

## Clearinghouse Rule 16-088

### PROPOSED ORDER OF DEPARTMENT OF HEALTH SERVICES TO ADOPT RULES

The Wisconsin Department of Health Services (“department”) proposes **to amend** DHS 129.01, DHS 129.07, DHS 129.07 (2) (b), DHS 129.07 (3) (d), DHS 129.07(3) (e), and **to create** DHS 129.03 (3m), DHS 129.07 (1m), and DHS 129.07 (20 (bm)), relating to certification of programs for training and testing nurse aides, medication aides and feeding assistants.

#### RULE SUMMARY

##### **Statute interpreted**

Sections 146.40 (5), 227.11 (2) (a), Stats.

##### **Statutory authority**

Sections 146.40 (5), 227.11 (2) (a), Stats.

##### **Explanation of agency authority**

The department’s authority to promulgate rules is as follows:

Section 146.40 (5) Stats., reads: (a) The department shall promulgate rules specifying standards for approval in this state of instructional programs and competency evaluation programs for nurse aides. The standards shall include specialized training in providing care to individuals with special needs.

(b) The department shall promulgate rules specifying criteria for acceptance by this state of an instructional program and a competency evaluation program that is certified in another state, including whether the other state grants nurse aide privileges to persons who have completed instruction in an instructional program that is approved under sub. (3) and whether one of the following is true:

1. If the other state certifies instructional programs and competency evaluation programs for nurse aides, the state's requirements are substantially similar, as determined by the department, to certification requirements in this state.
2. If the other state certifies nurse aides, that state's requirements are such that one of the following applies:
  - a. The instructional programs required for attendance by persons receiving certificates are substantially similar, as determined by the department, to instructional programs approved under sub. (3).
  - b. The competency evaluation programs required for successful completion by persons receiving certificates are substantially similar, as determined by the department, to competency evaluation programs approved under sub. (3m).

Section 227.11 (2) (a), Stats., reads: Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it

necessary to effectuate the purpose of the statute, but a rule is not valid if the rule exceeds the bounds of correct interpretation. All of the following apply to the promulgation of a rule interpreting the provisions of a statute enforced or administered by an agency:

1. A statutory or nonstatutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.
2. A statutory provision describing the agency's general powers or duties does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.
3. A statutory provision containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision.

### **Related statute or rule**

See the “Statute interpreted” and “Statutory authority” sections.

### **Plain language analysis**

Currently, under chapter DHS 129, a person must have completed 120 hours of instruction through a department-approved nurse aide training program and pass a competency examination in order to be employed as a nurse aide in Wisconsin. However, s. 146.40 (3g), Stats., as created by 2013 Wisconsin Act 357, directed the department to establish standards, by rule, for the approval of instructional programs that provide a pathway to certification for nurse aides who have received similar instruction in another state (hereinafter “bridge programs”). Bridge programs are intended to be combined with instruction received in another state and result in training that is substantially equivalent to that obtained through a department-approved, Wisconsin program. The department hereby intends to establish standards for approval of bridge programs, as directed by the Wisconsin Legislature. Pursuant to the authority granted in s. 146.40 (5) Stats., the department also intends to revise existing standards of approval for instructional programs to address requirements relating to training hours in a clinical setting and curriculum requirements addressing the needs of persons with dementia, the effects of certain medications, restorative services, and client rights.

### **Summary of, and comparison with, existing or proposed federal regulations**

Federal conditions of participation for the registry of nurse aides, nurse aide training and testing programs, and training of paid feeding assistants are contained in 42 CFR 483.150 through 483.160. These regulations establish conditions and standards for the approval of nurse aide training and competency evaluation programs, for the maintenance and operation of a registry, and for conducting training and testing programs for nurse aides and paid feeding assistants. State and federal regulations for registry services and training and testing of nurse aide and paid feeding assistants are comparable, however the department intends to supplement these requirements to address therapeutic interventions and non-pharmacological pain control interventions, techniques of restorative nursing, client rights and reporting abuse or neglect of a client or misappropriation of a client’s property.

### **Comparison with rules in adjacent states**

**Illinois:**

Illinois adopted significant portions of the federal regulation including the standards for the denial, suspension and revocation of program approval in 77 Admin Code 395, Long-Term Care Assistants and Aides Training Programs Code. Illinois specifies a comprehensive list of topics that must be addressed in any approved program including patient rights, communication, psychological needs of patient and family, hand washing, body mechanics, basic anatomy, nutrition, etc. Each set of topics includes course objectives and proficiency measures.

**Iowa:**

Iowa Code Chapter 81 – 16 Nurse Aide Requirements and Training and Testing Program closely mirrors federal requirements by including standards for denial, suspension and revocation of program approval. Like Illinois, Iowa code contains an extensive list of topics that must be included in any approved training program including bathing, dressing, toileting, assistance with eating, skin care, transfers, responding to behaviors, restorative care and avoiding the need for restraints.

**Michigan:**

Michigan has no state rule regarding certified nurse aide training programs or maintenance of a registry and relies solely on federal regulation.

**Minnesota:**

Minnesota has no state rule regarding certified nurse aide training programs or maintenance of a registry and relies solely on federal regulation.

**Summary of factual data and analytical methodologies**

The department relied on all of the following sources to draft the proposed rule and to determine the impact on small businesses.

- The department formed an advisory committee consisting of department staff, staff from the Board on Aging and Long-Term Care – Ombudsman Program, the Department of Workforce Development, LeadingAge Wisconsin, the Wisconsin Health Care Association, the Wisconsin Technical College System and private industry. The advisory committee reviewed the initial draft of the rule and provided comments. The rule was revised based upon the comments made by the advisory committee.
- The department considered criteria it adopted and that were approved by the Wisconsin Small Business Regulatory Review Board to determine whether proposed rules have a significant economic impact on a substantial number of small businesses. A proposed rule is understood to have an economic impact on a substantial number of small businesses if at least 10% of the businesses affected by the proposed rules are small businesses and if operating expenditures, including annualized capital expenditures, increase by more than the prior year's consumer price index, or revenues are reduced by more than the prior year's consumer price index. For the purposes of this rulemaking, 2012 is the index year. The consumer price index is compiled by the U.S. Department of Labor, Bureau of Labor Statistics as of December 2012 was 229.601. This represented an increase of 1.7 percent over the prior 12 months.

- Section 227.114 (1) (a), Stats., defines “small business” as a business entity, including its affiliates, which is independently owned and operated and not dominant in its field, and which employees 25 or fewer full-time employees or which has gross annual sales of less than \$5,000,000.
- The Department of Health Services / Division of Quality Assurance Databases – Nurse Aides – Training Options databases that contain demographic, licensing, program, and compliance history of nurse aide training programs and certified nurse aides in Wisconsin.

**Analysis and supporting documents used to determine effect on small business:**

Nurse aide training programs are not defined by the North American Industry Classification System (NAICS), as most of these programs operate within the Wisconsin Technical College System or within a health care facility. Specific revenue, expense, and staffing data is therefore not available from this source. The department instead relies on data obtained through the Department of Health Services/Division of Quality Assurance Databases – Nurse Aides - Training Options. As of July 25, 2016, 120 nurse aide training programs are operated by various entity types within state. The type of entity and number of programs is provided in the table below.

ENTITY TYPE	NUMBER
Nursing homes	24
Wisconsin Technical Colleges	47
High schools	12
Home health agency	1
Hospitals	7
Facilities serving people with developmental disabilities	4
Universities	5
Private	19
USDA Forest Service	1
Total	120

Based on a review of department licensing data, including, financial reports submitted by the entities, Medicaid reimbursement data, number of beds and whether the entity is a part of a larger health care organization, the Department has determined that the affected nursing homes, hospitals and facilities serving people with developmental disabilities are not small businesses as defined by Section 227.114 (1) (a), Stats. The technical colleges, high schools, universities and the USDA Forest Service also do not meet the definition of a small business.

**Effect on small business**

Based on the foregoing analysis, the rules are anticipated to have little to no economic impact on small businesses.

**Statement on quality of agency data**

The data sources used to draft the rules and analyses are accurate, reliable and objective and are listed in the Summary of Factual Data and Analytical Methodologies section of this rule order.

**Agency contact person**

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**Place where comments are to be submitted and deadline for submission**

Comments may be submitted to the agency contact person that is listed above until the deadline given in the upcoming notice of public hearing. The deadline for submitting comments and the notice of public hearing will be posted on the Wisconsin State Legislature's Administrative Rules website <http://docs.legis.wisconsin.gov/code>.

**RULE TEXT**

**SECTION 1.** DHS 129.01 is amended to read:

DHS 129.01 Authority and purpose. This chapter is promulgated under the authority of ss. 146.40 (2m), (3) and (5), 146.40 (3g) and 227.11 (2) (a), Stats., to provide conditions of approval for training programs and competency evaluation programs for persons who work as nurse aides, medication aides or feeding assistants in hospitals, nursing homes or facilities for the developmentally disabled, home health agencies or hospices certified under 42USC 1395 to 1395ccc, and conditions for including persons in the department's registry of nurse aides.

**SECTION 2.** DHS 129.03 (30m) is created to read:

DHS 129.03 **(30m)** "Nurse aide training program" means an instructional program for a nurse aide that is approved by the department as mandated by s. 146.40 (3) or (3g). Nurse aide training programs can be one of two types:

(a) "120-hour training program" means a Wisconsin nurse aide training program that is designed for an individual seeking to be eligible to work as a nurse aide in Wisconsin.

(b) "45-hour training program" means a nurse aide training program that is designed for an individual who received nurse aide training of less than 120 hours in another state, that when combined with an instruction program in the other state, will result in the individual receiving substantially the same instruction as an individual who completed a 120-hour training program in Wisconsin.

**SECTION 3.** DHS 129.07 (1) is amended to read:

DHS 129.07 Standards for nurse aide training programs. **(1) CURRICULUM FOR 120-HOUR TRAINING PROGRAM.** A 120-hour training program shall include theory and practice in all of the following care areas:

**SECTION 4.** DHS 129.07 (1m) is created to read:

DHS 129.07 **(1m) CURRICULUM FOR 45-HOUR TRAINING PROGRAM.** A 45-hour training program shall include the theory and practice in areas of care stated in s. DHS 129.07

(1) (b) 26. and 27., and s. DHS 129.07 (2) (d), (e), and (f).

**SECTION 5.** DHS 129.07 (2) (b) is amended to read:

DHS 129.07 (2) (b) *Program standards for 120-hour training programs.*

1. A 120-hour training program shall be a minimum of 120 hours in length. This requirement includes at least 32 hours of clinical experience in a clinical setting approved by the department. The first 16 hours of training shall be provided in a classroom setting before a student has direct contact with clients. Tours of a facility, including observations of clients and day-to-day facility activities, may be incorporated into the classroom hours. Competency evaluation under DHS 129.08 and provider orientation may not be counted toward meeting the 120-hour minimum requirement.

2. The program shall cover all of the following during the first 16 hours of classroom training:

- a. Communication and interpersonal skills.
- b. Infection control.
- c. Safety and emergency procedures.
- d. Promoting residents' independence.
- e. Residents' rights.

3. A health care provider may employ a student as a nurse aide after the student has completed 16 hours of classroom training in the topics in subd. 2., and if the student is a full-time permanent employee, and is enrolled in an approved training program. The training program shall provide the health care provider with verification that the program has provided the instruction specified in subd. 2.

4. The program shall provide notification to students sponsored by Medicaid-certified nursing facilities that the students are not responsible for any costs associated with training, including deposits for textbooks or supplies used.

**SECTION 6.** DHS 129.07 (2) (bm) is created to read:

(2) (bm) *Program standards for 45-hour training programs.*

1. The 45-hour training program shall be a minimum of 45 hours in length. This requirement includes at least 16 hours of clinical experience in a clinical setting approved by the department working with residents with Alzheimer's disease or a related dementia. Competency evaluation and provider orientation may not be counted toward meeting the 45-hour minimum requirement.

2. The program shall provide notification to students sponsored by Medicaid-certified nursing facilities that the students are not responsible for any costs associated with training, including deposits for textbooks or supplies used.

**SECTION 7.** DHS 129.07 (2) (d) is amended to read:

DHS 129.07 (2) (d) *Nursing home-based program.* Training of nurse aides may be performed under the general supervision of the director of nursing for a facility; however, the director of nursing may not act as the primary instructor or as a program trainer.

Primary instructors ~~Instructors~~ shall not be involved in more than one role while supervising students in the clinical area.

**SECTION 8.** DHS 129.07(2) (e) is amended to read:

DHS 129.07 (2) (e) *Expectations and records.* 1. The training program shall maintain a list of the required skills and competencies ~~a summary of the knowledge~~ that a student will complete by the end of the training program.

2. On the list of skills, the primary instructor shall verify, by initialing and dating each individual skill, that the student has satisfactorily performed that skill. When a student has satisfactorily completed all required skills and competencies and attained the necessary knowledge, as well as achieved the stated course completion criteria, the trainee qualifies to enter a competency evaluation program.

3. The primary instructor shall provide a copy of the student's performance record to the student at the conclusion of the student's training.

**SECTION 9.** EFFECTIVE DATE: This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register, as provided in s. 227.22 (2), Stats.