Jonnathan Busko Testimony in Support of support LD 238, "An Act to Protect Emergency Medical Services Persons' Right to Work in Multiple Health Care Settings"
February 4, 2025

Senator Bailey, Representative Mathieson, and members of the Committee on Health Coverage, Insurance, and Financial Services,

My name is Jonnathan Busko. I am an emergency and EMS physician in Bangor. I am here today to urge you to support LD 238, "An Act to Protect Emergency Medical Services Persons' Right to Work in Multiple Health Care Settings." This is not the first time this matter has come before this committee and I'm hoping that this bill is the opportunity to lay it to rest.

By way background, historically Maine EMS has adhered to its scope and mission as laid out in the Statement of Purpose of the Maine Emergency Medical Services Act of 1982:

> It is the purpose of this chapter to promote and provide for a comprehensive and effective emergency medical services system to ensure optimum patient care. The Legislature finds that emergency medical services provided by an ambulance service are essential services. The Legislature finds that the provision of medical assistance in an emergency is a matter of vital concern affecting the health, safety and welfare of the public.
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> It is the intent of the Legislature to designate that a central agency be responsible for the coordination and integration of all state activities concerning emergency medical services and the overall planning, evaluation, coordination, facilitation and regulation of emergency medical services systems. Further, the Legislature finds that the provision of prompt, efficient and effective emergency medical dispatch and emergency medical care, a well-coordinated trauma care system, effective communication between prehospital care providers and hospitals and the safe handling and transportation, and the treatment and nontransport under appropriate medical guidance, of the sick and injured are key elements of an emergency medical services system. This chapter is intended to promote the public health, safety and welfare by providing for the creation of a statewide emergency medical services system with standards for all providers of emergency medical services.

In practical terms, this meant that individuals who also happened to hold EMS licenses were excluded from Maine EMS oversight when they worked under the delegating authority of individuals licensed by the Maine Allopathic and Osteopathic Medical Licensure Boards (sections 2594-A and 3270-A "Assistants; Delegating Authority") and, as applicable, under rules and regulations of the Department of Health and Human Services and the Center for Medicare and Medicaid Services (CMS). However, and I was aware of this work but was not involved, in the mid-2010's there was concern expressed that perhaps Maine EMS would have regulatory authority over individuals holding Maine EMS licenses who were working under delegated practice in hospitals and thus LD 2025 ("An Act To Authorize Emergency Medical Services Personnel To Provide

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§85. Emergency medical services persons

...

7. Delegation. This chapter may not be construed to prohibit a person licensed as an emergency medical services person from rendering medical services in a hospital or other health care facility setting if those services are:

A. Rendered in the person's capacity as an employee of the hospital or health care facility; [PL 2021, c. 587, §1 (AMD).]

B. Authorized by the hospital or health care facility; and [PL 2021, c. 587, §1 (AMD).]

C. Delegated in accordance with section 2594-A, section 2594-E, subsection 4, section 3270-A or section 3270-E, subsection 4. [PL 2023, c. 132, §1 (AMD).]

Unless otherwise provided by law, an emergency medical services person licensed under this chapter may not simultaneously act as a licensee under this chapter and an assistant performing medical services delegated by a physician in accordance with section 2594-A or section 3270-A or by a physician assistant in accordance with section 2594-E, subsection 4 or section 3270-E, subsection 4.

[PL 2023, c. 132, §1 (AMD).]

Treatment within Their Scope Of Practice in a Hospital Setting With the Permission of the Hospital") was enacted as PL 2019, Ch. 609 / 32 MRS§85(7).

In a letter to an EMS agency dated July 26, 2021, then Director of Maine EMS Sam Hurley suggested that Maine EMS would have authority over people who happened to hold Maine EMS licenses who were working under delegated practice in locations outside of hospitals and in arrangements other than "employed" because those circumstances were not explicitly listed in 32 MRS§85(7). This led to the introduction of LD1858 which proposed to expand the list of locations in which Maine EMS regulatory authority was definitively excluded when individuals were practicing under delegated authority and added the language "or contracted agents" to Section 85.7.a. This language was added to help address a crisis of EMS and healthcare facility staffing which I will discuss shortly. The consequence of LD 1858 was that the question of authority over delegated practice was referred to the Maine Medical Licensing Boards. Former Maine EMS Director Hurley had stated that Maine EMS' primary concern was that if an EMS agency and a hospital entered into an arrangement in which EMS persons were contracted to the hospital rather than being directly employed to work under delegated practice that those individuals would have no clear regulatory oversight of the care they delivered. In the report presented to committee by the Allopathic and Osteopathic Licensing Boards, they assured this committee and Maine EMS that under the delegation statutes and subsequent rules and regulations, regardless of employment status, the delegating physician or PA had not only civil and criminal liability but also professional (licensure) liability regarding delegation. A recommendation was made in this report (and subsequently enacted) to add the following language to Section 85.7:

> Unless otherwise provided by law, an emergency medical services person licensed under this chapter may not simultaneously act as a licensee under this chapter and an assistant performing medical services delegated by a physician in accordance with section 2594-A or section 3270-A or by a physician assistant in accordance with section 2594-E, subsection 4 or section 3270-E, subsection 4.

Subsequently, at the October 2024 Maine EMS board meeting, Director William Montejo of the DHHS Division of Licensing and Certification informed the Maine EMS Board that DHHS Regulations and Rules recognized individuals acting under delegation as agents of a regulated entity regardless of whether they are employees, contracted agents, or volunteers and thus their practice would not fall under a regulatory authority.

While it would seem that these actions would have laid the question to rest, unfortunately the statute as written continues to create confusion. As you may be aware, EMS in Maine is in crisis and interfacility transport, the work of moving patients between hospitals, is particularly challenged. As of today, there are hospitals and EMS agencies that desire to enter contractual arrangements in which those ambulance services would place a staffed ambulance at the hospital to provide interfacility transports. The only way these arrangements work financially is if the ambulance crews are able to do other productive work while awaiting interfacility transports (e.g. to work in the emergency departments under delegated practice) and the intention of the prior statutory work was to allow such arrangements to happen. Unfortunately, while both the Allopathic

and Osteopathic Medical Licensing Boards and DHHS have been clear that there is proper structure in place to regulate the delegated practice of those individuals, because the language of the law is unchanged, healthcare system attorneys are declining to authorize their systems to enter those contractual arrangements. In short, they assert that the language as it stands leaves open the possibility of a third regulatory agency, Maine EMS, also asserting authority as to the way the hospitals are choosing to deliver care.

The simplest solution would be to remove in its entirety Section 85.7. Maine EMS has a scope of authority limited to EMS care as outlined in the Statement of Purpose, and it can be asserted that all Section 85.7 does is explicitly state what is implicit; that is, that Maine EMS does not have any authority over individuals who are functioning under delegated practice. However, in light of the confusion that has arisen as to the scope of Maine EMS' authority over the last 7 years, rescinding this section would also require a letter of opinion from Maine EMS, the Commissioner of Public Safety, or the Attorney General's office that Maine EMS only has authority over individuals who hold EMS licenses in the context of emergency and non-emergency EMS responses (including community paramedicine) to assure all interested parties that Maine EMS would not exert authority over these healthcare workers in other settings.

Another solution would be to simply remove Sections 85.7.a and 85.7.b, leaving Section 85.7 to read:

> **Delegation.** This chapter may not be construed to prohibit a person licensed as an emergency medical services person from rendering medical services in a hospital or other health care facility setting if those services are delegated in accordance with section 2594-A, section 2594-E, subsection 4, section 3270-A or section 3270-E, subsection 4.
>
> Unless otherwise provided by law, an emergency medical services person licensed under this chapter may not simultaneously act as a licensee under this chapter and an assistant performing medical services delegated by a physician in accordance with section 2594-A or section 3270-A or by a physician assistant in accordance with section 2594-E, subsection 4 or section 3270-E, subsection 4.

This solves the problem of scope as both DHHS regulations and section 2594-A, section 2594-E, subsection 4, section 3270-A and section 3270-E, subsection 4 set the conditions under which delegated practice may and does occur; there is no need for the EMS statue to set any other conditions Removing extraneous language makes it clear that if someone is acting in accordance with all laws, rules, and regulations pertaining to delegated practice then Maine EMS does not have authority over them.

Finally, you could approve this bill which is simply to add additional language about contract status and volunteer status. This would clarify the immediate issue but does leave open the possibility that if there is some other arrangement that could be made for delegated practice in the future that additional language changes to this statute would be necessary. It also has the

potential to imply that individuals with EMS licenses are somehow working under their licenses when they are working under delegated practice.

Regardless of choice you make, eliminating the whole section, modifying the language to refer to the relevant delegation statutes, or adding the language as suggested in this bill, it is clear that change is necessary. Right now, operational arrangements that would improve interfacility transport and improve staffing of hospital emergency departments, nursing homes, and other healthcare facilities throughout the state ae being impeded by the lack of clarity in the current statutory language. Maintaining the status quo will do nothing but continue to harm patients.

I appreciate your consideration of this important matter.

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Exhibit A: Report to HCIFS Committee regarding LD1858, 2023

BOARD OF LICENSURE IN MEDICINE
Marouila S. Gleaton, M.D., Chair
137 State House Station
Augusta, ME 04333-0137
https://www.maine.gov/md/

Janet T. Mills
GOVENOR

BOARD OF OSTEOPATHIC LICENSURE
Melissa Michaud, PA-C, Chair
142 State House Station
Augusta, ME 04333-0142
https://www.maine.gov/osteo/home

January 27, 2023

Senator Donna Baily, Chair
Representative Anne Perry, Chair
Committee on Health Coverage, Insurance and Financial Services
100 State House Station
Augusta, ME 04333

Re: ***Report to the Committee Pursuant to LD 1858 An Act Regarding Delegating Authority for Services Performed by Emergency Medical Services Personnel in Health Care Facilities***

Dear Senator Baily, Representative Perry, and members of the Committee on Health Coverage, Insurance and Financial Services:

On April 12, 2022, LD 1858 was enacted into law. That law added "or health care facility" to provisions of 32 M.R.S. § 85, and also:

1. Ensured that a previously authorized pilot project in Jackman, Maine known as "the Maine EMS Critical Access Integrated Paramedic (CAIP) Pilot Project" would be permitted to continue notwithstanding any other provision of law "for so long as the project remains approved by the Emergency Medical Services' Board."

2. Directed the Board of Licensure in Medicine (BOLIM) and the Board of Osteopathic Licensure (BOL), in consultation with the Emergency Medical Services' (EMS) Board and interested stakeholders, to develop guidance regarding the delegation of medical tasks by physicians and physician assistants to persons "acting contemporaneously pursuant to a contractual arrangement as a medical assistant under delegated authority and as an emergency medical services person… [and] submit a report including the guidance and any recommendations for statutory changes to the joint standing committee of the Legislature having jurisdiction over physician licensing matters no later than January 31, 2023."

The BOLIM and BOL established a workgroup to review the issues and receive input from interested stakeholders and the staff of EMS. Following consultation with interested stakeholders and EMS staff, BOLIM and BOL issue the following guidance:

I. Background.

A. Physician/Physician Assistant Delegation – BOLIM and BOL Laws.

For four decades, the laws in Maine have authorized physicians licensed by BOLIM and BOL to delegate *certain activities relating to medical care and treatment* to medical assistants.[1] In 2015 the Legislature expanded this authority to delegate these activities to physician assistants. 32 M.R.S. §§ 2594-E(4), 3270-E(4).

Medical assistants are not licensed by BOLIM and BOL and receive education and training either directly by the physician or physician assistant or by other means, such as a medical assistant course. The type of training provided to medical assistants depends upon the nature of the medical practice in which they work – as do the types of medical acts that may be delegated. Because the practice of medicine and the provision of medical services is complex and includes numerous specialties and subspecialties as well as different methods of delivery (e.g., in person or via telehealth) it would be impossible to identify and categorize all of the different types of activities that may be performed by a medical assistant under delegation for all practice types and all settings.

It is important to note that currently the applicable statutes, as interpreted by BOLIM and BOL, limit a physician's and physician assistant's ability to delegate activities related to medical care and treatment in four significant ways:

1. The activities related to medical care and treatment being delegated must be of the type that are *carried out by custom and usage.* While the law does not define the terms *custom and usage*, BOLIM and BOL have interpreted this language to mean that activities may be delegated if those activities have traditionally been delegated and they are widely accepted in the practice setting that the activities are delegable. In other words, the activities may be delegated if it is the customary practice that they are delegated in those circumstances. Typical activities performed by a medical assistant may include communication with and the scheduling of patients, recording certain parts of an office visit in medical documentation, and taking patient vital signs.

2. If the activities being delegated would require a state license, registration, or certification to perform, then the activity cannot be delegated. For example, a physician or physician assistant cannot delegate to a medical assistant the activity of taking radiographs of patients as that requires specific education and training and a license to perform radiologic technology in order to safely expose patients to ionizing radiation.

3. The activities being delegated must be *under the control of the physician or surgeon* or *under control of the physician assistant.* The law does not define the terms *under the control of* and would allow either direct (on-site) or indirect (remote/telehealth) control. At a minimum, BOLIM and BOL interpret these terms to mean that a physician or physician assistant delegating activities must be aware of the nature and scope of activities being delegated, ensures that the medical assistant has the appropriate training and education to safely and competently perform the delegated activities, and ensures that the activities were performed competently and safely.

[1] BOLIM's statute authorizing physician delegation is 32 M.R.S. § 3270-A https://legislature.maine.gov/statutes/32/title32sec3270-A.html. BOL's statute authorizing physician delegation is 32 M.R.S. § 2594-A https://legislature.maine.gov/statutes/32/title32sec2594-A.html.

4. While not explicitly stated in the law, BOLIM and BOL interpret the law to implicitly require that the physician or physician assistant delegating the activity must be competent to perform the activity being delegated. As an extreme example, a physician or physician assistant could not delegate the activity of intubating a patient if they are unable to do so because they would be unable to ensure that the procedure was being done correctly and safely – a requisite for activity to be *under the control* of the physician or physician assistant.

It is also important to note that the law makes the physician or physician assistant delegating activities relating to medical care and treatment to medical assistants *legally liable for the activities of those individuals*. This includes at least:

1. Civil/criminal liability – A physician/physician delegating activities relating to medical care and treatment are subject to medical malpractice actions for activities delegated to and performed by a medical assistant.

2. Professional liability – A physician/physician assistant delegating activities relating to medical care and treatment are subject to investigation and possible discipline by BOLIM or BOL for activities delegated to and performed by a medical assistant.

The expressly stated legal liability outlined in the law should ensure that physicians and physician assistants contemplating delegating an activity to a medical assistant ensure that the activity is one that is performed *by custom and usage,* is appropriately *under their control*, and that the medical assistant is appropriately trained to safely perform the activity.

In conclusion, while BOLIM and BOL laws authorize physicians and physician assistants to delegate activities related to medical care and treatment, the law explicitly and implicitly places *reasonable limitations* upon that authority and imposes the ultimate legal liability and responsibility upon the delegating physician or physician assistant.

B. Physician/Physician Assistant Delegation – EMS Laws.

According to information provided by the stakeholders during the workgroup meetings, EMS licensed personnel have been employed as medical assistants by physicians and health care facilities for many years. Reportedly 30% of EMS personnel work as medical assistants under delegation of a physician in a private practice or hospital emergency department. In addition, hospitals reportedly allow medical assistants to perform activities related to medical care and treatment that *exceed the scope of practice* of an Emergency Medical Technician.

In 2019 and 2021, the Legislature amended the EMS law to make clear that licensed EMS personnel could not be prohibited from rendering medical services in a hospital or other health care facility setting if the person was an *employee* of the hospital or health care facility, the activity being delegated was *authorized* by the hospital or health care facility, and the medical services were *delegated by a physician* pursuant to BOLIM's or BOL's laws.[2]

C. LD 1858.

The reported impetus for LD 1858 as originally drafted was to ensure that persons who have been employed as medical assistants and working under delegation in *non-hospital and non- health care*

[2] 32 M.R.S. § 85(7) https://legislature.maine.gov/statutes/32/title32sec85.html.

facilities (i.e. private medical practices) for years – and who also happen to have an EMS license – were not prohibited by EMS law from continuing to do so. Due to concerns expressed by EMS staff regarding LD 1858, the Committee passed the amended version and directed this review and report.

II. BOLIM and BOL Guidance and Recommendations.

A. EMS and BOLIM/BOL laws should be clear that a person is either acting within their scope of practice as a licensed EMS professional or they are acting as a medical assistant acting under the delegation of a physician or physician assistant[3] – *they cannot do both concurrently (i.e. at the same time).*

For example, a EMT on an ambulance run with a patient pursuant to their EMS license cannot – at the same time and moment – act as a medical assistant under the delegation of a physician and perform a service that is not within the scope of their EMT license. While BOLIM and BOL believe that the law is already clear on this point, EMS staff conveyed concerns about it – to include the preceding hypothetical situation.

Recommendation 1: The Committee may want to consider adding language to the EMS statute to require photo identification badges be worn to identify the individual either as an EMS licensee or as a medical assistant and unless otherwise provided by law[4] include language that EMS licensees cannot simultaneously act as EMS-licensed personnel and a medical assistant under delegation.

B. BOLIM/BOL laws regarding delegation should fully align. The BOLIM law regarding delegation by physicians and physician assistants requires "control" while BOL's law regarding physician assistants requires "control" but physician delegation requires "direct control."

Recommendation 2: The Committee may want to consider amending BOL's statute 32 M.R.S. § 2594-A to delete the word "direct" when referring to physician control of activities being delegated. The term "direct" does not appear in BOLIM's statute and implies that the delegating physician must be physically present which could impact access to care by patients who are seen in rural locations without a physician on site via telehealth.

C. The EMS statute limits delegation of activities to EMS-licensed personnel to *physicians*. Both BOLIM's and BOL's statutes[5] specifically provide physician assistants with the authority to delegate activities related to medical care and treatment to medical assistants.

Recommendation 3: The Committee may want to consider amending the EMS statute regarding delegation to include references to BOLIM's and BOL's laws regarding physician assistant delegation.

D. BOLIM and BOL laws regarding delegation could be further clarified by adding language to explicitly include specific limitations.

Recommendation 4: The Committee may want to consider amending BOLIM and BOL statues regarding delegation as follows:

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[3] As previously indicated, the current EMS statute regarding delegation only refers to physicians.
[4] For example, "The Jackman Project" which authorizes EMS licensed personnel to work in a clinic pursuant to protocols approved by the EMS Medical Direction Board.
[5] BOLIM's statute is 32 M.R.S. § 3270-E https://legislature.maine.gov/statutes/32/title32sec3270-E.html. BOL's statute is 32 M.R.S. § 2594-E https://legislature.maine.gov/statutes/32/title32sec2594-E.html.

Physician Delegation Language:

Assistants; delegating authority
This chapter may not be construed as prohibiting a physician or surgeon from delegating to the physician's or surgeon's employees or support staff certain activities relating to medical care and treatment carried out by custom and usage when the activities are under the control of the physician or surgeon, the activities being delegated do not – unless otherwise provided by law – require a State license, registration or certification to perform, the physician has the appropriate training or experience to perform the activities being delegated, the physician ensures that the person being delegated the activities has the appropriate training, education, or experience to perform the delegated activities, and the physician ensures that the person to whom the activities are delegated performs them competently and safely. The physician delegating these activities to employees or support staff, to program graduates or to participants in an approved training program is legally liable for the activities of those individuals, and any individual in this relationship is considered the physician's agent. This section may not be construed to apply to registered nurses acting pursuant to chapter 31 and licensed physician assistants acting pursuant to this chapter and chapter 36.

When the delegated activities are part of the practice of optometry as defined in chapter 34-A, then the individual to whom these activities are delegated must possess a valid license to practice optometry in Maine, or otherwise may perform only as a technician within the established office of a physician, and otherwise acting solely on the order of and under the responsibility of a physician skilled in the treatment of eyes as designated by the proper professional board, and without assuming evaluation or interpretation of examination findings by prescribing corrective procedures to preserve, restore or improve vision.

Physician Assistant Delegation Language:

Delegation by physician assistant. *A physician assistant may delegate to the physician assistant's employees or support staff or members of a health care team, including medical assistants, certain activities relating to medical care and treatment carried out by custom and usage when the activities are under the control of the physician assistant, the activities being delegated do not – unless otherwise provided by law – require a State license, registration or certification to perform, the person being delegated the activities has the appropriate training, education or experience to perform the delegated activities, and the physician assistant ensures that the person to whom the activities are delegated performs them competently and safely. The physician assistant who delegates an activity permitted under this subsection is legally liable for the activity performed by an employee, a medical assistant, support staff or a member of a health care team.*

Maroulla S. Gleaton, M.D., Chair
Board of Licensure in Medicine

Melissa Michaud, PA-C
Melissa Michaud, PA-C, Chair
Board of Osteopathic Licensure