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June 14, 2018

Via email: John.Walsh@state.de.us
Senator John Walsh
411 Legislative Avenue
Dover, DE 19901

Via email: David.Bentz@state.de.us
Representative David Bentz
411 Legislative Avenue
Dover, DE 19901

RE: Proposal to Amend 24 Del.C. § 1921

Dear Senator Walsh & Representative Bentz,

The Delaware Nurses Association (DNA) learned that you intend to introduce the attached draft bill to amend 24 Del.C. § 1921 to add provisions for the administration of both prescription and nonprescription medications by “unlicensed assistive personnel” (“UAP”) to homebound adults who lack decision-making capacity, with certain specific requirements. We write to make you aware that the position of the DNA is that we are generally in favor of this bill, with two very specific objections. We also write to suggest a larger – and later – effort may be called for instead of passage of this bill.

Inclusion of two specific care scenarios create unacceptable areas of potential liability for nurses for the acts of those UAP’s administering meds in two scenarios: those working for a “hospice program licensed under §122(3)m of Title 16” and those with a “home health care agency licensed under §122(3)o of Title 16.” *See* lines 54 & 55 of the draft bill.

DNA takes the position that a nurse providing care to a patient concurrently with a UAP in one of those two care scenarios could potentially be held vicariously liable for the errors or omissions of one of these UAP’s. This is so even if that nurse was not included in, or part of, the UAP medication administration approval/authorization process spelled out in the draft bill.

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In fact, 16 Del.C. §122(3)o supports this proposition and directly contradicts any argument to the contrary, that “[a]ll home health agency services must be supervised by a registered nurse.” So, for example, if that nurse’s only interaction with the UAP may be completion of the patient’s plan of care that guides or directs, i.e. “supervises,” the UAP’s duties (other than medication administration), that nurse would, if this bill is enacted in its present form, find herself being held responsible for not properly training or supervising that UAP if a medication error occurs; even though as envisioned by this draft bill that nurse was not part of the UAP medication administration approval/authorization process.

Further, addressing this worthwhile effort in the context of an exclusion of the applicability of Delaware’s Nurse Practice Act (Chapter 19 of Title 24) potentially creates the notion that this potential medication administration program has, or should have, something to do with nursing; when by its very nature it does not. Instead, it seems to create a mechanism that allows nurses to be removed completely from medication administration in certain specific scenarios. If the two “nurse supervised” specific care scenarios described above remain, then the bill fails in that presumptive mission or objective and potentially creates yet more complications for nurses and their employers to protect themselves against the potential liability described herein.

DNA believes that the better approach is to defer this effort so that all stakeholders can come together to craft a solution to this apparent deficit in the provision of care to certain patients or consumers. We further believe that this effort should be incorporated into a larger effort to revamp and perhaps relocate the Limited Lay Administration of Medications, which also currently appears as an exception or carve-out within the Nurse Practice Act at 24 *Del.C.* §1932. DNA submits that the program proposed by the draft bill has great similarity to the 24 *Del.C.* §1932, and that both should perhaps be relocated elsewhere within the Delaware Code so that there is no association with nurses and nursing, implied or otherwise.

DNA further believes that its position on this draft bill and the ideas expressed herein regarding the larger LLAM issues is also consistent with the position of the Delaware Board of Nursing, who is copied on this letter.

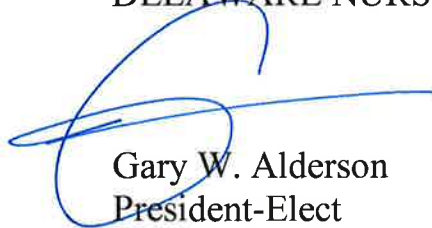
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Again, DNA looks favorably upon the ultimate objectives or goals of this proposed legislation. As explained herein, we simply ask that revisions be made to assuage our concerns over liability. We also copied AARP on this letter whom we understand initially proposed this draft bill so that they may be aware of our position.

DNA looks forward to working with you as well as the other stakeholders. We place ourselves at your service to assist either in drafting an acceptable bill now - with lines 54 & 55 removed - or later in the context of a larger “overhaul” of both the non-nurse “lay” and UAP medication administration process as suggested herein.

Sincerely,

DELAWARE NURSES ASSOCIATION



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GWA/bgb
Enclosures

cc: Dr. Megan Williams, President, Delaware Board of Nursing (by email)
Dr. Pamela Zickafoose, E.D., Delaware Board of Nursing (by email)
Sheila Grant, AARP (by email)



SPONSOR:

DELAWARE STATE SENATE
149th GENERAL ASSEMBLY

SENATE BILL

AN ACT TO AMEND TITLE 24 OF THE DELAWARE CODE RELATING TO NURSING.

1 WHEREAS, as Delaware's population ages, an increasing number of older Delawareans need assistance to
2 continue to live at home with help from family and other caregivers; and

3 WHEREAS, many family caregivers have full-time jobs and cannot be home to manage their loved one's 4
medications throughout the day; and

5 WHEREAS, family caregivers often must pay for expensive nursing care to ensure their loved one's needs are met 6 at
home throughout the day; and

7 WHEREAS, it is less expensive to provide this care to individuals in their homes than to support the individuals in 8 an
institutional setting; and

9 WHEREAS, the General Assembly finds that one solution to this situation is to permit family or other responsible
10 caregivers to give permission to an individual employed by a home care agency selected by the family or other
responsible

11 caregivers to administer medications to an adult individual who lacks decision-making capacity in the individual's
12 residence.

13 NOW, THEREFORE:

14 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

15 Section 1. Amend § 1921, Title 24 of the Delaware Code by making deletions as shown by strikethrough and 16
insertions as shown by underline as follows:

17 § 1921. Applicability of chapter.

18 (a) This chapter ~~shall~~ does not apply to the following situations:

19 (4) The incidental care of the sick in private homes by members of the family, friends, domestic servants or 20
persons primarily employed as housekeepers;

21 (15) A competent individual who does not reside in a medical facility or a facility regulated pursuant to

22 Chapter 11 of Title 16, may delegate to unlicensed persons performance of health-care acts, unless of a nature excluded

23 by the Board through regulations, provided:

24 a. The acts are those individuals could normally perform themselves but for functional limitations; and

25 b. The delegation decision is entirely voluntary.

26 c. Nothing contained herein shall diminish any legal or contractual entitlement to receive health-care

27 services from licensed or certified personnel;

28 (16) The limited lay administration of medications pursuant to § 1932 of this title.

29 (17)a. The administration of prescription or nonprescription medications by unlicensed assistive personnel to
30 an adult individual who lacks decision-making capacity in the individual's residence, if the administration is
31 authorized by a responsible caregiver and all of the following apply:

32 1. The responsible caregiver prepackages the medication by date and time and provides the unlicensed assistive personnel
33 with written instructions regarding the administration procedure.

34 2. The responsible caregiver and the person employing the unlicensed assistive personnel sign an
35 agreement governing the administration under this paragraph (a)(17) of this section. The agreement must
36 include confirmation by the responsible caregiver that the medication to be administered and the
37 process for
38 administering the medication are safe and appropriate.

39 b. For purposes of this paragraph (a)(17) of this section:

40 1. "Decision-making capacity" means a individual's ability to understand and appreciate the nature
41 and consequences of a particular health-care decision, including the benefits and risks of that
42 decision and alternatives to any proposed health care, and to reach an informed health-care
43 decision.

44 2. "Residence" means a dwelling considered by an adult individual who lacks decision-making
45 capacity to be the individual's home. "Residence" does not include any facility licensed by the
46 Department of

47 Health and Social Services under Title 16.

48 3. "Responsible caregiver" means one of the following:

A. An individual designated under an advance health-care directive under Chapter 25 of Title 16.

B. A guardian appointed under Chapters 39 or 39A of Title 12.

C. A surrogate under § 2507 of Title 16.

49 D. An individual who is otherwise authorized to make health-care decisions under applicable
50 law of this State.

51 4. “Unlicensed assistive personnel” means an individual employed by any of the following that
52 are
53 selected by a responsible caregiver to assist an individual needing assistance with medication in
54 the
55 individual’s residence:

56 A. A hospice program licensed under § 122(3)m. of Title 16.
57 B. A home health agency licensed under § 122(3)o. of Title 16.
58 C. A personal assistance services agency licensed under § 122(3)x. of Title 16.

59 c. This paragraph (a)(17) does not apply to the administration of medications by any of the
60 following
61 means:

62 1. Injection.
63 2. Intravenous therapy.
64 3. Through the rectum.
65 4. Through a catheter.
66 5. Through a feeding tube, including nasogastric, gastrostomy, or jejunostomy tubes.

67 d. This paragraph (a)(17) of this section does apply to the administration of non-oral
68 medications, such as
69 eye or ear drops.

Section 2. This Act may be known and cited as the “Share the Care Act.”

SYNOPSIS

This Act, named the Share the Care Act, permits a responsible caregiver to give permission to an individual employed by a home care agency selected by the responsible caregiver to administer medications to an adult individual who lacks decision-making capacity in the individual’s residence.

Under this Act, the responsible caregiver must prepackage the medication by date and time and provide written instructions regarding the administration procedure. And, the responsible caregiver and the person employing the unlicensed assistive personnel must sign an agreement governing the administration or medication.