



INSTITUTE FOR JUSTICE

April 3, 2020

Via Email and UPS

North Carolina Board of Nursing
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North Carolina Medical Board
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Re: North Carolina's restrictions on nurse practitioners volunteering during Covid-19

To the North Carolina Board of Nursing and the North Carolina Medical Board:

The Institute for Justice has learned that the state is barring nurse practitioners from working in hospitals to assist with the Covid-19 pandemic, unless they are supervised by a physician. This supervision requirement is effectively banning many nurse practitioners from offering their services to overburdened hospitals, even as volunteers. Not only is this requirement hurting the state's emergency efforts, but it is also completely unnecessary and likely unconstitutional. We thus request that the Board of Nursing and Medical Board use their emergency powers to lift this requirement as soon as possible.

The Institute for Justice (IJ) is a national nonprofit organization that has worked to remove and reduce licensing restrictions for over 20 years, including in medical professions. For example, IJ has sued several states regarding their unduly burdensome certificate of need requirements, including North Carolina. IJ has also sued states regarding their telemedicine and medicine dispensing restrictions. In addition, IJ drafts model legislation and advises state legislatures on licensing matters nationwide.

We understand that the Boards have just approved several measures to ease barriers to nurse and physician licensure during the pandemic. These measures are extremely welcome and speak highly of the Boards' ability to act quickly during a crisis.



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However, there is still more to be done—especially when it comes to nurse practitioners.

Under the rules of both Boards, nurse practitioners can only practice under the supervision of a physician. *See* 21 N.C. Admin. Code 36.0804. This requirement applies even to volunteers, *id.*, and nurse practitioners “practicing during a disaster.” 21 N.C. Admin. Code 36.0814. Although state law also imposes supervisory requirements on nurse practitioners, N.C. Gen. Stat. § 90-18.2, the Boards have the power to waive these requirements during a declared emergency “in order to permit the provision of emergency health services to the public.” N.C. Gen. Stat. § 90-12.5. The Boards should do so now.

Indeed, this supervisory restriction is preventing many nurse practitioners from volunteering to help with Covid-19 patients. Some physicians are unable to supervise volunteering nurse practitioners because of limitations in their medical malpractice insurance, while others cannot take on additional supervisory responsibilities during this chaotic time. Nurse practitioners want to be able to volunteer now, but they are getting caught in red tape.

The supervision requirement is also unnecessary. According to the American Association of Nurse Practitioners, North Carolina has one of the strictest regulatory regimes for nurse practitioners in the country and the overwhelming majority of states do not require nurse practitioners to have career-long supervision.¹ Many states do not require nurse practitioners to have any supervision at all. In addition, research has found that physicians’ supervision of nurse practitioners does not increase quality or safety but just raises prices of medical services.² During the Covid-19 pandemic, it may also cost lives.

The evidence suggests that the only reason for the supervision provision is to protect doctors from competition. Not only is such protectionism irrelevant during the pandemic, but both the North Carolina Supreme Court and several federal courts have held that licensing laws that exist to protect others from competition are unconstitutional. *In re Certificate of Need for Aston Park Hosp., Inc.*, 193 S.E.2d 729 (N.C. 1973); *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002); *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008); *Bruner v. Zawacki*, 997 F. Supp. 2d 691 (E.D. Ky. 2014); *Santos v. City of Houston*, 852 F. Supp. 601 (S.D. Tex. 1994).

¹ American Association of Nurse Practitioners, State Practice Environment, <https://www.aanp.org/advocacy/state/state-practice-environment>.

² *See, e.g.*, Institute for Justice, the Costs of Occupational Licensing (Nov. 2018), <https://ij.org/report/at-what-cost/costs-of-occupational-licensing/>.



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We thus respectfully recommend that you lift the supervisory requirement for nurse practitioners during the pandemic, which would allow them to help overburdened hospitals and needy patients. We would be happy to discuss this with you further. I can be reached at 631-383-5302 or esmith@ij.org if you have any questions.

Sincerely,

Erica Smith
Senior Attorney
Institute for Justice

CC: William McKinney, General Counsel to the Governor, *via*
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