



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>August 18, 2021</p>	<p>No. I21-006 (R21-009)</p> <p>Re: Whether the Governor’s action to opt out of a federal requirement that physicians supervise CRNAs was valid under Arizona Law</p>
--	---

To: The Honorable Robert Meza
Arizona House of Representatives

Questions Presented

1. Whether a brief, undocumented discussion with the Executive Director (“ED”) of the Arizona Medical Board constitutes a “consultation” with the Board itself, and whether the ED of a licensing Board has the authority to act on behalf of the Board when neither the Board as a whole nor any of its members are even informed of the issue?
2. Whether the March 23 Opt Out Letter is “consistent with state law”?
3. Whether the Opt Out Letter modifies any aspect of existing Arizona law with regard to the scope of practice of certified registered nurse anesthetists (“CRNAs”), and if any such unilateral modification is permitted under state law?

Summary Answers

1. The Governor’s consultations with the Executive Directors of the Arizona Medical Board and the Arizona Nursing Board likely satisfied the regulation.
2. The March 23 Opt Out Letter is consistent with state law.

3. The Opt Out Letter does not modify any aspect of existing Arizona law with regard to the scope of practice of CRNAs.

Background

The Centers for Medicare and Medicaid Services (“CMS”) is the federal agency responsible for overseeing and administering the federal Medicare and Medicaid programs and is responsible for issuing federal guidelines outlining the conditions that medical providers must satisfy to participate in and receive payment for medical services rendered to recipients of medical care under Medicare and Medicaid.

Pursuant to that authority, CMS has issued at least three regulations providing the conditions under which certified registered nurse anesthetists (“CRNAs”) must comply with to receive reimbursement.¹ Each regulation requires a CRNA to administer anesthesia under the supervision of the operating physician or an anesthesiologist.² In addition, the regulations also require medical personnel, including CRNAs, to comply with state licensing regulations and other state standards.³

In 2001, CMS amended each regulation to allow individual states to opt out of the supervision requirement. To do so, a state must submit a letter to CMS from the Governor

¹ Condition for Coverage–Surgical Services, 42 C.F.R. § 416.42; Condition of Participation: Anesthesia Services, 42 C.F.R. § 482.52; Condition of Participation: Surgical Services, 42 C.F.R. § 485.639.

² 42 C.F.R. § 482.52(a)(4) (“Anesthesia must be administered only by . . . [a CRNA] . . . under the supervision of the operating practitioner or of an anesthesiologist who is immediately available if needed[.]”); 42 C.F.R. § 485.639(c)(2) (“In those cases in which a CRNA administers the anesthesia, the anesthetist must be under the supervision of the operating practitioner[.]”); 42 C.F.R. § 416.42(b)(2) (“In those cases in which a non-physician administers the anesthesia, . . . the anesthetist must be under the supervision of the operating physician[.]”).

³ See 42 C.F.R. § 482.11(c) (hospitals must assure “that personnel are licensed or meet other applicable standards that are required by State or local laws.”); § 485.608 (“All patient care services [must be] furnished in accordance with applicable State and local laws and regulations.”); § 416.40 (“The [ambulatory surgical center] must comply with State licensure requirements.”).

attesting that: (1) “he or she has consulted with State Boards of Medicine and Nursing[;]” (2) “has concluded” that opting out of the supervision requirement “is in the best interests of the State’s citizens[;]” and (3) “the opt-out is consistent with State law.” See 42 C.F.R. §§ 482.52(c)(1), 485.639(e)(1), 416.42(c)(1). The request for exemption is “effective upon submission.” 42 C.F.R. §§ 482.52(c)(2), 485.639(e)(2), 416.42(c)(2).

On March 23, 2020, Governor Ducey sent a letter to CMS Administrator Seema Verma “exercising the option available to states” to opt out of the federal supervision requirement. Letter from Doug Ducey, Governor of Arizona, to Seema Verma, Administrator Centers for Medicare and Medicaid Services (Mar. 23, 2020) (available at https://azgovernor.gov/sites/default/files/crna_opt-out_letter_03.24.2020.pdf). In addition to his statement that the “exception is consistent with Arizona law,” Governor Ducey acknowledged that his office “consulted with the Executive Directors of both the Arizona Nursing Board and the Arizona Medical Board about this issue as it relates to both access to care and quality of services and is satisfied that this exemption is in the best interest of patients.” *Id.* In light of the “heightened demands” on the healthcare system at that time, Governor Ducey believed that the exemption would enhance access to “high quality care” especially in rural areas, which is “in the best interest of the citizens of Arizona.” *Id.* Pursuant to the regulations, once Governor Ducey submitted the letter, CRNAs in Arizona became exempt from the federal supervision requirement. See 42 C.F.R. §§ 482.52(c)(2), 485.639(e)(2), 416.42(c)(2).

Analysis

I. The Governor’s Consultations With The Executive Directors Of The Arizona Medical Board And Nursing Board Likely Satisfy The Regulation.

As part of the opt-out process, the regulations require the Governor to attest that he has “consulted with the State Boards of Medicine and Nursing.” 42 C.F.R. §§ 482.52(c)(1),

485.639(e)(1), 416.42(c)(1). When CMS amended these regulations, it received many comments specifically requesting “clarification and procedures detailing the means by which Boards of Medicine and Nursing act to advise the governor under the rule.” 66 Fed. Reg. at 56764. In response, CMS declined to provide such procedures, noting instead that the failure to provide “detailed processes or steps that should be undertaken” to consult with the Boards was “purposeful.” 66 Fed. Reg. at 56764. CMS further explained that “[t]he purposed consultation with the Boards of Medicine and Nursing is to ensure appropriate involvement of parties on both sides of the issue,” and “Governors should be given the discretion and maximum flexibility to decide with whom they should consult.” *Id.*

Arizona law details the authority of both the Arizona Medical and Nursing Boards, as well as their Executive Directors. *See* A.R.S. § 32-1401 *et seq.*; A.R.S. § 32-1601 *et seq.* The Executive Director of the Medical Board is authorized to “[r]epresent the board with the federal government, other states or jurisdictions of the United States, this state, political subdivisions of this state, the news media and the public.” A.R.S. § 32-1405(C)(19). While there is no similar provision regarding the Executive Director of the Nursing Board, Arizona law permits the Executive Director to “[p]erform other duties as directed by the board.” A.R.S. § 32-1605.01(5).

Ultimately, the regulation entrusts the Governor with the decision of whether to opt out of the supervision requirement. *See* 42 C.F.R. §§ 482.52(c)(1), 485.639(e)(1), 416.42(c)(1). As the regulation explains, the purpose of the consultation requirement is for the Governor to obtain information regarding what is best for the State in providing medical care. The consultation requirement does not contemplate that the Governor will receive approval from either Board. If Board approval were required, then mere consultation with the Executive Directors may be insufficient. But in the absence of an approval requirement, and in light of the “maximum

flexibility” the regulations intentionally provide to the Governor when it comes to consultation, it is likely that the Governor’s consultations with the Executive Directors of each Board satisfied the consultation requirement in the regulations. In reaching this conclusion, we assume that the Governor in fact consulted with the Executive Directors of each Board and that the Executive Directors of each Board followed any Board requirements for consulting with other government officials.

II. The Governor’s Decision To Opt Out Is Consistent With State Law.

The regulations permit a Governor to opt out of the supervision requirement if “the opt-out is consistent with State law.” 42 C.F.R. §§ 482.52(c)(1), 485.639(e)(1), 416.42(c)(1). While CMS declined to define what it means for the decision to be “consistent with State law,” 66 Fed. Reg 56,764–65, it explained that “CRNAs would have to be supervised by a physician where such oversight is required by State law or hospital policy,” *id.* at 56,765. Courts addressing this issue have looked to the state’s laws to determine whether opting out would conflict with any of that state’s physician supervision requirements. *See, e.g., Cal. Soc’y of Anesthesiologists v. Brown*, 204 Cal. App. 4th 390, 395 (2012) (holding that the Governor’s decision to opt out was consistent with California’s law because California only required a CRNA to be “ordered by a physician” to administer anesthesia).

Under the federal regulation, a CRNA is required to administer anesthesia under the supervision of the operating practitioner or an anesthesiologist. *See supra* note 2. The “operating practitioner” is the person “who is performing the procedure.” U.S. Dep’t of Health & Human Services, *State Operations Manual: Appendix A – Survey Protocol, Regulations and Interpretive Guidelines for Hospitals*, 2004 WL 4993168, * 341 (Feb. 21, 2020).

Arizona law, on the other hand, provides greater flexibility regarding who may supervise

a CRNA. For example, Arizona law provides that a CRNA “may administer anesthetics under the direction of and in the presence of a physician or surgeon in connection with the preoperative, intraoperative or postoperative care of a patient[.]” A.R.S. § 32-1634.04(A). Because the federal regulation limits supervision to the operating practitioner or an anesthesiologist, and Arizona law allows supervision more generally by a physician or surgeon, Arizona law is broader. By opting out of the federal regulation, the Governor did not permit CRNA supervision that violates state law. Opting out of the federal regulation’s supervision requirement, therefore, is not inconsistent with state law because, unlike the federal regulation, Arizona law does not require CRNA supervision to be performed solely by the operating practitioner or an anesthesiologist. *See Cal. Soc’y of Anesthesiologists*, 204 Cal. App. 4th at 395.

III. The Governor’s Decision Did Not Alter State Law.

When CMS issued the new regulation, it acknowledged that “Congress has left this licensure function to States, and Medicare recognizes the scope of practice for which health care professionals are licensed by States.” 66 Fed. Reg. at 56765. CMS also agreed that “[a]llowing States to make determinations about health care professional standards of practice . . . assures that those closest to, and who know the most about, the health care delivery system are accountable for the outcomes of that care.” *Id.* Thus, CMS assured interested parties that “[w]e are not restricting or limiting the legislative or regulatory process at a State level.” *Id.* CMS further recognized that under the final regulations CRNAs “have to be supervised by a physician where such oversight is required by State law or hospital policy,” and are not allowed “to practice outside the scope of authority granted by State Law.” *Id.*

As explained, exempting CRNAs in Arizona from the federal supervision requirement

did not expand the types of supervision permitted under Arizona law; rather, it removed the more limited types of supervision required under federal law. Thus, the Governor's decision to opt out of the federal supervision requirement did not alter or modify any provision of Arizona law and CRNAs in Arizona are still required to comply with the supervision requirement contained in A.R.S. § 32-1634.04(A).

Conclusion

The Governor's consultations with the Executive Directors of the Medical and Nursing Boards likely satisfied the consultation requirement of the regulation. The Governor's decision to opt out of the federal supervision requirement is consistent with Arizona law. And the Governor's decision to opt out of the federal supervision requirement did not alter or amend any provision of Arizona law. Thus, CRNAs in Arizona must comply with the supervision requirement contained in A.R.S. § 32-1634.04(A).

Mark Brnovich
Attorney General