

To: Catrice C. Williams

Office of the General Counsel

Massachusetts Department of Public Health

From: Donna Kelly-Williams, President of the Massachusetts Nurses Association

Date: October 11, 2016

Re: Comments on proposed changes to 244 CMR 3.00, 6.00, 7.00, and 10.00

1. The proposed change in 244 CMR 3.05(3)(c) Supervision strikes the word “task” and replaces it with “activity” which could adversely affected a registered nurse’s legal status to become a member of a labor union because supervisors under the National Labor Relations Act (NLRA) are excluded from union membership. However, current federal labor law does allow a bargaining unit member to delegate a task to another employee without be deemed a statutory supervisor (see *NLRB v. Kentucky River Community Care, Inc.,* 532 U.S. 706 (2001). The MNA urges the Board to retain the word task so it will not adversely affect the union rights of registered nurses.
2. The proposed change in 244 CMR 3.05(3)(d) would allow the use of telephonic or other telecommunications devises, but this exception should only be allowed for patients that are “stable and predictable.” If a patient is unstable, then a registered nurse will have to be present to assess the patient. The regulation should be further amended as follows (Board changes in red, MNA proposed change in blue.

(d)   the proximity and availability of a ~~qualified~~ licensed nurse to the unlicensed person when performing the nursing activity, which may include the use of telephonic or other telecommunication device(s) if patient’s condition is stable and predictable; and,

1. The proposed addition to 244 CMR 3.05(3)(e) is an addition that will benefit patients in Massachusetts, but for it to be effective the first word in the proposed change “the” should be struck and replaced with “physically” so that resources needed for proper delegation are not just secured in computer or paper file but readily accessible to nurses.
2. The proposed change to regulation 244 CMR 3.05(4) Delegation of Nursing Activities is not properly constructed and could lead to a great expansion of the delegation of nursing activities including core nurse functions. As proposed 244 CMR 3.05(4)(a) would allow delegation if such delegation meets one of the listed criteria.

“(a) ~~Nursing a~~Activities which**meet one or more** (emphasis added) of the following criteria:

1. can be performed according to an established sequence of steps leading to a predictable outcome, ~~that~~

2. do not require nursing assessment and judgment during implementation, or

3. do not involve modification;

This is not consistent with maintaining safe delegation, safe patient care, and the intent of the Board to maintain the current scope of delegation. The proper construction of (a) would be that activities which meet the following criteria may be delegated, and in 2. “or” should be struck and replaced with “and” to assure that each of the criteria are met before delegation of a nursing task is made. The MNA proposed the following change – Board changes in red, MNA suggested changes in blue:

“(a) ~~Nursing a~~Activities whichmeet ~~one or more of~~ the following criteria:

1. can be performed according to an established sequence of steps leading to a predictable outcome, ~~that~~

2. do not require nursing assessment and judgment during implementation, ~~or~~ and

3. do not involve modification;

1. The proposed additional of a new subsection (d) to 244CMR 3.05(4) Delegation of Nursing Activities is not appropriate to 244 CMR 3.05 because it could lead to an expansion of delegation of medical administration that is not appropriate for nursing practice, safe patient care, nor intended by the Board. Because it expands the regulations under Delegation of Nursing Activities the change could be interpreted as not restrictive but only illustrative of proper delegation of medical administration beyond the only two (2) exceptions allowed –the MAP program and school nurse delegation of medical administration. The proper placement of this proposed change in in 244 CMR 3.05 to replace the current (d). This placement would, as intended by the Board, not provide for any expansion of the delegation of medical administration, but provide further safeguards in the only two (2) exceptions (MAP and school nursing) to the general prohibition on delegation of medication administration.
2. The Massachusetts Nurses Association (MNA) supports the proposed changes to 244 CMR 6.00. The proposed changes to the regulations by the Board of Registration in Nursing in the Accreditation of Nursing Education programs should be applauded. The new criteria of three progressive stages of accreditation for by requiring Board approval for establishing or continuing operation of a nursing program, by strengthening of admission requirements, and by requiring affiliation with an accredited a parent institution will strengthen the programs in Massachusetts. Also, publication of information about National Council Licensure Exam (NCLEX) pass rate, the transferability of credits to another institution, the requirement of faculty qualifications of education and experience that includes competence in administration and teaching responsibilities as well as the development of a nursing curriculum that provides a variety of learning experiences and resources with written agreements by both program and agency personnel all strengthen nursing education.
3. 244 CMR 7.03(1)(i) should be removed because it is ambiguous and overly broad denying license holder a reliable standard for behavior. Also, if the license holder faced a complaint of non-compliance, the license holder may be denied due process due to the ambiguous and subjective definition of terms in this subsection. Lastly, community standards of what constitutes good character change over time, e.g., mixed race and gay marriage have at times been illegal and during such times a license holder could have been punished under this provision.
4. 244 CMR 7.03(1)(t) should be removed because it is ambiguous and overly broad denying license holder a reliable standard for behavior. Also, if the license holder faced a complaint of non-compliance, the license holder may be denied due process due to the ambiguous and subjective definition of terms in this subsection.
5. 244 CMR 7.03(1)(x) should be removed because it is ambiguous and overly broad denying license holder a reliable standard for behavior. Also, if the license holder faced a complaint of non-compliance, the license holder may be denied due process due to the ambiguous and subjective definition of terms in this subsection.
6. The Nursing Substance Abuse Rehabilitation Program (SARP) has been a successful program assisting many RNs to recovery and rehabilitation. Part of the success of the program relies on nurses agreeing to participate, and any process or reporting that could expose a nurse to public exposure will chill participation in this unique program. There is concern that 244 CMR 7.04(6) will require disclosure of agreements that include participation in SARP, thus deterring nurses from seeking assistance when needed creating a safety concern. Public policy should encourage RNs to self-report substance abuse issues, and any possible disclosure of such would deter such reporting. Therefore, this subsection should be modified to clearly exclude any references to SARP in agreements, discipline or orders.
7. Proposed 244 CMR 7.04(7) provides for the imposition of a fine. However, the proposed regulation does not specifically cite which act(s) would be subject to a fine nor does it provide notice of the possible fine level for an act thus depriving a nurse of notice about which acts are subject to fines or the fine levels. Also, it would not appropriate to place the Board in a situation where the implementation of fines appears to be a funding mechanism.
8. 244 CMR 7.06(2) Receipt of Notice as proposed does not provide a definition on what is proof of delivery, nor does it grant a reasonable time period after notice is delivered prior to deeming receipt of notice by a licensee. Since the licensee has a property interest in the nursing license, the licensee should have reasonable notice that there may be some action that could affect licensure. The MNA suggests that any request, notice, order or other correspondence be send to the licensee via regular mail and certified mail. The BORN should only be able to deem receipt ten (10) business days after the BORN can prove delivery has been made.
9. Proposed 244 CMR 10.01Delegation should amended to strike “services” and replace with the work “tasks.” The current proposal could adversely affect a registered nurse’s legal status to become a member of a labor union because supervisors under the National Labor Relations Act (NLRA) and National Labor Relations Board (NLRB) law are excluded from union membership. However, current federal labor law does allow a bargaining unit member to delegate a task to another employee without be deemed a statutory supervisor (see *NLRB v. Kentucky River Community Care, Inc.,* 532 U.S. 706 (2001).