December 13, 1994

OPINION NO. 94-090

Rosa Lee Weinert, R.N., M.S., Executive Director
Ohio Board of Nursing
77 South High Street, 17th Floor
Columbus, Ohio 43266-0316

Dear Executive Director Weinert:

You have requested an opinion on several questions relating to the rulemaking authority of the Board of Nursing ("Board") as it is affected by the provisions of R.C. 5111.74. R.C. 5111.74 requires the Ohio Department of Human Services to establish a "fair share demonstration project" in Butler County for two years to demonstrate "the viability of delivering health care services to Butler county medical assistance recipients through a cooperative health care purchasing plan involving the organization of a managed care network by physicians practicing medicine in Butler county and hospitals located there." R.C. 5111.74(A). The demonstration project is administered by the Butler County Health Care Management Board created under R.C. 5111.74(B). The Butler County Health Care Management Board consists of the county director of human services, representatives of hospital systems and clinics, physicians with a variety of specialties, and other medical care providers, including a licensed registered nurse. R.C. 5111.74(B).

R.C. 5111.74 contains the following language describing the responsibilities of the Board of Nursing with respect to the fair share demonstration project:

> The Butler county health care management board shall pass a resolution by a majority vote establishing the terms and conditions under which the scope of practice of advanced practice nurses, nurse practitioners, clinical nurse specialists, nurse midwives, and physician assistants in Butler county may be expanded. The expansion of practice shall comply with section[s] 4723.66 [section does not exist; perhaps R.C. 4723.06 was intended], 4730.06 [limits the activity of a physician's assistant], and 4730.07 [exceptions to statutes governing a physician's assistant] of the Revised Code. The resolution shall be sent to the board of nursing and the Ohio state medical board with a request that the scope of practice of the practitioners be amended in accordance with the resolution. *On receipt of the resolution and request, the board of nursing* and the Ohio state medical board *shall, without amendment,*

> *adopt rules establishing the terms and conditions for expansion of the scope of practice* of advanced practice nurses, nurse practitioners, clinical nurse specialists, nurse midwives, and physician assistants *in Butler county in accordance with the resolution.* Such rules shall apply only to such practitioners performing their duties in Butler county in conjunction with and in accordance with the fair share demonstration project.

R.C. 5111.74(D) (emphasis added). The Butler County Health Care Management Board is thus required to pass a resolution establishing the terms and conditions under which the scope of practice of nurses may be expanded, and the Board of Nursing "shall, without amendment, adopt rules establishing the terms and conditions for expansion of the scope of practice ... in accordance with the resolution." R.C. 5111.74(D).[1]

Your letter outlines provisions that require the Board of Nursing to act in accordance with R.C. Chapter 119 when it adopts rules. *See* R.C. 4723.07. You raise the following questions:

1. Does Section 5111.74 of the Revised Code conflict with Chapter 119. of the Revised Code in regards to the Board of Nursing promulgating rules, because it requires the Board to adopt rules without amendment and in accordance with a resolution?

2. If the Board complies with Section 5111.74, of the Revised Code, are we violating Chapter 119. of the Revised Code? Would the Board be denying public input to rules? Could the rules be invalidated?

3. Section 119.02 of the Revised Code allows for an exception when an agency does not need to follow Chapter 119. of the Revised Code. Does Section 5111.74 of the Revised Code provide a specific provision in law which would be an exception to following Chapter 119. of the Revised Code? If Section 5111.74 of the Revised Code would allow the Board to not comply with Chapter 119. of the Revised Code, then what process and procedure should the Board follow because Section 5111.74 of the Revised Code does not set forth a specific process?

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[1] For purposes of this opinion, it is presumed that the resolution sent to the Board of Nursing by the Butler County Health Care Management Board complies with R.C. 5111.74(D) and that the provisions of R.C. 5111.74 are constitutional.

The Board of Nursing Is Subject to R.C. Chapter 119

The Board of Nursing is responsible for examining and licensing individuals to practice nursing, for defining educational standards, and for approving educational programs. The Board has authority to administer and enforce the provisions of R.C. Chapter 4723 and rules promulgated under R.C. Chapter 119 and may take disciplinary action against licensees. *See* R.C. 4723.06, .28.

As your letter indicates, the Board of Nursing is required generally to comply with the provisions of R.C. Chapter 119 in exercising its rulemaking authority. R.C. 4723.07 authorizes the Board to adopt rules governing various aspects of its functions, including providing for its government and control of its actions and business affairs, establishing standards and requirements for nursing education and licensure, and establishing universal blood and body fluid precautions. R.C. 4723.07 states that, in each case, the Board must act "[i]n accordance with" R.C. Chapter 119. R.C. 4723.07 also contains general language authorizing the Board to adopt other rules necessary to carry out the provisions of R.C. Chapter 4723 and makes such authority "[s]ubject to" R.C. Chapter 119. *See* 13 Ohio Admin. Code Chapters 4723-1 to 4723-19 *and* 1994-1995 Ohio Monthly Record, vol. 1, at 84-100.[2]

R.C. 119.02 requires every agency authorized by law to adopt, amend, or rescind rules to comply with the procedure prescribed in R.C. 119.01-.13. The term "agency" includes any state entity that is specifically made subject to R.C. 119.01-.13. *See* R.C. 119.01(A). The term "rule" is defined to mean:

> any rule, regulation, or standard, having a general and uniform operation, adopted, promulgated, and enforced by any agency under the authority of the laws governing such agency, and includes any appendix to a rule. "Rule" does not include any internal management rule of an agency unless the internal management rule affects private rights and does not include any guideline adopted pursuant to section 3301.0714 of the Revised Code [statewide education management information system].

R.C. 119.01(C).

The procedure for rule adoption provided by R.C. 119.01-.13 requires in general that reasonable public notice be given at least thirty days prior to a public hearing on a proposed rule.

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[2] The Board of Nursing has also adopted certain rules pursuant to R.C. 111.15. *See* [1994-1995 Monthly Record, vol. 1] Ohio Admin. Code 4723-109-02, at 100; [1993-1994 Monthly Record, vol. 2] Ohio Admin. Code 4723-104-01 and 4723-109-01, at 1865. R.C. 111.15 governs internal management rules and other rules that are not subject to R.C. Chapter 119. *See* R.C. 111.15(A)(1), (3). A rule may be designated a rule by reference in accordance with the provisions of R.C. 103.05 and be included in the Ohio Administrative Code by reference instead of in full text. The rules adopted by the Board of Nursing pursuant to R.C. 111.15 have been so designated.

The proposed rule must be filed with the Secretary of State, the Director of the Legislative Service Commission, and, except in specified instances, the Joint Committee on Agency Rule Review ("JCARR"). The rule must also be made available for review at the office of the agency. R.C. 119.03(A), (B), (H). As required by R.C. 121.24 and R.C. 127.18, the agency must prepare a rule summary and fiscal analysis. *See* R.C. 119.03(B), (I). At the public hearing:

> any person affected by the proposed action of the agency may appear and be heard in person, by his attorney, or both, may present his position, arguments, or contentions, orally or in writing, offer and examine witnesses, and present evidence tending to show that the proposed rule, amendment, or rescission, if adopted or effectuated, will be unreasonable or unlawful.

R.C. 119.03(C). The agency may amend a proposed rule in response to comments made at a public hearing or for other reasons and must follow appropriate notification procedures with regard to substantive revisions. *See* R.C. 119.03, .031. JCARR may recommend the adoption of a concurrent resolution invalidating a proposed rule if it makes certain findings. The House of Representatives and Senate may then adopt such a concurrent resolution, preventing the agency from adopting the proposed rule. *See* R.C. 119.03(I); R.C. 119.031. If the House of Representatives and Senate do not adopt a concurrent resolution in a timely manner, the agency may proceed to adopt the rule in accordance with prescribed procedures. *See* R.C. 119.03(D), (I); R.C. 119.04. Special procedures are available in emergency situations. *See* R.C. 119.03(F), (H).

The Board of Nursing is an agency for purposes of R.C. Chapter 119 because it is specifically made subject to R.C. Chapter 119 by R.C. 4723.07. *See* R.C. 119.01(A). The Ohio Supreme Court has ruled that, when the Board of Nursing establishes nursing procedures or limitations that are not set forth in the statute, it must promulgate those procedures or limitations by rule, in accordance with the provisions of R.C. 119.01-.13. In *Ohio Nurses Association v. State Board of Nursing Education and Nurse Registration*, 44 Ohio St. 3d 73, 540 N.E.2d 1354 (1989), the Court considered a position paper in which the Board[3] addressed the authority of licensed practical nurses to administer intravenous fluids and concluded that the Board was required to file such a position paper as a proposed rule under R.C. Chapter 119.[4] The Court stated, in part:

> Upon a careful review of the position paper ... we find that it meets the foregoing statutory definition of "rule" [in R.C. 119.01(C)] as determined by the General

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[3] The Board was then the State Board of Nursing Education and Nurse Registration, the predecessor to today's Board of Nursing. *See* 1987-1988 Ohio Laws, Part III, 4189 (Am. Sub. H.B. 529, eff. June 14, 1988).

[4] Provisions governing the role of licensed practical nurses in intravenous therapy now appear in 13 Ohio Admin. Code Chapter 4723-17.

> Assembly. As appellants point out, the position paper enlarges the scope of practice for LPNs [licensed practical nurses], and regulates those LPNs qualified to start IVs by requiring a post-licensure course of study. Additionally, it is readily apparent that the position paper is intended to have a uniform application to all LPNs in the state of Ohio .... [W]hen a regulatory body such as the board declares that it will permit those persons it regulates to perform certain procedures, the new standard is inherently "enforced" as soon as it is adopted .... [T]he true effect of the position paper is that LPNs are now permitted to perform certain additional aspects of IV therapy without the threat of disciplinary action or other penalty levied by the board.
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> ....
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> In our view, the foregoing language [R.C. 4723.05, predecessor to R.C. 4723.07] reflects the General Assembly's intent that the board follow the rule-making procedures set forth in R.C. 119.01 to 119.13, *and* that nursing procedures or limitations not already established or set forth in the statutes be promulgated by rule.

44 Ohio St. 3d at 75-76, 540 N.E.2d at 1356. It has thus been established that provisions adopted by the Board of Nursing to govern the scope of practice of nurses must be adopted by rule in accordance with R.C. Chapter 119.

Conflicts Exist Between R.C. 5111.74 and R.C. Chapter 119

Your first two questions concern possible conflicts between R.C. Chapter 119 and R.C. 5111.74 and the action that the Board should take pursuant to those sections. R.C. Chapter 119 is a general provision, governing the adoption of rules by a variety of state agencies. In contrast, R.C. 5111.74(D) is a special provision, directing the Board of Nursing to take particular action with respect to rules dealing with a specific subject. The rule of construction applicable to a situation involving general and special provisions is set forth in R.C. 1.51, as follows:

> If a general provision conflicts with a special or local provision, *they shall be construed, if possible, so that effect is given to both*. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

R.C. 1.51 (emphasis added).

In accordance with R.C. 1.51, R.C. 5111.74 and R.C. Chapter 119 should be construed, if possible, so that effect is given to both. R.C. 5111.74 was enacted by H.B. 152, 120th Gen. A. (1993) (eff. July 1, 1993). The rulemaking provisions of R.C. Chapter 119 that are relevant to this opinion were in effect well in advance of that date. Therefore, if any conflict between R.C. 5111.74 and R.C. Chapter 119 is irreconcilable, the provisions of R.C. 5111.74 should prevail as an exception to the general provision. *See, e.g., Acme Engineering Co. v. Jones*, 150 Ohio St. 423, 83

N.E.2d 202 (1948) (syllabus, paragraph 1) ("[a] special statutory provision which applies to a specific subject matter constitutes an exception to a general statutory provision covering other subjects as well as the specific subject matter which might otherwise be included under the general provision").

R.C. 5111.74(D) directs the Board of Nursing to adopt rules that amend the scope of practice in accordance with the resolution submitted by the Butler County Health Care Management Board and prohibits the Board of Nursing from amending the rules requested by that resolution. These provisions conflict with the provisions of R.C. Chapter 119 that provide opportunity for a proposed rule to be considered and amended. *See* R.C. 119.03, *see also, e.g., Condee v. Lindley*, 12 Ohio St. 3d 90, 93, 465 N.E.2d 450, 452 (1984) ("[t]he rulemaking requirements set forth in R.C. Chapter 119 are designed to permit a full and fair analysis of the impact and validity of a proposed rule").

Both R.C. 5111.74(D) and R.C. Chapter 119 may be given effect, however, if the procedures established by R.C. Chapter 119 are followed, subject to the specific exceptions required by R.C. 5111.74(D). Thus, the Board of Nursing may propose the rules required under R.C. 5111.74(D) and follow the procedures set forth in R.C. Chapter 119, including the provision of public notice and hearing in accordance with R.C. 119.03. The Board of Nursing is prohibited by R.C. 5111.74(D) from amending those rules. The Board, however, may consider any comments received to the extent that the comments may be relevant to any of the Board's activities other than adopting rules pursuant to R.C. 5111.74(D), and may inform the Butler County Health Care Management Board and the General Assembly of comments that it receives for those bodies to consider in their subsequent actions. The rules may be submitted to JCARR pursuant to R.C. 119.03 for review on behalf of the General Assembly. Any rules so adopted should be filed and made available to the public in accordance with R.C. 119.04.

Thus, while R.C. 5111.74(D) and R.C. Chapter 119 are not completely consistent, it is possible to construe them so that effect is given to both. This is the result mandated by R.C. 1.51. It has the effect of providing for public notice and hearing on the rules required under R.C. 5111.74(D), even though the rules are not subject to amendment.

R.C. 5111.74(D) Creates an Exception to R.C. Chapter 119

Your second question asks whether the Board of Nursing would violate R.C. Chapter 119 if it were to comply with R.C. 5111.74, and whether the rules promulgated under R.C. 5111.74 could be invalidated. The Board of Nursing is a creature of statute that has only the powers and duties that are bestowed upon it by the General Assembly. *See, e.g.*, 1971 Op. Att'y Gen. No. 71-001. *See generally State ex rel. Kuntz v. Zangerle*, 130 Ohio St. 84, 197 N.E.2d 112 (1935). By the provisions of R.C. 4723.07, the General Assembly has authorized the Board of Nursing to adopt rules governing nurses in accordance with R.C. Chapter 119. In R.C. 5111.74(D), the General Assembly has directed the Board of Nursing to adopt certain rules upon the request of the Butler County Health Care Management Board and without amendment. The Board of Nursing is obligated to comply with the provisions of R.C. 5111.74(D). Since that provision creates an

exception to R.C. Chapter 119, compliance with its provisions would not result in a violation of R.C. Chapter 119.

With respect to rules adopted pursuant to R.C. 5111.74(D), the General Assembly has deprived the Board of the authority to make amendments. The Board is required to act in accordance with the directives of the General Assembly and, therefore, must comply with R.C. 5111.74(D) where that provision creates an exception to R.C. Chapter 119. The rules cannot be invalidated for failure of the Board to comply with R.C. Chapter 119 when the Board is taking action required by R.C. 5111.74(D).

The Board of Nursing Must Comply with R.C. Chapter 119 in Adopting Rules Pursuant to R.C. 5111.74

Your third question asks whether R.C. 5111.74(D) contemplates that the Board of Nursing will follow R.C. Chapter 119 in adopting the mandated rules, or whether it creates an exception to all requirements of R.C. Chapter 119. R.C. 5111.74(D) requires that the Board of Nursing adopt rules that contain particular provisions, and it is clear that formal rulemaking action is contemplated by that section. As your letter notes, R.C. 119.02 permits an agency to adopt rules without complying with R.C. Chapter 119 when "otherwise specifically provided by law." It does not appear, however, that R.C. 5111.74 permits the Board of Nursing to adopt rules without following any of the procedures established by R.C. Chapter 119.

Unlike the provisions considered in the *Ohio Nurses Association* case, rules adopted pursuant to R.C. 5111.74(D) are not intended to apply to all nurses in the State of Ohio. Instead, R.C. 5111.74 limits the effect of those rules to "such practitioners performing their duties in Butler county in conjunction with and in accordance with the fair share demonstration project." R.C. 5111.74(D). The rules here at issue may be considered a special provision, since they apply to a limited group of practitioners. *See generally, e.g., Acme Engineering Co. v. Jones*. It might be argued that rules adopted pursuant to R.C. 5111.74(D) are not rules "having a general and uniform operation," as the term "rule" is defined in R.C. 119.01(C), so that those rules are not required to be adopted in accordance with R.C. Chapter 119. A rule, however, may have a general and uniform operation even if it contains various classifications, provided that the classifications are reasonable. *See, e.g., Porter v. Hopkins*, 91 Ohio St. 74, 83, 109 N.E. 629, 632 (1914) ("a statute is general and uniform if it operates equally upon every person and locality within the circumstances covered by the act, and when a classification has a reasonable basis it is not invalid merely because not made with exactness or because in practice it may result in some inequality"). Since rules adopted under R.C. 5111.74(D) create an exception to general provisions governing the scope of practice, they are part of the general scheme of regulation and should be included with other provisions governing that subject matter. In order for the Board of Nursing to administer rules adopted pursuant to R.C. 5111.74(D) in its regulation of the nursing function throughout the State of Ohio, those rules must be adopted as part of its regulatory scheme under R.C. Chapter 119.

This conclusion is supported by the fact that R.C. 5111.74 requires that the resolution prepared by the Butler County Health Care Management Board request that the scope of practice of

the practitioners "be amended" in accordance with the resolution. R.C. 5111.74(D). Pursuant to the *Ohio Nurses Association* case, provisions adopted by the Board of Nursing to govern the scope of practice must be adopted by rule in accordance with R.C. Chapter 119. Accordingly, provisions amending the scope of practice as required by R.C. 5111.74(D) must be adopted by rule in accordance with R.C. Chapter 119. *See* R.C. 119.02 (provisions of R.C. 119.01-.13 apply to adoption, amendment, and rescission of rules).

The answer to your third question, therefore, is that R.C. 5111.74 does not excuse the Board of Nursing from the requirement that it comply with R.C. Chapter 119 in adopting the required rules. Instead, the provisions of R.C. 5111.74 excuse compliance with particular provisions of R.C. Chapter 119 only insofar as conflicts exist.

Conclusion

For the reasons discussed above, it is my opinion, and you are advised:

1. Pursuant to R.C. 1.51, R.C. 5111.74(D) and R.C. Chapter 119 should be construed so that effect is given to both. The Board of Nursing may achieve this result by following the procedures set forth in R.C. Chapter 119 to adopt rules in accordance with the resolution submitted by the Butler County Health Care Management Board pursuant to R.C. 5111.74(D), while refraining from making any amendments to the rules requested by the resolution.

2. R.C. 5111.74(D) creates an exception to R.C. Chapter 119, so that the Board of Nursing does not violate R.C. Chapter 119 when it takes action in compliance with R.C. 5111.74(D).

3. R.C. 5111.74(D), which requires the Board of Nursing to adopt rules in accordance with a resolution submitted by the Butler County Health Care Management Board, does not excuse the Board of Nursing from the requirement that it comply with the provisions of R.C. Chapter 119 in adopting rules that regulate the scope of practice of nurses. Instead, the provisions of R.C. 5111.74(D) excuse compliance with particular provisions of R.C. Chapter 119 only insofar as conflicts exist.

Respectfully,

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Attorney General

December 13, 1994

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SYLLABUS: 94-090

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