17.0776.01000

# FISCAL NOTE

**Requested by Legislative Council**
**01/10/2017**

Bill/Resolution No.: HB 1215

1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

| | 2015-2017 Biennium | | 2017-2019 Biennium | | 2019-2021 Biennium | |
|---|---|---|---|---|---|---|
| | General Fund | Other Funds | General Fund | Other Funds | General Fund | Other Funds |
| Revenues | | | | | | |
| Expenditures | | | | | | |
| Appropriations | | | | | | |

1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

| | 2015-2017 Biennium | 2017-2019 Biennium | 2019-2021 Biennium |
|---|---|---|---|
| Counties | | | |
| Cities | | | |
| School Districts | | | |
| Townships | | | |

2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

This bill amends subsection 23-09.3-01 of the North Dakota Century Code and expands the definition of a basic care facility.

B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

No fiscal impact is expected.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation or a part of the appropriation is included in the executive budget or relates to a continuing appropriation.*

**Name:** Jennifer Scheet
**Agency:** Department of Human Services
**Telephone:** 328-4608
**Date Prepared:** 01/13/2017

**2017 HOUSE HUMAN SERVICES**

**HB 1215**

# 2017 HOUSE STANDING COMMITTEE MINUTES

**Human Services Committee**
Fort Union Room, State Capitol

HB 1215
1/17/2017
26972

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature Judy Kepple

**Explanation or reason for introduction of bill/resolution:**

Relating to the definition of basic care facility.

**Minutes:** 1,2,

Chairman Weisz: called the committee to order.
Attendance taken
Chairman Weisz: Opened the hearing on HB 1215

Chairman Weisz: Presented HB 1215
I am here in support of this bill It gives them more flexibility in sharing staff. I think anything we can do that allows them to save money without effecting quality of care we should do.

Vice Chairman Rohr: Are there any questions for Chairman Weisz?

Vice Chairman Rohr: Any one else in support of HB 1215?
3:48
Shelly Peterson, President of ND Long Term Care Association
(Attachment 1, 2, )
9:39
Chairman Weisz: Questions for Shelly?

Representative Skroch: If we make these changes in the wording that is suggested here on HB 1215, will that encourage the facilities that closed to reopen?

Shelly: I don't know. They asked us to bring the legislation forward so they would have the option to reconsider. Because many of the residents had to leave the communities, because of the loss of services they probably will not come back. I really don't know, but this was such a major barrier. It might give them reason to reconsider. The legislation would not be effective until August 1, so they have time.

Representative Skroch: If we are able to get this legislation passed, I understand the need for basic care. Sometimes they begin in basic care and then transition into the skilled care. That means that you would be better able to predict being able to fill the skilled beds. You

would know there were some coming up that would eventually need skilled care. Do you have any concern that in some of these facilities that staff might be overwhelmed if there were many different situations in basic care that would call them away from skilled care? Do you see any over extension of staff to accommodate that?

Shelly: It was never a quality of care and staffing that brought this forward. a care issue. They didn't have deficiencies in staffing. Each facility still needs to staff according to the needs of residents, so I don't believe that was an issue. They were properly staffed before and staff were going back and forth and then we found out it wasn't allowed.

Representative Schneider: If the problem is with CMS at the federal level and there isn't a change there does this bill still have an effect?

Shelly: We still have an issue with CMS and we are not predicting that we will ever be able to change that at this point in time. The problem is also a state issue because the state definition of basic care required that you had to have someone in the unit 24/7. CMS does not regulate basic care, so it was our own state definition that was causing the problem of not being able to share. CMS initially thought it a fraud issue. They we down in Hettinger doing a survey and they were observing the nurse going and giving the medication pass and she said to them that she was going down to the basic care unit for the med pass and they didn't know what basic care was and why she was in the unit. They thought she was committing fraud because that nurse left that unit and then where was her time charged for the 15 minutes that she was down there. Through the correspondence that I Have given you you will see that they determined there was no fraud and that we are properly allocating, but we still need to go back to the state and meet the licensure requirements on staffing. It would be very helpful to expand that definition. That is our main barrier now.

Representative McWilliams: Are there specific staffing ratios that this would still fall under? If you had 20 beds in basic care that they still have adequate staffing there, does this still fall under those staffing ratios?

Shelly: There are some states that have specific staffing ratios in nursing facilities. ND does not have any set staffing ratios for nursing facilities in basic care or assisted living. We are a state that says you must provide sufficient staffing to meet the needs of your residents. So each facility individually determines that staffing ratio, but we don't have set ratios.

Representative McWilliams: Does that issue ever come up? Do we have a problem with that here in ND?

Shelly: Staffing is our biggest problem. Spent over $20,000,000 on contract staff trying to meet the needs of residents. Also we have over 70% of nursing homes dependent upon contract staff. So staffing in and of itself is a significant issue. What happened before was that we would actually stop admissions because we didn't have sufficient staff, so that we wouldn't get ourselves into quality of care issues. Facilities will find themselves having issues here and there when someone calls in sick or we have a blizzard and we can't actually get people in. They know they must manage those and plan for those times, but periodically we have been very challenged trying to make sure we don't have quality of care issues, but they work really hard.

Vice Chairman Rohr: Which staff are you speaking about, nurses, CNAs? Also would there be any cross training requirement?

Shelly: CNAs are our greatest challenged. The hands on staff are the ones we do the most contract nursing with. Nurses are absolutely second. If someone is working in a nursing facility as a cna they must meet the standard as a certified nurse assistant which means they have to complete the minimum 75 hour training course and be certified and pass a national exam and clinical exam. If they spend one night working in a nursing facility they must meet that standard. In basic care you need to be a nurse assistant, so you don't need to meet the 75 hours. If they only hire certified staff they are qualified for both.

Representative Skroch: I think you are touching on the very question I was trying to get to the bottom of. We are already stretched in terms of staff and then we add on yet that additional set of duties. Is that just one more thing that would take more time for them to perform their tasks in the skilled care and then also be asked to cover the basic care.

Shelly: Hopefully at the end of the day they will look at the resident's needs in both facilities and staff accordingly. Yes, staff will be called upon to work on both sides and meet all the needs of all residents and should we find ourselves short, it is everyone coming to help. Nurses might be doing cna duties at times. One of the new CMS requirements, we have 800 pages of requirements that started to be implemented in November. One of them is that each facility needs to do a facility assessment now beginning in 2017. Part of that facility assessment is: what are your challenges; how are you meeting them; how are you meeting the staffing. So facilities really have to plan and determine and find sufficient staff to meet the needs no matter what that is. So there are some that closed those units. Did they reduce staffing? Did they not have to hire more staff? Did they not have to hire contract staff? Was it that luxurious, probably not. They probably pay a lot of overtime. At the end of the day we have to meet their needs.

Vice Chairman Rohr: Would you make that a hiring requirement of staff then? In other words if you hired a nurse or a cna or a cma would you hire with them knowing that they will be working in both facilities? Would there be a change in hourly rate depending on where they are working?

Shelly: Yes, when you hire them they would be informed and there would be a clause that says they will help as needed. Pay and benefits would be different between skilled and basic, but they are employed by the skilled facility and their pay scale would be the same.

Chairman Weisz: Are there further questions? Seeing none, thank you Shelly.
Is there further support for HB 1215?
Chairman Weisz: Is there anyone here in opposition to HB 1215?

Seeing none close hearing on HB 1215.

Hearing closed.

# 2017 HOUSE STANDING COMMITTEE MINUTES

**Human Services Committee**
Fort Union Room, State Capitol

HB 1215
1/17/2017
26976

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature Judy Kopple

**Explanation or reason for introduction of bill/resolution:**

Relating to the definition of basic care facility.

**Minutes:**

Chairman Weisz: reopened the hearing on HB 1215

Representative P. Anderson: I just have a question about the health department. How do they decide about what is right or what is not? Compared to CMS. This is not a CMS issue, it is a health department issue.

Chairman Weisz: The answer to that is yes and no. The health department in this case interpreted CMS as saying you guys can't do this anymore. So then the health department said that we can't do it. After the thing in Hettinger the health department said no we are not going to let you share staff. So that is what this bill is fixing. Because of what they thought was a CMS requirement, which doesn't appear to be the case.

Representative P. Anderson: So when the health department rules that is it?

Chairman Weisz: Yes, until we do this.

Representative P. Anderson: Well I think we should fix this.

Representative Westlind: I make a motion for a do pass on HB 1215.

Representative Porter: Second.

Chairman Weisz: We have a motion and a second for a do pass on HB 1215
Is there further discussion?

Representative McWilliams: I am just wondering if it is a problem that we are already short staffed and now we are adding this. I certainly see the need to do it for smaller facilities, but I am wondering if it will open the door for the understaffing.

Chairman Weisz: Representative McWilliams, this should help the problem. The reason I say that is because nursing homes already have to have nurses 24/7. Now you have a basic care facility that requires certain nursing functions. You don't have enough beds that you need to hire full time, you either have to hire someone in basic care when you already have nurses in the skilled facility. They are not constantly working, but they have to be on staff and there. So if the basic care needs something that takes 20 minutes you can make the time more efficient so in reality the demand for staff decreases. So I think it should help that problem.

Chairman Weisz: Is there any more discussion? Seeing none.
The clerk will call the roll for a do pass on HB 1215.

Roll call vote taken on a do pass on HB 1215

Motion carried: yes 13 No 0 Absent 1

Chairman Weisz: Motion carried. Do I have a volunteer to carry this bill?

Representative B. Anderson will carry this bill.

Meeting adjourned.

Date: 1-17-17
Roll Call Vote #: 1

**2017 HOUSE STANDING COMMITTEE**
**ROLL CALL VOTES**
**BILL/RESOLUTION NO.** HB 1215

House Human Services Committee

☐ Subcommittee

Amendment LC# or Description:

Recommendation: ☐ Adopt Amendment
☑ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐

Motion Made By Rep. Westlind Seconded By Rep. Porter

| Representatives | Yes | No | Representatives | Yes | No |
|---|---|---|---|---|---|
| Chairman Weisz | ✓ | | Rep. P. Anderson | ✓ | |
| Vice Chairman Rohr | absent | | Rep. Schneider | ✓ | |
| Rep. B. Anderson | ✓ | | | | |
| Rep. D. Anderson | ✓ | | | | |
| Rep. Damschen | ✓ | | | | |
| Rep. Devlin | ✓ | | | | |
| Rep. Kiefert | ✓ | | | | |
| Rep. McWilliams | ✓ | | | | |
| Rep. Porter | ✓ | | | | |
| Rep. Seibel | ✓ | | | | |
| Rep. Skroch | ✓ | | | | |
| Rep. Westlind | ✓ | | | | |
| | | | | | |
| | | | | | |

Total (Yes) 13 No 0

Absent 1

Floor Assignment Rep. B. Anderson

If the vote is on an amendment, briefly indicate intent:

## REPORT OF STANDING COMMITTEE

**HB 1215: Human Services Committee (Rep. Weisz, Chairman)** recommends **DO PASS** (13 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1215 was placed on the Eleventh order on the calendar.

**2017 SENATE HUMAN SERVICES**

**HB 1215**

# 2017 SENATE STANDING COMMITTEE MINUTES

**Human Services Committee**
Red River Room, State Capitol

HB 1215
3/13/2017
Job Number 29091

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature Marie Johnson

**Explanation or reason for introduction of bill/resolution:**

A bill relating to the definition of basic care facility.

**Minutes:** 2 Attachments

**Chair J. Lee:** Brought the hearing to order. All members were present.

**Representative Robin Wiesz, District 14 (0:20-1:50)** introduced the bill. It allows flexibility in sharing staff for basic care facility if its attached to a nursing home or assisted living facility, as long as the staff documents time spent in each.

**Chair J. Lee:** The department has a small problem because of a letter from CMS that says they can't do this.

**Rep. Wiesz:** That is correct, but the way the language is, it makes it clear. I know the feds had an issue with billing, concerned that the facility was not properly billing. We think we have that issue addressed.

**Shelly Peterson, President, ND Long Term Care Association (3:40-14:55) testified in favor, please see attachment #1.**

**Senator Clemens:** In the bill, what does attached mean?

**Ms. Peterson:** Physically in the same building. If a facility had 60 units, and decided to take 5 beds at the end of the hall and convert to basic care. We wouldn't want a free standing building to not have staff 24/7.

**Chair J. Lee:** A structure connected by a walkway wouldn't count.

**Ms. Peterson:** No, usually the small units are at the end of a hall, there are two requirements, they have to be contiguous, at least five beds.

**Bruce Kallis, Administrator, Augusta Place, former Administrator Good Samaritan Center in Mott, (16:20)** In 2001, we were able to convert beds, our census with skilled

nursing had dropped we were able to convert 6 beds to basic care; eventually we had 12. When we learned that we could no longer share staff between basic and skilled, we made the decision last July 1st to end our basic care beds, we had 1 person who needed to leave, we have a number of couples who stayed. I would encourage a do pass, we are willing to work with CMS, to be able to offer this is beneficial to small communities.

**Bruce Pritschet, Health Facilities Division Director, ND DoH (19:35-25:20) testified in opposition, please see attachment #2.**

**Senator Kreun:** What portion does the CMS pay in the small nursing facility?

**Mr. Pritschet:** I'm not sure, it changes, about 51% Medicaid.

**Senator Kreun:** The cost for the non-certified facility, what would that increase to in a small facility to meet the requirements of the federal government.

**Mr. Pritschet:** I don't know; the cost isn't something the Health Department gets involved in, the Human Services does the cost.

**Senator Piepkorn:** Is your main objection the possibility of a law suit from CMS?

**Mr. Pritschet:** Not a lawsuit, but losing the federal money that comes in. If they're not in compliance, they won't be certified, and they wouldn't get money.

**Senator Piepkorn:** Is quality of care an issue?

**Mr. Pritschet:** The potential that care could decrease is there, we haven't had episodes where this has happened.

**No Neutral testimony**

**Chair J. Lee:** Closed the hearing.

# 2017 SENATE STANDING COMMITTEE MINUTES

**Human Services Committee**
Red River Room, State Capitol

HB 1215
3/13/2017
Job Number 29102

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature Maura Johnson

**Explanation or reason for introduction of bill/resolution:**

A bill relating to the definition of basic care facility.

**Minutes:** No attachments

**Senator Anderson: I move do pass.**
**Senator Kreun: Second.**

**Chair J. Lee:** Bruce Pritschet brought in the Health Department amendments, CMS doesn't recognize this, it could leave one side with no staff, they have to inspect for this situation.

**Shelly Peterson, Long Term Care Association** (1:35-) we think the federal issue work out, change in state definition of basic care, that's where we found we had more problems than with the federal issue. Right now it requires 24/7 staff in that little unit, 1 and 2 people in the units, we were supposed to have staff in there 24/7. We wanted flexibility in the state definitions so that we're not tied to 24/7. We still have to work it out with the feds, but we feel confident.

**Senator Heckaman:** But we don't need the amendment.

**Ms. Peterson:** No. The amendment would make it null and void, it wouldn't help.

**Chair J. Lee:** Should we do something to differently describe 'attached to'?

**Ms. Peterson:** In the current rules, it has to be contiguous, and it has to be at least 5 beds.
**A discussion about attached to followed (4:00-6:35)**

**Senator Anderson:** By wordsmithing this, we're not accomplishing much. Our intention is to get ready for a change that will occur with the federal regulations. The State Health Department accredits nursing homes based on the contract with the CMS, as long as their requirements remain the way they are, the Health Department isn't going to accredit anybody who doesn't meet their requirements, that's what their contract says. As it says, follow state and federal regulations, at that point it will be good. We ought to go ahead with it as it is.

**V-Chair Larsen:** I remember when Mott closed, do you think by changing this, that will open opportunity to open again?

**Ms. Peterson:** Once we work out the federal issue, yes we hope so.

**Senator Kreun:** In Bruce's testimony, if we get 51% for the nursing home from CMS, and if we have full 5 bed non-certified area, and that's full pay that's not subsidized by CMS.

**Ms. Peterson: Basic care** has a personal care option, so we can get some federal funds form those, they're around 41%. Right now in rule, we're putting in all the dementia units, they must be staffed 24/7, but the funding source is different; we would never want to jeopardize that.

**Senator Kreun:** That was my next question, forgo CMS.

**Chair J. Lee:** We are the only state with basic care.

**A roll call vote was taken.**
**Motion passes 7-0-0**
**V-Chair Larsen: will carry**
**Chair J. Lee: Closed the hearing.**

Date: 3/13 2017

Roll Call Vote #: 1

## 2017 SENATE STANDING COMMITTEE
## ROLL CALL VOTES

**BILL/RESOLUTION NO.** 1215

Senate Human Services Committee

☐ Subcommittee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Sen. Anderson Seconded By Sen. Kreun

| Senators | Yes | No | Senators | Yes | No |
|---|---|---|---|---|---|
| Senator Judy Lee (Chairman) | X | | Senator Joan Heckaman | X | |
| Senator Oley Larsen (Vice-Chair) | X | | Senator Merrill Piepkorn | X | |
| Senator Howard C. Anderson, Jr. | X | | | | |
| Senator David A. Clemens | X | | | | |
| Senator Curt Kreun | X | | | | |

Total (Yes) _____ No _____

Absent _____

Floor Assignment Sen. Larsen

If the vote is on an amendment, briefly indicate intent:

## REPORT OF STANDING COMMITTEE

**HB 1215: Human Services Committee (Sen. J. Lee, Chairman)** recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1215 was placed on the Fourteenth order on the calendar.

**2017 TESTIMONY**

**HB 1215**

Att. 1
HB 1215
1-17-17

# Testimony on HB 1215

## Sharing of Staff between Nursing Homes and Basic Care

## January 17 2017

Good Morning Chairman Weisz and members of House Human Services. My name is Shelly Peterson, President of the North Dakota Long Term Care Association (NDLTCA). We represent 210 Assisted Living, Basic Care and Nursing Home Facilities across North Dakota. I am here to testify in support of HB 1215.

HB 1215 proposes to expand the definition of basic care, to better allow the option of basic care facilities connected to a nursing home or assisted living facility to share staff. After 16 years of facilities sharing staff, it was recently clarified by the Health Department that the definition of basic care requires staff to be present and in the specific unit 24/7. Thus you need a person every second of every day in the small basic care unit, even though the resident may not need assistance. The basic care regulations requires there be one person available and on duty 24 hours per day. For years this was never an issue, because staff were always available to help, residents and facilities didn't give it a second thought.

A year ago we had 21 basic care facilities co-located with a nursing home, of these 21 basic care facilities, there are 17 that are impacted by this issue. In the last year, 6 basic care facilities have closed because they found it impossible and economically not feasible to staff 24/7.

As you know, staffing is very difficult and the sharing of staff has been routine in facilities that have small basic care units. Facilities have staff document the time they are in each unit, (the basic care or nursing

facility), and the cost is properly allocated to each level of care. Through this process, staff are not in the basic care unit 24/7, as they are not needed every single minute of the day. Basic care residents are getting the proper care and services and so are nursing facility residents. According to the definition, a small basic care unit had to have a person onsite in one of the five rooms, (or more), even if it wasn't warranted or needed. The expansion of this definition will better allow small rural basic care facilities operating as a unit of the nursing facility, to reopen or not have additional facilities close.

The nursing facilities that have closed their basic care units because of this issue include:

| | |
|---|---|
| Dunseith Community Nursing Home, Dunseith | 5 beds |
| Four Seasons Healthcare Center, Forman | 5 beds |
| Lutheran Sunset Home, Grafton | 5 beds |
| Western Horizons Care Center, Hettinger | 15 beds |
| Good Samaritan Society, Mott | 12 beds |
| Pembilier Nursing Center, Walhalla | 8 beds |

The closing of these facilities has negatively impacted residents, forcing some to leave their communities. The only way facilities with small units can remain open and affordable is by sharing staff.

The creation of these small basic care facilities started in 2001 when the legislature changed the law to provide such units. We did not bring this legislation forward in 2001 but a legislator did in response to the needs of their community. They wanted to allow any nursing facility to convert some of their beds to basic care, to allow this level of care in some communities where it was not available. Basic care is a great care option, for those who need support, nutrition, social interaction, but not 24 hour nursing care.

Attached is the December 10, 2015 letter from the Health Department sent to nursing facilities, acute care hospitals, critical access hospitals and basic care facilities, notifying them of the enforcement that would occur to assure compliance with the staffing requirements.

I've also included additional correspondence between the Department of Health and CMS on this issue.

This legislation requires all providers to meet the requirements, but allows a softening of the 24/7 onsite staff requirement in basic care. Staff will still be readily available and will respond to all the needs of residents. Resident care will not be negatively impacted. This issue did not surface because of a quality of care issue.

Lastly, I want to share with you a summary of satisfaction survey results in basic care. This is the first time we attempted a statewide survey and hope to continue this annually. Basic care residents seem very satisfied with the overall quality and their caregivers.

I would be happy to answer any questions you might have.

Shelly Peterson, President
North Dakota Long Term Care Association
1900 North 11th Street
Bismarck, ND 58501
(701) 222-0660

NORTH DAKOTA
DEPARTMENT *of* HEALTH

Health Resources Section
600 East Boulevard Avenue, Dept. 301
Bismarck, N.D. 58505-0200
Fax: 701.328.1890
www.ndhealth.gov

To: North Dakota Skilled Nursing Facilities;
North Dakota Acute Care Hospitals and Critical Access Hospitals;
North Dakota Basic Care Facilities

From: Bruce Pritschet, Director, Division of Health Facilities

Date: December 10, 2015

Subject: **Sharing staff between two different licensed and/or certified facilities.**

A meeting took place between staff from Department of Human Services and the Department of Health on October 13, 2015 and on December 2, 2015. The meetings were to discuss the implications of sharing staff between separately licensed and/or federally certified facility types.

Several Skilled Nursing Facilities (SNF) have a co-located Basic Care (BC) facility or Assisted Living Facility (ALF). Some hospitals and/or Critical Access Hospitals (CAHs) have a SNF or BC co-located with their facility. Each different facility type is either licensed or certified, or both licensed by the state to operate and certified for Medicare and Medicaid (M/M) participation. Each facility type has its own staffing requirements, and the facility is paid or reimbursed for the services they provide by a different cost center, method, grant, or fund. Concern was identified related to: 1) each facility type consistently meeting the specific staffing requirements for that facility type; and 2) ensuring that related expenses for shared staff members are charged to the correct cost center for each facility type as staff member's work time may be shared between two or more facility types.

It would be **non-compliance** with the requirements if a facility that requires 24/7 licensed nurse coverage **allowed the only** licensed nurse working during a shift to leave the certified and/or licensed facility to provide nursing care for a resident/patient in another certified and/or licensed facility.

Another issue relates to how time is being charged between two licensed and/or certified facilities that share staff. A shared staff member's time must be charged each shift consistent with the location and time the shared staff member provided services to the residents/patients. If the shared staff member spent time providing services during the same shift in two separately licensed and/or certified facilities, this should be reflected in the time and pay records for that individual.

**Example**

A free standing skilled nursing facility has a 10 bed BC unit down one hallway. The SNF regulations require a licensed nurse on duty 24 hours per day seven days per week. The BC regulations require there be one person awake and on duty 24 hours per day. For this example there is one licensed nurse and two CNAs in the SNF and the BC has one CNA on duty. During the night in the BC one resident gets up out of bed and falls on her way to the bathroom. The CNA calls the night nurse from the SNF to assist with the resident on the floor. When the nurse leaves the SNF and enters the BC to assist with the fallen resident, the SNF is left without a licensed nurse and is therefore out of compliance with the regulations related to staffing in the SNF.

When a skilled nursing facility (SNF) schedules one licensed nurse to cover more than one type of healthcare entity without a qualified backup (working alone), the facility has placed itself in a situation where they are not appropriately staffed. Facilities not appropriately staffed are in violation of their certification and/or licensing requirements and subject to sanctions.

If the hours (FTE) for the licensed nurse are charged to the SNF program to meet the 24/7 coverage requirements for a licensed nurse, and this licensed nurse provides services to a resident in the BC facility, it could be considered fraudulent charging of time, in addition to non-compliance with the SNF staffing requirements. When providing services to a BC resident in the licensed basic care facility, the licensed nurse should have clocked out of the SNF and into the BC facility. However, if this left the SNF without a licensed nurse, the SNF would still be in a non-compliance situation.

**Implications**

The State Survey Agency has visited with the LTC Advisory Workgroup, staff from the Department of Human Services, and with the ND Long Term Care Association on this issue. **The consensus was to provide the facilities with a memorandum identifying the concerns, and to notify facilities that this is something that the survey staff would be reviewing during future surveys of healthcare facilities. This memorandum serves as that notification with an effective date February 1, 2016.**

The sharing of staff requires good documentation on the part of both facilities involved. It is important that a facility be able to clearly demonstrate compliance with the staffing requirements for each facility type at all times, and to ensure that charges for staff time are documented appropriately for each shift by each facility to avoid allegations of fraud and citations of non-compliance with staffing requirements.

Other areas of concern related to sharing of staff include when staff members, assigned to one licensed and/or certified facility, pass medications in another licensed facility without "checking out of one facility and into the other facility." Another example is if the only staff member scheduled for the BC facility would leave the BC facility unattended to help care for residents in the SNF facility. There are many other scenarios that may be occurring. If you have two licensed and/or certified facilities that are sharing staff, we ask that you take a close look at what is occurring and the documentation that is occurring, and to make changes if needed to ensure compliance with the requirements prior to this being identified as an issue through the survey process.

If you have questions related to sharing of staff between two certified and/or licensed facilities that have not been discussed in this memo, please contact Bruce Pritschet, Division of Health Facilities.

Copy to: Stacey Koehley – Administrative Assistant DHS
Karen Tescher - DHS

NORTH DAKOTA
DEPARTMENT of HEALTH

HEALTH RESOURCES SECTION
600 East Boulevard Avenue, Dept. 301
Bismarck, ND 58505-0200
Fax: 701.328.1890
www.ndhealth.gov

January 11, 2016

Robert Casteel, Survey Branch Manager
Captain Linda Bedker, Certification and Enforcement Branch Manager
U.S. Department of Health and Human Services
Centers for Medicare and Medicaid Services
1961 Stout Street
Room 08-148
Denver, Colorado 80294

Dear Robert:

This letter is in follow-up to the issue sharing of staff by co-located facilities identified by CMS surveyors from your office during the CMS federal monitoring survey in Hettinger ND in October 2014. This SNF/NF facility is a co-located with a basic care facility. During the ROSA meeting in November 2014, the CMS survey staff members expressed their concerns about the practice of sharing of staff between two separately licensed facilities, one of which was federally certified, and identified the need for North Dakota certified facilities to change this practice as it could be both a staffing compliance issue and possible fraud issue.

Since this was brought to our attention, we have met with the Department of Human Services and representatives from the NDLTCA to discuss the concerns identified. Staff from the Department of Human Services (DHS) indicated that they have completed time studies in the facilities with co-located basic care facilities and costs are allocated consistent with the results of the time study. Staff members from DHS have assured us they do not believe that any financial fraud is taking place by the co-located facilities.

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We anticipate that we will begin taking a closer look at the sharing of staff issue for possible non-compliance with staffing requirements during the surveys of co-located facilities beginning April 1, 2016. Please let us know if you are in agreement with this approach and with the timeframe identified for implementation.

I look forward to hearing from you on this issue in the near future.

CMS said no

Sincerely,

Dr. Darleen Bartz

Darleen Bartz, PhD
Chief, Health Resources Section

6

NORTH DAKOTA
DEPARTMENT of HEALTH

HEALTH RESOURCES SECTION
600 East Boulevard Avenue, Dept. 301
Bismarck, ND 58505-0200
Fax: 701.328.1890
www.ndhealth.gov

March 4, 2016

Robert Casteel, Survey Branch Manager
Captain Linda Bedker, Certification and Enforcement Manager
U.S. Department of Health and Human Services
Centers for Medicare and Medicaid Services
1961 Stout Street
Room 08-148
Denver, Colorado 80294

TOPIC: Options for Sharing of Staff by Distinct Part Co-Located Certificated and/or Licensed Facilities

This letter is in follow-up to the sharing of staff by co-located facilities concerns identified by CMS and your previous communication with us on this issue. On behalf of CMS, the following direction was provided: "We would not be able to knowingly allow a facility we were surveying to practice staffing as identified. Knowing that this (shared staffing) has been identified and affects multiple facilities, we cannot waive or dismiss any recognized or known issues where shared staff are identified." Know that we understand the need to follow this guidance, however, we have identified some concerns related to this guidance and have prepared some comments and potential options for your consideration.

As a result of no longer being able to share staff in co-located SNF/NF and basic care facilities, some of the small 5-10 bed basic care facilities in our state are being forced to close or convert their beds back to SNF/NF beds due to the resultant economic and staffing issues. Regardless of which direction they choose to go with their basic care facility beds, the end result is the same. The basic care facility level of care residents are being forced to leave the facility or community because of basic care facility closure and relocate to another basic care facility which may be located away from family and friends. It is not cost effective for the 5-10 bed basic care facility to have their own staff 24/7, in addition there being a shortage of staff to provide that coverage.

With these thoughts in mind, staff from the North Dakota Department of Health, North Dakota Department of Human Services, and the North Dakota Long Term Care Association met to discuss options. The biggest area of concern is related to the licensed nurse on the night shift. Many of our smaller SNF/NFs may be staffed with only one licensed nurse on the night shift along with certified nurse aides. The concern related to if a basic care resident would fall or have some other medical emergency that required a nursing assessment, the licensed nurse from the SNF/NF may be called upon to assist the basic care resident and be away from the SNF/NF for a short period of time. We anticipate the amount of time the licensed nurse would be away



Health Facilities 701.328.2352
Life Safety and Construction 701.328.4873
Food and Lodging 701.328.1291

would be comparable to the licensed nurse taking a bathroom break or lunch break during their shift, and only long enough for another licensed nurse to be called in if needed or for an ambulance to arrive.

Option 1: If this sharing of licensed nurse staff only occurred in the case of emergencies in a contiguous co-located facility for a short period of time as described above, would this be an acceptable plan to CMS, and if identified on a survey, not require a citation due to the infrequency of occurrence, the short period of time involved, and the limitation to emergency situations?

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Please let us know your thoughts on this. Not being able to share licensed nursing and other staff between the facilities has resulted in a great hardship for the facilities and the residents housed in the facilities which are now needing to be relocated to other basic care facilities in other communities. We would like to have some options for sharing of licensed nursing staff in emergency situations for these co-located facilities to pursue that would not result in closure of basic care facilities and relocation of residents screened at the basic care level of care.

Thank you for your consideration. I look forward to hearing from you on this issue in the near future.

Sincerely,

Darleen Bartz

Darleen Bartz, PhD
Chief, Health Resources Section

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
Western Division of Survey and Certification
Denver Regional Office
1961 Stout Street, Room 08-148
Denver, CO 80294
Refer to WDSC:RC

CENTERS FOR MEDICARE & MEDICAID SERVICES

May 19, 2016

Department of Health
Health Resources Section
Attn: Darleen Bartz, PhD., Chief
600 East Boulevard Avenue, Dept. 301
Bismarch, ND 58505-0200

Dear Darleen:

This is to respond to your letter of March 4, 2016 regarding the "Options of Sharing of Staff by Distinct Part Co-Located Certificated and/or Licensed Facilities". Your letter requested consideration of essentially two Options with regard to sharing of staff between a CMS certified facility and a non-CMS certified facility. So that we did not miss any avenue that might be available, we did take additional time research this matter.

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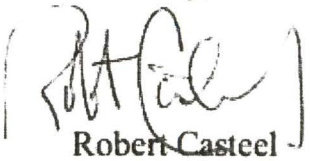
Please feel free to contact me if you should have any additional questions.

Sincerely,

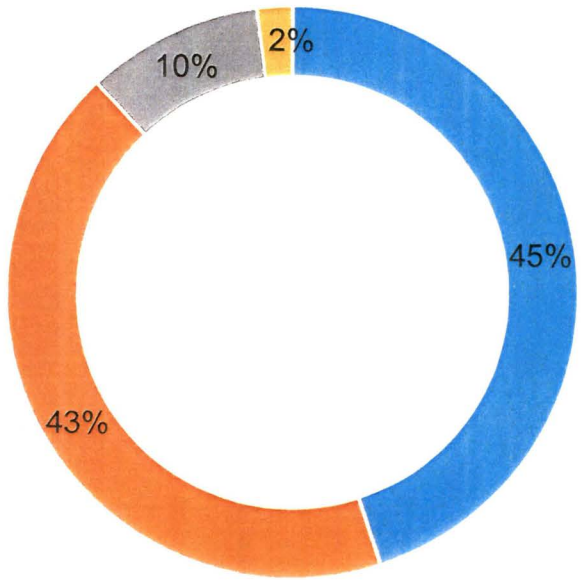


Robert Casteel
Survey Branch Manager
CMS Denver Regional Office

*COPIES via email:*
Steve Chickering, WDSC Associate Regional Administrator
Capt. Linda Bedker, Denver CMS Certification and Enforcement Branch

# 88% support nursing homes and basic care facilities sharing staff

"The federal government currently does not allow nursing homes and basic care facilities to share staff. Because of this law, five (5) basic care facilities in rural communities have closed in the last few months. Would you support a change in state law allowing nursing homes and basic care facilities to share staff, meaning some staff would not be present at the one facility or the other during a given time, but staff shared with the other facility, typically just a few yards away, could be called upon to provide basic care to residents if needed?"



# Basic Care Satisfaction Survey Results

| | 1-Poor | 2-Average | 3-Good | 4-Very Good | 5-Excellent |
|---|---|---|---|---|---|
| Overall Satisfaction (n=596) | <1% | 4% | 13% | 31% | 51% |
| Quality of Staff (n=545) | <1% | 3% | 13% | 42% | 41% |
| Quality of Care (n=572) | <1% | 3% | 12% | 40% | 45% |
| Quality of Food (n=585) | 4% | 11% | 27% | 33% | 26% |

29 Basic Care Facilities and representing 834 beds participated in the survey October 2016

# Assisted Living Satisfaction Survey Results

| | 1-Poor | 2-Average | 3-Good | 4-Very Good | 5-Excellent |
|---|---|---|---|---|---|
| Overall Satisfaction (n=966) | <1% | 4% | 13% | 35% | 47% |
| Quality of Staff (n=981) | <1% | 3% | 12% | 34% | 51% |
| Quality of Care (n=974) | <1% | 3% | 14% | 36% | 46% |
| Quality of Food (n=940) | 4% | 16% | 28% | 31% | 21% |

40 Assisted Living Facilities representing 1392 units participated in the survey October 2016

aH.2 HB1215
1-17-17

# WEST RIVER HEALTH SERVICES

02/03/2016

Senator John Hoeven
Senator Heidi Heitkamp
Representative Kevin Cramer
Bruce Kallis
Mott Nursing Home Administrator
Shelly Peterson
Terry Dwelle
ND State Health Department

To Whom It May Concern:

I am writing you to request legislative help with the CMS bureaucracy that has recently issued a decree preventing nursing homes in North Dakota from housing skilled nursing home patients in the same facility as basic care patients. Basic care patients are people that need some help, but not very much. Most of this help consists of administering medications, monitoring vital signs and nursing aides helping with some occasional activities of daily living. The rationale for the new CMS rule is that at night when there is one nurse on duty and if a basic care patient needs assistance, then the nurse must "abandon" the skilled patient to help the basic care patient. This reasoning is fallacious since the nursing homes in our area (Mott, Bowman and Hettinger) are small facilities and there is no abandonment going on if the one nurse at night has to help a basic resident. The patients are all housed together and the basic patient requires very little assistance. To help one of these basic patients is no more abandonment than it would be for the nurse to help any of the other residents. To follow the line of reasoning for CMS then if the nurse

helps one of the skilled patients, why isn't she abandoning all the other skilled patients. This makes no sense.

The practice of housing a few basic care patients (that require minimum help, etc.) in the same facility as skilled patients has been done for years. There has never been a problem and it is of great benefit to these few basic patients to be able to stay in a facility in their home town. In most of these towns there are not a lot of options for these patients as usually there is only one nursing home (as in the case of Mott) and no assisted living or other housing for people that need more than just a roof over their heads.

CMS laid down this rule out of the blue with very little warning for the patients who will end up being discharged. In addition, the bureaucracy is unresponsive to appeals for reconsideration by the long term care association and even our state health department. The result is that four to five basic care patients in these facilities will have to be discharged and different living arrangements will have to be found. Several of these patients are frail, elderly, over 90 years old, some are blind, etc. and they are essentially being forced out of what has been their homes for years. As usual those being hurt are the weak and defenseless and there is no reason for this other than a particular nonelected official just decided.

Unfortunately bureaucratic overreach through arbitrary regulations often decided by one nonelected official is becoming all too common as regulating continue to metastasize. The victims are the people who have no recourse or advocate other than our elected officials who are the only ones with the power to make these bureaucrats behave. The individuals at CMS respond to only one thing, statutory direction.

Otherwise the bureaucracy is becoming a form of tyranny in which the victims (in this case several frail elderly) have no voice. The only hope is for you, the people's representative, to restore sanity and restrain the heavy hand of the CMS bureaucrats.

Dr. Terry Dwelle, head of the North Dakota State Health Department, is aware of this and the other contact to get more information would be Shelly Peterson of the North Dakota Long Term Care Association. Her phone number is 701-222-0660. These people could provide direction regarding what kind of legislation would be best to exempt small nursing homes from having to discharge their basic care residents.

Thank you very much for your help. I cannot tell you how frustrating it is to have to deal with the bureaucracy and what a ray of hope it is to have legislators that are as responsive as you are to the needs of the people.

Sincerely,

Brian G Willoughby, MD, FACP
Internal Medicine/Geriatrics

BGW/nls

HB 1215
#1
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Pg. 1

# Testimony on HB 1215

## Sharing of Staff between Nursing Homes and Basic Care

## March 13, 2017

Good Morning Chairman Lee and members of Senate Human Services. My name is Shelly Peterson, President of the North Dakota Long Term Care Association (NDLTCA). We represent 212 Assisted Living, Basic Care and Nursing Home Facilities across North Dakota. I am here to testify in support of HB 1215.

HB 1215 proposes to expand the definition of basic care, to better allow the option of basic care facilities connected to a nursing home or assisted living facility to share staff. After 16 years of facilities sharing staff, it was recently clarified by the Health Department that the definition of basic care requires staff to be present and in the specific unit 24/7. Thus you need a person every second of every day in the small basic care unit, even though the resident may not need assistance. The basic care regulations requires there be one person available and on duty 24 hours per day. For years this was never an issue, because staff were always available to help, residents and facilities didn't give it a second thought.

A year ago we had 21 basic care facilities co-located with a nursing home, of these 21 basic care facilities, there are 17 that are impacted by this issue. In the last year, 6 basic care facilities have closed because they found it impossible and economically not feasible to staff 24/7.

As you know, staffing is very difficult and the sharing of staff has been routine in facilities that have small basic care units. Facilities have staff document the time they are in each unit, (the basic care or nursing

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facility), and the cost is properly allocated to each level of care. Through this process, staff are not in the basic care unit 24/7, as they are not needed every single minute of the day. Basic care residents are getting the proper care and services and so are nursing facility residents. According to the definition, a small basic care unit had to have a person onsite in one of the five rooms, (or more), even if it wasn't warranted or needed. The expansion of this definition will better allow small rural basic care facilities operating as a unit of the nursing facility, to reopen or not have additional facilities close.

The nursing facilities that have closed their basic care units because of this issue include:

| | |
|---|---|
| Dunseith Community Nursing Home, Dunseith | 5 beds |
| Four Seasons Healthcare Center, Forman | 5 beds |
| Lutheran Sunset Home, Grafton | 5 beds |
| Western Horizons Care Center, Hettinger | 15 beds |
| Good Samaritan Society, Mott | 12 beds |
| Pembilier Nursing Center, Walhalla | 8 beds |

The closing of these facilities has negatively impacted residents, forcing some to leave their communities. The only way facilities with small units can remain open and affordable is by sharing staff.

The creation of these small basic care facilities started in 2001 when the legislature changed the law to provide such units. We did not bring this legislation forward in 2001 but a legislator did in response to the needs of their community. They wanted to allow any nursing facility to convert some of their beds to basic care, to allow this level of care in some communities where it was not available. Basic care is a great care option, for those who need support, nutrition, social interaction, but not 24 hour nursing care.

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Attached is the December 10, 2015 letter from the Health Department sent to nursing facilities, acute care hospitals, critical access hospitals and basic care facilities, notifying them of the enforcement that would occur to assure compliance with the staffing requirements.

I've also included additional correspondence between the Department of Health and CMS on this issue.

This legislation requires all providers to meet the requirements, but allows a softening of the 24/7 onsite staff requirement in basic care. Staff will still be readily available and will respond to all the needs of residents. Resident care will not be negatively impacted. This issue did not surface because of a quality of care issue.

Lastly, I want to share with you a summary of satisfaction survey results in basic care. This is the first time we attempted a statewide survey and hope to continue this annually. Basic care residents seem very satisfied with the overall quality and their caregivers.

I would be happy to answer any questions you might have.

Shelly Peterson, President
North Dakota Long Term Care Association
1900 North 11th Street
Bismarck, ND 58501
(701) 222-0660

1215 #1 3/13 pg 4

NORTH DAKOTA
DEPARTMENT of HEALTH

Health Resources Section
600 East Boulevard Avenue, Dept. 301
Bismarck, N.D. 58505-0200
Fax: 701.328.1890
www.ndhealth.gov

To: North Dakota Skilled Nursing Facilities;
North Dakota Acute Care Hospitals and Critical Access Hospitals;
North Dakota Basic Care Facilities

From: Bruce Pritschet, Director, Division of Health Facilities

Date: December 10, 2015

Subject: **Sharing staff between two different licensed and/or certified facilities.**

A meeting took place between staff from Department of Human Services and the Department of Health on October 13, 2015 and on December 2, 2015. The meetings were to discuss the implications of sharing staff between separately licensed and/or federally certified facility types.

Several Skilled Nursing Facilities (SNF) have a co-located Basic Care (BC) facility or Assisted Living Facility (ALF). Some hospitals and/or Critical Access Hospitals (CAHs) have a SNF or BC co-located with their facility. Each different facility type is either licensed or certified, or both licensed by the state to operate and certified for Medicare and Medicaid (M/M) participation. Each facility type has its own staffing requirements, and the facility is paid or reimbursed for the services they provide by a different cost center, method, grant, or fund. Concern was identified related to: 1) each facility type consistently meeting the specific staffing requirements for that facility type; and 2) ensuring that related expenses for shared staff members are charged to the correct cost center for each facility type as staff member's work time may be shared between two or more facility types.

It would be **non-compliance** with the requirements if a facility that requires 24/7 licensed nurse coverage **allowed the only** licensed nurse working during a shift to leave the certified and/or licensed facility to provide nursing care for a resident/patient in another certified and/or licensed facility.

Another issue relates to how time is being charged between two licensed and/or certified facilities that share staff. A shared staff member's time must be charged each shift consistent with the location and time the shared staff member provided services to the residents/patients. If the shared staff member spent time providing services during the same shift in two separately licensed and/or certified facilities, this should be reflected in the time and pay records for that individual.

**Example**

A free standing skilled nursing facility has a 10 bed BC unit down one hallway. The SNF regulations require a licensed nurse on duty 24 hours per day seven days per week. The BC regulations require there be one person awake and on duty 24 hours per day. For this example there is one licensed nurse and two CNAs in the SNF and the BC has one CNA on duty. During the night in the BC one resident gets up out of bed and falls on her way to the bathroom. The CNA calls the night nurse from the SNF to assist with the resident on the floor. When the nurse leaves the SNF and enters the BC to assist with the fallen resident, the SNF is left without a licensed nurse and is therefore out of compliance with the regulations related to staffing in the SNF.

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When a skilled nursing facility (SNF) schedules one licensed nurse to cover more than one type of healthcare entity without a qualified backup (working alone), the facility has placed itself in a situation where they are not appropriately staffed. Facilities not appropriately staffed are in violation of their certification and/or licensing requirements and subject to sanctions.

If the hours (FTE) for the licensed nurse are charged to the SNF program to meet the 24/7 coverage requirements for a licensed nurse, and this licensed nurse provides services to a resident in the BC facility, it could be considered fraudulent charging of time, in addition to non-compliance with the SNF staffing requirements. When providing services to a BC resident in the licensed basic care facility, the licensed nurse should have clocked out of the SNF and into the BC facility. However, if this left the SNF without a licensed nurse, the SNF would still be in a non-compliance situation.

**Implications**

The State Survey Agency has visited with the LTC Advisory Workgroup, staff from the Department of Human Services, and with the ND Long Term Care Association on this issue. **The consensus was to provide the facilities with a memorandum identifying the concerns, and to notify facilities that this is something that the survey staff would be reviewing during future surveys of healthcare facilities. This memorandum serves as that notification with an effective date February 1, 2016.**

The sharing of staff requires good documentation on the part of both facilities involved. It is important that a facility be able to clearly demonstrate compliance with the staffing requirements for each facility type at all times, and to ensure that charges for staff time are documented appropriately for each shift by each facility to avoid allegations of fraud and citations of non-compliance with staffing requirements.

Other areas of concern related to sharing of staff include when staff members, assigned to one licensed and/or certified facility, pass medications in another licensed facility without "checking out of one facility and into the other facility." Another example is if the only staff member scheduled for the BC facility would leave the BC facility unattended to help care for residents in the SNF facility. There are many other scenarios that may be occurring. If you have two licensed and/or certified facilities that are sharing staff, we ask that you take a close look at what is occurring and the documentation that is occurring, and to make changes if needed to ensure compliance with the requirements prior to this being identified as an issue through the survey process.

If you have questions related to sharing of staff between two certified and/or licensed facilities that have not been discussed in this memo, please contact Bruce Pritschet, Division of Health Facilities.

Copy to: Stacey Koehley – Administrative Assistant DHS
Karen Tescher - DHS

1215
#1
3/13
Pg.6

NORTH DAKOTA
DEPARTMENT of HEALTH

HEALTH RESOURCES SECTION
600 East Boulevard Avenue, Dept. 301
Bismarck, ND 58505-0200
Fax: 701.328.1890
www.ndhealth.gov

January 11, 2016

Robert Casteel, Survey Branch Manager
Captain Linda Bedker, Certification and Enforcement Branch Manager
U.S. Department of Health and Human Services
Centers for Medicare and Medicaid Services
1961 Stout Street
Room 08-148
Denver, Colorado 80294

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I look forward to hearing from you on this issue in the near future.

Sincerely,

CMS said no

Dr. Darleen Bartz

Darleen Bartz, PhD
Chief, Health Resources Section

1215
#1
3/13
Pg. 7

NORTH DAKOTA
DEPARTMENT of HEALTH

HEALTH RESOURCES SECTION
600 East Boulevard Avenue, Dept. 301
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Fax: 701.328.1890
www.ndhealth.gov

March 4, 2016

Robert Casteel, Survey Branch Manager
Captain Linda Bedker, Certification and Enforcement Manager
U.S. Department of Health and Human Services
Centers for Medicare and Medicaid Services
1961 Stout Street
Room 08-148
Denver, Colorado 80294

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Pg. 8



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Thank you for your consideration. I look forward to hearing from you on this issue in the near future.

Sincerely,

Darleen Bartz

Darleen Bartz, PhD
Chief, Health Resources Section

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3/13
Pg. 9

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
Western Division of Survey and Certification
Denver Regional Office
1961 Stout Street, Room 08-148
Denver, CO 80294
Refer to WDSC:RC


May 19, 2016

Department of Health
Health Resources Section
Attn: Darleen Bartz, PhD., Chief
600 East Boulevard Avenue, Dept. 301
Bismarch, ND 58505-0200

Dear Darleen:

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1215
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3/13
Pg. 10



Please feel free to contact me if you should have any additional questions.

Sincerely,

Robert Casteel
Survey Branch Manager
CMS Denver Regional Office

*COPIES via email:*
Steve Chickering, WDSC Associate Regional Administrator
Capt. Linda Bedker, Denver CMS Certification and Enforcement Branch

**Testimony**
**Senate Human Services Committee**
**House Bill 1215**
**March 13, 2017, 10:45 AM**
**North Dakota Department of Health**

Good morning, Chairman Lee and members of the Human Services Committee. My name is Bruce Pritschet, and I am the Health Facilities Division director of the North Dakota Department of Health (DoH). I am here to provide testimony in opposition to House Bill 1215. As written, this bill provides basic care facilities with options for sharing of staff that would place them in known conflict with federal requirements, and a possible fraud situation. This bill also provides no limits on the number of beds in each attached facility that would be allowed to share staff, nor definition of an attached facility, which may result in health and safety concerns for residents in both facilities. If it is the decision of the committee to move the bill forward, we have also included amendments for consideration to remove the known conflict with federal requirements.

In 2016, the department requested permission from the Centers for Medicare and Medicaid Services (CMS) to be allowed to share staff between basic care facilities and federally certified skilled nursing facilities. We received correspondence from CMS in response to our request dated May 16, 2016 which indicated that staff cannot be shared between a federally certified facility and a non-federally certified facility. Please refer to the attached letter. The CMS letter stated:

> While we understand the circumstances you describe, we are not able to find any provision that would permit such sharing of staff between a CMS certified provider and a non-CMS certified provider. Additionally, there is no provision that would provide for a waiver to allow the sharing of staff between a CMS certified provider and a non-certified CMS provider.

The CMS letter further states:

> The expectation is that any staff, at all times that staff is scheduled to work, in any CMS certified facility would be available at all times for the CMS beneficiaries and their needs within the CMS certified facility. The time schedule to work would include that time the staff person was to be on duty as well as scheduled breaks and any meal breaks. Any CMS survey, conducted by the State Survey Agency or by the Regional Office, that found sharing of staff between a CMS certified facility and a non-CMS certified facility should include the appropriate citations for non-compliance that apply.

The CMS letter concludes with the statement:

> It would be our hope that any non-CMS certified provider or program would consider the necessary staffing needs for their residents or patients. This would

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include anticipating the needs for those individuals in everyday care, as well as emergency situations.

The amendment proposed by the department removes "a nursing home" (CMS certified facility) from the new proposed language in this bill, as sharing of staff with a non-certified facility would place the federally certified nursing facility out of compliance with federal requirements, which places the certification status and access to federal funding at risk. We believe that sharing of staff in this situation could also place the facility at risk for fraud when using staff from one facility to care for residents in another facility.

As can be seen by the definition of a basic care facility in the statute, residents with Alzheimer's, dementia, or special memory care needs can be cared for in basic care facilities. We have been informed by the Department of Human Services, that to be eligible to receive CMS Home and Community Based Services (HCBS) Waiver funding for residents with Alzheimer's who require skilled level of care and reside in a secured Basic Care Alzheimer's Unit or Facility, staffing is required to be dedicated twenty-four hours per day seven days per week to meet the health and safety needs of these individuals and to meet the requirements of the waiver. The amendments as proposed by the department would result in individuals with Alzheimer's, dementia, or special memory care needs residing in basic care facilities to continue to receive the dedicated twenty-four-hour seven days a week care as required to comply with the CMS HCBS waiver and to meet the health and safety needs of these individuals.

While the proposed amendments by the department do not remove the potential for sharing of staff between an assisted living facility and basic care facility that is physically attached, we do have concerns with this option. We have concerns because as written, there is no definition of attached facility or limit to the size of the facilities that can share staff. For example, attached could mean a five bed facility in one wing of another facility or it could mean a 90 bed facility attached to another large facility by a wall or covered walkway.

Basic care facilities are currently required to have response staff available at all times to meet the twenty-four-hour per day scheduled or unscheduled needs of individuals. This means that there needs to be a minimum of one awake staff member onsite twenty-four-hours per day seven days a week to meet the health and safety needs of the residents. Assisted living facilities are not required to have awake staff twenty-four-hours per day. As proposed, there are no size restrictions on the number of combined beds in the physically attached assisted living facilities and basic care facilities. As a result, the one basic care staff member required to be awake and respond to the needs of the basic care residents could also be assigned to cover both the assisted living facility and basic care facilities regardless of size.

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We have attached, for your consideration, a copy of our proposed amendments which would eliminate the known conflict with federal regulations should you choose to move forward with this bill.

I would be happy to address any question that you may have at this time.

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PROPOSED AMENDMENTS TO HOUSE BILL NO. 1215

Page 1, line 11, overstrike ":"

Page 1, line 12, overstrike "a. Makes", and insert immediately thereafter "makes"

Page 1, line 13, overstrike ";", replace with "."

Page 1, line 14, overstrike "b. Is" and insert immediately thereafter "A basic care facility may also be"

Page 1, line 15, remove ":"

Page 1, line 16, replace "c. Is" with "may be physically", overstrike "a nursing home or" and insert "an" and replace "its" with "the combined"

Renumber accordingly

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17.0776.01000
Sixty-fifth
Legislative Assembly
of North Dakota

# HOUSE BILL NO. 1215

Introduced by

Representatives Weisz, Devlin, Kreidt

Senator J. Lee

A BILL for an Act to amend and reenact subsection 1 of section 23-09.3-01 of the North Dakota Century Code, relating to the definition of basic care facility.

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1. AMENDMENT.** Subsection 1 of section 23-09.3-01 of the North Dakota Century Code is amended and reenacted as follows:

1. "Basic care facility" means a residence, not licensed under chapter 23-16 by the department, that provides room and board to five or more individuals who are not related by blood or marriage to the owner or manager of the residence and who, because of impaired capacity for independent living, require health, social, or personal care services, but do not require regular twenty-four-hour medical or nursing services and~~:~~

   ~~a.~~ ~~Makes~~ makes response staff available at all times to meet the twenty-four-hour per day scheduled and unscheduled needs of the individual~~,~~; ~~or~~

   ~~b.~~ ~~Is~~ A basic care facility may also be kept, used, maintained, advertised, or held out to the public as an Alzheimer's, dementia, or special memory care facility~~;~~ or

   ~~c.~~ ~~Is~~ may be physically attached to ~~a nursing home or~~ an assisted living facility and ~~its~~ the combined staff are available to meet the needs of all residents and comply with state and federal regulations.

Renumber accordingly

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DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
Western Division of Survey and Certification
Denver Regional Office
1961 Stout Street, Room 08-148
Denver, CO 80294
Refer to WDSC:RC

CMS
CENTERS FOR MEDICARE & MEDICAID SERVICES

May 19, 2016

Department of Health
Health Resources Section
Attn: Darleen Bartz, PhD., Chief
600 East Boulevard Avenue, Dept. 301
Bismarch, ND 58505-0200

Dear Darleen:

This is to respond to your letter of March 4, 2016 regarding the "Options of Sharing of Staff by Distinct Part Co-Located Certificated and/or Licensed Facilities". Your letter requested consideration of essentially two Options with regard to sharing of staff between a CMS certified facility and a non-CMS certified facility. So that we did not miss any avenue that might be available, we did take additional time research this matter.

While we understand the circumstances that you describe, we are not able to find any provision that would permit such sharing of staff between a CMS certified provider and a non-CMS certified provider. Additionally, there is no provision that would provide for a waiver to allow the sharing of staff between a CMS certified provider and a non-CMS certified provider. CMS funded resources must be used for those CMS programs and beneficiaries to which they are assigned.

The expectation is that any staff, at all times that staff is scheduled to work, in any CMS certified facility would be available at all times for the CMS beneficiaries and their needs within that CMS certified facility. The time schedule to work would include that time the staff person was to be on duty as well as scheduled breaks and any meal breaks. Any CMS survey, conducted by the State Survey Agency or by the Regional Office, that found the sharing of staff between a CMS certified facility and a non-CMS certified facility should include the appropriate citations for non-compliance that apply.

It would be our hope that any non-CMS certified provider or program would consider the necessary staffing needs for their residents or patients. This would include anticipating the needs for those individuals in everyday care, as well as emergency situations.

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Please feel free to contact me if you should have any additional questions.

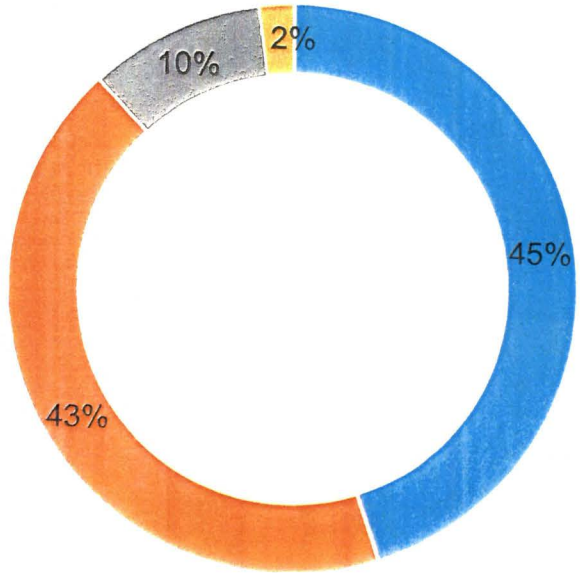
Sincerely,

Robert Casteel
Survey Branch Manager
CMS Denver Regional Office

*COPIES via email:*
Steve Chickering, WDSC Associate Regional Administrator
Capt. Linda Bedker, Denver CMS Certification and Enforcement Branch

# 88% support nursing homes and basic care facilities sharing staff

"The federal government currently does not allow nursing homes and basic care facilities to share staff. Because of this law, five (5) basic care facilities in rural communities have closed in the last few months. Would you support a change in state law allowing nursing homes and basic care facilities to share staff, meaning some staff would not be present at the one facility or the other during a given time, but staff shared with the other facility, typically just a few yards away, could be called upon to provide basic care to residents if needed?"

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# Basic Care Satisfaction Survey Results

| | 1-Poor | 2-Average | 3-Good | 4-Very Good | 5-Excellent |
|---|---|---|---|---|---|
| Overall Satisfaction (n=596) | <1% | 4% | 13% | 31% | 51% |
| Quality of Staff (n=545) | <1% | 3% | 13% | 42% | 41% |
| Quality of Care (n=572) | <1% | 3% | 12% | 40% | 45% |
| Quality of Food (n=585) | 4% | 11% | 27% | 33% | 26% |

29 Basic Care Facilities and representing 834 beds participated in the survey October 2016

# Assisted Living Satisfaction Survey Results

| | 1-Poor | 2-Average | 3-Good | 4-Very Good | 5-Excellent |
|---|---|---|---|---|---|
| Overall Satisfaction (n=966) | <1% | 4% | 13% | 35% | 47% |
| Quality of Staff (n=981) | <1% | 3% | 12% | 34% | 51% |
| Quality of Care (n=974) | <1% | 3% | 14% | 36% | 46% |
| Quality of Food (n=940) | 4% | 16% | 28% | 31% | 21% |

40 Assisted Living Facilities representing 1392 units participated in the survey October 2016

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# WEST RIVER HEALTH SERVICES

02/03/2016

Senator John Hoeven
Senator Heidi Heitkamp
Representative Kevin Cramer
Bruce Kallis
Mott Nursing Home Administrator
Shelly Peterson
Terry Dwelle
ND State Health Department

To Whom It May Concern:

I am writing you to request legislative help with the CMS bureaucracy that has recently issued a decree preventing nursing homes in North Dakota from housing skilled nursing home patients in the same facility as basic care patients. Basic care patients are people that need some help, but not very much. Most of this help consists of administering medications, monitoring vital signs and nursing aides helping with some occasional activities of daily living. The rationale for the new CMS rule is that at night when there is one nurse on duty and if a basic care patient needs assistance, then the nurse must "abandon" the skilled patient to help the basic care patient. This reasoning is fallacious since the nursing homes in our area (Mott, Bowman and Hettinger) are small facilities and there is no abandonment going on if the one nurse at night has to help a basic resident. The patients are all housed together and the basic patient requires very little assistance. To help one of these basic patients is no more abandonment than it would be for the nurse to help any of the other residents. To follow the line of reasoning for CMS then if the nurse

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# WEST RIVER HEALTH SERVICES



helps one of the skilled patients, why isn't she abandoning all the other skilled patients. This makes no sense.

The practice of housing a few basic care patients (that require minimum help, etc.) in the same facility as skilled patients has been done for years. There has never been a problem and it is of great benefit to these few basic patients to be able to stay in a facility in their home town. In most of these towns there are not a lot of options for these patients as usually there is only one nursing home (as in the case of Mott) and no assisted living or other housing for people that need more than just a roof over their heads.

CMS laid down this rule out of the blue with very little warning for the patients who will end up being discharged. In addition, the bureaucracy is unresponsive to appeals for reconsideration by the long term care association and even our state health department. The result is that four to five basic care patients in these facilities will have to be discharged and different living arrangements will have to be found. Several of these patients are frail, elderly, over 90 years old, some are blind, etc. and they are essentially being forced out of what has been their homes for years. As usual those being hurt are the weak and defenseless and there is no reason for this other than a particular nonelected official just decided.

Unfortunately bureaucratic overreach through arbitrary regulations often decided by one nonelected official is becoming all too common as regulating continue to metastasize. The victims are the people who have no recourse or advocate other than our elected officials who are the only ones with the power to make these bureaucrats behave. The individuals at CMS respond to only one thing, statutory direction.

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# WEST RIVER HEALTH SERVICES



Otherwise the bureaucracy is becoming a form of tyranny in which the victims (in this case several frail elderly) have no voice. The only hope is for you, the people's representative, to restore sanity and restrain the heavy hand of the CMS bureaucrats.

Dr. Terry Dwelle, head of the North Dakota State Health Department, is aware of this and the other contact to get more information would be Shelly Peterson of the North Dakota Long Term Care Association. Her phone number is 701-222-0660. These people could provide direction regarding what kind of legislation would be best to exempt small nursing homes from having to discharge their basic care residents.

Thank you very much for your help. I cannot tell you how frustrating it is to have to deal with the bureaucracy and what a ray of hope it is to have legislators that are as responsive as you are to the needs of the people.

Sincerely,

Brian G Willoughby, MD, FACP
Internal Medicine/Geriatrics

BGW/nls