

LETTER OPINION
94-L-141

May 3, 1994

Dr. Jon R. Rice
State Health Officer
North Dakota Department of Health
and Consolidated Laboratories
State Capitol
Bismarck, ND 58505-0200

Dear Dr. Rice:

Thank you for your March 23, 1994, letter inquiring about the Department's licensing responsibilities under North Dakota Century Code (N.D.C.C.) ch. 23-09.3 regarding basic care facilities as they relate to so-called "assisted living environments."

N.D.C.C. ? 23-09.3-01(1) defines a basic care facility as "a residence, not licensed under chapter 23-16 by the department, that provides room and board to five or more individuals who are not related by blood or marriage to the owner or manager of the residence and who, because of impaired capacity for independent living require health, social, or personal care services, but do not require regular twenty-four hour medical or nursing services." N.D.C.C. ? 23-09.3-08.1 provides that "[a] basic care facility may admit and retain an individual for whom the facility provides, directly or through contract, appropriate services within the facility to attain or maintain the individual at the individual's highest practicable level of functioning." These provisions when read together require a basic care license whenever a residence providing room and board to five or more individuals assumes responsibility for providing necessary health, social or personal care services to residents with impaired capacity for independent living.

In 1993 the North Dakota Legislature enacted N.D.C.C. ch. 50-24.5 regarding the administration of aid to vulnerable aged, blind, and disabled persons. In this

legislation, the term "assisted living" is defined as an "environment where a person lives in an apartment like unit and receives services on a twenty-four hour basis to accommodate that person's needs and abilities to maintain as much independence as possible." N.D.C.C. ? 50-24.5-01(2). This term is used in reference to "assisted living services" for which the Department of Human Services is directed to establish an individualized care rate. N.D.C.C. ? 50-24.5-02(6). Although it would appear that a facility could provide a residential environment as described in the definition of "assisted living" and still be subject to basic care licensure, it is clear that the term "assisted living services" is used in N.D.C.C. ch. 50-24.5 to refer to services provided in residential environments that are not licensed as basic care facilities.

In delineating between residential environments subject to basic care licensure and those that are not, the critical inquiry in my judgment is whether the residents maintain residences or households separate and apart from the proprietor or manager of the facility. In order to maintain separate residences or households, each resident must live independent of the proprietor or manager of the facility as well as independent of one another. See generally Fischer v. Taub, 491 N.Y.S.2d 538 (Supp. 1984). Some of the factors one must look at include whether the living quarters are "home-like", allowing for independent living (i.e. kitchen, living area, and one or more bedrooms), the degree of control a tenant exercises over the living quarters including the freedom to come and go and the freedom to decide who may enter the living quarters, and the overall qualitative ability of residents to live independent of the proprietor or manager of the facility and other residents.

In your letter you list the following criteria you believe describe residential environments which provide assisted living but which are not basic care facilities:

1. The tenant may freely choose personal service providers. A corollary is that personal services may be provided to tenants by the entity which operates the tenant's residential environment or by other entities or

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persons without any objection from the operating entity.

2. The apartment-like unit in an assisted living facility must include a kitchen. A corollary is that the tenant is not obliged to pay a rate which includes meals, although the operating entity may offer food services, including "take-out" meals or congregate meals.

3. The tenant determines the services that allow the tenant to maintain the degree of independence the tenant believes appropriate. A corollary is that the operating entity's base charge may not include any services and the operating entity's admission policy may not require any tenant to accept any "services" as a condition of admission.

4. Each tenant must be competent or must have an existing on-site method or substitute decision making (live-in spouse, parent or adult child).

In my opinion the above criteria are indicative of a residential environment where each tenant maintains his or her own residence or household. Where each resident is competent or has an existing on-site method for substitute decision making such as a live-in spouse, independently determines what services he or she needs, lives in a home-like atmosphere, and is free to choose personal service providers, the facility has not assumed the overall responsibility of providing necessary health, social or personal care services to individuals with impaired capacity for independent living. Such overall responsibility remains with the resident. Ultimately, however, the question of whether a residential environment is "institutional" in nature, and accordingly subject to licensure under N.D.C.C. ch. 23-09.3 is a question of fact on which I am unable to render an opinion. In the end, each case must be decided on a case-by-case basis taking into account the above mentioned factors as well as the nature of the specific services offered.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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tca/vkk
cc: Rod Breene, Wedgewood Group
Jon Rappaport, Kensington Assisted Living Homes