

**Evaluation of Federal Requirements And, If Appropriate,
Development of Plan To Transition The Nurse Aide I
Education And Training Program To The Board Of Nursing**

Session Law 2023-129, Section 7.1.(c)



Report to

**The Joint Legislative Oversight Committee on
Health and Human Services**

By

**North Carolina Department of Health and Human Services,
Division of Health Service Regulation
and
North Carolina Board of Nursing**

August 30, 2024

Reporting Requirements

Session Law 2023-129¹ directs the Department of Health and Human Services (DHHS) and the North Carolina Board of Nursing (NCBON) to provide a report to the Joint Legislative Oversight Committee on Health and Human Services that evaluates whether oversight of Nurse Aide I education and training programs may be transitioned to the NCBON under applicable federal requirements; and, if so, includes a plan to transition these responsibilities from the Division of Health Service Regulation (DHSR) to the NCBON.

The legislation provides in full:

SECTION 7.1.(a) The North Carolina Board of Nursing and the North Carolina Department of Health and Human Services, Division of Health Service Regulation, shall evaluate the federal requirements applicable to the Nurse Aide I education and training program and, to the extent consistent with the applicable federal requirements, develop a plan for the Board of Nursing to assume responsibility for and provide oversight of all nurse aide programs, regardless of nurse aide title, as individuals in these positions collaborate with nurses and other health care providers to deliver care across all health care settings.

SECTION 7.1.(b) The Department of Health and Human Services shall continue to maintain the registries as required by Article 15 of Chapter 131E of the General Statutes.

SECTION 7.1.(c) On or before September 1, 2024, the Department of Health and Human Services and the Board of Nursing shall provide a report to the Joint Legislative Oversight Committee on Health and Human Services that shall contain the evaluation of the federal requirements applicable to the Nurse Aide I education and training program and, to the extent consistent with the applicable federal requirements, a plan for the Board of Nursing to assume responsibility for it, a transition time line, and recommendations for statutory changes necessary to transition the Nurse Aide I education and training program from the Department to the Board of Nursing, if appropriate.

Executive Summary

To meet the requirements of Session Law 2023-129, DHSR engaged Manatt Health Strategies to evaluate the federal requirements applicable to Nurse Aide I education and training programs, including whether oversight of Nurse Aide I education and training programs may be transitioned to the NCBON under applicable federal requirements; and, if so, to prepare a plan to transition these responsibilities from DHSR to the NCBON.

None of the federal statutes, regulations, nor U.S. Centers for Medicare and Medicaid Services (CMS) guidance specify whether a state survey and certification agency, such as DHSR, may

¹ N.C. Gen. Assemb., Sess. Law 2023-129, 2023 (2023).

delegate its oversight and responsibility for nurse aide training and competency programs to a state board of nursing, like the NCBON.

Because publicly available CMS guidance does not specify whether DHSR could delegate oversight and approval of nurse aide training and competency programs to the NCBON, DHSR sought written guidance from CMS. In correspondence to DHSR, CMS clarified that the State cannot delegate approval of nurse aide training and competency programs to the NCBON. CMS' written response also emphasized that the State maintains accountability to CMS for the approval of all nurse aide training and competency programs.

Based on the direct response from CMS and this review, DHSR and the NCBON conclude that *federal requirements do not allow DHSR to transfer responsibility for and oversight of the Nurse Aide I training and competency programs to the NCBON*. DHSR and the NCBON have not, therefore, prepared a transition plan for inclusion with this report.

Background

Nurse aides provide nursing-related services to skilled nursing facility residents.² Federal laws and regulations govern skilled nursing facilities and the nurse aides who work there. Although nurse aides are not licensed, they must complete specific training and competency evaluation programs regulated by both federal and state law.

Under federal law, CMS has the authority and responsibility to oversee skilled nursing facilities and nurse aides. CMS has issued several regulations and guidance documents for nursing homes and state agencies describing the federal requirements related to nurse aides.

In North Carolina, there are two overlapping categories of nurse aides. The Nurse Aide I is anyone who has met the requirements to work as a certified nurse aide in a federally-certified skilled nursing facility.⁴ The Nurse Aide II is a certified Nurse Aide I who has completed additional training under North Carolina law which permits them to obtain additional skills and seek employment for potentially higher compensation.³ Every Nurse Aide II must be listed on the Nurse Aide I Registry maintained by DHSR. As of July 1, 2024, there are 91,432 Nurse Aide Is registered in North Carolina. As of July 1, 2024, there are 10,369 Nurse Aide IIs within that number listed on the Registry.

DHSR oversees Nurse Aide Is. DHSR is a sub-unit of DHHS, created by Article 3 of Chapter 143B of the North Carolina General Statutes. DHSR is designated with the federal government as the state agency responsible for conducting survey and certification activities of skilled nursing facilities in the State.⁴ DHSR oversees the Nurse Aide I training programs, the Nurse Aide I Registry, and investigations into abuse, neglect, and misappropriation of resident property by all nurse aides. DHSR's responsibilities include developing curricula for and evaluating

² 42 USC § 1395i-3(b)(5).

³ See 21 NCAC 36.0403(b).

⁴ See Agreement between U.S. Secretary of Health and Human Services and the State of North Carolina, dated April 8, 1985, pursuant to Sections 1864(a)(c), 1865(a), and 1874 of the Social Security Act ("1864 Agreement").

Nurse Aide I training programs. DHSR engages a third-party vendor, Credentia, to administer a written examination and skills assessment that Nurse Aide Is must pass to complete certification.

The NCBON was established pursuant to the Nursing Practice Act under Article 9A of Chapter 90 of the North Carolina General Statutes. The NCBON sits outside DHHS. The NCBON develops the curriculum for Nurse Aide II training, approves Nurse Aide II Educational Programs, and maintains the Nurse Aide II Registry. The NCBON's additional training and certification for Nurse Aide IIs are governed by state law. To be listed on the Nurse Aide II Registry, the individual must pass an additional examination administered by the NCBON approved Nurse Aide II program. DHSR, however, continues to be solely responsible for conducting investigations of all nurse aides.

As required by Session Law 2023-129, this Report evaluates the federal requirements applicable to the Nurse Aide I education and training program and considers the extent to which, consistent with those federal requirements, the NCBON may assume responsibility for and provide oversight of Nurse Aide I programs. To complete this analysis, Manatt reviewed the applicable federal statutes, regulations, published CMS guidance, written agreements, and private correspondence.⁵

Oversight and Review and Approval of Nurse Aide Competency and Training Programs

Under federal law, States must specify and approve the nurse aide training and competency evaluation programs and regularly review these programs to ensure they meet all federal requirements.⁶ In a contract signed in 1985, DHHS and the U.S. Secretary of Health & Human Services agreed that DHSR is the “state survey and certification agency” responsible for this work in North Carolina.⁷

Nothing in the federal statutes, regulations, or published guidance from CMS specifies whether the state survey and certification agency, in this case DHSR, may delegate responsibility for the Nurse Aide I training and competency programs to the state nurse licensing agency, such as the NCBON. As noted above, the relevant federal statute requires the State to provide oversight and review and approval of nurse aide competency and training programs.⁸ “State” is not defined in the statute, and none of the statutes, regulations, nor sub-regulatory guidance specifies which state agency may perform this activity.

In 1991, CMS commented in the preamble to the skilled nursing facility regulations, “[w]e agree that agencies other than the State survey agency may review and approve [nurse aide training and competency education programs] NATCEPs and have not specified which State agency should evaluate programs.” CMS emphasized that it is the State’s responsibility to review and

⁵ The relevant legal authorities include: 42 U.S.C. §§ 1395i-3, 1396(r), 42 C.F.R. §§ 483.12, 483.13(c)(1)(iii)(B), 483.35, 483.150-8, the CMS State Operations Manual, and the 1864 Agreement.

⁶ 42 U.S.C. § 1395i-3(e).

⁷ See 1864 Agreement.

⁸ 42 U.S.C. § 1395i-3(e)(1).

approve nurse aide training and competency education programs, though CMS did not specify which state agency must carry out this function. For example, in response to a comment that all States should be required to review all programs, CMS agreed: “[The] Act indicates that *States must approve programs that meet the requirements for approval of NATCEPs and CEPs.*”⁹

Throughout its commentary in the preamble to the regulations and the regulations themselves, CMS refers to the “State survey agency” and the “state licensure office” or “state licensure body” as separate bodies.¹⁰ However, CMS does not define these terms and Manatt did not identify published guidance from CMS allowing a board of nursing to oversee nurse aide training and competency programs.¹¹

Like the federal statute, regulations, and guidance, the CMS State Operations Manual (Manual) for survey and certification of skilled nursing facilities likewise places responsibility for nurse aide evaluation and training on the state survey and certification agency. The Manual states that, generally, the survey agency’s responsibility for evaluation and certification may not be re-delegated.¹² The Manual also specifies: “*The State survey agency must notify the State agency responsible for Nurse Aide Training and Competency Evaluation Programs/Competency Evaluation Program* when it determines that denial or withdrawal of program approval is necessary.”¹³ This statement suggests that the state survey and certification agency is the agency responsible for approval or withdrawal of approval of competency evaluation programs. Federal regulations and CMS guidance are clear that the state survey agency must conduct surveys of training programs.

Because the statute, regulation, and guidance do not answer the question as to whether the NCBON may assume responsibility for and provide oversight of all nurse aide programs, Manatt recommended that DHR directly seek CMS’s position on this issue. DHR sent an e-mail to CMS’ Center for Clinical Standards and Quality, inquiring whether DHR may delegate the review and approval of nurse aide training and competency programs to the NCBON. CMS responded:

“Titles 18 and 19 of the [Social Security Act], sections 1819(e) and 1919(e) specifies that a State must approve nurse aide training and competency evaluation programs. Consistent with statute, 42 CFR 483.151 explains that a state may offer a nurse aide training and competency evaluation program or competency evaluation program, and if not, the State must review and approve or disapprove

⁹ 56 Fed. Reg. 48826, 48892-3 (September 26, 1991).

¹⁰ *See, e.g.*, 42 C.F.R. § 483.10(g)(4); 81 Fed. Reg. 68688, 68705-6 (Oct. 4, 2016).

¹¹ In contrast, CMS has stated that maintenance of the nurse aide registry could be overseen by a board of nursing: “We also recognize that States may find it efficient to delegate the maintenance and operation of a registry to another entity in the State, for example, the component of the State that maintains the registry of licensed nurses.” 55 Fed. Reg. 10938, 10945 (March 23, 1990). The Session Law, however, specifies that “[t]he Department of Health and Human Services shall continue to maintain the registries as required by Article 15 of Chapter 131E of the General Statutes.” N.C. Gen. Assemb., Sess. Law 2023-129, 2023, § 7.1(b) (2023).

¹² CMS State Operations Manual, Chapter 1, § 1004.

¹³ CMS State Operations Manual, Chapter 7, § 7809.4.

nurse aide training and competency evaluation programs and nurse aide competency evaluation programs. In consideration of these provisions, a State could allow the State Board of Nursing to operate NATCEPs, *but the state could not delegate the approval of NATCEPs to the State Board of Nursing*. That said, there may be ways for the State Board of Nursing to take on a larger role than a traditional NATCEP operator, such as overseeing NATCEPs operated by other entities in the State. Additionally, the State could potentially work with the State Board of Nursing to have them implement programs that are already approved (i.e., pre-approval to implement NATCEPs that are consistent with the requirements). However, *the State is ultimately accountable for the approval of all NATCEP programs.*" (emphasis in original).¹⁴

While CMS' response indicates that DHSR, as an agency of the State, could delegate certain operations of the Nurse Aide I training and competency programs to the NCBON, similar to DHSR's current agreement with Credentia, DHSR **may not** delegate the approval and oversight of the training programs to the NCBON. CMS is clear that DHSR must be responsible for the review and approval of training programs, and furthermore, DHSR must be accountable to CMS for the nurse aide training and competency programs. DHSR cannot delegate review and approval of training and competency programs to the NCBON.

Conclusion

The federal requirements, reflected in statutes, regulations, guidance, and direct correspondence with CMS, require DHSR to maintain responsibility for and provide oversight and approval of the Nurse Aide I education and training program. Likewise, DHSR must remain accountable to CMS for the training and competency program's compliance with applicable regulations.

DHSR and the NCBON, therefore, conclude that DHSR *cannot* delegate to the NCBON responsibility for and oversight of Nurse Aide I training and competency programs based on current federal requirements.

¹⁴ See E-mail from L. Smith, Director, Division of Atlanta Survey & Enforcement to M. Payne and E. Milliken, DHSR (June 5, 2024) (on file with DHSR).