



INSTITUTE FOR JUSTICE

April 15, 2020

Via Email and UPS

Director David E. Brown
Virginia Department of Health Professions
Perimeter Center
Maryland Drive, Suite 300
Henrico, VA 23233-1463
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Re: Virginia's restrictions on nurse practitioners volunteering during COVID-19

To Director Brown:

The Institute for Justice has learned that Virginia is barring nurse practitioners from working in hospitals to assist with the COVID-19 pandemic unless they have been supervised by a physician for five years. This supervision requirement is effectively banning many nurse practitioners from offering their services to 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 you 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 30 years, including in medical professions. For example, IJ has sued several states regarding their unduly burdensome regulations for certificates of need, telemedicine, and medicine dispensing. In addition, IJ drafts model legislation and advises state legislatures on licensing matters nationwide.

We understand that you have approved several measures to ease barriers to licensure of health professionals during the pandemic, including measures relating to graduation requirements, license reinstatement, and license endorsement. These measures are extremely welcome and speak highly of the Department's ability to act quickly during a crisis.

However, there is still more to be done—especially when it comes to nurse practitioners. Under state law, nurse practitioners can only practice independently after being supervised by a physician for five years. Va. Code Ann. § 54.1-2957. Yet Governor Northam's Executive Order 51 gave the Department authority to waive “any state requirement or regulation.” We request that the Department waive this supervision requirement now.



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This requirement is preventing many nurse practitioners from volunteering to help with COVID-19 patients. Some physicians are unable to supervise 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. On Monday, NBC 12 even reported that this requirement is encouraging some nurse practitioners to leave the state to work in other hospitals.¹

The supervision requirement is also unnecessary. Virginia has one of the strictest regulatory regimes for nurse practitioners in the country.² Fourteen states and the District of Columbia do not require supervision at all. While another fourteen states do require supervision early in a nurse practitioner's career, Virginia has by far the longest supervision requirement at 5 years.³ In addition, multiple studies, including an extensive 2018 report from the Brookings Institute, have found that physicians' supervision of nurse practitioners does not increase quality or safety but just restricts competition, raises prices, and reduces patient access to care.⁴ During the COVID-19 pandemic, it may also cost lives.

Indeed, 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 several federal courts have held that licensing laws that exist to protect others from competition are unconstitutional. *See, e.g., 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).

Several other states have already loosened or lifted supervision requirements on nurse practitioners during the pandemic, including Kentucky, Louisiana, Michigan, New Jersey, New York, and Wisconsin. Multiple other states have lifted other restrictions on nurse practitioners as well.

¹ Kate Masters, *Nurse practitioners say supervision requirements are a hindrance amid COVID-19 pandemic*, NBC 12 (April 13, 2020), <https://www.nbc12.com/2020/04/13/nurse-practitioners-say-supervision-requirements-are-hindrance-amid-covid-pandemic/>.

² *E.g.*, American Association of Nurse Practitioners, *State Practice Environment*, <https://www.aanp.org/advocacy/state/state-practice-environment>.

³ Becker's Hospital Review, *28 states with full practice authority for NPs* (Dec. 28, 2019), <https://www.beckershospitalreview.com/hospital-physician-relationships/28-states-with-full-practice-authority-for-nps.html>.

⁴ *E.g.*, E. Kathleen Adams & Sara Markowitz, *Improving efficiency in the health-care system: Removing anticompetitive barriers for advanced practice registered nurses and physician assistants* (June 2018), <https://www.brookings.edu/research/improving-efficiency-in-the-health-care-system-removing-anticompetitive-barriers-for-advanced-practice-registered-nurses-and-physician-assistants/>; 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 supervision requirement for nurse practitioners during the pandemic, which would allow them to help overburdened hospitals and needy patients. We also hope that your state will choose to remove this requirement permanently. If you have any question, I can be reached at 631-383-5302 or esmith@ij.org.

Sincerely,

Erica Smith
Senior Attorney
Institute for Justice

CC:

Mr. Matt Mansell, Director of the Office of Policy and Legislative Affairs for Governor Northam, *via* matt.mansell@governor.virginia.gov

Mr. Jay Douglas, Executive Director of the Virginia Board of Nursing, *via* Jay.Douglas@dhp.virginia.gov