

**ADMINISTRATIVE RULES
REPORT TO LEGISLATURE
CLEARINGHOUSE RULE 08-042**

By the Department of Health Services relating to Ch. HFS 129, certification of programs for training and testing nurse assistants, home health aides, and hospice aides.

Basis and Purpose of Proposed Rule

Sections 146.40 (3), (4d), and (5) give the Department authority to promulgate rules specifying standards for certification of instructional and competency evaluation programs for nurse aides.

Chapter HFS 129 establishes conditions for certification of instructional programs, including standards for instructors, curriculum, and criteria for the competency evaluation programs for persons who work as nurse aides in hospitals, nursing homes, facilities for the developmentally disabled, home health agencies or hospices. HFS 129 also establishes standards for the development of a registry of persons who have satisfactorily completed the training and competency program or who otherwise are eligible for listing in the registry. The Department proposes to repeal and re-create ch. HFS 129, relating to the certification of programs and requirements for training and testing of nurse aides for the following reasons:

1. To reflect the Department's decision to standardize the administration and operation of nurse aide training and competency evaluation statewide by contracting for this service.
2. To improve the accuracy of the registry.
3. To clarify who may be included on the registry and who is eligible to work as a nurse aide and specifically as a medication aide.
4. To make ch. HFS 129 more consistent with current federal regulations governing nurse aides.
5. To expand the mechanisms available to the Department for enforcing compliance of testing and evaluation programs.
6. To include the feeding assistant training and testing program requirements.
7. To include the medication aide training and testing program requirements.
8. To increase the minimum number of hours required for nurse aide training programs from 75 to 120 hours due to the increase in the acuity level of persons receiving care by certified nurse aides.
9. To include the process for requesting, reviewing and approving or disapproving waivers of Federal sanctions to training programs.

Responses to Legislative Council Rules Clearinghouse Recommendations

The Department accepted the comments made by the Legislative Council Rules Clearinghouse and modified the proposed rule where suggested.

Final Regulatory Flexibility Analysis

Based on a review of DHFS licensing data, including, financial reports submitted by the entity, Medicaid reimbursement data, number of beds and whether the entity is a part of a larger health care organization, DHFS has determined that the affected nursing homes, hospitals and facilities for the developmentally disabled are not small businesses as defined by Section 227.114 (1) (a), Stats.

Although some nursing homes in Wisconsin meet the definition of a small business, none of the 33 nursing homes that currently provide nurse aide training meet this definition. The technical colleges, high schools, universities and 3 non profit entities in the Other category that provide nurse aide training do not meet the definition of a small business either. The Department has no detailed financial data regarding the remaining ten nurse aide training programs in the Other category and assumes these for profit entities are small businesses. Based on available data it appears 8 of the 10 nurse aide training programs categorized as Other will be affected by this rule change. (As noted above, 2 training programs meeting the definition of a small business already provide 120 or more training hours.) This represents 9% of all nurse aide training programs in Wisconsin. It is estimated that any increased costs will be passed on to students in the form of higher tuition, with no significant impact on the affected entities. New training programs will be able to build the 120 hour training requirement into their business plan.

Changes to the Analysis or Fiscal Estimate

Analysis

No changes were made to the rule's analysis.

Fiscal Estimate

No changes were made to the fiscal estimate.

Public Hearing Summary

The Department began accepting public comments on the proposed rule on May 6, 2008. Public hearings were held in Madison on June 12, in Milwaukee on June 13, in Wausau on June 16 and in Rice Lake on June 17, 2008. A total of 16 people attended the public hearings. The hearing record remained open for public comment until 4:30 PM on June 24, 2008.

List of Public Hearing Attendees and Commenters

The following is a complete list of the persons who attended the public hearing or submitted comments on the proposed rule, the position taken by the commenter and whether or not the individual provided written or oral comments.

Name and Address	Position Taken (Support or Opposed)	Action (Oral or Written)
1. Ruth Wheaton Cox Blackhawk Technical College 6004 S. County Rd G PO Box 5009 Janesville, WI 53547-5009	Support	Written
2. Lucille A. Olson Blackhawk Technical College 6004 Prairie Rd. Rte. Rd. G Janesville WI 53547	Support	Observer
3. Heather Bruemmer, Executive Director Board on Aging and Long Term Care 1402 Pankratz St. Madison WI 53704	Support	Oral and Written
4. Bill Donaldson, Legal Counsel Board on Aging and Long Term Care 1402 Pankratz St. Madison WI 53704	Support	Observer
5. Susan Worth Madison Technical College 211 N. Carroll St. Madison WI 53703	None taken	Observer
6. Mary Cieslak Duchek, Director	Opposed	Oral and Written

	Name and Address	Position Taken (Support or Opposed)	Action (Oral or Written)
	Systems Nursing Integration Aurora Health Care 3000 W. Montana Ave. Milwaukee WI 53215		
7.	Barbara Wisnefski WI Long Term Care Workforce Alliance 8600 Sheridan Road Kenosha WI 53143	Support	Oral and Written
8.	Kelli Jones Marquette University PO Box 1881 Milwaukee WI 53201	None taken	Observer
9.	JoAnne Grode Mid-State Technical College 500 32 nd St. N. Wisconsin Rapids WI 54494	Support	Written
10.	Joseph M. Placek Nicolet Area Technical College PO Box 518 Rhineland WI 54501	None taken	Observer
11.	Mary Herman 1506 S. Oneida St. Appleton WI 54915	None taken	Observer
12.	Zoe Cujak 175 N. Adams Ave. Berlin WI 54923	Support	Observer
13.	Mary Ann Pebler Wisconsin Indianhead Technical College 1900 College Drive Rice Lake WI 54868	Oppose	Oral and Written
14.	Mary Wiley-Lippert 2311 11374 Cameron WI 64822	Oppose	Written
15.	Lisa Hall WITC 505 Pine Ridge Drive Shell Lake WI 54871	None taken	Observer
16.	Kathy Kitter-Carey 505 Pine Ridge Drive Shell Lake WI 54871	Oppose	Oral
17.	Wade Reddy, Administrator Good Samaritan Society St. Croix Valley 750 E. Louisiana St. Saint Croix Falls WI 54024	Oppose	Written
18.	Judy Warmuth, Vice President, Workforce Wisconsin Hospital Association 5510 Research Drive Madison WI 53725-9038	Oppose	Written
19.	Kathy Lopnow Health Occupations Education Director WI Technical College System 4622 University Avenue Madison WI 53707-7874	Support	Written
20.	Joan Smaglik St. Mary's at Felician Village 2005 Division Street	Support	Written

Name and Address		Position Taken (Support or Opposed)	Action (Oral or Written)
	Manitowoc WI 54220-5652		
21.	Lynn Binnie Administrator of Operations Fairhaven Senior Services Whitewater WI 53190	Oppose	Written
22.	Brian Purtell, Director of Legal Services Wisconsin Health Care Association 121 E. Wilson Street Madison WI 53703	Oppose	Written
23.	John Sauer, Executive Director Tom Ramsey, Director of Government Relation 204 South Hamilton Street Madison WI 53703	Oppose	Written

Public Comments and Department Responses

The number(s) following each comment corresponds to the number assigned to the individual listed in the Public Hearing Attendees and Commenters section of this document.

Rule Provision	Public Comment	Department Response
General	The Board on Aging and Long Term Care supports contracting for competency testing for nurse aides. The practice of having an in-house training program also act as the competency testing agent appears to represent a conflict of interest. 3, 4	No response necessary.
General	Since the average starting wage for a nurse aide is \$8 -\$10 an hour, the WI Department of Workforce Development does not fund the training. Low nurse aide wages are reflective of inadequate reimbursement for long term care services. Medicare/Medicaid employers receive inadequate government funding to reimburse nurse aides for training. 7	HFS 129 establishes standards for training and testing programs for nurse aides, medication aides and feeding assistants. There is no authority under HFS 129 to set nurse aide wages or government reimbursement rates for long term care services.

<p>General</p>	<p>We request the new rule require the Department to initiate, complete and report investigations in a timely manner. Currently, a significant time lapse exists between the filing of a complaint and final action by the Department. More timely action is needed. 18</p>	<p>HFS 129 establishes standards for training and testing programs for nurse aide, medication aide and feeding assistants. Investigations of caregiver misconduct are not a part of HFS 129. Wisconsin Statute, s. 146.40(4r)(b) requires the Department to review and investigate allegations, notify the person in writing and allow appeal rights for substantiated findings. HFS 13.05(6) provides detail regarding the required investigation process. Neither s. 146.40 (4r), Stat., nor ch. HFS 13 of the Wisconsin Administrative Code establish mandatory time frames for completing complaint investigations, but the Department remains committed to completing these investigations as promptly as possible.</p>
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<p>General</p>	<p>We oppose the requirement that a prospective nurse aide be a full-time nurse aide trainee. Individuals who are participating in training sometimes have to maintain other full-time employment in order to support themselves during the training period. While we recognize this provision may fall under federal law, it is an impediment which should be removed.17, 21, 23</p>	<p>The commentors may be referring to federal nursing home regulations that state a facility may not use an individual as a nurse aide for more than four months, on a full time basis, unless the individual has completed a training and competency evaluation program. (42 CFR 83.75(e) (2)).</p> <p>There are no provisions in HFS 129 that require a prospective nurse aide to be a full time trainee. Many approved training programs offer training to students on a part time basis. Many students attend nurse aide classes part time while working full time.</p>
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<p>General</p>	<p>We support some form of notification that a nurse aide is under investigation. Employers check the registry prior to hiring a nurse aide and any complaints that may have been filed against the person or if an investigation has been initiated is not available to employers. This has resulted in nurse aides with more than one complaint or under investigation being hired. Patients have been harmed by this lack of knowledge. Given the inherent delay with conducting a complete investigation and the due process necessary, it can be several months before a “finding” is placed on the registry. While we appreciate the need to protect individuals who are subject to an allegation, we must balance this against the need to protect vulnerable clients. We request that the status of any current investigation become part of the public information or at least available in response to employer inquiries. 17, 18, 21, 22, 23</p>	<p>The authority for investigating and substantiating allegations of caregiver misconduct is found in 146.40 (4g) and (4r), Wis Stats., and HFS 13, rather than in HFS 129. Therefore, pursuant to Wis. Adm. Code § HFS 13.05(8)(b) and Wis. Stat. § 19.85(1)(f), no information regarding open investigations is released. Information about substantiated findings may be released to the extent permitted by state and federal law. If an investigation results in a substantiated finding, information is released pursuant to Wis. Adm. Code § HFS 13.04(3).</p>
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General	<p>The Wisconsin Nurse Aide registry contains the two character alpha postal code of any other state in which a finding of abuse, neglect or misappropriation has been made. We request this information also be available on the public version of the registry. 18</p>	<p>The Nurse Aide Registry search at https://www.asisvcs.com/services/registry/search_generic.asp?CPCat=0750NUR SE indicates if a person's finding is from another state.</p>
General	<p>Inclusion of the current federal nurse aide training, competency, and registry standards is an important improvement in the rule. 3, 4</p> <p>We have concerns about portions of the rule that repeat federal requirements for nurse aide programs. There is no purpose to repeat these federal regulations and it is unclear why the Department has made this insertion. We request the citation in state statute upon which this addition to the rule is based. 18</p>	<p>No response necessary.</p> <p>Sections 146.40 (3), (4d) and (5) require the Department to promulgate rules specifying standards for certification of instructional and competency evaluation programs for nurse aides. The Department has chosen to include certain portions of the federal regulation to ensure that state licensure law is fully compliant with federal standards.</p>
129.05 (2) (d)	<p>Strengthening the Department's enforcement options will have a positive effect to correct deficiencies and encourage compliance. Additional monitoring and sanctions for non-compliant trainers and examiners is a positive addition to the rule. 3,4</p>	<p>No response necessary.</p>

<p>129.05 (2) (d) 4.</p>	<p>We believe the proposed inclusion of the factors for denial or removal of facility-based training programs does not need to be included in HFS129. Federal law triggers the loss of a nurse aide training program for several reasons. The law is criticized as being counter to a facility's ability to establish and maintain a qualified workforce and efforts continue to remove this federal law. In the alternative, language should be revised to simply state that denial or withdrawal is subject to the dictates of applicable federal law. 22</p>	<p>The Department has amended HFS 129.05 (2) (d) 4. as requested by the commenters.</p>
<p>129.05 (2) (d) 6.</p>	<p>HFS 129.05(2)(d) 6. states that if the Department withdraws the approval of a nursing facility's nurse aide training program, the facility may not reapply for program approval for one year from the date of the withdrawal of the program approval. This one-year delay is not required under federal law and prolongs the elimination of a service which could be vital to the residents we serve. The Department has adequate authority to deny an applicant if necessary and the addition of this restriction is not needed. 22, 23</p>	<p>Based on public comments, the department has amended HFS 129.05 (2) (d) 6. to shorten the amount of time from one year to 6 months before a program may reapply after approval of a program has been withdrawn or denied. The Department has retained the ability to delay reapplication to the program for 6 months in order for the program to have sufficient time to correct its problems.</p> <p>Although not cited by the commentors, similar provisions found at HFS 129.05 (2) (a) 3. and (b) 3. were modified from 1 year to 6 months for the reason given above.</p>

<p>129.05 (2) (e)</p>	<p>We support the deletion of the Nurse Aide Training and Competency Evaluation Program waiver of prohibition. This provision is contained in federal statute and does not need to be included in HFS 129 to be enforceable. We are working to amend this federal law because we believe it is unfair to penalize a facility with a loss of their nurse aide training program for a non-quality of care violation. We would prefer not to be required to amend HFS 129 if we are successful in removing this provision from federal law. 23</p>	<p>Although HFS 129.05 (2) (e) contains the federal statutory framework that permit states to waive the prohibition of a Nurse Aide Training and Competency Evaluation program, each state is expected by the federal government to augment these standards and define the criteria the state uses to review and approve requests for waivers. Each state must define the terms “reasonable distance of the facility” and “adequate environment” and establish an administrative process for review. The Department needs to define these standards to continue to carry out their responsibility to review and approve requests from nursing homes for a waiver of the NATCEP prohibition.</p>
<p>129.06 (1) (a)</p>	<p>We oppose the requirement that a primary nurse aide training instructor must have a minimum of one-year experience in long-term care. The provision of care in a long-term care facility is not so different from that in other settings so as to require such a mandate. It is often difficult for schools to recruit nursing instructors and we should not raise this barrier to recruitment. The vast majority of patients found on hospital units are over age 65 and it is essential we select RN’s who can train aides in the aspects of patient care unique to the hospitalized patient. 6, 17, 21</p>	<p>Federal regulation, CFR 483.152(a)(5) states that the training of nurse aides must be performed by or under the general supervision of a registered nurse who possesses a minimum of 2 years of nursing experience, at least 1 year of which must be in the provision of long term care facility services. This is federal law and cannot be waived.</p>

<p>129.07 (2) (b) 1.</p>	<p>1. Certified Nursing Assistants (CNA) provide much of the direct care received by nursing home, community based, home health or hospice residents. Nurse aides perform many complex and essential health care functions. Necessary content can not be adequately covered in less than 120 hours. Due to the complicated environment of health care and increased acuity of residents there needs to an assurance of safety and competence for the community. We support the 120-hour minimum training standard. 1, 3, 4, 6, 7, 9, 17, 19, 20, 21, 23</p> <p>WTCS does not anticipate the change in the minimum hour requirement will have any effect on WTCS training costs. To meet the needs of students and employers, WTCS now requires all districts to offer a minimum 120 hour program for 3 credits. This requirement takes effect for the 2008-09 academic year, regardless of whether the state minimum requirements are increased. 19</p> <p>2. We suggest that the increased clinical time be structured in a way to provide entities options in accommodating the increase clinical. 6</p> <p>3. We believe our current 90 hour configuration is effective. Our students have excellent passing rates and employers are satisfied with our graduates. The budget impact of going from 90-120 hours will be significant since our instructors are almost exclusively part-time and limited to 759 hours per year. This will reduce the number of course offerings we will be able to provide. 13, 14, 16</p> <p>4. While we would support an increase in the minimum training hours, the Department has not adequately addressed the issues associated with the proposed increase. We are concerned that the unintended consequences to increase the hours will hamper those individuals seeking to enter the long term care workforce. We are concerned that the Department has not adequately considered the costs associated with the increase in training hours, both to the individual nurse aide and the long term care delivery system. Absent demonstrable need for this increase in hours, we request that the Department more closely examine the true costs that will be incurred and consider these as part of the final decision as to such revision.</p> <p>If the increase in hours within the proposed revisions would assure an increased level of competence, the increased costs would be warranted. However, the Department has not adequately demonstrated the need for this increase in expectations, particularly since the majority of programs exceed the 75 hour minimum, and a the majority of candidates that complete training programs in excess of the 75 hour minimum. There further does not appear to be a correlation between pass rates and hours of a program. 22</p>	<p>1. No response necessary.</p> <p>2. The proposed rule offers flexibility to training programs to structure the increased training hours to meet the needs of their students. The rule requires that 32 of the 120 hours be assigned to clinical experience and that students are given 16 hours of initial classroom training before direct contact with residents. The remaining hours may be structured by the training program to best accommodate the needs of their students.</p> <p>3. As indicated by commentor # 19, WTCS now requires all districts to offer a minimum 120 hour program for 3 credits. This requirement takes effect for the 2008-09 academic year, regardless of whether the state or federal minimum requirements are increased. The commenter also indicated that WTCS does not anticipate that the change in the minimum hour requirement will have any effect on WTCS FTE costs for training.</p> <p>4. In January, 1993, HFS 129 established minimum nurse aide training standards that mirrored federal</p>
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requirements by requiring a minimum of 75 hours of training. These requirements have not changed since that time.

While an increase in the number of training hours does not guarantee nurse aide competency, it recognizes that the needs of elderly and handicapped patients have changed making it necessary to provide additional training hours to ensure staff are adequately trained.

A report prepared by the federal Office of Inspector General, November, 2002, found that nurse aide training requirements have not kept pace with the nursing home industry needs. The report indicated that aides need more training and concluded that nurse aide training is not sufficient to meet residents' needs, and recommended improving training program requirements.

Similarly, the American Association of Retired Persons conducted in March 2006. The study examined training programs in 10 states and identified the need to increase the 75-hour minimum requirement to at

least 100 to 120 hours to insure that aides have the training needed to provide quality care to residents. The study concluded that improving training may reduce CNA turnover, thereby improving the quality of care and reducing the costs associated with high turnover rates.

Already 31 states have extended the minimum number of hours for nurse aide training programs. Twenty of these states have established a standard of 100 hundred or more hours; six of these states exceed 140 or more hours. Wisconsin is one of 20 states that have not increased the minimum number of training hours.

Although Wisconsin has not increased the minimum number of training hours by rule, all but one nurse aide training program provides more than the 75 hours minimum training. In 2007, 47% of all training programs provided 120 or more training hours. These programs train over 89% of all nurse aides in Wisconsin. Seventy-four percent of these students are trained by Wisconsin's Technical Colleges (WTCS). Nursing

		<p>homes train only 8% of all students. Only 2 of the 16 technical colleges provides less than 120 hours of training. And, as indicated by commentor # 19, WTCS now requires all districts to offer a minimum 120 hour program.</p> <p>By increasing the minimum number of hours to 120 in rule, the remaining 11% of Wisconsin's training programs will be consistent with the industry standard of practice.</p> <p>Also, it does not appear the proposed increase will act as a disincentive or barrier, since 89% of all students are already trained in programs offering 120 hours or more training.</p> <p>While there does not appear to be a correlation between pass-fail rates and the number of hours in a training program, the test only measures whether the student meets minimum standards, not how well they performed above the pass-rate.</p>
129.07(2) (b) 4.	We are concerned with the rule that says we may not charge for a training course. We request a nominal fee for each student. This fee is reasonable enough to not create hardship for the employee, yet demonstrates the employee's commitment to the role and training experience. 6	Only Medicaid-certified nursing homes that employ a student full time are prohibited from charging a student for training. All other entities may charge students for nurse aide training.
129.07 (2) (c) 1.L.	This provision limits a health care facility to serve as a site for clinical instruction to no more than 2 nurse aide training programs at a time. For a	In response to public comment, the

	<p>nursing facility, this provision is unnecessary because the facility is responsible for its own residents. This restriction does not take into account the size of a health care facility, nor the limitations that may exist, particularly in rural settings, for available clinical sites. This provision should be deleted. 17, 22, 23</p> <p>We would suggest that the limit be increased for large hospital facilities or that a waiver process is created for large facilities that could accommodate more students. Hospitals with many clinical units have the capacity to accommodate more programs. 18</p>	<p>Department has modified HFS 129.07 (2) (c) 1.L. to provide greater flexibility when a health care facility would like to use more than 2 nurse aide training programs at the same time. The proposed rule has been modified to state that the determination to allow more than 2 programs will be made on a case-by-case basis and in conjunction with the health care facility's administrative staff. Many larger facilities are able to accommodate more students without creating a burden to the welfare and rights of the residents.</p>
129.09	<p>We support the requirement to periodically update a nurse aide's status in the registry. Our nursing workforce will continue to age and experience shortages over the next decades; therefore it will be necessary to assess the assistive personnel available as well. Trended information overtime may also help us determine the number and location of training programs needed across the state. I</p> <p>Clarifications and improved accuracy of the registry are important improvements to the rule. 3,4</p>	<p>No response necessary.</p>
129.11 through 129.20	<p>We support the feeding assistant program and recommend that caregivers are adequately trained and supervised. Additionally, the inclusion of the standards for medication aide training and testing brings the entire program under one rule. 3,4</p>	<p>No response necessary.</p>