

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IDEAL PROFESSIONAL INSTITUTE,

Petitioner,

vs.

Case No. 17-6838

BOARD OF NURSING,

Respondent.

_____ /

RECOMMENDED ORDER

On February 6, 2018, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing by videoconference in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Gregory M. Ochalek, Esquire
Law Offices of Gregory M. Ochalek, PLLC
19553 Northwest Second Avenue, Suite 217
Miami Gardens, Florida 33169-3366

For Respondent: Diane L. Guillemette, Esquire
Deborah Bartholow Loucks, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
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STATEMENT OF THE ISSUE

The issue is whether Respondent may place on probation for 2017 Petitioner's approved program offering an associate's degree in nursing (ADN) due to the failure of its relevant

graduates to achieve the required passing rate on the nursing licensing examination for 2015 and 2016.

PRELIMINARY STATEMENT

By Notice of Intent to Place Program on Probation filed on November 17, 2017, Respondent placed on probationary status for 2017 Petitioner's approved program for an ADN because, in 2015 and 2016, the program's relevant graduates failed to achieve the required passing rates on the licensing examination offered by the National Council of State Boards of Nursing (NCLEX).

By request for hearing served on December 6, 2017, Petitioner requested a formal administrative hearing.

At the final hearing, Petitioner called no witnesses and offered into evidence no exhibits. Respondent called one witness and offered into evidence nine exhibits: Respondent Exhibits 1, 2, 4, 11, 12, and 33 through 36. The parties jointly offered Joint Exhibits 1 through 13. All exhibits were admitted. Respondent Exhibit 35, which is the transcript of the deposition of Dr. Doyoung Kim, includes several exhibits that are identified in the transcript and attached to the transcript. The Administrative Law Judge has sealed Respondent Exhibits 1 and 2, pursuant to sections 456.014 and 464.019(6), Florida Statutes.

The court reporter filed the transcript on March 16, 2018. The parties filed their proposed recommended orders by April 16,

2018. On April 19, 2018, Petitioner filed a motion objecting to Respondent's proposed recommended order; the motion is denied.

FINDINGS OF FACT

1. Petitioner operates an ADN program. Graduates of Petitioner's ADN program are eligible to take the NCLEX, which, if passed, renders them eligible for nursing licensure.

2. As discussed in the Conclusions of Law, Respondent is required to penalize any approved program whose first-time test takers taking the NCLEX within six months of graduation fail to achieve a minimum passing rate. The minimum passing rate is ten points less than the first-time test taker average (National Test Taker Average) announced by the National Council of State Boards of Nursing (Council).

3. The first full year that Petitioner's graduates took the NCLEX was 2015. For 2015, the National Test Taker Average for ADN graduates was 82%. For 2016, the National Test Taker Average for ADN graduates was 81.68%.

4. For 2015, ten first-time test takers of the NCLEX who had graduated from Petitioner's approved program passed out of 73 such takers. For 2016, 13 first-time test takers of the NCLEX who had graduated from Petitioner's approved program passed out of 143 such takers. The passing rates were thus 15.07% for 2015 and 9.1% for 2016.

5. During the years at issue, Florida law restricted the calculation of passing rates of first-time test takers to persons who took the NCLEX within six months of graduation. The Council obtains and reports, by test taker, the graduation month and year, but not the day, month, and year. Respondent obtains graduation dates only of applicants to take the NCLEX in Florida. However, through discovery in this case, Respondent obtained exact graduation dates of a sufficient number of the relevant test takers to meet the applicable evidentiary standard.

6. As adjusted for test takers taking the NCLEX within six months of graduation, the passing rate of Petitioner's relevant graduates in 2015 was 22.58%. There were two students for whom precise graduate dates could not be obtained; one student passed the NCLEX and one student failed the NCLEX. If the figures include the student who passed, but not the student who failed, the adjusted passing rate of Petitioner's relevant graduates in 2015 was 25%. Making the same adjustment for one student who failed the NCLEX and for whom a precise graduation date is unavailable, the adjusted passing rate of Petitioner's relevant graduates in 2016 was 12.5%.

7. By clear and convincing evidence, Respondent has proved that graduates of Petitioner's approved program taking the NCLEX for the first time and within six months of graduation did not

come anywhere near passing the NCLEX at the statutory minimum rates for 2015 and 2016.

CONCLUSIONS OF LAW

8. DOAH has jurisdiction of the subject matter. §§ 120.569, 120.57(1), and 464.019(5)(a)2., Fla. Stat. (2017) (all references to statutes are to the statutes in effect in 2017 except where noted).

9. Respondent has the burden of proving the material allegations. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). The standard of proof is clear and convincing evidence. § 120.57(1)(j); Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

10. Section 464.019(5)(a)1. (2016) requires an approved program offering prelicensure nursing education to achieve a passing rate, for first-time test takers who take the NCLEX within six months of graduation, not more than ten points lower than the National Test Taker Average reported for the applicable year by the Council for graduates of a comparable program.

11. Unchanged in 2017, section 464.019(5)(a)2. provides that Respondent shall place an approved program on probationary status if the program fails to achieve minimum passing rates for two consecutive years.

12. Petitioner's relevant graduates failed to achieve the statutory minimum passing rates on the NCLEX for 2015 and 2016.

RECOMMENDATION

It is

RECOMMENDED that the Board of Nursing enter a final order placing Petitioner's approved program on probation for 2017.

DONE AND ENTERED this 24th day of April, 2018, in Tallahassee, Leon County, Florida.



ROBERT E. MEALE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of April, 2018.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.