

March 8, 2021

Honorable Richard D. Roth, Chair and Members,
Senate Business, Professions, and Economic Development Committee
State Capitol, Room 2053
Sacramento, CA 95814

Honorable Evan Low, Chair, and Members
Assembly Business and Professions Committee
Legislative Office Building, Room 379
Sacramento, CA 95814

Re: Joint Sunset Oversight Hearing, Board of Registered Nursing

Dear Senator Roth, Assemblymember Low, and Members of the Committees:

The Center for Public Interest Law (CPIL) respectfully submits the following testimony relevant to the Committees' sunset review of the Board of Registered Nursing (BRN). As set forth in detail below, we are concerned that **the nursing profession has significant control over the Board and its decisionmaking**. Not only does this present antitrust issues, but as documented by multiple audits since the Board's last sunset review, it has resulted in a decreased supply of nurses in California (even before the pandemic), as well as substandard discipline of nurses—all to the detriment of public protection, the Board's paramount priority.

Accordingly, CPIL proposes retention of the Board but makes the following major recommendations (which are explained more fully below):

- 1) **Remove the statutory requirement that its Executive Officer be a BRN Licensee:** Section 2708 of the Business and Professions Code is unique among Department of Consumer Affairs (DCA) boards, does nothing to protect the public, and presents antitrust concerns.
- 2) **Establish a Public Member Majority on the Board:** Add two public members to the composition of the Board—one from each house of the Legislature—to ensure public protection remains the highest priority of the Board.
- 3) **Scrutinize BRN's Control over the Supply of Nurses in California:** California nurses are the highest paid in the nation (and in the world). Thus the Board's supply control efforts – including its potentially excessive requirements for nursing schools compared to other states, and its policies for processing of out of state applicants for licensure – are benefitting nurses, but not the public.
- 4) **Add Mandated Reporting:** As first proposed by the Board's last sunset legislation, and confirmed by the California Research Bureau's findings, this is critical to identifying, investigating, and disciplining nurses who are harmful to patients.

About the Center for Public Interest Law

CPIL is a nonprofit, nonpartisan academic and advocacy center based at the University of San Diego School of Law. Since 1980, CPIL has studied the state’s regulation of business, professions, and trades, and monitors the activities of state occupational licensing agencies, including BRN, and several other regulatory boards within the DCA. CPIL publishes the [California Regulatory Law Reporter](#), which chronicles the activities and decisions of California regulatory agencies. CPIL has participated in the sunset review of DCA boards and commissions since the onset of sunset review in 1996.

U.S. Supreme Court Precedent Demands Reform at BRN

As observers of BRN over the years, it has become increasingly clear that the nursing profession—particularly the California Nurses Association (CNA) — exerts tremendous influence over the Board’s decisionmaking. For example, CNA members of the Board (and public members who have ties to CNA) have repeatedly insisted upon stricter requirements for California nursing schools than any other state, even as nursing students reported extreme difficulty in securing clinical placements in a health care facility—a key pre-licensure requirement.¹ They also limit the number of students which nursing schools may accept, and impose the same stringent educational requirements on individuals who wish to move to California and are already licensed in another state, making it exceedingly difficult for license portability.² A recent audit has also concluded that BRN’s regulation of nursing schools is often duplicative with nursing accrediting organizations.³

The nursing profession’s advocacy in restricting the supply of nurses has paid off – the Board’s 2020 Sunset Report reveals that the average nurse’s income in California **has more than doubled**

¹ See California Code of Regulations (CCR), Title 16 § 1426 (requiring 75% of clinical hours to take place in direct patient care and limiting simulated clinical experiences to 25%); AB 2288 (Low) (Chapter 282, Statutes of 2020) (temporarily permitting nursing education programs to permit up to 50% simulated clinical hours during a state of emergency, which BRN opposed). Notably, California is only one of 11 states that limit simulated clinical hours to 30% or less, and studies have consistently shown that simulations are just as effective as direct patient care. See [National Council of State Boards of Nursing \(NCSBN\) Simulation Guidelines for Prelicensure Nursing Programs](#), Volume 6, Issue 3, Journal of Nursing Regulation (2015).

² See e.g. BRN 2020 Sunset Report at p. 72-73 (1/3 of survey respondents indicated they were somewhat dissatisfied or not satisfied at all with the time the Board took to approve out-of-state licensees’ endorsement applications into California, and the overall endorsement process); *id.* at pgs. 94, 98 (describing process and requirements for out-of-state endorsements); [Board Materials for February 17-18, 2021](#) meeting at p. 137 (processing times for out-of-state applicants have doubled over the past year).

³ See [Board of Registered Nursing: It has Failed to Use Sufficient Information when Considering Enrollment Decisions for New and Existing Nursing Programs](#), California State Auditor Report 2019-120, July 2020 (hereinafter “CSA Report”).

since 1997. (*See* p. 29) And this average far exceeds the average income for nurses in the United States in general.⁴

CPIL has long argued that regulatory boards composed in majority of licensee members — who can then control their own regulation and stand to benefit from anticompetitive decisions the board makes — violates federal antitrust law. In 2015, the U.S. Supreme Court validated CPIL’s position in *North Carolina State Board of Dental Examiners v. FTC*, 574 U.S. 494 (2015) (“*North Carolina*”). In that case, the Court recognized the inherent conflict of interest that exists when a state licensing board is controlled by members of the profession regulated by that board, and unequivocally held that state regulatory boards are not immune from federal antitrust scrutiny unless they are controlled by public members (and not “active market participant” licensees) **or** the state has created a mechanism to actively supervise the acts and decisions of these boards to ensure they benefit the public, and not merely the professions themselves. Since the issuance of the *North Carolina* decision, CPIL has participated in public hearings, submitted numerous letters explaining the decision, and supported legislation that would properly implement the decision.⁵

BRN’s 5/4 licensee majority composition (Bus. & Prof. Code § 2702), combined with its unique statutory requirement that its Executive Officer (EO) must be a licensee of the Board (Bus. & Prof. Code § 2708(b)), not only presents fertile ground for anticompetitive conduct, but places BRN in an especially vulnerable position with respect to antitrust liability in light of the *North Carolina* decision. Indeed, the recent doubling of California nurses’ average income over a relatively short time period, combined with the fact that California nurses are paid higher than those outside of California, is condemning evidence that active market participants on the Board are effectively controlling the supply of nurses to their own economic benefit.

Accordingly, CPIL strongly recommends that the Legislature take the following actions to strengthen public protection and decrease the influence of the profession over Board decisionmaking:

- 1) **Amend section 2708 of the Business and Professions Code** to *preclude* licensees of the Board from serving as its EO, rather than *requiring* the EO to be a licensee as it does now. This is necessary to provide an appropriate check on the Board, and to ensure that the chief administrator of Board staff has public protection at the forefront of the Board’s operations.⁶

⁴ *See* U.S. Department of Labor, Bureau of Labor Statistics Occupational Employment Statistics Program data, compiled at <https://www.careeronestop.org/Toolkit/Wages/find-salary.aspx?keyword=Registered%20Nurses&soccode=291141&location=California>

⁵ *See, e.g.*, SB 1195 (Hill) in 2016, which was vehemently opposed by CNA. CPIL also respectfully disagrees with those who argue that DCA boards are “actively supervised” by the state. Nursing Board members make final disciplinary and other policy decisions which are not subject to review or ratification by the Department or any other state agency. Although the DCA Director is authorized to review and reject BRN rulemaking under the Administrative Procedure Act (APA), the Board may — by a unanimous vote — override the Director’s disapproval of regulations. *See* Bus. & Prof. Code § 313.1.

⁶ In making this recommendation, we do not mean to suggest that the Board’s existing EO is not appropriately exercising her duties; rather we believe it is important infrastructural change that must be made to ensure compliance with the antitrust laws, and achieve the Board’s statutory paramount priority. *See* Bus. & Prof. Code § 2708.1 (“Protection of the public shall be the highest priority for the Board of Registered Nursing in exercising its licensing,

- 2) **Add two public members to the Board** to give the public, and not the profession, the majority of the voting members of the Board, and guard against potentially anticompetitive conduct in the future.
- 3) **Implement the State Auditor’s Recommendations with Respect to its Oversight of Nursing Programs.** The CSA report found that BRN does not gather and use sufficient data to make decisions about the number of students nursing programs can enroll.⁷ This raises significant antitrust concerns as the Board, controlled by active market participants in the nursing profession, is directly limiting the supply of nurses in California via its enrollment decisions—a *per se* violation of the antitrust laws. At a minimum, the Board should be required to implement the auditor’s recommendation as to the types of data it collects, and upon which it bases its enrollment decisions. The Legislature should maintain its scrutiny over the Board’s regulation of the pre-licensure programs.

Mandatory Reporting Requirements Should be Imposed on BRN and its Licensees

While other health care licensing boards, most notably the Medical Board of California, receive a host of mandated reports about their licensees,⁸ BRN receives no such reports. Significantly, the Board admits that it can only investigate known allegations or violations, and that **the lack of mandatory reporting “leaves the public at risk.”**⁹

CPIL’s former Administrative Director, Julianne D’Angelo Fellmeth, served as the Enforcement Monitor for the Medical Board of California from 2004-2005, and found the reporting of adverse events pursuant to section 805 to be the single highest source of information for the Board with respect to the detection of unethical and dangerous physicians.¹⁰ The fact that BRN does not receive these reports is wholly inconsistent with the Board’s paramount priority to protect the public, and this must change.

Indeed, during BRN’s last sunset review, the Legislature recognized employer reporting of disciplined nurses as an important regulatory tool, but ultimately directed the California Research Bureau (CRB) to study the issue before imposing mandatory reporting requirements.¹¹ Importantly, CRB was tasked with evaluating the extent to which employers voluntarily report disciplined nurses to the board, but it was unable to deliver this portion of the report because BRN does not collect this data.¹² Ultimately, CRB presented “Mandatory Reporting for Alleged Violations of the Nursing Practice Act” as one of the options for a “consistent and reasonable

regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.”)

⁷ CSA Report at 1-3; 15-19.

⁸ See Bus. & Prof. Code §§ 800, *et seq.*

⁹ Sunset Report at p. 116.

¹⁰ See Julianne D’Angelo Fellmeth and Thomas A. Papageorge, [Initial Report of the Medical Board Enforcement Monitor](#) (November 1, 2004) at 111–112.

¹¹ SB 799 (Hill) (Chapter 520, Statutes of 2017); Bus. & Prof. Code § 2761.5.

¹² California Research Bureau, *Employer Reporting of Nurse Practice Act Violations in California*, January 2019 (“CRB report”) at p. 1.

reporting mechanism” for the Legislature’s consideration.¹³ As such, the Committees now have sufficient data to support the imposition of mandated reporting as an important public protection outcome of BRN’s sunset review.

CPIL appreciates your consideration of this testimony and these recommendations.

Sincerely,

A handwritten signature in cursive script that reads "Bridget Fogarty Gramme".

Bridget Fogarty Gramme
Administrative Director and Supervising Attorney
Center for Public Interest Law
University of San Diego School of Law

cc Loretta Melby, Executive Officer, Board of Registered Nursing
Kimberly Kirchmeyer, Director, Department of Consumer Affairs
Hon. Toni Atkins, Senate President pro Tempore
Hon. Anthony Rendon, Speaker of the Assembly

¹³ *Id.* at 16-17.