



STATE OF MAINE  
BOARD OF NURSING  
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EXECUTIVE DIRECTOR

March 4, 2024

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

**RE: LD 227 An Act Regarding Health Care in the State**

Dear Senator Bailey, Representative Perry, and Members of the Committee:

Since its creation by the state's legislature in 1915, the State Board of Nursing (BON) has been protecting the citizens of the State of Maine by ensuring its licensees are professional, ethical, and competent. The Board carries out its sole purpose to protect the public by licensing practical nurses (PNs), registered professional nurses (RNs) and advanced practice registered nurses (APRNs), investigating and resolving complaints filed with the board, approving prelicensure nursing education programs and rulemaking.

The BON acknowledges and understands that, at this time, there are differing legal opinions on the potential implications of a shield law on states participating in the Nurse Licensure Compact (NLC). Given the potential legal implications are novel and have not yet been tested, the BON offers the following comments NFNA the bill:

1. Definitional concerns in § 9002

The exclusion from the definition of "aid and assist legally protected health care activity" of any conduct that deviates from the "applicable standard of care" may lead to inconsistent results between professional health care licensing agencies and courts, and will be also impacted by other definitions in the bill that delegate the determination of the standard of care to "major medical associations and agencies with expertise in the field." In addition, the exclusion does not explicitly state that the Maine professional licensing agency responsible for ensuring safe and competent care of patients determines the standard of care. This is particularly relevant because the broad definitions for services may result in unexpected litigation between licensees and the licensing boards over the applicable standard of care and the meaning of "legally protected health care activity" in licensing actions.



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The “Gender-affirming health care services” and “Reproductive health care services” definitions delegate the determination/definition of “accepted standard of care” to unidentified “major medical professional organizations and agencies with expertise in the field of gender-affirming care” [with the exception of World Professional Association for Transgender Health] and “major medical professional organizations and agencies with expertise in the relevant field.” The definitions provide no process for how this will be determined, leading to potential inconsistent treatment, etc. At a minimum, the Maine health care professional licensing agencies should be granted rulemaking ability to establish how this standard of care is determined and by what entities. These definitions are very broad giving rise to increased risk of impacting the professional health care licensing agencies both in delaying and impeding the ability to take appropriate action against licensees in the interest of patient protection.

The definition of “Hostile litigation,” together with very broad definitions regarding the services covered by the LD, and the definition of aggrieved person” give rise to an increased unintended litigation risk for the licensing agencies by licensees suing the licensing agencies. This provision will also directly conflict with requirements contained in licensure compacts. There are at least seven separate licensure compacts either already in effect or in process in Maine. Typical compact provisions include: cooperation with other states licensing agencies, including a requirement to issue or obtain subpoenas; sharing of information; automatic disciplinary provisions with no discretion [such as revocation in one state requires revocation of a license in another state issued by the compact]; and the ability of the entity created by the compact, usually a commission, to enforce the compact provisions [contract/statute/rules] including initiating litigation in federal court against a member state in default [*see, e.g.* 32 M.R.S. § 18518(2)] and seeking injunctive relief and damages, including costs and attorneys’ fees. To date to collective knowledge only one such lawsuit has ever been filed [and was quickly dismissed], but the risk is real. The lawsuit requires only a majority vote of commissioners, so the risk of litigation will depend on control of compact commissions. The executive committee for the Interstate Nurse Licensure Compact Commission, for example, currently includes representatives from the states of Delaware, Florida, Montana, Oklahoma, South Carolina, South Dakota and Tennessee.

The definition of “Legally protected health care activity” includes the “regardless of whether the patient is located in this State or whether the health care practitioner is licensed in the state where the patient is located at the time the services is rendered.” This goes against all legal precedent that health care *professional licensing applicability is based upon the location of the patient when the services are rendered* and will significantly increase the risk of litigation regarding all licensing agency activities.

## 2. § 9003

It is unclear whether the ability to initiate a civil action includes the ability to initiate an action against a Maine health care licensing agency, and/or its members and/or its staff. If so, a concern arises whether immunities are being unintentionally waived. If they are being waived, there may be practical concerns. There is also an increased risk that licensees will utilize the provision to delay or impede the licensing activities of licensing agencies and significantly delay their ability to move quickly in the interests of protecting the public. The exception does not eliminate this risk.

### **3. § 9004**

This provision may potentially impact health care licensing agencies by creating conflict with interstate licensure compacts with risk of enforcement and litigation as explained above.

### **4. § 9005**

This provision may potentially impact health care licensing agencies by creating conflict with interstate licensure compacts with risk of enforcement and litigation as explained above. 3

### **5. § 9006**

This provision may potentially impact health care licensing agencies by creating conflict with interstate licensure compacts with risk of enforcement and litigation as explained above. In addition, the good faith exception identified is very limited and should apply to the licensing agencies, licensing agency members, and licensing employees/staff. Any waiver of immunities for licensing agency members and licensing agency employees/staff arising by application of this statute would have a significant practical effect on licensing agency functions.

### **6. Part E § 8012**

The definition of “professional discipline” includes terms that are not technically “discipline” and does not include terms that are such as a surrender of license. Also, section 8012 may potentially impact health care licensing agencies by creating conflict with interstate licensure compacts with risk of enforcement and litigation as explained above, including regarding disciplinary action and confidentiality. Another concern is the use of “based solely,” which fails to take into account that virtually all conduct reviewed by licensing agencies is almost never “based solely” on one type of conduct.

### **7. § 2513**

This provision may have unintended interference with Title 24 mandated reports [ §§ 2505, 2506] to professional health care licensing agencies.

### **8. Part F § 1711-C**

This provision may have unintended interference with Title 24 mandated reports [ §§ 2505, 2506] to professional health care licensing agencies. Paragraph C should not be limited only to “complaint investigation” but should be applicable to any investigation by the licensing agency and should not include the “based solely” language for the reasons stated above. In addition, the health care entity should not be in a position to make a determination to deny information to the licensing agency.

There exists a concern that passage of this type of legislation will result in decreased cooperation and assistance from other states for Maine licensing agencies seeking to investigate licensee

conduct occurring outside of Maine, but which conduct has the potential to impact Maine patient safety.

Thank you for the opportunity to provide these comments on LD 227.

Sincerely,

A handwritten signature in black ink that reads "Kim Esquibel". The signature is written in a cursive, slightly slanted style.

Kim Esquibel, PhD, MSN, RN  
Executive Director