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State of Kansas
Office of the Attorney General

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ATTORNEY GENERAL OPINION NO. 2002- 49

The Honorable Willa DeCastro
State Representative, 96th District
4515 Pattie
Wichita, Kansas 67216

Re: Public Health--Regulation of Nursing; Nurses--Definitions; Practice of Nursing; Unlawful Acts

Synopsis: Attendant care services, such as medication administration, dressing changes and enteral tube feeding provided by an unlicensed attendant to an individual who is in need of and receiving in-home care, are exempt from the unlawful practice of nursing, provided the individual receiving the services has been approved by a registered nurse or a physician to self-direct his or her care pursuant to K.S.A. 65-6201. In order to be approved, the individual who directs the services must be functionally, not mentally, disabled and must be able to perform the services but for this disability, and the services include only those that may be safely performed in the home. Additionally, although attendants and home health aides perform some of the same services, attendants performing attendant care services pursuant to K.S.A. 65-6201 are exempt from the requirements of training and examination required of home health aides. Cited herein: K.S.A. 39-7,100; 65-1114; K.S.A. 2001 Supp. 65-1115; 65-1122; 65-1124; 65-1165; K.S.A. 65-5101; K.S.A. 2001 Supp. 65-5112; K.S.A. 65-5115; 65-6201; K.A.R. 28-39-171; 30-5-300; 42 U.S.C. § 1396n.

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Dear Representative DeCastro:

You inquire whether the guidelines¹ dealing with the role of personal care attendants and issued by the Kansas Department of Social and Rehabilitation Services conflict with the statutes or regulations governing the practice of nursing.

You indicate that in your opinion the guidelines expand the role of a personal care attendant to include medication administration, dressing changes and enteral tube feeding under circumstances that you believe require the skill level of a licensed professional. Your question arises in the context of home health care provided under home and community based services programs² and is limited to skilled services performed by an attendant who is not required to be licensed or certified. At issue is whether the services being performed constitute the practice of nursing, thus requiring that one performing the duties or providing the services be licensed as a registered nurse or a licensed practical nurse.

K.S.A. 39-7,100 defines the home and community based services (HCBS) programs as:

"[T]he programs established under the state medical assistance program under plans or waivers as defined in the federal social security act in accordance with the plans or waivers adopted by the secretary of social and rehabilitation services and the secretary of aging, either separately or jointly, to provide attendant care services to individuals in need of in-home care who would require admission to an institution if the attendant care services were not otherwise provided."

States may request waivers of certain federal Medicaid requirements in order to develop Medicaid-financed community-based treatment alternatives.³ The Kansas Department of Social and Rehabilitation Services administers the waiver programs that afford alternative care to Medicaid-eligible individuals who would otherwise be placed in an institutional care facility. Eligible individuals receive attendant care services⁴ defined as:

"[T]hose basic and ancillary services which enable an individual in need of in-home care to live in the individual's home and community rather than in an institution and to carry out functions of daily living, self-care and mobility."⁵

¹SRS document entitled "The Kansas 2002 Legislative Session, Detailed Schedule of Legislative Policy Changes That Affect the SRS Budget."

²The waiver program is authorized by Section 1915(c) of the Social Security Act, codified at 42 U.S.C. § 1396n(c).

³More information is available at the Centers for Medicare and Medicaid Services website available at <<http://cms.hhs.gov>>.

⁴The terms "attendant" and "personal care attendant" are used interchangeably, K.S.A. 39-7,100.

⁵K.S.A. 65-6201(a); 65-5101(j). See also K.A.R. 30-5-300(a)(43) (definition of self-directed care.)

In order to be eligible for the services under the waiver program, a person must be an "individual in need of in-home care," defined as:

"[A]ny functionally disabled individual in need of attendant care services because of impairment who requires assistance to complete functions of daily living, self-care and mobility, including, but not limited to, those functions included in the definition of attendant care services."⁶

An eligible individual is one who is functionally disabled, not mentally disabled, because the services performed by an attendant are directed by the eligible individual.⁷ Among the basic services that might be performed by an attendant are health maintenance activities, defined by statute to include:

"[C]atheter irrigation; administration of medications, enemas and suppositories; and wound care, if such activities in the opinion of the attending physician or licensed professional nurse may be performed by the individual if the individual were physically capable, and the procedure may be safely performed in the home."⁸

Included in the definition of health maintenance activities are two of the three the services in question. Both medication administration and dressing changes are within the services performed by an attendant, and the services may also include nutritional intake such as enteral tube feeding if it meets the requirements imposed by the statute where an attending physician or a licensed professional nurse finds that the tube feeding could be performed by the individual if the individual were physically capable and the procedure may be safely performed in the home under the specific circumstances.

Although these services may require the skill level of a licensed professional, in the context of self-directed care the services are exempt from the unlawful practice of nursing by K.S.A. 65-1124 (l):

"No provisions of this law shall be construed as prohibiting:

.....

"(l) performance of attendant care services directed by or on behalf of an individual in need of in-home care as the terms 'attendant care services' and 'individual in need of in-home care' are defined under K.S.A. 65-6201 and amendments thereto."

⁶K.S.A. 65-6201(e).

⁷K.S.A. 39-7,100(4).

⁸K.S.A. 65-6201(d).

In conclusion, it is our opinion that services such as medication administration, dressing changes and enteral tube feeding may be provided by an unlicensed attendant without violating the Nurse Practice Act when performed as directed by a individual receiving in home care who has been approved by a registered nurse or a physician to self-direct the services as part of his or her care pursuant to K.S.A. 65-6201.

Your second question is whether a personal care attendant performs duties without proper certification given that an attendant performs the same duties as a certified home health aide.

A home health aide is statutorily defined as:

"An employee of a home health agency who is not licensed or professionally registered to provide home health services but who assists, under supervision, in the provision of home health services and who provides related health care to patients but shall not include employees of a home health agency providing only attendant care services."⁹

A home health aide performs home health services defined as:

"[A]ny of the following services provided at the residence of the patient on a full-time, part-time or intermittent basis: Nursing, physical therapy, speech therapy, nutritional or dietetic consulting, occupational therapy, respiratory therapy, home health aid, attendant care services or medical social services."¹⁰

Although it is clear from the definition of services provided by a home health aide that an attendant performs some of the duties that are performed by a home health aide, there is no requirement that an attendant who provides only attendant care services pursuant to K.S.A. 65-6201 [self-directed care] be similarly trained and certified.¹¹ Moreover, home health agencies that provide only attendant care services pursuant to K.S.A. 65-6201 are not required to be licensed.¹²

In conclusion, it is our opinion that attendant care services, such as medication administration, dressing changes and enteral tube feeding provided by an unlicensed attendant to an individual who is in need of receiving in home care are exempt from the

⁹K.S.A. 65-510(d).

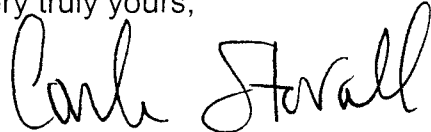
¹⁰K.S.A. 65-510(c).

¹¹A home health aide must complete an approved course of instruction and take an examination prescribed the Kansas Department of Health and Environment. K.S.A. 65-5115; K.A.R. 28-39-171.

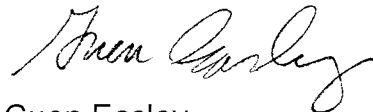
¹²K.S.A. 65-5102. See K.S.A. 2001 Supp. 65-5112 (home health agency act not applicable to individuals performing attendant care services pursuant to K.S.A. 65-6201 when not employed or doing work for a home health agency).

unlawful practice of nursing, provided the individual receiving the services has been approved by a registered nurse or a physician to self-direct his or her care pursuant to K.S.A. 65-6201. In order for the services to be approved, the individual in need of care who directs the services must be functionally disabled and able to perform the services but for this disability, and the services include only those that may be safely performed in the home. Additionally, although attendants and home health aides perform some of the same services, attendants performing services pursuant to K.S.A. 65-6201 are exempt from the requirements of training and examination required of home health aides.

Very truly yours,



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