, may also be charged with the regulation of those who assist in the practice of nursing and specific health care agencies, and it is the intent of the board to recognize other state registries that may exist, rather than duplicating those services.

Given the above, it is my opinion that the authority that is given to the board of nursing to regulate and maintain a registry of assistants to the nurse is not intended to displace the Health Department's authority to establish and maintain a nurse aide registry meeting the federal Medicare and Medicaid requirements. N.D.C.C. ? 23-01-11(2) provides that the "state department of health and consolidated laboratories may . . . [a]dopt rules necessary to enable the state to be in compliance with any federal laws in order to qualify for any federal funds related to medical facilities or agencies licensed by the [Department]." This provision clearly grants to the Department the authority as well as the obligation to establish by rule a nurse aide registry meeting the federal requirements. The Department may, but is not required to, contract with the Board of Nursing to perform some of the daily operation and maintenance of the registry. If the department cannot reach an agreement with the Board of Nursing to carry out some of the delegatable responsibilities otherwise borne by the Department, it is my opinion that the Department must maintain and operate a separate and independent registry which meets the federal requirements for states in order for North Dakota providers to be

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eligible to participate in Medicaid and Medicare.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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