A Report to the Legislature on

RECOMMENDATIONS FOR A PERSONAL CARE SERVICES LICENSURE RULE

Department of Human Services
Prepared in response to Laws of Minnesota, 1991, Ch.292, Art. 7, sec. 8.

Pursuant to 1991 LAws, Chapter 292
Article 7, Section 8

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Advisory committee members included Mary Absolon, Cathy Berg, David Cassidy, Margo Fatticci, George French, Morgan Grant, Terry Hake, Tina Hawkins, Jacki Stalley McCormack, John Walsh, and Leah Welch. Valuable assistance was also provided by Ron Abato, Lynda Adams, Alana Fiala, Cindy Gislason, Cathy Griffin, Paul Hagen, Barbara Harding, Anne Henry, Carol Manteuffel, Dan McCarthy, Sherilyn Moe, Frances Strong, and Mary Tyrrell.

This project was coordinated by staff of the Long Term Care Management Division of the Department of Human Services. Jan Buelow facilitated the advisory committee meetings and was the author of this report. Overall project direction was provided by Pam Parker, Director of the Long Term Care Management Division.

EXECUTIVE SUMMARY

RECOMMENDATIONS FOR A PERSONAL CARE SERVICES LICENSURE RULE

I. NEED FOR THIS REPORT

Legislation passed in 1991 [M.S. 256B.04, sub. 16] requires the Department of Human Services to write a report to the legislature with recommendations for licensure of personal care services provided under the state Medical Assistance program, prior to joint promulgation of that rule with the Department of Health.

II. HOW INFORMATION WAS OBTAINED

The Department is directed to include in the report preliminary findings and comments from an advisory committee consisting of 60% consumers or consumer representatives. Personal care services consumers must be either capable of directing their own care, or live with a designated person who directs their care. Both these groups of consumers were represented on the advisory committee.

Per legislative requirement, the committee reviewed the World Institute on Disability (WID) paper, "Attending to America," and the proposed MDH Health Care Licensure (HCL) Rule. The committee also reviewed Minnesota Rules part 9505.0335 (Rule 47), the Medical Assistance reimbursement rule for personal care services.

III. RECOMMENDATIONS EXPLORED

The committee considered all the recommendations in the WID paper, all of the section of Rule 47 that relates to personal care services, and the proposed HCL Rule.

The committee's focus in discussion and in recommendations was on a consumer driven, independent living model of service provision, in accord with the purposes of the PCA program. This type of model requires a relatively flexible regulatory scheme, which is demonstrated in the recommendations of this report.

In reviewing the proposed HCL rule for language that could be duplicated in the personal care rule, the advisory committee found they had serious reservations about many portions of the HCL rule, most notably portions that, in the view of the committee, tended to overemphasize a medical-model orientation in areas where it would be appropriate for consumers to have more control over their own lives. It was for this reason that the committee modified many sections of the HCL rule to stress the consumer component before recommending these sections for inclusion in a personal care services licensing rule.

IV. RECOMMENDATIONS; BUDGETARY & LEGISLATIVE CHANGES REQUIRED

The personal care services category (M.S. 256B.0627) was established in order to address the potential for independence that personal care services provide to consumers of these home health services.

The Department considers the committee's efforts to ground the personal care licensure rule in an independent living model and to permit the DHS rule to be applicable to as many consumers of personal care services as possible to be reasonable and appropriate. Some specific recommendations are:

- **The committee and the Department recommend that agencies providing personal care services be licensed, but it is not necessary to license individual PCAs.**

  Rationale: Current statute requires that personal care services be provided through a personal care provider agency unless there is no choice of vendor. There are currently very few individual personal care assistants (PCAs) providing services in Minnesota, and the expectation is that as home health services grow, there will at some time in the near future no longer be any individual providers of personal care services.

  The committee and the Department believe that minimum safety and quality of care standards can be attained most efficiently and cost effectively through licensure of agencies, rather than through licensure of individuals.

- **The committee and the Department recommend that the DHS personal care licensure rule apply to agencies that provide up to 75% of their personal care assistant services through Medical Assistance.**

  Rationale: Present state law is written so that the source of payment is the factor that governs which licensing rule would apply: the PCA licensing rule would apply to Medical Assistance-reimbursed services and the HCL rule would apply to home health or personal care services paid for by Medicare or by private pay sources.

  If the personal care licensure rule were to apply only to MA-reimbursed personal care services, many provider agencies would find themselves required to provide identical services under two sets of regulations based solely on payment source for those services. Requiring agencies to provide the same services under two different state agency licensing rules would place an unnecessary regulatory burden on agencies.

  Additionally, people who receive personal care services through private-payment sources should be able to receive these services under the independent living model

on which the DHS personal care licensure is recommended to be based, and which will be available to people receiving these services through MA.

A statutory change to M.S. 256B.04, subd. 16. would be required in order for the DHS rule to cover private-pay personal care services as well as those provided through MA.

- **The Department recommends that consumer training of PCAs is appropriate and should be permitted, with RN certification that a PCA is qualified to perform PCA tasks for each consumer for whom that PCA provides services.**

  Rationale: Advisory committee and Department resolution of issues relating to PCA training qualifications illustrate a pivotal difference between the recommendations in this report and the proposed HCL rule. Committee members advocated an individually appropriate optimum degree of consumer direction regarding hiring and training of PCAs.

  There are many reasons to avoid requiring a classroom training course, such as the 75-hour class required by the HCL rule. A medically-oriented course such as the Certified Nurse Assistant (CNA) course required by the HCL rule trains service providers in a way that can be troublesome for consumers of personal care services. Committee members' contention was that such medically-oriented training tends to emphasize provider control of consumers, rather than consumer self-direction and independence. An extensive course requirement could have the effect of discouraging potentially well-qualified people from an interest in a PCA position. The expense of a course and who would pay for it is also an issue.

- **The Department recommends that the care plan be used to indicate prescribed and over the counter medications that can be taken without prior-dose RN authorization, and to indicate how often RN supervision of the PCA is needed.**

  Rationale: This recommendation for flexibility in regulation will allow provider agencies to tailor services to match individual needs. Board of Nursing representatives present during committee discussion of this issue agreed that if the care plan included it, designated medications could be taken without receiving RN authorization prior to each dose, and without requiring a post-dose checkup by the RN. They also indicated that necessary frequency of RN supervision would vary among individuals, and that the care plan could be used to specify how often and what type of supervision was needed.

- **The Department recommends that license fees not be imposed on agencies that receive MA reimbursement for at least 75% of the personal care services the agency provides; that administrative costs associated with DHS licensure of these agencies be included in a DHS budget line item; and that a fee schedule be set for**

licensure of agencies that provide less than 75% of their personal care services through MA.

Rationale: This is reasonable because personal care licensure costs would become part of the calculation of MA reimbursement rates for agencies that are primarily MA providers. License fees for agencies that provide less than 75% of personal care services through MA should be determined at the time of rulewriting.

- **The committee and the Department recommend that this report's recommendations be considered by MDH for inclusion in their revisions of the proposed HCL rule.**

Rationale: Many of the recommendations for rule language in this report are modifications of the proposed HCL rule. The modifications in this report strengthen consumer participation in decisionmaking regarding their own personal care services. The Department recommends that the DHS and MDH rules should be as congruent as possible, to simplify agency administration.

A statutory change to M.S. 144A.45 would be helpful in achieving this recommendation, but is probably not necessary, given the expressed desire of MDH to work cooperatively with DHS in writing the two rules.

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Introduction

Legislation passed in 1991 requires the Department of Human Services and the Department of Health to jointly promulgate a rule for licensure of personal care services provided under the state Medical Assistance program[1]. The Department of Human Services is responsible for writing a report to the legislature that includes preliminary findings and comments from an advisory committee established to assist in the process.

An advisory committee was formed by DHS to assist in development of the rule recommendations. The committee consisted of sixty percent consumers and representatives of consumers of personal care services. Providers of personal care services made up the balance of the committee.

The enabling legislation required the committee to at minimum consider two documents in its review of personal care licensing issues. These documents were the World Institute on Disability paper, "Attending to America,"[2] and the proposed MDH Health Care Licensure Rule (hereinafter referred to as the "HCL rule")[3]. Each of the thirteen recommendations in the WID document were discussed, as were all relevant parts of the HCL rule.

The committee also reviewed Minnesota Rules part 9505.0335 (Rule 47), the Medical Assistance reimbursement rule for personal care services.

This report is submitted in response to the legislative request. The following sections

Abbreviations

BON	Board of Nursing
DHS	Department of Human Services
DOC	Directs Own Care
HCFA	Health Care Financing Administration (Federal)
HCL Rule	Proposed MDH Home Care Licensure rule
MA	Medical Assistance
MDH	Minnesota Department of Health
OTC	Over-the-counter [medications]
PCA	Personal Care Assistant
PRN	*Pro re nata* (taken as needed)
Rule 47	The state MA reimbursement rule for personal care services
WID	World Institute on Disability

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1 M.S. 256B.04, subd. 16.

2 "Attending to America: Personal Assistance for Independent Living," World Institute on Disability, April 1987. Recommendations included in Appendix A.

3 This rule covers home care services provided under M.S. 144A.45. This rule was available in draft form at the time that the PCA Advisory Committee considered it.

outline licensure issues, describe advisory committee and Department discussion of germane policy questions, and offer recommendations for legislative consideration.

SCOPE OF A PERSONAL CARE SERVICES LICENSURE RULE

The rule recommendations in this report relate to a licensing rule for personal care services. The scope of this rule will include all elements relevant to licensing standards for personal care services. This rule cannot go beyond statute or conflict with other statutes, such as those governing medical assistance (MA) reimbursement or service limitations. For example, the rule can determine standards for services, but cannot determine what services shall be provided, or levels or methods of reimbursement. (Standards for MA-reimbursed payment of personal care services are found in Rule 47.)

The advisory committee agreed that the WID paper they considered has very broad goals and recommendations, some of which are beyond the scope of a personal care services licensure rule. Other recommendations in the WID paper endorse policies that already exist in Minnesota. However, WID recommendations that appeared to be a reasonable fit with the committee recommendations for the personal care licensure rule are included in this report as a part of recommendations or as rationale for recommendations for the personal care licensure rule.

Background of Personal Care Services Licensure Issues

In 1978, the category of services called personal care services (usually referred to as "PCA services") was added to the Medical Assistance program administered by the Minnesota Department of Human Services. Personal care services are listed as a distinct category of home care services under state Medical Assistance statutes and rules. Medical Assistance rules are administered by DHS.

The personal care services category (M.S. 256B.0627) was established in order to address the unique circumstances of persons who are consumers of this type of home care services. People who are consumers of personal care services are either capable of directing their own care (defined in section 3 of this report), or have a designated person who directs their care (also defined in section 3). Both these groups of consumers were represented on the advisory committee that was convened to make initial recommendations on a personal care licensure rule. These consumers prefer program regulations that are designed to enhance and support independent living in noninstitutional settings.

Home health services are included as a covered service state Medical Assistance statutes, and also appear in health department statutes (M.S. 144A.43). These services are available to people through Medical Assistance, Medicare, and private-pay sources. Home health services are regulated by the Minnesota Department of Health.

In reviewing the HCL rule for language that could be duplicated in the personal care rule, the advisory committee found they had some serious reservations about many portions of the HCL rule, most notably portions that, in the view of the committee, tended to overemphasize a medical-model orientation in areas where it would be appropriate for consumers to have more control over their own lives. It was for this reason that the committee modified many sections of the HCL rule to stress the consumer component before recommending these sections for inclusion in a personal care services licensing rule.

Current statute[4] requires that personal care services be provided through a personal care provider agency unless there is no choice of vendor. There are currently very few individual personal care assistants (PCAs) providing services in Minnesota, and the expectation is that as home health services grow, there will at some time in the near future no longer be any individual providers of personal care services.

SIMILAR SERVICES, DIFFERENT RULES

Personal care services and home health services are similar.[5] In fact, M.S. 144A.43 includes personal care services in a list of home care services. There is no essential difference between "home care services" as defined in M.S. 144A.43. and "personal care services" as defined in M.S. 256B.0625.[6] The only difference is that, under state MA rules, only persons who have been determined to be capable of directing their own care or who have a responsible party to direct their care are eligible for MA payment of personal care services. This is the only legal distinction between MA-reimbursed personal care services and other home care services that may or may not be called personal care services by the agency that provides them.

Present state law is written so that the source of payment is the factor that governs which licensing rule would apply: the PCA licensing rule would apply to Medical Assistance-reimbursed services and the HCL rule would apply to home health or personal care services paid for by Medicare or by private pay sources.

The committee discussed and endorsed the idea of extending the applicability of the personal care licensing rule so that its standards would apply to provision of all personal care services, regardless of source of reimbursement.

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[4] M.S. 256B.0625

[5] See Appendix A for a comparison listing of services.

[6] It should be noted that M.S. 256B.0625, subd.19 [Personal care assistants] was inadvertently repealed in the 1991 legislative session; this subdivision appears as a reenactment in a DHS bill to be introduced in the 1992 legislative session.

The committee supported this idea based on consumer satisfaction and with provider agency administration issues. Regarding consumer satisfaction, some people who receive personal care services and are capable of directing their own care (or have a person living with them who could be designated as a responsible party), are not financially eligible to receive those services through MA. Under current statute, these people would be required to receive these services through the less consumer-empowering HCL rule. Regarding agency administration, the committee contended that requiring agencies to provide the same services under two different state agency licensing rules would place an unnecessary regulatory burden on agencies.

This attempt at simplicity is complicated by the fact that with certain exceptions, home health agencies that are certified by the federal government as agencies qualified to receive Medicare reimbursement must adhere to Medicare standards where they differ from state standards. Decisions should be made by the state legislature as to which state rule should apply to which situations. Chart 1 illustrates the areas in question.

Chart 1. Type of regulation dependent on agency type, services provided, and source of payment.

Agency Type ↓	Services Provided		
	PERSONAL CARE SERVICES		OTHER Home Care Services
	private pay	Medical Assistance	
Cert. HHA and PCA/PO	*Medicare & HCL or DHS ?*	*Medicare & DHS*	*Medicare & HCL*
PCA/PO (non-cert.)	*HCL or DHS ?*	*DHS*	*N.A.*

Cert. HHA is an agency federally certified as a Medicare home health agency.
PCA/PO is a PCA provider organization. These agencies provide personal care services reimbursed under the state MA program and/or paid by private payers.

The committee supported the idea that the personal care services licensing rule should apply to all agencies that provide personal care assistant services, regardless of source of reimbursement. However, agencies that are certified under the Medicare program to provide home health services usually must adhere to federal Medicare standards in the provision of personal care services.

In Department discussion of this issue, it was agreed that the committee's recommendations to ground the personal care licensure rule in an independent living model and to permit the DHS rule to be applicable to as many consumers of personal care services as possible, were reasonable and appropriate. People paying for personal care services through private sources should be able to receive these services under the independent living model available to people

receiving these services through MA. A strategy may be to permit PCA/POs which provide the majority of their services through MA to deliver all their personal care services under the DHS rule. This would permit these relatively small agencies to operate under one state licensure rule instead of two, to provide the same services. In preliminary discussions between DHS and MDH, it was determined that it would be appropriate to permit agencies which provide at least 75% of their personal care services through MA to operate under the DHS rule for all their home care services.

Regarding federal Medicare regulations, there is a possibility, but some uncertainty as to whether the federal Medicare/Medicaid agency (HCFA) would permit state rules to govern in situations where agencies are Medicare certified but also provide personal care services under state rules. The Department has received some apparently conflicting information. For example, an October 1991 HCFA memo clarifying revised conditions of participation for home health agencies stated that with certain exceptions, for Medical Assistance purposes, home health agencies must meet Medicare requirements for participation.[7] Medicare-certified agencies generally are accustomed to providing services under both federal Medicare and state rules. But, HCFA has waived Medicare standards regarding PCA training requirements for Medicare-certified agencies who employ PCAs to provide Medical Assistance services. In response to questions about the HCFA rule regarding training for nurse aides, HCFA stated:

> "in order to avoid imposing an undue hardship on Medicare-certified Home Health Agencies that also furnish personal care attendant services under the Medical Assistance program, the regulations are amended to allow individuals who have satisfied state PCA competency requirements [to] furnish those services without having ... completed a competency evaluation [required for home health aides]. This amendment will facilitate matters for the several states in which PCAs have already been found competent by the state in those areas of their responsibility that overlap with the areas of competency required by these regulations."[8]

This appears to mean that the training requirements of the personal care licensing rule could apply to all personnel providing these services. But it does not also imply that other areas of the personal care licensure rule could apply as well for Medicare certified agencies.

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[7] Federal Health Care Financing Administration (HCFA), memo # CR11, October 1991.

[8] Medicare and Medicaid Guide, Number 664, 1991. Final Rule ¶ 39,462. p.2-3.

1. GENERAL LICENSURE RECOMMENDATIONS

- **The committee and the Department recommend that agencies providing personal care services be licensed, but it is not necessary to license individual PCAs.**

  Rationale: The advisory committee discussed possibilities and quickly determined that it would be appropriate to license agencies providing personal care services, but it would not be desirable to license individual PCAs. The statute that authorizes rulemaking requires licensure of personal care services. The committee and the Department believe that minimum safety and quality of care standards can be attained most efficiently and cost effectively through licensure of agencies, rather than through licensure of individuals.

  The committee did not make recommendations about details of licensing procedure, as that area is primarily technical and is most appropriately addressed during the actual rulewriting process.

- **The committee and the Department recommend that the DHS personal care licensing rule apply to agencies that provide at least 75% of their personal care assistant services through Medical Assistance, but which are not certified to provide personal care attendant services under the Medicare program.**

  Rationale: As noted in the discussion above, there is overlap in the definition of personal care services and home care services. (See Appendix B for a comparison.) If the personal care licensure rule were to apply only to MA-reimbursed personal care services, many provider agencies would find themselves required to provide identical services under two sets of regulations based solely on payment source for those services: Medicare and private-paid services would be regulated by the HCL Rule, and Medical Assistance services would be regulated by the personal care licensure rule.

  Requiring agencies to provide the same services under two different state agency licensing rules would place an unnecessary regulatory burden on agencies. Additionally, people who receive personal care services through private-payment sources should be able to receive these services under the independent living model on which the DHS personal care licensure is recommended to be based, and which will be available to people receiving these services through MA.

  This recommendation would permit non-certified PCA/POs which provide personal care services through MA and to private pay clients to be governed only by the DHS personal care services licensure rule. A statutory change to M.S. 256B.04, subd. 16. will be required in order for this rule to cover private-pay personal care services.

- **The Department recommends that license fees not be imposed on agencies that receive MA reimbursement for at least 75% of the personal care services the agency provides; that administrative costs associated with DHS licensure of these agencies be included in a DHS budget line item; and that a fee schedule be set for agencies that provide less than 75% of their personal care services through MA.**

  Rationale: This is reasonable because personal care licensure costs would become part of the calculation of MA reimbursement rates for agencies that are primarily MA providers. License fees for agencies that provide less than 75% of personal care services through MA should be determined at the time of rulewriting.

  A budget line item would be necessary for an interagency contract between DHS and MDH for MDH enforcement of this licensure rule.

- **The committee and the Department recommend that hospice care continue to be regulated by the HCL rule.**

  Rationale: Hospice care is currently included in the HCL rule and it would be most appropriate for it to remain under this regulation. The medical condition of hospice care consumers is relatively unstable compared to that of people receiving personal care services; the HCL rule is appropriate for these situations.

- **The committee and the Department recommend that this report's recommendations be considered by MDH for inclusion in their revisions of the proposed HCL rule.**

  Rationale: The HCL rule is still in process as the Administrative Law Judge who heard the rule determined that substantial changes were made by MDH after the public hearing and that another public hearing is necessary before promulgation. The advisory committee responsible for making the recommendations in this report studied the HCL rule. Many sections of the HCL rule were modified by the committee to strengthen the consumer component, then incorporated into the recommendations in this report. Most of these modifications were discussed by the advisory committee with input and advice from the Board of Nursing and the Minnesota Department of Health. Committee members suggested that these sections of the HCL rule, as modified, would strengthen the proposed HCL rule and therefore merit inclusion in that revised rule. The Department concurs that the personal care licensure and HCL rules should be congruent in as many sections as is realistic, to simplify administration of programs.

- **The committee and the Department recommend that sections of Rule 47 [Mn. Rules part 9505.0335 Personal Care Services] that are recommended in this report for inclusion in the personal care licensure rule be incorporated rather than referenced.**

  Rationale: This method makes rules easier to use, while merely referencing another rule causes inefficiencies in distribution and difficulties in interpretation. In order to prevent conflicting rules, and because Rule 47 is intended to be a reimbursement rule only, the parts of Rule 47 that are incorporated or modified and included in the personal care licensure rule should be deleted from Rule 47. Definitions common to both rules should be included in each.

REPORT FORMAT

The following sections of this report include committee discussion followed by recommended language in a rule format. It was necessary to recommend specific language in order to demonstrate clearly the independent living model on which the advisory committee and the Department of Human Services is recommending this rule be based. Recommended rule language is indicated in the margins by a ‖ symbol. If the recommended language is a modification of existing or proposed rule or statute, the source of the language is cited. Unless noted otherwise, the HCL rule citations refer to the 4/22/91 draft of that rule.

In one case (section 11), the advisory committee and the Department of Human Services were not able to reach an agreement on recommendations. In this instance, the controversy is noted and explained, and recommendations are those of the Department. In a few sections, clarifying language that does not change the intent of the committee recommendations was included in recommendations after the advisory committee had completed its schedule of meetings. These instances are also noted in the text of the discussion.

2. DESCRIPTION OF PERSONAL CARE SERVICES

Discussion

Personal care services are listed in statute.[9] The committee's focus in discussion and in recommendations was on a consumer driven, independent living model of service provision. With an independent living model, the consumer of services (in accord with that person's physician and/or the nurse responsible for delegating PCA tasks) is primarily responsible for choices to be made regarding the provision of services. The WID proposes that

> "program[s] should provide for an optimum degree of self-direction and self-reliance as individually appropriate. . . . For persons with limited cognitive function, more third party involvement and supervision may be required; individuals should still be able to maintain control to a degree consonant with their ability. The issue of user control is of extreme importance to the independent living movement because often people with disabilities never develop (or, having once developed it, lose) the ability to be independent because other people take charge of their lives."[10]

Other models often result in placing responsibility for decisions on others, taking control of one's life away from the consumer. It is for this reason that the committee also decided throughout the rule to recommend the use of the word "consumer" rather than "client" to describe the person who receives personal care services. The consumer driven, independent living model is especially important for this rule, as consumers of personal care services are people who are capable of directing their own care, or have a "responsible party" (both terms are explained in section 3) who lives with them who is designated to oversee their care. (Responsible parties are often family members.)

Recommendations

- **The committee and the Department recommend the use of the word "consumer" rather than "client" throughout the rule to describe the person who receives personal care services.**

  Rationale: The committee asserts that the use of the word "client" implies control by others, while the word "consumer" implies self-direction. Based on this reasoning, the word "consumer" is more appropriate to a rule for services that are intended to empower people to maintain an independent lifestyle in their own home.

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[9] M.S. 256B.0627

[10] Ibid., "Attending to America."

Note: Within the specific language recommendations which follow throughout this report, when existing language is recommended, the word "consumer" is substituted for "client" without noting its substitution.

- **The committee does not at this time have other specific language recommendations for this section. The Department recommends that specific language for this section be addressed during the rulemaking process.**

  Rationale: Although committee members expressed an interest in expanding or modifying the Rule 47 description of personal care services, no substitute language was submitted by the committee to the Department.

3. DEFINITIONS

Discussion

The committee reviewed all the definitions of terms included in both the HCL rule and in Rule 47. The discussion included the following conslusions:

AMBULATORY: The committee determined that the definition of ambulatory in the HCL rule (used to differentiate between which tasks could be performed by a home health aide and which by a home care aide) is not relevant to the personal care licensure rule, as there is only one class of PCAs, unlike the two classes of aides in the HCL rule. Whether or not the person is ambulatory is not an issue for the personal care licensure rule.

CARE PLAN: The most recent definition of this term is found in statute (M.S. 256B.0627). The committee determined that it would be practical to include this definition in the personal care licensure rule.

CONSUMER: For the reasons stated in Section 2 of this report, the committee determined that the word "consumer" rather than "client" should be used in the personal care licensure rule when referring to recipients of personal care services.

DIRECTS OWN CARE: The committee determined that Rule 47 language was appropriate to the personal care licensure rule. Because the Board of Nursing (BON) was concerned about nurse delegation issues, the BON suggested to the Department clarifying language that would further distinguish these consumers from others requiring personal care services. This occurred after the committee had completed its scheduled meetings, so there was not opportunity for committee discussion of this language. The language recommended by the BON included additional qualifiers such as "understanding the need for and contraindications of medications." This addition would permit the BON to be more comfortable with self-administration of medication with PCA assistance without requiring RN supervision.

It is important to note that, according to the statutory listing of PCA tasks,[11] PCAs do not directly administer medications. Rather, PCAs assist with administration of medications. An example of this would be that of a personal care services consumer who is not able to physically place a capsule in his or her own mouth, and requests the PCA to assist with this task. Because PCAs are assisting rather than actually administering medications, it is questionable whether this is actually a delegated nursing task, as the BON has maintained. However, the Department does not object to including the BON clarifications regarding understanding medications in the rule.

The BON also suggested language regarding "determining the ability to communicate physical and psycho-social needs" to assist in identifying persons who can self-determine the need for

[11] M.S. 256B.0627.

OTC and PRN medications without consulting a supervising nurse or doctor. However, the Department maintains that Rule 47 language is sufficient on this topic.

INDEPENDENT LIVING: The committee reviewed Rule 47 and determined that this definition is appropriate for inclusion into the personal care licensure rule without modification. The committee also determined that this definition could be expanded but did not have specific suggestions.

PERSONAL CARE ASSISTANT: The committee reviewed the definition of this term in Rule 47 and determined that it is appropriate for inclusion in the personal care licensure rule without modification.

PERSONAL CARE PROVIDER: The committee reviewed the definition of this term in Rule 47 and determined that it is appropriate for inclusion in the personal care licensure rule without modification.

PERSONAL CARE SERVICE: The committee reviewed the definition of this term in statute[12] and determined that it is appropriate for the rule. The committee further determined that current statutory language should be referenced in the rule rather than incorporated, in order to allow the rule to change in concert with any future changes in the statutory definition.

QUALIFIED RECIPIENT: The committee reviewed the definition of this term in Rule 47 and determined that it is appropriate for inclusion in the personal care licensure rule without modification.

RESIDENCE: The purpose of this definition in Rule 47 is to make it clear that PCA services are not reimbursed through MA if the services are provided in institutional settings. One exception is for ventilator-dependent persons who are in acute care settings. The committee determined that it would not be approprate to change this exception. Additionally, a licensure rule is not intended to address reimbursement issues. Therefore, the Rule 47 definition does not appear to be necessary for the licensing rule.

RESPONSIBLE PARTY: For the purposes of Rule 47 and a personal care licensure rule, consumers are classified into two groups, one of which can direct their own care and the other of which is not capable of doing so. The former group is referred to throughout this report as "DOC consumers" [Directs Own Care], while consumers in the latter group must have a "responsible party" designated who is responsible for directing their care.

The committee suggested that the Rule 47 definition of responsible party be modified to explain that a consumer who can direct their own care is their own responsible party. However, the Department contended that the definition of DOC implies that those consumers are responsi-

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[12] M.S. 256B.0627.

ble for themselves. In current law, the term "responsible party" applies only to persons who live with a consumer who cannot direct their own care and who are designated as responsible party to enable the consumer to receive personal care services. Therefore, the Department does not support the suggestion that the term "responsible party" include mention of DOC consumers as this would tend to muddy the definition of "responsible party."

It is likely that statutory changes will be introduced by the Department in the 1992 legislative session that will address the "responsible party" definition and/or requirements. The changes would be more likely to affect MA reimbursement rather than licensing issues; however, the committee and Department agreed that these changes would be appropriate for study during the rulewriting process for the personal care licensing rule.

SERVICE AGREEMENT: The committee discussed what should be included in the service agreement, and determined that the service agreement should include administrative details between the consumer and agency and also include the care plan.

Recommendations

■ **The committee and the Department recommend incorporating the following language into this section of the personal care licensing rule (citations follow each definition; clarifying language that differs from the cited source is underlined):**

DEFINITIONS

Care plan: A written description of the services needed which shall include a detailed description of the covered home care services, who is to provide the services; frequency and duration of provision of services; and expected outcomes and goals including expected date of goal accomplishment. The care plan shall also include notation of whether a consumer is able to direct their own care, and all medication and treatment orders. [M.S. 256B.0627]

Consumer: One who is a recipient of personal care services. [New]

Directs own care: A consumer's ability to direct their own care is determined by the consumer's ability to communicate:

A. orientation to person, place, and time;

B. an understanding of the plan of care, including medications and medication schedule;

C. needs;

D. an understanding of the need for and contraindications of OTC and PRN medications included in the care plan; and

E. an understanding of safety issues, including how to access emergency assistance.

This determination is made in consultation among the consumer, the supervising nurse, and the consumer's physician and is noted in the care plan. [Rule 47, subp. 1]

Independent living: The situation of a consumer living in their own residence and having the opportunity to control basic decisions about their own life to the fullest extent possible. [Rule 47, subp. 1]

Licensee: An agency that has signed a provider agreement with the Department of Human Services to provide personal care services. [Rule 47, subp. 1]

Personal care assistant: A person who, according to provisions in [Section 16 of this Report] (PCA Training Qualifications), is qualified to perform personal care assistant tasks, is an employee of or is under contract to a personal care provider, and provides a personal care service. [Rule 47, subp. 1]

Personal care service: A health service listed in M.S. 256B.0625, 256B.0627, or 144A.43, ordered by a physician, described in a care plan, supervised by a registered nurse, and provided by a personal care assistant to a consumer to maintain the consumer in their residence. [Rule 47, subp. 1]

Responsible party: A person who is designated according to the provisions of M.S. * as a responsible party for a consumer of personal care services. [* Cite statute passed in 1992 session.] [New]

Service agreement: The service agreement includes administrative details agreed upon by the consumer and licensee for provision of personal care services. The service agreement includes but is not limited to the care plan. [New]

4. PCA TASKS

Discussion

The committee reviewed the section of the HCL rule which specifies home care aide tasks in detail. But, because PCA tasks are clearly stated in statute, the committee considered whether this section in the personal care licensing rule should instead merely reference the statute.

The committee reasoned that it would be preferable not to specify PCA tasks in the rule, for two reasons. There was a concern that a listing in rule could inadvertently exclude some tasks meant to be included. Additionally, merely referencing the appropriate PCA statute would build flexibility into the rule, ensuring that PCA tasks in rule would always be in accord with statute.

This was the only situation in which the committee envisioned an advantage to referencing a statute instead of incorporating it.

Subsequent to discussions about DHS and MDH licensing rules, the Department determined that the definition of personal care services in this section should also refer to health department statute (144A.43) in order to be consistent with recommendations in section 1 (General Licensure Recommendations) of this report.

Recommendations

■ **The committee and the Department recommend the following new language for this section of the personal care licensure rule:**

PCA TASKS

PCA tasks. For the purposes of this rule, PCA tasks shall include those tasks listed in M.S. 256B.0627 and personal care services according to M.S. 144A.43.

5. ORIENTATION

Discussion

Orientation, as discussed by the committee (and as implied in the HCL rule), includes training administrators and staff of provider agencies in principles and policies important to provision of personal care services, such as applicable state laws, issues of consumer independence, dignity and respect, and various community resources for consumers. Orientation differs from training that qualifies PCAs to perform PCA tasks. (Training is addressed in this report in section 15, "PCA Training Qualifications.")

The committee considered the language in the HCL rule regarding employee transfers from one agency to another and the applicability of orientation from one agency to another. After some discussion, the committee concluded that if a PCA transfers to another agency, the PCA should be required to complete the new agency's orientation within "x" amount of time. This is because some aspects of orientation (such as emergency procedures) could differ from one agency to another. The committee also agreed that it would be appropriate for an agency to have discretion in deciding which, if any, parts of another agency's orientation (that a PCA had completed) would be acceptable in lieu of their own orientation.

Committee members considered appropriate timelines within which a PCA should receive an orientation from the original or a new agency, and concluded that requiring orientation to be completed within 12 hours of service or one week, whichever comes later, would ensure that orientation is completed soon enough to meet safety standards, but still accommodate different PCA situations. The reason the later-occurring time frame option was selected is that it would be conceivable for a PCA to begin work with two six-hour shifts over a weekend, and it would be unrealistic to expect orientation to fit into that time frame. That PCA would have one week to complete orientation. On the other hand, a PCA who works only six hours a week would have up to two weeks, but no longer, to complete orientation.

The committee agreed that, as in the HCL rule, a section on the reporting requirements of Minnesota Statutes, sections 626.556 and 626.557 (Reporting the maltreatment of vulnerable minors or adults) should be included in orientation.

Two of the recommendations in the WID document relate to orientation issues, although they are not precisely applicable to a state licensing rule. The committee's discussion of these WID recommendations included the following points:

WID RECOMMENDATION #9: This recommendation regards orientation training of administrators and staff of provider organizations in an independent living model with consumers as trainers. The committee endorsed two of the three parts of this recommendation, concurring that a knowledge of independent living philosophy should be required of licensed personal care providers, and that this issue could be addressed through orientation materials. The committee also concurred that there is value and legitimacy in having consumers of personal care services

involved in training whenever possible. It is of interest to note that in a statement of who is qualified to provide nurse aide training, HCFA's view was that consumers would be especially expert at providing education on consumer rights issues.[13]

The third part of this WID recommendation would require staff to be oriented about special needs of various disability groups served by the licensee. The viewpoint of many committee members was that it is inappropriate to teach about special needs of groups; instead, special needs of individuals should be emphasized. The committee agreed that this part of the WID recommendation is not necessary and that PCAs should receive training as it applies to the individual consumers for whom they will provide services.

WID RECOMMENDATION #11: This recommendation has two parts. It would be beyond the scope of a personal care licensure rule to mandate WID recommendation 11(1), which would require outreach by provider agencies. However, the committee supported the idea and stated that ideally, agencies would conduct outreach whenever possible. Recommendation 11(2), which would require provider agencies to offer training in management of personal assistance for consumers or responsible parties, was supported by the committee, with a modification that would include an option for providers to inform consumers of how and where to get training in this area, instead of providing this training themselves.

The committee also discussed a similar part of Rule 47 that requires the commissioner to "provide a curriculum and materials that may be used to present the orientation" and agreed that this is not really necessary. Instead, the committee suggested that providers be permitted to design their own orientation within the requirements of the rule. This would not preclude providers from asking the Department for technical assistance and materials. The Department concluded in its discussions that it should be determined before rulewriting commences whether providers are likely to request that DHS provide this training. If so, a budget would be required for this function.

The committee also proposed the concept of a self-study general curriculum of orientation-type materials that a PCA could "test out" on. This option was not pursued as a recommendation as time constraints prevented a thorough discussion of this concept.

Recommendations

■ **The committee and the Department recommend incorporating the following language for this section of the personal care licensure rule (citations follow each definition; clarifying language that differs from the cited source is underlined):**

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[13] Federal Register, Vol. 56, No. 187, September 26, 1991, pg. 48898.

ORIENTATION.

Orientation. Every person who provides personal care services, supervision of direct care, or management of services for a licensee, shall complete an orientation to personal care requirements before providing personal care services to consumers. The orientation training required by this part may be provided by the licensee or may be obtained from other sources, including consumers of personal care services and responsible parties. [HCL 4668.0075]

Orientation completion. Every PCA and supervising RN must complete an agency's orientation within 12 hours of service or seven calendar days, whichever occurs later. [New]

Orientation transfers. In the event that a PCA or supervising RN transfers from one agency to another, the PCA must complete the new agency's orientation within 12 hours of service or seven calendar days, whichever occurs later. Licensees may accept from another provider written verification that a person has completed an orientation. A licensee may determine which, if any, parts of another licensee's orientation program (that a PCA or supervising RN has completed) is acceptable in lieu of their own orientation program. [HCL 4668.0075]

Orientation content--PCAs. The orientation required for PCAs by subpart 1 must contain the following topics:

A. agency philosophy regarding people with disabilities and independent living; [New]

B. home care bill of rights; [HCL 4668.0075]

C. handling of emergencies and use of emergency services, including agency contact person and method of contact; [HCL 4668.0075]

D. reporting the maltreatment of vulnerable minors or adults under Minnesota Statutes, sections 626.556 and 626.557; [HCL 4668.0075]

E. infection control in-service training, including training in prevention of tuberculosis and HIV transmission [New]; and

F. consumer rights issues, including but not limited to: promoting privacy and maintenance of confidentiality; promoting the consumer's right to make personal choices to accommodate their needs; maintaining care and security of consumers' personal possessions; and providing care which maintains the consumer free from abuse and neglect. [Excerpted from CFR § 483.152]

It is not necessary for PCA orientation to include specifics of providing services to all the disability groups the licensee serves; PCAs shall receive this training as it is relevant to the individual consumers for whom they provide services. [New]

Orientation content--supervisors and managers. The orientation required for supervisors and managers of PCA provider organizations by subpart 1 must contain the following topics:

A. agency philosophy regarding people with disabilities and independent living; [New]

B. an overview of the personal care services statute, Minnesota Statutes, sections 256B.0625 and 256B.0627 and this rule; [HCL 4668.0075]

C. handling of emergencies and use of emergency services; [HCL 4668.0075]

D. reporting the maltreatment of vulnerable minors or adults under Minnesota Statutes, sections 626.556 and 626.557; [HCL 4668.0075]

E. home care bill of rights; [HCL 4668.0075]

F. handling of consumers' complaints and reporting of complaints to the Office of Health Facility Complaints, the home care ombudsman and the ombudsman mental health and mental retardation; [HCL 4668.0075]

G. services of the home care ombudsman and the ombudsman mental health and mental retardation; [New]

H. consumer rights issues, including but not limited to: promoting privacy and maintenance of confidentiality; promoting the consumer's right to make personal choices to accommodate their needs; maintaining care and security of consumers' personal possessions; providing care which maintains the consumer free from abuse and neglect; [CFR § 483.152] and

I. resources in the community to which consumers may be referred, including medical and dental practitioners, health and social service providers, and other related service providers, and procedures for making referrals. [HCL 4668.0075]

Verification and documentation. Each licensee shall retain evidence that each person required under subpart 1, has completed the orientation required by this part. [HCL 4668.0075]

6. PCA TRAINING QUALIFICATIONS

Advisory committee and Department resolution of issues relating to PCA training qualifications illustrate a pivotal difference between the recommendations in this report and the proposed HCL rule. Because this is a complex issue and both the advisory committee and the Department spent much time discussing it, this section of this report is divided into three subsections. The subsections which follow are Discussion of Related WID Recommendations, Discussion of Choice and Risk Issues, and Discussion of Training Options.

DISCUSSION OF RELATED WID RECOMMENDATIONS

Three of the recommendations in the WID document relate to training issues, although they are not all precisely applicable to a state licensing rule. The committee's discussion of these WID recommendations included the following points:

WID RECOMMENDATION #3: The WID discussion that accompanies this recommendation advocates an "optimum degree of self-direction and self-reliance as individually appropriate" regarding hiring, management, payment, and termination of PCA services. The recommendation appears to advocate consumer-only training of PCAs when the consumer desires it.

Most of the discussion centered around training issues. Opinions expressed included:

- PCAs need to know the basics of care, but there are many reasons to avoid requiring a classroom training course, such as the 75-hour class required by the HCL rule. This course is a certified nurse assistant (CNA) course, which prepares individuals to provide services to many individuals. But, because PCAs provide services to specific individuals (often for only one person), a course like the CNA course is not necessary or appropriate.

- A medically-oriented course such as the Certified Nurse Assistant (CNA) course required by the HCL rule trains service providers in a way that can be troublesome for consumers of personal care services. Committee members' contention was that such medically-oriented training tends to emphasize provider control of consumers, rather than consumer self-direction and independence. Committee members preferred that training be grounded in a philosophy of independent living, self-direction by consumers, and the idea that the consumer or responsible party (not the PCA) is in charge.

  The committee was somewhat divided on how to ensure this--at the provider agency level, at the interview for hire stage, or somewhere else. Some thought the individual relationship of PCA and consumer was most important. The committee agreed that the consumer or responsible party should be the one to make the determination that an individual PCA holds a philosophy in accord with one's own.

- An extensive course requirement could have the effect of discouraging potentially well-qualified people from an interest in a PCA position. Yet, in the experience of committee members, some of the best PCAs are people who for varying reasons do not have the time to take an extensive course such as the minimum training required by the HCL rule for home care aides. An example would be a college student who is taking courses in nursing, but who does not have the time to take an additional 75 hour course. The expense of a course and who would pay for it is also an issue.

- It would be difficult to design a short PCA training course that would cover all types of personal care consumers' needs. It is more important that PCAs learn what specific individuals require in the way of personal care assistance.

- The committee debated whether there should be an option for consumer training of PCAs. The extent of consumer training could range from full training to orientation to individual needs. No substantive decision was reached on this topic, although there appeared to be consensus that consumers should be permitted to do as much as they are able and willing to do regarding training of their own PCA, and make their own decisions on how much formal training they wish their PCA to have. The Department concurs that consumer training is beneficial and appropriate and should be permitted. This concept is compatibile with Rule 47 training requirements that have existed since 19**.

WID RECOMMENDATION #10 also relates to recruitment and training of PCAs. The committee agreed with only part of this seven-part WID recommendation. Committee conclusions were: (1) all PCA training programs should "be imbued with the Independent Living philosophy;" (2) it would not be necessary or desirable, and could be impossible, to require all training programs to be managed by Independent Living Centers; (3) consumers should provide training whenever possible; (4) it would be appropriate for consumers of personal care services to be instructors in a formal training program, but it is not necessary to mandate this; (5) training should be required, but a classroom course should be optional; (6) training based on consumers' individual needs would be most appropriate, rather than general training about providing personal care services to people with mental or intellectual disabilities; (7) referral, recruitment, and screening services should be available for all consumers who desire them.

WID RECOMMENDATION #16 does not really relate to a rule (it is about convening a conference), but its basis lies in accountability and liability issues. The committee discussed the issues involved in balancing consumer independence with health and safety regulation, and the similar necessity to balance training and enforcement: more flexible training requirements would require stronger enforcement mechanisms, while fewer enforcement regulations would require stronger training requirements. However, if either aspect is excessively strong, program costs could be expected to rise.

There were differences of opinion among committee members as to which scenario was preferred. Some committee members preferred more frequent enforcement (i.e., a supervising

nurse making frequent visits to observe the provision of services) over extensive training, reasoning that nurse visits would not be a concern, assuming the PCA is doing a proper job. Other members stated that they would be opposed to extensive enforcement. These members speculated on how extensive enforcement mechanisms could interfere with consumer privacy, and time concerns. Examples of these concerns were: how often would the consumer or responsible party have to stay home so the nurse could visit; would the nurse come at night to check on the work done by a PCA who works at night and knows nighttime tasks, but maybe not the daytime tasks; if a consumer has several PCAs, how often would a nurse come to check? However, committee members who are consumers of personal care services noted that it would likely be only active persons like themselves who would be most bothered by these time concerns.

DISCUSSION OF CHOICE AND RISK ISSUES

The committee spent some time debating the related issues of choice and risk. Committee consensus was that if a person is capable of doing so (eg. DOC consumers), it should be their choice whether or not to take a personal risk. This ability to make choices provides individuals with independence and with a sense of control over their lives. Extensive regulation intended to protect consumers prevents the independence intrinsic in making choices about one's own life. Of all the risks consumers face, some in the group see the risk of institutional care as the greatest risk to themselves, because of the lack of choice and independence inherent in institutional care.

Members noted that people who can direct their own care don't need much "protection" through extensive enforcement, because if they have a problem with their PCA services, they are able to take action to handle the situation, themselves. It may seem that the situation is different with "responsible parties" because the actual consumers are not able to protect themselves; however, the responsible party is intended to be an advocate for the consumer and act in the consumer's interest.

DISCUSSION OF TRAINING OPTIONS

PCA training, as discussed by the committee, is the training and/or skills a person must have in order to properly perform specific PCA tasks.

The committee proposed and considered various PCA training concepts and narrowed down their choices to:

1. Permit consumers who can direct their own care to provide the bulk of the training of their own PCA, and require RN or agency training of PCAs who will be providing services to consumers who cannot direct their own care; or

2. Training specific to each individual consumer could be provided by the consumer or responsible party and/or the supervising RN, depending on the situation.

The primary issue in the alternatives discussed is who should be permitted to train a PCA. Although the committee at first endorsed the idea of permitting only DOC consumers and supervising RNs to provide training, the group later changed their position and endorsed the idea that responsible parties could also provide PCA training. It was agreed that regardless of who provides training, it would be appropriate for the supervising RN to make the determination that a PCA possesses the skills necessary to perform the personal care tasks for each consumer.

The committee agreed that the care plan could be used to indicate what type of PCA training would be necessary for each individual consumer; i.e. whether the consumer, responsible party, or supervising nurse would provide consumer-specific training.

Recommendations

■ **The committee and the Department recommend incorporating into this section of the personal care licensure rule the following language from the Minnesota Rules, part 9505.0335, subp. 3 [Rule 47], with additional language underlined:**

PCA TRAINING REQUIREMENTS

Required training options. A PCA must be certified to be competent to provide PCA tasks as specified in M.S. 256B.0627, under one or more of the following options:

A. Determination by the supervising RN and the consumer or responsible party that the PCA possesses the skills required to perform the personal care services specified in PCA services, as needed by that particular consumer. In the case that a PCA provides services to more than one consumer, this determination must be made for each consumer for whom the PCA provides services.

B. Completion of a training program that provides the assistant with skills required to perform personal care assistant tasks, and clause A in this section.

C. Completion of an accredited educational program for registered nurses or licensed practical nurses, and clause A in this section.

D. Completion of a state-approved home health aide task training and/or testing program, and clause A in this section.

E. Completion of a state-approved nursing assistant training and/or testing program, and clause A in this section.

7. AGENCY PROVISION OF PERSONAL CARE SERVICES

Discussion

The committee reviewed sections of Rule 47 regarding provision of personal care services to consumers who are eligible for medical assistance. The committee determined that this section of Rule 47 was appropriate for incorporation into the personal care licensure rule essentially without changes. A language change in this section which would emphasize the consumers' role in planning their own health care would be appropriate.

In reviewing the draft of the committee recommendations, the Department determined that not all of this section of Rule 47 was germane to the personal care licensure rule; some parts are related directly to reimbursement issues and as such, should remain only in Rule 47. Therefore, the recommendations below do not include all those parts of Rule 47 which were originally recommended by the committee.

The committee considered a WID recommendation (#3) that advocates an "optimum degree of self-direction and self-reliance as individually appropriate" regarding hiring, management, payment, and termination of personal care services. Regarding the WID recommendation that people be able to bypass agency involvement and hire a PCA themselves, it was noted that state statute requires personal care services to be provided through an agency unless there is no choice of vendor.

This concept piqued the committee's interest in discussing the issue of allowing consumers or responsible parties the option of hiring a PCA on their own instead of being required to go through an agency, as is presently the case. Committee members expressed a preference for this, to permit full consumer responsibility for training, hiring, and other matters regarding provision of personal care services.

However, committee members were aware that this concept is contrary to the intent of an agency licensure rule, as it would preclude enforcement of health and safety standards unless individual PCAs were required to be licensed. This would result in higher program costs. There are additional reasons to retain statute in its current form. When the PCA program was first implemented in 1978, agency involvement was not required. However, because of problems consumers encountered with workers' compensation issues, state law was changed in 1988 to the current version which requires consumers to hire a PCA through an agency (unless there is no choice of vendor).

A final issue discussed by the committee was that of how consumers become informed about changes in service limits. The State currently informs all providers via official bulletins of changes in statute or rule that will affect service provision. It is the providers' responsibility to inform the people to whom they provide services. The committee did not feel that the present process is adequate and strongly recommended that the State mail notices directly to each MA client regarding changes in service limits set by statute or rule, preferably before the effective

date of the change. The committee felt that this is essential to properly inform consumers of policy changes that could affect their services. However, this process is not done now by the State because it would result in high administrative expenses. It would be especially difficult to implement at this time, given the budget and personnel constraints presently placed on state departments.

Recommendations

■ **The committee and the Department recommend incorporating the following language into the personal care licensure rule. This language is new language congruent with Rule 47 (Mn. Rules part 9505.0335, subp. 1 and 2).**

AGENCY PROVISION OF PERSONAL CARE SERVICES

Provision of personal care services. Personal care services must be provided through an agency licensed by the commissioner to provide those services, unless othervise permitted by law. Agencies providing personal care services must assure that those services are provided only to consumers who:

A. are capable of directing their own care, or have a designated responsible party according to M.S. 256B.___*__ [* cite statute as passed in 1992 session]; and

B. have a plan of personal care services developed in consultation by the consumer, the consumer's physician, and the supervising registered nurse that specifies the personal care services to be provided.

When providing services to medical assistance eligible persons, the agency must provide those services in accord with requirements for reimbursement of services through the state medical assistance rule (Mn. Rules part 9505.0335).

8. ACCEPTANCE AND DISCHARGE OF CONSUMERS.

Discussion

The following discussion is divided into two issue sections: acceptance of consumers by the provider organization, and discharge of consumers and PCAs.

ACCEPTANCE OF CONSUMERS

The committee reviewed this portion of the HCL rule, which requires licensees to have sufficient staff "to adequately provide services agreed to" before accepting a person as a client, and debated how this provision would be determined and monitored. Committee members doubted that it would be realistic to expect that agencies would have a number of emergency or substitute personnel on standby, as the HCL rule appears to require. A possible solution which fits well with a consumer-driven model of procuring care could be to have consumers and responsible parties responsible for lining up their own backup PCAs ahead of time. Both agency and consumer representatives on the advisory committee agreed that this concept seemed reasonable and workable.

It would be helpful to indicate in the service agreement between the consumer and the agency who is responsible (the consumer or the agency) for arranging for backup PCAs. The service agreement could require the agency to make a reasonable attempt to provide the substitute services, or could specify that the consumer will be responsible for lining up backup PCAs.

A caveat about consumer arrangement for backup provision of services is in order: it became apparent during committee discussion that MA reimbursement rules do not state clearly enough that a PCA's services are not eligible for MA reimbursement until the PCA actually becomes an employee of the agency. This is relevant to the personal care licensure rule because consumers and agencies will need to be made aware that there cannot be retroactive reimbursement for services provided by a PCA who had arrangements with a consumer to provide backup or emergency PCA services but who has not yet become an employee of an agency. Rule 47 should be clarified on this point.

DISCHARGE OF CONSUMERS AND PCAS

Because agencies sometimes wish to cease providing services to particular consumers, the committee discussed the necessity for a procedure regarding discharge of consumers. In order to safeguard consumers against arbitrary cutoff of services, the committee suggested that a procedure and a timeline for discharge of consumers should be standard in all service agreements. A 30-day notice of termination of services exists in other DHS home care programs (such as the Alternative Care and Elderly Waiver programs) and committee members agreed that this timeline was reasonable. The committee also thought it necessary that the licensee continue to provide services during this time until other satisfactory arrangements are made.

Determining what is a "satisfactory arrangement" could be problematic, however, as consumers and providers may have different ideas of what arrangements are suitable. Some type of appeal process may be desirable, although the statutory state appeals process would not apply to services provided by private agencies, even when these services are reimbursed with state MA funds. This issue may require additional work during the rulemaking process.

On a related issue, the committee discussed consumer discharge of a PCA, and determined that the section on the Consumer Bill of Rights has adequate provisions for consumer discharge of a PCA, including, among others enumerated in M.S. 144A.44, the rights to refuse services or treatment and to change providers.

Recommendations

- **The committee and the Department recommend incorporating into this section of the personal care licensure rule the following language from the HCL rule, part 4668.0050, with new language underlined:**

ACCEPTANCE AND DISCHARGE OF CONSUMERS

Acceptance of consumers. No licensee may accept a person as a customer unless the licensee has staff sufficient to adequately provide the services agreed to in the service agreement, under part 11.

Assistance upon discontinuance of services. If the licensee discontinues a personal care service to a consumer for any reason and the consumer continues to need that service, the licensee shall provide to the consumer or responsible party a list of personal care providers that provide similar services in the consumer's geographic area.

This subpart does not apply to a licensee that discontinues a service to a consumer because of the consumer's failure to pay for the service.

Notice of discontinuation of services. Licensees must provide written notice to consumers to whom services will be discontinued for any reason. Licensees must continue to provide services to consumers with whom they have service agreements for a period of up to 30 days or until other suitable arrangements are made, whichever occurs first.

This subpart does not apply to a licensee that discontinues a service to a consumer because of the consumer's failure to pay for the service.

9. ADMINISTRATION OF PERSONAL CARE SERVICES

Discussion

The committee discussed the administration section of the HCL rule and agreed that the subparts regarding the contractual relationship between the provider organization and the consumer were important and should be included in the "administration" section of the personal care licensure rule.

Some subparts of this section of the HCL rule were determined by the committee to be more relevant to service agreements, and those parts are addressed in that section of this report.

The remaining subparts of this section of the HCL rule would require licensees to notify another home care provider, inpatient facility, or other health care practitioner or provider to whom the licensee transfers a consumer, of any contagious disease to which the consumer is known to have been exposed or which the consumer is known to have contracted. The committee was concerned about the appropriateness and legality of this section as it existed in the HCL rule at the time of committee review. One concern was whether this provision could lead to discrimination against some consumers, especially those with HIV (even though HIV is not considered a "contagious" disease).

However, the committee was convinced by members and others with public health nursing backgrounds that this is an important issue regarding tuberculosis (TB). The ease of TB transmission was discussed and members agreed it appeared to be cause for caution. Nevertheless, the committee suggested that the state Office of the Attorney General be consulted on this issue before commencing rulewriting on this issue. Therefore, the committee did not recommend rule language addressing this issue in this report. But, because the committee agreed that this was an important issue, related recommendations are included in this report in the section titled "Infection Control" (section 18).

Department discussions of this issue included the suggestion that the other side of this issue is that of informing consumers when a PCA is known to have a contagious disease. This issue may require more work before rulewriting commences.

Recommendations

- **The committee and the Department recommend incorporating into this section of the personal care licensure rule the following language from the HCL rule, part 4668.0060:**

ADMINISTRATION OF PERSONAL CARE SERVICES

Services by contract. The licensee may contract for services to be provided to its consumers. Personnel providing services under contract must meet the same requirements required by this chapter of personnel employed by the licensee.

Responsibility of licensee for contractors. A violation of this chapter by a contractor of the licensee will be considered to be a violation by the licensee.

Fulfillment of services. The licensee shall provide all services required by the consumer's service agreement, required by part [10].

10. SERVICE AGREEMENTS

Discussion

The committee discussed HCL rule language regarding service agreements, and determined that most parts of this section in the HCL rule were not relevant to the PCA rule. The committee did discuss the section which requires availability of a contact person. After much debate about the importance of a designated contact person, the committee's point of view was that it was not necessary to designate a contact person because a PCA could call an emergency medical service (eg. "911") if a life-threatening emergency arose.

This issue is an area where the Department and the advisory committee were not able to reach an agreement on recommendations. The Department believes that because consumers of personal care services do have ongoing medical needs, a contact person should be designated so that person can be reached in case of an emergency. Situations that are not immediately life-threatening and therefore would not warrant calling emergency medical services could be expedited by the assistance of a designated contact person. This would include situations such as a consumer's unusual reaction to prescribed medications or similar atypical circumstances where the consumer was not able to provide adequate guidance to the PCA. Availability of a contact person at all hours could also provide a source of assistance to consumers if a PCA's behavior is unusual (eg. under the influence of drugs or alcohol).

Some advisory committee members maintained that a consumer could designate "call 911" in their service agreement as the action to perform in case of an emergency, but it is the Department's view that this is not sufficient for the purposes for which this section is intended. If an agency is providing personal care services to a consumer and an emergency situation develops, the PCA or emergency medical personnel should be able to reach the person's physician or supervising RN when necessary. In a non life-threatening, but unusual or confusing situation, a PCA should have a reliable source of assistance if needed in order to manage the situation. It should not be necessary for PCAs (or consumers) to rely on law-enforcement or similar systems in situations for which these options are not appropriate.

The Department maintains that a reliable designated contact person should be available on an on-call basis at all times. It would not be necessary for the contact person to be a supervising RN (this would lead to higher costs), but should be a responsible person with access to consumer records. This person would be able to provide guidance in an emergency situation to a PCA who requested it or would have access to consumer records so that the consumer's physician or a supervising nurse could be contacted if necessary. A consumer could alternatively designate as contact person a relative or friend who has knowledge of their medical condition and needs, and where medical records can be located. Individual preference for one of these options would appropriately be accommodated within service agreements. The department believes that this requirement would not place an undue burden on consumers' privacy as people generally supply this type of information willingly under other circumstances, such as at a place of employment.

The committee also looked at the HCL section on request by client for discontinuation of life support (4668.0170) and agreed that this section is not necessary for the PCA rule. The law (M.S. 145B) would apply in any case.

Recommendations

■ **The committee and the Department recommend incorporating into this section of the personal care licensure rule the following language from the HCL rule, part 4668.0140, with new language underlined:**

SERVICE AGREEMENTS

Service agreements. No later than the second visit to a consumer, a licensee shall enter into a written service agreement with the consumer or the consumer's responsible party. Any modifications of the service agreement must be in writing.

Contents of service agreement. The service agreement required by subpart 1 must include:

A. a care plan as described in part [3] ;

B. the schedule or frequency of sessions of supervision or monitoring required, if any;

C. a designation of responsibility for arranging for backup PCAs;

D. a plan for contingency action that includes:

(1) the action to be taken by the licensee, consumer, and responsible party, if scheduled services cannot be provided;

(2) the method for the licensee to contact the consumer or responsible party, if any; and

(3) whom to contact in case of an emergency or significant adverse change in the consumer's condition, and how that person can be reached. [This clause is a DHS recommendation only.]

11. CONSUMER RECORDS

Discussion

The committee discussion on this section of the HCL rule began as a continuation of the issues discussed in Section 10 (Service Agreements) of this report. The committee discussed the issue of emergency personnel being able to easily find out what medications a consumer is taking. This is an important consideration; because consumers of personal services are receiving services because of demonstrated medical needs, it is reasonable to assume that many of them take prescribed medications. Various possibilities were considered, but none seemed to adequately address the problem. The committee determined that the HCL rule section, "Consumer Records," is probably the only way to address the issue. Clause "E" in this section requires names, addresses, and telephone numbers of the consumer's medical services providers and other home care providers to be included in the consumer records.

The committee also discussed the HCL rule language that would require each person who provides any type of services to a personal care consumer to note and summarize the contact on the client record. The HCL rule specifies that this would include not only a PCA visit, but also visits by volunteers. The committee thought this was excessive and unnecessary and therefore limited this provision in the recommendations of this section. (See "Content of Consumer Record," clause D, below.)

Some committee members wished to include a reference to the state Data Practices Act[14] to this section, to emphasize the privacy of these records. However, this Act covers only records of public agencies and as such, the protections of that Act do not apply to data held by private agencies. The sections from the HCL rule on security and confidentiality that are included in the recommendations of this report appear to adequately address this issue.

Recommendations

■ **The committee and the Department recommend incorporating into this section of the personal care licensure rule the following language from the HCL rule, part 4668.0160, with new or modified language underlined:**

CONSUMER RECORDS

Maintenance of consumer record. The licensee shall maintain a record for each consumer.

Form of entries. All entries in the consumer record must be:

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[14] M.S. 13.46

A. legible, permanently recorded in ink, dated, and authenticated with the name and title of the person making the entry; or

B. recorded in an electronic media in a secure manner.

Content of consumer record. The consumer record must contain the following information about the consumer:

A. name; address; telephone number; date of birth; dates of the beginning and end of services; and names, addresses, and telephone numbers of any responsible party;

B. a service agreement[15] as required by part [10];

C. physician's orders for personal care services;

D. notes of the supervising nurse related to changes in care plan or the consumer's condition;

E. names, addresses, and telephone numbers of the consumer's medical services providers and other home care providers; and

F. a summary following the termination of services, which includes the reason for the initiation and termination of services, and the consumer's condition at the termination of services.

Security. Consumer record information must be safeguarded against loss, destruction, or unauthorized use. The licensee shall establish written procedures to control use, removal, or provision of consumer records from the provider's offices and to establish criteria for release of information. The consumer record must be readily accessible to personnel authorized by the licensee to use the consumer record.

Confidentiality. The licensee shall not disclose to any other person any personal, financial, medical, or other information about the consumer, except:

A. as may be required by law;

B. to staff or contractors of the licensee who require information in order to provide services to the consumer, but only such information that is necessary to the provision of services;

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15 N.B.: The service agreement is defined to include "administrative details agreed upon by the consumer and agency for provision of personal care services and . . . the care plan."

C. to persons authorized in writing by the consumer or the consumer's responsible party to receive the information, including third-party payers; and

D. representatives of the commissioners of health and of human services authorized to survey or investigate home care providers.

Retention. A consumer's record must be retained for at least five years following discharge. Arrangements must be made for secure storage and retrieval of consumer records if the licensee ceases business.

Transfer of consumer. If a consumer transfers to another home care provider or is admitted to an inpatient facility, the licensee, upon request of the consumer, shall send a copy or summary of the consumer's record to the new provider or facility or to the consumer.

12. SUPERVISION BY REGISTERED NURSE

Discussion

Committee members discussed several questions and issues related to "nurse supervision" with a nurse consultant to DHS and representatives from the Board of Nursing[16]. Concepts discussed included nurse delegation issues, prescribed and over-the-counter medications, and nurse consultation. The following discussion is divided into these topics.

NURSE DELEGATION ISSUES

Committee members had some difficulty interpreting how the Nurse Practices Act[17] regulates nursing practices and how its principles would apply to a personal care licensing rule. One of the questions was whether a nurse delegates authority to a consumer or to a PCA. The committee learned that the Act permits nurses the option of delegating performance of nursing tasks to others, if this coincides with a consumer's needs. However, delegating authority to another person to perform nursing tasks does not include delegation of nursing supervision authority. Therefore, the nursing tasks are delegated to the person who provides those services, not to the consumer of those services.

The committee concluded that it would be helpful to state in DOC consumers' care plans that the consumer retains the right to direct all personal activities not specified in the care plan. This would make it clear that the RN does not play a role in every part of the consumer's life, but only in those areas that directly relate to delegating nursing tasks to a PCA.

PRESCRIBED AND OTC MEDICATIONS

The committee was also puzzled about whether or not the supervising nurse would be required to be involved in changes in medication. This would include situations such as taking a medication prescribed PRN (*pro re nata:* taken as needed) or changing a prescribed dosage for some reason. (This type of situation usually occurs when a person is taking a new medication and has been directed by the prescribing physician to observe for effectiveness or side effects.) It would also include taking over-the-counter (OTC) medications. The BON representatives suggested that when a prescribed medication dose is changed or an OTC medication is taken while personal care services are being provided, the supervising nurse would not have to authorize or supervise administration, but the change in dose should be communicated to the nurse within a reasonable period of time so that it could be recorded in the care plan.

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[16] Discussion took place with Barbara Harding, DHS nurse consultant; Carol Manteuffel, Board of Nursing; and Mary Tyrrell, Board of Nursing.

[17] M.S. 148.171 -- 148.285.

The BON representatives suggested that when consumers prefer to do so, it would be reasonable to designate in the care plan that it is not necessary for the consumer or responsible party to receive authorization from a supervising nurse to change a prescribed medication dose, if the consumer or responsible party is changing their medication as a result of direction received from the prescribing physician. In this case, any changes should still be noted in the care plan.

Based on the above discussions, the committee also agreed that the rule should establish how consumers can participate in establishing an individual OTC and PRN policy. Incorporating individually appropriate OTC and PRN policies in care plans would provide a degree of flexibility which does not exist at present.

CONSULTATION

Consultation is the act of determining that PCA tasks are being performed properly, by the supervising RN.

The Department nurse consultant addressed the committee's question of when a supervising nurse would need to be on site to observe the provision of delegated nursing tasks. She stated that in the best case scenario, a supervising RN would be on site sometime during the first day that services are provided by a new PCA, but situations do arise where this is not possible. In these cases, the RN should be on site to check the delivery of services within a reasonable period of time. (Rule 47 requires a visit within 14 days; the committee agreed that this was an adequate timeline.) It is important to note that in the recommendations in the "Training" section of this report (section 16), the supervising RN must certify that the PCA is qualified to perform personal care services for an individual consumer before that person can begin to provide services as an employee of a licensee.

After lengthy discussion, the committee determined that telephone consultation between the supervising nurse and the consumer and/or the PCA should be permitted for DOC consumers. For others (those with responsible parties), the committee supported requiring at least occasional in-person consultations, to ensure the protection of vulnerable persons, with frequency stated in the care plan.

The committee discussed current Rule 47 consultation requirements. This Rule does not specify whether consultation must be in person or may include telephone consultation. According to committee members, providers usually make a determination on a case-by-case basis as to whether phone consultation is adequate or in-person consultation is necessary. It appears that providers are fairly conservative on this and more often require in-person consultation. Committee members thought that an agency's tendencies in this area could be a reasonable factor in consumers' or responsible parties' decisions about which agency they choose to use. Based on current consultation practices, the committee determined that incorporating Rule 47 language on the topic would provide an adequate minimum standard for safety.

Recommendations

■ **The committee and the Department recommend incorporating into this section of the personal care licensure rule the following language from Minnesota Rules, part 9505.0335, subp. 4 [Rule 47], including new language underlined and a deletion [noted as a strikeout]:**

SUPERVISION.

Supervision by the registered nurse. Through consultation with the consumer of PCA services or the responsible party, the supervising registered nurse is responsible for the duties listed in clause A through I below.

A. Ensure that the PCA is capable of providing the required personal care services, through direct observation of the PCA's work, or through consultation with the consumer of PCA services or the responsible party.

B. Ensure that the PCA is knowledgeable about the plan of personal care services before the PCA performs personal care services.

C. Ensure that the PCA is knowledgeable about essential observations of the consumer's health, and about any conditions that should be immediately brought to the attention of either the nurse or the consumer's physician.

D. Evaluate the personal care services of a consumer through direct observation of the PCA's work, or through consultation with the consumer of PCA services or the responsible party. Following an initial assessment, evaluation must be made:

1. within 14 days after the placement of a personal care assistant with a consumer;

~~at least once every 30 days during the first 90 days after the qualified recipient first receives personal care services according to the plan of personal care services;~~

2. at least once every 120 days thereafter. The nurse must record in writing the result of the evaluation and actions taken to correct any deficiencies in the work of the PCA.

E. Review, together with the consumer or responsible party, and revise as necessary, the plan of personal care services at least once every 120 days after a care plan is developed.

F. Ensure that the PCA and consumer or responsible party are knowledgeable about a change in the plan of personal care services.

G. Ensure that records are kept showing the services provided to the consumer by the personal care assistant and the time spent providing the services.

H. Determine that the consumer is capable of directing their own care or resides with a responsible party.

I. Determine that a consumer is a qualified recipient of personal care services.

13. CARE PLANS AND MEDICATION ORDERS

Discussion

The committee reviewed the "Medication and Treatment Orders" section of the HCL rule, and debated its relevance to a personal care licensure rule. Committee members noted that it is important to recognize that personal care services are provided to more independent people than those for whom this section of the HCL rule appears to be written. (Qualified recipients of personal care services are people who need "personal care services to live independently in the community, [are] in a stable medical condition, and [do] not have acute care needs that require inpatient hospitalization or ongoing care of a RN in the recipient's residence," according to Rule 47.)

There was much debate among committee members about why there is a "supervising RN" at all and why that nurse has any involvement with whether or not a consumer takes OTC medications or prescriptions prescribed PRN. In the course of discussion among consumers, providers, and professional nurses, it became clear that the nurse has a concern only as it pertains to PCA tasks. These are the tasks for which the supervising nurse has responsibility. In other words, if a person takes OTC medications or PRN prescriptions on their own, nurse oversight is not required, because it is not a delegated RN task. However, if a PCA provides assistance in taking these medications, it is a delegated RN task, (according to the BON's interpretation of Nurse Practice statutes[18]).

Because consumers of personal care services are relatively independent and are able to direct their own care or have a responsible party to direct their care, the committee believes that there could be more flexibility in medication and treatment orders in the personal care licensure rule, especially as regards PRN and OTC medications. For example, rather than directing a nurse to authorize each dose as required in this section of the HCL rule, the committee discussed the option of writing each consumer's care plan to include individually appropriate orders for assistance with administration of specific PRN and OTC medications. This method would ensure that a balance between flexibility and protection is afforded to each client.

Members noted that while they might not like the idea that life is more complicated for people with disabilities, the concept of including in the care plan what medications can be taken without per-dose RN authorization is a broadening of current policy. This would be more liberal than the HCL rule, which,at the time that the committee reviewed it, required prior authorization and post-dose checkup for any PRN or OTC medication. BON representatives present during committee discussion of this issue agreed that if the care plan included it, designated medications could be taken without receiving RN authorization prior to each dose, and without requiring a post-dose checkup by the RN.

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[18] M.S. 148.171 – 148.285.

The committee expressed an interest in including some language in the rule that reflects that nurses and consumers or responsible parties work together to design care plans--that it should be a team effort, rather than the nurse dictating what must be done. It was determined that the consumer or responsible party, supervising RN, and doctor should decide as a team what goes into the care plan, including such items as OTC and PRN medication guidelines.

The committee also discussed parts of Rule 47 relating to medication and treatment orders, and determined that sections regarding updating the care plan were relevant to a personal care licensure rule, but that these sections should be modified somewhat to avoid the perception that this procedure is different from general medical practice for consumers of personal care services because the consumers are disabled.

Recommendations in this section also reflect the result of committee discussion of issues in section 12 (Supervision by RN).

Recommendations

■ **The committee and the Department recommend incorporating into this section of the personal care licensure rule the following language from the HCL rule, part 4668.0150, with new language underlined:**

CONSUMER CARE PLANS AND MEDICATION ORDERS

Scope. This part applies to medications and treatments that are ordered by a physician, osteopath, dentist, podiatrist, chiropractor, or other prescriber, and over-the-counter (OTC) medications listed in the care plan.

Medication orders. As generally practiced, all orders for medications and treatments must be dated and signed by the prescriber, except as provided by subpart ___ [verbal orders]; all orders for medications must contain the name of the drug, dosage, and directions for use; and all orders must be renewed at least every three months.

Verbal orders. As generally practiced, upon receiving an order verbally from a prescriber, the nurse or therapist shall:

A. record and sign the order; and
B. forward the written order to the prescriber for the prescriber's signature no later than seven days after receipt of the verbal order.

Consumer care plans. Medications and treatments must be administered by the consumer or with assistance from a PCA, as stated in the consumer's care plan. Care plans may include individually appropriate orders for PCA assistance with administration of specific *pro re nata* (PRN) and/or over-the-counter (OTC) medication. Determination of specific

OTC and prescribed PRN medications to be designated in the care plan which do not require per-dose authorization or supervision by a registered nurse or physician shall be made by the consumer or responsible party, the supervising RN, and the consumer's physician, as a team.

The care plan must indicate frequency of supervising RN consultations with the consumer and PCA, based on individual needs.

The care plan must be signed by the licensee and the consumer. A copy of the care plan must be supplied to the consumer.

14. HANDLING OF CONSUMERS' FINANCES AND PROPERTY.

Discussion

The committee reviewed and agreed with most of the language in this part of the HCL rule. The committee did determine, however, that the HCL rule is vague on the point of "minimal value" as the limit of gifts a PCA or provider agency may legally receive from a consumer of personal care services. As an alternative, the committee discussed the Internal Revenue Service standard of $25 as a "minimal" amount for certain purposes and determined that it would be more appropriate for the personal care licensure rule to use this amount rather than a vague term such as "minimal." The committee also determined that it would be appropriate to permit this level of gift to be given each year.

In the case of receipts to be provided to the consumer by the PCA or licensee for items and services purchased with the consumer's funds, as required by the HCL rule, the committee determined that it would be appropriate to permit documentation (such as a hand-written receipt) as well. This is necessary for situations where a cash-register receipt is not available.

Recommendations

- **The committee and the Department recommend incorporating into this section of the personal care licensure rule the following language from the HCL rule, part 4668.0035, with modifications and additions underlined:**

HANDLING CONSUMERS' FINANCES AND PROPERTY

Powers-of-attorney. A licensee or its employees or contractors may not accept powers-of-attorney from consumers or responsible parties for any purpose, and may not accept appointments as guardians or conservators of consumers. This subpart does not apply to licensees that are Minnesota counties or other units of government.

Handling consumers' finances. A licensee may assist consumers with household budgeting, including paying bills and purchasing household goods, but may not otherwise manage a consumer's property. Licensees and PCAs must provide consumers or the responsible party with receipts or documentation for all transactions and purchases paid with the consumer's funds, and must maintain records of all such transactions.

Security of consumers' property. A licensee or its employees or contractors may not borrow a consumer's property, nor in any way convert a consumer's property to the licensee's or its employees' or contractors' possession, except in payment of a fee at the fair market value of the property.

Gifts and donations. Nothing in this part precludes a licensee or its staff from accepting bona fide gifts of less than $25 in value within one calendar year, or precludes the acceptance of donations or bequests made to a licensee that are exempt from income tax under section 501(c) of the Internal Revenue Code of 1-986.

15. HOME CARE BILL OF RIGHTS

Discussion

The Home Care Bill of Rights is a notice that is provided to each consumer of home care services, according to provisions in M.S. 144A.46. Similar Bills of Rights exist for consumers of other health care services.

A requirement to provide the Home Care Bill of Rights notice to all consumers is included in the HCL rule. The committee reviewed this notice as it appears in the HCL rule and determined that the notice should include the Office of Health Facility Complaints (OHFC) as a resource (as appears in the HCL rule), but that the notice should substitute the Home Care Ombudsman for the Ombudsman for Older Minnesotans. The Home Care Ombudsman is administered within the Aging Division of DHS and is therefore presumably intended to provide services to persons age 60 or older. Therefore, committee members suggested that the Ombudsman for Mental Health and Mental Retardation (OMHMR) be included as a third option for consumers of personal care services.

In order to be effective, these offices do not have to have the authority to enforce provisions of this rule, but must be able to act as referral sources for consumers and responsible parties. Both the Home Care Ombudsman and the OMHMR have procedures to ensure that complaints brought to these ombudsman agencies are referred to the OHFC for enforcement when necessary, as this office does have the ability to enforce legal provisions when the authority is assigned to them. The Home Care Bill of Rights is one part of the personal care licensure rule that would be reasonably be enforced by MDH.

The committee also thought it would be helpful to consumers if providers ensured that the notice was understood by consumers. Suggestions that there be a requirement that the written Home Care Bill of Rights be provided in a language other than English when necessary, and that the consumer or responsible party be asked if they desire further explanation of the notice were discussed and agreed upon. Although the Department did not change the committee's recommendation in this section regarding this issue, in discussion after the committee had completed its scheduled meetings the Department determined that it may be more realistic and less potentially costly for each copy of the Home Care Bill of Rights to include the "translation box" that has become standard on many DHS forms. The box has the instructions, "This form contains important information. If you do not understand it, get someone to translate it now," in several languages, including various Southeast Asian versions.

Recommendations

- **The committee and the Department recommend incorporating into this section of the personal care licensure rule the following language from the HCL rule, part 4668.0030, with new language underlined:**

HOME CARE BILL OF RIGHTS

Scope and enforcement against those exempt from licensure. All home care providers, including those exempt from licensure under Minnesota Statutes, sec.144A.46, subd. 2, must comply with this part and the home care bill of rights, as provided by Minnesota Statutes, sec.144A.44. The commissioner of Health shall enforce this part and the home care bill of rights against providers exempt from licensure in the same manner as against licensees.

Notification of consumer or responsible party. The provider shall give a written copy of the home care bill of rights, as required by Minnesota Statutes, section 144A, to each consumer or each consumer's responsible party.

Time of notice. The provider shall deliver the bill of rights at the time that the provider and the consumer or the consumer's responsible party sign a service agreement, or at the time that services are initiated, whichever occurs first.

Content of notice. In addition to the text of the bill of rights in Minnesota Statutes, section 144A.44, subdivision 1, the written notice to the consumer or responsible party must include the following:

A. a statement, printed prominently in capital letters, that is substantially the same as the following:

IF YOU HAVE A COMPLAINT ABOUT THE AGENCY OR PERSON PROVIDING YOU PERSONAL CARE SERVICES, YOU MAY CALL, WRITE, OR VISIT THE OFFICE OF HEALTH FACILITY COMPLAINTS, THE HOME CARE OMBUDSMAN, OR THE OMBUDSMAN FOR MENTAL HEALTH AND MENTAL RETARDATION.

B. the telephone number, mailing address, and street address of the Office of Health Facility Complaints, the Home Care Ombudsman, and the Ombudsman for Mental Health and Mental Retardation;

C. the licensee's name, address, telephone number, and name or title of the person to whom problems or complaints may be directed.

The information required by this item shall be provided by the commissioner of Health to licensees upon issuance of licenses and whenever changes are made.

Home Care Bill of Rights provided in a language other than English; explanation. A written copy of the Home Care Bill of Rights shall be provided by the licensee to each consumer or responsible party in a language other than English when appropriate, and the consumer or responsible party shall be asked if they desire further explanation of the notice.

If explanation is requested, the licensee shall explain the notice and consumer rights to the consumer or responsible party.

Acknowledgment of receipt. The provider shall obtain written acknowledgment of the consumer or responsible party's receipt of the bill of rights or shall document why an acknowledgment cannot be obtained. The acknowledgment may be obtained from the consumer or the consumer's responsible party.

Documentation. The licensee shall retain in the consumer's record documentation of compliance with this part.

Abuse reporting. The licensee and all employees of the licensee shall report the maltreatment of vulnerable minors or adults in compliance with Minnesota Statutes, sections 626.556 and 626.557, respectively.

Prohibition against waivers. The licensee may not request nor obtain from consumers or responsible party any waiver of any of the rights enumerated in Minnesota Statutes, sec. 144A.44, subd. 1. Any waiver obtained in violation of this subpart is void.

16. COMPLAINT PROCEDURE

Discussion

The committee reviewed and agreed with the language in this part of the HCL rule, except that committee members determined that it was necessary to modify the section slightly regarding complaint resources to make this section consistent with the committee's recommendations in Section 15 (Home Care Bill of Rights) of this report.

Additionally, a clause from Rule 47 appears in the recommendations of this section to strengthen consumers' ability to choose their own PCA, as discuddes in Section 8 (Acceptance and Discharge of Consumers) of this report.

Recommendations

■ **The committee and the Department recommend the following language for inclusion in this section of the personal care licensure rule (citations follow each definition; clarifying language that differs from the cited source is underlined):**

CONSUMER COMPLAINT PROCEDURE

Complaint procedure. Every licensee shall establish a system for receiving, investigating, and resolving complaints from consumers or responsible parties [HCL 4668.0040], including establishing a grievance mechanism to resolve consumer complaints about the personal care provider's decision whether to employ or subcontract the consumer's choice of a PCA. [Mn. Rules, part 9505.0335, subp. 6]

Informing consumers and responsible parties. The system required by [subpart 1] must provide written notice to each consumer or responsible party that includes:

A. the consumer or responsible party's right to complain to the licensee about the services received;

B. the name or title of the person or persons to contact with complaints;

C. the method of submitting a complaint to the licensee.

D. the right to complain to the Office of Health Facility Complaints, the Home Care Ombudsman, and the Ombudsman for mental health and mental retardation.

E. a statement that he provider will in no way retaliate because of a complaint. [HCL 4668.0040]

Prohibition against retaliation. No licensee shall take any action that negatively affects a consumer in retaliation for a complaint made by the consumer or responsible party. [HCL4668.0040]

17. INFECTION CONTROL

Discussion

The committee debated the need for this section as it exists in the HCL rule and determined it should be included. Providers on the committee suggested that Mantoux testing for TB is inexpensive and easy, and that the test could be administered by an agency nurse at the time that a PCA becomes an employee. However, the committee determined that it would be more reasonable for repeat Mantoux testing to be done in accordance with established CDC [Center for Disease Control] guidelines rather than the HCL rule requirement of repeat Mantoux testing every 24 months.

There was also discussion about at which point a PCA is an employee of an agency, as the agency would be responsible for ensuring that the test is done before consumer services are provided. Members noted that it might be important (but nearly impossible unless it was undertaken as a public health effort) to inform consumers or responsible parties--especially those who find their own PCAs who then may provide some informal services before becoming an agency employee providing reimbursed services--that this is a safety measure and should be done before any services are provided.

It would also be necessary to establish a timeline within which PCAs working with consumers at the time of rule promulgation would need to have the test. This could be some type of "grandparent" clause, but it would be necessary to ensure that PCAs working at the time of rule promulgation did receive the test.

Testing for HIV/AIDS was discussed briefly. It was determined that because the mode of transmission for HIV/AIDS is very specific (unlike TB), that testing should not be required, but that HIV/AIDS prevention should be covered as an orientation topic. That recommendation is included in Section 5 (Orientation) of this report.

Recommendations

■ **The committee and the Department recommend incorporating into this section of the personal care licensure rule the following language from the HCL rule, part 4668.0065, with new language underlined:**

INFECTION CONTROL

Tuberculosis screening. No person who is contagious with tuberculosis may provide services that require direct contact with consumers. All individual licensees and employees and contractors of licensees must document the following before providing services that require direct contact with consumers:

A. the person must provide documentation of having received a negative reaction to a Mantoux tuberculin skin test administered within the 12 months before working in a position involving direct consumer contact, and thereafter in accord with federal Center for Disease Control guidelines;

B. if the person has had a positive reaction to a Mantoux tuberculin skin test within the two years before working in a position involving direct consumer contact, the person must provide:

(1) documentation of a negative chest x-ray administered within the three months before working in a position involving direct consumer contact; and

(2) documentation of a negative chest x-ray administered each 12 months, for two years after the positive reaction to a Mantoux test; or

C. if the person has had a positive reaction to a Mantoux test, the person must complete or be taking tuberculosis preventive therapy. [6/24/91 draft of 4668.0065]

Exposure to tuberculosis. In addition to the requirements of subpart 1, a person who has been exposed to active tuberculosis must document a negative result of a Mantoux test or chest x-ray administered no earlier than ten weeks and no later than 14 weeks after the exposure.

Persons providing PCA services at time of rule promulgation. [No specific language recommendation for this section at this time.]

18. CRIMINAL DISQUALIFICATIONS

Discussion

The committee reviewed this section of the HCL rule, and expressed concerns about the legality and necessity of this extensive section. Investigative costs and effectiveness were considered. Committee members agreed that the important issue is to prevent persons with a history of committing abuse or neglect from being able to provide personal care services. A suggestion was made and endorsed by the committee that federal language that applies to nursing homes that does not permit employment of a person convicted of abuse or neglect[19] would be a more appropriate standard than what appears in the HCL rule.

In reviewing this issue after the committee had completed its meetings, the Department determined that the Rule 47 section on "Employment Prohibitions" would be appropriate, as it is in line with the federal language endorsed by the committee, and also includes a paragraph that would disqualify a person from employment as a PCA if they are dependent on and misusing mood altering chemicals. This is a subject that the committee discussed briefly, but because of time constraints, neglected to include in further discussion. It is the Department's opinion that the committee would endorse incorporating this section of Rule 47, as the federal language discussed is not as precisely applicable to home care.

Recommendations

The Department recommends incorporating the following section of Minnesota Rules, part 9505.0335, subps. 7 and 12 [Rule 47] into this section of the personal care licensure rule with new language underlined:

EMPLOYMENT PROHIBITION

Personal care provider; employment prohibition. A licensee shall not employ or subcontract with a person to provide personal care service to a consumer if the person:

A. refuses to provide full disclosure of criminal history records as specified in this section;

B. has been convicted of a crime that directly relates to the occupation of providing personal care services;

[19] 42 CFR, §483.13.

C. has jeopardized the health or welfare of a vulnerable minor or vulnerable adult through physical abuse, sexual abuse, or neglect as defined in Minnesota Statutes, section 626.557; or 626.557;

D. is misusing or is dependent on mood altering chemicals including alcohol to the extent that the licensee or consumer knows or has reason to believe that the use of chemicals has a negative effect on the person's ability to provide personal care services or the use of chemicals is apparent during the hours the person is providing personal care services.

Preemployment check of criminal history. Before employing a person as a personal care assistant, the licensee shall require from the applicant full disclosure of conviction and criminal history records pertaining to any crime related to the provision of health services or to the occupation of a personal care assistant.

19. REGISTRY REPORTING

Discussion

The committee did not have an opportunity to discuss the concept of a PCA Registry in depth, although the idea was favorably considered in a discussion of how to handle recordkeeping regarding persons convicted of abuse or neglect.

The committee did not consider it necessary to establish a registry for all PCAs, but agreed a registry could be used to identify PCAs with negative records. Adding these names to the already existing state Nurse Assistant Registry would probably be a relatively low-cost option.

It is important to clarify why registering all PCAs on the state Nurse Assistant Registry would not be appropriate. The primary purpose of the Nurse Assistant Registry is to list people who have established competency in nurse aide skills. These skills include a broad range of tasks which are roughly comparable to PCA tasks. However, CNA competency is based on a knowledge of a body of skills. PCA competency, as recommended in this report, is established on an individual consumer basis, i.e., a PCA must demonstrate competency to perform PCA tasks for each consumer for whom that PCA provides services. Consequently, it would be expensive, cumbersome, and unnecessary to establish a separate PCA registry for all PCAs.

According to HCFA, home health aides (including PCAs) may be added to a state Nurse Assistant Registry, with an identifier to distinguish them from certified nurse assistants (CNAs). Another option outlined by HCFA is for states to use a Nurse Assistant registry to identify people who have been found to be guilty of abuse or neglect of consumers.[20]

Recommendations

■ **The committee and the Department recommend the following new language for this section of the PCA rule:**

REPORTING ABUSE OR NEGLECT; REGISTRY

Reporting abuse or neglect. A licensee must report to the Department of Health the name of any PCA or applicant for PCA or supervising RN employment who has been found to have abused or neglected consumers or to have misappropriated consumer property.

Establishment of Registry. The Minnesota Department of Health shall develop a method to register names of persons providing personal care services who have been convicted of abuse or neglect. This listing shall be public record and shall be available free of charge

[20] Federal Register, Vol. 56, No. 187, September 26, 1991, page 48909.

to personal care agencies licensed under M.S.___* [* statute that governs personal care provider organization licensure--none exists at present] or M.S. 144A.46.

20. SURVEYS & INVESTIGATIONS; ENFORCEMENT

Discussion

The committee determined that, based on statutory requirements, enforcement of this licensing rule should be by the Minnesota Department of Health, including but not limited to the Office of Health Facility Complaints. A schedule of fines and/or conditions for license revocation should be determined by MDH & DHS at the time of rulewriting.

Recommendations:

- Neither the committee nor the Department has specific language recommendations for this section at this time. The Departments of Health and Human Services will need to work on this section prior to commencement of rulewriting.

APPENDIX A

World Institute on Disability Recommendations[1]

1. 1) that every state make personal assistance services available to people with disabilities of all kinds; 2) that more information be gathered on the availability, type of services offered and quality of separate personal assistance service programs for people with intellectual, mental and sensory disabilities; 3) that the extent of need for personal assistance services to these three populations be explored; and 4) that demonstration projects be funded that combine services to these three groups with services to people with physical disabilities and brain injury.

2. 1) that every state make personal assistance services available to all age groups; 2) that projects be established to look at how children and adolescents who are disabled can benefit from attendant services; and 3) that states begin the process of consolidating programs for different age groups.

3. 1) that all programs allow users the choice of individual providers or trained home health aides and homemakers from public or private agencies; and 2) that a continuum for managing service delivery be made available, ranging from consumer management; and 3) that users of short term periodic services also have the option to locate, screen, train, hire and pay attendants if desired; and 4) that policies be developed that presume consumers prefer self-direction and require an evidential finding that an individual does not want or is incapable of total self-direction.

4. 1) that all rural and urban areas in the U.S. have a program offering the full array of personal assistance services needed by disabled people of all ages and all disabilities - physical, intellectual, mental and sensory; 2) that the states which offer services through separate household assistance and personal hygiene and maintenance services programs establish new programs which combine these services in terms of service delivery as well as organizational structure.

5. 1) that all programs make services available 24 hours a day, 7 days a week; 2) that a pool of emergency assistants be maintained in every locality; 3) that short-term services be established for all age groups in the 16 states that do not offer them and 4) that short-term services be available for longer periods (2 - 4 weeks) or less on a regular or periodic basis; and 5) that short-term and emergency services be provided in the location the user requests, instead of being restricted to institutional settings.

6. 1) that all personal assistance service programs establish an appropriate cost-sharing formula and a realistic income ceiling from which all reasonable disability-related expenditures are excluded; and 2) that Medicaid benefits or other federal health insurance be made available to disabled workers who are unable to obtain private health insurance at reasonable cost.

7. 1) that personal assistance be made available to users, not only for personal maintenance, hygiene and mobility tasks and housework, but also for work, school and recreation needs as

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[1] "Attending to America: Personal Assistance for Independent Living," Report of The National Survey of Attendant Services Programs in the United States, World Institute on Disability, April 1987.

well; 2) that eligibility requirements not limit the geographic mobility of the individual, so that people needing personal assistance are allowed to travel outside a state and still retain coverage for personal assistance services; and 3) that employers in both the private and public sectors explore the possibility of making personal assistants available in the workplace as is already being done in Sweden (Ratzka, 1986).

8. 1) that attendants be paid at least 150% of the minimum wage with periodic increases to reflect inflation and growth in experience and qualifications; 2) that attendants receive paid sick leave, vacation and group health insurance benefits in addition to Social Security, worker's compensation and unemployment benefits; 3) that joint discussions between unions and users be instituted to explore ways in which users and assistants can work together to provide benefits for each other.

9. 1) that the legislation establishing the program (as well as the implementing regulations) require that administrators and agency personnel undergo appropriate training; and 2) that qualified disabled persons who use personal assistance services play a significant role in this training nationwide.

10. 1) that all personal assistant training programs be imbued with the Independent Living philosophy; 2) that training programs be managed and administered by the Independent Living Centers, wherever possible; 3) that personal assistants be taught that, whenever possible, the bulk of their training will be provided by their clients; 4) that users of personal assistance be instructors in the training program; 5) that training of personal assistants not be mandatory in most cases; 6) that registration and special training be required for those working with people with mental or intellectual disabilities; and 7) that personal assistant referral, recruitment and screening services be available for users who desire them.

11. 1) that all personal assistance service programs be required to undertake outreach efforts such as visits to rehabilitation centers, sheltered workshops and schools, as well as brochures, public service announcements on T.V. and radio, buses, and so on; and 2) that personal assistance service programs offer both training for consumers in management of personal assistance and follow-up.

12. 1) that every personal assistance service program actively recruit personal assistance users to fill administrative and management positions; and 2) that representatives of Independent Living Programs be included on policy boards and state/local commissions which establish personal assistance service policy, rules and regulations.

13. 1) that programs allow personal assistance users to train independent providers in catheter management, injections and medication administration; and 2) that programs ensure that all providers are allowed to provide the full range of services, paramedical as well as non-medical.

14. 1) that all family members be eligible to be paid providers at a user's request; and 2) that a cash "personal assistance allowance" be provided which the disabled person can use to hire family members or to purchase services from the outside.

15. That all states institute mandatory programs to screen prospective nursing home admissions.

16. That a conference of independent living activists, users and program administrators be convened to discuss the issue of liability more fully.

APPENDIX B

STATUTORY COMPARISON OF PERSONAL CARE AND HOME CARE SERVICES

PERSONAL CARE SERVICES[1]	HOME CARE SERVICES[2]
1) bowel and bladder care; 2) skin care to maintain the health of the skin; 3) range of motion exercises; 4) respiratory assistance; 5) transfers; 6) bathing, grooming, and hairwashing necessary for personal hygiene; 7) turning and positioning; 8) assistance with furnishing medication that is normally self-administered; 9) application and maintenance of prosthetics and orthotics; 10) cleaning medical equipment; 11) dressing or undressing; 12) assistance with food, nutrition, and diet activities; 13) accompanying a recipient to obtain medical diagnosis or treatment; 14) helping the recipient to obtain medical diagnosis or treatment; 15) supervision and observation that are medically necessary because of the recipient's diagnosis or disability; and 16) incidental household services that are an integral part of a personal care service described in clauses (1) to (15).	1) nursing services, including the services of a home health aide; 2) personal care services not included under sections 148.171 to 148.285 [RN & LPN--Minn. nurse practice act]; 3) physical therapy; 4) speech therapy; 5) respiratory therapy; 6) occupational therapy; 7) nutritional services; 8) home management services when provided to a person who is unable to perform these activities due to illness, disability, or physical condition. Home management services include at least two of the following services: housekeeping, meal preparation, laundry, shopping, and other similar services; 9) medical social services; 10) the provision of medical supplies and equipment when accompanied by the provision of a home care service; 11) the provision of a hospice program as specified in section 144A.48; and 12) other similar medical services and health-related support services identified by the commissioner in rule.

[1] M.S. 256B.0627, Subd. 4, 1991.

[2] M.S. 144A.43, Subd. 3, 1990.