

Administrative Rules Committee
December 15, 2011 – 11:00 a.m.
Nurse Aide Training, Competency Evaluation, and Registry
NDAC Article 33-43

1. The Nurse Aide Training, Competency Evaluation, and Registry Article 33-43 resulted from the adoption of HB 1041 during the 2011 legislative session which was signed into law on April 28, 2011 with an effective date of July 1, 2011.
2. The rules were not mandated by federal law or statute; however, compliance with the federal laws regulating the certified nurse aides had to be considered as the rules were promulgated.
3. A public notice of the intent for hold a public hearing on NDAC article 33-43 was placed in newspapers throughout the state and a public hearing was held of September 8, 2011. Ten individuals were present at the hearing. One individual representing the North Dakota Board of Nursing provided oral and written comments. The period for written comments closed on September 20, 2011. Written comments were received from one additional individual representing long term care facilities in our state. The rules were reviewed by the Office of the Attorney General and adopted by the State Health Council.
4. Written and oral comments were received were fully considered by the department with regards to these rules, and changes were made as deemed appropriate. No overall objections or complaints were received during the comment period. A summary of the comments, department response, and recommended changes is attached.
5. The approximate cost of giving public notice and review for legality by the attorney general's office was approximately \$500. This does not include staff time.
6. HB 1041 transferred the responsibility of training, competency evaluation, and registry of nurse aides, home health aides, and medication assistants I and II from the North Dakota Board of Nursing to the North Dakota Department of Health. The department previously had the responsibility for regulation and registry of certified nurse aides. HB 1041 directed the health council to adopt rules that address the nurse aide registry requirements; training and competency requirements; approval of training programs; initial registration and renewal of registration of individuals who have met training and competency requirements; reporting and investigation of complaints regarding individuals on the registry; and a disciplinary process for validated findings of abuse, neglect, or misappropriation of resident or client property and for other misconduct that has the potential to be harmful to a resident or client by an individual on the nurse aide registry.
7. A regulatory analysis consistent with NDCC section 28-32-08 was prepared, and is attached for your review.

8. A small entity regulatory analysis and economic impact statement as required by NDCC 28-32-08.1 were completed, and is attached for your review.
9. The anticipated expenditures for this program for the 2011-2013 biennium was 287,870. Funding to cover these expenditures included \$155,000 out of the health care trust fund and \$130,000 or so much of the fund as may be necessary from the department's operating funds from \$25.00 fees collected from for each initial or renewal registration of a nurse aide, home health aide, or medication assistant I or II. Please refer to the attached fiscal note.
10. A takings assessment is not required as the rules do not result in takings in the context of NDCC Section 28-32-09.
11. On June 27, 2011, these rules were adopted as emergency (interim final rules) under NDCC Section 28-32-03 with an effective date of July 1, 2011. It was necessary for the department to implement these requirements by July 1, 2011 to ensure that a mechanism was in place to provide for the training, competency evaluation, and registry of certified nurse aides, home health aides, and nurse aides, as well as medication assistants I and II. These individuals would then be able to work in the health care settings throughout our state without interruption.

The department drafted the proposed rules, and convened a group of stakeholders representing the North Dakota Board of Nursing, North Dakota Department of Health, North Dakota Department of Human Services, North Dakota Long Term Care Association, North Dakota Hospital Association, individuals representing people with physical and intellectual disabilities, Home Health Agencies, and others. This group was convened on June 13 and 14, 2011 to review the draft rules and provide recommendations.

Attached for your review is a copy of the letter signed by the Governor on June 27, 2011 approving the rules as interim final.

Summary of Public Comments
NDAC ARTICLE 33-43
Nurse Aide Training, Competency Evaluation, and Registry

The public hearing for the Interim Final Rules regarding Nurse Aide Training, Competency Evaluation, and Registry was held on Thursday, September 8, 2011 at 1 pm in Audio Visual Room 212, State Capital, Bismarck, ND. Ten individuals were present at the hearing. One individual representing a board gave oral testimony and provided a written copy of the testimony which is attached. The period for written comments closed on September 20, 2011. Written comments were received from one individual representing long term care facilities.

A summary of the specific comments which were received, the department responses, and recommended changes are addressed below. In addition, some minor edits in the form of typographical corrections and for clarification. Clarification in the language includes clear statements related to the requirement to be Nurse Aide and Certified Nurse Aide prior to becoming a Medication Assistant I, or to be a Certified Nurse Aide prior to becoming a Medication Assistant II, and that a registration will be considered temporary until payment of the fee as been confirmed.

Comment : The North Dakota Long Term Care Association greatly appreciates the opportunity to work with the Department and others in developing the nurse assistant registry rules. It was a significant system change from one state agency to another. We believe the change will be very beneficial in the long run. The rule changes have been significant and we look forward to working with the Department to continue to improve the registry rules. As written right now, we support them and do not recommend changes at this time.

Department Response: As there was no recommended change, the Department has no response.

Recommended Change: No changes were recommended.

Comment: In the table of contents, the word "of" should be removed from the heading for Section 33-43-01-02.

Department Response: We agree with this recommendation.

Recommended Change: The word "of" was removed from the table of contents heading for Section 33-43-01-02.

Comment: Throughout the proposed Article, the term "licensed registered nurse" is used to refer to a registered nurse, and the term "licensed nurse" is used to collectively refer to registered nurses and licensed practical nurses. Unless the term "licensed registered nurse" is required by federal law, the word "licensed" should be removed from each reference to "registered nurse," so that the term is consistent with the Board's rules.

Department Response: We agree with this recommendation.

Recommended Change: "Licensed Registered Nurse" will be changed to "Registered Nurse" throughout the Article.

Comment: In Section 33-43-01-01(26), the term “Qualified instructor for a nurse aide training program” is defined to be a licensed nurse. Is it the Department’s intent to allow licensed practical nurses to serve as a “Qualified instructor for a nurse aide training program?” If not, the term “licensed nurse” should be replaced with “licensed registered nurse” or “registered nurse,” as applicable.

Department Response: It was the Department’s intent to maintain the same requirements in this area as the Board had previously maintained. We agree with the Board’s recommended change in language to “Registered Nurse.”

Recommended Change: In Section 33-43-01-01(26), “licensed nurse” will be changed to “registered nurse.”

Comment: In Section 33-43-01-01(32), the language “...under the direct supervision of a licensed registered nurse or a licensed nurse under the general supervision of a qualified instructor” is confusing. I believe that the phrase “licensed registered nurse or a licensed nurse” should be replaced with “licensed nurse or” in that clause.

Department Response: The federal requirements require that the supervised training by a registered nurse or licensed practical nurse be under the general supervision of an individual who meets the definition of qualified instructor. However, as licensed nurse means both registered nurse and licensed practical nurse, we believe some modifications can be made.

Recommended Change: Change “...under the direct supervision of a registered nurse or licensed nurse under the general supervision of a qualified instructor” to “...under the direct supervision of a licensed nurse under the general supervision of a qualified instructor. ”

Comment: In Section 33-43-01-04(1)(f), the phrase “licensed registered nurse or a” can be deleted.

Department Response: As licensed nurse means both registered nurse and licensed practical nurse, we believe this change in wording maintains the intent of the rule.

Recommended Change: Delete the words “licensed registered nurse or a” from Section 33-43-01-04(1)(f).

Comment: The language of Section 33-43-01-04(3), as written, inadvertently requires nurses to complete nurse aide training. The beginning of that section should be changed from “Any individual” to “Any individual who is not a licensed nurse.”

Department Response: It was not the Department’s intent to require nurses to complete nurse aide training. We are in agreement with the requested change.

Recommended Change: The words “who is not a licensed nurse” will be added after “Any individual” in Section 33-43-01-04(3).

Comment: Should the headings for Sections 33-43-01-05, 33-43-01-06, 33-43-01-07, and 33-43-01-08 refer to a certified nurse aide competency evaluation or training program?

Department Response: In the titles of the Sections, the term “nurse aide” is used as a general term to include “certified nurse aides,” “home health aides,” and “nurse aides” as the requirements for all three are included in these sections.

Recommended Change: No change is recommended.

Comment: In Section 33-43-01-11(1), it appears that the phrase “or competency evaluation program” should be deleted from the end of the first sentence.

Department Response: The federal requirements for certified nurse aides provides for two options, training and testing or testing only. The wording included in the regulations is consistent with the wording in the federal requirements related to this requirement. It is not our intent to be more stringent than the federal requirements.

Recommended Change: No change is recommended.

Comment: In Section 33-43-01-11(1)(a), the term “nurse” should be replaced with “licensed nurse.”

Department Response: We agree with the recommended wording change.

Recommended Change: In Section 33-43-01-11(1)(a), the word “licensed” will be added before “nurse.”

Comment: The language of 33-43-01-11(1)(b), as written, inadvertently requires nurses to obtain registry status. The beginning of that section should be changed from “Any individual” to “Any individual who is not a licensed nurse.”

Department Response: We are in agreement with this recommended change for the reasons previously stated.

Recommended Change: The language of Section 33-43-01-11(1)(b), will be changed to add the words “who is not a licensed nurse” after the words “Any individual.”

Comment: The language of Section 33-43-01-13, as written, appears to be directed towards licensed nurses rather than nurse aides. For example, subsection 1 states “In a nursing facility, the licensed nurse must be on the unit and available for immediate direction.” The language of Section 33-43-01-13 should be redrafted to make it applicable to nurse aides rather than licensed nurses. For example, subsection 1 could be redrafted as follows: “In a nursing facility, the medication assistant may perform medication assistance only when a licensed nurse is on the unit and available for immediate direction.” Similar redrafting should also be done in the other subsections of Section 33-43-01-13.

Department Response: It is not the Departments’ intent to regulate licensed nurses and agree that this section would benefit from rewording.

Recommended Change: This section has been reworded as needed so that it is directed towards the medication assistants regulated by the department rather than the licensed nurse.

Comment: In Section 33-43-10-15(4), the last clause, which states “unless the individual has performed duties,” appears to be incomplete.

Department Response: We agree that this sentence needs to be modified.

Recommended Change: The words “unless the individual has performed duties” will be removed from this sentence.

Comment: Section 33-43-01-16 should be deleted in its entirety, as it dictates what a licensed nurse must do in order to delegate medication administration. These requirements are for licensed nurses and are contained in the Board’s rules in Section 54-07-08-01, and do not need to be restated in the Departments’ rules.

Department Response: As stated previously, it is not the Department's intent to regulate licensed nurses. However, our intent was to have all the rules related to the regulation of nurse aides, home health aides, certified nurse aides, and medications assistants I and II located in one set of rules so that individuals seeking the information could go to one source. To respond to the comment as well as the intent of the Department, the wording in this section will be changed to discuss the duties of the nurse aide, rather than the nurse, related to specific delegation of medication.

Recommended Change: The wording in this section will be changed to identify the duty of the nurse aide when receiving delegated tasks from a nurse, rather than the duty of the nurse when delegating tasks.

Nurse Aide Training, Competency Evaluation, and Registry

Takings Assessment (NDCC 28-32-09): A takings assessment is not required as the rule did not result in a takings in the context of NDCC Section 28-32-09.

Regulatory Analysis (NDCC 28-32-08):

1. Describe the classes of people likely to be affected by the proposed rule, including classes bearing the cost of the proposed rule and classes benefiting from the proposed rule: *Nurse Aide, Home Health Aides, and Medication Assistants I and II transferred from the Board of Nursing to the Department of Health Nurse Aide Registry. Certified Nurse Aides were already on the Department of Health Registry. This change resulted in one location for registration and registration of nurse assistants in North Dakota rather than two locations.*
2. Describe the probable impact, including the economic impact, of the proposed rule: *This bill was funded with \$155,000 out of the Health Care Trust Fund and \$130,000 or however much as necessary to be collected in fees of \$25.00 per registration. With this change, the cost of individual registration for nurse aides, home health aides, and medication assistants I and II was reduced from \$30 per registration for two years to \$25 for two years, in addition to reduction of costs in other areas such as processing fees. As a result, there will be a reduction of costs to the regulated community rather than an impact as a result of implementing these rules.*
3. Describe the probable costs to the agency of implementation and enforcement of the proposed rule and any anticipated effect on state revenues: *The probable costs of implementation and enforcement of these rules is anticipated to be \$285,000 during the upcoming biennium. As stated in #2 above, \$155,000 will come from the Health Care Trust Fund and it is anticipated that \$130,000 will be collected in fees so there should be no impact on state revenue.*
4. Describe any alternative methods of achieving the purpose of the proposed rule that were considered: *The alternative was to continue as in the past with two nurse aide registries in different regulatory agencies, with some individuals registered on both.*

Small Entity Regulatory Analysis (NDCC 28-32-08.1):

1. Was establishment of less stringent compliance or reporting requirements for small entities considered? *Less stringent requirements were not considered – the intent was to move the regulation and registration of Nurse Aides, Home Health Aides, and Medication Assistants I and II from the Board of Nursing to the Department of Health with minimum change in the regulatory requirements.*
2. Was establishment of less stringent schedules or deadlines for compliance or reporting requirements considered for small entities? *Less stringent schedules for renewal were not considered. The requirement for renewal of registrations status every two years is required by federal regulations for certified nurse aides. It was decided to continue the requirement for renewal every two years for nurse aides, home health aides, and medication assistants I and II.*
3. Was consolidation or simplification of compliance or reporting considered? *Yes, the process has been streamlined so an individual will only have one expiration date regardless of the number of registrations. For example, an individual who is a certified nurse aide and medication assistant II will hold the same expiration date for both registrations so there will only be the need to renew one time rather than two times which will increase efficiency and decrease confusion.*

4. Were performance standards established for small entities for replacement design or operational standards required in the proposed rules? *No changes or minimal changes in performance or operational standards were part of these rules.*
5. Was exemption for small entities from all or part of these requirements in the proposed rules considered? *Yes, the same exemptions which were allowed by the BON were considered.*

Small Entity Economic Impact Statement (NDCC 28-32-08.1):

1. Which small entities will be subject to these proposed rules? *No entities are impacted as these rules regulate and register individuals.*
2. What are the administrative and other costs required for compliance with the proposed rules? *There are no additional costs for anyone for compliance with these rules. In fact, the cost to the individuals decreases.*
3. What is the probable cost and benefit to the private persons and consumers who may be affected by these proposed rules? *Nurse Aides, Home Health Aides, Certified Nurse Aides, and Medications Assistants I and II will all be on the same registry, the expiration date of their registrations will all be the same so renewal will take place at the same time rather than at different times, and the cost of initial and renewal registrations will be reduced by \$5.00 each.*
4. What is the probable affect on state revenues? *These proposed rules should have no affect on state revenues as \$155,000 comes from the Health Care Trust Fund and \$130,000 or however much is necessary, will come from fees.*
5. Are there less intrusive or less costly methods of achieving the purpose of the proposed rules? *Once established, the cost of having one registry will be less than the cost of having the two registries.*

FISCAL NOTE

Requested by Legislative Council
04/19/2011

Amendment to: Engrossed
HB 1041

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.*

	2009-2011 Biennium		2011-2013 Biennium		2013-2015 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues				\$130,000		\$130,000
Expenditures				\$287,870		\$238,576
Appropriations				\$285,000		\$238,576

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

2009-2011 Biennium			2011-2013 Biennium			2013-2015 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

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

This bill transfers the regulation and registry of nurse aides, home health aides, and medication assistants I and II from the ND Board of Nursing to the Health Department.

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

Section 1 transfers the responsibility for the regulation and registration of nurse aides, home health aides, and medication assistants I and II from the ND Board of Nursing to the ND Department of Health. This section requires the Department to develop rules to address registry requirements, training and competency requirements, approval of training and competency programs, initial and renewal of registration for these individuals, and reporting and investigation of complaints received related to the individuals on the registry, and to establish a disciplinary process. This section also indicates that the Department may not charge fees for the initial registration or renewal of individuals on the Department's registry consistent with the federal prohibition of charging.

This bill would result in new state level workload for the Department. Based on the Department's experience operating the federal certified nurse aide registry, discussion with the Board of Nursing related to workload, and review of other information available, it was determined that it would require a minimum of 1.5 FTEs of additional staff to handle the ongoing workload related to the registry and regulation of the nurse aides, home health aides, and medication assistants I and II. This would include review of applications, complaint intake and investigation, disciplinary actions as needed, and review and approval of medication assistant training programs. As this is a state activity, federal funds may not be used to cover the associated costs. In order to provide this service, at no fee to the individuals, it is estimated it would cost the department \$238,576 of ongoing costs and \$49,294 of one time start up costs for Unlicensed Assistive Person registry data migration to Department database and registry web changes, and rulemaking. Total cost for the 2011-13 biennium are \$287,870.

Section 2 changes the definition of the Board of Nursing's Unlicensed Assistive Person, removing the nurse aides, home health aides, and medication assistants I and II from their regulatory authority. This will result in a decrease in revenue for the BON as they currently charge a fee for work in these areas as well as a reduction in duties related to regulating these individuals

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.*

The department will collect registration fees of approximately \$130,000 and deposit them in the department's operating account. It is anticipated that a fee of \$25 for each initial registration and renewal will be collected every two years.

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.*

Based on the current workload for the Board of Nursing and the experience the Department has had related to the Certified Nurse Aide registry, it is conservatively estimated that it will take 1.5 FTE to accomplish the added workload. This includes 1 FTE (\$161,395) administrator and a .5 FTE (\$44,741) administrative assistant. The staff will administer the program by providing registry support personnel, staff to review training and competency evaluation programs and complete complaint investigations and associated review process. The total salary and benefits costs would be \$206,136 for the 2011-13 biennium.

Operating costs include associated travel for training and investigations, (\$3,000) registry software costs and ITD storage and maintenance costs (\$15,640) legal costs (\$4,000), and general operating costs (\$9,800). In addition there are also one time start up costs for registry web changes (\$42,794), office equipment (\$1,500) and rulemaking activities (\$5,000). Total operating costs are \$81,734 for the 2011-13 biennium. The total estimated expenditures for the 2011 - 2013 biennium, including salaries and wages, operating expenses, and one time start up costs is \$287,870 and \$238,576 for the 2013-15 biennium.

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

This bill includes an appropriation of \$130,000 from fees generated and deposited into the Department's operating fund and \$155,000 from the health care trust fund. This appropriation also includes funding for an additional 1.5 full time FTE to the state department of health. This funding or FTE's are not included in the department's appropriation bill (HB 1004).

Name:	Kathy J. Albin	Agency:	Health Department
Phone Number:	328.4542	Date Prepared:	04/19/2011



— State of —
North Dakota
Office of the Governor

Jack Dalrymple
Governor

June 27, 2011

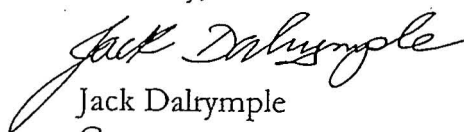
Terry Dwelle
State Health Officer
Department of Health
600 East Boulevard Avenue
Bismarck, ND 58505-0200

Dear Dr. Dwelle,

On June 27, 2011, I received your request for approval of emergency rulemaking to adopt North Dakota Administrative Code Chapter 33-43-01 regarding Nurse Aide Training, Competency Evaluation, and Registry.

I have reviewed the request pursuant to N.D.C.C. § 28-32-03 and House Bill 1041 and I find that an emergency rulemaking is reasonably necessary and I therefore approve adoption of your proposed rules as interim final rules.

Sincerely,


Jack Dalrymple
Governor

37:74:58