NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES
NOTICE OF PUBLIC HEARING

January 24, 2022
10:00 a.m. Central Time
Nebraska State Office Building – Lower Level A
301 Centennial Mall South, Lincoln, Nebraska
Phone call information: 888-820-1398; Participant code: 3213662#

The purpose of this hearing is to receive comments on proposed changes to Title 471, Chapter 44 of the Nebraska Administrative Code (NAC) – *Nursing Facility Level of Care Determination for Adults.* The proposed changes will remove the requirement to perform nursing facility level of care assessments in-person.

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

In order to encourage participation in this public hearing, a phone conference line will be set up for any member of the public to call in and provide oral comments. Interested persons may provide verbal comments by participating via phone conference line by calling 888-820-1398; Participant code: 3213662#.

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) 471-8417. The fiscal impact statement for these proposed changes may be obtained at the office of the Secretary of State, Regulations Division, 1201 N Street, Suite 120, Lincoln, NE 68508, or by calling (402) 471-2385.

Auxiliary aids or reasonable accommodations needed to participate in a hearing can be requested by calling (402) 471-8417. Individuals who are deaf or hard of hearing 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.

TO: Executive Board
Room 2108 State Capitol
Legislative Council

FROM: Marge Respeliers, Paralegal I
Legal Services
Department of Health and Human Services (DHHS)

DATE: December 16, 2021

RE: Notice of Rulemaking under Neb. Rev. Stat. § 84-907.06

The Department of Health and Human Services (DHHS) will be holding a public hearing on amending the following regulations:

TITLE:	471	Nebraska Medical Assistance Program
CHAPTER:	44	Nursing Facility Level of Care Determination for Adults

These regulations are scheduled for public hearing on January 24, 2022.

The purpose of this hearing is to receive comments on proposed changes to Title 471, Chapter 44 of the Nebraska Administrative Code (NAC) – *Nursing Facility Level of Care Determination for Adults.* The proposed changes will remove the requirement to perform nursing facility level of care assessments in-person.

The following items are enclosed for your referral to the chair of the relevant standing committee of the Legislature:

1. A copy of the notice of public hearing;
2. A copy of the proposed regulations;
3. A copy of the Policy Pre-Review Checklist; and
4. The estimated fiscal impact of this rulemaking action on state agencies, political subdivisions or persons being regulated.

FISCAL IMPACT STATEMENT

Agency: **Department of Health and Human Services**	
Title: 471	Prepared by:Jeremy Brunssen
Chapter:44	Date prepared:12/7/2021
Subject: Nursing Facility Level Of Care Determination For Adults	Telephone:402-471-5046

Type of Fiscal Impact:

	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: N/A.

Political Subdivision: N/A.

Regulated Public: N/A.

If indeterminable, explain why:

TITLE 471 NEBRASKA MEDICAL ASSISTANCE PROGRAM SERVICES

CHAPTER 44 NURSING FACILITY LEVEL OF CARE DETERMINATION FOR ADULTS

001. SCOPE AND AUTHORITY. The regulations govern the services provided under Nebraska's Medicaid program as defined by Nebraska Revised Statute (Neb. Rev. Stat.) § 68-901 et seq. (the Medical Assistance Act).

002. DEFINITIONS. The definitions set out in Neb. Rev. Stat. § 68-907 and the following definitions apply:

002.01 ACTIVITIES OF DAILY LIVING (ADL). Activities related to personal care, including but not limited to bathing or showering, continence, dressing, grooming, transferring to and from a bed or chair, mobility, toileting, and eating.

002.02 BATHING. A person's ability to take a full-body bath or shower, including but not limited to transferring in and out of tub or shower and bathing each part of the body.

002.03 CONTINENCE. A person's ability to control their body to empty the bladder or bowel on time or change incontinence pads or briefs, cleansing, or disposing of soiled articles.

002.04 DRESSING. A person's ability to put on and remove clothing from upper and lower body, including but not limited to the ability to put on or remove physician ordered prosthetic or orthotic devices.

002.05 EATING. A person's ability to eat and drink, including but not limited to intake of nourishments by other means, such as tube feeding or total parenteral nutrition.

002.06 GROOMING. A person's ability to manage personal hygiene, including but not limited to combing hair, brushing teeth, and washing and drying self.

002.07 HOME AND COMMUNITY-BASED WAIVER SERVICES FOR AGED PERSONS OR ADULTS OR CHILDREN WITH DISABILITIES. An array of community-based services available to individuals who are eligible for nursing facility (NF) services under Medicaid but choose to receive services at home. The purpose of the waiver services is to offer alternative service delivery options to Medicaid recipients who would otherwise receive services in a nursing facility (NF) or other institutional setting.

002.08 HOSPICE. Hospice or hospice services shall meet the definition in 471 Nebraska Administrative Code (NAC) 36.

002.09 LEGAL REPRESENTATIVE. Any person who has been vested by law with the power to act on behalf of an individual. The term includes a guardian appointed by a court of competent jurisdiction in the case of an incompetent individual or minor, or a person acting under a valid power of attorney.

002.10 LEVEL OF CARE (LOC) DETERMINATION. Medicaid's evaluation to determine whether an individual requires the supports typically provided by a nursing facility (NF) or other institutional setting.

002.11 LIMITATION. When a person has difficulty performing tasks associated with an activity of daily living (ADL) by themselves, or is unable to perform the tasks at all.

002.12 LEVEL II EVALUATION. See 471 NAC 12.

002.13 MEDICAID-ELIGIBLE. See 471 NAC 12.

002.14 MOBILITY. A person's ability to move from place to place indoors or outside, by walking or other locomotion.

002.15 NURSING FACILITY (NF). See 471 NAC 12.

002.16 PROGRAM OF ALL-INCLUSIVE CARE FOR THE ELDERLY (PACE). A program that provides comprehensive, coordinated health care and long-term services and supports for voluntarily enrolled individuals. Program of All-inclusive Care for the Elderly (PACE) provides another alternative along the continuum of available long-term care services and supports to enable participants to continue to live in their homes and communities.

002.17 TOILETING. A person's ability to use the toilet, commode, bedpan, or urinal, including but not limited to how a person cleanses self after toilet use, manages ostomy or catheter, and adjusts clothes.

002.18 TRANSFERRING. A person's ability to move from one place to another, including but not limited to bed to chair and back, into and out of a vehicle, and on and off toilet or commode.

003. LEVEL OF CARE.

003.01 NURSING FACILITY LEVEL OF CARE (NF LOC) CRITERIA. The person or his or her legal representative must provide information needed to determine nursing facility level of care (NF LOC). In order to make a determination, the person or representative must be addressed on the basis of activities of daily living (ADL), risk factors, medical conditions and interventions, and cognitive function, to be determined via ~~in-person~~ discussion and observation of the person; reports from caregivers, family, and providers; and current medical records.

003.01(A) LEVEL OF CARE DETERMINATION FOR ADULTS AGE 18 OR OLDER. A person must satisfy one of the four following categories to meet nursing facility level of care (NF LOC) eligibility:

(1) A limitation in at least three activities of daily living (ADL) and one or more risk

factors;
(2) A limitation in at least three activities of daily living (ADL) and one or more medical conditions and treatments;
(3) A limitation in at least three activities of daily living (ADL) and one or more areas of cognitive limitation; or
(4) A limitation in at least one activity of daily living (ADL) and at least one risk factor and at least one area of cognitive limitation.

003.01(A)(i) ACTIVITIES OF DAILY LIVING (ADL). Information about limitations in activities of daily living (ADL) is obtained from observation of the person in the home setting, reports from guardians or caregivers, current medical records, school records, and standardized assessments. Activities in daily living (ADL) are considered a limitation when the person, due to their physical disabilities, requires physical assistance from another person on a daily basis, or supervision, monitoring, or direction to complete the tasks associated with each activity of daily living (ADL) defined in this section. For the purposes of this section, the term “ability” must be interpreted to include the physical ability, cognitive ability, and endurance necessary to complete identified activities. The following activities of daily living (ADL) are considered for nursing facility level of care (NF LOC) eligibility:
(1) Bathing;
(2) Continence;
(3) Dressing or grooming;
(4) Eating;
(5) Mobility;
(6) Toileting; and
(7) Transferring.

003.01(A)(ii) RISK FACTORS. Risk factors must cause significant impact to the person’s life and functional abilities and require significant intervention in a timely manner. Risk factors to be considered are:
(1) Behavior: The inability to act on one's own behalf, including but not limited to lack of interest or motivation to eat, not taking medications, not caring for one's self, not maintaining personal safety, wandering, avoiding social activities, and relating to others in a socially-inappropriate manner;
(2) Frailty: The inability to function independently without the presence of a support person, including but not limited to mismanaging finances or using poor judgment in understanding abilities and health factors to safeguard well-being and avoid inappropriate safety risk such as risk of falling; and
(3) Safety: The lack of adequate housing, including the absence of home modification or adaptive equipment to assure safety and accessibility, the lack of a formal or informal support system, or presence of abuse, neglect, or exploitation in the home.

003.01(A)(iii) MEDICAL CONDITIONS AND TREATMENTS. Medical conditions and treatments to be considered are:
(1) A medical condition is present which requires observation and assessment to evaluate the person's need for treatment modification or additional medical procedures to prevent destabilization when a person has demonstrated an

inability to self-observe or evaluate the need to contact skilled medical professionals;

(2) Due to the complexity created by multiple, interrelated medical conditions, there exists potential for the person's medical condition to be unstable; and

(3) The person requires at least one ongoing medical or nursing service.

003.01(A)(iv) COGNITIVE FUNCTION. Limitations in cognitive function to be considered are:

(1) Memory: Lack of short-term recall, unable to perform all or almost all steps in a multitask sequence without cues, inability to recognize frequently encountered caregivers’ names or faces or know location of regularly visited places in residential setting;

(2) Orientation: Easily distracted, episodes of disorganized speech, or variation in mental function over the course of a day; behavior must be inconsistent with usual functioning;

(3) Communication: Inability to make oneself understood, including inability to express information content, both verbal and nonverbal, or the inability to understand information conveyed;

(4) Judgment: Inability to independently make decisions regarding tasks of daily life, except in new situations with only some difficulty; and

(5) Dementia: Dementia diagnosis, including Alzheimer’s disease.

003.02 PERSONS ELIGIBLE. A Level of Care (LOC) determination will be completed when a person is:

(1) Determined to be eligible for Medicaid, or is under consideration for Medicaid eligibility; and

(2) Requesting Medicaid funding to cover nursing facility (NF) service or Home and Community-Based Waiver Services for Aged Persons or Adults or Children with Disabilities.

003.02(A) SPECIAL CIRCUMSTANCES NOT EVALUATED OR SCREENED. Level of care (LOC) will not be evaluated or reevaluated for Medicaid recipients who:

(i) Have previously been determined to meet nursing facility level of care (NF LOC) and return to the same nursing facility (NF) after discharge to a hospital, other nursing facility (NF), or swing bed. This exception does not apply for persons who have previously been discharged to an alternative level of care, or to the community;

(ii) Are Medicaid-eligible persons who admit to the nursing facility (NF) under hospice care;

(iii) Are nursing facility (NF) residents who elect hospice upon becoming Medicaid eligible;

(iv) Are receiving nursing facility (NF) care which is currently being paid by Medicare;

(v) Direct transfer from one nursing facility (NF) to another nursing facility (NF);

(vi) Have a preadmission screening and resident review (PASRR) Level II level of care (LOC) determination indicating the resident meets nursing facility level of care (NF LOC);

(vii) Are currently, or were previously eligible the month prior to nursing facility (NF) admission, for the Aged and Disabled Waiver program through the Department;

(viii) Are admitted to a special needs nursing facility (NF) unit;
(ix) Are currently eligible for the Program of All-Inclusive Care for the Elderly (PACE) through the Department; or
(x) Are seeking out-of-state nursing facility (NF) admission.

003.02(B) EVALUATION FORMAT. Evaluations will be conducted using common evaluation tools. The evaluation tools reflect each area of nursing facility level of care (NF LOC) criteria, the amount of assistance required and the complexity of the care.

003.02(C) REFERRAL.

003.02(C)(i) MINIMUM REFERRAL INFORMATION. The following is the minimum information required to process a referral for level of care (LOC) determination:
(1) The name, position, and telephone number of the person making the referral;
(2) The name of the nursing facility (NF) involved, if different than the referral source;
(3) The name, date of birth, and social security number of the person to be evaluated; and
(4) The date and time the referral is being made.

003.02(C)(ii) RECEIVING REFERRALS. When the Department or its agent receives a referral to evaluate an applicant for admission to a nursing facility (NF), they will begin to collect the information and supporting documentation established in the evaluation tool. Information may be collected either in person or through telephone interviews. Based on the information gathered through the evaluation, the Department determines whether the applicant meets nursing facility level of care (NF LOC) criteria.

003.02(C)(iii) APPLICABLE TIME FRAMES. A referral will only be accepted if it is verified by the Department that an application has been received and is under consideration or if an individual is determined eligible for Medicaid. The Department must complete a level of care (LOC) evaluation within forty-eight (48) hours. If the evaluation is not completed by the Department within forty-eight (48) hours, the applicant for admission must be deemed by the Department to be appropriate for admission until a level of care (LOC) determination is completed and any required notice is given.

003.02(C)(iii)(1) RETROACTIVE MEDICAID LEVEL OF CARE (LOC) DETERMINATION. If a current nursing facility (NF) resident applies for Medicaid without informing the nursing facility (NF) and a level of care (LOC) referral is not completed during the Medicaid eligibility consideration period, the nursing facility (NF) must make an immediate referral to the Department when information is received that Medicaid has been approved. If the following conditions are met, Medicaid coverage will be retroactive to the date of Medicaid eligibility:
(a) The nursing facility (NF) has in place a process to inform private pay clients and their families that the nursing facility (NF) must be informed when a Medicaid application is made;
(b) The nursing facility (NF) makes a referral to the Department immediately upon receipt of information about the opening of the Medicaid case. At

the time of this referral, the nursing facility (NF) must provide information on the date and means by which information about Medicaid eligibility was obtained; and

(c) The resident meets the nursing facility level of care (NF LOC) criteria.

003.02(C)(iii)(2) LEVEL OF CARE (LOC) REFERRAL 14-DAY POST-MEDICAID DETERMINATION. A level of care (LOC) approval determination will be effective as of the date of Medicaid eligibility if the referral is completed by the 14th calendar day following the Medicaid eligibility determination date.

003.02(C)(iii)(3) REFERRAL AFTER DEATH OR DISCHARGE. A level of care (LOC) referral will also be accepted and a medical records-based level of care (LOC) determination will be completed if Medicaid eligibility is not approved until after the person dies or is discharged from the facility. To qualify, the referral must be completed within 14 days of the Medicaid eligibility determination date, and the person must meet level of care (LOC) criteria. If the required conditions are met, the level of care (LOC) determination will be effective to the date of Medicaid eligibility.

003.02(C)(iii)(4) PROGRAM OF ALL-INCLUSIVE CARE FOR THE ELDERLY (PACE) LEVEL OF CARE (LOC) DETERMINATION. A Program of All-inclusive Care for the Elderly (PACE) level of care (LOC) determination may be used to substantiate nursing facility level of care (NF LOC) in the following cases:

(a) A Program of All-inclusive Care for the Elderly (PACE) recipient immediately admits to, or already resides in, a nursing facility (NF) following their disenrollment from the Program of All-inclusive Care for the Elderly (PACE); or
(b) A Program of All-inclusive Care for the Elderly (PACE) recipient admits to a nursing facility (NF) the month after disenrollment from the Program of All-inclusive Care for the Elderly (PACE).

003.02(C)(iii)(5) DETERMINATION OTHERWISE REQUIRED. A level of care (LOC) determination will be required in all other cases for nursing facility (NF) admission.

003.02(D) OUTCOMES OF THE EVALUATION.

003.02(D)(i) NURSING FACILITY LEVEL OF CARE (NF LOC) MET. If the Department determines that the applicant meets nursing facility level of care (NF LOC) criteria and the person chooses to receive nursing facility (NF) services, the Department will make appropriate notifications.

003.02(D)(ii) NURSING FACILITY LEVEL OF CARE (NF LOC) NOT MET. If the Department determines that the applicant does not meet nursing facility level of care (NF LOC), notification of the determination is issued to the applicant, the facility, and the managed care organization. Persons who are found to be ineligible for Medicaid reimbursement for nursing facility (NF) services will be sent a notice of denial by the Department.

003.02(D)(iii) POSSIBLE OPTIONS. Medicaid payment for nursing facility (NF) services will only be available to those persons who are determined to require nursing facility level of care (NF LOC). They will have the option of entering a nursing facility (NF) or exploring home and community-based care services. If the evaluation determines that there is a need for post-hospitalization rehabilitative or convalescent care, the Department may indicate that short-term or time-limited nursing facility (NF) care is medically necessary. Prior to the end of the short-term or time-limited stay, the nursing facility (NF) must contact Medicaid to review the person's condition and determine future nursing facility level of care (NF LOC).

003.02(E) NOTICES AND APPEALS.

003.02(E)(i) LEVEL OF CARE (LOC) DETERMINATION NOTIFICATION. Medicaid staff send notification to each person, family, or applicable parties, to inform the person of the level of care (LOC) decision. Nursing facility (NF) residents with Medicaid funding, who no longer meet the criteria for nursing facility level of care (NF LOC), must be allowed to remain in the facility up to 30 days from the date of the notice.

003.02(E)(ii) APPEALS. The person or his or her authorized representative may appeal any action or inaction of the Department by following standard Medicaid appeal procedures as defined in 465 NAC 6.