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Deanna Hall
Operator's Signature

12/03
Date

2003 HOUSE HUMAN SERVICES

HB 1201

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10/2/03
Date

2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1201

House Human Services Committee

☐ Conference Committee

Hearing Date January 13, 2003

Tape Number	Side A	Side B	Meter #
1		x	11.7-54.6
2	x		0.0-17.9
2	x		34.3-36.0
Committee Clerk Signature <i>Sharon Penzance</i>			

Minutes:

Rep. Bill Devlin appeared in support of the bill as the prime sponsor with written testimony stating this bill will allow our disabled, our old and our young to be employed in a nursing home.

Sen. Klein appeared as a sponsor and in support of the bill.

Rep. Weisz appeared as a sponsor and in support of this bill also stating this protects the care in the nursing homes and will keep those working there now employed.

Shelly Peterson, President of the ND Long Term Care Assoc. appeared in support with written testimony. She also handed out written testimony from Audrey Aurit.

Jack MacDonald appeared on behalf of the Arc of North Dakota in support of the bill with written testimony stating the Arc strongly supports this bill as a means of making more work opportunities available for developmentally disabled individuals. This bill fully protects the public interest by requiring this work to be done under the direct supervision of licensed nurses.

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House Human Services Committee
Bill/Resolution Number HB 1201
Hearing Date January 13, 2003

Tim Huseeth, Executive Director of HAV-IT Services in Harvey, ND appeared in support with written testimony.

Charles Strutz, an employee of Oakes Manor Good Samaritan Center, appeared in support of the bill and to tell his story of work and duties.

Jerome Swanson, Administrator of Oakes Manor Good Samaritan Center, appeared in support of and to state that they had Chuck take the test, spent a minimum of 75 hrs training him, \$110.00 for him to take the test and the end result is that he is doing just what he did before.

Rocky Zastoupil, Administrator at Elm Crest Manor in New Salem, ND appeared in support of the bill noting a very small amount of time is actually spent learning feeding assistants positions and bed making during the 75 hours of training that we are talking about.

Jon Larson, Executive Director of Enable, Inc. in Bismarck and Mandan, appeared in support of the bill with written testimony.

Grant Wilz, Director of Nursing at the Baptist Home in Bismarck appeared in support explaining the personnel that they would lose because they didn't want to take the test or couldn't. He would also be in favor of exempting some persons from the Nurse Practices Act.

Discussion: Would this save money to the State? Yes. Non certified Assistants are paid \$1.50 less than the certified assistants. Also, the certified assistants are being paid more money, still less than those that are doing direct care but we are paying them more money because of the need for them to be certified. Why the Nurses group had a problem with taking these two groups in the Nurse Practices Act? Exempting someone from the Nurse Practices Act, your wondering how do you hold this person accountable for an action that could be a nursing service. How

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10/2/03
Date

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House Human Services Committee
Bill/Resolution Number HB 1201
Hearing Date January 13, 2003

many, RN's, CNA's, or LPN's need to be on per shift legally. Different sized places have different requirements. . Facilities must have posted, how many people are working.

Darleen Bartz, Section Chief of the Health Resources Section of the ND Dept. of Health, appeared neutral with written testimony.

Sharon Moos, Executive Director of ND Nurses Assoc., appeared neutral with written testimony and stated she would supports amendments.

Dr. Constance Kalanek, Executive Director of the ND Board of Nursing, appeared neutral on the bill with written testimony and offered an amendment. Also stated that if the bill was not amended, they would oppose the bill.

Discussion: Conflicts with Medicare, misunderstanding of delegated functions and delegated interventions, if fraud of Medicare funds would be taking place if this such bill were passed and where the cost is going to go with bed making and feeding assistant.

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Darleen Bartz
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10/2/03
Date

2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1201

House Human Services Committee

☐ Conference Committee

Hearing Date January 20, 2003

Tape Number	Side A	Side B	Meter #
2		x	1.7 - 20.
Committee Clerk Signature <i>Sharon Renshaw</i>			

Rep. Devlin asked Shelly Peterson of the ND Long Term Care Association to explain the proposed amendments.

Shelly Peterson stated that the language handed out is acceptable to the Health Dept. and to the Board of Nursing and also believes that it will be acceptable to the Nurses Assoc.. The critical players in this bill were the Health Dept. which were the ones that were citing us. The issue on the original bill that the Health Dept. didn't like was the issue of delegated nursing intervention. Because anytime its a delegated nursing task, it falls under the issue of having to be certified and 75 hours of training. This stays away from the whole issue of delegated nursing intervention and it simply states that an individual working in the Medicare climate organization, which could include a hospital or nursing home, we need to received clarification that hospitals wouldn't have an issue or problem with this. So it was the advice of the Board of Nursing and the Health Dept. that we could use Medicare funded organizations. That way it will cover all of us. We could specifically say who is not a licensed nurse and who is in the performance of non hands on task.

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Doreen Hall
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1/21/03
Date

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House Human Services Committee
Bill/Resolution Number HB 1201
Hearing Date January 20, 2003

And in making a bed, we don't have any contact with the residents, in feeding residents, we had a question on that, but it was determined by the Health Dept. that even though we might take a spoon to a residents mouth, it was considered not a hands on. So we believe that this will solve the problem and we should be able to have persons with disabilities, older women and younger people to primarily do bed making of an unoccupied bed and feeding residents.

Concerns of the committee with direct care and indirect care and hands on care. Also if there was supervision over the feeders and if a nurse had to be in the room during feeding. Were nursing homes different in that aspect. Clarification on the Board of Nursing licensing and regulating and the Nurses Association doesn't license or regulate.

Sharon Moos, Director of the ND Nurses Association appeared to state that the nurses association testified on this bill and were supportive of the intent of the bill but had some concerns about the language because of the way licensure works for registered nurses. We were afraid that the delegation in the practices act would actually be forced sweeping and allow licensed nurses not being able to practice or to delegate. We are comfortable with the Health Dept. and the Board of Nursing is responsibility it is for the practices act to make those decisions. Also stated for the committee that their are about 7,000 licensed registered nurses who actually live in ND, We also have about 700 members in organization which represent about 10% of the registered nurses in the state.

Rep. Kreidt moved to adopt the amendment, second by Rep. Uglem. 12 - 1 - 0

Rep. Porter moved an amendment that at the end of work task, to specifically state, including feeding assistants. Second by Rep. Weisz. 13 - 0 - 0

Rep. Kreidt moved a DP as Amended, second by Rep. Potter. 13 - 0 - 0, Rep. Kreidt to carry.

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10/2/03
Date

FISCAL NOTE
Requested by Legislative Council
01/09/2003

Bill/Resolution No.: HB 1201

1A. 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.

	2001-2003 Biennium		2003-2005 Biennium		2005-2007 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

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

2001-2003 Biennium			2003-2005 Biennium			2005-2007 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2. Narrative: Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.

There would be no fiscal impact for this bill. This bill would remove supervision of the Board of Nursing from Medicare funded nursing facilities. This would not affect the reimbursement rates for these facilities.

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, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.

Name:	Brenda M. Welsz	Agency:	Human Services
Phone Number:	328-2397	Date Prepared:	01/10/2003

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10/2/03
Date

30317.0201
Title.0300

Adopted by the Human Services Committee
January 21, 2003

VK
1/22/03

HOUSE AMENDMENTS TO HOUSE BILL NO. 1201 HR 1-22-03

Page 1, line 6, replace "working in a medicare-funded nursing facility, in the performance of" with ", including a feeding assistant, performing nonhands-on tasks while employed in a medicare-funded organization."

Page 1, remove line 7

Renumber accordingly

Page No. 1

30317.0201

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1/22/03
Date

Date: 1-20-03
Roll Call Vote #: 1

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1201

House _____ HUMAN SERVICES _____ Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken DP as Amended

Motion Made By Rep Kreidt Seconded By Rep Porter

Representatives	Yes	No	Representatives	Yes	No
Rep. Clara Sue Price - Chair	✓		Rep. Sally Sandvig	✓	
Rep. Bill Devlin, Vice-Chair	✓		Rep. Bill Amerman	✓	
Rep. Robin Weisz	✓		Rep. Carol Niemeier	✓	
Rep. Vonnice Pietsch	✓		Rep. Louise Potter	✓	
Rep. Gerald Uglem	✓				
Rep. Chet Pollert	✓				
Rep. Todd Porter	✓				
Rep. Gary Kreidt	✓				
Rep. Alon Wieland	✓				

Total (Yes) 13 No 0

Absent 0

Floor Assignment Rep. Kreidt

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

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10/2/03
Date

REPORT OF STANDING COMMITTEE (410)
January 22, 2003 1:03 p.m.

Module No: HR-12-0909
Carrier: Kreidt
Insert LC: 30317.0201 Title: .0300

REPORT OF STANDING COMMITTEE

HB 1201: Human Services Committee (Rep. Price, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends DO PASS (13 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1201 was placed on the Sixth order on the calendar.

Page 1, line 6, replace "working in a medicare-funded nursing facility, in the performance of" with ", including a feeding assistant, performing nonhands-on tasks while employed in a medicare-funded organization."

Page 1, remove line 7

Renumber accordingly

2003 SENATE HUMAN SERVICES

HB 1201

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10/2/03
Date

2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1201

Senate Human Services Committee

☐ Conference Committee

Hearing Date February 26, 2003

Tape Number	Side A	Side B	Meter #
1		X	2825 - end
2	X		0 - 76
Committee Clerk Signature <i>Donna Kramer</i>			

Minutes:

SENATOR JUDY LEE opened the public hearing for HB 1201 relating to persons excluded from the Nurse Practices Act.

REPRESENTATIVE WILLIAM DEVLIN introduced HB 1201 as the prime sponsor. The disabled in our state need to know, he said, their jobs are secure and won't be lost because of a conflict in regulations. (Written testimony plus Harvey newspaper article) (Meter # 2835 - 3088)

SHELLY PETERSON, President of the North Dakota Long Term Care Association, testified on behalf of the members. She stated that although we represent nursing facilities, basic care facilities and assisted living facilities, the issue is only affecting nursing facilities. Have been struggling with this issue for almost four years. We have been unsuccessful in achieving an administrative remedy and need your help. HB 1201 is an option the Board of Nursing identified as a way to solve the dilemma. (Written testimony) (Meter # 3124 - 4577)

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Donna Kramer
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10/2/03
Date

Page 2

Senate Human Services Committee

Bill/Resolution Number HB 1201

Hearing Date February 26, 2003

DARLEEN BARTZ, Health Resources Section chief for the North Dakota Department of Health, testified to provide information about the Department's nurse aide registry. Indicated they were in support of the bill. (Written testimony provided) (Meter #4746 - 5115)

DR. CONSTANCE KALANEK, Executive Director from the North Dakota Board of Nursing, testified in support of the bill. (Meter # 5170 - 5295)

JACK MCDONALD, appearing on behalf of the The Arc of North Dakota, testified in support of the bill. (Written testimony) (Meter # 5360 - 5450)

MRS. GARY ZENTZ, testified in behalf of herself in support of the bill. She said she had worked at a long-term facility for 10 years. (Meter # 5496 - 5718)

SENATOR LEE closed the Public Hearing for HB 1201. (Meter #5750)

SENATOR LEE reopened the Committee Discussion on HB 1201.

SENATOR POLOVITZ moved for a Do Pass.

SENATOR FISCHER seconded the motion.

Roll call was read. 6 yeas 0 nays.

SENATOR POLOVITZ to be the carrier. (Tape 2, Side A, Meter # 0 - 76)

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10/2/03
Date

Date: 02-26-03
Roll Call Vote #: ①

2003 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1201

Senate Human Services Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken

Do Pass

Motion Made By

Sen. Polovitz

Seconded By

Sen. Fischer

Senators	Yes	No	Senators	Yes	No
Senator Judy Lee - Chairman	✓				
Senator Richard Brown - V. Chair.	✓				
Senator Robert S. Erbele	✓				
Senator Tom Fischer	✓				
Senator April Fairfield	✓				
Senator Michael Polovitz	✓				

Total (Yes)

6

No

0

Absent _____

Floor Assignment

Sen. Polovitz

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

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Dan Hall

Date

10/2/03

REPORT OF STANDING COMMITTEE (410)
February 26, 2003 3:31 p.m.

Module No: SR-34-3534
Carrier: Polovitz
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE
HB 1201, as engrossed: Human Services Committee (Sen. J. Lee, Chairman)
recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING).
Engrossed HB 1201 was placed on the Fourteenth order on the calendar.

2003 TESTIMONY

HB 1201

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10/2/03
Date

HB 1201

Comments by Representative William Devlin - Prime Sponsor

I'm the prime sponsor on HB 1201 because something is wrong and we can help fix it. It doesn't cost any money and it will allow our disabled, our old and our young to be employed in a nursing home. I heard about this issue for a long time now. I finally reached my breaking point this past spring when Shelly Peterson called me frantic one day. She was upset because two developmentally disabled individuals were going to lose their jobs. They were going to lose their jobs, not because of poor performance, but because of a conflict between federal and state rules. See an article that ran in the front page of the Harvey newspaper regarding Mary Browning and Jaynee Faul. The last sentence of the article states "Mary Browning and Jaynee Faul continue to work at St. Aloisius while they wait the final outcome."

I think it's time we write the final outcome. The disabled in our state need to know, their jobs are secure and won't be lost because of a conflict in regulations. As long as they do the quality job they are employed to do, some stupid rule shouldn't crush their independence and livelihood.

We have many excellent nurses and certified staff working in nursing homes. We need them to carry out the nursing functions and assure residents get the medical and nursing care they need and deserve. We have over 5,000 certified nurse assistants that help residents with bathing, walking, transferring from their bed to a wheelchair, toileting, etc. These staff are certified. We are not talking about taking away these duties and responsibilities. Providing direct hands on care must be done by licensed nurses and certified staff. What I'm trying to do in HB 1201, is take non-nursing tasks, such as making an unoccupied bed, taking medical supplies to a resident's room, emptying a dehumidifier, emptying the trash from a residents room; taking these tasks, tasks that do not involve direct caregiving or nursing, and allow non-certified people who are perfectly capable of completing these tasks to do so in our nursing homes. There used to be a time when the nurse scrubbed the floor, emptied the trash and gave the shot. Let's use the time of licensed and certified staff wisely. We need nurses and certified staff to provide nursing care. If we allow non-certified staff to make empty beds and the other tasks I identified, that will free up time of the nurse and CNA's so they have more time to provide the hands on care.

Please help me right a wrong and correct an injustice. A number of presentors are here this afternoon to describe the problem, please listen to them carefully and together let's solve the problem they are facing.

Regulations may affect nursing home employees

by Mark Phillips

Two employees of St. Aloisius Long Term Care, Mary Browning and Jaynee Faul, have been caught in the web of government guidelines and regulations.

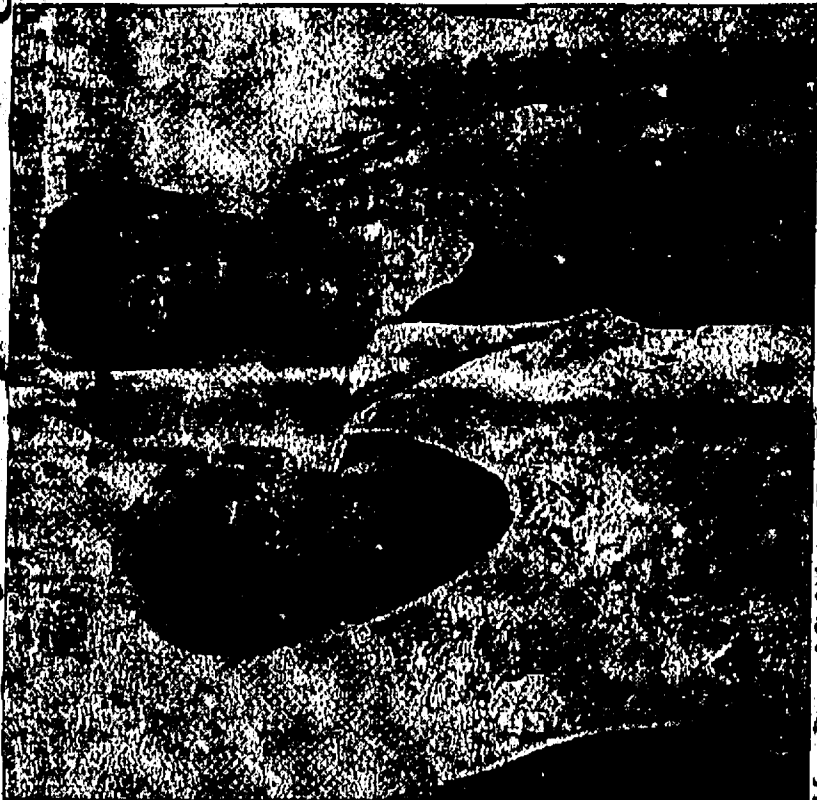
About 10 years ago St. Aloisius began hiring the disabled to assist the nursing staff. Both Browning and Faul make up beds for the residents. That may change because of a June 6 survey of the home.

In 1999 the North Dakota Department of Human Services decided that the salary and benefits for the bed makers were in the wrong cost center. Across the state these types of expenses, previously classified as nursing costs, were disallowed and reallocated to housekeeping.

To complicate matters further, the two cost centers receive entirely different funding. The nursing budget is "direct," meaning the residents receive benefit directly from that department. The housekeeping department is "indirect," meaning residents receive indirect attention from these departments.

Also included in the indirect category are dietary and maintenance departments. Direct and indirect departments receive independent budgets and allocations.

The North Dakota Long Term Care Association encouraged facilities to appeal this decision, re-



Mary Browning, left, and Jaynee Faul

sulting in two Good Samaritan Centers filing an appeal.

On June 8, 2001 an administrative law judge issued a recommended order, ruling that bedmaking is skilled nursing facilities is a delegated nursing task and bedmakers are members of

the nursing staff. He said the facilities were correct in categorizing bedmaker salaries and fringe benefits as nursing costs.

Within 30 days, the Department of Human Services rewrote the decision, stating the judge's rationale was wrong. The facilities

then appealed to the District Court, which issued an order which reversed the Agency's decision and reinstated the decision made by the administrative law judge in favor of the facilities.

Since then, the North Dakota Department of Human Services has written to the North Dakota Health Department requesting they mandate all bedmakers become certified through the 75 hour Certified Nurses Aide (C.N.A.) training course and passing the C.N.A. exam.

Then, June 6 of this year, St. Aloisius was surveyed. The state survey noted neither Browning nor Faul was certified and identified that as a deficiency. "I had to let them know they were no longer employed," said Beth Huseeth, Director of Nursing. "Jaynee and Mary were both quite surprised and upset."

Fortunately, because the issue has not been resolved at the state level, the report came back with the deficiencies removed. "But when things are formalized, they may come back and bite us," said Huseeth.

"It's been a perfect arrangement," said Tim Huseeth, Executive Director at HAV-IT Adult Services. "We need jobs for our clients, the nursing home needs employees. It's been a mutually beneficial situation. These people are providing a real service to the home and the community. Jaynee is on the HAV-IT Board of Directors."

The North Dakota Long Term Care Association has requested The Centers for Medicare & Medicaid Services (CMS) to clarify the certification issue, but has not yet received a response. On June 24, the Department of Human Services, three legislators and the Association will meet in Bismarck to try to resolve the issue concerning "non-certified" staff.

According to the draft of paper sent to legislators by Shelly Peterson, director of the North Dakota Long Term Care Association, "Every disabled individual employed as a bedmaker in a nursing facility will need to be fired as it is very unlikely they can pass the national certification test. Nursing facilities will need to certify all bedmakers, this will cost the facility and ultimately the Medicaid Program at least \$800 per person. All bedmakers, especially disabled individuals are very qualified in this task and do an outstanding job."

Mary Browning and Jaynee Faul continue to work at St. Aloisius while they wait the final outcome.

Testimony on HB 1201
House Human Services Committee
January 13, 2003

Chairman Price and members of the House Human Services Committee, thank you for the opportunity to testify on HB 1201. My name is Shelly Peterson, President of the North Dakota Long Term Care Association. I am here to testify on behalf of members.

Although we represent nursing facilities, basic care facilities and assisted living facilities, the issue before you today is only affecting nursing facilities. We have been struggling with this issue for almost four years. We have been unsuccessful in achieving an administrative remedy and we need your help. We don't know if the language before you is the correct wordage. We are simply following an option the Board of Nursing identified as a way to solve the dilemma facing us. Rather than give you four years of history on this issue and probably confuse everyone in the process, I'm going to define the problem. In defining the problem, it is not my intention to point fingers at the North Dakota Board of Nursing, North Dakota Department of Health, or North Dakota Department of Human Services. We have been working with them to solve this issue and together none of us have been able to find the right solution.

Prior to last month, the Board of Nursing was on record stating that making an unoccupied bed in a nursing facility was a nursing task. They remain on record today that feeding of a patient is a nursing task. This position in and of itself is fine, however it becomes complicated because of the definition of "nurse aide" in the federal rules promulgated under the Social Security Act. Our federal rules (42CFR 483.75) in essence require that anytime you call something a "nursing or nursing related service," the person completing that task must complete a 75 hour training course and pass a national test to be certified.

The federal government is careful not to define the tasks of nursing. Here comes the conflict, with the Board of Nursing having the position, that making an unoccupied bed and feeding a resident is a nursing task, our federal rules kick in, which state these tasks can only be done by an LPN, RN or certified nursing assistant (CNA).

Let me assure you all staff that take care of residents, that complete personal cares, such as bathing, brushing of teeth, lifting, transferring, peri-care are certified staff that are well training and qualified. We have found that the two tasks of making an unoccupied bed and feeding residents who need a little help can be delegated to well-trained uncertified staff. People who we have employed in these positions have been the old, the young and persons with disabilities. We have found they provide outstanding service, are dedicated employees and contributed greatly to the quality of life of nursing facilities residents because of the relationships they develop with residents.

Page 1 of 5

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Date

As you found out from your Vice Chair, this summer the Health Department, at the direction of the Department of Human Services began citing nursing facilities for using non-certified staff to make unoccupied beds. The first citation was going to be given to St. Aloisius Medical Center in Harvey. I'm not going to address the devastation, the threat of that action had on the two women employed in Harvey, you will hear their personal story later.

The young, the old and persons with disabilities we employ are excellent, well trained and well qualified. They contribute greatly. The bed-making issue and feeding issue are slightly different, because of recent action by the Board of Nursing and the federal government changing their position on the use of feeding assistants. For a few minutes I would like to address each issue separately.

Bed-Making:

After the Health Department received their directive from Human Services to enforce the position that all people making an unoccupied bed be a certified nursing assistant or an LPN or RN, we requested the Health Department not issue citations until after we sought clarification from Centers for Medicare and Medicaid Services (CMS). The Health Department waited on citations and informed us they would "track" non-compliance. What this meant was, if during your unannounced survey you were found to be using "non-certified" people to make unoccupied beds, your facilities name would be put on a list. If it was later determined the state was required to enforce only certified staff could make an unoccupied bed, all on the "list" would receive a citation. The problem with receiving this citation, was the only way you could remove the deficient practice was certify these people by enrolling them in the 75 hour course, have them pass a written examination and demonstrate clinical competency in numerous caregiving situations. The vast majority of the developmentally disabled can't master the training and testing requirements, the old don't have the physical strength and endurance and the young just want to work around school, sports and a social life. We make allowances for these situations because we have found all three groups are excellent caregivers.

CMS clarified the certification issue with bed-makers in September 2002. They said, in essence, they do not require individuals who make unoccupied beds to be certified, however if North Dakota has a more stringent rule or law, (i.e. BON) it should be enforced. After this clarification, again the Health Department, delayed issuing citations, giving us an opportunity to solve this problem with the Board of Nursing. In November the Board of Nursing invited me into their Board meeting and asked my opinion on four options they were considering to solve the bed-making issue. Attached see the letter. To us the only viable solution was option #3, seek an exemption from the Nurse Practice Act (NPA). We had been in communication with the Board since July 2002 on this issue. It was our hope to seek a solution with them. We also

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Operator's Signature

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indicated that if we could not solve this issue administratively, we would seek a legislative solution. In November the Board of Nursing tabled the issue and took the action of asking their attorney and executive director to seek a viable solution to bed-making and delay the feeding assistant solution until March or April 2003. The Board of Nursing revisited this issue through a conference call on December 10, 2002. I'm happy to state the Board of Nursing, changed their position on bed-making and I'm hopeful it's acceptable to the Health Department and CMS. Attached is the new position of the Board of Nursing. It is my understanding the North Dakota Health Department has forwarded this new position/statement to CMS for comment.

The issue of feeding is still unresolved for us. Anytime the Board of Nursing identifies something as nursing, our federal rules will require the person to be certified. Although we don't expect the Board of Nursing to take such action and the Board of Nursing has worked hand-in-hand with us to solve this problem, we don't want to leave the issue unresolved. There are rate-setting cases before the administrative law judge and the district court that are arguing about what is nursing in this state, and those rate-setting cases are driving this issue. We feel the legislation before you will remove our bed-makers and feeding assistants from the preview of the nursing debate and allow us to employ them.

Feeding Assistants:

Since the mid-eighties nursing facilities have used specially trained individuals to feed residents during dining times, which as you can imagine is a very busy time. To assure residents are properly fed and hydrated, extra staff are employed for this task. This practice was recognized and supported by the State Health Department. It was considered a very positive practice with no negative outcome ever documented. In 2000, eighty percent of the nursing facilities used feeding assistants, we estimated 447 individuals were employed for this purpose. In August 2000, the federal government, CMS cited a North Dakota nursing facility for using feeding assistants. CMS asserted that a change in the Social Security Act was needed if North Dakota wanted to continue to use feeding assistants. At the same time, they asserted the feeding assistants appeared to be doing an excellent job, residents were well fed and hydrated, however the law must be followed. It was the federal government position that all feeding assistants must be certified if they work in a nursing facility. They also said if we simply converted our feeding assistants into volunteers, we would meet the regulations. This citation was made at a time when we had 1000 open positions, we were experiencing 66% turnover in our caregiving staff, two-thirds of nursing facilities termed themselves in a staffing crisis and 40% of the nursing facilities had stopped admissions because they didn't have sufficient staff.

CMS forced the State Health Department to enforce this requirement and thus we had two options: 1) enroll all your feeding assistants in the minimum 75 hour course and have them pass a written and clinical skills test or 2) fire them in their current position. We worked with our Congressional Delegation to amend the Social Security Act and to date legislation has been stalled in Congress.

For some facilities it became a moral issue pitted against a legal issue. Facilities felt to deliver the highest quality of care and assure residents were properly fed, they wanted at all costs to continue to employ these valuable employees.

Facilities encouraged their staff to take the training course. For a variety of reasons not all feeding assistants were willing or capable of taking the course. Although well-trained in their feeding functions, the comprehensive course and testing was beyond the reach for many. Today, at least three nursing facilities continue to employ feeding assistants who are not certified, thus out of compliance with the federal requirement. One facility you will hear from today, because they were recently cited for non-compliance. Their story and situation is compelling.

Two facilities we can't share their identity with you, as acknowledging their existence would put them at risk of citation. One employs a woman in her late eighties, this job is her life, we hope they never find out about her work.

The legislation before you, HB 1201 will clear the path for us to re-employ (or take them out of hiding) feeding assistants. Finally, CMS has seen the light, in March 2002 they proposed rules to allow all the states to utilize and employ feeding assistants. Those proposed rules are a god-send. It was hoped the proposed rules would become final by the end of 2002. We are told the rules should be published early in 2003. Attached is a brief summary of the proposed rules. Since the publishing of the proposed rules we have been in communication with the Health Department on, how can we immediately implement the rules in North Dakota.

The Health Department has informed us there are two obstacles that must be removed prior to implementation. The first issue is the Board of Nursing is on record stating feeding is a nursing task and because of that position we could never implement the rules because once a task is determined to be a nursing function, only an LPN, RN or "certified" nurse assistant can be utilized to complete that function. The exemption before you would solve that problem. The second issue is the State Health Department indicated they need more money to provide the oversight and supervision to implement this new regulation. We are working with them to overcome this barrier.

My testimony before you is the short version. We have four years of history. I've left out a lot of the details and tried to highlight the problems and solution. Again we don't intend to blame anyone for the mess we are in. The Board of Nursing, Health Department and facilities all had good and right intentions on this seemingly simply but complex issue. Our desire is to seek a legislative solution and solve this problem once and for all. We are open to amendments that could better achieve our end result of employing bed-makers and feeding assistants.

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Deanna Hallmark
Operator's Signature

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I have a number of individuals that want to share with you how this issue impacts their life. This issue has hurt people, people who were caught in a web of regulations. People who are excellent employees, delivering a valuable service. The examples are from across the state, each has their own story...

Today I'm touching upon the people who want to be a feeding assistants or bed-makers. I haven't touched upon the impact of nursing facility residents and the loss of these caregivers in their life.

Audrey Aurit - A former feeding assistant who lost her job and wants to work again.

Tim Huseeth - Executive Director at HAV-IT Adult Services in Harvey an advocate on behalf of two developmentally disabled women who work at St. Aloisius Medical Center in Harvey, speaking on behalf of Mary and Jaynee.

Charles Strutz - A twenty plus year employee who makes beds at the Oakes Manor Good Samaritan Center. Chuck was the focus of a rate-setting case that brought this issue to the forefront.

Rockford Zastoupil - Administrator at Elm Crest Manor in New Salem tells the stories of a recent citation for using an individual as a feeding assistant. Excellent employee, is on her third try of passing the certification test.

Jon Larson - Representing the North Dakota Association of Community Facilities.

Grant Wilz - Director of Nursing at the Baptist Home in Bismarck.

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

*20013 N.D. Code § 43-12.1-04

**WEST'S NORTH DAKOTA CODE
TITLE 43. OCCUPATIONS AND PROFESSIONS
CHAPTER 43-12.1. NURSE PRACTICES ACT**

Current through the Special Session of the 57th Legislative Assembly (2001)

§ 43-12.1-04. Persons exempt from provisions of chapter

This chapter does not apply to:

1. Persons who perform nursing interventions in cases of emergency or disaster.
2. Students practicing nursing as a part of a board-approved nursing education program.
3. Legally licensed nurses of another state employed in this state by the United States government or any of its bureaus, divisions, or agencies.
4. A nurse licensed by another state or Canada, whose employment requires the nurse to accompany and care for a patient in transit for health care.
5. A nurse licensed by another state whose employment by a resident of that state requires the nurse to accompany and care for the resident in North Dakota.
6. A person who performs nursing tasks for a family member.
7. A person who is not licensed under this chapter and who renders assistance pursuant to chapter 23-27.
8. A person licensed or registered under this title and carrying out the therapy or practice for which the person is licensed or registered.
9. A person who provides medications, other than by the parenteral route:
 - a. Within residential treatment centers for children licensed under chapter 25-03.2 and North Dakota Administrative Code chapter 75-03-17;
 - b. Within treatment or care centers for developmentally disabled persons licensed under chapter 25-16;
 - c. Within group homes, residential child care facilities, and adult foster care facilities licensed under section 50-11-01 or North Dakota Administrative Code chapter 75-03-16; or
 - d. Within human service centers licensed under chapter 50-06.
10. A nurse currently licensed to practice nursing by another jurisdiction:
 - a. Whose practice in another state requires that nurse to attend orientation, meetings, or continuing education in North Dakota;
 - b. Who serves as a guest lecturer or short-term consultant; or
 - c. Who provides evaluation undertaken on behalf of an accrediting organization.

*Amended by L.1995, c. 403, § 5, eff. July 1, 1995; L.1995, c. 404, § 1, eff. July 1, 1995; L.1999, c. 376, § 1, eff. Aug. 1, 1999; L.2001, c. 372, § 3, eff. July 1, 2001. *20014*

HISTORICAL NOTES

HISTORICAL AND STATUTORY NOTES

L.1995, c. 403, §§ 18 to 20, provide:

"Section 18. Transition. Rights and duties that have matured, penalties that were incurred, and proceedings that were commenced before the effective date [Aug. 1, 1995] of this Act remain valid under the law in effect at the time of the occurrence. Any person holding a license or registration to practice nursing that is valid on the effective date of this Act is deemed to be licensed or registered under the provisions of this Act and is eligible for renewal of the license or registration under the conditions and

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11/19/02 DRAFT

DRAFT

TO: North Dakota Board of Nursing Members

FROM: Constance B. Kalanek, Ph.D., R.N., Executive Director
North Dakota Board of Nursing

Brian Bergeson, Special Assistant Attorney General
North Dakota Board of Nursing

DATE: November 19, 2002

RE: Clarification regarding Services by Assistive Personnel
in Medicare-Funded Facilities in North Dakota

At its September, 2000 meeting, the North Dakota Board of Nursing reaffirmed its position that the feeding of a patient is a nursing task. The Board similarly asserted, in the Mott/Oakes administrative appeal, that bed making is a nursing task. Defining nursing by individual tasks, however, has proven to be complicated and confusing, and such definitions are difficult (if not impossible) to apply in Medicare-funded facilities in North Dakota. A departure from the prior definitions may therefore be justified.

The complication is present because of the definition of "nurse aide" in the federal rules promulgated under the Social Security Act. Specifically, in 42 C.F.R. § 483.75, a nurse aide is defined as "any individual furnishing nursing or nursing-related services." Importantly, individuals defined as nurse aides under § 483.75 are further required by the federal rules to become certified. As a result, consistent with § 483.75, all individuals performing feeding and bed making services, which the Board has defined as nursing tasks, are performing nursing-related services and must be federally certified.

The North Dakota Department of Health and the North Dakota Long Term Care Association have asked the Board to clarify its position regarding feeding and bed making. Without clarification, individuals performing such services in Medicare-funded facilities must be federally certified under § 483.75, and the individuals who are not and cannot be certified will no longer be able to provide such services.

We believe that the Board has several options to consider. First, the Board can maintain its position that feeding and bed making are nursing tasks, which will require all

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Individuals performing such services in Medicare-funded facilities to become federally certified. As you are aware, the Board is required by the Nurse Practices Act to assure that qualified, competent practitioners and high-quality standards are available in the public interest. See N.D.C.C. 43-12.1-01. Requiring all individuals employed in Medicare-funded facilities to become federally certified will help assure that the individuals providing feeding and bed making services are qualified and competent.

Second, the Board could modify its position regarding the performance of feeding and bed making services so that individuals may be able to perform such services without being federally certified. The Board previously and partially modified its position about feeding when it adopted the following statement at its March 1, 2001 meeting:

This activity of daily living [i.e., feeding] applies to nurse assistants carrying out a delegated nursing intervention who must hold current registry status. Services that are indirectly provided to clients can be administratively directed and may or may not be a nursing responsibility.

One possible modification would be to emphasize applicable statutory and other nursing definitions. The Nurse Practices Act, and its related administrative rules, anticipate that nursing services will be provided either by licensed nurses or registered unlicensed assistive persons. See e.g. N.D.A.C. 54-05-04-01. The term "unlicensed assistive person" is defined to mean "an assistant to the nurse who regardless of title is authorized by the board to perform nursing interventions delegated and supervised by a licensed nurse." N.D.C.C. § 43-12.1-02(11). The term "nursing intervention" is then defined to mean "the initiation and completion of client-focused actions necessary to accomplish the goals defined in the plan of care." N.D.A.C. § 54-01-03-01(38). Importantly, the administrative rules contemplate that "nursing interventions vary from setting to setting depending on the client population served and the acuity and complexity of the client's care needs." *Id.*

As a result, unlicensed assistive persons are performing nursing interventions, or nursing services, only when the interventions or services are necessary to accomplish the goals defined in a patient's plan of care. In other words, rather than broadly defining feeding and bed making services as nursing tasks, such services can be regarded as nursing tasks only when necessary to accomplish the goals defined in each patient's particular plan of care. If the plan of care does not address a particular feeding or bed making need, the provision of such services will not be nursing services, regardless of who supervises the provision of such services. However, based upon our discussions with representatives of the North Dakota Department of Health, a modification based upon a patient's plan of care (unless it is further restricted) will in practice generally require federal certification for most individuals, as all services provided to a patient are generally included within that patient's particular plan of care.

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Deanna Halbach
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Another possibility would be to modify the term "nursing intervention", or the Board's interpretation of that term, in order to restrict its scope. For example, the Board could separate the nursing and non-nursing components of nursing interventions. Such modification would be similar in nature to the March 1, 2001, modification referenced above, but would likely need to be more specific.

*This is
what we
believe
we need.*

Third, the Board could consider seeking or supporting another exemption to § 43-12.1-04 of the Nurse Practices Act. Such exemption could broadly exempt unlicensed assistive persons from the scope of the Nurse Practices Act, or could be more narrowly drafted to exempt certain unlicensed assistive persons, such as those working in Medicare-funded facilities or those performing feeding and bed making services. It may prove difficult, however, to draft a limited exemption that will properly and appropriately define the persons and terms of the exemption.

Finally, the Board could table its discussion on this matter until March or April of 2003. At that time, it is expected that new federal rules will be promulgated which will exclude the services of feeding assistants from the "nursing or nursing-related services" contemplated in § 483.75. The wording of the new federal rules may impact how any potential modification or exemption of the Board should be worded or applied. By waiting for the new rules to be promulgated, the Board may be better able to address this matter.

If the Board is inclined to follow the first option described above, we recommend adopting the following statement:

FEEDING AND BED MAKING SERVICES ARE NURSING INTERVENTIONS SUBJECT TO REGULATION BY THE NORTH DAKOTA BOARD OF NURSING; HOWEVER, SUCH INTERVENTIONS CAN SAFELY AND PROPERLY BE DELEGATED TO UNLICENSED ASSISTIVE PERSONS WITHIN MEDICARE-FUNDED FACILITIES, AS LONG AS THEY ARE DELEGATED AND SUPERVISED BY A LICENSED NURSE.

If the Board is inclined to follow the second option described above, thereby emphasizing the nursing definitions, we recommend adopting the following statement:

NURSING SERVICES WITHIN MEDICARE-FUNDED FACILITIES MUST BE DEFINED IN ACCORDANCE WITH EACH PATIENT'S PARTICULAR PLAN OF CARE. IF AN ACTION IS NECESSARY TO ACCOMPLISH THE GOALS DEFINED IN THE PLAN OF CARE, THE ACTION WILL BE A NURSING INTERVENTION AND THEREFORE A NURSING SERVICE.

Doreen Hall
Operator's Signature

10/2/03
Date

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ALTHOUGH IT MAY BE SAFELY AND PROPERLY DELEGATED TO UNLICENSED ASSISTIVE PERSONS AS LONG AS IT IS DELEGATED AND SUPERVISED BY A LICENSED NURSE. IF AN ACTION IS NOT NECESSARY TO ACCOMPLISH THE GOALS DEFINED IN THE PLAN OF CARE, THE SERVICE WILL NOT BE A NURSING INTERVENTION OR A NURSING SERVICE, ALTHOUGH IT MAY BE PERFORMED BY UNLICENSED ASSISTIVE PERSONS AND SUPERVISED BY A LICENSED NURSE.

If the Board is inclined to follow any of the remaining options described above, we believe that further discussion and direction will be necessary.

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Deanna H. [Signature]
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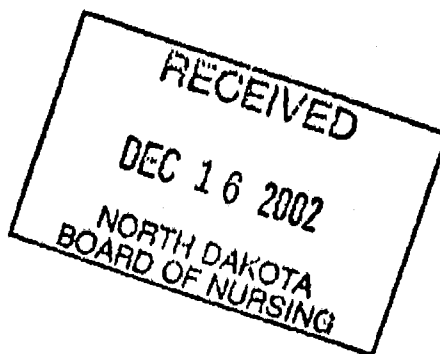
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The Law
Offices of SCHULZ LERVICK
GEIERMANN & BERGESON

COPY

December 13, 2002



Edward Erickson
Office of Attorney General
600 E Boulevard Ave
Bismarck ND 58505-0040

Re: Unoccupied Bed Making

Dear Edward:

I am enclosing a copy of the Statement regarding Unoccupied Bedmaking Services by Assistive Personnel that was adopted by the North Dakota Board of Nursing at its meeting on December 10, 2002. This Statement includes revisions based upon your observations that we discussed last Friday.

It is my understanding that the North Dakota Department of Health will be forwarding this Statement to the Centers for Medicare and Medicaid Services ("CMS") for comment. I kindly request that you provide me with a copy of CMS' comments.

Thank you for your assistance. I look forward to CMS' comments.

Sincerely,

Brian L. Bergeson
Special Assistant Attorney General
North Dakota Board of Nursing

BLB/vs

cc: Constance B. Kalanek, Ph.D., R.N., Exec. Dir.,
N.D. Board of Nursing

A Professional Corporation ■ Norlyn E. Schulz, Tim Lervick, Michael Geiermann, Brian L. Bergeson*
425 N. Fifth St. ■ P.O. Box 2196 ■ Bismarck, ND 58502-2196 ■ Phone: 701-223-1986 ■ Fax: 701-223-4049
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12/2/03
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NORTH DAKOTA BOARD OF NURSING

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Statement regarding Unoccupied Bedmaking Services by Assistive Personnel

At its September, 2000 Board meeting, the North Dakota Board of Nursing ("Board") reaffirmed its position that the feeding of a patient is a nursing task. The Board similarly asserted, in the rate-setting administrative action concerning the North Dakota Department of Human Services, Mott Good Samaritan Nursing Center and Oakes Manor Good Samaritan Center ("Mott/Oakes action"), that bed making is a nursing task. Defining nursing by individual tasks, however, has proven to be complicated and confusing, and such definitions are difficult (if not impossible) to reasonably apply in North Dakota due to certain federal regulations applicable to Medicare and Medicaid-funded facilities. A departure from the Board's prior definitions by task may therefore be justified.

The complication is present because of the definition of "nurse aide" in the federal rules promulgated under the Social Security Act. Specifically, in 42 C.F.R. § 483.75, a nurse aide is defined as "any individual furnishing nursing or nursing-related services." Importantly, individuals defined as nurse aides under § 483.75 are further required by the federal rules to become certified. As a result, because of the Board's current definitions by task, all individuals performing feeding and bed making services in Medicare and Medicaid-funded facilities are being regarded as performing nursing or nursing-related services and are therefore required to be federally certified.

The North Dakota Department of Health and the North Dakota Long Term Care Association have asked the Board to clarify its position regarding feeding and bed making. Without clarification, individuals performing such services in Medicare and Medicaid-funded facilities must be federally certified under § 483.75, and the individuals who are not and cannot be certified will no longer be able to provide such services.

At its November, 2002 Board meeting, the Board tabled its discussion regarding feeding until March or April of 2003. At that time, it is anticipated that new federal rules will be promulgated which will expressly exclude the services of feeding assistants from the "nursing or nursing-related services" contemplated in § 483.75. The wording of the new federal rules may impact how the Board should clarify its position. By waiting for the new rules to be promulgated, the Board may be better able to address the feeding issue. The Board did determine, however, to clarify its position with respect to unoccupied bed making.

The Board described bed making as a nursing task when it intervened in the

The mission of the North Dakota Board of Nursing is to assure North Dakota citizens quality nursing care through the regulation of standards for nursing education, licensure and practice.

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Mott/Oakes action, which was a state rate-setting administrative action. The issue specified for determination in that action was whether the salaries and employment benefits of persons employed as bedmakers should be classified in the category of housekeepers or the category of nurse aides for rate-setting purposes. In order to resolve that issue, the meaning of the term "nurse aides", as set forth in N.D.A.C. § 75-02-06-02.2(2)(a), was debated.

The Board in the Mott/Oakes action argued, and presented testimony, that bed making in a nursing facility is a nursing task, and therefore should not be regarded by the North Dakota Department of Human Services as a housekeeping service for rate-setting purposes. The Board's intent, consistent with its duty to protect the health and welfare of the residents of North Dakota, was to insure that bed making services were delegated by, supervised by and authorized by nurses rather than housekeepers. Accordingly, the Board argued, and the District Court upheld, that bedmakers were "nurse aides" within the meaning of the state rate-setting regulations. The meaning of the term "nurse aide" as defined in § 483.75 was not an issue, and the Board did not assert any position with respect to the meaning of that term for any survey or certification purposes. (After the Mott/Oakes action was resolved, the North Dakota Department of Human Services amended its definition of the term "nurse aides", thereby effectively rendering moot the Board's arguments in that action.) The Board's testimony, however, has been used for certification purposes following the Mott/Oakes action.

Although bed making itself is a relatively minor focus of nursing as a profession, the responsibility for bed making in the health care setting, as argued by the Board in the Mott/Oakes action, generally falls within the boundary of nursing practice. Although the Board generally asserted, for rate-setting purposes and within the meaning of N.D.A.C. § 75-02-06-02.2(2)(a), that bed making is a nursing task, the Board does not believe, for certification purposes and within the meaning of § 483.75, that the making of an unoccupied bed must always be performed by a licensed nurse or an individual who has completed the federal certification requirements. Instead, the Board believes that unoccupied bed making can in many circumstances be safely and properly delegated to non-certified individuals.

The Nurse Practices Act, and its related administrative rules, anticipate that nursing services will be provided either by licensed nurses or registered unlicensed assistive persons. See e.g. N.D.A.C. 54-05-04-01. The term "unlicensed assistive person" is defined to mean "an assistant to the nurse who regardless of title is authorized by the board to perform nursing interventions delegated and supervised by a licensed nurse." N.D.C.C. § 43-12.1-02(11). The term "nursing intervention" is then defined to mean "the initiation and completion of client-focused actions necessary to accomplish the goals defined in the plan of care." N.D.A.C. § 54-01-03-01(38). In other words, a nursing intervention, which presumably is a "nursing or nursing-related service" under § 483.75, requires the initiation and completion of a "client-focused action."

As discussed above, the Board has previously described bed making, including the making of unoccupied beds, as a nursing task. In fact, the principles for making an unoccupied bed can be found in most basic nursing and nurse assistant textbooks. The term "unoccupied bed," however, refers to a bed on which the assigned patient or resident is not lying or sitting down when the linens are to be changed. The Board does not believe that the making of an unoccupied bed, which is not directly provided to a patient or resident, is a "client-focused action." As a result, the Board holds that the making of unoccupied beds, while a service that may be delegated and supervised by a licensed nurse, is not a nursing intervention within the meaning of N.D.A.C. § 54-01-03-01(38) and therefore should not be a nursing or nursing-related service within the meaning of § 483.75.

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Donna Bell
Operator's Signature

10/2/03
Date

Feeding Assistant Regulations:

- ✓ Feeding assistants must complete a state-approved training course.
- ✓ The rules specify the content, not the length of the course.
- ✓ The content of training must be: feeding techniques, safety and emergency procedures, communication and interpersonal skills, infection control and resident rights, appropriate responses to resident behavior and recognizing changes in residents and reporting those to the nurse.
- ✓ States must approve the feeding assistant training programs however, CMS states this training could easily be implemented in any facility with an approved nurse aide training program.
- ✓ Facilities need to maintain a record of individuals it uses as feeding assistants.
- ✓ Facilities must report any incidents of feeding assistants who have been found to neglect or abuse a resident, or misappropriated a residents funds.
- ✓ States aren't required to maintain a formal registry, but the intent is similar.
- ✓ Professional nursing staff in the facility must identify residents who need help eating and drinking and those who can be fed by feeding assistants. Use the MDS to determine who is appropriate.
- ✓ A nurse must be in the unit or on the floor where the feeding assistant is provided and is immediately available to help.
- ✓ Any non-professional nursing facility employee, including the administrator, activity staff, clerical, laundry or housekeeping staff may be considered a feeding assistant if they complete the training requirements.
- ✓ Feeding assistants are meant to supplement staff, not replace them. Therefore, feeding assistants can not be counted toward any minimum staffing requirements.

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Deanna Hall
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10/2/03
Date

Good afternoon, my name is Audrey Aurit, I was a feeding assistant at Medcenter One Golden Manor in Steele until I lost my job in June of 2001. I loved my job and the last thing I wanted to do was quit.

I started working at the nursing home in 1996 after many years with BEK Communications in Steele. I didn't want to become a couch potato and when they asked if I would be willing to help during meal times at the home, I said yes.

Today I'm approaching 80 years old. I was 78 when I quit at the home. I've got some trouble breathing and most days, something hurts. I'm having a little more trouble walking now but I can get around okay.

My residents loved it when I helped them eat and visited with them. In fact, one time one of my favorite residents lost seven pounds while I was gone on vacation. She and I have gotten into a kind of routine, and my being gone wasn't part of the routine. After I returned, it didn't take long at all and we had that weight right back where it belonged!

It's not that I did anything really special at the nursing home. I just took the time to care for the residents like I hope someone will care for me when I'm a resident. And that might not be so far away.

I certainly don't want to have a rushed or overburdened employee asking me to "open my mouth wider" or "chew a little quicker" or "try not to talk so much, we're eating now." I want to enjoy my meals while I can, and I know that's how my residents felt about me.

Yes, the staff at the nursing home encouraged me to take the course and test so I could keep my job. Do I look like I could go through 75 more hours of training, training to learn how to lift and move residents bigger than me, training I don't want and don't need to help my residents with their meals and snacks?

I understand the folks in Washington finally understand people like me are a good thing for the residents. Now we seem to have a problem with some state rule.

Periodically I call the nursing home, to see if I can go back to work. It's been almost two years since I've fed my residents. Some have died. I miss the residents. It was one of the most rewarding jobs I've ever had.

Please do something so other folks like me who want to work in their local nursing home can.

Thank you.

Audrey Aurit
2535 39th St SE
Steele, ND 58482
(701) 475-2633

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Donna Goldsmith
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10/2/03
Date

January 12, 2003

HOUSE HUMAN SERVICES COMMITTEE
HB 1201

CHAIRMAN PRICE AND COMMITTEE MEMBERS:

My name is Jack McDonald. I'm appearing here today on behalf of The Arc of North Dakota. The Arc is an open membership organization made up of people with mental retardation and other related developmental disabilities, their families, friends, interested citizens, and professionals in the disability field.

The Arc of North Dakota has over 1,200 committed members and friends...your neighbors and constituents...in chapters in Grand Forks, Fargo, Valley City, Jamestown, Bismarck, Dickinson and Bowman.

Our Mission Statement is to improve the quality of life for children and adults with mental, retardation and related developmental disabilities and their families through advocacy, education and family support services.

Public policy advocacy is an essential component of the Arc movement, and that's why we're here today. Arc members have worked together legislators over the past 50 years to secure family support services, special education, health care, leisure opportunities, vocational training, community housing and other community support services.

The Arc strongly supports this bill as a means of making more work opportunities available for developmentally disabled individuals. It is difficult, at best, to find meaningful work opportunities for these individuals. It makes it just that much more difficult if they are precluded from certain jobs because they can't qualify as licensed nurses. This bill fully protects the public interest by requiring this work to be done under the direct supervision of licensed nurses.

The Arc urges you to support and give a "do pass" to HB 1201.

If you have any questions, I will be happy to try to answer them. Good luck this session. THANK YOU FOR YOUR TIME AND CONSIDERATION.

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**Testimony on HB 1201
2003 Legislative Assembly
Health & Human Services Committee
January 13, 2003**

Chairperson Clara Sue Price and members of the Health & Human Services Committee, my name is Tim Huseh. I am the Executive Director of HAV-IT Services in Harvey, ND. Our agency provides services to 34 people who have developmental disabilities. I am here to ask your support for HB 1210 regarding persons to be excluded from the Nurse Practices Act.

Last summer our local nursing home was surveyed and sited a deficiency by Health Facilities for employing people who did not have CNA certification to make unoccupied beds for nursing home residents. As a result two people with developmental disabilities who receive support services from us and who are employed by the nursing home to make beds were effected. One person had been working as a bed maker for the past 2 years and the other person for the past 5 years. In order to correct the deficiency, the nursing home's options included transferring these two employees to another job within the facility or releasing them from employment. The nursing home director shared with me that she had to meet with the two people effected to explain the situation. The first person was in shock, in disbelief that she would have to leave the nursing home. The second person became very upset and responded with a tearful "No!" Fortunately, Health Facilities agreed to temporarily remove the deficiency. These two employees continue to be employed as bed makers and await the final decision of their employment status.

As a DD Service Provider for the past 21 years, we have been an important partner with the state of North Dakota integrating people who have developmental disabilities from institution settings to community living. Our local nursing home, the largest employer in our community, has also been an important partner with us as we identified employment opportunities to help people who have developmental disabilities become tax payers rather than tax dollar recipients. We search for jobs that are labor intensive and/or are routine. Bed making fits this criteria very well.

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Donna H. Huseh
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Testimony on HB 1201
January 13, 2003
Page 2

As a result of this partnership, people who have developmental disabilities have obtained employment earning wages as well as vacations. They have a sense of self-worth that they can contribute to our community. They have established friendships with their co-workers and are included in their social activities, staff meetings, birthdays, weddings & parties. DD Service Providers such as HAV-IT Services are located across the state in both urban and rural communities. Please support HB 1201 as it offers an important job opportunity to people who have developmental disabilities.

This concludes my testimony. I would be happy to try to answer any questions that you might have.

Tim Huseeth, Executive Director HAV-IT Services

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10/2/03
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**Testimony on HB 1201
House Human Services Committee
January 13, 2003**

Chairperson Price and members of the House Human Services Committee, my name is Jon Larson. I am the executive director of Enable, Inc., a private, non-profit agency in Bismarck and Mandan that provides services to people with developmental disabilities. I am also representing today the North Dakota Association of Community Facilities. NDACF represents 26 agencies across the state that provide services to people with disabilities. I am here to express our support for HB1201.

Part of what providers do for the people we support is to find meaningful jobs in the community. Many of the people we support possess skills that are a good match to a job that is fairly routine and labor intensive. Bed making in a nursing home is a good example of a win-win situation where an employer gains a steady employee for a necessary task and a worker gains a much needed and valued job. To restrict this activity because an employee can not pass a written test or can not perform a wide variety of other job functions does not seem right or helpful. Passage of this bill will allow Nursing Homes to gain valuable employees while providing meaningful job opportunities for people with disabilities.

We urge your support of HB1201. Thank-you for this opportunity to testify.

Jon Larson, Executive Director of Enable Inc. and representing NDACF

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Testimony

House Bill 1201

House Human Services Committee

January 13, 2002

2:00 p.m.

North Dakota Department of Health

Madam Chairman and members of the House Human Services Committee, I am Darleen Bartz, Section Chief of the Health Resources Section, North Dakota Department of Health. I am here today to provide information to the committee regarding the Department's nurse aide registry.

The Department of Health as the state survey agency is designated through federal Medicare and Medicaid requirements to operate the nurse aide registry. The registry, which has been maintained by the Department for more than 10 years, currently lists more than 10,000 certified nurse aides who are eligible to work in nursing facilities. The Department's nurse aide registry is recognized by the North Dakota Board of Nursing. This means that the Department's registry meets or exceeds the requirements of the Board's nurse aide registry and that a nurse aide listed on the Department's registry does not also need to be listed on the Board's registry.

The federal Medicare and Medicaid nursing facility requirements mandate that individuals who provide nursing or nursing-related services who are not licensed staff, volunteers or family members be listed on the Department's nurse aide registry. To obtain registry status, the individual is required to successfully complete nurse aide training and competency evaluation program requirements. The competency evaluation programs approved by the Department are required to be nationally recognized and have both a written/oral and a clinical component.

The Department is also required to investigate allegations of abuse, neglect or misappropriation of residents' property against individuals working in the nursing facility and to place validated findings on the Department's nurse aide registry.

During the annual Medicare and Medicaid inspection of nursing facilities, staff are observed providing care to residents, and records of staff training and registration/licensure are reviewed as needed to follow up on any concerns. Since renewal is required every two years, the Department also monitors to determine that registrations are current.

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Darleen Bartz
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Date

The proposed legislation would exempt from the Nurse Practices Act those individuals in nursing facilities who provide nursing or nursing-related services and who are not licensed nurses. The Department would continue to operate the nurse aide registry as identified above, including approval of nurse aide training and competency evaluation programs, investigation of abuse allegations, and onsite monitoring of care provided to residents. The Department anticipates that the nurse aide registry would continue to be a Board-recognized registry.

This concludes my formal testimony. I am happy to respond to any questions you may have.

Thank you.

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TESTIMONY ON HOUSE BILL NO. 1201
January 13, 2003

Sharon Moos, Executive Director
North Dakota Nurses Association

The North Dakota Nurses Association is concerned that the language in House Bill 1201 is "too broad" and goes beyond the intent of exempting "single-task workers."

It is our understanding that licensed nurses can neither delegate to, or be responsible for individuals exempted from the Nurse Practices Act. The current language in this bill would remove a nurse's responsibility for all of the workers in Medicare-funded nursing facilities who now perform delegated nursing functions. We do not believe this was the intent of the Long Term Care Association but if the language remains unchanged it would be opposed by the Nurses Association.

If the problem is the single-task worker then we recommend amending the bill language to identify and exempt "single-task workers employed in Medicare-funded facilities".

The current language is problematic because of the types and numbers of long term care employees who could be impacted by a licensed nurses inability to delegate to or supervise their activities. We support amending the language to clearly identify who is being exempted and believe the type of tasks completed by these individuals should be those not requiring delegation by a licensed nurse or of a nature that could threaten the safety of a resident in a Medicare-funded facility.

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Sharon Moos
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1/12/03
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NORTH DAKOTA BOARD OF NURSING

919 S 7th St., Suite 504, Bismarck, ND 58501-5881

Web Site Address: <http://www.ndbn.org>

Telephone # (701) 328-9777

Nurse Advocacy # (701) 328-9783

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HUMAN SERVICES COMMITTEE

TESTIMONY RELATED TO HB 1201

Chairperson Price and members of the Human Services Committee, my name is Dr. Constance Kalanek, Executive Director of the North Dakota Board of Nursing.

On behalf of the board, I wish to offer testimony on HB 1201 relating to the exemption in the Nurse Practices Act 43-12.1-04.

The North Dakota Board of Nursing works diligently to establish and maintain rules and regulations that protect and serve the public. The board currently licenses 8392 registered nurses of which 61% hold a bachelor's degree or higher, 3179 licensed practical nurses of which 48% hold an associate degree, and 489 advanced practice nurses. The board also maintains a Unlicensed Assistive Person Registry of 2341 individuals who assist the nurse in the delivery of nursing care and 716 medication assistants. The Board protects the citizens of North Dakota through the licensure and registration of these individuals.

As a representative of the North Dakota Board of Nursing I would like to offer the following amendment to the proposed language:

An individual working in a Medicare-funded facility, who is not a licensed nurse, in the performance of single tasks, ~~delegated nursing interventions under the direction of a licensed nurse.~~

The rationale for the amendment includes the following:

- The original language is too broad and leaves the statement open for broad interpretation.
- The exemption is specific for a single task worker.
- The individual would be providing a service under the direction of housekeeping or dietary.

The mission of the North Dakota Board of Nursing is to assure North Dakota citizens quality nursing care through the regulation of standards for nursing education, licensure and practice.

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Deanna G. Ball

Date

10/2/03

- It eliminates the possible conflict with NDAC 54-05-04 Standards for Assignment and Delegation.

Healthcare is in a constant state of change with impetus coming from many different agendas. The Board of Nursing and the North Dakota Department of Health worked jointly to provide a clarification on the use of this type of worker. I have attached the clarification document submitted to the Centers for Medicare and Medicaid Services in December 2002 for your review. Ultimately, CMS will need to provide guidance as to what they include in the definition of "nursing related services. We expect a response shortly.

The Board of Nursing will be meeting for the January meeting on Thursday and Friday this week and will be discussing this exemption in detail. I would ask for consideration in submitting any additional testimony at that time.

Thank you for giving me the opportunity to provide testimony.

I am now open for questions.

REFERENCES

North Dakota Board of Nursing, (2002). *Current Database*. 919 So. 7th St., Bismarck, ND 58504.

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Deanna Holbrook
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10/2/03
Date

February 26, 2003

SENATE HUMAN SERVICES COMMITTEE
HB 1201

CHAIRMAN LEE AND COMMITTEE MEMBERS:

My name is Jack McDonald. I'm appearing here today on behalf of The Arc of North Dakota. The Arc is an open membership organization made up of people with mental retardation and other related developmental disabilities, their families, friends, interested citizens, and professionals in the disability field.

The Arc of North Dakota has over 1,200 committed members and friends...your neighbors and constituents...in chapters in **Grand Forks, Fargo, Valley City, Jamestown, Bismarck, Dickinson and Bowman.**

Our **Mission Statement** is to improve the quality of life for children and adults with mental, retardation and related developmental disabilities and their families through advocacy, education and family support services.

Public policy advocacy is an essential component of the Arc movement, and that's why we're here today. Arc members have worked together legislators over the past 50 years to secure family support services, special education, health care, leisure opportunities, vocational training, community housing and other community support services.

The Arc strongly supports this bill as a means of making more work opportunities available for developmentally disabled individuals. It is difficult, at best, to find meaningful work opportunities for these individuals. It makes it just that much more difficult if they are precluded from certain jobs because they can't qualify as licensed nurses. This bill is truly one of those win-win bills; it helps the workers and it helps the facilities. It helps everyone involved.

The Arc urges you to support and give a "do pass" to HB 1201.

If you have any questions, I will be happy to try to answer them. Good luck this session. **THANK YOU FOR YOUR TIME AND CONSIDERATION.**

Testimony

House Bill 1201

Senate Human Services Committee

February 26, 2003

10:30 a.m.

North Dakota Department of Health

Madam Chairman and members of the Committee, I am Darleen Bartz, Health Resources Section chief for the North Dakota Department of Health. I am here today to provide information about the Department's nurse aide registry.

As the state survey agency, the Department of Health is designated through federal Medicare and Medicaid requirements to operate the nurse aide registry. The registry, which has been maintained by the Department for more than 10 years, currently lists more than 10,000 certified nurse aides who are eligible to work in nursing facilities. The Department's nurse aide registry is recognized by the North Dakota Board of Nursing. This means that the Department's registry meets or exceeds the requirements of the Board's nurse aide registry and that a nurse aide listed on the Department's registry does not also need to be listed on the Board's registry.

The federal Medicare and Medicaid nursing facility requirements mandate that individuals who provide nursing or nursing-related services who are not licensed staff, volunteers or family members be listed on the Department's nurse aide registry. To obtain registry status, the individual is required to successfully complete nurse aide training and competency evaluation program requirements. The competency evaluation programs approved by the Department are required to be nationally recognized and to have both a written/oral and a clinical component.

The Department of Health is required to investigate allegations of abuse, neglect or misappropriation of residents' property against individuals working in the nursing facility and to place validated findings on the Department's nurse aide registry.

During the annual Medicare and Medicaid inspection of nursing facilities, staff are observed providing care to residents, and records of staff training and registration/licensure are reviewed as needed to follow up on any concerns. Since renewal is required every two years, the Department also monitors to determine that registrations are current.

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Darleen Bartz
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10/2/03
Date

The proposed legislation would exempt from the Nurse Practices Act those individuals in nursing facilities who provide non hands-on tasks, including assistance with feeding, in a Medicare-funded organization. With this change, the Department will continue to operate the nurse aide registry as identified above, including approval of nurse aide training and competency evaluation programs, investigation of abuse allegations, and onsite monitoring of care provided to residents. The Department anticipates that the nurse aide registry would continue to be a Board-recognized registry.

This concludes my formal testimony. I am happy to respond to any questions you may have.

Thank you.

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Deanna S. Smith
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10/2/03
Date

Testimony on HB 1201
Senate Human Services Committee
February 26, 2003

Chairman Lee and members of the Senate Human Services Committee, thank you for the opportunity to testify on HB 1201. My name is Shelly Peterson, President of the North Dakota Long Term Care Association. I am here to testify on behalf of members.

Although we represent nursing facilities, basic care facilities and assisted living facilities, the issue before you today is only affecting nursing facilities. We have been struggling with this issue for almost four years. We have been unsuccessful in achieving an administrative remedy and we need your help. HB 1201 is an option the Board of Nursing identified as a way to solve the dilemma facing us. Rather than give you four years of history on this issue and probably confuse everyone in the process, I'm going to define the problem. In defining the problem, it is not my intention to point fingers at the North Dakota Board of Nursing, North Dakota Department of Health, or North Dakota Department of Human Services. We have been working with them to solve this issue and together none of us have been able to find the right solution.

Prior to December 2002, the Board of Nursing was on record stating that making an unoccupied bed in a nursing facility was a nursing task. They remain on record today that feeding of a patient is a nursing task. This position in and of itself is fine, however it becomes complicated because of the definition of "nurse aide" in the federal rules promulgated under the Social Security Act. Our federal rules (42CFR 483.75) in essence require that anytime you call something a "nursing or nursing related service," the person completing that task must complete a 75 hour training course and pass a national test to be certified.

The federal government is careful not to define the tasks of nursing. Here comes the conflict, with the Board of Nursing having the position, that making an unoccupied bed and feeding a resident is a nursing task, our federal rules kick in, which state these tasks can only be done by an LPN, RN or certified nursing assistant (CNA).

Let me assure you all staff that take care of residents, that complete personal cares, such as bathing, brushing of teeth, lifting, transferring, peri-care are certified staff that are well training and qualified. We have found that the two tasks of making an unoccupied bed and feeding residents who need a little help can be delegated to well-trained uncertified staff.

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Shelly Peterson
Operator's Signature

10/2/03
Date

People who we have employed in these positions have been the old, the young and persons with disabilities. We have found they provide outstanding service, are dedicated employees and contributed greatly to the quality of life of nursing facilities residents because of the relationships they develop with residents.

This past summer the Health Department, at the direction of the Department of Human Services began citing nursing facilities for using non-certified staff to make unoccupied beds. The first citation was going to be given to St. Aloisius Medical Center in Harvey. The threat of that action was devastating.

The young, the old and persons with disabilities we employ are excellent, well trained and well qualified. They contribute greatly. The bed-making issue and feeding issue are slightly different, because of recent action by the Board of Nursing and the federal government changing their position on the use of feeding assistants. For a few minutes I would like to address each issue separately.

Bed-Making:

After the Health Department received their directive from Human Services to enforce the position that all people making an unoccupied bed be a certified nursing assistant or an LPN or RN, we requested the Health Department not issue citations until after we sought clarification from Centers for Medicare and Medicaid Services (CMS). The Health Department waited on citations and informed us they would "track" non-compliance. What this meant was, if during your unannounced survey you were found to be using "non-certified" people to make unoccupied beds, your facilities name would be put on a list. If it was later determined the state was required to enforce only certified staff could make an unoccupied bed, all on the "list" would receive a citation. The problem with receiving this citation, was the only way you could remove the deficient practice was certify these people by enrolling them in the 75 hour course, have them pass a written examination and demonstrate clinical competency in numerous caregiving situations. The vast majority of the developmentally disabled can't master the training and testing requirements, the old don't have the physical strength and endurance and the young just want to work around school, sports and a social life. We make allowances for these situations because we have found all three groups are excellent caregivers.

CMS clarified the certification issue with bed-makers in September 2002. They said, in essence, they do not require individuals who make unoccupied beds to be certified, however

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if North Dakota has a more stringent rule or law, (i.e. BON) it should be enforced. After this clarification, again the Health Department, delayed issuing citations, giving us an opportunity to solve this problem with the Board of Nursing. In November the Board of Nursing invited me into their Board meeting and asked my opinion on four options they were considering to solve the bed-making issue. Attached see the letter. To us the only viable solution was option #3, seek an exemption from the Nurse Practice Act (NPA). We had been in communication with the Board since July 2002 on this issue. It was our hope to seek a solution with them. We also indicated that if we could not solve this issue administratively, we would seek a legislative solution. In November the Board of Nursing tabled the issue and took the action of asking their attorney and executive director to seek a viable solution to bed-making and delay the feeding assistant solution until March or April 2003. The Board of Nursing revisited this issue through a conference call on December 10, 2002. I'm happy to state the Board of Nursing, changed their position on bed-making and I'm hopeful it's acceptable to the Health Department and CMS. Attached is the new position of the Board of Nursing. It is my understanding the North Dakota Health Department has forwarded this new position/statement to CMS for comment.

The issue of feeding is still unresolved for us. Anytime the Board of Nursing identifies something as nursing, our federal rules will require the person to be certified. Although we don't expect the Board of Nursing to take such action and the Board of Nursing has worked hand-in-hand with us to solve this problem, we don't want to leave the issue unresolved. There are rate-setting cases before the administrative law judge and the district court that are arguing about what is nursing in this state, and those rate-setting cases are driving this issue. We feel the legislation before you will remove our bed-makers and feeding assistants from the preview of the nursing debate and allow us to employ them.

Feeding Assistants:

Since the mid-eighties nursing facilities have used specially trained individuals to feed residents during dining times, which as you can imagine is a very busy time. To assure residents are properly fed and hydrated, extra staff are employed for this task. This practice was recognized and supported by the State Health Department. It was considered a very positive practice with no negative outcome ever documented. In 2000, eighty percent of the nursing facilities used feeding assistants, we estimated 447 individuals were employed for this purpose. In August 2000, the federal government, CMS cited a North Dakota nursing facility for using feeding assistants. CMS asserted that a change in the Social Security Act was needed if North Dakota wanted to continue to use feeding assistants. At the same time,

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10/2/03
Date

they asserted the feeding assistants appeared to be doing an excellent job, residents were well fed and hydrated, however the law must be followed. It was the federal government position that all feeding assistants must be certified if they work in a nursing facility. They also said if we simply converted our feeding assistants into volunteers, we would meet the regulations. This citation was made at a time when we had 1000 open positions, we were experiencing 66% turnover in our caregiving staff, two-thirds of nursing facilities termed themselves in a staffing crisis and 40% of the nursing facilities had stopped admissions because they didn't have sufficient staff.

CMS forced the State Health Department to enforce this requirement and thus we had two options: 1) enroll all your feeding assistants in the minimum 75 hour course and have them pass a written and clinical skills test or 2) fire them in their current position. We worked with our Congressional Delegation to amend the Social Security Act and to date legislation has been stalled in Congress.

For some facilities it became a moral issue pitted against a legal issue. Facilities felt to deliver the highest quality of care and assure residents were properly fed, they wanted at all costs to continue to employ these valuable employees.

Facilities encouraged their staff to take the training course. For a variety of reasons not all feeding assistants were willing or capable of taking the course. Although well-trained in their feeding functions, the comprehensive course and testing was beyond the reach for many. Today, at least three nursing facilities continue to employ feeding assistants who are not certified, thus out of compliance with the federal requirement.

Identifying the facilities using feeding assistants would put them at risk of citation. One employs a woman in her late eighties, this job is her life, we hope they never find out about her work.

The legislation before you, HB 1201 will clear the path for us to re-employ (or take them out of hiding) feeding assistants. Finally, CMS has seen the light, in March 2002 they proposed rules to allow all the states to utilize and employ feeding assistants. Those proposed rules are a god-send. It was hoped the proposed rules would become final by the end of 2002. We are told the rules should be published early in 2003. Attached is a brief summary of the proposed rules. Since the publishing of the proposed rules we have been in communication with the Health Department on, how can we immediately implement the rules in North Dakota.

Page 4 of 5

Deanna Holbrook
Operator's Signature

10/2/03
Date

The Health Department has informed us there are two obstacles that must be removed prior to implementation. The first issue is the Board of Nursing is on record stating feeding is a nursing task and because of that position we could never implement the rules because once a task is determined to be a nursing function, only an LPN, RN or "certified" nurse assistant can be utilized to complete that function. The exemption before you would solve that problem.

The second issue is the State Health Department indicated they need more money to provide the oversight and supervision to implement this new regulation. We are working with them to overcome this barrier.

My testimony before you is the short version. We have four years of history. I've left out a lot of the details and tried to highlight the problems and solution. Again we don't intend to blame anyone for the mess we are in. The Board of Nursing, Health Department and facilities all had good and right intentions on this seemingly simply but complex issue. Our desire is to seek a legislative solution and solve this problem once and for all.

This issue impacts the caregivers who want to work and the residents who need their care. This issue has hurt people, people who were caught in a web of regulations. People who are excellent employees, delivering a valuable service.

Today I'm touching upon the people who want to be a feeding assistants or bed-makers. I haven't touched upon the impact of nursing facility residents and the loss of these caregivers in their life.

Thank you for the opportunity to testify on HB 1201. I would be happy to answer any questions you may have.

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

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