

STATE OF TENNESSEE

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Opinion No. 10-32

Standards for Nursing Services in Residential Hospices

QUESTION

Whether a federal interpretive guideline contained in the recent interim final Hospice Program Interpretive Guidance that specifically interprets 42 C.F.R. § 418.110(b)(2) and does not require that each shift include a registered nurse who provides direct patient care in all circumstances preempts or modifies the applicable Tennessee Department of Health rule regarding nursing services in residential hospices, Tenn. Comp. R. & Regs. 1200-08-15-.06(1)(a).

OPINION

No. Interpretive Guideline § 418.110(b)(2), which is contained in the recent interim final Hospice Program Interpretive Guidance promulgated by the Department of Health and Human Services, Centers for Medicare and Medicaid Services, Center for Medicaid and State Operations/Survey and Certification Group ("CMS"), and which is related to the 42 C.F.R. Part 418 Conditions of Participation for hospices and specifically interprets 42 C.F.R. § 418.110(b)(2), neither preempts nor modifies the applicable Department of Health rule regarding nursing services in residential hospices, Tenn. Comp. R. & Regs. 1200-08-15-.06(1)(a). 42 C.F.R. § 418.116 requires that the hospice and its staff furnish services in compliance with all federal, state and local laws, including state or local law that provides for licensing of hospices. Further, the "Principles of Documentation" for the Statement of Deficiencies promulgated by CMS as Chapter 9, Exhibit 7A to the Medicare State Operations Manual clarify that in the event there is a difference between the stringency of a federal certification requirement and a corresponding state or local licensing requirement, the entity is to comply with the more stringent of the two requirements.

ANALYSIS

The rules of the Tennessee Department of Health, Board for Licensing Health Care Facilities, Standards for Residential Hospices regarding "Basic Hospice Functions," provide in Tenn. Comp. R. & Regs. 1200-08-15-.06(1)(a):

- (a) Nursing services. The residential hospice must provide nursing care and services by, or under the supervision of, a registered nurse (R.N.) at all times.

1. Nursing services must be directed and staffed to assure the nursing needs of patients and residents are met.
2. Patient and resident care responsibilities of nursing personnel must be specified.
3. Hospice services and HIV care services must be provided in accordance with recognized standards of practice.
4. Nursing services include the authorization of a Registered Nurse to pronounce the death of a patient or resident.

In addition, 42 C.F.R. § 418.110(b) provides:

- (b) Standard: Twenty-four hour nursing services.
- (1) The hospice facility must provide 24-hour nursing services that meet the nursing needs of all patients and are furnished in accordance with each patient's plan of care. Each patient must receive all nursing services as prescribed and must be kept comfortable, clean, well-groomed, and protected from accident, injury, and infection.
 - (2) If at least one patient in the hospice facility is receiving general inpatient care, then each shift must include a registered nurse who provides direct patient care.

Your question emanates from an updated Hospice Program Interpretive Guideline that represents the most recent guidance related to the 42 C.F.R. Part 418 Conditions of Participation for hospices, the relevant section of which is set out above. The recently promulgated Interpretive Guideline section for § 418.110(b)(2) states:

The general inpatient care provided in a facility for pain control or acute or chronic symptom management, which cannot be managed in other settings, is a different level of care than respite care. It is not automatically necessary to have an RN assigned to every shift *to provide direct patient care* if the only hospice patients in a facility are receiving the respite or routine levels of care. Staffing for a facility solely providing the respite or routine home care levels of care to hospice patients should be based on each patient's care needs. The requirements for nursing services for respite care are located at § 418.108(b)(2).

(Emphasis added.)¹

¹ The "Procedures and Probes" that follow the above Interpretive Guideline for § 418.110(b)(2) provide: "Ask the hospice for a schedule of RN personnel for the past month and inquire about the mechanism *to ensure an RN provides direct patient care on each shift.*" (emphasis added).

The distinction between the condition of participation required by §418.110(b)(2) (regarding hospices that provide inpatient care directly) and that reflected in §418.108(b)(2) (regarding facilities that provide short-term inpatient care for respite purposes) concerns whether the patient must be provided *direct* patient care by a registered nurse, not merely whether a registered nurse is required to be present on each shift. In fact, § 418.110(b)(2) mandates that "[i]f at least one patient in the hospice facility is receiving general inpatient care, then each shift must include a registered nurse who provides direct patient care." On the other hand, § 418.108(b)(2) contains no such requirement for provision of direct patient care by a registered nurse: "The facility providing respite care must provide 24-hour nursing services that meet the nursing needs of all patients and are furnished in accordance with each patient's plan of care. Each patient must receive all nursing services as prescribed and must be kept comfortable, clean, well-groomed, and protected from accident, injury, and infection."

As is set out above, the applicable state licensing rule, Tenn. Comp. R. & Regs. 1200-08-15-.06(1)(a), requires that the residential hospice provide nursing care and services by, or under the supervision of, a registered nurse at all times. In turn, Tenn. Comp. R. & Regs. 1200-08-15-.01(77) defines "supervision" as "[a]uthoritative procedural guidance by a qualified person for the accomplishment of a function or activity with initial direction and periodic inspection of the actual act of accomplishing the function or activity. Periodic supervision must be provided if the person is not a licensed or certified assistant, unless otherwise provided in accordance with these regulations."

Both the applicable federal regulations and guidelines, as well as Tenn. Comp. R. & Regs. 1200-08-15-.06(1)(a), require the provision of twenty-four hour nursing services in an inpatient/residential hospice setting.² However, neither federal nor state law requires the provision of direct patient care by a registered nurse in all hospice circumstances. The above state regulation requires that the residential hospice provide nursing care and services by, or under the supervision of, a registered nurse at all times, while 42 C.F.R. § 418.110(b)(2) requires that "each shift must include a registered nurse who provides direct patient care," but only "[i]f at least one patient in the hospice facility is receiving general inpatient care."

Even if there were a conflict between the requirements of 42 C.F.R. § 418.110(b)(2) and Tenn. Comp. R. & Regs. 1200-08-15-.06(1)(a) (and we do not believe that there exists any direct conflict between the two provisions), then neither the federal requirement nor its corollary Interpretive Guideline would preempt or modify a more stringent state licensing requirement.

The reason for this is twofold. First, § 418.116 requires that "[t]he hospice and its staff must operate and furnish services in compliance with all applicable Federal, State and local laws and regulations related to the health and safety of patients. If State or local law provides for

² We note that 2009 Pub. Chap. 36, § 2, amended Tenn. Code Ann. § 68-11-201(26) by deleting the second sentence in its entirety, which had read: "Hospice services shall be provided twenty-four (24) hours a day, seven (7) days a week," and substituting instead the following: "Hospice services shall be available twenty-four hours a day, seven (7) days a week pursuant to the patient's hospice plan of care." Such amendment became effective April 8, 2009, and currently is incorporated in a newly-designated subsection (28). However, we do not believe that this recent statutory amendment alters our analysis since the language in § 418.108(b)(2) and § 418.110(b)(1) discussed above requires the *provision* of twenty-four hour nursing services in an inpatient hospice setting.

licensing of hospices, the hospice must be licensed." Second, the "Principles of Documentation" for the Statement of Deficiencies promulgated by CMS as Chapter 9, Exhibit 7A to the Medicare State Operations Manual clarify that in the event there is a difference between the stringency of a federal certification requirement and a corresponding state or local [licensing] requirement, the entity is to comply with the more stringent of the two requirements. These "Principles of Documentation" are guidelines that include a general discussion of the legal aspects of the Statements of Deficiencies and identify and explain the principles considered in the citations of deficiencies.³ Principle #6, "Citation of State or Local Code Violations," provides in pertinent part:

Federal certification requirements are uniform throughout the United States. However, States and localities may have additional requirements that the entity must meet in order to continue to operate within those jurisdictions. Some licensing requirements may be more stringent or prescriptive than Federal requirements. Licensure surveys are conducted to determine an entity's compliance with specific State or local laws or regulations. Entities that do not meet the State or local requirements for licensure may not be certified for participation in the Medicare/Medicaid programs.

In the event of a difference in the stringency of a Federal certification requirement and a corresponding State or local (e.g., licensing) requirement, the entity is to comply with the more stringent of the two.

Based on the above, it is our opinion that Interpretive Guideline § 418.110(b)(2), relative to 42 C.F.R. § 418.110(b)(2), neither preempts nor modifies the applicable Department of Health rule regarding nursing services in residential hospices, Tenn. Comp. R. & Regs. 1200-08-15-.06(1)(a).

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³ These deficiencies are to be documented on a specific form (the record of the survey wherein the survey team documents and justifies its determination of compliance and informs the provider or supplier regarding its status of compliance with the requirements for participation in the federal programs).

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