

CR 87-20

CERTIFICATE

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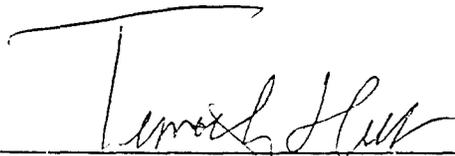
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Review Bureau

STATE OF WISCONSIN)
) SS
DEPARTMENT OF HEALTH AND SOCIAL SERVICES)

I, Timothy F. Cullen, Secretary of the Department of Health and Social Services and custodian of the official records of the Department, do hereby certify that the annexed rules relating to conversion of nursing home beds to ICF/MR (FDD) beds were duly approved and adopted by this Department on September 4, 1987.

I further certify that this copy has been compared by me with the original on file in the Department and that this copy is a true copy of the original, and of the whole of the original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the Department at the State Office Building, 1 W. Wilson Street, in the city of Madison, this 4th day of September, 1987.



Timothy F. Cullen, Secretary
Department of Health and Social Services

SEAL:

11-1-87

Order of the
Department of Health and Social Services
Renumbering, Amending, and Creating Rules

To renumber HSS 122.02 and 122.06(9); to amend HSS 122.06(7)(a) and (9)(a), as renumbered; and to create HSS 122.02(2), 122.04(1)(b)2, 122.05(2)(c), 122.06(1)(c), 7(b)(title) and (c) and (9)(b), and 122.07(1m) and (2)(am), relating to conversion of a nursing home or a distinct part of a nursing home to be an intermediate care facility for the mentally retarded (ICF/MR).

Analysis Prepared by the Department of Health and Social Services

Currently about 2,700 developmentally disabled persons who have active treatment needs related to their disabilities receive care in nursing homes that are not certified under 42 CFR 442 Subpt. G as intermediate care facilities for mentally retarded persons (ICF/MR). Their care and treatment is financed in whole or part by the Federal-State Medicaid program which in Wisconsin is called Medical Assistance (MA). Yet the Federal government agency that administers Medicaid, the Health Care Financing Administration (HCFA), has long maintained that the use of nursing homes that are not ICF/MR as long-term care residencies for Medicaid recipients with developmental disabilities who do not have need for skilled nursing care is contrary to Federal Medicaid law. Under 42 CFR 442 Medicaid is not supposed to pay for the care provided by these facilities to developmentally disabled persons who do not have major medical needs.

HCFA officials notified the Department a few months ago that for purposes of reimbursement under the Medicaid program, persons with developmental disabilities who require active treatment for their disabilities and who do not have skilled nursing needs that would preclude their receiving active treatment must receive it in ICF/MR facilities, and that HCFA officials are prepared to disallow claims for Medicaid reimbursement unless the Department takes immediate action to correct the present situation and come into compliance with Federal law. As the first step in a negotiated plan of compliance, the Department on September 18, 1986 published emergency rules prohibiting the admission of developmentally disabled persons who need intermediate nursing care to nursing homes that are not certified as ICF/MR facilities. As another step toward compliance, the Department on January 1, 1987 published emergency rules that amended ch. HSS 122, the Department's rules on long-term care bed additions and capital expenditures review, to permit conversion of a nursing home not certified as an ICF/MR facility to be an ICF/MR facility. But these rules were predicated on an estimate of 1,100 developmentally disabled ICF-level residents of nursing homes, limited conversion in 1987 to 200 beds statewide, did not make provision for post-approval reconversion of beds to be non-ICF/MR nursing home beds, and set the minimum size of a converted facility at 25 beds.

Shortly after the emergency rules were published, better information became available about the number of developmentally disabled persons in non-ICF/MR nursing homes and their actual levels of care. Department staff who visited the homes found that 2,700 people were in need of active treatment, many more than the earlier estimate of 1,100. Of these 2,700 developmentally

disabled residents, some 1,600 were estimated to need ICF/MR placement. These new numbers as well as comments received at the Department's public hearing on the emergency rules and replacement permanent rules prompted the Department to let these emergency rules expire on May 31, 1987, to substantially modify the proposed permanent rules and to publish new emergency rules incorporating those modifications.

These are the permanent rules to replace the new emergency rules. They amend ch. HSS 122 to permit conversion of a nursing home licensed as a skilled care facility or an intermediate care facility to be an ICF/MR facility or, if not the whole home, a physically separate part of it. The Wisconsin term for an ICF/MR is a facility for the developmentally disabled (FDD). Conversions are limited to a total of 1,600 beds statewide by December 31, 1989, of which no more than 1,000 beds will be approved for conversion in 1987. The rules permit the Department to approve the reconversion of some FDD beds to non-FDD nursing home beds; provide for issuance of approvals for conversions to FDDs in 1987 only to persons who apply by June 2, 1987; establish the minimum size of a new FDD as 16 beds; and include criteria for reviewing applications to convert a non-FDD nursing home or part of a nursing home to be an FDD and a method for selecting from among applications that meet all review criteria when more beds are proposed for conversion than will be permitted to convert.

Approval under ch. HSS 122 is a necessary but not sufficient condition for ICF/MR certification which in turn is a prerequisite for MA reimbursement for the cost of providing nursing care to developmentally disabled persons who do not have major medical needs.

The Department's authority to renumber, amend and create these rules is found in s.150.03, Stats. The rules interpret ss. 150.21 to 150.45, Stats.

SECTION 1. HSS 122.02 is renumbered HSS 122.02(1).

SECTION 2. HSS 122.02(2) is created to read:

HSS 122.02(2) The following activities are subject to review and approval under this chapter as the construction or total replacement of a nursing home within the meaning of s.150.21(1), Stats., or an increase in the bed capacity of a nursing home within the meaning of s.150.21(2), Stats.:

(a) The conversion of a skilled nursing facility under 42 CFR 442 Subpt. D or an intermediate care facility under 42 CFR 442 Subpt. F to an intermediate care facility for the mentally retarded under 42 CFR 442, Subpt. G, for purposes of medical assistance certification;

(b) The conversion of an intermediate care facility for the mentally retarded under 42 CFR 442 Subpt. G to a skilled nursing facility under 42 CFR 442 Subpt. D or an intermediate care facility under 42 CFR 442 Subpt. F, for purposes of medical assistance certification;

(c) A conversion described in par. (a) or (b) of part of a facility; and

(d) Any other activity which would increase the statewide number of beds in FDDs or beds in nursing homes exclusive of FDDs.

SECTION 3. HSS 122.04(1)(b)2 is created to read:

HSS 122.04(1)(b)2 a. Except as provided in subpar. b, the department shall limit approvals for conversions to FDDs under s.HSS 122.02(2)(a) and (c) to a total of 1,600 beds statewide by December 31, 1989, no more than 1,000 of which may be approved by December 31, 1987.

b. Notwithstanding the bed limit under subpar. a, the department may in addition approve the total conversion of a facility to an FDD if the conversion would be the result of relocating developmentally disabled residents from 2 or more facilities operated by one county, the new FDD will

serve only residents who are developmentally disabled and the department determines that there is a compelling need for the conversion.

SECTION 4. HSS 122.05(2)(c) is created to read:

HSS 122.05(2)(c). In making the distribution of beds under s.HSS 122.04(1)(b)2a, the department shall use as its standard what best meets the needs of the population to be served.

SECTION 5. HSS 122.06(1)(c) is created to read:

HSS 122.06(1)(c) Converted beds. The following provisions apply to applications for conversion to an FDD under s.HSS 122.02(a) and (c):

1. Applications that meet all applicable review criteria but do not receive approval due to bed limits imposed under s.HSS 122.04(1)(b)2a shall be automatically accepted for review under any subsequent request for applications without additional application fee unless the application has been substantially modified.

2. The department shall request applications at least once between January 1, 1988 and December 31, 1989.

SECTION 6. HSS 122.06(7)(a) is amended to read:

HSS 122.06(7) DEPARTMENT REVIEW AND INITIAL FINDING. (a) Review. The department shall review applications for their consistency with the criteria in s.HSS 122.07 and shall issue an initial finding to approve or reject an application within 75 days following publication of the complete applications list, unless all applicants undergoing concurrent review agree to an extension or the review cycle is extended under sub. (8). In no case may the initial finding be made prior to receipt by the department of the appropriate HSA's recommendation ~~or less than 60 days after publication of the complete application list.~~

SECTION 7. HSS 122.06(7)(b)(title) and (c) are created to read:

HSS 122.06(7)(b)(title) Initial finding.

(c) Initial finding: converted beds. The following provisions apply to initial findings on applications for conversions to an FDD under s.HSS 122.02(2)(a) and (c):

1. The department may issue approvals during 1987 only to applicants who file applications by June 2, 1987.

2. The department may delay the effective dates of approval to permit a gradual phase-in of conversions.

3. The department may issue an approval authorizing the applicant to reconvert all or some of the FDD beds to non-FDD nursing home beds without subsequent review and approval under this chapter if the reconversion meets both of the following requirements:

a. The department receives at least 30 days notice of reconversion, if all beds to be reconverted are unoccupied, or a notice that the facility has complied with the requirements of s. 50.03(14)(c) to (e), Stats., if any bed to be reconverted is occupied; and

b. Any partial reconversion results in a remaining FDD of at least 3 FDD beds which meets the provisions of s. HSS 122.07(lm)(c).

SECTION 8. HSS 122.06(9) is renumbered 122.06(9)(a) and 122.06(9)(a), as renumbered, is amended to read:

(9) REQUEST FOR HEARING.(a) An adversely affected applicant or HSA may file a written request for a public hearing under s. HSS 122.08 within 10 days after the date of the department's initial finding under sub. (7). If no request for a hearing is made, or if a request is received after the 10-day limit, the department's initial finding shall be the department's final decision. Except as provided in par. (b), A a timely request for hearing from an applicant undergoing concurrent review shall preclude issuance of an

approval for a competing concurrent application until a final decision is issued by the secretary or a designee. Hearings shall be held in the manner prescribed in s. HSS 122.08.

SECTION 9. HSS 122.06(9)(b) is created to read:

HSS 122.06(9)(b). When an applicant for conversion to an FDD under s.HSS 122.02(2)(a) or (c) who has undergone concurrent review files a timely request for a hearing under s. HSS 122.08 on the initial finding, the department shall issue approvals for the competing concurrent applications that were initially approved but only for the number of beds that exceeds the number proposed by the applicant or applicants requesting a hearing. Approvals shall be issued in order beginning with the application which received the lowest score under s. HSS 122.07(2)(am).

SECTION 10. HSS 122.07(1m) and (2)(am) are created to read:

HSS 122.07(1m) REVIEW CRITERIA FOR CONVERSION OF A NURSING HOME TO AN FDD. The department shall use the criteria in sub. (1) and the additional criteria in this subsection in its review of all applications for conversion of a nursing home to an FDD under s. HSS 122.02(2)(a) and (c). The department shall solicit the comments of county departments organized under s. 46.23, 51.42, or 51.437, Stats., on all of these applications. The department shall not approve an application subject to this subsection unless the applicant has demonstrated that:

(a) The proposed per diem rates for the FDD are consistent with those of similar facilities for developmentally disabled persons;

(b) The applicant has experience in providing active treatment as defined in 42 CFR 435.1099 and the department has approved the applicant's program statement under s.HSS 132.51(3);

(c) Conversion of some beds within a non-FDD nursing home to FDD beds will result in a physically separate unit of the facility, which may be a ward, contiguous wards, a wing, a floor or a building, and which is separately staffed;

(d) Staff will be efficiently deployed in the FDD part of the facility and in the nursing home part of the facility, as well as in the facility as a whole;

(e) The FDD will have a minimum of 16 beds for developmentally disabled persons; and

(f) 1. A number of developmentally disabled residents sufficient to fill the requested beds currently reside in the facility and require active treatment; and

2. If the applicant proposes more beds than it has residents under par. (f), that county departments organized under s.46.23, 51.42 or 51.437, Stats., identify persons who need placement in an FDD and give assurances that these persons will be placed in that facility.

(2)(am) Applications under s.HSS 122.02(2)(a) and (c) which meet all of the criteria in subs. (1) and (1m) shall be subject to the following selection process:

1. If after removing from consideration all applications which fail to meet one or more review criteria, there remain more applications than can be approved for the beds available under s.HSS 122.04(1)(b)2 a, the department shall rank the remaining applications according to how each meets each applicable review criterion under subs. (1) and (1m), assigning the lowest number to the application which best meets each criterion.

2. The department shall approve applications in order beginning with the lowest score, until all available beds are allocated. If there is a tie

between applications for the last available approval, the department shall rank the applications according to their scores on review criteria under sub. (1m)(b).

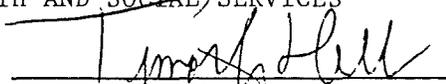
The rules contained in the order shall take effect on the first day of the month following their publication in the Wisconsin Administrative Register, as provided in s.227.22(2), Stats.

DATE: September 4, 1987

(SEAL)

WISCONSIN DEPARTMENT OF
HEALTH AND SOCIAL SERVICES

BY:


TIMOTHY F. CULLEN
SECRETARY



State of Wisconsin

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
1 West Wilson Street, Madison, Wisconsin 53702

Tommy G. Thompson
Governor

Timothy F. Cullen
Secretary

Mailing Address:
Post Office Box 7850
Madison, WI 53707

September 4, 1987

Mr. Orlan Prestegard
Revisor of Statutes
9th Floor - 30 on the Square
Madison, Wisconsin

RECEIVED
SEP 4 1987
Revisor of Statutes
Bureau

Dear Mr. Prestegard:

As provided in s. 227.20, Stats., there is hereby submitted a certified copy of HSS 122, administrative rules relating to conversion of nursing home beds to ICF/MR (FDD) beds.

These rules are also being submitted to the Secretary of State as required by s. 227.20, Stats.

Sincerely,

Timothy F. Cullen
SECRETARY

Enclosure