STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EMERGENCY EDUCATION INSTITUTE, LLC,

Petitioner,

Case No. 18-1872

vs.

BOARD OF NURSING,

Respondent.
_____/

RECOMMENDED ORDER

On September 28 and November 7, 2018, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing by videoconference in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: Shavon L. Jones, Esquire
Sec Outsourcing, LLC
14311 Biscayne Boulevard, Suite 2851
Miami Beach, Florida 33154

Wendy Brewster-Maroun, Esquire
Brewster-Maroun Spradley, PLLC
18520 Northwest 67th Avenue, Suite 259
Hialeah, Florida 33015-3302

For Respondent: Marlene K. Stern, Esquire
Timothy Frizzell, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399

## STATEMENT OF THE ISSUES

The issues are: 1) whether, based on the 2017 passing rate of graduates of Petitioner's prelicensure nursing education program (Program) taking the National Council of Licensing Examination (NCLEX), Respondent is required to return the Program from probationary to approved status, pursuant to section 464.019, Florida Statutes; and 2) whether, in declining to return the Program to approved status, Respondent has unlawfully relied on an unadopted rule, in violation of section 120.57(1)(e). At Petitioner's request, the parties presented evidence concerning constitutional challenges that Petitioner intends to present to a district court of appeal.

## PRELIMINARY STATEMENT

By Notice of Intent to Place Program on Probation filed May 3, 2017, Respondent placed Petitioner's Program on probationary status for 2017 due to inadequate passing rates of its graduates taking the NCLEX for the first time in 2015 and 2016 (Probationary Order). By Notice of Intent to Extend Probation filed February 23, 2018, Respondent extended the Program's probationary status for 2018 due to an inadequate passing rate of its graduates taking the NCLEX in 2017 (Order Extending Probation).

In response to the Order Extending Probation, on March 21, 2018, Petitioner filed with DOAH a Petition for Formal

Administrative Proceedings (Petition). Paragraph 10 of the Petition states that, on March 12, Petitioner filed with Respondent the same petition, but paragraph 11 of the Petition alleges that, on March 19, Respondent advised that, rather than transmit the proceeding to DOAH, it "wanted to dismiss the petition on the ground that it was filed in an incorrect forum."

When Respondent reportedly resisted transmitting the request to DOAH, Petitioner filed another copy of the Petition with DOAH. On its face, the Petition commenced a proceeding, under section 120.56(4)(c), to obtain a final order from the administrative law judge invalidating an unadopted rule and impliedly commenced a proceeding, under sections 120.569(1) and 120.57(1), to obtain a final order from Respondent returning Petitioner's program to approved status from probationary status. Indirectly confirming its intent to commence a proceeding under sections 120.569(1) and 120.57(1), the Petition invoked section 120.57(1)(e) to bar Respondent and the administrative law judge from basing agency action on an unadopted rule. Obviating the question of whether Petitioner could file the Petition with DOAH to commence a proceeding under sections 120.569(1) and 120.57(1), on April 10, 2018, Respondent filed a Referral for Hearing, which transmitted to DOAH both proceedings.

Through the final hearing, the proceedings under sections 120.569(1) and 120.57(1) and section 120.56 remained

consolidated, as filed, pursuant to section 120.57(1)(e)1.d. The need for separate orders dictated the severance of the section 120.56 proceeding, which became DOAH Case 19-0442RU.

On June 8, 2018, Petitioner filed a Motion for Leave to Amend Petition. On June 15, 2018, Respondent filed a response stating that it took no position on the motion, which seeks attorneys' fees and costs under section 57.111. On June 19, 2018, the administrative law judge granted the motion. Issued on the same date as the recommended order in this case, the final order in DOAH Case 19-0442RU determines that Respondent has made an agency statement that is an unadopted rule, but denies Petitioner's request for attorneys' fees and costs under section 57.111.

As pertinent to the proceeding under sections 120.569(1) and 120.57(1), the Petition challenges Respondent's decision to extend Petitioner's probationary status for 2018 and alleges that Respondent unlawfully implemented, by an unadopted rule, a statutory amendment governing which graduates to include in calculating the passing rate of the Program's graduates.

At the hearing, Petitioner called three witnesses and offered into evidence 13 exhibits: Petitioner Exhibits C.1, D.3, E, E.1 (as identified by Respondent), E.11 (as identified by Respondent), E.12 (as identified by Respondent), F, G.1, G.2, H.1, H.2, J, and K. Respondent called two witnesses and offered

into evidence nine exhibits: Respondent Exhibits Dd.2, E.2 through E.6, E.8 through E.9, and E.16. All exhibits were admitted.

The court reporter filed the transcript on October 23, 2018. On December 21, 2018, Petitioner filed a proposed final order and Respondent filed a proposed recommended order. The administrative law judge has considered each proposed order in preparing this recommended order.

## FINDINGS OF FACT

1. The Program is a prelicensure professional nursing education program that terminates with an associate degree. Respondent approved the Program in 2013, thus authorizing Petitioner to admit degree-seeking students into the Program, as provided in section 464.019.

2. As provided by section 464.019(5)(a)1., the passing rate of the Program's graduates taking the NCLEX for the first time must meet or exceed the minimum passing rate, which is ten points less than the average passing rate of graduates taking the NCLEX nationally for the first time. Until June 23, 2017, the passing rate of a Florida program was based only on first-time test-takers who had graduated within six months of taking the exam (New Graduates). Chapter 2017-134, sections 4 and 8, Laws of Florida, which took effect when signed into law on June 23, 2017 (Statutory Amendment), removes the six-month restriction, so that

the passing rate of a Florida program is now based on all first-time test-takers, regardless of when they graduated (Graduates). The statutory language does not otherwise address the implementation of the Statutory Amendment.

3. For 2015 and 2016, respectively, the minimum passing rates in Florida were 72% and 71.68%, and the Program's New Graduates passed the NCLEX at the rates of 44% and 15.79%. As required by section 464.019(5), Respondent issued the Probationary Order.

4. The Probationary Order recites the provisions of section 464.019(5)(a) specifying the applicable passing rate, directing Respondent to place a program on probation if its graduates fail to pass at the minimum specified passing rates for two consecutive years, and mandating that the program remain on probation until its passing rate achieves the minimum specified rate. The Probationary Order details the 2015 and 2016 passing rates of Petitioner's relevant graduates and the minimum passing rates for these years. The Probationary Order makes no attempt to describe the condition of probation, which might have included a reference to New Graduates, other than to refer to section 464.019(5)(a)2., which, unchanged by the Statutory Amendment, specifies only that a program must remain on probation until and unless its graduates achieve a passing rate at least equal to the minimum passing rate for the year in question.

5. For 2017, the minimum passing rate for a Florida program was 74.24%. If, as Respondent contends, the new law applies to all of 2017, six of the fifteen of the Program's Graduates failed the NCLEX, so the Program's passing rate was inadequate at 60%. If, as Petitioner contends, the old law applies to all of 2017, twelve of the Program's test-takers were New Graduates, and only three of them failed, so the Program's passing rate was adequate at 75%.

6. To discredit Respondent's retroactive application of the new law to January 1, 2017, which produced its calculation of a 60% passing rate, Petitioner, relying on section 120.57(1)(e)1., has shown that this implementation of the Statutory Amendment constitutes an unadopted rule that enlarges, modifies, or contravenes the Statutory Amendment, as detailed in the final order issued in DOAH Case 19-0442RU.

7. But no more credit can be given to Petitioner's contention that the Statutory Amendment may only be applied prospectively, starting on January 1, 2018. Petitioner grounds this argument in the timing of Respondent's meeting in early 2018 to determine the 2017 passing rate for the Program: because the meeting took place in 2018, Respondent could not apply the new law until 2018. It makes no sense that an agency could control the effective date of a statute by timing when it convenes a meeting to apply the statute.

8. Even if Petitioner's argument were an attempt to claim a vested interest in the calculation methodology set forth in the Probationary Order, it is unpersuasive. In stating the condition of probation, the Probationary Order does not incorporate textually the notion of New Graduates, but instead refers to the statute, which was not amended, that sets the passing rates. The condition of probation does not even refer to the statute that, amended by the Statutory Amendment, identifies which graduates to include in calculating the passing rate.

9. Assigning meaning to the effective date of the Statutory Amendment, the passing rate of Petitioner's graduates in 2017 was inadequate. From January 1 through June 22, 2017, five of the Program's test-takers were New Graduates and they all passed. From June 23 through December 31, 2017, four of the eight Graduates taking the NCLEX passed the test. Combining these results for all of 2017, the Program's passing rate was nine divided by thirteen, or 69%--more than five points below the minimum passing rate for 2017.

## CONCLUSIONS OF LAW

10. There is jurisdiction under section 120.569(1) because Respondent's decision not to return the Program to approved status determines the substantial interests of Petitioner. But Petitioner is entitled only to an informal hearing, not a formal DOAH hearing, because the basic facts necessary to dispose of the

case are undisputed. §§ 120.569(1) and 120.57(1) and (2). A DOAH hearing may not be predicated on the ultimate factfinding or analysis that is set forth in the preceding paragraph, in which the Statutory Amendment is applied in a readily apparent way to undisputed facts.

11. Nor, under Florida administrative law, is there any notion of supplemental jurisdiction by which DOAH's jurisdiction over the proceeding under section 120.56(4) establishes jurisdiction over this proceeding under sections 120.569(1) and 120.57(1). Section 120.57(1)(e)2.d. authorizes the consolidation of a proceeding under sections 120.569(1) and 120.57(1) with a proceeding under section 120.56, but does not dispense with the necessity of a jurisdictional basis for each proceeding.

12. If there were jurisdiction under section 120.57(1), for the reasons set forth above, this recommended order would recommend that Respondent enter a final order extending the Program's probationary status for 2018, as set forth in the Order Extending Probation. Petitioner's reliance on section 120.57(1)(e) to rid itself of Respondent's implementation of the Statutory Amendment retroactive to January 1, 2017, does not preclude a sensible application of the Statutory Amendment with due regard to its effective date.

## RECOMMENDATION

It is

RECOMMENDED that the Board of Nursing enter a final order extending the probationary status of the Program for 2018.

DONE AND ENTERED this 29th day of January, 2019, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of January, 2019.

COPIES FURNISHED:

Diane L. Guillemette, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399
(eServed)

Shavon L. Jones, Esquire
Sec Outsourcing, LLC
14311 Biscayne Boulevard, Suite 2851
Miami Beach, Florida 33154
(eServed)

Timothy Frizzell, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399
(eServed)

Marlene K. Stern, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399
(eServed)

Wendy Brewster-Maroun, Esquire
Brewster-Maroun Spradley, PLLC
18520 Northwest 67th Avenue, Suite 259
Hialeah, Florida 33015-3302
(eServed)

Joe Baker, Jr., Executive Director
Board of Nursing
Department of Health
4052 Bald Cypress Way, Bin C02
Tallahassee, Florida 32399-3252
(eServed)

Jody Bryant Newman, EdD, EdS
Board of Nursing
Department of Health
4052 Bald Cypress Way, Bin D02
Tallahassee, Florida 32399

Louise Wilhite-St Laurent, Interim General Counsel
Department of Health
4052 Bald Cypress Way, Bin C65
Tallahassee, Florida 32399
(eServed)

## NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

As to the recommended order, 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.