

January 23, 1996

Leola Daniels, M.S., R.N.
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Board of Nursing
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Boise, ID 83720-0061

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Proposed IDAPA 23.01.01.400.03 and .04

Dear Ms. Daniels:

This letter is in response to your January 2, 1996, inquiry in which you ask:

Are proposed IDAPA 23.01.01.400.03 and .04 within the proper authority of the Idaho Board of Nursing to regulate nurses in relation to delegation of nursing functions to unlicensed assistive personnel?

These rules address the relationship of the nursing profession to "Technician/Tech-nologists," "Monitor Technicians," and "Unlicensed Assistive Personnel." We conclude that the rules admit of a reading that falls within the proper authority of the Idaho Board of Nursing.

Objections of the Idaho Board of Medicine

The Idaho Board of Medicine has objected to these rules on the ground that they "attempt to regulate non-licensed personnel working for or under the direction of physicians." (Comments to Proposed Rules, January 9, 1996.)¹ The Board of Medicine points to the informal guideline issued by this office on January 13, 1993, regarding the authority of physicians to delegate medical or nursing functions. The opinion concludes that "physicians may direct a non-licensed person to administer a remedy, diagnostic procedure or advice, pursuant to Idaho Code 54-1804(1)(g)." 1993 Idaho Att'y Gen. Ann. Rpt. 180.

It follows that any restriction adopted by the Board of Nursing regarding the practice of nursing can have no effect on the authority of physicians to delegate medical procedures to non-licensed personnel subject to their supervision. In other words, although a person might otherwise be unlawfully engaging in the practice of nursing, as defined by

the Nursing Practice Act or rules promulgated by the Board of Nursing, such practice is nonetheless proper if engaged in pursuant to delegation by a physician.

While it might have been better to state so explicitly, the rules as we read them do not impinge on the authority of physicians to delegate medical procedures to the non-licensed personnel they supervise. Thus, the rules do not violate Idaho Code § 54-1804(1)(g) and do not, on that score, exceed the authority of the Board of Nursing.

Objections of the Idaho Department of Health and Welfare

The Idaho Department of Health and Welfare (the Department) likewise objected to the Board of Nursing rules during the public hearings devoted to their promulgation. The Department asserted that the rules would have major policy and budgetary impacts on three community based programs: Personal Care Services, Adult Residential Care Facilities, and Residential Habilitation. The Department read proposed Section 400.04 to mandate that providers cannot assist clients with activities of daily living unless the providers have completed Board training courses and are supervised by a registered nurse.

The Department's concerns were echoed by the Board of Medicine and are part of that Board's more comprehensive objection to the rules:

[A]ll of the provisions of Sections 400.03 and .04 purporting to grant the Board of Nursing authority to regulate the practice of technicians/technologists and unlicensed assistive personnel exceed the statutory authorization granted to regulate nursing. . . . These rules also purport to dictate who institutions may hire, how the institutions operate and how medical functions can be delegated.

We do not read the proposed rules so broadly. The rules repeatedly emphasize that they apply in the context of delegation of nursing responsibility by nurses in typical nursing settings. For example, the rules dealing with "technicians/technologists" address the situation where such professionals are "providing basic nursing care services on an organized nursing unit in an institutional setting . . . under the supervision of a licensed professional nurse." Similarly, the provisions of the rules dealing with "unlicensed assistive personnel" state on four separate occasions that they deal with the functions that "may be delegated" (presumably, by nurses) to such personnel.²

Thus, it seems clear that these rules are not attempting to reach out and regulate other health care professionals. Rather, they are providing direction to nurses themselves on how to exercise the powers of delegation that are clearly theirs pursuant to Idaho Code §§ 54-1402(b)(1)g and (2)g of the Nursing Practice Act. As the Hearing Officer noted, this statute has long specified that licensed professional nurses (registered nurses) and li-

censed practical nurses may authorize or delegate nursing interventions to be performed by others and such delegations do not conflict with the Nursing Practice Act.

Furthermore, section 54-2404(3) of the Nursing Practice Act authorizes the Board of Nursing to establish standards of conduct and practice. Since 1974, the Nursing Practice Rules have included provisions directing nurses in the authorization or delegation of functions to auxiliary personnel. Indeed, many of these proposed rules are mere rewrites of rules that are currently in effect. As the Hearing Officer noted:

These rules restrict the nurses' authority to delegate to those settings in which the nurse has delegation/supervision authorization for nursing care services.

(Emphasis added.) It is our understanding that the concerns of the Department have been successfully addressed by the Board of Nursing through the above comments, by various revisions to the proposed rules and at a meeting between the Department and the Board to clarify the intent of the rules.

The intent of the Board of Nursing was repeated in its transmittal letter to Attorney General Lance on December 15, 1995:

The purpose of the proposed rules is to clarify the authority and responsibility of licensed nurses for nursing care functions that they may delegate to non-licensed personnel. The Board of Nursing does not believe that the proposed language of the rules implies or asserts any regulatory authority over any person who is not a licensed nurse in this state. Many technicians and other non-nurses perform technical or other skilled health care services without supervision or delegation of licensed nurses.

(Emphasis added.) It is true that some provisions of the rules, taken separately and out of context, may appear ambiguous. Whatever ambiguities exist in the rules must be read against this clear statement of intent by the Board of Nursing that has promulgated them that the rules do not attempt to assert regulatory authority over anyone who is not a licensed nurse in the State of Idaho.

CONCLUSION

It is our conclusion that the proposed rules do not exceed the statutory authority of the Board of Nursing. The rules do not interfere with the authority of physicians to delegate medical procedures to non-licensed personnel subject to their supervision. Nor do the rules attempt to regulate the practice of non-nurses, or to dictate to hospitals whom they may hire or how such institutions must be run. The sole purpose of these rules is to

regulate nurses in relation to their delegation of nursing functions to non-nurse assistive personnel.

Very truly yours,

JOHN J. MCMAHON
Division Chief
Contracts & Administrative Law Division

¹ The Idaho Board of Medicine, on January 18, 1996, submitted its own request for an Attorney General's opinion regarding these Board of Nursing rules. The request arrived too late to be included in this opinion. It is our understanding that the Board of Medicine will make its concerns known this week to the germane committees during the legislative rule review process. Thus, this office will not respond to that letter.

² The use of the passive voice makes it ambiguous who is doing the delegating. In context, the only correct reading is that the rules apply in situations where nurses are delegating authority to non-nurse personnel whom they supervise.