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DEPARTMENT OF STATE  
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS  
STATE BOARD OF NURSING

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March 12, 2009

The Honorable Arthur Coccodrilli, Chairman  
INDEPENDENT REGULATORY REVIEW COMMISSION  
14<sup>th</sup> Floor, Harristown 2, 333 Market Street  
Harrisburg, Pennsylvania 17101

Re: Final Regulation  
State Board of Nursing  
16A-5123: Nursing Education Programs; Provisional Approval; Removal from  
Approved List; Examination Pass Rates

Dear Chairman Coccodrilli:

Enclosed please find two copies of an updated Preamble for the final rulemaking package of the State Board of Nursing pertaining to 16A-5123: Nursing Education Programs; Provisional Approval; Removal from Approved List; Examination Pass Rates. One copy is highlighted at pages 10, 11, and 13, to show changes made at the request of the IRRC analyst and the other copy is not highlighted, for inclusion in your final rulemaking package. Mr. Jewett has advised that the Preamble may be amended at any time before publication.

The Board will be pleased to provide whatever information the Commission may require during the course of its review of the rulemaking.

Sincerely,

A handwritten signature in black ink that reads "Ann L. O'Sullivan".

Ann L. O'Sullivan, Ph.D., FAAN, CRNP, Chairperson  
State Board of Nursing

ALO/TL:apm  
Enclosure

cc: Basil L. Merenda, Commissioner  
Bureau of Professional and Occupational Affairs  
Peter V. Marks, Executive Deputy Chief Counsel  
Department of State  
Joyce McKeever, Deputy Chief Counsel  
Department of State  
Cynthia Montgomery, Regulatory Counsel & Senior Counsel in Charge  
Department of State  
Teresa Lazo, Counsel  
State Board of Nursing  
State Board of Nursing

the action of staff within 10 days after service of notice of the action by the staff. The appeal would be filed with the Board. The General Rules of Administrative Practice and Procedure contemplate the appeal of all staff action; therefore, the Board believes that a program could appeal any restriction placed on the program by Board staff. These sections have been expanded to further explicate the appeal process provided by the General Rules of Administrative Practice and Procedure.

Finally, HPLC asked why the regulation does not require notice to current students of the changes in approval status or provide students the opportunity to transfer to another program with full approval status. Sections 21.33(b) and 21.162(b) require a program to notify applicants and students whenever the program's approval status changes. The provisions assume that the students know the status of the program upon enrollment. The Board does not have any authority to "provide students the opportunity to transfer to another program." Students, as consumers of educational services, are free to apply to other programs and, if accepted, transfer, at any time.

#### IRRC Comments

IRRC first addressed the clarity of §§ 21.31(d) and 21.162(c), noting that the word "approval" was confusing. The Board's nursing education advisors are authorized to move a program from initial approval status to full approval status. In addition, the Board's nursing education advisors conduct the compliance review and monitor the performance and improvement plan processes on behalf of the Board. Only the Board may grant initial approval status to a program or remove a program from the approved list. Based on comments received, the Board has amended this section to include, as a function solely of the Board, the authority to extend the two-year maximum period for the correction of deficiencies. These sections have been rewritten for clarity. **In addition, a typographical error was detected by IRRC and corrected.**

IRRC next suggested that the Board provide a time period for the notice programs are required to give to applicants and students under §§ 21.33(b) and 21.162(b). The Board will add a 30-day time period for the notice. In addition, the Board will add direction concerning the methods of acceptable notice, as requested by IRRC.

IRRC suggested that §§ 21.33a(a) and 21.162a(a) specifically provide that the Board provide written notice to the program describing the reported deficiencies. The Board had anticipated that written notice would be provided and has added this provision. IRRC also asked, regarding the notice provision in subsections (b), whether this was a different notice than that in subsection (c). Depending on the circumstances, the education advisors may provide one notice or separate notices. In some cases, multiple notices may be provided. The process is intended to remain informal to permit the programs to address concerns without a formal, public proceeding. To this end, the Board seeks to encourage a collegial flow of information between the program director and the educational advisors.

IRRC asked the Board what criteria or factors the Board would consider in making the determination to place a program on provisional approval status. Section 21.33(a)(3), and its counterpart for PN programs, § 21.162(a)(3), provide that the Board may exercise its discretion to place a program on provisional approval status if the program does not meet the standards of the subchapter. The standards set forth in the subchapter are the criteria or factors that the Board considers. The Board also considers the steps a program takes to return to compliance.

IRRC asked whether the provisions of subsections (c) and (g) were in conflict. The Board has amended subsection (g) to clarify that only the Board, and not the education advisors, may extend the correction period beyond two years.

IRRC requested that the Board provide that its education advisors will provide written notice and requests in subsections (d) and (e). The Board anticipated that these requests would be in writing and has added the requested provisions.

Many of the questions raised by IRRC under its question number 4 have been addressed in response to other commenters' concerns. IRRC also asked if the Board had any information on how many programs will be able to reach the 80% standard in two years, and what kind of changes would be required to meet the standard. As noted previously, programs with a pass rate between 60.1% and 80% have been receiving communication and assistance from the Board for the past 10 to 12 years. In answering IRRC's question, the Board considered the pass rates for the Commonwealth's nursing education programs for the examination years 2003-2004, 2004-2005, 2005-2006 and 2006 to 2007.

Exam Year	PN programs below 75%	PN programs 75.1 – 79.9%	RN programs below 75%	RN programs 75.1 – 79.9%
2003-2004	2	3	12	13
2004-2005	0	2	6	9
2005-2006	2	2	7	9
2006-2007	4	2	19	11

Of the RN programs with pass rates below 80% for the 2003-2004 examination year, 15 programs increased their pass rate to over 80% in the 2004-2005 examination year, an additional 5 increased their pass rate to over 80% by the 2005-2006 examination year, and all but one of the programs was in compliance with the 80% pass rate by the 2006-2007 examination year. Based on this historic data, it appears that virtually all RN programs will be able to reach the 80% standard within two years.

Of the PN programs with pass rates below 80% over the four examination years considered, only one was unable to improve its pass rate to above 80% within one examination year; that program improved its pass rate to over 90% in the second year after initiating corrective measures. Based on this historic data, it appears that all PN programs will be able to reach the 80% standard within two years.

been placed in other programs. The provisions that make the controlling institution responsible for students in the institution's program is found in § 21.41(c) (related to completion of program) for professional nursing education programs and in § 21.173(c) (related to discontinuance or interruption of practical nursing education programs).

Finally, IRRC suggested that the Board include in its regulation a reference to section 6.2(a) of the RN Law (63 P.S. § 216.2(a)). Section 6.2(a) provides that a student who obtained part of his or her nursing education from a program that was removed from the proposed list shall be granted credit for that course work by another program into which the student transfers. The Board has referenced this section of the RN Law in § 21.34(d). **The PN Law (63 P.S. § 659) does not include a parallel provision for practical nursing students because practical nursing programs take less than a year to complete.**

### **Fiscal Impact and Paperwork Requirements**

The final rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions. The final rulemaking will impose only minimal additional paperwork requirements upon the Board, and none upon any political subdivisions. Nursing education programs may incur additional costs in conforming to the regulation.

### **Regulatory Review**

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on April 18, 2007, the Board submitted a copy of the notice of proposed rulemaking, published at 37 Pa.B. 1980 (April 28, 2007) to IRRC and the Chairpersons of the House Professional Licensure Committee (HPLC) and the Senate Consumer Protection and Professional Licensure Committee (SCP/PLC) for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC, the HPLC and the SCP/PLC were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Board has considered all comments from IRRC, the HPLC, the SCP/PLC and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on \_\_\_\_\_, the final-form rulemaking was approved by the HPLC. On \_\_\_\_\_, the final-form rulemaking was deemed approved by the SCP/PLC. Under section 5.1(e) of the Regulatory Review Act, IRRC met on \_\_\_\_\_, and approved the final-form rulemaking.

The State Board of Nursing (Board) adopts §§ 21.1, 21.26, 21.31, 21.33, 21.33a, 21.33b, 21.34, 21.141, 21.162, 21.162a, 21.162b, and 21.166, relating to approval of nursing education programs for professional nurses (RNs) and practical nurses (LPNs), to read as set forth in Annex A. These regulations will establish a new pass-fail rate for approved registered nursing and licensed practical nurse programs in the Commonwealth. Beginning one year after the regulation is promulgated, nursing education programs will remain on full approval status if at least 75% of the programs graduates pass the national licensure examination. Beginning two years after the regulation is promulgated, nursing education programs will remain on full approval status if at least 80% of the programs graduates pass the national licensure examination. The regulation provides for oversight and assistance to those programs whose pass rates fall below acceptable standards.

Notice of Proposed Rulemaking was published at 38 Pa. B. 344 (January 19, 2008). Publication was followed by a 30-day public comment period during which the Board received numerous comments from stakeholders. On February 13, 2008 the House Professional Licensure Committee (HPLC) submitted its comments. The Senate Consumer Protection and Professional Licensure Committee (SCP/PLC) made no comments. The Independent Regulatory Review Commission (IRRC) submitted comments to the proposed rulemaking on March 20, 2008.

### **Statutory Authority**

The final rulemaking is authorized under section 6.1 of the Professional Nursing Law (RN act) (63 P.S. § 216.1), which requires the Board to establish standards for the operation and approval of nursing education programs and for the preparation of professional nurses. Section 9 of the Practical Nurse Law (LPN act) (63 P.S. §659) authorizes the Board to approve all schools and institutions that educate practical nurses. The Board is further authorized to establish rules and regulations for the practice of professional nursing and the administration of the RN act under section 2.1(k) of the RN act (63 P.S. § 212.1(k)) and for the practice of practical nursing and the administration of the LPN act under section 17.6 of the LPN act (63 P.S. § 667.6).

### **Summary of Comments and Responses to Proposed Rulemaking**

#### **Comments from Stakeholders**

The Board received comments from several nursing education programs. Butler County Community College (Butler) agreed with the proposal to increase the licensure passing rate requirements for nursing education programs. However, Butler suggested that the Board could support nursing education by identifying the appropriate faculty to student ratios for clinical courses. Butler suggested that this requirement would assist program administrators when requesting additional faculty positions. Second, Butler

suggested that a program that admits students annually in the fall semester would be including students from two different cohorts in their annual report, which is based on an examination year October 1 through September 30.

The Board has consistently declined to establish a minimum faculty to student ratio for clinical courses because it believes that each program is in the best position to make determinations regarding the effectiveness of its student to faculty ratio based on the program's instructors, the acuity of the patient population in a clinical program and the nature of the program's student body. While establishing the student to faculty ratio by regulation might assist some schools in successfully lobbying their administration for additional faculty positions, other schools might be placed in a position of justifying current faculty assignments and decrease faculty. The Board believes that the best way to ensure an effective student to faculty ratio is to allow each nursing education program to set its ratio consistent with meeting educational objectives.

The Board cannot dictate when program graduates sit for the licensure examination. Therefore, no matter what dates the Board might set for the examination year, it is possible that individuals from more than one cohort from a particular nursing education program may sit for any given administration of the examination. The Board obtains examination results from the National Council of State Boards of Nursing, which are provided quarterly. The Board chose the October 1 through September 30, examination year to capture the majority of each program's cohorts.

The Clearfield Campus of Lock Haven University (Lock Haven) wrote in support of the increase to 70 percent, but commented that the additional increase to 80 percent two years following the first increase would not provide nursing education programs ample time to implement and evaluate strategies and their effectiveness. For at least ten years, the Board has written to all programs with pass rates between 60.1% and 80% and notified these programs that the Board has been planning to raise the minimum pass rate. Included with this notice, the Board provided suggestions for self-assessment and correction and offered assistance from its education advisors. The Board believes that it has given nursing education programs sufficient notice of its intention to increase the minimum pass rate and that the programs will be able to implement and evaluate strategies and their effectiveness.

Lock Haven also commented that the proposal would force nursing programs to "implement stringent admission criteria, decrease enrollment, increase GPA requirements, increase grading scales, and utilize standardized exams as a means to weed out students prior to graduation" and suggested that these changes "could affect the numbers of potential registered nurses in the Commonwealth, and have a direct impact on the nursing shortage." The Board disagrees with Lock Haven's conclusion. There are many reasons why a nursing education program's graduates cannot pass the licensure examination. Rather than decreasing enrollment, a program could evaluate its status related to having an adequate number of qualified faculty, a well-defined faculty development plan, and a sound curriculum plan as evidenced through program outcomes in its systematic evaluation plan.

The Board's proposal to increase the minimum pass rate will positively impact the number of potential registered nurses in the Commonwealth. If at least 70 percent, and, after two years, at least 80 percent, of the graduates of every nursing program in the Commonwealth pass the licensure examination, enabling them to become licensed nurses practicing in the Commonwealth, there will be more nurses than if only 60 percent of the graduates of the programs pass the licensure examination and become licensed nurses practicing in the Commonwealth.

The Board received two comments from Thomas Jefferson University (TJU). The Dean of the School of Nursing expressed support for the increase in the minimum pass rates for program graduates as essential to ensuring the quality of nursing education programs in the Commonwealth and assuring the safety of the public and the integrity of the nursing profession. The Dean requested that the Board consider establishing regulations to require an individual who was unsuccessful after twice taking the licensure examination to meet additional educational requirements prior to repeating the examination and to require graduates to sit for the examination within three years of completing their nursing education. The Board will take up these recommendations at its meetings and consider regulations in these areas.

The Assistant Dean of the School of Nursing sent the second letter from TJU. This letter also expressed support for the Board's proposal to raise the minimum passing standard. The writer proposed that the Board amend its rulemaking to add another type of approval. The writer suggested that a program that is on provisional approval status and is not improving after two years should be placed on probationary approval status for another period of time prior to the program being removed from the approved list. The Board does not agree that adding another step in the process would improve schools' compliance with the regulations.

*Comments from other interested parties*

The Executive Director of the Pennsylvania Association of County Affiliated Homes (PACAH) wrote in support of the regulation raising the pass rates to around the national average, noting that Pennsylvania had been behind most states in regards to this issue. PACAH suggested that the Board place additional restrictions on nursing education programs to ensure that the programs contain the essential elements/instructional processes to support their students. As part of the process of granting initial approval to nursing education programs, the Board performs a detailed review of the program's curriculum, faculty, resources and clinical sites. The Board's assessment of these areas is ongoing through the annual and triennial reports that programs are required to file with the Board.

PACAH expressed concern about the impact on students if a program is removed from the approved list, and asked for more information about transitioning students to another program. The Board's educational advisors monitor all nursing education programs on provisional status. However, it is the responsibility of the controlling



institution to provide for the completion of the program for students currently enrolled either by placing the students in an approved program or continuing the enrolled classes until completion.

The Pennsylvania State Nurses Association (PSNA) wrote to support increasing the pass rates over the two-year period and downgrading programs to provisional approval status if their pass rate falls below 80%. PSNA noted that the revision would align Pennsylvania with other states that mandate higher standards and will motivate programs that hover near marginal levels to improve. PSNA also wrote in support of the procedures developed by the Board for removal of a program from the approved list.

PSNA asked that the Board further investigate whether individuals who successfully take the licensure examination on the first try are safer practitioners than those who pass on their second attempt. The Board has never collected data to correlate the efficacy of practitioners and the number of times practitioners took the licensure examination nor is the Board aware of any research that even suggests a correlation between safe practice and number of times an individual examined. Nevertheless, it is not clear to the Board that any relation that might be revealed would indicate the quality of particular nursing education programs. To the Board's knowledge, all states consider only first time test takers when evaluating the success of their nursing education programs.

The Hospital and Healthsystem Association of Pennsylvania (HAP) wrote in support of increasing the accountability of nursing education programs for achieving increased pass rate standards, but expressed concern that the regulation might have the unintended effect of negatively impacting the supply of nurses in the Commonwealth. The Board believes that the increased pass rate standard will increase the number of nurses licensed in the Commonwealth. By way of illustration, the Board compared the number of nurses eligible for licensure from programs with pass rates below 80% during the October 1, 2006, through September 30, 2007, period to the number of nurses eligible for licensure if those programs met the 80% pass rate. During this period of time, 1,962 students from nursing programs with a pass rate below 80% took the examination and 1,422 passed the examination. If, during this same period of time, 1,962 students from nursing programs with a pass rate of 80% took the examination, 1,570 would have passed, resulting in an increase of 148 new nurses who could be licensed in the Commonwealth.

HAP suggested that the Board amend its rulemaking to provide a three-year phase in of the 80% standard in order to give programs more time to meet the upgraded standards. HAP opined that "it generally takes considerable effort – often over several years time – to assess what . . . issues [have resulted in low pass rates], develop plans for correction, implement changes, and monitor those changes to evaluate effectiveness." As noted above, the Board has, for at least ten years, notified all programs with pass rates between 60.1% and 80% of the Board's intention to raise the minimum pass rate. Also, it has requested that the programs assess the factors contributing to the low pass rate and

address those factors. The Board does not believe that programs need more time to implement changes; rather, by virtue of the new regulation, programs that do not assess shortcomings and implement changes will be faced with the consequence of being placed on provisional approval status. Once on provisional status, the programs will be subject to a timetable for assessing the programs' weaknesses and improving the program so that at least 80% of program graduates are prepared to pass the licensure examination and begin their careers as nurses.

HAP also suggested that the Board determine a program's pass rate based on a three-year average. The vast majority of states evaluate programs based on annual NCLEX performance. Several states consider NCLEX performance of program graduates over more than one year.

Delaware Board of Nursing, which uses an 80% pass rate standard, places a program on provisional approval status if pass rates are below 80% for two consecutive years. Looking at examination results for Pennsylvania programs for the examination year October 1, 2005, through September 30, 2006, 16 programs failed to achieve a minimum 80% pass rate and would be subject to provisional approval status. Using Delaware's standards, that is, schools below the 80% minimum in the 2005 – 2006 year and still below the 80% minimum in the October 1, 2006, through September 30, 2007, examination year, 15 programs would be subject to provisional approval status.

Georgia Board of Nursing also uses 80% as the minimum pass rate standard. If a program fails to meet the 80% standard in any given year, the Board will consider a four-year average of the program's pass rates. Applying Georgia's standard to Pennsylvania, 16 programs failed to achieve the minimum 80% standard in the 2005-2006 examination year. Seventeen programs failed to achieve the minimum 80% standard when all four years of examination score data, from 2003-2004 through 2006-2007, were considered.

North Carolina Board of Nursing uses 95% of the national pass rate as its minimum pass rate standard, but uses a three-year average to determine a program's pass rate. Using North Carolina's system, 21 programs would fall below the minimum pass rate in the 2005-2006 examination year, as compared to 16 that would fall below the proposed Pennsylvania standard in the same year. In addition, using the three-year average, over 16 programs would be subject to provisional approval status in the 2005-2006 examination year under the North Carolina Standard.

Maryland Board of Nursing uses 90% as the minimum pass rate standard. Applying Maryland's rules in Pennsylvania during the 2005-2006 examination year, 47 programs would have been placed on "warning status" and given only one year to improve performance. Using the model proposed by the Board, only 16 programs would have been placed on provisional status and given two years to improve performance.

In short, the Board is aware that there are different approaches by the states to calculate and evaluate pass standards as one method of evaluating the effectiveness of the state's nursing education programs. Remediation programs also vary from state to state.

The Board considered other states' regulatory schemes. The Board is satisfied that its proposal, which emphasizes early intervention with programs experiencing difficulty and the emphasis on a plan to ensure improvement so that programs can be returned to full approval status, will be an effective method to improve the quality of nursing education programs in the Commonwealth.

Regarding HAP's comments about the licensure examination and test plan, the Board is confident that the examination, which is used in by every Board of Nursing in the United States, has not placed graduates of Pennsylvania nursing programs in a negative position in comparison with their colleagues in other states. Changes to the test plan and passing standard occur through a rigorous scientific methodology in accordance with psychometric principles at most once every three years. The 2005 RN Practice Analysis conducted by the National Council of State Boards of Nursing demonstrated that the RNs surveyed "worked an average of 3.64 months as RNs" and not the six to 12 months asserted. In addition, approximately one-third of Pennsylvania programs experienced an increase in their pass rate in the October 2006 – September 2007 reporting period as compared to the prior reporting period. Of the Pennsylvania programs whose pass rates declined in the October 2006 – September 2007 reporting period, approximately one-third experienced a decline in their pass rate of less than two percentage points.

HAP next questioned whether the Board would have sufficient resources to monitor and assist programs on provisional approval status. The Board is committed to having appropriate resources available for monitoring all nursing education program with the intent to assure regulatory compliance and overall program quality provided in the education of nurses in the Commonwealth.

HAP next recommended that the Board use the pass rate only as a first-level screening tool to determine whether any nursing education program should be placed on provisional status, and that the Board "fully consider other data" before placing a program on provisional status. Specifically, HAP suggested that the Board consider the pass rate of program graduates who tested in another state. When a candidate applies for licensure by examination, the candidate must provide on the application the Program Code assigned by NCSBN to the nursing education program. This program code identifies the program the candidate graduate from and their results are reported to that respective program. The Board already considers the test results reported to each program, which includes program graduates who tested in another state.

HAP also suggested the Board consider whether the examination year test results included a mixing of cohort groups. The Board is not clear why this is a concern, considering HAP's suggestion to average three years of pass rates, which would clearly involve mixing cohort groups. The Board does not have a method to track individual cohorts from programs, nor does the Board require individuals to test at any particular time. The Board does not believe that having examination year results include students from several cohorts decreases the validity of the pass rate data. HAP next suggested that

the Board consider the diversity of the program's student population. The Board is not clear how HAP foresees a regulatory scheme to address any relationship that might exist between the diversity of a program's student population and NCLEX performance.

Next, HAP suggested that the Board recalculate the pass rate of programs by considering second-time pass rate success due to generational differences and approaches to the examination. First, the Board has no way to correlate the age of the test takers with their scores. Second, the NCLEX has been a computer based examination for 14 years. The Board knows of no basis for HAP's suggestion that some students view the first time taking of the NCLEX as a practice examination. The cost of the examination is around \$200; the Board has not received reports that students view it as a "practice" examination.

HAP then suggested that the Board should consider the number of students that sat for the examination. The Board is aware that if only a small number of students sit for the examination, even a small number of failures will affect the pass rate. However, percentage-based assessment inherently treats large and small programs with equality. The Board's education advisors consider the size of the graduating class and the program's historic pass rate performance when working with a program to improve performance.

Finally, HAP suggested that the Board consider the retention rates of the programs. HAP stated that some schools have implemented periodic testing throughout the program to "weed out students before graduation to ensure that the school attains the NCLEX pass rate standards." Students pay tuition to the program with the intention of gaining an education that will permit them to successfully pass the NCLEX, obtain licensure, and work in their chosen profession. The Board does not agree with HAP's implication that a program should continue to take tuition payments from students in a nursing education program when the program has every indication that the student will not be able to pass the licensure examination and practice the profession. In fact, the Board believes that a program that does so is doing a disservice to the student, who should either be given the tools to succeed in the program or encouraged to choose another course of study that will enable the student to find employment upon graduation. By increasing the minimum pass rate standard, the Board is requiring nursing education programs to be more responsible and accountable to their students by providing a high quality educational program that will ultimately lead graduates to the practice of the profession.

Next, HAP suggested that there may be serious unintended consequences of the Board's regulation, including having nursing programs institute more stringent admission criteria resulting in the acceptance of fewer nursing students, particularly fewer minority students, into the programs; limiting the pool of applicants for admission by excluding those that don't perform as well on standardized tests such as the SAT; limiting the number of diverse students because demographically, certain populations of students don't perform well on standardized tests; and encouraging schools to "weed out" students before graduation. HAP suggested that these unintended consequences would exacerbate

the current nursing shortage. The Board disagrees with HAP's predictions. It is the responsibility of the school to determine its admissions criteria. Programs should provide sound, ongoing evaluation for students' progression through the program to ensure that graduates will be prepared to enter the workforce.

HAP also suggested exploring the implementation of a monitoring program that could be used to assist at-risk programs. For at least the past 10 years, the Board has been notifying programs that the Board has identified as at-risk and offering suggestions and assistance to these programs in identifying and correcting factors that might have led to substandard pass rates. A monitoring program has been in place for many years.

HAP next suggested that the requirement that nursing programs apprise applicants and students whenever the program's approval status changes would place an operational burden on schools. The Board believes that programs must be responsible for and accountable to their students. Moreover, the Board believes that prospective students and current students should be aware of the approval status of programs they are intending to enroll in or in which they are currently enrolled. The Board purposefully left to the programs the means by which this notification would be made in order to give programs flexibility. At the request of IRRC, the Board will clarify the means of notification. The Board does not believe that the requirement places an undue burden on nursing education programs.

Finally, HAP proposed that programs be given three years to correct deficiencies. The Board stands by its proposal that programs be required to correct deficiencies in two years, and has allowed that an extension of time may be granted if a program is showing progress toward correction.

#### HPLC Comments

The House Professional Licensure Committee (HPLC) submitted nine comments to the Board. HPLC asked if a program that had been removed from the approved list could reapply to be placed on the approved list and the procedure the program would follow. A program that has been removed from the approved list would be treated the same as any other program that does not have Board approval, that is, as if a new program were being established under § 21.51. If approved, the program would be placed on initial approval status, as set forth in § 21.33.

HPLC noted that the Board used the numeral "2" in §§ 21.33a(a) and 21.162a(g). The Board's usage appears to be consistent with § 4.11 of the Pennsylvania Code and Bulletin Style Manual. The Board is confident that if its usage is erroneous, the editors of the Pennsylvania Code will make an appropriate correction.

HPLC suggested that the informal process to correct deficiencies should be separated from the formal process for removal in §§ 21.33a and 21.162a. The Board has deleted the last part of subsections (a), (d) and (e) from these subsections, which seem to mingle the informal process and the process when a program is on provisional approval

with the removal process. As the entire section relates to failure to comply with standards, the last part of subsections (a), (d) and (e) is more properly placed in its own subsection. The Board has created a new subsection (k) for the provision.

HPLC noted that Wilson College had commented on the regulation during the pre-draft comment period and requested that certain restrictions, such as only daytime programming, be placed on schools on provisional approval status. The Board noted in the preamble to proposed rulemaking that the Board already imposes restrictions as appropriate. HPLC asked what other restrictions the Board might impose and how they might improve pass rates. The Board has imposed a variety of restrictions, such as requiring a program to institute a program of student testing in order to identify deficiencies in the curriculum, collecting data to correlate pre-admission GPA and student performance, raising the GPA admission standard, and instituting tutoring programs for at-risk students. Identifying deficiencies in the curriculum allows a program to make targeted improvements in teaching methodology and/or personnel, correlating pre-admission GPA to student performance allows a program to determine if remedial programs for students will improve NCLEX performance.

HPLC next asked for examples of the additional reports that may be required of a program on provisional approval status under §§ 21.33a(e) and 21.162a(e). Different reports may be required depending on the status of the program's self-assessment of the underlying causes for failing to meet the regulations and the educational advisor's identified deficiencies. Reports might include detail from the program's systematic evaluation plan, such as curriculum plans, admission and progression policies and competency determination tools.

HPLC noted that §§ 21.33a(g) and § 21.162a(g) provide for a two-year period for a program to become compliant with the Board's regulations. HPLC asked whether the Board had considered a period of time for correction of deficiencies. The Board has used the terms come into compliance or become compliant and correct deficiencies interchangeably. The same time period applies. The Board has rewritten these subsections for clarity.

HPLC's next comment related to a draft copy of the rulemaking that was corrected by the Pennsylvania Code and Bulletin editors prior to publication as proposed rulemaking.

HPLC asked at what specific points in time a program could appeal the Board's decision that a program has a deficiency. Specifically, HPLC asked if there could be an appeal before formal action was taken and whether the restrictions in §§ 21.33a(g) and 21.162a(g) were appealable. Finally, HPLC asked the Board to enumerate the appeals process in the regulation. Sections 21.33a(j) and 21.162a(j) provide that a program may appeal the decision to place the program on provisional status in accordance with 1 Pa. Code § 35.20. This section of the General Rules of Administrative Practice and Procedure applies to appeals from actions taken by administrative agency staff, such as actions of the Board's nursing education advisors. The section allows a party to appeal

the action of staff within 10 days after service of notice of the action by the staff. The appeal would be filed with the Board. The General Rules of Administrative Practice and Procedure contemplate the appeal of all staff action; therefore, the Board believes that a program could appeal any restriction placed on the program by Board staff. These sections have been expanded to further explicate the appeal process provided by the General Rules of Administrative Practice and Procedure.

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#### IRRC Comments

IRRC first addressed the clarity of §§ 21.31(d) and 21.162(c), noting that the word "approval" was confusing. The Board's nursing education advisors are authorized to move a program from initial approval status to full approval status. In addition, the Board's nursing education advisors conduct the compliance review and monitor the performance and improvement plan processes on behalf of the Board. Only the Board may grant initial approval status to a program or remove a program from the approved list. Based on comments received, the Board has amended this section to include, as a function solely of the Board, the authority to extend the two-year maximum period for the correction of deficiencies. These sections have been rewritten for clarity. In addition, a typographical error was detected by IRRC and corrected.

IRRC next suggested that the Board provide a time period for the notice programs are required to give to applicants and students under §§ 21.33(b) and 21.162(b). The Board will add a 30-day time period for the notice. In addition, the Board will add direction concerning the methods of acceptable notice, as requested by IRRC.

IRRC suggested that §§ 21.33a(a) and 21.162a(a) specifically provide that the Board provide written notice to the program describing the reported deficiencies. The Board had anticipated that written notice would be provided and has added this provision. IRRC also asked, regarding the notice provision in subsections (b), whether this was a different notice than that in subsection (c). Depending on the circumstances, the education advisors may provide one notice or separate notices. In some cases, multiple notices may be provided. The process is intended to remain informal to permit the programs to address concerns without a formal, public proceeding. To this end, the Board seeks to encourage a collegial flow of information between the program director and the educational advisors.

IRRC asked the Board what criteria or factors the Board would consider in making the determination to place a program on provisional approval status. Section 21.33(a)(3), and its counterpart for PN programs, § 21.162(a)(3), provide that the Board may exercise its discretion to place a program on provisional approval status if the program does not meet the standards of the subchapter. The standards set forth in the subchapter are the criteria or factors that the Board considers. The Board also considers the steps a program takes to return to compliance.

IRRC asked whether the provisions of subsections (c) and (g) were in conflict. The Board has amended subsection (g) to clarify that only the Board, and not the education advisors, may extend the correction period beyond two years.

IRRC requested that the Board provide that its education advisors will provide written notice and requests in subsections (d) and (e). The Board anticipated that these requests would be in writing and has added the requested provisions.

Many of the questions raised by IRRC under its question number 4 have been addressed in response to other commenters' concerns. IRRC also asked if the Board had any information on how many programs will be able to reach the 80% standard in two years, and what kind of changes would be required to meet the standard. As noted previously, programs with a pass rate between 60.1% and 80% have been receiving communication and assistance from the Board for the past 10 to 12 years. In answering IRRC's question, the Board considered the pass rates for the Commonwealth's nursing education programs for the examination years 2003-2004, 2004-2005, 2005-2006 and 2006 to 2007.

Exam Year	PN programs below 75%	PN programs 75.1 – 79.9%	RN programs below 75%	RN programs 75.1 – 79.9%
2003-2004	2	3	12	13
2004-2005	0	2	6	9
2005-2006	2	2	7	9
2006-2007	4	2	19	11

Of the RN programs with pass rates below 80% for the 2003-2004 examination year, 15 programs increased their pass rate to over 80% in the 2004-2005 examination year, an additional 5 increased their pass rate to over 80% by the 2005-2006 examination year, and all but one of the programs was in compliance with the 80% pass rate by the 2006-2007 examination year. Based on this historic data, it appears that virtually all RN programs will be able to reach the 80% standard within two years.

Of the PN programs with pass rates below 80% over the four examination years considered, only one was unable to improve its pass rate to above 80% within one examination year; that program improved its pass rate to over 90% in the second year after initiating corrective measures. Based on this historic data, it appears that all PN programs will be able to reach the 80% standard within two years.



Only three programs have had pass rates below 80% for four consecutive examination years. These programs include two baccalaureate degree programs (with rates of 60% - 74.42% - 74.24% - 74.58% for a total of 183 students sitting for examination over the four year period, and 50% - 76.92% - 47.37% - 47.52% for a total of 61 students sitting for examination over the four year period), and one diploma program (with rates of 75% - 64.29% - 64% - 63.16% for a total of 101 students sitting for examination over the four year period). The Board anticipates that the second BSN program and the diploma program will need to make significant improvements across their programs to meet the 80% standard. Because programs have never been subject to the 80% pass rate or a timetable for coming into compliance with the new pass rate, it is impossible to anticipate whether all three of these programs would be able to reach the goal.

IRRC next noted that HAP recommended two additional approaches to meeting the 80% standard; first, phasing in the standard over a three-year period and second, using a three-year average to calculate the pass rate. As noted above, the Board has notified programs for ten years that a change would be coming to increase pass rates. The Board does not believe that programs need another year of notice that pass rate standards are increasing. The Board fully discussed the three-year average suggestion in its response to HAP's comments. It is also interesting to note that two of the three programs identified above would be placed on provisional approval status after one year under HAP's recommendation, and that all three of the programs would be placed on provisional approval status after two years under HAP's recommendation. The Board does not anticipate that its approach will be grossly overinclusive.

IRRC commented that it agreed with other commenters who had suggested that the Board consider examining the success rate of second time test takers and, if there were a question about the nexus between the program and a second time test taker's success, the Board could require that applicants report and document additional course work. The Board's statutory authority is to approve, and disapprove, nursing education programs. Even if the Board reviewed and analyzed information about the study habits of applicants for reexamination, it is not clear that the Board could distinguish what made an applicant successful or unsuccessful on reexamination. Moreover, it is important to note that all states base the determination of an educational program's effectiveness on the pass rate of first time test takers.

Regarding removal from the approved list, IRRC, following up on a question from HPLC, asked if in the past any programs had been removed from the approved list and later inquired about submitting an application for reinstatement. The Board has never removed a program from the approved list. Should a program be removed, it could reapply for initial approval by the Board.

IRRC next questioned the responsibility of the controlling institution to students set forth in §§ 21.34(b) and 21.166(b). This provision requires the controlling institutions to maintain support from the program until currently enrolled students have graduated or

been placed in other programs. The provisions that make the controlling institution responsible for students in the institution's program is found in § 21.41(c) (related to completion of program) for professional nursing education programs and in § 21.173(c) (related to discontinuance or interruption of practical nursing education programs).

Finally, IRRC suggested that the Board include in its regulation a reference to section 6.2(a) of the RN Law (63 P.S. § 216.2(a)). Section 6.2(a) provides that a student who obtained part of his or her nursing education from a program that was removed from the proposed list shall be granted credit for that course work by another program into which the student transfers. The Board has referenced this section of the RN Law in § 21.34(d). The PN Law (63 P.S. § 659) does not include a parallel provision for practical nursing students because practical nursing programs take less than a year to complete.

### **Fiscal Impact and Paperwork Requirements**

The final rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions. The final rulemaking will impose only minimal additional paperwork requirements upon the Board, and none upon any political subdivisions. Nursing education programs may incur additional costs in conforming to the regulation.

### **Regulatory Review**

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on April 18, 2007, the Board submitted a copy of the notice of proposed rulemaking, published at 37 Pa.B. 1980 (April 28, 2007) to IRRC and the Chairpersons of the House Professional Licensure Committee (HPLC) and the Senate Consumer Protection and Professional Licensure Committee (SCP/PLC) for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC, the HPLC and the SCP/PLC were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Board has considered all comments from IRRC, the HPLC, the SCP/PLC and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on \_\_\_\_\_, the final-form rulemaking was approved by the HPLC. On \_\_\_\_\_, the final-form rulemaking was deemed approved by the SCP/PLC. Under section 5.1(e) of the Regulatory Review Act, IRRC met on \_\_\_\_\_, and approved the final-form rulemaking.

### **Additional Information**

Additional information may be obtained by writing to Ann Steffanic, Board Administrator, State Board of Nursing, P.O. Box 2649, Harrisburg, PA 17105-2649.

### **Findings**

The State Board of Nursing finds that:

- (1) Public notice of intention to adopt a regulation at 49 Pa. Code, Chapter 21, was given under sections 201 and 202 of the Act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201-1202) and the regulations promulgated under those sections at 1 Pa. Code §§ 7.1-7.2.
- (2) A public comment period was provided as required by law and all comments were considered in drafting this final-form rulemaking.
- (3) The amendments made to the final-form rulemaking do not enlarge the original purpose of the proposed rulemaking as published at 38 Pa. B. 344
- (4) That these amendments to the regulations of the State Board of Nursing are necessary and appropriate for the regulation of the practice of professional nurses in the Commonwealth.

### **Order**

The Board therefore ORDERS:

- (A) That the regulations of the State Board of Nursing, 49 Pa. Code, Chapter 21, are amended to read as set forth in Annex A.
- (B) That the Board shall submit a copy of Annex A to the Office of the Attorney General and the Office of General Counsel for approval as required by law.
- (C) That the Board shall certify this Order and Annex and shall deposit them with the Legislative Reference Bureau as required by law.
- (D) That the regulations shall take effect immediately upon publication in the Pennsylvania Bulletin.

Mary Bowen, RN, CRNP, DNP  
Chairperson, State Board of Nursing

