



Physicians Caring for Texans

January 21, 2024

James W. Johnston  
General Counsel  
Texas Board of Nursing  
333 Guadalupe, Suite 3-460,  
Austin, Texas 78701

**Via email: [dusty.johnston@bon.texas.gov](mailto:dusty.johnston@bon.texas.gov)**

*Re: Comments on Proposed Rules, 22 Tex. Admin. Code §§ 213.36, 213.37, 48 TexReg 7740 (Dec. 22, 2023)*

Dear Mr. Johnston:

The Texas Medical Association (“TMA”) appreciates the opportunity to provide comments to the Texas Board of Nursing (“BON”) on the proposed rules in Chapter 213 regarding alleged standard of care violations, as proposed in the Texas Register for Dec. 22, 2023, which implement Senate Bill 1343 (88th R.S.).<sup>1</sup>

TMA is a private, voluntary, non-profit association of more than 57,000 physician and medical student members. It was founded in 1853 to serve the people of Texas in matters of medical care, prevention and cure of disease, and improvement of public health. Today, its vision is “Improving the health of all Texans.”

#### **COMMENTS AND RECOMMENDATIONS**

TMA has concerns that the use of the term “medical care” in the proposed rules could be interpreted either to expand the scope of the rule to include physicians or to expand the scope of practice for advanced practice registered nurses (APRNs). As neither would be supported by Texas law, TMA recommends the rule use “nursing care” instead.

Pursuant to SB 1343, the BON is to adopt rules for complaints relating to alleged standard of care violations for APRNs.<sup>2</sup> Under the rules proposed in §213.36, if the BON’s investigation

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<sup>1</sup> 48 TexReg 7740 (Dec. 22, 2023).

<sup>2</sup> Act of May 11, 2023, 88th Leg. R.S., Senate Bill 1343 (“Relating to the composition of the Texas Board of Nursing and procedures applicable to complaints against advanced practice registered nurses.”).

determines that the complaint likely involves an act falling below the acceptable standard of care, the BON shall appoint another APRN as an expert reviewer to assist in the investigation.<sup>3</sup> The reviewer will evaluate whether the accused APRN violated the applicable standard of care and issue a preliminary report to the BON.<sup>4</sup> The proposed rule states that the expert reviewer's preliminary report must include:

- (1) relevant facts concerning the medical care rendered;
- (2) the applicable standard of care;
- (3) application of the standard of care to the relevant facts;
- (4) a determination of whether the standard of care has been violated; and
- (5) a summation of the expert reviewer's opinion.<sup>5</sup>

TMA has significant concerns about describing the treatment at issue as “medical care.” Texas statutes governing nurses and physicians use “nursing care” to refer to the treatment services provided by nurses.<sup>6</sup> “Medical care” refers to treatment provided by physicians.<sup>7</sup> The same is true for the rules of the BON,<sup>8</sup> as well as the Texas Medical Board.<sup>9</sup>

As such, the inclusion of “medical care” in §213.36 could be construed as either including care provided by physicians, or expanding the scope of care that may be provided by advanced practice registered nurses. Neither S.B. 1343 nor the other provisions of Nursing Practice Act support either expansion.

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<sup>3</sup> 48 TexReg 7741 (proposed §213.36(a)).

<sup>4</sup> 48 TexReg 7741 (proposed §213.36(c)).

<sup>5</sup> 48 TexReg 7741 (proposed §213.36(d)).

<sup>6</sup> For example, in Occupations Code, Subtitle E, Regulation of Nursing, “nursing care” is part of the definition of practice of nursing. Tex. Occ. Code §301.002 (“Professional nursing involves... the development of a **nursing care** plan. [] Vocational nursing involves... participating in the planning of the **nursing care** needs of an individual [and] participating in the development and modification of the **nursing care** plan.”) (emphasis added); *see also* Tex. Occ. Code §301.251 (“Unless the person holds a license under this chapter, a person may not use, in connection with the person's name: (1) the title ‘nurse’; or (2) any other designation tending to imply that the person is licensed to provide **nursing care**.”) (emphasis added).

<sup>7</sup> *See* Tex. Civ. Prac. & Rem. Code §74.001 (“‘**Medical care**’ means any act defined as practicing medicine under Section 151.002, Occupations Code, performed or furnished... by one licensed to practice medicine in this state for, to, or on behalf of a patient...”) (emphasis added); *see also* Tex. Code §151.002 (“‘Patient’ means a person who, to receive **medical care**, consults with or is seen by a physician.”) (emphasis added).

<sup>8</sup> In the BON rules in Part 11 of Title 22, the term “nursing care” is found in 32 separate rules. *See* 22 Tex. Admin. Code §§ 213.28, 213.29, 214.2, 214.9, 214.10, 214.11, 215.2, 215.10, 215.11, 217.1, 217.4, 217.11, 217.13, 217.14, 217.19, 217.20, 219.2, 219.5, 221.5, 221.7, 221.12, 221.13, 224.2, 224.3, 224.6, 224.7, 224.8, 225.2, 224.3, 225.4, 225.13, 227.3. Conversely, there are only two references to “medical care” in the BON rules, neither of which state that a nurse would provide such care. *See* 22 Tex. Admin. Code §217.23 (addressing the prioritization of balance-billing related complaints that do not involve delayed health care or medical care), §221.14 (addressing the availability of access to medical care when a physician delegates administration of a controlled substance to a nurse-midwife).

<sup>9</sup> “Medical care” is used throughout the Medical Board rules, appearing in 20 separate rules. *See* 22 Tex. Admin. Code §§ 165.1, 165.2, 165.3, 166.6, 167.4, 172.2, 172.5, 177.17, 180.4, 182.8, 187.31, 193.2, 193.14, 193.15, 193.20, 194.11, 197.2, 197.3, 197.7, 200.3.

For the first possible interpretation—that §213.36 could also apply to physicians—nothing in S.B. 1343 supports broadening its applicability beyond APRNs. Both the bill’s caption and its amendments to Occ. Code §301.457 solely address “complaints against advanced practice registered nurses.”<sup>10</sup> Neither S.B. 1343 nor the Nursing Practice Act contain any references to “medical care.” In contrast, the established statutory terminology for referring to review or evaluation of patient care provided by a nurse is “nursing care.”<sup>11</sup>

The second possible interpretation—that §213.36 expands the scope APRNs to include medical care—would also be unsupported by S.B. 1343 and the statutory framework governing nurses and physicians in Texas. Nothing in S.B. 1343 addresses—let alone expands—the scope of practice for APRNs. Perhaps the proposed use of “medical care” is to reflect that the existing statutory framework does allow certain medical acts to be performed by an APRN under physician delegation and supervision.<sup>12</sup> However, even in that context, those acts would still fall within the practice of nursing.<sup>13</sup>

As such, TMA recommends that “medical care” be replaced with “nursing care” in §213.36:

- (1) relevant facts concerning the nursing [~~medical~~] care rendered;
- (2) the applicable standard of care;
- (3) application of the standard of care to the relevant facts;
- (4) a determination of whether the standard of care has been violated; and
- (5) a summation of the expert reviewer's opinion.<sup>14</sup>

If there is an intended operation of the proposed rules that would prevent the BON from making this recommended change, TMA respectfully requests that the BON convene a stakeholder

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<sup>10</sup> Act of May 11, 2023, 88th Leg. R.S., Senate Bill 1343 (“Relating to the composition of the Texas Board of Nursing and procedures applicable to complaints against advanced practice registered nurses.”); Tex. Occ. Code §301.457.

<sup>11</sup> See Tex. Occ. Code §301.407 (“This section applies only to a state agency that... surveys a facility or agency listed in Subdivision (1) regarding the quality of **nursing care** provided by the facility or agency.”) (emphasis added); Tex. Occ. Code §301.408 (“Each insurer that provides to a nurse liability insurance that covers claims arising from providing or failing to provide **nursing care** shall submit to the board the report or data required by this section at the time prescribed.”) (emphasis added); Tex. Occ. Code §303.001 (“‘Peer review’ means the evaluation of nursing services, the qualifications of a nurse, the quality of patient care rendered by a nurse, the merits of a complaint concerning a nurse or **nursing care**, and a determination or recommendation regarding a complaint.”) (emphasis added).

<sup>12</sup> See Tex. Occ. Code §301.002(2) (“Professional nursing involves the performance of an act delegated by a physician under Section 157.0512, 157.054, 157.058, or 157.059.”).

<sup>13</sup> Tex. Att’y Gen. Op. No. KP-0266 (2019) (“Thus, pursuant to subsection 301.002(2)(G), when a certified registered nurse anesthetist administers anesthesia pursuant to a physician's delegation, such act falls within the scope of professional nursing, not the practice of medicine.”) (citing to Tex. Att’y Gen. Op. No. JC-0117 (1999)).

<sup>14</sup> Note if the intent behind using “medical care” was to include a more holistic view of the care at issue, including care provided by other health care professionals, this could still be accomplished with TMA’s proposed language, as such care could fall with the “relevant facts” concerning the nursing care.

meeting prior to adopting final rules, in order to: (1) more fully explain the BON's intent and rationale for the proposed language at issue, and (2) receive additional stakeholder input.

## CONCLUSION

TMA thanks the BON for the opportunity to comment on these proposed rules. If you have any questions, please do not hesitate to contact Kelly Walla, Vice President and General Counsel, at [kelly.walla@texmed.org](mailto:kelly.walla@texmed.org), Eamon Reilly, Associate General Counsel, at [eamon.reilly@texmed.org](mailto:eamon.reilly@texmed.org), or Michelle Romero, Associate Vice President of Public Affairs at [michelle.romero@texmed.org](mailto:michelle.romero@texmed.org).

Sincerely,

A handwritten signature in cursive script, appearing to read "Rick W. Snyder, II".

Richard W. "Rick" Snyder, II, MD  
President, Texas Medical Association