

FILED DATE **SEP 14 2018**
Department of Health

By: *Ornel Saudek*
Deputy Agency Clerk

**STATE OF FLORIDA
BOARD OF NURSING**

**IDEAL PROFESSIONAL INSTITUTE,
US70706300**

Petitioner,

v.

DOAH Case No.: **17-6838**

BOARD OF NURSING,

Respondent.

AMENDED FINAL ORDER

(As to Certificate of Service)

THIS CAUSE came before the Board of Nursing pursuant to Sections 120.569 and 120.57(1), Florida Statutes, at the properly noticed hearing on June 7, 2018, in Orlando, Florida, for the purpose of considering the Administrative Law Judge's Recommended Order, a copy of which is attached hereto as Exhibit A, in the above-styled cause. Petitioner was not present and was not represented by counsel. Respondent was represented by Lee Ann Gustafson, Esquire.

Upon review of the Recommended order, Petitioner's Exceptions to Recommended Order, the argument of the parties, and after a review of the complete record in this case, the Board makes the following findings and conclusions.

EXCEPTIONS

Petitioner's exception to paragraph three of the Recommended Order is REJECTED.

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DIVISION OF
ADMINISTRATIVE HEARINGS

Petitioner's exception to paragraph four of the Recommended Order is REJECTED.

Petitioner's exception to paragraph six of the Recommended Order is REJECTED.

FINDINGS OF FACT

1. The findings of fact set forth in the Recommended Order are approved and adopted and incorporated herein by reference.
2. There is competent substantial evidence to support the findings of fact.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter pursuant to Section 120.57(1), Florida Statutes, and Chapter 464, Florida Statutes.
2. The conclusions of law set forth in the Recommended Order are approved and adopted and incorporated herein by reference.

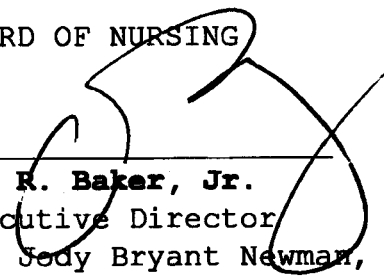
DISPOSITION

Upon a complete review of the record in this case, the Board determines that the disposition recommended by the Administrative Law Judge be **ACCEPTED**.

IT IS HEREBY ORDERED AND ADJUDGED that Ideal Professional Institute's approved program be placed on probation for 2018.

DONE AND ORDERED this 13th day of Sept, 2018.

BOARD OF NURSING


Joe R. Baker, Jr.
Executive Director
For Jody Bryant Newman, EdD, EdS
Chair, Florida Board of Nursing

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF HEALTH AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF THE RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided by U.S. Mail to **Petitioner, Ideal Professional Institute, Attention: Joain Silvera, Program Director, 20295 NW 2nd Avenue #210, Miami Gardens, FL 33169; Gregory Ochalek, Esquire, 90 SW 8th Street, #211, Miami, FL 33130; 19553 NW Second Avenue, Suite 217, Miami Garden, Florida 33169; and by e-mail at ochaleklaw@gmail.com; The Honorable Robert E. Meale, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399- 3060; to Diane L. Guillemette,**

Esquire, Department of Legal Affairs, by email at
diane.guillemette@myfloridalegal.com; and to **Louise St. Laurent**,
Esquire, Office of General Counsel, Department of Health, by email
at louise.stlaurent@flhealth.gov.

THIS 14th DAY OF September, 2018.


DEPUTY AGENCY CLERK

STATE OF FLORIDA
BOARD OF NURSING

Final Order No. DOH-18-1137-~~FD~~ -MQA

FILED DATE - JUL 02 2018
Department of Health

By: *Amber Greene*
Deputy Agency Clerk

IDEAL PROFESSIONAL INSTITUTE,

Petitioner,

vs.

DOAH Case No.: 17-6838

BOARD OF NURSING,

Respondent.

FINAL ORDER

THIS CAUSE came before the Board of Nursing pursuant to Sections 120.569 and 120.57(1), Florida Statutes, on June 7, 2018, in Orlando, Florida, for the purpose of considering the Administrative Law Judge's Recommended Order, a copy of which is attached hereto as Exhibit A, in the above-styled cause. Petitioner was not present and was not represented by counsel. Respondent was represented by Lee Ann Gustafson, Esquire.

Upon review of the Recommended Order, Petitioner's Exceptions to Recommended Order, the argument of the parties, and after a review of the complete record in this case, the Board makes the following findings and conclusions.

EXCEPTIONS

Petitioner's exception to paragraph three of the Recommended Order is
REJECTED.

Petitioner's exception to paragraph four of the Recommended Order is
REJECTED.

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DIVISION OF HEARINGS
ADMINISTRATIVE

Petitioner's exception to paragraph six of the Recommended Order is
REJECTED.

FINDINGS OF FACT

1. The findings of fact set forth in the Recommended Order are approved and adopted and incorporated herein by reference.
2. There is competent substantial evidence to support the findings of fact.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter pursuant to Section 120.57(1), Florida Statutes, and Chapter 464, Florida Statutes.
2. The conclusions of law set forth in the Recommended Order are approved and adopted and incorporated herein by reference.

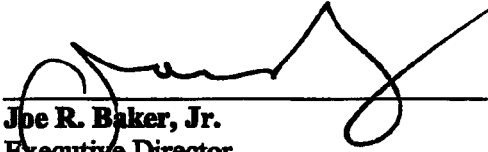
DISPOSITION

Upon a complete review of the record in this case, the Board determines that the disposition recommended by the Administrative Law Judge be **ACCEPTED.**

IT IS HEREBY ORDERED AND ADJUDGED that Ideal Professional Institute's approved program be placed on probation for 2017.

DONE AND ORDERED this 28th day of June, 2018.

BOARD OF NURSING


Joe R. Baker, Jr.
Executive Director
for Jody Bryant Newman, EdD, EdS
Chair, Florida Board of Nursing

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF HEALTH AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided by U.S. Mail to **Petitioner, Ideal Professional Institute, c/o Gregory M. Ochalek, Esquire**, 19553 N.W. Second Avenue, Miami Garden, Florida 33169, **The Honorable Robert E. Meale, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060**; to **Diane L. Guillemette, Esquire, Department of Legal Affairs, by email at diane.guillemette@myfloridalegal.com**; and to **Nichole Geary, Esquire, Office of General Counsel, Department of Health, by email at Nichole.geary@flhealth.gov**.

THIS 2nd day of July, 2018.

Anber Greene

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DEPARTMENT OF HEALTH
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CLERK ANGEL SANDERS

DATE MAY 09 2018

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IDEAL PROFESSIONAL INSTITUTE
Petitioner,

v.

CASE NO: 17-6838

FLORIDA BOARD OF NURSING
Respondent.

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DIVISION OF
ADMINISTRATIVE HEARINGS

PETITIONER'S EXCEPTIONS TO DOAH RECOMMEND ORDER

DATED APRIL 24, 2018

PETITIONER IDEAL, by and through undersigned Counsel, files its Exceptions as follows;

Pursuant to FS 120.57(1)(k) & FAC 28-106.217 the following Exceptions to the above noted DOAH Recommended Order are filed with the Agency via record Counsel, and Pursuant to Notice, the captioned cause was heard by *Honorable Robert E. Meale*, the assigned Administrative Law Judge of the Division of Administrative Hearings on *February 6, 2018* via video conference between Tallahassee and Miami, Florida.

I. APPEARANCES

For Petitioner/Ideal, Gregory M. Ochalek, J.D., 19553 N.W. 2nd Avenue, #217, Miami FL 33169, 305.329.4591 (F) 305.329.4591, Cell; 305.610.7778, and

For Respondent/Board Of Nursing (BON hereafter): Diane L. Guillemette, Esq. & Lynette Norr, Esq. at; The Capitol, PL 01, The Capitol, Tallahassee, FL 32399-1050.

II. IDEAL'S STATEMENT OF EXCEPTIONS TO APRIL 24, 2018RECOMMENDED ORDER

Page 3, Paragraph 3: The finding herein should be rejected because on considering the record in its entirety it is not supported by a) admissible competent substantial evidence and b) does not comply with essential requirements of law as it is predicated on the January 30, 2018 deposition testimony of Dr. Doyoung Kim offered on behalf of the Board. The finding lists the National Council of State Boards of Nursing (NCLEX hereafter) mathematical "National Test Taker Average" value for 2015 as 82% and 2016 as 81.68% in very exacting measures based per Dr. Kim's testimony and supporting exhibits. The record citation legal basis for the exception to this finding was raised in the hearing transcript at page 14, line 23 to page 20, line 25 noting the Board's failure to disclose to Ideal that it was relying on Dr. Kim as an expert witness which created impermissible testimony and related hearsay exhibits as noted in the Hearing Transcript at page 19, line 19 to page 20, line 12, and page 32, lines 10 to 21.

The Board failed to make the expert witness disclosures to Ideal as required in discovery and by FIRCP 1.280 regarding Dr. Kim. The Board's surprise use of Dr. Kim's testimony in an undisclosed expert capacity regarding the NCLEX percentages, exhibits and their supporting math calculus fatally prejudices Ideal's informed opportunity to challenge Dr. Kim with a contesting expert witness and to fairly cross examine him and taints his deposition exhibits when used by other Board witnesses. Admitting Dr. Kim's deposition and its exhibits subsequently allows the Board's other witness to impermissibly rely on Dr. Kim's hearsay evidence to create a consequential chain of defective evidence prejudicially relied upon at hearing. Therefore, admitting Dr. Kim's surprise deposition expert witness testimony and exhibits departs from essential requirements of law. Absent Dr. Kim's improper testimony and exhibits in the record this fact is not supported by substantial competent evidence.

Page 3, Paragraph 4: The finding herein should be rejected because on considering the record in its entirety it is not supported by a) admissible competent substantial evidence and b) does not comply with essential requirements of law as it is predicated on the

January 30, 2018 deposition testimony of Dr. Doyoung Kim offered on behalf of the Board. The finding lists the Ideal student *first-time test takers* passing rates as 15.07% for 2015 and 9.1% for 2016.

The Board failed to make the expert witness disclosures to Ideal as required in discovery and by FIRCP 1.280 regarding Dr. Kim. The Board's surprise use of Dr. Kim's testimony in an undisclosed expert capacity regarding the NCLEX percentages, exhibits and their supporting math calculus fatally prejudices Ideal's informed opportunity to challenge Dr. Kim with a contesting expert witness and to fairly cross examine him and taints his deposition exhibits when used by other Board witnesses. Admitting Dr. Kim's deposition and its exhibits subsequently allows the Board's other witness to impermissibly rely on Dr. Kim's hearsay evidence to create a consequential chain of defective evidence prejudicially relied upon at hearing. Therefore, admitting Dr. Kim's surprise deposition expert witness testimony and exhibits departs from essential requirements of law. Absent Dr. Kim's improper testimony in the record this fact is not supported by substantial competent evidence.

Page 4, Paragraph 6: The finding herein should be rejected because on considering the record in its entirety it is not supported by a) admissible competent substantial evidence and b) does not comply with essential requirements of law as it is predicated on the January 30, 2018 deposition testimony of Dr. Doyoung Kim offered on behalf of the Board. The finding lists the adjusted test takers within 6 months of graduation as; 22.58% for 2015 at transcript page 55, lines 1-10,... and an alternate competing 2015 data set including a person the Board did not have a past result of graduation date for of 25% at transcript page 63, lines 3-5. The finding lists the data set in 2016 as 12.5% at transcript page 57, line 4 to 9 with the Board unilaterally "excluding" from the calculations a person for which the Board did not have an "exact" graduation date for "was a failure". Further defect is that there is not statutory authority for any party to round numbers, or otherwise alter mathematical applications and determinations. (Transcript at page 55, lines 5-8 & page 73, lines 19-24 re "benefit of the doubt".)

The finding omits any legal analysis of why one competing percentage data set was relied upon as competent substantial evidence to the rejection of the other sets and omits any legal citations to allow for the Board to make competing discretionary percentage calculations so each listed data set is unreliable as record evidence to support this finding. Further, the finding is absent any record facts legal rationale as to why said Board "excluding" calculus was considered as substantial, relevant or reliable evidence.

Moreover, the Board failed to make the expert witness disclosures to Ideal as required in discovery and by FIRCP 1.280 regarding Dr. Kim. The Board's surprise use of Dr. Kim's testimony in an undisclosed expert capacity regarding the NCLEX percentages, exhibits and their supporting math calculus fatally prejudices Ideal's informed opportunity to challenge Dr. Kim with a contesting expert witness and to fairly cross examine him and taints his deposition exhibits when used by other Board witnesses. Admitting Dr. Kim's deposition and its exhibits subsequently allows the Board's other witness to impermissibly rely on Dr. Kim's hearsay evidence to create a consequential chain of defective evidence prejudicially relied upon at hearing. Therefore, admitting Dr. Kim's surprise deposition expert witness testimony and exhibits departs from essential requirements of law. Absent Dr. Kim's improper testimony in the record this fact is not supported by substantial competent substantial evidence.

The Court also as best can be understood declined to ruled on Ideal's post trial Motion to Strike Dr. Doyoung Kim's Deposition Testimony and Exhibits to prejudice Ideal's DOAH hearing relief opportunities.

III. CONCLUSION

Based upon the foregoing Exceptions based upon the record facts and statutory law the Agency should incorporate the foregoing into the DOAH Recommended Order in this Case and enter a Final Order DENYING the Agency November 17, 2017 *Notice of Intent to Place Program On Probation* as required substantial evidence is lacking per DeGroot v. Sheffield, 95 So.2d 912 (Fla. 1957) and required competent evidence is lacking per Heifetz v Dept. of Business Regulation, Div. Of Alcoholic Beverages, 475 So. 2d 1277

(Fla. 1st DCA 1985). The Board should also immediately REMOVE any negative remarks and the like from the agency website, records, and the like.

WHEREFORE, Ideal petitions the Board to adopt the above Exceptions in its Final Order to deny any adverse rulings, effects or conditions being placed in Ideal. Further, Ideal requests a Board Hearing to record argue said exceptions, with the Board granting any other relief seen fit.

By: Gregory M. Ochalek, J.D.
Attorney for Respondent/FBN 659703

I HEREBY CERTIFY that on the 7 day of May, 2018 a true copy of the above was sent via Email to the Florida Board of Nursing, in c/o
1) Diane L. Guillemette, Esq., Board Counsel, Diane.Guillemette@myfloridalegal.com,
and
2) Lynette Norr, Esq. Board Counsel at, Office of Florida Attorney General, The Capitol, PL 01 Tallahassee, FL 32399-1050, Lynette.Norr@myfloridalegal.com,
Division of Administrative Hearings, C/O Clerk of Court, 1230 Apalachee Parkway, Tallahassee, FL 32399-3060.

S/Gregory M. Ochalek, J.D. FBN 659703
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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DATE MAY 16 2018

IDEAL PROFESSIONAL INSTITUTE,
Petitioner,

DOAH Case No.: 17-006838

v.

BOARD OF NURSING,
Respondent.

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DIVISION OF ADMINISTRATIVE HEARINGS

**RESPONDENT'S RESPONSE TO
PETITIONER'S EXCEPTIONS**

COMES NOW, Respondent, Board of Nursing, by and through undersigned counsel, and files this Response to Petitioner's exceptions. The standards for exceptions are as follows:

120.57(2)(k) ... The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

(l) The agency may adopt the recommended order as the final order of the agency.

The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.

Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on

which the findings were based did not comply with essential requirements of law.

The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action.

(emphasis added)

1. Petitioner's first exception relates to page 3, paragraph 3 of the Recommended Order (RO). At the hearing, the Administrative Law Judge (ALJ) ruled that he would allow testimony of Dr. Kim to come into evidence and specifically overruled Petitioner's objection. (Tr. p. 14, line 11- p. 18, line 16). The ALJ made an evidentiary ruling over which the Board has no authority. *Barfield v. Dep't of Health, 805 So2d 108, 1012 (Fla. 1st DCA) 2001* (Board lacked substantive jurisdiction to reject evidentiary conclusions). Petitioner's exception to page 3, paragraph 3 should be rejected.

2. Petitioner's second exception relates to page 3, paragraph 4 of the RO on the same basis as his first exception. Again, the ALJ made an evidentiary ruling over which the Board has no authority. Petitioner's exception to page 3, paragraph 4 should be rejected.

3. Petition next takes exception to page 4, paragraph 6, arguing that several data sets were presented to the ALJ, and that with multiple data sets being offered none of the data could be relied upon. Respondent fails to acknowledge that all of the different data collections offered were explained at the hearing so that the ALJ could make a final determination. The final numbers are found in paragraph 6 of the RO, and they did "not come anywhere near passing the NCLEX at the statutory minimum rates of 2015 and 2016." (RO p. 7).

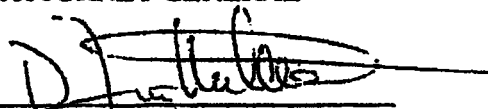
Petitioner also reiterates the same basis for its exceptions listed at 1 and 2, related to an evidentiary ruling.

Petitioner's exception to page 4, paragraph 6 should be rejected.

4. In conclusion, the Board should reject Petitioner's exceptions, and place the program on probation for the time period statutorily required as of the entry of Final Order.

Respectfully submitted, this 15 day of May 2018.

PAMELA JO BONDI
ATTORNEY GENERAL


DIANE L. GUILLEMETTE
Assistant Attorney General
Fla. Bar No.: 0887803
LYNETTE NORR
Assistant Attorney General
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PL-01 the Capitol
Tallahassee, FL 32399-1050
Diane.guillemette@myfloridalegal.com
Lynette.norr@myfloridalegal.com
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by e-mail to: Gregory M. Ochalek at ochaleklaw@gmail.com this 15 day of May 2108.


Diane L. Guillemette