

New CMS Regulation and Implications for Minnesota Nursing Home Regulations with Respect to Therapeutic Diet Orders.

Updated: June 1, 2017

A. Objective:

Understand the implications of the new CMS regulation for Long Term Care Facilities with respect to physician option to delegate Therapeutic Diet orders to a registered or licensed dietitian.

B. Background on updated CMS Regulations:

The Centers for Medicare & Medicaid Services (CMS) of the Department of Health and Human Services released the Final Rule for participation in Medicare and Medicaid programs. The long-awaited 'Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities' was published in the Federal Register on October 4, 2016. The new regulations became effective on November 28, 2016.

The new regulations reflect advances in practice and service made over the past several years. CMS stated in a response to a public comment that "Effective management and oversight of the food and nutrition service is critical to the safety and well-being of all residents of a nursing facility." The new regulations specify that physicians may delegate to a registered or licensed dietitian the task of prescribing a resident's diet, including a therapeutic diet, to the extent allowed by State law. CMS underscored the advantages of expertise and efficiencies contributing to better resident service and care by allowing physicians to delegate therapeutic diet orders to dietitians. For example, dietitians recognize the importance of considering both benefits and risks with dietary restrictions and therapeutic diets. Less-restrictive diets tailored to each resident's needs, desires, and medical conditions can lead to enhanced quality of life and improved nutritional status. Dietitians are also more familiar with formulary, diet order protocols and format, thereby eliminating confusion that can delay proper nutrition care or result in incorrect diet and supplement orders.

It is also noted that *hospital* dietitians have been able to order therapeutic diets (along with laboratory tests to monitor the dietary plan) since July 2014 when CMS included physician ability to delegate therapeutic diet orders to dietitians. US Statute 482.22: <http://1.usa.gov/1qk8AJF> Ordering Privileges for Registered Dietitians (RDs) (Food and Dietetic Services § 482.28).

C. Details about the new CMS regulations relevant to the topic of therapeutic diets:

The Final Rule was published in the Federal Register/Vol. 81, No. 192/Tuesday, October 4, 2016/Rules and Regulations and is available at: <https://www.gpo.gov/fdsys/pkg/FR-2016-10-04/pdf/2016-23503.pdf>.

Relevant excerpts from Federal Register / Vol. 81, No. 192 / Tuesday, October 4, 2016 / Rules and Regulations:

1. §483.30 Physician Services
"We are allowing attending physicians to delegate dietary orders to qualified dietitians or other clinically qualified nutrition professionals and therapy orders to therapists."
2. 483.25 Quality of Care
"(2) A resident's attending physician may delegate the task of writing dietary orders, consistent with § 483.60, to a qualified dietitian or other clinically qualified nutrition professional who— (i) Is acting within the scope of practice as defined by State law; and (ii) Is under the supervision of the physician."
3. §483.60 Food and nutrition services
"(e) Therapeutic diets. (1) Therapeutic diets must be prescribed by the attending physician. (2) The attending physician may delegate to a registered or licensed dietitian the task of prescribing a resident's diet, including a therapeutic diet, to the extent allowed by State law."

D. Regarding Minnesota's Licensure Statute for Dietitians:

Minnesota Statutes, Chapter 148 Public Health Occupations, Licensing Dietitians and Nutritionists. Minnesota was one of the first states in the country to pass a Licensure bill for Dietitians and Nutritionists. The Licensure Board was established in 1994. A copy of the statute can be accessed under the MN Statutes, Public Health Occupations Ch 148.621 – 148.633 at <https://www.revisor.mn.gov/statutes/?id=148> (also attached as pdf).

Definitions in the licensure statute provide scope description at a functional level. This enables evolution and advances in practice, agility in responding to new patient needs, meeting organizational objectives, and adopting better ways of care delivery. See Subd 9-12 for definitions below.

Subd. 9. Dietetics or nutrition practice.

"Dietetics or nutrition practice" means the integration and application of scientific principles of food, nutrition, biochemistry, physiology, food management, and behavioral and social sciences to achieve and maintain human health through the provision of nutrition care services.

Subd. 10. Nutrition care services.

"Nutrition care services" means:

- (1) assessment of the nutritional needs of individuals or groups;*
- (2) establishment of priorities, goals, and objectives to meet nutritional needs;*
- (3) provision of nutrition counseling for both normal and therapeutic needs;*
- (4) development, implementation, and management of nutrition care services; or*
- (5) evaluation, adjustment, and maintenance of appropriate standards of quality in nutrition care.*

Subd. 11. Nutritional assessment.

"Nutritional assessment" means the evaluation of the nutritional needs of individuals or groups based on appropriate biochemical, anthropometric, physical, and dietary data to determine nutrient needs and recommend appropriate nutritional intake.

Subd. 12. Nutrition counseling.

"Nutrition counseling" means advising and assisting individuals or groups on appropriate nutritional intake by integrating information from the nutritional assessment with information on food and other sources of nutrients and meal preparation consistent with cultural background and socioeconomic status

E. Excerpts from Minnesota's Nursing Home License Chapter 4658.

As per Minnesota Nursing Home License excerpts below, dietitians are involved in nutrition services for residents. However, the current language related to "Physician designee," as we understand it, does not accommodate an option for the dietitian to be delegated to manage therapeutic diet orders. Note: Dietitians are licensed by the state – Minnesota Statutes Chapter 148, Public Health Occupations Licensing Dietitians and Nutritionists.

4658.0605 DIRECTION OF DIETARY DEPARTMENT.

Subpart 1. Dietitian. The nursing home must employ a qualified dietitian either full time, part time, or on a consultant basis. For purposes of this chapter, a "qualified dietitian" means a person who:

- A. is registered by the Commission on Dietetic Registration of the American Dietetic Association;
- B. is licensed under Minnesota Statutes, section 148.624; or
- C. has a bachelor's degree in dietetics, food and nutrition, or food service management plus

experience in long-term care and ongoing continuing education in identification of dietary needs, and planning and implementation of dietary programs.
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Subp. 13. **Physician designee.** "Physician designee" means a nurse practitioner or physician assistant who has been authorized in writing by the physician to perform medical functions.
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4658.0715 MEDICAL INFORMATION FOR CLINICAL RECORD.

A physician or physician designee must provide the following information for the clinical record:

- A. the report of the admission history and physical examination;
- B. the admitting diagnosis;
- C. a description of the general medical condition, including disabilities and limitations;
- D. a report of subsequent physical examinations;
- E. instructions relative to the resident's total program of care;
- F. written orders for all medications with stop dates, treatments, rehabilitations, and any medically prescribed special diets;
- G. progress notes;

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F. What is included in Therapeutic Diet Orders?

As defined by CMS per Minimum Data Set 3.0 Resident Assessment Manual Chapter 3, Section K:

Swallowing/Nutrition Status. <https://downloads.cms.gov/files/MDS-30-RAI-Manual-V114-October-2016.pdf>

The definition states on K-11 states "The therapeutic diet is a diet intervention ordered by a health care practitioner as part of the treatment for a disease or clinical condition manifesting an altered nutritional status, to eliminate, decrease, or increase certain substances in the diet (e.g. sodium, potassium) (ADA, 2011)." Under coding tips of the manual, this guidance is also provided: "Therapeutic diets are not defined by the content of what is provided or when it is served, but why the diet is required. Therapeutic diets provide the corresponding treatment that addresses a particular disease or clinical condition which is manifesting an altered nutritional status by providing the specific nutritional requirements to remedy the alteration."

Therefore, provided the dietitian has appropriate qualifications, the therapeutic diet order delegation by the attending physician may include:

- Order all patient diets, including therapeutic diets;
- Order both standard house and disease-specific nutrition supplements;
- Order enteral nutrition or parenteral nutrition;
- Order nutrition-related laboratory tests needed to inform nutrition decisions and orders;

The process and extent to which physicians delegate independent order responsibility to the dietitian will vary depending on the LTC organizational structure, practice and residents' needs. This will need to be established and determined at the local facility level.

G. Feedback and guidance

Minnesota Department of Health: April 17 Mary Absolon with MDH (Mary.Absolon@state.mn.us) called Ann to give input regarding the current Minnesota definition of physician delegate being limited to nurse practitioner or physician assistant. Mary's recommendation was to use a waiver approach for now for the option of Physicians

delegating to a registered or licensed dietitian the task of prescribing a resident's diet, including a therapeutic diet.

We appreciate input from other stakeholders on the utility of a waiver. It would be helpful to have an example or model to help in the design and implementation of a waiver.

Contacts:

Ann Erickson: ann.erickson@cimalabs.com 763.488.4783 Ann.erickson75@gmail.com 651.808.3297

Katelyn Engel: Katelyn.engel10@gmail.com 612.743.2340

Jami Burbidge mand@eatrightmn.org w 612-293-9140