

LEGISLATIVE BILL 1053

Approved by the Governor August 15, 2020

Introduced by Health and Human Services Committee: Howard, 9, Chairperson; Arch, 14; Cavanaugh, 6; Hansen, B., 16; Murman, 38; Walz, 15; Williams, 36.

A BILL FOR AN ACT relating to public health and welfare; to amend sections 71-401, 71-403, 71-404, 71-413, 71-415, 71-416, 71-417, 71-436, 71-2085, 71-2086, 71-2087, 71-2092, 71-2093, 71-2094, and 71-6720, Reissue Revised Statutes of Nebraska, and section 68-901, Revised Statutes Supplement, 2019; to require adoption of rules and regulations for certain reimbursement rates under the Medical Assistance Act; to define and redefine terms and change licensure provisions under the Health Care Facility Licensure Act; to change receiver and receivership provisions relating to health care facilities; to change applicability of the Medication Aide Act; to harmonize provisions; to provide operative dates; and to repeal the original sections.

Be it enacted by the people of the State of Nebraska,

Section 1. Section 68-901, Revised Statutes Supplement, 2019, is amended to read:

68-901 Sections 68-901 to 68-994 and section 2 of this act shall be known and may be cited as the Medical Assistance Act.

Sec. 2. The department shall adopt and promulgate rules and regulations regarding the rate methodology for reimbursement of hospital and nursing facility services. Any change to the rate methodology is considered substantive and requires a new rulemaking or regulationmaking proceeding under the Administrative Procedure Act.

Sec. 3. Section 71-401, Reissue Revised Statutes of Nebraska, is amended to read:

71-401 Sections 71-401 to 71-475 and sections 10 to 12 of this act shall be known and may be cited as the Health Care Facility Licensure Act.

Sec. 4. Section 71-403, Reissue Revised Statutes of Nebraska, is amended to read:

71-403 For purposes of the Health Care Facility Licensure Act, unless the context otherwise requires, the definitions found in sections 71-404 to 71-431 and sections 10 to 12 of this act shall apply.

Sec. 5. Section 71-404, Reissue Revised Statutes of Nebraska, is amended to read:

71-404 (1) Adult day service means a person or any legal entity which provides care and an array of social, medical, or other support services for a period of less than twenty-four consecutive hours in a community-based group program to four or more persons who require or request such services due to age or functional impairment.

(2) Adult day service does not include services provided under the Developmental Disabilities Services Act or a PACE center.

Sec. 6. Section 71-413, Reissue Revised Statutes of Nebraska, is amended to read:

71-413 Health care facility means an ambulatory surgical center, an assisted-living facility, a center or group home for the developmentally disabled, a critical access hospital, a general acute hospital, a health clinic, a hospital, an intermediate care facility, an intermediate care facility for persons with developmental disabilities, a long-term care hospital, a mental health substance use treatment center, a nursing facility, a PACE center, a pharmacy, a psychiatric or mental hospital, a public health clinic, a rehabilitation hospital, or a skilled nursing facility.

Sec. 7. Section 71-415, Reissue Revised Statutes of Nebraska, is amended to read:

71-415 Health care service means an adult day service, a children's day health service, a home health agency, a hospice or hospice service, a PACE center, or a respite care service, ~~or beginning January 1, 2011, a children's day health service~~. Health care service does not include an in-home personal services agency as defined in section 71-6501.

Sec. 8. Section 71-416, Reissue Revised Statutes of Nebraska, is amended to read:

71-416 (1) Health clinic means a facility where advice, counseling, diagnosis, treatment, surgery, care, or services relating to the preservation or maintenance of health are provided on an outpatient basis for a period of less than twenty-four consecutive hours to persons not residing or confined at such facility. Health clinic includes, but is not limited to, an ambulatory surgical center or a public health clinic.

(2) Health clinic does not include (a) a health care practitioner facility (i) unless such facility is an ambulatory surgical center, (ii) unless ten or more abortions, as defined in subdivision (1) of section 28-326, are performed during any one calendar week at such facility, or (iii) unless hemodialysis or labor and delivery services are provided at such facility, or (b) a facility which provides only routine health screenings, health education, or

immunizations, or (c) a PACE center.

(3) For purposes of this section:

(a) Public health clinic means the department, any county, city-county, or multicounty health department, or any private not-for-profit family planning clinic licensed as a health clinic;

(b) Routine health screenings means the collection of health data through the administration of a screening tool designed for a specific health problem, evaluation and comparison of results to referral criteria, and referral to appropriate sources of care, if indicated; and

(c) Screening tool means a simple interview or testing procedure to collect basic information on health status.

Sec. 9. Section 71-417, Reissue Revised Statutes of Nebraska, is amended to read:

71-417 (1) Home health agency means a person or any legal entity which provides skilled nursing care or a minimum of one other therapeutic service as defined by the department on a full-time, part-time, or intermittent basis to persons in a place of temporary or permanent residence used as the person's home.

(2) Home health agency does not include a PACE center.

Sec. 10. PACE center means a facility from which a PACE provider offers services within the scope of a PACE program pursuant to a written agreement between the provider, the United States Department of Health and Human Services, and the Nebraska Department of Health and Human Services.

Sec. 11. PACE program means a program of all-inclusive care for elderly under 42 U.S.C. 1396u-4, as such section existed on January 1, 2020.

Sec. 12. PACE provider means provider of services pursuant to a PACE program meeting the requirements of 42 U.S.C. 1396u-4(a)(3), as such section existed on January 1, 2020.

Sec. 13. Section 71-436, Reissue Revised Statutes of Nebraska, is amended to read:

71-436 (1) Except as otherwise provided in section 71-470, an applicant for licensure under the Health Care Facility Licensure Act shall obtain a separate license for each type of health care facility or health care service that the applicant seeks to operate. A single license may be issued for (a) a facility or service operating in separate buildings or structures on the same premises under one management, (b) an inpatient facility that provides services on an outpatient basis at multiple locations, or (c) a health clinic operating satellite clinics on an intermittent basis within a portion of the total geographic area served by such health clinic and sharing administration with such clinics. A single license shall be issued for a PACE center which meets the requirements for licensure established by the department pursuant to section 71-457.

(2) The department may issue one license document that indicates the various types of health care facilities or health care services for which the entity is licensed. The department may inspect any of the locations that are covered by the license. If an entity is licensed in multiple types of licensure for one location, the department shall conduct all required inspections simultaneously for all types of licensure when requested by the entity.

Sec. 14. Section 71-2085, Reissue Revised Statutes of Nebraska, is amended to read:

71-2085 The department may petition the district court of Lancaster County or the county where the health care facility is located for appointment of a receiver for a health care facility when any of the following conditions exist:

(1) If the department determines that the health, safety, or welfare of the residents or patients is in immediate danger;

(2) The health care facility is operating without a license;

(3) The department has suspended, revoked, or refused to renew the existing license of the health care facility;

(4) The health care facility is closing, or has informed the department that it intends to close, and adequate arrangements for the relocation of the residents or patients of such health care facility have not been made at least thirty days prior to closure; or

(5) The department determines that an emergency exists, whether or not it has initiated revocation or nonrenewal procedures, and because of the unwillingness or inability of the licensee, owner, or operator to remedy the emergency, the department believes a receiver is necessary.

Sec. 15. Section 71-2086, Reissue Revised Statutes of Nebraska, is amended to read:

71-2086 (1) The department shall file the petition for the appointment of a receiver provided for in section 71-2085 in the district court of Lancaster County or the county where the health care facility is located and shall request that a receiver be appointed for the health care facility. Unless otherwise approved by the court, no person shall be appointed as a receiver for more than six health care facilities at the same time.

(2) The court shall expeditiously hold a hearing on the petition within seven days after the filing of the petition. The department shall present evidence at the hearing in support of the petition. The licensee, owner, or operator may also present evidence, and both parties may subpoena witnesses. The court may appoint a temporary receiver for the health care facility ex parte if the department, by affidavit, states that an emergency exists which presents an imminent danger of death or physical harm to the residents or patients of the health care facility. If a temporary receiver is appointed, notice of the petition and order shall be served on the licensee, owner,

operator, or administrator of the health care facility within seventy-two hours after the entry of the order. The petition and order may be served by any method specified in section 25-505.01 or the court may permit substitute or constructive service as provided in section 25-517.02 when service cannot be made with reasonable diligence by any of the methods specified in section 25-505.01. A hearing on the petition and temporary order shall be held within seventy-two hours after notice has been served unless the licensee, owner, or operator consents to a later date. After the hearing the court may terminate, continue, or modify the temporary order. If the court determines that the department did not have probable cause to submit the affidavit in support of the appointment of the temporary receiver, the court shall have the jurisdiction to determine and award compensatory damages against the state to the owner or operator. If the licensee, owner, or operator informs the court at or before the time set for hearing that the licensee, owner, or operator he or she does not object to the petition, the court shall waive the hearing and at once appoint a receiver for the health care facility.

(3) The purpose of a receivership created under this section is to safeguard the health, safety, and continuity of care of residents and patients and to protect them from adverse health effects. A receiver shall not take any actions or assume any responsibilities inconsistent with this purpose. No person shall impede the operation of a receivership created under this section. After the appointment of a receiver, there shall be an automatic stay of any action that would interfere with the functioning of the health care facility, including, but not limited to, cancellation of insurance policies executed by the licensee, owner, or operator, termination of utility services, attachments or setoffs of resident trust funds or working capital accounts, and repossession of equipment used in the health care facility. The stay shall not apply to any licensure, certification, or injunctive action taken by the department.

Sec. 16. Section 71-2087, Reissue Revised Statutes of Nebraska, is amended to read:

71-2087 When a receiver is appointed under section 71-2086, the licensee, owner, or operator shall be divested of possession and control of the health care facility in favor of the receiver. The appointment of the receiver shall not affect the rights of the owner or operator to defend against any claim, suit, or action against such owner or operator or the health care facility, including, but not limited to, any licensure, certification, or injunctive action taken by the department. A receiver shall:

(1) Take such action as is reasonably necessary to protect and conserve the assets or property of which the receiver takes possession or the proceeds of any transfer of the assets or property and may use them only in the performance of the powers and duties set forth in this section and section 71-2088 or by order of the court;

(2) Apply the current revenue and current assets of the health care facility to current operating expenses and to debts incurred by the licensee, owner, or operator prior to the appointment of the receiver. The receiver may apply to the court for approval for payment of debts incurred prior to appointment if the debts appear extraordinary, of questionable validity, or unrelated to the normal and expected maintenance and operation of the health care facility or if the payment of the debts will interfere with the purposes of the receivership. The receiver shall give priority to expenditures for current, direct resident care, including nursing care, social services, dietary services, and housekeeping;

(3) Be responsible for the payment of taxes against the health care facility which become due during the receivership, including property taxes, sales and use taxes, withholding, taxes imposed pursuant to the Federal Insurance Contributions Act, and other payroll taxes, but not including state and federal taxes which are the liability of the owner or operator;

(4) Be entitled to and take possession of all property or assets of residents or patients which are in the possession of the licensee, owner, operator, or administrator of the health care facility. The receiver shall preserve all property, assets, and records of residents or patients of which the receiver takes possession and shall provide for the prompt transfer of the property, assets, and necessary and appropriate records to the alternative placement of any transferred or discharged resident;

(5) Upon order of the court, provide for the orderly transfer of all residents or patients in the health care facility to other suitable facilities if correction of violations of federal and state laws and regulations is not possible or cannot be completed in a timely manner or there are reasonable grounds to believe the health care facility cannot be operated on a sound financial basis and in compliance with all applicable federal or state laws and regulations or make other provisions for the continued health, safety, and welfare of the residents or patients;

(6) Conduct a thorough analysis of the financial records of the health care facility within the first thirty days of the receivership, perform ongoing accountings throughout the remainder of the receivership, and provide monthly reports of the financial status of the health care facility to the court and the department Perform regular accountings; and

(7) Make monthly periodic reports to the court and the department related to plans for continued operation or sale of the health care facility.

Sec. 17. Section 71-2092, Reissue Revised Statutes of Nebraska, is amended to read:

71-2092 (1) A receivership established under section 71-2086 may be

terminated by the district court which established it after a hearing upon an application for termination. The application may be filed:

(a) Jointly by the receiver and the current licensee of the health care facility which is in receivership, stating that the deficiencies in the operation, maintenance, or other circumstances which were the grounds for establishment of the receivership have been corrected and that there are reasonable grounds to believe that the health care facility will be operated in compliance with all applicable statutes and the rules and regulations adopted and promulgated pursuant thereto;

(b) By the current licensee of the health care facility, alleging that termination of the receivership is merited for the reasons set forth in subdivision (a) of this subsection, but that the receiver has declined to join in the petition for termination of the receivership;

(c) By the receiver, stating that all residents or patients of the health care facility have been relocated elsewhere and that there are reasonable grounds to believe it will not be feasible to again operate the health care facility on a sound financial basis and in compliance with federal and state laws and regulations and asking that the court approve the surrender of the license of the health care facility to the department and the subsequent return of the control of the premises of the health care facility to the owner of the premises; or

(d) By the department (i) stating that the deficiencies in the operation, maintenance, or other circumstances which were the grounds for establishment of the receivership have been corrected and that there are reasonable grounds to believe that the health care facility will be operated in compliance with all applicable statutes and the rules and regulations adopted and promulgated pursuant thereto or (ii) stating that there are reasonable grounds to believe that the health care facility cannot be operated in compliance with federal or state law and regulations and asking that the court order the removal of the residents or patients to appropriate alternative placements, the closure of the facility, and the license, if any, surrendered to the department or that the health care facility be sold under reasonable terms approved by the court to a new owner meeting the requirements approved for licensure by the department.

(2) If the receivership has not been terminated within ~~six~~ twelve months after the appointment of the receiver, the court shall, after hearing, order either that the health care facility be closed after an orderly transfer of the residents or patients to appropriate alternative placements or that the health care facility be sold under reasonable terms approved by the court to a new owner meeting the requirements approved for licensure by the department. The closure or sale shall occur within sixty days after the court order, unless ordered otherwise, receivership period may be extended as necessary to protect the health, safety, and welfare of the residents or patients.

Sec. 18. Section 71-2093, Reissue Revised Statutes of Nebraska, is amended to read:

71-2093 The health care facility for which a receiver is appointed shall be responsible for payment of the expenses of a receivership established under section 71-2086 unless the court directs otherwise. The expenses include, but are not limited to:

(1) Compensation for the receiver and any related receivership expenses approved by the court;

(2) Expenses incurred by the health care facility for the continuing care of the residents or patients of the health care facility;

(3) Expenses incurred by the health care facility for the maintenance of buildings and grounds of the health care facility; and

(4) Expenses incurred by the health care facility in the ordinary course of business, such as employees' salaries and accounts payable.

Sec. 19. Section 71-2094, Reissue Revised Statutes of Nebraska, is amended to read:

71-2094 (1) No person shall bring an action against a receiver appointed under section 71-2086 without first securing leave of the court. The receiver and the members and officers of the receiver are liable in their individual is liable in his or her personal capacity for intentional wrongdoing or gross negligence.

(2) In all other cases, the receiver is liable in the receiver's his or her official capacity only, and any judgment rendered shall be satisfied out of the receivership assets. The receiver is not personally liable in the receiver's individual capacity for the expenses of the health care facility during the receivership. The receiver is an employee of the state only for the purpose of defending a claim filed against the receiver in the receiver's official capacity. If an action is brought against a receiver in the receiver's official capacity, the receiver may file a written request for counsel with the Attorney General asserting that such civil action is based in fact upon an alleged act or omission in the course and scope of the receiver's duties. The Attorney General shall thereupon appear and defend the receiver unless after investigation the Attorney General finds that the claim or demand does not arise out of an alleged act or omission occurring in the course and scope of the receiver's duties or the act or omission complained of amounted to intentional wrongdoing or gross negligence, in which case the Attorney General shall give the receiver written notice that defense of the claim or representation before the court has been rejected. The Attorney General shall defend or arrange for the defense of all suits filed against the receiver personally.

(3) A receiver against whom a claim is made, which is not rejected by the

Attorney General pursuant to subsection (2) of this section, shall cooperate fully with the Attorney General in the defense of such claim. If the Attorney General determines that such receiver has not cooperated or has otherwise acted to prejudice the defense of the claim or the appearance, the Attorney General may at any time reject the defense of the claim before the court.

(4) If the Attorney General rejects the defense of a claim pursuant to subsection (2) of this section or if it is established by the judgment ultimately rendered on the claim that the act or omission complained of was not in the course or scope of the receiver's duties or amounted to intentional wrongdoing or gross negligence, no public money shall be paid in settlement of such claim or in payment of any judgment against such receiver. Such action by the Attorney General shall not prejudice the right of the receiver to assert and establish as a defense that the claim arose out of an alleged act or omission occurring in the course and scope of the receiver's duties or that the act or omission complained of did not amount to intentional wrongdoing or gross negligence. If the receiver is successful in asserting such defense, the receiver shall be indemnified for the reasonable costs of defending the claim.

(5) If the receiver has been defended by the Attorney General and it is established by the judgment ultimately rendered on the claim that the act or omission complained of amounted to intentional wrongdoing or gross negligence, the judgment against the receiver shall provide for payment to the state of the state's costs, including a reasonable attorney's fee.

Sec. 20. Section 71-6720, Reissue Revised Statutes of Nebraska, is amended to read:

71-6720 (1) The purposes of the Medication Aide Act are to ensure the health, safety, and welfare of the public by providing for the accurate, cost-effective, efficient, and safe utilization of medication aides to assist in the administration of medications by (a) competent individuals, (b) caretakers who are parents, foster parents, family, friends or legal guardians, and (c) licensed health care professionals.

(2) The act applies to all settings in which medications are administered except the home, unless the in-home administration of medication is provided through a licensed home health agency, ~~a or~~ a licensed or certified home and community-based provider, or a licensed PACE center as defined in section 10 of this act.

(3) The act does not apply to the provision of reminders to persons to self-administer medication or assistance to persons in the delivery of nontherapeutic topical applications by in-home personal services workers. For purposes of this subsection, in-home personal services worker has the definition found in section 71-6501.

Sec. 21. Sections 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 20, and 22 of this act become operative on January 1, 2021. The other sections of this act become operative on their effective date.

Sec. 22. Original sections 71-401, 71-403, 71-404, 71-413, 71-415, 71-416, 71-417, 71-436, and 71-6720, Reissue Revised Statutes of Nebraska, are repealed.

Sec. 23. Original sections 71-2085, 71-2086, 71-2087, 71-2092, 71-2093, and 71-2094, Reissue Revised Statutes of Nebraska, and section 68-901, Revised Statutes Supplement, 2019, are repealed.