COMMONWEALTH OF MASSACHUSETTS

**Division of Administrative Law Appeals**

**1 Congress Street, 11th Floor**

**Boston, MA 02114**

**www.mass.gov/dala**

**Board of Registration in Medicine**,

Petitioner

v. Docket No. RM-16-238

**John C. Nadolny, M.D.**,

Respondent

**Appearance for Petitioner**:

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Board of Registration in Medicine

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**Appearance for Respondent**:

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**Administrative Magistrate**:

Kenneth Bresler

**SUMMARY OF RECOMMENDED DECISION**

**ON ORDER OF TEMPORARY SUSPENSION**

Temporary suspension is not recommended for the respondent physician, who allowed nurse practitioners to use his online ID to issue marijuana certifications. By allowing nurse practitioners to use his online ID, the physician was following the Department of Public Health’s advice, and did not delegate to nurse practitioners his authority to issue marijuana certifications; they had independent authority to issue certifications.

**RECOMMENDED DECISION**

**ON ORDER OF TEMPORARY SUSPENSION**

 The respondent, Dr. John C. Nadolny, appeals the Order of Temporary Suspension by the Board of Registration in Medicine (BRM).

 I held a hearing on August 3, 2016, which a court reporter transcribed. Dr. Nadolny testified, and called Stephanie Gluchacki, Chief Financial Officer of Canna Care Docs, as a witness. Norma Jaynes, an investigator for the BRM, testified for it to confirm the accuracy of her affidavit. (Ex. J.)

I accepted into evidence Exhibits A through J. Both parties submitted post-hearing briefs.

**Findings of Fact**

 1. On November 6, 2012, the people of Massachusetts, through a ballot question, approved An Act for the Humanitarian Medical Use of Marijuana. (This decision calls it “the medical marijuana statute.”) It became Chapter 369 of the Acts of 2012. St. 2012, c. 369.

It has not been codified into the Massachusetts General Laws.[[1]](#footnote-1)

 2. The Department of Public Health (DPH) administers the Medical Use of Marijuana Program, which it refers to by the acronym “MMJ.” (This decision calls it “the medical marijuana program.”) To implement the statute, DPH issued regulations under 105 CMR 725.000 (which this decision calls “the medical marijuana regulations”).

 3. Under the medical marijuana program, a certification allows patients to use medical marijuana. (This decision refers to “a certification” or “a marijuana certification.”) A marijuana certification is comparable to, but is not, a prescription.

 4. Under the medical marijuana regulations, a certification

means a form submitted to the Department by a Massachusetts licensed certifying physician, describing the qualifying patient’s pertinent symptoms, specifying the patient’s debilitating medical condition, and stating that in the physician’s professional opinion the potential benefits of the medical use of marijuana would likely outweigh the health risks for the patient.

105 CMR 725.004.

 5. The medical marijuana regulations generally envision that physicians will issue marijuana certifications. *See* 105 CMR 725.005 (mentioning certifying physicians), 725.004 (definition of marijuana certification is a form submitted by a physician).

 6. The medical marijuana regulations do not explicitly and directly authorize nurse practitioners to issue marijuana certifications.

 7. The medical marijuana regulations do *indirectly* authorize nurse practitioners to issue marijuana certifications, as follows:

Nothing in 105 CMR 725.000 shall be construed to limit the scope of practice of a nurse practitioner pursuant to M.G.L. c. 112, § 80I.

105 CMR 725.650(C).[[2]](#footnote-2)

 8. G.L. c. 112, § 80I, in turn, states:

When a law or rule requires a signature, certification, stamp, verification, affidavit or endorsement by a physician, when relating to physical or mental health, that requirement may be fulfilled by a nurse practitioner….[[3]](#footnote-3)

 9. Although the medical marijuana regulations, which DPH promulgated, do not explicitly and directly authorize nurse practitioners to issue marijuana certifications, a regulation promulgated by the Board of Registration in Nursing does so:

Pursuant to St. 2012, c. 369 and M.G.L. c. 112 § 80I, CNPs [Certified Nurse Practitioners] are authorized to issue written certifications of marijuana for medical use as provided pursuant to the mutually agreed upon guidelines between the NP and the physician supervising the CNP’s prescriptive practice.

244 CMR 4.06(3)(d).[[4]](#footnote-4)

 10. Canna Care Docs, the entity for which Dr. Nadolny worked, had guidelines mentioned in 244 CMR 4.06(3)(d).

 11. Canna Care Docs’ Administrative Policy Statement, which is undated, states in part:

 A CNP issuing approvals for a patient under the Medical Use of Marijuana Program is subject to periodic chart review. The Medical Director will be the certifying physician in all approval cases.

(Ex. B.)[[5]](#footnote-5)

 12. The Administrative Policy Statement may or may not constitute “mutually agreed upon guidelines” under 244 CMR 4.06(3)(d), but it appears to have an element of such guidelines.

 13. In addition to the Administrative Policy Statement, Canna Care Docs had a Collaborative Practice Agreement between Dr. Nadolny and the nurse practitioners. (Ex. C.)

14. The Collaborative Practice Agreement did constitute “mutually agreed upon guidelines” under 244 CMR 4.06(3)(d).

 15. The agreement stated in part, “The nurse practitioners will work in collaboration with John Nadolny, MD….” (Ex. C.)

16. The agreement proceeded to discuss a “bona fide provider patient relationship,” which is a relationship between a certifying physician and patient,

in which the physician has conducted a clinical visit, completed and documented a full assessment of the patient’s medical history and current medical condition, has explained the potential risks and benefits of the marijuana use, and has a role in the patient’s ongoing care and treatment.[[6]](#footnote-6)

(Ex. C.)

 17. The agreement continued:

Nurse practitioners can independently perform selected evaluations. These evaluations may include but [are] not limited to all aspects of the physical examination and assessment of a de[b]il[it]ating condition.

(Ex. C.)[[7]](#footnote-7)

 18. The agreement further stated:

Physician consultation from Dr. Nadolny and/or [a] covering physician is always available to the Nurse Practitioner by telephone or by his physical presence in the clinic.

The agreement listed three circumstances when nurse practitioners will consult the physician. (Ex. C.)

 19. The agreement also stated:

Dr. Nadolny will periodically review medical records and verify physical findings of the nurse practitioners. Any deficiencies will be discussed with the Nurse Practitioner.

(Ex. C.)

 20. The Medical Use of Marijuana Program is a component of DPH. www.mass.gov/eohhs/gov/departments/dph/programs/hcq/medical-marijuana/. So is the Board of Registration in Nursing. www.mass.gov/eohhs/gov/departments/dph/programs/hcq/dhpl/. The BRM is not a component of DPH, but both BRM and DPH are components of the Executive Office of Health and Human Services (EOHHS). www.mass.gov/eohhs/gov/departments/.

 21. In 1984, Dr. Nadolny graduated from Boston University School of Medicine. (Ex. J, Jaynes Affidavit; Tr. 38.)

 22. Since 1985, Dr. Nadolny has been licensed to practice medicine in Massachusetts under certificate number 54880. He is not licensed to practice medicine in another state. (Ex. J, Jaynes Affidavit.)

 23. Dr. Nadolny worked in the Hallmark Health System, which includes Melrose-Wakefield Hospital and Lawrence Memorial Hospital, where he worked in the emergency department until May 2016. (Tr. 40, 41.)

24. On December 2, 2014, Dr. Nadolny became a certifying physician under the medical marijuana program. (Ex. J, Jaynes Affidavit; Tr. 60.)

 25. Dr. Nadolny began working with Canna Care Docs in 2014. (Tr. 44.),

26. Canna Care Docs, which has offices in Seekonk, Fall River, Peabody, South Dennis, Stoughton/Brockton, Waltham, and Worcester, provides marijuana certifications to patients. (Ex. J; Ex.1 (marijuana certification issued to Patient A by Canna Care Docs) to Ex. J. (Jaynes Affidavit).)

 27. Initially, Dr. Nadolny worked full-time as an emergency physician and 36 to 48 hours per month at Canna Care Docs. As of January 2015, his emergency department clinical hours dropped to 70 or 80 per month. (Tr. 46.)

 28. In October 2015, Dr. Nadolny became the medical director of Canna Care Docs. (Tr. 48.)

 29. As medical director, Dr. Nadolny supervised approximately four to six nurse practitioners, including reviewing their medical records. (Tr. 49, 50.)

 30. Dr. Nadolny fielded many telephone calls from nurse practitioners, including when they were not comfortable approving a marijuana certification to a patient. (Tr. 50.)

 31. Even though Dr. Nadolny conferred with nurse practitioners when they were not comfortable approving a marijuana certification, his position was that

the nurse practitioners were functioning on their own. They would do their own certification; they didn’t need my approval to certify or not certify a patient.

(Tr. 56.)[[8]](#footnote-8)

 32. Even though Dr. Nadolny reviewed nurse practitioners’ records, his position on marijuana certification was that it was “their decision to do or not to do.” (Tr. 56.)

 33. When Dr. Nadolny reviewed nurse practitioners’ records, they had already approved marijuana certifications. (Tr. 70.)

 34. For all or most of 2014, nurse practitioners at Canna Care Docs submitted paper marijuana certifications by U.S. mail to the medical marijuana program. (Tr. 89, 95; Ex. E;

Ex. 5, p. 6 (marijuana certification) to Ex. J. (Jaynes Affidavit).)

 35. Physicians, too, used to submit paper marijuana certifications to the medical marijuana program by U.S. mail. Exhibit H is an example.

 36. Canna Care Docs used the same format for paper marijuana certifications for both physicians and nurse practitioners, with one exception. The physicians’ form had a line reading “Signature of physician,” while the nurse practitioners’ form had a signature line reading “Signature of practitioner.” (Ex. H.; Ex. 5, p. 6 to Ex. J. (Jaynes Affidavit).)

 37. In October 2014, DPH informed Canna Care Docs that it would be switching from paper marijuana certifications that were mailed to it. Instead, electronic certifications would be submitted to it the Medical Use of Marijuana Online System (MMJ Online System). (Tr. 89, 95.)[[9]](#footnote-9)

 38. To issue a certification, a physician must currently use the MMJ Online System. (Ex. D (on-line MMJ Program publication, “How to Register with the Medical Use of Marijuana Program: Instructions for Physicians”).)

 39. The MMJ Online System is housed within the Executive Office of Health and Human Services Virtual Gateway (VG) portal. (Ex. D.)

40. The Virtual Gateway Terms and Conditions state, “User’s assigned ID and password are non-transferable, and may not be shared with any other employee or individual.” (Ex. 2, ¶ 5 to Ex. J (Jaynes Affidavit).)

 41. Ms. Gluchacki facilitated the registration with the MMJ Online System of physicians at Canna Care Docs, even though she found the process daunting. In December 2015, Ms. Gluchacki, then the Finance Manager, and now the Chief Financial Officer of Canna Care Docs (Tr. 83), visited DPH in person to complete the registration of physicians. (Ex. E; Tr. 91.)

 42. However, the MMJ Online System did not accept registrations from nurse practitioners. (Ex. E.)

 43. Ms. Gluchacki received an email from DPH, an excerpt of which she passed on to Dr. Nadolny on October 30, 2015. The DPH email stated “the authority for marijuana certification by certified nursing practitioners has been addressed” in 244 CMR 4.06(3)(d), which had been recently issued. It continued:

The Medical Use of Marijuana Program is working…to incorporate the regulatory amendment into the Program and will be issuing guidance to the healthcare community.

Our system is currently unable to accept certifications from CNPs.

(Ex. F.)

 44. Ms. Gluchacki recalled that the email also stated that DPH was putting out bids to have the MMJ Online System updated to allow nurse practitioners to use it. (Tr. 96.) She understood that a computer coding issue with a dropdown box kept nurse practitioners from using the MMJ Online System. (Tr. 91-92.)

 45. In her October 30, 2015 email, Ms. Gluchacki advised Dr. Nadolny:

I was also informed by the DPH that while NPs can write recommendations, they currently do not have the ability to issue patient numbers via the MMJ Online System. This is something they are working on. In the interim, the “Overseeing Physician” will need to do this on their behalf.

(Ex. F.)

 46. With Dr. Nadolny’s knowledge and permission, nurse practitioners at Canna Care Docs started using his MMJ Online System ID to issue marijuana certifications. (Gluchacki testimony, Tr. 104.)[[10]](#footnote-10)

 47. As of May 20, 2016, 5,792 marijuana certifications had been issued under Dr. Nadolny’s ID. (Ex. J, Jaynes Affidavit.)

 48. Of the 5,792 marijuana certifications, Dr. Nadolny personally certified over 2,000 of them. The rest of the marijuana certifications were completed by nurse practitioners using his ID. (Tr. 69.)

 49. On November 18, 2015, a nurse practitioner at Canna Care Docs saw Patient A and issued a marijuana certification to Patient A. (Ex. 1 to Ex. J. (Jaynes Affidavit).)

 50. The nurse practitioner used Dr. Nadolny’s name as the medical provider and Dr. Nadolny’s MMJ Online System ID. (Tr. 66-68; Ex. 1 to Ex. J. (Jaynes Affidavit).)

 51. Dr. Nadolny never met Patient A. (Tr. 66.)

 52. Dr. Nadolny did not have a bona fide physician-patient relationship with Patient A. (Tr. 68.)

 53. On May 24, 2016, Dr. Nadolny suspended the practice of nurse practitioners at Canna Care Docs issuing marijuana certifications. (Ex. G.) He figured that the BRM objected to nurse practitioners’ issuing marijuana certifications and he suspended the practice until the issue was resolved. (Tr. 71.)

 54. Dr. Nadolny did not delegate his duties under the medical marijuana regulations to nurse practitioners. He did allow nurse practitioners to use his MMJ Online System ID for their own cases, which is not the same.

**Discussion**

Regulations, and terms and conditions

If cases exist explaining how to discern the will of the people in enacting legislation through initiatives and referenda, I have been unable to locate them. However, “[t]he primary source of legislative intent is the plain language of the statute.” *Boston Retirement Board v. Contributory Retirement Appeal Board*, 441 Mass. 78, 81 (2004)(citation omitted). Therefore, the primary source of the intent of the 1,914,747 voters who approved the medical marijuana statute, www.sec.state.ma.us/ele/elebalm/balmresults.html#year2012, must also be the plain language of the statute.

 The “[p]urpose and [i]ntent” of the medical marijuana statute was that

there should be no punishment under state law for qualifying patients, physicians and health care professionals, personal caregivers for patients, or medical marijuana treatment center agents for the medical use of marijuana....

St. 2012, c. 369, § 1. Other language in the medical marijuana statute indirectly and subtly reveals the will of the people. The statute does not explicitly assign responsibility to the Department of Public Health to enforce it; however, by assigning various functions to DPH, the statute assumes that DPH will enforce it. And DPH is of course concerned with the public health. *See e.g.*, G.L. c. 17, § 4.

 Therefore, by enacting the medical marijuana statute, the people intended, not only that the medical marijuana program would entail “no punishment under state law” for participants in the medical marijuana program, St. 2012, c. 369, § 1, but that the program be implemented in a way that protects the public health.

 The statute authorized DPH to issue regulations in specific areas: 60-day supplies of marijuana for qualifying patients, St. 2012, c. 369, § 8; nonprofit medical marijuana treatment centers, and registration of dispensary agents, hardship cultivation, and patients and caregivers. St. 2012, c. 369, § 11. This was not a case of “*expressio unius est exclusio alterius*, the expression of one thing is the exclusion of another,” *Aquino v. Civil Service Commission*, 34 Mass. App. Ct. 538, 541 (1993)(citations omitted) – that the people intended to authorize DPH to issue regulations only in specific areas.

 The people’s intent to authorize DPH to issue detailed regulations implementing all aspects of the medical marijuana program can be discerned in three ways. One, the statute assigned DPH to implement the medical marijuana statute, and implementation implies issuing regulations. (DPH’s having *implici*t authority to issue regulations is not the same thing as having *inherent* authority, which DPH does not have and no administrative body has. *Telles v. Commissioner of Insurance*, 410 Mass. 560, 565 (1991).) Two, some language in the statute implied that DPH would issue regulations, and practically required it. For example, the statute reads in part:

Section 14. Penalties for Fraudulent Acts.
(A) The department, after a hearing, may revoke any registration card issued under this law for a willful violation of this law....

St. 2012, c. 369, § 14. The absence of a definition of “[f]raudulent [a]cts” – the definition section contains no such definition, St. 2012, c. 369, § 2 – implicitly called on DPH to issue regulations. And it did so. *E.g.*, 105 CMR 725.425.

 And three, the medical marijuana statute consists of broad brush strokes. That too implies that DPH was going to fill in the gaps, major and minor, with regulations. And it did so. The statute is silent about sanitary conditions and security of marijuana dispensaries, but DPH has added extensive requirements about these and other operational issues for marijuana dispensaries. *E.g.*, 105 CMR 725.105 and 110 (*12 pages* of regulation).

 As the Supreme Judicial Court has ruled:

Frequently, administrative agencies are charged, implicitly or explicitly, with the task of crafting regulations that are more detailed than statutes and tailored to more situations than the legislation specifies. [Citation omitted.] In examining the regulatory response to statutory *silence* or ambiguity, it is unimportant whether we would have come to the same interpretation of the statute as the agency. [Citation omitted.]....*Statutory silence*, like statutory ambiguity, often requires that an agency give clarity to an issue necessarily implicated by the statute but either not addressed by the Legislature or delegated to the superior expertise of agency administrators. [Citation omitted.] Our deference is especially appropriate where, as here, the statutes in question involve an explicit, broad grant of rule-making authority.

*Goldberg v. Board of Health of Granby*, 444 Mass. 627, 633-34 (2005)(emphasis added). The “broad grant of rule-making authority,” *id.* at 634, is implicit here, whereas it was explicit in *Goldberg*, but the point remains valid.

 The medical marijuana statute is silent on whether nurse practitioners may issue marijuana certifications. DPH, being aware of G.L. c. 112, § 80, properly promulgated a regulation recognizing it, 105 CMR 725.650(C).

[A] regulation...need not necessarily find support in a particular section of [the enabling statute]; it is enough if it carries out the scheme or design of the chapter and is thus consistent with it.

*Entergy Nuclear Generation Company v. Department of Environmental Protection*, 459 Mass. 319, 331 (2011)(citation and quotation marks omitted; brackets in the original). An enabling statute “need not mention” topics “explicitly…to encompass them within the department’s broad regulatory mandate.” *Id.*

 In general, “a properly promulgated regulation has the force of law, [citation omitted,] and must be accorded all the deference due to a statute.” *Borden, Inc. v. Commissioner of Public Health*, 388 Mass. 707, 723 (1983)(citation omitted), *cert. denied*, 464 U.S. 936 (1983).

 BRM does not challenge DPH’s authority to issue 105 CMR 725.650(C). (BRM br. 11.) BRM *does* challenge the Board of Registration in Nursing’s authority to issue 244 CMR 4.06(3)(d) – *which is equally valid*. Both regulations are grounded in G.L. c. 112, § 80. Both regulations did not need to be explicitly grounded in the medical marijuana statute to be valid. Both regulations were promulgated properly (or at least BRM has not alleged otherwise). And both regulations have the force of law.

 Another related way to view both regulations as proper is that they are “rationally related to…statutory goals.” *American Family Life Assurance Co. v. Commissioner of Insurance*, 388 Mass. 468, 477 (twice) (1983), *cert. denied*, 464 U.S. 850 (1983).

 The Virtual Gateway Terms and Conditions (Ex. 2, ¶ 5 to Ex. J (Jaynes Affidavit) are comparable to administrative guidelines. Administrative guidelines enunciate the requirements of a person’s participation in a program; the terms and conditions enunciate the requirements of a person’s participation in the MMJ Online System. Although an administrative guideline does

does “not carry the force of law,” *Boston Retirement Board v. Contributory Retirement Appeal Board*, 441 Mass. 78, 80, 82 (2004), it is still “entitled to substantial deference.” *Global NAPs, Inc. v. Awiszus*, 457 Mass. 489, 497 (2010).

 BRM is trying to suspend Dr. Nadolny for violating the Virtual Gateway Terms and Conditions, which *do not* carry the force of law, while challenging the validity of 244 CMR 4.06(3)(d), which *does* carry the force of law. It is trying to enforce the terms and conditions, which neither the medical marijuana statute nor regulations mention, while challenging 244 CMR 4.06(3)(d), specifically because the medical marijuana statute does not mention nurse practitioners. BRM did not explain these apparent inconsistent positions.

 Dr. Nadolny

 The issue before me now is whether Dr. Nadolny “is an immediate and serious threat to the public health, safety, or welfare.” 243 CMR 1.03(11)(a). *See* Ex. A. (The issue before me now is not whether Dr. Nadolny may be disciplined under the Statement of Allegations.) More specifically, the issue is whether Dr. Nadolny is an immediate and serious threat to the public health, safety, or welfare because he (1) allowed nurse practitioners to use his MMJ Online System ID or (2) allegedly delegated to nurse practitioners his authority to issue marijuana certifications.

 It is unclear whether BRM seeks to temporarily suspend Dr. Nadolny because he issued one marijuana certification to Patient A or because he issued marijuana certifications to thousands of patients, with Patient A as an example. *See* BRM br. 9, 10 (referring to “thousands of individuals” and “thousands of occasions”).

 In either event, I conclude that he is not an immediate and serious threat to the public health, safety, or welfare. Dr. Nadolny stopped the practice of nurse practitioners at Canna Care Docs issuing marijuana certifications in May 2016. Although Dr. Nadolny did not comply with the Virtual Gateway Terms and Conditions, which state, “User’s assigned ID and password are non-transferable, and may not be shared with any other employee or individual” (Ex. 2, ¶ 5 to Ex. J (Jaynes Affidavit)), I note two things. One, DPH informed Canna Care Docs of this technological work-around. The BRM seeks to temporarily suspend Dr. Nadolny’s license because DPH advised his office to do what it did: not comply with DPH’s terms and conditions. For Dr. Nadolny to have followed the advice of DPH, which administers the medical marijuana program, does not constitute bad judgment, as BRM twice seems to have alleged. (BRM br. at 9, 10.)

And, two, there is no allegation that any of the marijuana certifications that nurse practitioners issued under Dr. Nadolny’s ID were faulty or illegal. The marijuana certifications that nurse practitioners issued under Dr. Nadolny’s ID were apparently appropriate and legal under 105 CMR 725.650(C) ; G.L. c. 112, § 80I; and 244 CMR 4.06(3)(d). There is no allegation to the contrary. Hence, there was no threat to the public health, safety, or welfare.

It is not as if Dr. Nadolny let his MMJ Online System ID be used by strangers or by people who were not authorized to issue marijuana certifications. It is not as if Dr. Nadolny let his MMJ Online System ID be used by people who were authorized to issue marijuana certifications but who violated the medical marijuana regulations.

As for whether Dr. Nadolny delegated to nurse practitioners his authority to issue marijuana certifications, he did not. He had his caseload of patients; they had their own caseloads. They sometimes conferred with them, but he did not veto their decisions. For better or worse, Dr. Nadolny supervised the nurse practitioners – but didn’t really supervise them. He monitored them and might have stepped in had he noticed something grossly untoward, but he did not delegate to them.

BRM does not allege that Dr. Nadolny, by working in the same office as the nurse practitioners and by conducting chart reviews after they had issued certifications, delegated his authority to issue certifications to them. When nurse practitioners in Canna Care Docs were issuing paper certifications, the patients were those of the nurse practitioners, who were authorized to issue paper certifications under valid regulations. Dr. Nadolny did not delegate his authority to them. When nurse practitioners tried to use the MMJ Online System, the patients were still those of the nurse practitioners, who were still authorized to issue certifications under valid regulations. Had the MMJ Online System allowed nurse practitioners to do technologically what the regulations allowed them to do legally, issue certifications, the BRM probably would not have moved to suspend Dr. Nadolny. Dr. Nadolny’s act of allowing nurse practitioners to use his ID was just that: allowing them to use his ID. It did not transform the process of nurse practitioners’ issuing their own marijuana certifications into Dr. Nadolny’s delegating to nurse practitioners his authority to issue certifications.

Ultimately, I see two non-issues in this case. One is St. 2012, c. 369, § 3, which provides:

A physician, and other health care professionals under a physician's supervision, shall not be penalized under Massachusetts law, in any manner, or denied any right or privilege, for:
(a) Advising a qualifying patient about the risks and benefits of medical use of marijuana; or
(b) Providing a qualifying patient with written certification, based upon a full assessment of the qualifying patient’s medical history and condition, that the medical use of marijuana may benefit a particular qualifying patient.

This provision, which Dr. Nadolny raises, does not confer blanket immunity from state action against a physician for any act related to the medical marijuana program.The BRM does not seek to penalize Dr. Nadolny for advising Patient A or any other patient about “the risks and benefits of medical use of marijuana.” *Id.* It does not seek to penalize him for providing Patient A or any other qualifying patient with a marijuana certification. It seeks to penalize him for letting nurse practitioners use his MMJ Online System ID and allegedly delegating to nurse practitioners his authority to issue marijuana certifications.

The second non-issue, or what I hope is a non-issue, is the tension between the Board of Registration in Medicine and the Board of Registration in Nursing. Dr. Nadolny sensed it; he figured that the BRM objected to nurse practitioners’ issuing marijuana certifications and he suspended the practice of nurse practitioners at Canna Care Docs doing so until the issue was resolved. (Tr. 71.) I sensed the tension too. The BRM’s Complaint Counsel, in her opening statement’s overview of the law, stated that the medical marijuana statute “doesn’t say anything about nurse practitioners,” and the BRM was relying on that omission to proceed against Dr. Nadolny. (Tr. 33.) The Complaint Counsel continued that the Board of Registration in Nursing’s regulation was unauthorized under the medical marijuana statute or regulations,[[11]](#footnote-11) stating that the “Nursing Board” is “not part of the Medical Marijuana Program;” it “decided on [its] own” that nurse practitioners could issue marijuana certifications; and it “issued regulations on [its] own” – “sua sponte.”[[12]](#footnote-12)

The Complaint Counsel enunciated the BRM’s position as follows:

We’re here because a physician delegated this legal authority to certify to a nurse practitioner, and he is relying on the nursing regs to give that authority.

(Tr. 34.)

 I hope that the BRM is not seeking to temporarily suspend Dr. Nadolny because it objects to the Board of Registration in Nursing’s regulation or to the involvement of nurse practitioners in the medical marijuana program.

**Conclusion and Order**

 I recommend that the Board of Registration in Medicine not temporarily suspend Dr. Nadolny. When he allowed nurse practitioners to use his online ID, he was following DPH’s advice, and did not delegate to nurse practitioners his authority to issue marijuana certifications; they had independent authority to issue certifications.

 DIVISION OF ADMINISTRATIVE LAW APPEALS

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 Kenneth Bresler

 Administrative Magistrate

Dated: September 23, 2016

1. The statute and regulations for the medical marijuana program provide background for the other facts of this decision. [↑](#footnote-ref-1)
2. In its brief, BRM does *not* list this regulation in its section, “Applicable Law and Regulations,” indicating that it does not consider the regulation as applicable. [↑](#footnote-ref-2)
3. In its brief, BRM does not list this regulation in its section, “Applicable Law and Regulations.” [↑](#footnote-ref-3)
4. In its brief, BRM does not list this regulation in its section, “Applicable Law and Regulations.” [↑](#footnote-ref-4)
5. This provision is apparently self-contradictory. It does not explain how an approval for marijuana certification can be both the certified nursing practitioner’s and the certifying physician’s. The apparent contradiction is probably due to the uneasy relationship of one set of regulations allowing physicians to issue medical marijuana certifications, and 105 CMR 725.650(C); G.L. c. 112, § 80I; and 244 CMR 4.06(3)(d), allowing nurse practitioners to do so. The apparent self-contradiction is not legally significant to this decision. [↑](#footnote-ref-5)
6. This language is derived, word for word, from 105 CMR 725.004 (definition of “*Bona Fide* Physician-patient Relationship”). [↑](#footnote-ref-6)
7. These two successive provisions appear to conflict. *See* note 5. The apparent self-contradiction is not legally significant to this decision. [↑](#footnote-ref-7)
8. Dr. Nadolny’s position is correct under 105 CMR 725.650(C) ; G.L. c. 112, § 80I; and 244 CMR 4.06(3)(d). [↑](#footnote-ref-8)
9. When DPH switched from paper marijuana certifications to the MMJ Online System is not in the record. [↑](#footnote-ref-9)
10. This factual finding is valid whether Dr. Nadolny actually sat down and personally used his MMJ Online System ID to approve nurse practitioners’ marijuana certificates or whether nurse practitioners used his ID. The latter is more likely, because Patient A’s marijuana certification was issued on a day that he was not present at Canna Care Docs. (Tr. 100.) Furthermore, it is unlikely that Dr. Nadolny sat down and physically entered his ID for thousands of patients whom nurse practitioners assessed. BRM seems to be arguing both that Dr. Nadolny used his MMJ Online System ID to approve nurse practitioners’ marijuana certificates (BRM br. at 7, citing Tr. 101) and that nurse practitioners used his ID. (BRM br. at 12.) (BRM relies on Tr. 101, where Ms. Gluchacki’s testimony is more ambiguous than it is at Tr. 104. Her testimony at Tr. 99 is ambiguous as well.) I hope that BRM is not arguing the contradictory positions that Dr. Nadolny’s license to practice medicine should be suspended both because he is culpable for personally entering his ID for thousands of patients who weren’t his, *and* because he wasn’t even present when marijuana certifications were being issued under his ID. [↑](#footnote-ref-10)
11. This is not accurate. 105 CMR 725.650(C) states:

Nothing in 105 CMR 725.000 shall be construed to limit the scope of practice of a nurse practitioner pursuant to M.G.L. c. 112, § 80I. [↑](#footnote-ref-11)
12. This is not precisely accurate. See the previous footnote. [↑](#footnote-ref-12)