

LETTER OPINION
94-L-57

March 14, 1994

Honorable Harvey D. Tallackson
State Senator
53 West 5th Street
Grafton, ND 58237

Dear Senator Tallackson:

Thank you for your letter concerning the Interstate Residency Agreement signed by the North Dakota Department of Human Services and the Minnesota Department of Human Services.

You first ask whether the Interstate Residency Agreement covers veterans in veterans' homes who are receiving benefits under the Medicaid program. An Interstate Residency Agreement is authorized by federal regulation. 42 Code of Federal Regulations (C.F.R.) ? 435.403(k). See Interstate Residency Agreement, p. 1. In the absence of such an agreement, federal regulations require a state agency to provide Medicaid benefits to eligible residents, "including residents who are absent from the State." 42 C.F.R. ? 435.403(a). The state which places an individual in a nursing facility of another state, excluding situations where the individual makes an independent decision to move, is considered to be the individual's state of residence. 42 C.F.R. ? 435.403(e). If an individual intends to return to his or her state of origin, that state is specifically prohibited from denying Medicaid eligibility because the individual has not resided in the state for a period of time or because of the individual's temporary absence from the state, except where another state has determined that the individual is a resident of that state for purposes of Medicaid. 42 C.F.R. ? 435.403(j).

A written agreement between states to resolve cases of disputed residency may use different criteria from that generally applicable under 42 C.F.R. ? 435.403, except the specific prohibitions of paragraph (j) may not be violated and the agreement must prevent

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affected individuals from losing residency in both states. 42 C.F.R. ? 435.403(k). The Interstate Residency Agreement between North Dakota and Minnesota provides a number of alternative rules for determining residency between North Dakota and Minnesota for medical assistance purposes. Paragraphs 2 through 6 provide:

2. An individual who immediately prior to admission to a Minnesota nursing facility would otherwise be considered to be a resident of North Dakota continues to be a North Dakota resident if:

a. The individual has a community spouse who resides in North Dakota; or

b. The individual was placed by North Dakota in a Minnesota nursing facility.

3. An individual who continues to be a North Dakota resident because the individual has a community spouse who resides in North Dakota remains a resident of North Dakota for at least twenty-four months following admission to a Minnesota nursing facility and thereafter for so long as a Minnesota state or local government agency has not assumed responsibility for the individual's care and the individual has a community spouse who resides in North Dakota.

4. An individual who continues to be a North Dakota resident because the individual was placed by North Dakota in a Minnesota nursing facility remains a resident of North Dakota for at least twenty-four months following admission to a Minnesota nursing facility and thereafter for so long as a Minnesota state or local government agency has not assumed responsibility for the individual's care.

5. An individual who immediately prior to admission to a Minnesota nursing facility otherwise would be considered a North Dakota resident, but who has no community spouse residing in North Dakota and was not placed in a Minnesota nursing facility by North Dakota, continues to be a North Dakota resident for twenty-four months following the date of admission or until such time as a Minnesota state or local government agency assumes

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responsibility for the individual's care, whichever occurs first.

6. An individual who immediately prior to admission to a North Dakota nursing facility otherwise would be considered to be a resident of Minnesota continues to be a Minnesota resident if:

a. The individual has a community spouse who resides in Minnesota; or

b. The individual was placed by Minnesota in a North Dakota nursing facility.

Similar provisions exist for Minnesota residents.

Nothing in the above-noted Interstate Residency Agreement between Minnesota and North Dakota excludes operation of the residency rules to veterans who are in veterans' homes. Further, nothing in the statutory and regulatory provisions surrounding the medical assistance program excludes veterans in veterans' homes from the operation of interstate residency agreements.

Therefore, it is my opinion that the Interstate Residency Agreement between North Dakota and Minnesota will cover veterans in veterans' homes who are receiving benefits under the state Medicaid program.¹

Your next question asks whether a patient, who has been placed by the patient's state of residence in a nursing facility located in another state which is a party to the agreement, maintains his or her original residency for benefit purposes beyond the two-year period specified in the agreement if the state in which the patient has been placed does not assume responsibility for paying Medicaid benefits.

The Interstate Residency Agreement is designed to meet each state's requirements under the Medicaid program to provide medical assistance to eligible residents of the state by defining who is a resident for purposes of the state Medicaid program. Under paragraphs 4 and 8 of the agreement, the states are agreeing to treat individuals as residents of their state of origin for at least 24 months after they have been placed by the state in a nursing facility in the other state and

¹It is my understanding, however, that currently no Minnesota veterans' home is MA certified.

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thereafter so long as the other state has not assumed responsibility for that individual's care under the Medicaid program because "a quick and certain determination of the state of residence is necessary to assure timely provision of and payment for nursing facility services for eligible medical assistance recipients." Interstate Residency Agreement, p. 1. By this agreement, individual patients have immediate access to treatment while the states have two years to determine actual residency for Medicaid purposes. The point at which the other state "assumes responsibility for the individual's care" after the initial 24 months is presumably when residency is affirmatively established in that state.

Generally, in the absence of an interstate agreement stating otherwise, individuals over the age of 21 and capable of indicating intent are residents of "the State where the individual is living with the intention to remain there permanently or for an indefinite period" for Medicaid purposes. 42 C.F.R. ? 435.403(i)(4). However, pursuant to 42 C.F.R. ? 435.403(k), North Dakota and Minnesota have agreed that an individual's residency for Medicaid purposes continues to be that individual's original state despite the individual's intent to change residence permanently to the other state, at least for a period of 24 months.

This agreement for Medicaid purposes does not, however, change an individual patient's right to change his or her state of residence generally. Under North Dakota law, a person can have only one legal residence. N.D.C.C. ? 54-01-26(2). The residence is "the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose." N.D.C.C. ? 54-01-26(1). A person's legal residence is changed only by the union of act and intent. N.D.C.C. ? 54-01-26. A person can remain a North Dakota resident despite having temporarily moved out of state for employment, and having obtained a driver's license and vehicle registration from another state, if the person intends to remain a legal resident of North Dakota. Habberstad v. Habberstad, 444 N.W.2d 703, 705 (N.D. 1989). Minnesota law is similar. See Mathey v. Commission of Revenue, 468 N.W.2d 548, 549 (Minn. 1991).

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In light of the general law of both North Dakota and Minnesota that residency and domicile are determined by an individual's act and intent, and the general rules for determining residency for Medicaid purposes outlined in 42 C.F.R. ? 435.403, it is my opinion that an individual may continue to be a resident of his or her home state for Medicaid purposes beyond a two-year period if that individual intends to remain a resident of his or her home state. It is my further opinion that such an individual may choose to unify act and intent to move to the other state, but that such a change of residence does not affect the original state's duty under paragraphs 4 and 8 of the agreement regarding that individual for purposes of Medicaid for the first 24 months of residency in a nursing facility of the other state under the Interstate Residency Agreement.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

tca/pg
cc: Wayne J. Anderson