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INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

March 20, 2008

Mary E. Bowen, R.N., C.R.N.P., Chairperson
State Board of Nursing
2601 North 3rd Street
Harrisburg, PA 17110

Re: Regulation #16A-5123 (IRRC #2664)
State Board of Nursing
Nursing Education Programs Examination Pass Rates

Dear Chairperson Bowen:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at www.irrc.state.pa.us. If you would like to discuss them, please contact me.

Sincerely,

Kim Kaufman
Executive Director
wbg
Enclosure

cc: Honorable Robert M. Tomlinson, Chairman, Senate Consumer Protection and Professional Licensure Committee
Honorable Lisa M. Boscola, Minority Chairman, Senate Consumer Protection and Professional Licensure Committee
Honorable P. Michael Sturla, Majority Chairman, House Professional Licensure Committee
Honorable William F. Adolph, Jr., Minority Chairman, House Professional Licensure Committee
Honorable Pedro A. Cortes, Secretary, Department of State

Comments of the Independent Regulatory Review Commission

on

State Board of Nursing Regulation #16A-5123 (IRRC #2664)

Nursing Education Programs Examination Pass Rates

March 20, 2008

We submit for your consideration the following comments on the proposed rulemaking published in the January 19, 2008 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the State Board of Nursing (Board) to respond to all comments received from us or any other source.

This proposed regulation adds new language, which is practically identical to Subchapters A and B (relating to Registered Nurses and Practical Nurses respectively) in 49 Pa. Code Chapter 21. In the following paragraphs, our comments on identical language will be combined under the headings and section numbers from the two subchapters.

1. Sections 21.31 and 21.162. Surveys; lists of approved schools; and Types of approval. - Reasonableness; Implementation procedure; Clarity.

New language in both Sections 21.31(d) and 21.162(c) reads:

For purposes of activities relating to the approval and status of nursing education programs, the term "Board" used in this subchapter may mean the Board's educational advisors appointed under section 2.1(j) of the act (63 P.S. § 212.1(j)). Only the Board may confer initial approval status on a proposed nursing education program and only the Board may remove a program from the approved list.

Since the word "approval" is used in both sentences, the section could be interpreted as giving "educational advisors" the authority to approve nursing education programs (programs). Therefore, the intent is unclear. When does the term "Board" indicate "educational advisors" and when does it mean the full Board or a majority of the Board? In what situations will the advisors be acting for the Board? In those provisions where "educational advisors" may act for the Board, their role should be clearly stated. Finally, both Sections 21.31(d) and 21.162(c) refer to Section 2.1(j) (63 P.S. § 212.1(j)). This may be a typographical error. Should these subsections refer to Section 2.1(i) (63 P.S. § 212.1(i))?

2. Sections 21.33 and 21.162. Types of approval. - Fiscal impact; Reasonableness; Implementation procedure; Clarity.

Subsection (b) requires that programs notify applicants for admission and current students whenever their approval status changes. There are two questions. First, upon receipt of a notice of status change from the Board, is a program expected to notify applicants and students within a

certain time period? If so, this time period should be set forth in the regulation. Second, may a program use email or other means to contact applicants and students? In the final-form regulation, the Board should provide direction concerning the time period and the types of notice that are acceptable, such as the U.S. Postal Service, email, voice mail, or facsimile.

3. Sections 21.33a and 21.162a. Failure to comply with standards.

Subsection (a) Approval status review

This subsection begins with this sentence:

Whenever the Board receives information suggesting that a nursing education program has not maintained the standards of this subchapter, the Board may request information from the program or conduct a site visit and may informally resolve any deficiency....

Will the Board provide written notice to the program describing the reported deficiencies, standards that are not being met, and the information that the Board is requesting? The final-form regulation should be amended to indicate that the Board or its advisors will provide the program with a written notice of the deficiencies and the information requested.

Subsections (b), (c) and (g) Provisional approval status notification, plan of correction, and maximum time allowed for correction

In Subsection (b), the Board states that it will notify a program in writing if it “determines that a nursing education program should be placed on provisional approval status.” Subsection (c) states the Board “will notify the program, in writing, of the deficiencies and the amount of time that will be allowed for correction of the deficiencies that resulted in the program's placement on provisional approval status.” Subsection (g) indicates that “[T]wo years will be the maximum time allowed for the correction of deficiencies resulting in provisional approval status.” There are three concerns.

First, the need for and purpose of Subsection (b) is unclear. Will the written notice from the Board, which is discussed by both subsections, be one notice or two separate notices? If it is one notice, then these two subsections should be combined into one subsection in the final-form regulation.

Second, what criteria or factors will the Board consider in making its determination to place a program on provisional approval status? On page 3 of its comments dated February 18, 2008, the Hospital and Healthsystem Association of Pennsylvania (HAP) listed several factors which it recommended that the Board consider in reviewing programs that may need to be placed on provisional approval status. Key elements or factors that the Board will use to make its determination should be identified in the final-form regulation.

Third, Subsections (c) and (g) appear to include conflicting provisions. Subsection (c) states that the Board will set the time period for a program to correct deficiencies, and adds that the Board “may extend the time period for correction of deficiencies at its discretion if the program is making demonstrable progress.” However, Subsection (g) allows for only two years as the maximum for the correction of deficiencies.

Under Subsection (c), may the Board extend the time period for correction beyond two years? Is two years a sufficient time to observe and measure corrections in every case? How much time do similar agencies in other states give programs to correct deficiencies? The Board needs to carefully review these questions and clarify these subsections in the final-form regulation.

Subsection (d) Restrictions

This subsection states that the Board may place restrictions on a program on “provisional approval status as deemed necessary by the Board to bring the program into compliance with this subchapter.” The House Professional Licensure Committee (House Committee) in its comments dated February 13, 2008, questioned what types of restrictions may be imposed and how they would improve the program. The final-form regulation should require the Board to give written notice to a program of each restriction with a detailed explanation of how the restriction will improve the program and obtain compliance with the subchapter.

Subsection (e) Additional reports

This section indicates that the Board may require “additional reports” from programs on “provisional” status? Will the Board submit written requests to programs describing what is required in the “additional reports.” At a minimum, the final-form regulation should state that the Board will provide programs with written requests for additional reports that specify the information requested by the Board.

4. Section 21.33b and 21.162b. Minimum rate for graduates of nursing education programs to pass the National licensure examination. - Fiscal impact; Protection of public health, safety and welfare; Reasonableness; Implementation procedure; Clarity.

This section gives programs two full academic years to achieve the new 80 percent minimum standard for the examination pass rate. Commentators expressed serious concerns with this requirement.

What will be the impact of this requirement on programs’ admissions and diversity policies, and on efforts to maintain sufficient numbers in the nursing profession? Is there any evidence that graduates of programs with pass rates below 80 percent, or those who pass on the second attempt, are a risk or problem? What threat do these licensees pose to public health, safety and welfare?

In light of these concerns, does the Board have any information on how many programs across the state will be able to reach the 80 percent examination pass rate within two years? For programs with pass rates currently below 80 percent, what types of changes will they need to make to improve their standing?

In its comments, HAP recommended two additional approaches to meeting the 80 percent standard. First, it recommended that the Board give programs more time to achieve the 80 percent standard by adding another year to the phase-in with another intermediate step where programs would be required to reach a pass rate of 75 percent. Second, HAP stated that the pass rate should be calculated by averaging it over a three-year period. This approach is used in other states and could prevent an anomalous year from being used to judge a program’s effectiveness.

Given the computer method for taking the national examination and other factors, commentators also suggested that the Board consider examining the success rate of second time test takers and their capability for success in the profession. We agree. If there is a presumption or concern that this is not an accurate measure of a program's effectiveness because graduates may obtain additional schooling before their second attempt, then the Board should require that applicants report and document additional course work.

The Board should thoroughly investigate these concerns and document whether an adequate number of the state's programs can meet the 80 percent first-time pass rate within two years. If not, it should explain how it is going to assist programs in meeting this goal, or it should amend the final-form regulation to provide for flexibility in determining and measuring the standard, and to allow for more time for programs to reach the goal.

5. Sections 21.34 and 21.166. Removal from approved list.

In its comments on this proposed regulation, the House Committee asked whether a program that has been removed from the approved list may later re-apply for approval. In the past, were there programs or schools removed from the approved list that later contacted the Board to inquire about submitting an application for reinstatement on the list? How did the Board respond? Is there anything in the Professional Nursing Law (Law) (63 P.S. §§ 211-225.5) or existing regulations that would prevent the Board from considering such a re-application?

Subsection (b) reads:

If a nursing education program is removed from the approved list, the controlling institution shall provide for the completion of the program for students currently enrolled by placing the students in an approved program.

The intent of this statement is unclear. For example, does it mean that the "controlling institution" is financially responsible to "provide for the completion of the program"? Commentators also raised questions concerning the impact of this regulation if a comparable program is not available in the same area or region, or the tuition and costs of the closest available program are significantly higher than the student's previous program. The Board needs to clarify this subsection in the final-form regulation.

Finally, Section 6.2(a) of the Law (63 P.S. § 216.2(a)) includes the following statement:

... Any student who shall be enrolled in any school which shall be removed from the approved list shall be given credit toward the satisfaction of the Board's requirements for examination for such of the requirements of the Board which any said student shall satisfactorily complete prior to the removal of said school from the approved list, and said student shall upon the satisfactory completion of the remainder of said requirements in any approved school be eligible for examination for licensure....

The Board should consider including a reference to this statement in the final-form regulation.

Facsimile Cover Sheet

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Date: March 20, 2008
Pages: 6

Comments: We are submitting the Independent Regulatory Review Commission's comments on the State Board of Nursing's regulation #16A-5123 (IRRC #2664). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: _____

Date: _____

03/20/08