

**Opinion No. 88-48**

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**OPINION OF:** HAL STRATTON, Attorney General

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**TO:** Nancy L. Twigg, Liaison, New Mexico Board of Nursing Home Administrators, 4125 Carlisle, N.E., Albuquerque, New Mexico 87107

**QUESTIONS**

Must administrators of intermediate care facilities for the mentally retarded (ICF/MR) be licensed as nursing home administrators pursuant to the Nursing Home Administrators Act ("Act"), Sections 61-13-1 to 61-13-16 NMSA 1978 (Repl. 1986)?

**CONCLUSIONS**

No.

**ANALYSIS**

Section 61-13-2(B) of the Act defines "nursing home administrator" as "any individual responsible for planning, organizing, directing and controlling the operation of a nursing home, or who shares such functions with one or more persons operating a nursing home." Section 61-13-2(C) defines "nursing home" as:

[A]ny nursing institution or facility required to be licensed under state law as a nursing home by the health and social services department [health services division of the health and environment department], whether proprietary or non-profit, including extended care facilities, skilled nursing home facilities, and whether a separate entity or part of a medical institutional facility.

Section 61-13-16 provides: "The Nursing Home Administrators Act does not apply to boardinghouses or to sheltered-care facilities." Section 61-13-14(C) prohibits individuals from "[practicing] as a nursing home administrator ... unless duly licensed and registered to so practice under the provisions of the Nursing Home Administrators Act." Historically, the Health and Social Services Department ("HSD") has not required that ICF/MRs be licensed as nursing homes. The question therefore is whether that policy is consonant with the applicable legal authorities.

HSD regulations, at part 9, section I, define an "intermediate care facility" as:

[O]ne which is licensed to give personal care on a 24-hour basis to one or more ambulant clients ... and who because of their physical or mental condition (or both)

require living accommodations and care which, as a practical matter, can be made available to them only through institutional facilities; and who do not have such an illness, disease, injury or other condition as to require the degree of care and treatment which a hospital or skilled nursing home is designed to provide.

These regulations address structural, mechanical, and electrical requirements for the facilities, and regulate food service, medication storage, client records and generally care. The regulations do not discuss nursing care, except to state that, "[c]are given and services provided shall comply with acceptable professional and ethical standards," and to require "sufficient staff of qualified and responsible persons ... to provide adequate, safe and humane care." HSD does not separately license and regulate ICF/MRs.

HSD regulations governing "nursing homes" are described as "New Mexico Department of Public Health, Licensing Regulations, Part 3, Rules, Regulations and Standards for Nursing Homes" (effective July 1, 1964). These regulations define a "nursing home" as: "[A] place which provides on a continuing 24-hour basis, in-patient facilities and resources to give skilled nursing care to two or more persons ... who are sick, injured, infirm or convalescent and who require such care, but who are not in need of hospitalization...." Id. § I(A). "Skilled nursing care" means "care of the sick ... demanding technical nursing skill which can be performed adequately and safely only by persons trained specifically in nursing." Id. § I(B). These regulations provide: "There shall be sufficient, qualified nursing personnel to provide adequate, safe and efficient nursing care to each patient;" and "[i]n each nursing home there shall be at least one professional or practical nurse ... on duty for not less than eight (8) hours of each day.... At all other times at least one currently licensed nurse shall be on call." Id. § II(T). Thus HSD's regulations define a "nursing home" in terms of a facility that provides "skilled nursing care" and define "intermediate care facility" as one whose patients do not require hospitalization or the care that a "skilled nursing home" provides.

While we recognize that we are construing state licensure requirements, federal law, specifically the Social Security Act, and the federal regulations of the Department of Health and Human Services, provide guidance to interpreting the terms "extended care facilities" and "skilled nursing facilities." Title 42 of the United States Code, Section 1395x(h) defines "extended care services" as "services furnished to an inpatient of a skilled nursing facility" and recites specifically nursing care and other services that skilled nursing facilities generally provide. A "skilled nursing facility," "is primarily engaged in providing to inpatients (A) skilled nursing care and related services ... or (B) rehabilitation services." 42 U.S.C. § 1395x(j). Such a facility must provide twenty-four hour nursing service. Id.

Federal regulations define "skilled nursing" services as those that: "(1) Are ordered by a physician; (2) Require the skills of technical or professional personnel such as registered nurses ... and (3) Are furnished directly by, or under the supervision of, such personnel. 42 C.F.R. § 409.31. Also, "A SNF must meet State nursing home licensing standards." 42 C.F.R. § 442.201(a). In contrast, "intermediate care facility services" are services provided in a facility that:

Fully meets the requirements for a State license to provide on a regular basis, health-related services to individuals who do not require hospital or skilled nursing facility care, but whose mental or physical condition requires services that ----

(i) are above the level of room and board; and

(ii) can be made available only through institutional facilities.

42 C.F.R. § 440.150(a)(1) (emphasis added). An ICF "must meet standards for a state license to provide, on a regular basis, health-related care and services" to satisfy the level of care that Section 442.251 requires. An ICF, other than an ICF/MR, must have an administrator who is either a licensed nursing home administrator or a hospital administrator, if the ICF is a hospital qualifying as an ICF. 42 C.F.R. § 442.303. An ICF/MR provides the same level of care that 42 C.F.R. § 440.150(a) describes. An ICF/MR administrator must have the following qualifications:

The chief executive officer must be an individual licensed in the state as a nursing home administrator or a qualified mental retardation professional, except ----

(1) If the ICF/MR is licensed as a nursing home, the chief executive officer must be an individual licensed in the state as a nursing home administrator.

42 C.F.R. § 442.401(b). An ICF/MR must "provide residents with nursing services," 42 C.F.R. § 442.478; must "have available enough nursing staff ... to carry out the various nursing services," *id.* § 442.480; and must "have a registered nurse or licensed practical or vocational nurse to supervise the health services full time, 7 days a week, on the day shift." *Id.* § 442.481. An ICF/MR with fifteen beds or less, whose residents do not require professional nursing services, may satisfy the supervisory nurse requirements of Section 442.481 by contracting with a nurse to provide care for minor illnesses and to consult about the residents' health care plans. 42 C.F.R. § 442.481(g). Thus, federal regulations distinguish between SNFs and ICFs, and direct that only the former meet "nursing home" licensing standards.

State law also distinguishes between the ICFs and SNFs. Section 24-1-2(D) NMSA 1978 (1987 Supp.) defines "health facility" as "any public hospital,... private hospital,... outpatient facility, ... nursing home, intermediate care facility, boarding home ... shelter care home...." Section 24-1-5(A) NMSA 1978 (1987 Supp.) provides: "No health facility shall be operated without a license issued by the department [HSD]." HSD has different licensing requirements for ICFs and nursing homes.

In summary, ICFs do not provide the degree of care that a hospital or skilled nursing home provides. "Nursing homes" provide, essentially, twenty-four-hour "skilled" nursing care for patients who do not require hospitalization. Unless a facility is a "nursing home," as defined by HSD's regulations and, therefore, required to be licensed as such, it is not a "nursing home" within the meaning of Section 61-13-2(C). An ICF/MR, properly licensed by HSD as an intermediate care facility, is not a nursing home as

defined by Section 61-13-2(C), and its administrator is not, therefore, required to be licensed as a nursing home administrator.

**ATTORNEY GENERAL**

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