NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES
NOTICE OF PUBLIC HEARING

NOVEMBER 6, 2017
3:00 p.m. Central Time
Nebraska State Office Building – Lower Level A
301 Centennial Mall South, Lincoln, Nebraska

The purpose of this hearing is to receive comments on proposed changes to Title 471, Chapter 12 of the Nebraska Administrative Code (NAC) – *Nursing Facility Services.* This change involves clarifying the adult level of care and including the child level of care. The addition of the child level of care into Title 471 Chapter 12 is being done in response to a recent ruling from the Nebraska Supreme Court. This change allows Medicaid and Long-Term Care to standardize and clarify the nursing facility level of care for both adults and children.

Authority for these regulations is found in Neb. Rev. Stat. 81-3117(7).

Interested persons may attend the hearing and provide verbal or written comments or mail, fax or email written comments, no later than the day of the hearing to: DHHS Legal Services, PO Box 95026, Lincoln, NE 68509-5026, (402) 742-2382 or dhhs.regulations@nebraska.gov, respectively. A copy of the proposed changes is available online at http://www.sos.ne.gov, or by contacting DHHS at the mailing address or email above, or by phone at (402) 471-8223. The fiscal impact statement for these proposed changes may be obtained at the office of the Secretary of State, Regulations Division, Room 1305, State Capitol, Lincoln, NE, or by calling (402) 471-2385.

Auxiliary aids or reasonable accommodations needed to participate in a hearing can be requested by calling (402) 471-8223. Individuals with hearing impairments may call DHHS at (402) 471-9570 (voice and TDD) or the Nebraska Relay System at 711 or (800) 833-7352 TDD at least 2 weeks prior to the hearing.

PROPOSED REGULATION
POLICY PRE-REVIEW CHECKLIST

Agency: Medicaid & Long-Term Care
Title, Chapter of Regulation: 471 NAC 12 Nursing Facility Services
Subject: Nursing Facility Level of Care Criteria
Prepared by: Stephanie Crouch
Telephone: 402-471-5240

A. Policy Changes and Impacts

1. What does the regulation do and whom does it impact? Provide a brief description of the proposed rule or regulation and its impacts on state agencies, political subdivisions, and regulated persons or entities.

   This change involves removing current regulations on the topic of nursing facility level of care criteria from Title 480 Home and Community-Based (HCBS) Waiver Services, revising that content, and repositioning the proposed changes in the Medicaid Title 471, Chapter 12 Nursing Facility (NF) Services. In doing so, the adult level of care regulations currently in Title 471 are also replaced.

   The addition of the child level of care into Title 471 Chapter 12 is being done in response to a recent ruling from the Nebraska Supreme Court.

   This change allows Medicaid and Long-Term Care to standardize and clarify the nursing facility level of care for both adults and children.

   This change would have no impact on political subdivision regulated persons or entities.

2. Describe changes being proposed to current policy and briefly provide rationale.

   The NE Supreme Court ruled in the case of "Merie B on behalf of Brayden O. v. State" (Cite as 290 Neb 919) that DHHS erred in not reflecting Child Nursing Facility Level of Care Criteria regulations in Title 471. As only Adult NF LOC Criteria is currently in Title 471, the Court ruled that this child's level of care must be determined using adult criteria.

   The Adult Level of Care eligibility is based on a combination of:
   - Activities of Daily Living, such as bathing, eating, mobility (ADLs);
   - Risk Factors;
   - Medical Treatment or Observation; and
   - Cognition impairments.

   The adult level of care criteria does not take into account the child's developmental level; all younger children need assistance with ADLs.

The Child Level of Care eligibility is based on a combination of:

- Medical Conditions and Treatments (all ages);
- Activities of Daily Living (ages 3 through 17 years); and
- Vision, hearing, communication, and behavior considerations (ages 3 through 17 years).

In general, proposed changes include clarification in both adult and child criteria, providing clarification for consistency in application across the state, generally following current practice. Adult scoring is unchanged; child scoring is in current practice, but has not been in regulation. Although the criteria between children and adults (age 18 and older) differ, these changes bring the similar components into closer alignment, adjusted for age. For example, to be considered a deficit, medical conditions must limit function and independence.

B. Why is the rule necessary? Explain and provide an identification of authorizing statute(s) or legislative bill(s).

1. Update of regulation (repeal of obsolete statutes, reflect current policy, editing or technical language changes, etc.)

   Both the adult and child LOC criteria are updated from current content in Title 480, to provide clarification and align with current practice.

2. Annual changes – cost of living, hunting season schedules, etc.
3. Law was changed – federal ___ or state ___ [Cite authorizing statute(s) or legislative bill(s)]
4. Extension of established policy or program, new initiatives or changes in policy (within statutory authority)
5. Constituent initiated
6. Financial needs – increases/decreases in fees
7. Litigation requires changes in rules

   NE Supreme Court ruling of May 22, 2015, (290 Neb 919), described above.

8. Addresses legal or constitutional concerns of Attorney General's office
9. Implements federal or court mandate
10. Other (explain)

C. What happens if these rules are not adopted?

Adult level of care criteria will be applied inappropriately to children age birth through 17 years. All young children would qualify due to their developmental need for assistance.

Outdated criteria, terms, and processes would remain in place.

D. Policy Checklist

1. Is this an update or editorial change reflecting essentially no change in policy? yes

2. Does the policy in the proposed regulation reflect legislative intent?

3. Is the policy proposed in the regulation a state mandate on local government? Is it funded?
4. Is the policy proposed in the regulation a federal mandate on local government? Is it funded?

E. Fiscal Impact. In addition to completing the required Fiscal Impact Statement (a copy must be attached to this document), the agency must address the following:

1. Will the proposed regulation reduce, increase, or have no change in resources – funds, personnel or FTE?

   No change in resources, funds personnel or FTS

2. Have initial contacts been made with citizens or organizations that may be impacted by the proposed regulation?

   Clarifications to these regulations have been drafted over a number of years and earlier versions shared with the Nebraska Heath Care Association, the Early Development Network (EDN), Area Agencies on Aging (AAA), and League of Human Dignity (LHD). The current version has not been provided to stakeholders.

3. Does the proposed regulation impact another agency? Explain the impact.

   EDN, AAA, and LHD are contracted entities which have a role in level of care determination for the Aged and Disabled Waiver, Traumatic Brain Injury Waiver, and/or Medicaid nursing facility services.

4. Will the proposed regulation reduce, increase, or have no change on reporting requirements of businesses?

   No change in reporting requirements

5. What is the agency's best estimate of the additional or reduced spending? If there is none, please note. If receipt of federal funds is contingent upon approval of the proposed regulation, then indicate the amount and nature of the federal funds affected, and enclose laws or correspondence from federal officials substantiating the information.

   No additional or reduced spending.

6. Include a description of the impact that the proposed regulation will have on the number of state employees and how the agency intends to address proposed increases or decreases in FTE.

   No impact on the number of state employees.

F. Unique problems or issues and recommendations.

No unique problems, issues or recommendations.

G. Who is expected to be affected, or to oppose or support the proposed regulation? Explain what initial informal contacts have been made with organizations or citizens who may be affected by the regulation prior to the public hearing.

The level of support by NF provider organizations such as the Nebraska Health Care Association and LeadingAge is unknown. They have provided informal comments and changes were made to the initial draft based on those comments.

H. Are these proposed rules a likely candidate for negotiated rulemaking? Explain. Has the process been completed? If so, explain how the issues were addressed.

No.

Agency Director's Verification of Review

I have reviewed these proposals and verify that, at this stage of the regulation's development, these questions have been accurately addressed.

Calder A. Lynch
Director
Division of Medicaid & Long-Term Care
Department of Health and Human Services

Date 2/14/17

FISCAL IMPACT STATEMENT

Agency: **Department of Health and Human Services**	
Title: 471	Prepared by: Rocky Thompson
Chapter: 12	Date prepared:
Subject: Nursing Facility Services	Telephone: 402-471-0300

Type of Fiscal Impact:

Please check all that apply

	State Agency	Political Sub.	Regulated Public
No Fiscal Impact	(☒)	(☒)	(☒)
Increased Costs	(☐)	(☐)	(☐)
Decreased Costs	(☐)	(☐)	(☐)
Increased Revenue	(☐)	(☐)	(☐)
Decreased Revenue	(☐)	(☐)	(☐)
Indeterminable	(☐)	(☐)	(☐)

Provide an Estimated Cost & Description of Impact:

State Agency:

Political Subdivision:

Regulated Public:

If indeterminable, explain why: