



STATE OF KANSAS

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May 27, 1986

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ATTORNEY GENERAL OPINION NO. 86- 76

Lois Rich Scibetta, Ph.D., R.N.
Executive Administrator
Kansas State Board of Nursing
Box 1098, 503 Kansas Avenue
Suite 330
Topeka, Kansas 66601

Re: Public Health--Examination, Licensure and
Regulation of Nursing--Acts Which are Not
Prohibited

Synopsis: We affirm Attorney General Opinion No. 79-274 in its conclusion that a professional nurse, licensed in a state other than Kansas, need not become licensed in this state in order to participate in the clinical training phase of the graduate programs in nursing at the University of Kansas and Wichita State University. K.S.A. 65-1124(e), which provides that nothing in the nurse practice act shall prohibit the practice of nursing by students enrolled in accredited schools of professional or practical nursing, applies to graduate as well as undergraduate students and nothing in the nurse practice act indicates the rule should be otherwise. To the extent that K.A.R. 60-11-108(k) is in direct conflict with K.S.A. 65-1124(e), the regulation is invalid. Cited herein: K.S.A. 65-1113; 65-1114; 65-1117; 65-1119; 65-1124; 65-1130; 65-1131; 65-1132; 65-1133; K.A.R. 60-11-108.

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Dear Ms. Scibetta:

As Executive Administrator for the Kansas State Board of Nursing (Board), you request our opinion as to whether professional nurses, licensed in states other than Kansas, should be required to obtain a Kansas nurse's license while enrolled in student educational programs in nursing in the state of Kansas. You state that this issue arose during the Board's process of evaluating the Advanced Nurse Practitioner programs at the University of Kansas School of Nursing and Wichita State University; that currently the universities do not require out of state R.N.'s to obtain Kansas licensure during their student experience; and that if these R.N.'s do additional professional work for compensation, they are required to obtain a license in Kansas.

The question of whether these nurses must become licensed in Kansas was decided in Attorney General Opinion No. 79-274. We concluded in that opinion that:

"[a] professional nurse, licensed in a state other than Kansas, need not become licensed in this state in order to participate in the clinical training phase of the graduate programs in nursing at the University of Kansas and Wichita State University."

In so concluding, we noted that K.S.A. 65-1114 makes it "unlawful for any person . . . [t]o practice or to offer to practice professional nursing in this state . . . to practice or offer to practice practical nursing in this state . . . unless such person has been duly licensed under the provisions of this act." However, K.S.A. 65-1124 provides, in part, that "[n]o provisions of this law shall be construed as prohibiting . . . (e) the practice of nursing by students enrolled in accredited schools of professional or practical nursing. . . ." Finding that the University of Kansas School of Nursing and Wichita State University were both accredited schools of professional or practical nursing, Opinion No. 79-274 concluded that "[s]o long as the schools maintain their accredited status . . . students enrolled in such schools, whether in graduate or undergraduate courses, are students within the meaning of K.S.A. 1978 Supp. 65-1124."

You indicate that you are aware of this previous Attorney General opinion, but suggest that since the nurse practice act, K.S.A. 65-1113 et seq., has been amended and new advanced registered nurse practitioner (ARNP) regulations have been promulgated subsequent to the issuance of that opinion, a different decision might be forthcoming. You state that the Board views the exception for licensure found in K.S.A. 65-1124(e) as applying only to unlicensed supervised students of nursing, rather than those already licensed who function more independently.

In 1983, the legislature did amend most of the statutes which constitute the Kansas nurse practice act. Many of the amendments, however, were "clean-up" in nature. See L. 1983, Ch. 206, §§6, 7, 10, 11, 12 and 14. Others were amended to delete provisions regarding ARNP's. For example, L. 1983, Ch. 206, §8 took the provisions regarding ARNP's out of K.S.A. 65-1117. These provisions were then placed in new §4 which is now K.S.A. 65-1132. Similarly, §9 of L. 1983, Ch. 206 removed the ARNP provisions from K.S.A. 65-1119 and §5 placed those provisions in K.S.A. 65-1133. The only truly new substantive provisions to the nurse practice act are found in K.S.A. 65-1130 and 65-1131. These sections give the Board authority to determine the standards and requirements for obtaining a certificate of qualification as an advanced registered nurse practitioner; they do not negate the application of K.S.A. 65-1124(e) to ARNP students. As there have been no changes in the statutes since our 1979 opinion which mandate a different conclusion regarding whether an out of state R.N. must obtain a Kansas license to participate in graduate nursing programs conducted by accredited schools of nursing in Kansas, we reaffirm Attorney General Opinion No. 79-274.

As you have noted, there has been a significant change in the advanced registered nurse practitioners regulations regarding whether out of state R.N.'s must be licensed in Kansas while students here. K.A.R. 60-11-108 sets forth the requirements for advanced registered nurse practitioner programs of study. Subsection (k) provides that "[a]dmission criteria shall be clearly stated, available in written form, and shall include the requirement of a current license to practice in Kansas as a registered professional nurse." (Emphasis added.) The regulation indicates that it is authorized by and implements K.S.A. 65-1119 and 65-1133. These statutes do allow the Board to promulgate regulations prescribing "the standards and the required curriculum for advanced registered nurse practitioners" programs for accreditation purposes. However,

it is a well-settled rule of law that an administrative regulation cannot override a conflicting statute. As the Supreme Court of Kansas stated in Willcott v. Murphy, 204 Kan. 640, Syl. ¶1 (1970):

"The power of an administrative agency to adopt rules and regulations is administrative in nature, not legislative, and to be valid administrative regulations must be within the authority conferred. An administrative regulation which goes beyond or conflicts with legislative authorization is void."

In Malone Oil Co. v. Department of Health and Environment, 234 Kan. 1066, 1068 (1984), the Supreme Court cited Pork Motel Corp. v. Kansas Department of Health and Environment, 234 Kan. 374 (1983), as follows:

"Administrative agencies are creatures of statute and their power is dependent upon authorizing statutes, therefore any exercise of authority claimed by the agency must come from within the statutes. There is no general or common law power that can be exercised by an administrative agency.

"Rules and regulations of an administrative agency, to be valid, must be within the statutory authority conferred upon the agency. Those rules or regulations that go beyond the authority authorized, which violate the statute, or are inconsistent with the statutory power of the agency have been found void. Administrative rules and regulations to be valid must be appropriate, reasonable and not inconsistent with the law. 234 Kan. at 378-379. (Emphasis added.)

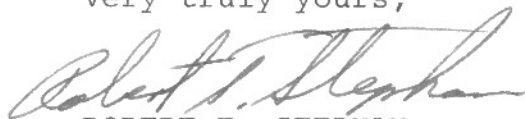
To the extent that K.S.A. 60-11-108(k) is in direct conflict with K.S.A. 65-1124(e), the regulation is invalid.

Finally, you raise the concern that the hospitals and health care facilities which utilize ARNP students may somehow be made more liable for negligent acts of the students who are licensed in states other than Kansas, than for negligent acts of

Kansas licensed graduate students. Since we have determined that the current statutes prohibit the Board from requiring these students to be licensed, we need not delve into the liability issue too deeply. We might comment, however, that having a Kansas nurse's license does not limit tort liability. The standard of care in a tort case measures the tortfeasor's conduct; absence of a Kansas license will not be a decisive factor.

In conclusion, we affirm Attorney General Opinion No. 79-274 in its conclusion that a professional nurse, licensed in a state other than Kansas, need not become licensed in this state in order to participate in the clinical training phase of the graduate programs in nursing at the University of Kansas and Wichita State University. K.S.A. 65-1124(e), which provides that nothing in the nurse practice act shall prohibit the practice of nursing by students enrolled in accredited schools of professional or practical nursing, applies to graduate as well as undergraduate students and nothing in the nurse practice act indicates the rule should be otherwise. To the extent that K.S.A. 60-11-108(k) is in direct conflict with K.S.A. 65-1124(e), the regulation is invalid.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Julene L. Miller
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