

**DEPARTMENT OF HEALTH AND SOCIAL SERVICES**  
**DIVISION OF LONG TERM CARE RESIDENTS PROTECTION**  
**Statutory Authority: 16 Delaware Code, Section 3006A (16 Del.C. §3006A)**

**FINAL**

**ORDER**

**Regulations for Training and Certification for Nursing Assistants and Certified Nursing Assistants**

**Nature of the Proceedings:**

The Department of Health and Social Services, Division of Long Term Care Residents Protection (DLTCRP) initiated proceedings in accordance with 29 **Delaware Code**, Chapter 101 to amend the Regulations for Training and Qualifications for Nursing Assistants and Certified Nursing Assistants. On November 1, 2004, DLTCRP published proposed regulations in the *Register of Regulations* and held public hearings on November 30 and December 2 at which written comments were received.

DLTCRP reviewed and evaluated the comments from those public hearings as well as comments from earlier public hearings on proposed regulations pertaining to the responsibility of federally certified nursing facilities to pay the costs of training nursing assistants. As a result of that evaluation, the accompanying proposed regulations are being promulgated as final regulations. The discussion of the comments is in the accompanying Summary of Evidence.

**Findings of Fact**

The Department of Health and Social Services finds that the proposed regulations, as set forth in the attached copy, should be adopted as final regulations. Therefore, it is ordered that the proposed Regulations for Training and Qualifications for Nursing Assistants and Certified Nursing Assistants are promulgated effective January 10, 2005.

Vincent P. Meconi, Secretary  
Department of Health and Social Services  
Date of Signature, 12.15.2004

**Summary of the Evidence**

A comment asked the purpose of the regulations relating to reimbursement issues. The purpose is to clarify and ensure compliance with federal regulations found at 42 CFR §483.152 which prohibit charging a nurse aide for any portion of a nurse aide training program and which require reimbursement of personally incurred training costs if a federally certified nursing facility hires an individual within twelve months of completion of a training program.

Several commenters discussed the issue of the added costs to facilities if students in facility-based CNA training programs cannot be charged any amount for the training. Concern was expressed that the added costs may lead to the closing of some facility-based training programs. Additionally, a commenter made the point that students who are paying for a portion of the training program score higher on the test because they have a personal investment in succeeding. However valid these points may be, the federal regulations are explicit in prohibiting facilities from charging students for CNA training.

One comment suggested that facilities are not required under federal regulations to pay for more than one competency evaluation although the federal regulations permit the student to test three times. Since the federal regulations clearly prohibit charging students for any portion of the training program, there is no basis to conclude that it is the intent of the regulations that students should pay for the second or third test.

Several comments focused on issues related to state reimbursement to facilities for their training and competency evaluation costs. One comment requested that these regulations clarify the method by which facilities recoup their training costs from Medicaid. Another comment suggested that Medicaid reimburse costs entirely under CNA training costs rather than to divide them between training costs and the regular cost report. A commenter called for the state to pay all costs of testing. Another comment stated that Medicaid and not the Division of Long Term Care

Residents Protection should issue these regulations because they are a Medicaid fiscal issue. The Medicaid reimbursement methodology in place in the Medicaid State Plan is the mechanism by which the state pays facilities for CNA training and testing costs; and, therefore, the Division of Long Term Care Residents Protection is not including in these regulations fiscal matters that are the province of Medicaid.

One comment called attention to the section of the state law pertaining to CNA training which says that it is the intent of the General Assembly that costs to entities administering CNA training courses be offset to the fullest extent possible by state and federal training funds. Currently, several schools offering CNA training programs receive funding from the Department of Labor. Facility-based programs may wish to explore their potential eligibility for such funding.

Several comments were received expressing concerns about nonfacility-based training programs raising their rates if students were eligible for reimbursement by a facility. It should be noted that federal regulations already require such reimbursement, so these regulations should not provide any new incentive for training programs to raise rates. In any event, since students who are not eligible for any other funding source must pay training costs out of pocket, school-based training programs imposing excessive rate increases would lose enrollments.

A comment proposed that a reasonable charge for nonfacility-based training programs be established prior to the adoption of these regulations. The Division of Long Term Care Residents Protection has no authority to set charges for training programs.

Another comment expressed concern that CNAs who are eligible for reimbursement of personally incurred expenses might encounter difficulty in finding jobs if they are competing for employment with applicants who are not eligible for reimbursement. The comment raises a legitimate concern, and the ease or difficulty with which a CNA eligible for reimbursement finds employment may be dictated by the facility's ease or difficulty in complying with minimum staffing requirements.

A commenter questioned how to handle a situation in which a facility hires a previously trained CNA and subsequently decides to retrain the CNA in the facility's training program because the facility found the individual's skills inadequate. A facility's decision to retrain an employee has no effect on the initial reimbursement requirement if the employee is eligible for reimbursement. If the facility subsequently expends additional funds to retrain the individual, those expenditures should be eligible for reimbursement through the cost-reporting process.

Comments were received urging that reimbursement to CNAs for personally incurred costs of training and testing should take place after a CNA has worked at the facility for one year in order to encourage the employee to remain at the facility for at least that period. By pro-rating payments over a year's time, these regulations attempt to address that concern while also recognizing the CNA's interest in recouping those expenditures.

Another comment proposed that these regulations extend to all Medicare and Medicaid certified entities that hire CNAs including home health agencies, temporary staffing agencies and hospitals. The Division of Long Term Care Residents Protection has jurisdiction strictly over long term care facilities and has no authority to regulate other entities.

Along the same lines, a comment called for the reimbursement requirements to be expanded by using the term "long term care facilities" rather than "nursing homes" so that the regulations would be more inclusive. The federal regulations that form the basis for the reimbursement requirement apply only to federally certified nursing facilities.

One comment expressed concern that facilities would be responsible for keeping records of all items in the CNA Registry. Nothing in these regulations assigns such responsibility to facilities; the Division of Long Term Care Residents Protection maintains records for the Delaware CNA Registry.

A comment criticized the requirement that facilities notify the Division upon reimbursing a CNA's personally incurred training costs, saying that the Division would be aware of the individual because the Division had issued the certification and that the notification would be a violation of the facility's privacy. The Division's issuance of certification is based on the applicant completing the Delaware training and testing requirement or meeting the requirements for reciprocal certification from another state. Nothing in the certification criteria relates to the source of payment for training. The purpose of requiring notification of reimbursement is to protect facilities from duplicating reimbursements, not to invade their privacy.

Comments called for addressing the matter of a duplicate reimbursement to a CNA by having the Division remove the CNA from the CNA Registry or otherwise note the fraudulent activity in the database until the duplicated payment is repaid to the facility. The CNA Registry is established under federal regulations which do not include provisions for such action to be taken. The issue of potential duplicated reimbursements is dealt with in these regulations by the requirement that facilities notify the Division upon reimbursing personally incurred training costs to students. The maintenance of that reimbursement data by the Division will enable any facility questioning the

eligibility of a CNA for reimbursement to prevent a duplicated payment by contacting the Division before initiating the reimbursement.

One comment proposed that a standard Division form be developed to report reimbursements by facilities to CNAs with the form identifying the individual at the Division who will enter the information in the database. If such a standard form is needed, the Division will prepare one. However, since several Division employees assist in responding to CNA inquiries and maintaining the CNA Registry database, the form would not identify a single contact person.

A commenter disputed the enforcement of these regulations in a facility that does not have a facility-based CNA training program. It should be noted that the regulations apply to all federally certified nursing facilities regardless of whether a facility chooses to have its own training program.

A commenter described scenarios that a facility might implement to avoid reimbursement to an employee or to prevent a school from charging a student for training. Implementation of such schemes would violate federal regulations. The commenter also characterized the regulations as a tax which the Division of Long Term Care Residents Protection has no authority to impose. The Division is not imposing a tax; it is clarifying federal regulations which already apply to federally certified nursing facilities.

One comment complained of the inadequacy of Medicaid reimbursement and stated that Medicare's portion of the training costs are eliminated. In fact, the training costs are to be allocated to Medicaid, Medicare and private pay patients based on patient days of service.

A comment complained that the regulations permit schools to shift their costs to facilities. Inasmuch as these regulations and federal regulations require reimbursement of student costs, it is costs being borne by students rather than costs being borne by schools that are the subject of these regulations.

One comment objected to the regulation that the 64 hours of nursing related services required for recertification be performed for pay. The comment stated that volunteer services should qualify for recertification. The requirement for 64 hours of nursing related services is intended to ensure that CNAs are current in maintaining their skills. By requiring that the 64 hours are performed for pay, a mechanism is established to verify the necessary maintenance of those skills. An ongoing issue of claims of unverifiable volunteer services has directly led to this regulation.

A comment objected to the reimbursement of costs to an employee on a quarterly basis. The comment appears to assume that an employee who left employment at a time other than the end of a quarter would not be eligible for reimbursement for less than a full quarter of work. That assumption should not be read into the regulation.

## **69 Regulations for Training and Qualifications for Nursing Assistants and Certified Nursing Assistants**

### **Section 69.200 – General Training Requirements And Competency Test**

Each Nursing Assistant/Certified Nursing Assistant employed by any nursing facility either as contract/agency or facility staff shall be required to meet the following:

69.201 An individual shall complete a nursing assistant training course approved by the Department on the recommendation of the CNA Training Curriculum Committee. The Committee shall consist of individuals with experience in the knowledge and skills required of CNAs.

69.202 Nursing Assistants are required to pass a competency test provided by the Department or by a contractor approved by the Department.

69.203 Nursing Assistants shall take the competency test within 30 days of completion of an approved program or when the nearest testing location is available to the nursing assistant, whichever is later. Nursing assistants who fail to obtain a passing score may repeat the test two additional times, but must obtain certification within 90 days of program completion. Nursing assistants who fail to obtain a passing score after testing three times must repeat the CNA training program before retaking the test, or they cannot continue to work as a nursing assistant.

69.204 A Certified Nursing Assistant must perform at least 64 hours of nursing related services ~~in a health care setting~~ for pay under the supervision of a licensed nurse or physician during each 24-month certification period in order to qualify for recertification. A certified nursing assistant who does not perform at least 64 hours of nursing related services in a certification period must complete and pass a new training course and competency test, or competency test.

69.205 A Certified Nursing Assistant trained and certified outside the State of Delaware in a program that equals or exceeds the federal nurse aide training program requirements in the Code of Federal Regulations § 483.152 cannot work in Delaware without a Delaware certificate. Delaware certification is required prior to being employed as a CNA. The Department will grant reciprocity if the following conditions are met:

A. The CNA must have a current certificate from the jurisdiction where he or she currently practices, except that candidates from the State of Maryland must hold a current Geriatric Nursing Assistant certificate.

B. The CNA must have 3 months of full-time experience as a CNA performing nursing related services for pay under the supervision of a licensed nurse or physician, or have completed a training and competency evaluation program with the number of hours at least equal to that required by the State of Delaware.

C. The CNA must be in good standing in the jurisdiction where he/she is currently certified.

69.206 Employees hired as Nursing Assistants/Certified Nursing Assistants who are currently enrolled in an RN or LPN nursing program and have satisfactorily completed a Fundamentals/Basic Nursing course with a clinical component will be deemed to meet the training requirements. These individuals will be approved to take the competency test upon submission of a letter from their school of nursing attesting to current enrollment status and satisfactory course completion as described.

69.207 Individuals who have graduated from an RN or LPN program within 24 months prior to application for certification are deemed qualified to meet the Department's nurse aide training and competency evaluation program requirements and are eligible for certification upon submission of a sealed copy of their diploma. Individuals who have graduated from an RN or LPN program more than 24 months prior to application for certification are deemed qualified to meet the Department's nurse aide training program requirements and are eligible to take the competency test upon submission of a sealed copy of their diploma.

69.208 An individual who has satisfactorily completed a military nursing assistant training course or hospital-based nursing assistant training course of at least 150 hours with a curriculum comparable to the curriculum content of Section 69.303 of these regulations and who has performed nursing related services within 24 months prior to application for certification is deemed qualified to meet the Department's nurse aide training program requirements and is eligible to take the competency test upon submission of documentation of course completion.

69.208~~9~~ For the purpose of calculating minimum staffing levels, any individual who has completed all of the classroom training and half of the clinical training in a facility sponsored training program may be considered as a member of such facility's staff while undergoing the last 37.5 hours of clinical training at such facility.

~~69.209 A nursing assistant who is employed by, or who has received an offer of employment from, a facility on the date on which the aide begins a nurse aide training and competency evaluation program may not be charged for any portion of the program including tuition, initial and any subsequent testing and fees for textbooks or other required course materials.~~

~~69.210 If a certified nursing assistant who is not employed, or does not have an offer to be employed as a nurse aide becomes employed by, or receives an offer of employment from, a facility not later than 12 months after completing a nurse aide training and competency evaluation program, the facility shall reimburse all personally incurred costs in completing the program. Such costs include tuition, initial and any subsequent testing and fees for textbooks or other required course materials. Such costs are payable upon completion by the CNA of a six month period of employment including the orientation period.~~

~~69.211 The facility shall be required to notify the Department upon reimbursement to a CNA of personally incurred costs of the nurse aide training and competency evaluation program for the purpose of inclusion in the CNA registry database. Facilities may contact the Department to verify the reimbursement status of any CNA seeking such reimbursement.~~

69.210 A nursing assistant who is employed by, or who has received an offer of employment from, a federally certified nursing facility on the date on which the aide begins a nurse aide training and competency evaluation program may not be charged for any portion of the program including tuition, any tests taken and fees for textbooks or other required course materials.

69.211 If a Certified Nursing Assistant who is not employed, or does not have an offer to be employed as a nurse aide becomes employed by, or receives an offer of employment from, a federally certified nursing facility not later than 12 months after completing a nurse aide training and competency evaluation program, the federally certified nursing facility shall reimburse all documented personally incurred costs in completing the program. Facilities shall accept as documentation canceled checks, paid receipts, written verification from a training program or other written evidence which reasonably establishes the CNA's personally incurred costs. Such costs include tuition, tests taken and fees for textbooks or other required course materials. Such costs shall be reimbursed in equal quarterly payments with full reimbursement to coincide with the CNA's completion of one year of employment including the orientation period.

69.212 Any nursing facility which reimburses a Certified Nursing Assistant for documented personally incurred costs of a nurse aide training and competency evaluation program shall notify the Division of Long Term Care Residents Protection of such reimbursement. Notice of such reimbursement shall be entered in the CNA Registry database and information regarding such reimbursement shall be available to facilities upon request.

8 DE Reg. 1014 (01/01/05)