

tasks performed by personnel fit into a direct or indirect care category. For Medicaid payment, payment is determined by each Medicaid state agency.

*Determining Which Residents Can Be Fed by Feeding Assistants*

*Comment:* One state commented that it is cumbersome to rely on the comprehensive assessment to determine which residents may be safely fed by a feeding assistant. Instead, the decision should be left entirely up to the professional judgment of the licensed nurse. A consumer advocacy group also indicated that the comprehensive assessment/annual evaluation is not an effective tool for the assessment of residents to be fed because the information may not be current. Several organizations suggested that we emphasize the importance of the RN or LPN's professional judgment along with input from the interdisciplinary team, as reflected in the comprehensive assessment, when selecting residents for feeding assistance.

*Response:* We agree with commenters and are revising § 483.35(h)(1)(ii) to say that the decision about whether a resident is to be fed by a feeding assistant is based on the charge nurse's assessment and the resident's latest assessment and plan of care. We note that facilities that choose to use paid feeding assistants remain responsible for any adverse actions resulting from the use of these assistants, as with any other employee.

*Comment:* An organization representing licensed professionals suggested that the RN or LPN should consult with a speech-language pathologist when a resident is suspected to have, or is at risk for, swallowing difficulties.

*Response:* We have no objection to this and facilities may use this approach if they choose.

*Comment:* Several commenters indicated that the criteria for selecting residents to be fed is inadequate and suggested that we define the clinical conditions that would require feeding by an RN or LPN or nurse aide. Another commenter suggested that we prohibit feeding assistants from feeding residents with swallowing problems.

*Response:* We believe that the clinical decisions as to which residents may be fed by feeding assistants are best left to the professional judgment and experience of RNs and LPNs who work in the facility and have personal knowledge of a resident's day-to-day condition. If we were to define clinical conditions, we would only be substituting the judgment of

professional nurses employed by the Federal government for the judgment of nurses working in facilities. We believe that professional nurses conclude that certain clinical conditions relating to eating and drinking would require the skills and knowledge of an RN or LPN. These conditions include, but are not limited to, recurrent lung aspirations, difficulty swallowing, and tube or parenteral/IV feedings.

*Comment:* One commenter suggested a number of more stringent requirements for facilities, including (1) obtaining informed consent from the resident or resident's representative that the resident agrees to be fed by a feeding assistant and accepts the risks and benefits; (2) an individualized feeding plan; and (3) a certification by a licensed nurse in a resident's medical record that the resident can be safely fed by a feeding assistant prior to each instance of feeding.

*Response:* We understand that the commenter intends the proposed provisions to be in the best interest of residents, but we believe that, for the most part, they are unduly burdensome for facilities to implement. To require consent before a resident can receive help from a feeding assistant implies that this is a high risk procedure, which we believe it is not. We believe that the Wisconsin and North Dakota experience indicates that it is safe to use well-trained feeding assistants who are properly supervised. It would be inconsistent to require residents to give informed consent for feeding assistance when they need not do so for any other services provided by a facility. Further, a feeding plan would very likely duplicate part of the care planning process. Consequently, we are not revising the rule to accommodate the commenter's suggestions.

*Supervision*

*Comment:* Commenters, concerned about lack of supervision, pointed out that the proposed requirement, in § 483.35(h)(2)(ii), that a nurse is in the unit or on the floor, exceeds the licensed nursing requirements in most states. Other commenters worried that the shortage and high turnover rates of licensed and unlicensed nursing staff could mean that fewer staff are familiar with residents and could result in inadequate monitoring.

*Response:* Facilities are required by § 483.30, Nursing services, to have sufficient qualified nursing staff available on a daily basis to meet residents' needs for nursing care. The requirement in § 483.30, Nursing services, is that, unless waived, a facility must have a RN on duty 8

consecutive hours per day, 7 days a week. A facility must also have a sufficient number of licensed nurses and other nursing personnel on a 24-hour basis to provide nursing and related services to residents. The proposed requirement that a feeding assistant work under the direct supervision of a RN or LPN builds on the requirement that sufficient licensed nursing staff are on duty 24 hours a day. We believe that, if a facility chooses to use feeding assistants, it is the facility's responsibility, and in its best interest, to ensure that adequate supervisory nursing staff is available.

However, we recognize that the supervision requirement is unclear and subject to a variety of interpretations. Therefore, we are revising § 483.35(h)(2) by removing the word, "direct" from the phrase, "direct supervision," because it may unintentionally imply visual contact between a feeding assistant and a supervisory nurse. This is not possible in most facilities, especially if assistants are feeding residents in their rooms. Next, we are removing the requirement that a nurse be in the unit or on the floor where the feeding assistance is furnished and immediately available to give help. As commenters noted, this sentence is unclear. While we are not prescribing the precise means by which facility RNs or LPNs assert their supervisory responsibilities, we will expect that facilities do so in a way that avoids negative outcomes for their residents. Additionally, we are requiring that a feeding assistant call a supervisory nurse on the resident call system when there is an emergency or a need for help. All facilities are currently required to have a resident call system.

*Comment:* Consumer advocates expressed concern about a potential lack of supervision and suggested that all residents who are fed by feeding assistants be fed in the dining room or other congregate area to ensure that a licensed nurse is physically present. Other commenters supported allowing feeding assistants to feed residents in their rooms, citing the fact that many of the most frail residents do not go to the dining room and are least likely to get adequate assistance with eating. Numerous commenters cited examples of bedfast residents, unable to feed themselves or reach the food, receiving no help at mealtime, after which the tray is removed, untouched by the resident.

*Response:* We share commenters' concerns about adequate supervision of feeding assistants to ensure the safety of residents. We are equally concerned, however, that those residents who are